Facultad de Derecho Universidad de Chile
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Diego G. Pardow L.

MATERIALES DE LECTURA SEMANA N°7

Primera Sesión: Administración de un mandato

(a) Lecturas obligatorias
- STITCHKIN, David (1950): *El mandato civil* (Santiago, Editorial Jurídica) pp. 54-82.
- PUELMA, Álvaro (2002): *Contratación comercial moderna* (Santiago, Editorial Jurídica) pp. 45-54.

(b) Lecturas sugeridas
- TREITEL, G. H. (1987): *The law of contract* (London, Sweet & Maxwell), 609-650.

Segunda Sesión: Índice y bibliografía

(a) Entrega de documento preliminar
- Elaborar una propuesta del índice y bibliografía para el tema de memoria que pretende desarrollar.

(b) Actividad en clases
- Exposición y discusión grupal de las propuestas de índice y bibliografía para cada tema de memoria.

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DAVID STITCHKIN BRANOVER

Profesor extraordinario de la Cátedra de Derecho Civil de la Universidad de Chile; ex Director del Seminario de Derecho Privado y ex Profesor de Derecho Civil Comparado y Profundizado de la Universidad de Concepción.

EL MANDATO CIVIL

CUARTA EDICION

EDITORIAL JURIDICA DE CHILE

NATURALEZA DEL MANDATO CIVIL EN EL DERECHO CHILENO

24. DEFINICION

El artículo 2116 del Código Civil define el mandato y dice que "es un contrato en que una persona confía la gestión de uno o más negocios a otra, que se hace cargo de ellos por cuenta y riesgo de la primera".

Para determinar la naturaleza del mandato debemos atenernos necesariamente a la definición transcrita, pues según el art. 20 del mismo Código, cuando el legislador ha definido expresamente una palabra para ciertas materias, se le dará en éstas su significado legal.

En nuestro caso, el legislador ha dicho expresamente qué debe entenderse por mandato; en consecuencia, no cabe darle otra significación que la que en el art. 2116 se indica.

25. ELEMENTOS DE LA DEFINICION

De la disposición arriba transcrita se desprende que los elementos esenciales o constitutivos del mandato son los siguientes:

1. El mandato es un contrato, o sea, una convención generadora de obligaciones; 2. En virtud de este contrato, una persona confía la gestión de uno o más negocios a otra; y 3. Esta se hace cargo de los negocios por cuenta y riesgo de aquélla.

De estos elementos, el primero es propio no sólo al mandato sino a una serie de relaciones jurídicas que se caracterizan por la misma circunstancia de requerir, para su generación, un acuerdo de voluntades.[1]

[1] Troplong, Du mandat, pág. 14, Nº 5.

Podríamos decir, entonces, que la expresión "contrato" empleada por el legislador, si bien determina la naturaleza convencional del mandato, no sirve para delimitarlo o distinguirlo de otros actos jurídicos bilaterales, como la compraventa, la sociedad, etc.

Los demás elementos, en cambio, son específicos, esto es, determinan la existencia del mandato y le distinguen de otros contratos.

26. ES UN CONTRATO DE CONFIANZA

El artículo 2116 establece que en el mandato una persona "confía" la gestión de uno o más negocios a otra.

Esta expresión viene a sentar uno de los elementos distintivos del mandato: es un contrato de confianza. Interviene aquí un factor subjetivo del que comete el encargo y que consiste en la fe que le inspira el mandatario, tanto por su honestidad cuanto por las cualidades que posee para desempeñar con buen éxito el negocio que le encomienda.[2]

De aquella circunstancia se deduce una serie de consecuencias que señalaremos más adelante, como la facultad del mandante para revocar a su arbitrio el encargo; que no se transmitan las obligaciones del mandatario; que la muerte del mandante produzca la extinción del contrato, etc.

En todo caso, debemos sentar como premisa indiscutible que en el mandato interviene necesariamente este elemento interno o subjetivo: la confianza que induce al mandante a la celebración del contrato. Este elemento equivale a la "afectio societatis" del contrato de sociedad, que bien puede deducirse del tenor o espíritu del acto, pero cuya ausencia permitiría concluir que no ha existido el propósito de celebrar mandato sino otro contrato, nominado o innominado, cuya regulación jurídica quedará determinada por la voluntad de las partes en virtud del principio de la libertad contractual consagrado en el artículo 1545 de nuestro Código Civil.

Observaremos, por último, que este carácter de contrato de confianza lo deriva del Derecho romano, donde, como hemos visto, antes de revestir forma jurídica fue simplemente un encargo entregado enteramente a la conciencia de quien se comprometía a desempeñarlo. Nuestros tribunales han fallado que la comisión es un mandato mercantil "fundado principalmente en la buena fe del comisionista que acepta el encargo y se obliga a desempeñarlo y en la confianza que al comitente inspira la

[2] Raúl Oliva M., ob. cit., página 63.

persona del mandatario buscado por él, para la correcta y adecuada ejecución de este mismo encargo".[3]

27. EL OBJETO DEL MANDATO CONSISTE EN LA GESTION DE UNO O MAS NEGOCIOS

A diferencia de la casi totalidad de las legislaciones, el Código Civil chileno ha empleado una expresión particular que viene a determinar en forma precisa el contenido del mandato: la gestión de uno o más negocios. Y conviene advertir desde ya que el legislador ha empleado deliberadamente esa expresión, pues se ha valido de ella no sólo en la definición que da al artículo 2116, sino en todas las demás disposiciones relativas al mandato. Así, el artículo 2119 establece que "el negocio que interesa al mandatario solo es un mero consejo"; el artículo 2120, que "si el negocio interesa juntamente. . ."; el artículo 2121, que "la simple recomendación de negocios ajenos. . .", etc.

No cabe duda, de consiguiente, que en concepto de nuestro legislador, es característico y esencial en el mandato que el encargo consista en la "gestión de uno o más negocios".

En consecuencia, sólo cabe determinar el alcance de esta expresión, o sea, esclarecer y precisar qué se entiende por gestión de negocios.

28. EL CONCEPTO DE GESTION DE NEGOCIOS

No solamente nuestro Código ha empleado en el mandato la expresión "negocios" o "gestión de negocios"; recordemos que también la emplea el Código Civil alemán,[4] conforme al cual, "cuando el contrato de servicios o el contrato de obra tienen por objeto la gestión de un negocio se le aplicarán, en lo pertinente, las principales reglas del mandato". Esto explica que los comentaristas del Código alemán se hayan preocupado de fijar el alcance de esta expresión.

Tres son las principales interpretaciones que se han dado por los comentadores alemanes. La primera es una interpretación amplia, conforme a la cual se comprenden en ellas todas las prestaciones posibles que no estén prohibidas por la ley ni vayan contra las buenas costumbres. La segunda es, por el contrario, restringida, pues según ella se comprenden solamente los

[3] Revista de Derecho y Jurisprudencia, tomo XIV, sec. 1ª, pág. 461.
[4] Artículos 662 y 675.

negocios jurídicos propiamente tales. La tercera, intermedia, es sin duda la más correcta: la expresión "gestión de negocios" comprende tanto los negocios jurídicos como los que se refieran a una actividad económica que tenga una importancia inmediata para el mandante.[5]

En el Código Federal suizo de las Obligaciones el mandato puede tener por objeto, entre otras cosas, la gestión de un negocio, en cuyo caso se presume la representación.

Los comentadores del Derecho suizo estiman, en cambio, que si bien es difícil clasificar y diferenciar los negocios de las prestaciones de trabajo o servicios, pues su denominación varía y se emplea tanto la una como la otra, se puede, sin embargo, hacer entrar en los negocios todo lo que se refiere al establecimiento, mantención o transferencia, a la modificación o extinción de relaciones de derecho, de obligaciones o de créditos.[6]

En otros términos, están por la interpretación restringida de esa expresión.[7]

29. EL CONCEPTO DE GESTION DE NEGOCIOS SEGUN LOS COMENTARIOS A NUESTRO CODIGO CIVIL

Raúl Oliva Murillo estima que la expresión gestión de negocios nos coloca ante tres alternativas: la primera consiste en suponer que ella implica la ejecución de actos de cualquiera naturaleza, sean jurídicos o materiales; la segunda, en restringir su alcance sólo a la ejecución de actos jurídicos; y la tercera, en considerarla una expresión compleja que implica la ejecución de asuntos de cierto orden y de los cuales puede derivar la ejecución de ciertos actos. El mismo señor Oliva rechaza la primera interpretación, entre otras razones, porque el legislador habría empleado la expresión "actos o hechos" en lugar de "gestión de negocios", porque el arrendamiento de servicios es, en nuestro derecho, un contrato general o común que comprende todas las prestaciones de servicios, menos las que se refieran al mandato o a otros contratos específicos. Luego, sólo ciertos asuntos pueden ser objeto del mandato. Además, el mandato presume la representación y ésta sólo cabe respecto de los actos jurídicos. Por último, porque todos los ejemplos de mandato que pone el legislador se refieren a actos jurídicos y no a hechos materiales.

Rechaza también la segunda interpretación, pues, en su concepto, si en el ánimo del legislador hubiera estado restringir el

5 Ludwig Enneccerus, Tratado de Derecho Civil, tomo II, pág. 338, nota 4.

6 Schneider y Fick, Coment. du C. F. des O., Vol. I, pág. 677.

7 Raúl Oliva Murillo, Naturaleza jurídica del mandato civil, pág. 44.

mandato sólo a los actos jurídicos, habría empleado esa expresión y no la de "negocios" y además, porque del artículo 2132 se desprende que el objeto del mandato comprende una idea más compleja que la mera ejecución de actos jurídicos. En efecto, esa disposición establece que el mandato confiere naturalmente al mandatario la facultad de "comprar los materiales necesarios para el cultivo o beneficio de tierras, minas, fábricas u otros objetos de industria que se le hayan encomendado". Es decir, es objeto del mandato un asunto de índole económica que interesa al mandante.

Rechazadas ambas tesis, acepta la tercera, de modo que la expresión "gestión de negocios" indica la ejecución de un asunto que tenga atingencia en la creación, mantenimiento, transferencia o extinción de relaciones jurídicas. Este asunto o actividad puede ser estrictamente jurídico —celebrar un contrato determinado— o de orden económico, del cual deba emanar la ejecución de actos jurídicos.[8]

En otros términos, sigue el criterio de los tratadistas alemanes que aceptan la tesis ecléctica o intermedia.

En el mismo sentido, aunque trata incidentalmente el problema, se pronuncia Renato Maino.[9]

30. LA EXPRESION GESTION DE NEGOCIOS EN SU ACEPCION PROPIA

Conforme al Diccionario de la Lengua Española, la palabra "gestión" significa la acción y efecto de administrar, y la palabra "negocio" comprende todo lo que es materia de una ocupación lucrativa o de interés.

Por otra parte, el legislador se ha referido en el título del mandato a ciertos mandatos especiales, cuyo objeto consiste esencialmente en la ejecución de actos jurídicos.

Aplicando las reglas de interpretación que nos dan los artículos 20 y 22 del Código Civil, podemos concluir que en nuestro Derecho puede ser objeto del mandato la administración y ejecución de negocios jurídicos y de negocios de índole económica que sean materia de una ocupación lucrativa o de interés.

Corroboran nuestra interpretación el artículo 2286, que refiriéndose a la agencia oficiosa o gestión de negocios ajenos, llamada comúnmente gestión de negocios, dispone que es un cuasicontrato por el cual el que administra sin mandato los negocios de alguna persona se obliga para con ésta y la obliga en

8 Ob. cit., pág. 45.

9 Renato Maino S., El Contrato de iguala, pág. 84, nota 179.

ciertos casos, y el artículo 2287, que agrega: "Las obligaciones del agente oficioso o gerente son las mismas que las del mandatario".

La expresión "gestión de negocios" implica, entonces, la idea de administrar un negocio ajeno, o sea, gobernar, regir, cuidar y dar término a una operación de interés económico, para lo cual puede ser necesario, en último o en primer término, la ejecución de uno o más actos jurídicos.

Resumiendo: hay mandato —considerado el problema sólo desde el punto de vista de su objeto— cuando se encomienda la ejecución de un negocio jurídico, o el cuidado, administración y ejecución de un asunto de interés económico.

31. LOS ASUNTOS QUE PUEDEN SER OBJETO DEL MANDATO EN NUESTRO DERECHO

El mismo Código se ha encargado de señalar, en sus diversas disposiciones, el alcance de la expresión "gestión de uno o más negocios" que emplea en el artículo 2116.

De estas disposiciones se desprende que el mandato puede tener por objeto:

a) La conservación de un patrimonio. Así, el mandato confiere naturalmente al mandatario la facultad de efectuar los actos de administración, artículo 2132. Entre éstos señala, por vía de ejemplo, pagar las deudas y cobrar los créditos del mandante, perteneciendo unos y otros al giro administrativo ordinario; perseguir en juicio a los deudores; intentar las acciones posesorias e interrumpir las prescripciones, en lo tocante a dicho giro; contratar las reparaciones de las cosas que administra y comprar los materiales necesarios para el cultivo o beneficio de la tierra, minas, fábricas u otros objetos de industria que se le hayan encomendado.

b) La administración de una industria. Así aparece de la parte final del mismo artículo 2132, en cuanto se refiere a la administración, cultivo o beneficio de las tierras, minas, fábricas u otros objetos de industria que se le hayan encomendado.

c) La ejecución de un negocio cualquiera de índole económica de interés para el mandante. Así aparece del art. 2147, que regla las situaciones que en tales casos pueden producirse entre mandante y mandatario, relativas a las utilidades o pérdidas que del negocio resultaren, conforme al cual artículo "en general, podrá el mandatario aprovecharse de las circunstancias para realizar su encargo con mayor beneficio o menor gravamen que los

designados por el mandante". Y "se le prohíbe apropiarse lo que exceda al beneficio o minore el gravamen designado en el mandato. Por el contrario, si negociare con menos beneficio o más gravamen que los designados en el mandato, le será imputable la diferencia".

Se observa, desde luego, que el mandato se caracteriza porque el riesgo del negocio corre de cargo del mandante, el cual se aprovecha de todos los beneficios, pero correlativamente soporta todas las pérdidas.

d) La ejecución de un negocio jurídico. También puede ser objeto del mandato. Distínguese el negocio jurídico del negocio económico en que en el primero el mandatario tiene como obligación principal ejecutar un acto o celebrar un contrato —a nombre propio o ajeno—, mientras que en el negocio económico la principal obligación consiste en administrar acertadamente un comercio o industria a fin de obtener un provecho pecuniario, para lo cual puede ser necesaria, a la postre, la ejecución de ciertos actos jurídicos o la abstención de ejecutarlos si de esta manera se obtiene un mayor beneficio.

En el primer caso el mandatario cumple su obligación y le pone término ejecutando el acto o celebrando el contrato; en el segundo, administrando el negocio en la mejor forma posible a fin de obtener un beneficio pecuniario o económico para el mandante.

Puede, entonces, ser objeto del mandato la celebración de una transacción o de un compromiso, artículo 2141; de una compraventa o la constitución de una hipoteca, artículos 2142 y 2143; y en general, todo acto jurídico que la ley no prohíba celebrar de esta manera, como la tradición, artículo 674; el pago, artículo 1581; el matrimonio, artículo 15 de la ley Nº 4808 sobre Registro Civil, etc.

La posesión, no siendo un acto sino un hecho jurídico, puede ser asimismo objeto del mandato, artículos 720 y 721.

La comparecencia en juicio, que es una cuestión exclusivamente jurídica, también puede ser objeto de un mandato. El que así se origina constituye una especie de mandato, el judicial, sujeto a reglas particulares.

32. EL MANDATARIO SE HACE CARGO DEL NEGOCIO POR CUENTA Y RIESGO DEL MANDANTE

Es el tercer elemento esencial del mandato, según aparece reglamentado en nuestro derecho, y quizá si de mayor importancia que el anterior, por cuanto es característico a este contrato. Así lo han declarado, también, nuestros tribunales.[10] En efecto, según hemos visto, el mandato tiene por objeto la ejecución de un negocio jurídico o la gestión de un negocio de índole económica. En ambos casos se derivarán responsabilidades por la gestión del mandatario: en el primero, responsabilidades jurídicas, que pueden reducirse en último término a responsabilidades pecuniarias; en el segundo, responsabilidades pecuniarias que se harán efectivas mediante la responsabilidad jurídica.

Asimismo, el negocio que se encomienda al mandatario puede resultar beneficioso o perjudicial, riesgo este ineludible, pues las circunstancias que lo producen escapan, en la mayoría de los casos, a la previsión del hombre.

Pues bien, estos riesgos, esta responsabilidad derivada de la gestión del mandatario, no afectarán al mandatario en definitiva, ya que el negocio no lo gestiona para sí mismo, sino por cuenta y riesgo del mandante, de manera que será éste quien aprovechará de los beneficios o soportará las pérdidas, como si el negocio lo hubiera realizado personalmente, por sí mismo.

La expresión "de cuenta y riesgo" significa "bajo su responsabilidad", y en derecho, por cuenta de una persona significa que sólo a esa persona corresponden los productos o beneficios de la cosa o negociación, como asimismo, a ella pertenecen su pérdida o deterioro; y riesgo es el acontecimiento incierto que puede hacer desmerecer la misma cosa o negociación y aun destruirla. Por consiguiente, la expresión "por cuenta y riesgo de una persona" establecida en un contrato, significa que a ella corresponde la responsabilidad de la cosa.[11]

Ni el Código Civil alemán, artículo 662, ni el Código Federal suizo de las Obligaciones, artículo 394, ni el Código Civil mexicano, artículo 2546, contemplan este factor esencial y característico del mandato.

En cuanto a los tratadistas, recordemos que solamente Lenel atiende al factor "por cuenta y riesgo" como esencial y privativo del mandato, expresando que "lo característico del mandato, lo mismo del gratuito que del retribuido, es que el mandatario se ocupe del negocio como algo que le es ajeno, como negocio cuyos ingresos y gastos en nada le afectan materialmente; en una palabra, que obre por cuenta del mandante".[12] No deben confundirse los conceptos "por cuenta y riesgo" del mandante y "representación" del mandante. El mandatario actúa siempre por cuenta y riesgo del mandante, pues sea que contrate a nombre propio, sea que lo haga a nombre del mandante, en último término sólo éste aprovechará los beneficios y soportará las pérdidas del negocio cometido, incluso los gastos, expensas y perjuicios que hubiere sufrido el mandatario sin culpa y a causa o con ocasión del mandato.[13] Es un error, por tanto, sostener que cuando el mandatario contrata a su propio nombre no obra por cuenta y riesgo de su mandante. Los artículos 2116 y 2151 dejan de manifiesto lo contrario. Sin embargo, en algunos casos, aunque aislados, nuestros tribunales han incurrido en esa confusión.[14]

10 Revista de Derecho y Jurisprudencia, tomo XLIV, sec. 1ª, pág. 444; tomo LXVII, sec. 1ª, pág. 451.
11 Revista de Derecho y Jurisprudencia, tomo XXIV, sec. 1ª, pág. 484.
12 Lenel, ob. cit., pág. 371.

33. LOS ELEMENTOS ANTERIORES CARACTERIZAN EL MANDATO

De lo expuesto es necesario concluir que, conforme a nuestro derecho, deben concurrir los tres elementos citados para que exista mandato. Faltando cualquiera de ellos el contrato no existe o degenera en otro diferente.

Es decir, nuestro Código no ha contemplado sólo un elemento como determinador del mandato, al revés de la opinión de los tratadistas y de lo establecido en otros códigos, sino varios de ellos que deben concurrir copulativamente y cuyo examen en conjunto permitirá a los jueces establecer o calificar jurídicamente la naturaleza del contrato sometido a discusión y a nosotros tomar un conocimiento exacto de lo que se entiende por mandato y de los factores que debemos tomar en cuenta para distinguirlo de otras relaciones jurídicas afines.

Sin pretender, entonces, apartarnos de la definición que nos proporciona el artículo 2116 del Código Civil, bien podemos decir que la substancia del mandato consiste en la confianza que una persona deposita en otra para correr los riesgos del beneficio o la pérdida que le pueda acarrear la gestión de un negocio jurídico o económico, que afectará exclusivamente al mandante y que administrará y realizará el mandatario.

Es decir, que al celebrarse el contrato el mandante atiende a dos factores para él esenciales: obtener la realización de un negocio que le interesa y cuyos resultados le afectarán exclusivamente; y la confianza que deposita en el mandatario en el sentido de que éste realizará el negocio con la diligencia y honestidad que emplearía si el negocio que realiza fuese suyo.

Obsérvese bien, porque éste servirá para distinguir el mandato de otras relaciones jurídicas afines, que lo que persigue el mandante es "la realización de un negocio jurídico o económico" y que la persona del mandatario no le interesa en cuanto a los

13 Revista de Derecho y Jurisprudencia, tomo XLIII, sec. 1ª, pág. 256.
14 Mismo fallo.

servicios que le presta sino en cuanto a la confianza que le inspira de que actuará en el negocio como si fuese propio, esto es, pondrá la diligencia y cuidado que dedica a la gestión de sus negocios particulares.

34. LA REPRESENTACION ES UN ELEMENTO DE LA NATURALEZA DEL MANDATO; NO ES DE SU ESENCIA

Andrés Bello se separó en este punto del Código francés y se adelantó a todas las legislaciones vigentes al reglamentar la representación en forma independiente del mandato.

En efecto, en el título II del Libro IV, que trata "De los actos y declaraciones de voluntad", establece como regla general aplicable a todo acto o contrato, que "lo que una persona ejecuta a nombre de otra, estando facultada por ella o por la ley para representarla, produce respecto del representado iguales efectos que si hubiese contratado él mismo".

De lo cual se desprende que la representación es una institución jurídica autónoma, que puede emanar de la ley o de la voluntad de las partes. En cualquier caso produce los mismos efectos; el acto o contrato obliga al representado como si hubiera contratado él mismo, salvo ciertas excepciones que no es del caso considerar aquí.[15]

La representación voluntaria puede existir independientemente de toda otra relación jurídica entre las partes o unida a una relación contractual determinada.[16] Así, puede convenirse que uno de los socios administre y represente a la sociedad, o que la represente solamente, sin administrarla, o puede estipularse en un contrato de trabajo o de arrendamiento de servicios, o lo que es más frecuente, va unida al contrato del mandato.

El problema que surge en este caso consiste en establecer el papel que según nuestro derecho positivo desempeña la representación en el mandato: ¿es un elemento de su esencia, de su naturaleza o simplemente accidental?

No es indiferente llegar a una u otra conclusión, pues en la primera hipótesis, el mandatario deberá actuar siempre a nombre del mandante, sin que pueda privársele de esta facultad por una convención en contrario, so pena de hacer ineficaz el contrato; en la segunda, podrá privarse al mandatario de la facultad de representar al mandante, pero si nada se dice al respecto deberá entenderse que se le ha conferido esa facultad por la sola celebración del contrato; y en la tercera, será necesario que se

[15] Nicolás Coviello, ob. cit., pág. 431; Hupka, ob. cit., pág. 20. Revista de Derecho y Jurisprudencia, tomo XL, sec. 1ª, pág. 304.

[16] Revista de Derecho y Jurisprudencia, tomo XLIII, sec. 1ª, pág. 495.

estipule expresamente, porque de otra manera el mandatario no estaría facultado para representar al mandante, artículo 1444 del Código Civil.

Desde luego, debemos rechazar de plano la tesis de que la representación, o mejor, que la facultad o poder de representación sea un elemento esencial del mandato. La definición del artículo 2116 no la contempla en forma alguna ni se refiere a ella. Además, el artículo 2151 dispone que el mandatario puede, en el ejercicio de su cargo, contratar a su nombre propio, en cuyo caso no obliga respecto de terceros al mandante. Si el mandatario contrata a su propio nombre, lo que es lícito según acaba de verse, no hay representación, tanto porque es esencial a ésta que se contrate a nombre de otro, artículo 1448, cuanto porque el artículo 2151 dice expresamente que actuando el mandatario a nombre propio no obliga respecto de terceros al mandante, lo que implica rechazar toda idea de representación.

En consecuencia, el mandatario puede actuar a nombre propio, y en tal caso hay mandato pero no representación, de donde resulta que ésta no es una cosa de la esencia del mandato.[17]

En cambio, de las mismas disposiciones se desprende que es un elemento de su naturaleza, esto es, una cosa que no siendo esencial en él, se entiende pertenecerle sin necesidad de una cláusula especial.

El artículo 2151 autoriza al mandatario para que actúe a nombre del mandante, esto es, para que le represente, y el artículo 2132 agrega que "el mandato no confiere naturalmente al mandatario más que el poder de efectuar los actos de administración que allí se señalan". Y termina diciendo que "para todos los actos que salgan de estos límites, necesitará de poder especial".

De manera, pues, que celebrado el contrato de mandato, el mandatario queda autorizado para representar al mandante en la ejecución del encargo que se le ha cometido.

Como no se requiere de una estipulación especial para ello, debemos terminar que en nuestro derecho la representación es una cosa de la naturaleza del mandato, no de su esencia ni tampoco puramente accidental.

De esta manera se han armonizado perfectamente los principios de la doctrina, que considera el mandato independiente de la representación, y las necesidades de la vida diaria, que exigen que el mandatario goce de tal facultad para la mejor y más expedita ejecución del negocio, tanto respecto del mandante como de terceros.

[17] Troplong, ob. cit., pág. 42, Nº 33. Revista de Derecho y Jurisprudencia, tomo XLIV, sec. 1ª, pág. 444; tomo XLIII, sec. 1ª, pág. 256; tomo XLVII, sec. 1ª, pág. 451; tomo XLIII, sec. 3ª, pág. 173.

35. JURISPRUDENCIA

Nuestros tribunales han incurrido en frecuentes y graves errores las veces que han debido pronunciarse sobre cuestiones relativas al mandato. Uno de ellos consiste, precisamente, en haber sentado la doctrina de que la representación es una cosa de la esencia del mandato.

Así, en una oportunidad la Corte Suprema resolvió que los caracteres esenciales distintivos del mandato son: a) la gestión de uno o más negocios que una persona confía a otra; b) que el mandatario tenga la facultad de representar al mandante, de obligarlo ante terceros y obligar a terceros con él.[18]

En otra sentencia la misma Corte declaró que por lo que toca al mandato, debe ante todo dejarse establecido "que los caracteres esenciales y distintivos de este contrato son dos: a) que el negocio que el mandatario se encarga de cumplir consista en un acto o en una serie de actos; y b) que el mandatario tenga la facultad de representar al mandante, de obligarle ante terceros y obligar a los terceros con él".[19] Agrega la misma sentencia que "examinando el contrato en cuya calificación difieren las partes, se ve que reúne estos dos requisitos esenciales, porque de las cláusulas primera y segunda se desprende que el objeto del contrato era la venta, es decir, un acto jurídico que debía hacer don X. X. por parcialidades o lotes de un terreno de propiedad de don N. N.: y de la octava y novena, la obligación de este último de firmar las respectivas escrituras".

Si bien la sentencia anotada resolvió correctamente el caso concreto sometido a su fallo, los fundamentos que invoca en apoyo del mismo no son exactos, porque, como se ha visto, no siempre el encargo consiste en la ejecución de un acto (aun cuando tal sea ordinariamente el objeto del mandato), ni es de la esencia del mandato que el mandatario tenga la facultad de representar al mandante, de obligarle ante terceros y obligar a los terceros con él, pues cuando el mandatario actúa en su propio nombre no obliga respecto de terceros al mandante, artículo 2151.

Otras sentencias, en cambio, han sentado la verdadera doctrina. Se ha fallado que si bien el mandatario aparece celebrando el contrato sin indicar que procedía en ese acto a nombre o en representación de su mandante, debe tenerse presente que el mandatario puede, en el ejercicio de su cargo, contratar a su

[18] Revista de Derecho y Jurisprudencia, tomo XXI, sec. 1ª, pág. 11.
[19] Revista de Derecho y Jurisprudencia, tomo XIX, sec. 1ª, pág. 164.

propio nombre o al del mandante, no obligando en el primer caso al mandante respecto de terceros.[20]

Y una sentencia antigua de la Corte Suprema había decidido, asimismo, que el encargo o negocio mercantil que se encomienda a una persona, y que consiste en la compra y venta de un determinado número de acciones que ésta debe efectuar "en su propio nombre, sin la intervención directa del que hace el encargo, importa comisión y no corretaje". Las circunstancias de ser corredor la persona a quien se hace el encargo y la de ejercer la correduría sin título oficial no modifica el aspecto jurídico de la cuestión.[21]

36. EL MANDATO SE PRESUME REMUNERADO; LA GRATUIDAD NO ES DE SU ESENCIA NI DE SU NATURALEZA

El artículo 2117 establece que "el mandato puede ser gratuito o remunerado". En consecuencia, ni la gratuidad ni la remuneración son cosas de la esencia del mandato; son circunstancias estas que no afectan su naturaleza jurídica.

Interesa, en seguida, establecer cuál de estos elementos —remuneración o gratuidad— es de la naturaleza del contrato y cuál es accidental al mismo, cuestión que reviste importancia, porque establecido que la remuneración es una cosa de la naturaleza del mandato, el mandatario tendrá derecho a ella aun cuando nada se hubiere estipulado. De aceptarse la conclusión contraria, el mandatario carecería del derecho de exigir una remuneración en caso de no haberse estipulado y si alegara la existencia de un pacto en este sentido, le correspondería probarlo.

Nuestro Código se refiere a la remuneración del mandatario en los artículos 2117 y 2158, Nº 3. Aquél establece que el mandato puede ser gratuito o remunerado. La remuneración (llamada honorario) es determinada por convención de las partes antes o después del contrato, por la ley, la costumbre o el juez.

Puede observarse que esta disposición, en el inciso primero, se refiere a un principio general que tiene por objeto establecer que en nuestro derecho la remuneración o gratuidad no influyen en la naturaleza del mandato. Puede ser, pues, indistintamente gratuito o remunerado. Nuestra legislación se aparta así del Derecho romano, en que era esencialmente gratuito, y del Derecho alemán, en que se ha seguido el mismo criterio.

[20] Revista de Derecho y Jurisprudencia, tomo XXVIII, sec. 1ª, pág. 185; tomo XLIV, sec. 1ª pág. 444; tomo XLIII, sec. 1ª, pág. 256; tomo LV, sec. 1ª, pág. 188; tomo LXVII, sec. 1ª, pág. 451.
[21] Revista de Derecho y Jurisprudencia, tomo XIV, sec. 1ª, pág. 461.

El inciso segundo del artículo 2117 se refiere a la forma en que puede determinarse la remuneración, esto es, establecerse su monto, cuestión que no interesa por ahora, en que se trata de esclarecer previamente si la remuneración es una cosa de la naturaleza o accidental del mandato.

El artículo 2158, ubicado en el párrafo que trata de las obligaciones del mandante, nos da la pauta en esta materia, disponiendo que "el mandante es obligado a pagar al mandatario la remuneración estipulada o usual".

En lo que se refiere a la remuneración estipulada no presenta novedad alguna, salvo que, como veremos, en caso de estipulación, por regla general, no es lícito al juez entrar a regular los honorarios.[22]

Si nada se ha estipulado, el mandante es obligado a pagar la remuneración usual, esto es, la que ordinariamente se paga en relación a la naturaleza o cuantía del servicio prestado.

Como puede observarse, la ley parte del supuesto de que debe pagarse una remuneración, la estipulada o la usual. No se remite a la costumbre para establecer si se debe o no una remuneración, como lo hace para determinar su cuantía, sino que obliga al mandante a pagar la usual, la que se usa según la época y lugar en que se encomienda la gestión.

De todo lo cual se desprende que en nuestro derecho la remuneración es una cosa de la naturaleza del mandato, esto es, que no siendo esencial en él se entiende pertenecerle sin necesidad de una cláusula especial.

Por lo tanto, la gratuidad en el mandato debe estipularse expresamente, pues en caso contrario se presume remunerado y la prueba de la estipulación incumbe al que la alegue.

37. JURISPRUDENCIA

Numerosos fallos de nuestros tribunales confirman la conclusión a que hemos llegado.

Así se ha resuelto que "el mandato es un contrato remunerado salvo que se estipule que sea gratuito",[23] "que en general, los servicios de un mandato deben presumirse remunerados, desde que nadie está obligado a hacerlos gratuitamente sino en

[22] Revista de Derecho y Jurisprudencia, tomo LVIII, sec. 5ª, pág. 34. En igual sentido, artículo 5º inciso final del Decreto Ley Nº 3.621 de 1981, que suprimió las facultades de los colegios profesionales para dictar aranceles de honorarios para sus asociados. Ese precepto faculta al juez para regular los honorarios "a falta de estipulación expresa o acuerdo entre las partes".

[23] Revista de Derecho y Jurisprudencia, tomo XXXIV, sec. 1ª, pág. 435.

los casos determinados por la ley",[24] que "establecido en la sentencia que el demandado comisionó al demandante para que le vendiera un fundo y le comprara algunas propiedades y que como consecuencia de la intervención de este último se vendió el fundo y se compraron las propiedades, no infringe ninguna disposición legal la sentencia que declara que el demandado debe remuneración al demandante. La gratuidad no es requisito esencial al mandato y, en general, a falta de estipulación expresa, debe presumirse remunerado",[25] que "si los mandantes no prueban culpa al mandatario en el cumplimiento de su encargo, necesariamente tienen la obligación de pagarle la remuneración de sus servicios";[26] y "que si los honorarios se devengaron en juicio seguido por la mujer en contra de su marido, éste es responsable del pago y la acción de cobro puede dirigirse contra él".[27]

38. CONCLUSION

Podemos concluir, entonces, que son elementos esenciales o constitutivos del mandato los que aparecen en la definición del artículo 2116; que sólo ellos nos permitirán distinguirlo de otras instituciones jurídicas y que sólo aquellos contratos que reúnen tales elementos quedan sujetos a las reglas del mandato.

En lo que toca al poder de representación, es una cosa de la naturaleza del mandato, como también lo es la remuneración a favor del mandatario.

Por último y como consecuencia de ello, ni la facultad que tenga una persona de representar a otra, ni la remuneración o gratuidad de los servicios son elementos que por sí solos nos sirvan para establecer la existencia del mandato.[28]

39. CONTRATOS QUE CONSTITUYEN MANDATO SEGUN NUESTROS TRIBUNALES

Los Tribunales de Justicia han establecido que constituyen mandato: a) el acto por el cual una persona encomienda a otra la venta de un fundo y la compra de algunas propiedades;[29] b) las

[24] Revista de Derecho y Jurisprudencia, tomo XXXI, sec. 1ª, pág. 11.

[25] Revista de Derecho y Jurisprudencia, tomo XIX, sec. 1ª, pág. 225; tomo LIX, sec. 1ª, pág. 219.

[26] Revista de Derecho y Jurisprudencia, tomo XLIV, sec. 1ª, pág. 492.

[27] Revista de Derecho y Jurisprudencia, tomo LVIII, sec. 1ª, pág. 285.

[28] En contrario, véase Renato Maino S., "El contrato de iguala", pág. 63, Nº 64.

[29] Revista de Derecho y Jurisprudencia, tomo XIX, sec. 1ª, pág. 226.

gestiones hechas para buscar una persona que celebre un contrato de arrendamiento de una fábrica y la venta de las existencias de ella;[30] c) el contrato por el cual una persona confía a otra la venta de unos terrenos de su propiedad, garantizándose por esta segunda persona una suma alzada;[31] d) el encargo conferido para administrar ciertas propiedades, continuar la construcción de otras y después cobrar los arriendos y atender a su reparación y conservación;[32] e) el contrato en que se encarga la dirección, gobierno y cuidado de la administración de un fundo;[33] f) la orden dada a un Banco para que entregue a otro Banco ciertos bonos que le debía el que dio la orden;[34] y g) los consignatarios particulares en las ferias y mercados municipales son mandatarios de los productores particulares para representarlos en los remates que se efectúen dentro de aquéllos.[35]

40. EL MANDATO Y EL CONTRATO DE ARRENDAMIENTO

El contrato de arrendamiento puede presentar, en algunos casos, cierta analogía con el mandato, y es así como la mayoría de las legislaciones extranjeras se han preocupado de esclarecer cuándo tienen lugar las reglas de uno u otro contrato.

La dificultad se debe, en gran parte, a la enorme latitud del contrato de arrendamiento, el cual contiene o puede contener prestaciones tan diversas que en realidad lo convierten en una especie de contrato común que alcanza a cubrir parcialmente el campo de regulación de otros contratos. Por esta razón, antes de señalar las semejanzas y diferencias de ambos contratos, es necesario analizar, aunque someramente, las diversas modalidades que reviste el arrendamiento.

41. DE LAS DIVERSAS MODALIDADES QUE REVISTE EL CONTRATO DE ARRENDAMIENTO

El artículo 1915 de nuestro Código dispone que el arrendamiento es un contrato en que las dos partes se obligan recíprocamente,

[30] Revista de Derecho y Jurisprudencia, tomo VIII, sec. 1ª, pág. 252.
[31] Revista de Derecho y Jurisprudencia, tomo VIII, sec. 1ª, pág. 162.
[32] Revista de Derecho y Jurisprudencia, tomo XXXI, sec. 1ª, pág. 11.
[33] Gaceta 1883, Sent. 2139.
[34] Revista de Derecho y Jurisprudencia, tomo XXV, sec. 1ª, pág. 426.
[35] Revista de Derecho y Jurisprudencia, tomo LXIII, sec. 2ª, pág. 1 y tomo LX, sec. 2ª, pág. 125.

la una a conceder el goce de una cosa, o a ejecutar una obra o prestar un servicio, y la otra a pagar por este goce, obra o servicio un precio determinado.

El arrendamiento puede ser, entonces, de cosas, de obra y de servicios.

Estas tres modalidades del mismo contrato presentan tales diferencias entre sí, que el legislador se ha visto en la necesidad de dar a cada una de ellas una reglamentación propia y hasta cierto punto independiente, lo que se explica por cuanto las prestaciones que se deben en uno y otro caso y las obligaciones que se contraen son de naturaleza muy diversa.

Como advierte Fubini[36] el lazo de unión que hoy todavía se quiere encontrar entre el arrendamiento de cosas y el de servicios, consiste en que en ambos se conserva la concesión temporal del goce de un bien determinado, entendido en el sentido que la economía le atribuye, pero es notorio que tal lazo es débil y carece de importancia con respecto a la disciplina de los dos negocios.

Más adelante agrega que lo que realmente separa el arrendamiento de obra y de servicios del arrendamiento de cosas, es el valor trabajo, elemento que en el arrendamiento de cosas, al igual que en otros contratos, como la compraventa por ejemplo, tiene el carácter de una prestación accesoria, mientras que en el arrendamiento de obra y en el de servicios constituye la prestación fundamental.[37]

En el arrendamiento de cosas, dice el mismo autor, el arrendador tiene que procurar al arrendatario la posibilidad de gozar la cosa arrendada, mientras que en el de servicios, el arrendador debe prestar la propia actividad para procurar la utilidad que el arrendatario tiene derecho a obtener.

Las observaciones de Fubini son exactas y casi todos los tratadistas coinciden en ellas.[38]

42. EL ARRENDAMIENTO DE COSAS Y EL MANDATO

Ninguna dificultad puede producirse en la determinación de uno y otro contrato, pues las mismas observaciones que hace Fubini respecto del arrendamiento de cosas y el arrendamiento de servicios, pueden formularse respecto del arrendamiento de cosas y el mandato.

[36] R. Fubini, "El contrato de arrendamiento de cosas", Parte General, pág. 15, Nº 2.
[37] Fubini, ob. cit., pág. 16, Nº 3.
[38] Colin y Capitant, ob. cit., tomo IV, págs. 226 y siguientes.

En el primero, el arrendador no hace objeto del contrato su propia actividad, que reviste un carácter accesorio, pues lo fundamental del contrato consiste en entregar al arrendatario la cosa arrendada y mantenerla en estado que pueda gozar de ella conforme a su objeto y sin turbación o embarazo, artículo 1924 de nuestro Código Civil. En cambio, en el mandato lo que importa fundamentalmente es la actividad del mandatario que permitirá el éxito de la gestión encomendada.

De aquí se desprende que el arrendador de una cosa se mantiene en una situación de inactividad respecto del arrendatario, pues entregada la cosa cumple la obligación inmediata del contrato, sin perjuicio de las obligaciones que eventualmente pueden surgir de reparar la cosa o librarlo de la turbación o embarazo, al revés de lo que sucede con el mandatario, cuya principal obligación es la de actuar para obtener la gestión del negocio que se le ha encomendado.

Es innecesario insistir en otras diferencias, pues tratándose de situaciones jurídicas totalmente extrañas, serían numerosísimas.

En cambio es interesante precisar las diferencias que existen entre el arrendamiento de servicios y el mandato, porque entre ambos existen tantas y tan profundas semejanzas, que muchas veces resulta extremadamente difícil establecer cuándo se trata de uno u otro contrato.

43. EL ARRENDAMIENTO DE SERVICIOS

Según el artículo 1915, es un contrato en que las dos partes se obligan recíprocamente, la una a ejecutar una obra o prestar un servicio y la otra a pagar por esta obra o servicio un precio determinado.

Tal como el arrendamiento de cosas —que puede ser de cosas muebles, de predios urbanos, predios rústicos, etc.—, el arrendamiento de servicios admite una clasificación tripartita, atendiendo a la naturaleza de los servicios que se prestan: arrendamiento de servicios materiales, arrendamiento de servicios inmateriales y contrato de obra o confección de una obra material.

Como cada uno de estos tipos de arrendamiento presentan caracteres propios, nos referiremos a ellos separadamente.

44. ARRENDAMIENTO DE SERVICIOS MATERIALES

El arrendamiento de servicios materiales, excluyendo de esta denominación el contrato de confección y el de transporte, queda circunscrito al arrendamiento de criados domésticos y al de servicio de obreros, que son materia, hoy día, del contrato de trabajo. Por eso nos remitimos en este punto al párrafo relativo a este contrato.

45. ARRENDAMIENTO DE SERVICIOS INMATERIALES

Nuestro Código se refiere al arrendamiento de servicios inmateriales en el artículo 2006. Dispone que los servicios inmateriales o en que predomina la inteligencia sobre la obra de mano, como una composición literaria o la corrección tipográfica de un impreso, se sujetan a las disposiciones especiales de los artículos 1997, 1998, 1999 y 2002.

Estos artículos son aplicables solamente al arrendamiento de servicios inmateriales, de donde aparece la necesidad de establecer cuándo la prestación de servicios reviste esa calidad.

La prestación de servicios inmateriales puede revestir tres formas jurídicas diversas: contrato de trabajo de empleados particulares, mandato y arrendamiento de servicios inmateriales.

No insistiremos en la importancia de tal distinción; bastará hacer presente que la perfección, efectos y terminación de cada uno de ellos se rigen por disposiciones diferentes y especiales.

Veamos, entonces, cuándo hay contrato de trabajo, su naturaleza jurídica y sus elementos esenciales.

46. EL CONTRATO DE TRABAJO

El artículo 1º del Código del Trabajo lo define como la convención en que el patrón o empleador, y el obrero o empleado, se obligan recíprocamente: éstos a ejecutar cualquier labor o servicio material o intelectual, y aquéllos a pagar por esta labor o servicio una remuneración determinada. Para los efectos de este texto se entiende: 1º por patrón o empleador, la persona natural o jurídica que por cuenta propia o ajena tenga a su cargo la explotación de una empresa o faena de cualquier importancia, en que trabajen obreros o empleados, cualquiera que sea su número; 2º por empleado, toda persona en cuyo trabajo predomine el esfuerzo intelectual sobre el físico, y 3º por obrero, toda persona que, sin estar comprendida en los números anteriores, trabaje por cuenta ajena en un oficio u obra de mano o preste un servicio material determinado.

El interés que existe para distinguir el contrato de trabajo se advierte, entre otras circunstancias, por las siguientes:

a) en el mandato puede o no haber remuneración; en el contrato de trabajo siempre debe haberla, pues es una cosa de la esencia de este contrato;

b) las reglas que protegen la remuneración del trabajo, tales como inembargabilidad, salario mínimo, etc., no son aplicables a los honorarios que se devengan a favor del mandatario;

c) la previsión social que ampara a los trabajadores e impone prestaciones con cargo a éstos y al patrón o empleador, no ampara al mandatario ni grava al mandante;

d) el privilegio establecido en el art. 2472 número 3º del Código Civil, corresponde sólo a las remuneraciones de los empleados y obreros, de modo que no aprovecha a los honorarios que se adeuden al mandatario;

e) el mandatario representa naturalmente al mandante. Los empleados u obreros no representan al patrón o empleador, salvo pacto especial. Sin embargo, conviene advertir que en ciertos casos la facultad de representar puede ser una cosa de la naturaleza del contrato de trabajo. Tal cosa sucede siempre que los servicios que se contratan colocan al empleado en relación con terceros, como ocurre con los vendedores de establecimientos de comercio abiertos al público; los cajeros de los mismos establecimientos encargados de recibir el precio de los artículos vendidos en ellos; los cajeros de bancos encargados de recibir los depósitos del público y de pagar los cheques u otros efectos de comercio presentados al banco para su cobro, etc.;

f) el mandatario puede delegar el encargo, art. 2135 del Código Civil. El empleado u obrero no puede hacerse sustituir por otro en la ejecución de los servicios que se ha obligado a prestar;

g) las prescripciones de corto tiempo establecidas en el Código del Trabajo y demás leyes especiales que lo modifican o complementan, no se aplican a las acciones emanadas del mandato, que se rigen por lo dispuesto en los artículos 2514 y siguientes y 2521 y siguientes del Código Civil;

h) las causales de terminación de ambos contratos no son las mismas. Al contrato de trabajo se aplican las normas específicas del Código del Trabajo y leyes especiales, particularmente la que consagra la llamada inamovilidad de que gozan los trabajadores por razones de interés social, en tanto que para el mandato rigen las normas contenidas en los artículos 2163 y siguientes del Código Civil.[39]

i) Los Tribunales del Trabajo sólo son competentes para conocer de las cuestiones a que da origen el contrato de trabajo y no de las que se susciten con ocasión del mandato. Lo mismo diremos del procedimiento.

47. CARACTERES DEL CONTRATO DE TRABAJO

La noción de contrato de trabajo es relativamente moderna. Hasta la dictación de nuestro Código se le consideró simplemente como una especie de arrendamiento de servicios, sea de criados domésticos, de servicios materiales o inmateriales.

Con posterioridad, esta materia fue reglamentada especialmente, generándose así el contrato de trabajo como una noción jurídica autónoma hasta llegar a la legislación abundantísima que existe hoy día, tanto en el Código del Trabajo, que legisla sobre las diversas situaciones a que da origen este contrato, como en leyes especiales que se refieren a materias no comprendidas en ese Código.

No obstante este desarrollo extraordinario, el contrato de trabajo ha mantenido, porque esos son su esencia y objeto, el carácter de una prestación de servicios, elemento este que es característico o por lo menos base de otros contratos distintos, como el contrato de confección de obra, de sociedad, de mandato, etcétera.

De aquí que los tratadistas se hayan preocupado de buscar en otras circunstancias que la prestación del trabajo, el elemento característico del contrato que nos ocupa.

Al respecto se han formulado varias tesis o criterios. Así, Planiol y Ripert consideran que debe atenderse a la forma de remuneración, que en el contrato de trabajo es proporcional al tiempo que se emplea, mientras que en los demás contratos se determina en otra forma, ya por la importancia de la obra —en el contrato de confección—, ya por los beneficios que se obtienen —como en la sociedad—, etc.[40]

C. Perrau estima, por su parte, que hay contrato de trabajo siempre que una persona se obligue a trabajar para un emplea-

[39] Revista de Derecho y Jurisprudencia, tomo LXVI, sec. 3ª, pág. 111; tomo LXIII, sec. 3ª, pág. 174.
[40] Planiol y Ripert, ob. cit., tomo II, Nºs 1824 y 1827.

dor determinado; si ofrece su trabajo al público en general hay contrato de empresa.[41]

Pero el criterio que ha encontrado amplia acogida, tanto entre los tratadistas como en la jurisprudencia, es el que considera que lo esencial en este contrato es el vínculo de subordinación y dependencia que existe entre el empleado u obrero y el empleador o patrono.[42]

Este vínculo de subordinación y dependencia puede considerarse desde dos aspectos diferentes, que cuando coinciden determinan con mayor firmeza la existencia del contrato de trabajo; estos dos aspectos son el jurídico y el económico.[43]

La dependencia jurídica se traduce en la subordinación en que se encuentra el que presta su trabajo respecto del empleador, en lo que dice relación con la forma y condiciones que debe respetar en el ejercicio de su cargo.

La subordinación económica consiste en que el que suministra el trabajo obtenga de él su principal medio de subsistencia.

Debe observarse, por último, que el concepto de subordinación no puede tener un sentido concreto o uniforme, ya que variará con las circunstancias, y así será diferente en el contrato de trabajo de un criado doméstico, de un empleado particular oficinista o de un médico o abogado. En este último caso la facultad de dirigir y controlar el trabajo, que corresponde al empleador, se reduce considerablemente, y el vínculo de subordinación y dependencia se manifestará frecuentemente en una simple continuidad de relaciones.[44]

En esta forma y resumiendo, puede decirse que el contrato de trabajo se caracteriza en que una persona pone a disposición de otra su capacidad de trabajo, de una manera más o menos continua y subordinada a la última, mediante una remuneración.[45]

Estos elementos nos permitirán diferenciar el contrato de trabajo de cualquier otro análogo o semejante en su apariencia.[46]

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41 C. Perrau, "El contrato de trabajo y el C. Civil", citado por Patricio Santander D., La noción jurídica del contrato de trabajo. Rev. de Derecho y Jurisprudencia, tomo XXX, 1ª parte, págs. 51 y siguientes.

42 Planiol y Ripert, tomo XI, pág. 14, Nº 772; Cuche, Du rapport de dépendance, élément constitutif du contrat du travail, Revue Critique, 1931, págs. 412 y siguientes.

43 Beudant, La vente et le louage; Baudry Lacantinerie et Wahl, Louage; Colin et Capitant, tomo II, pág. 564, etc.

44 Patricio Santander: Noción Jurídica del Contrato de Trabajo, pág. 17.

45 Capitant y Cuche, pág. 134, Nº 134.

46 En contra, R. Maino, ob. cit., pág. 84 y nota 177.

48. EL MANDATO Y EL CONTRATO DE TRABAJO SEGUN LA DOCTRINA

Para aquellos que sustentan la tesis que el mandato es un contrato de representación esencialmente, esta misma circunstancia es la que lo distingue del contrato de trabajo.

Como en nuestro derecho positivo no es posible sostener tal cosa, desecharemos desde luego ese criterio, aun cuando hay sentencias de nuestros tribunales que así lo han establecido respecto del mandato.[47]

Tampoco podemos aceptar la tesis que sustenta Planiol en el sentido que el mandato supone necesariamente la ejecución de actos jurídicos, circunstancia que lo distinguiría del contrato de trabajo, pues, como se ha visto, el encargo que es objeto del mandato puede consistir en la gestión de uno o más negocios, expresión que comprende tanto los negocios jurídicos como los económicos.

Colin y Capitant consideran que el rasgo distintivo y característico que separa el mandato del contrato de trabajo reside en que este último contrato supone una subordinación del que presta sus servicios, obrero, empleado, ingeniero, director, que el mandato no lleva consigo.

El mandatario conserva su independencia, su libertad de realizar como le parece el negocio que le ha sido confiado. Además, el contrato de trabajo absorbe ordinariamente toda la actividad del empleado, al paso que el mandato versa sobre uno o más negocios determinados. Esta teoría concuerda, pues, con la tesis de que el rasgo esencial y distintivo del contrato de trabajo consiste en la relación de subordinación y dependencia que une al empleado con su empleador.

Planiol, Ripert y Rouast consideran que este solo factor no es suficiente para distinguir el contrato de trabajo del mandato y le agregan, además, el concepto de representación, que sería esencial en este último.

Vivante considera, por su parte, que no siendo la representación de la esencia del mandato, se diferencia del contrato de trabajo en que el mandatario "administra" los negocios del mandante mientras que el empleado los "ejecuta". El primero pone al servicio del mandante su capacidad administrativa; el segundo su capacidad técnica, mecánica o profesional. El trabajador o el empleado es un "cooperador material", mientras que el mandatario es un "cooperador jurídico", como lo es también el representante.

Imaginemos, dice este autor, un ingeniero encargado por

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47 Revista de Derecho y Jurisprudencia, tomo XXXI, sec. 1ª, pág. 11.

una sociedad anónima de la construcción de un edificio (trabajador o empleado), un Consejo de administración que examina los proyectos y delibera sobre la adquisición de los materiales (administrador o mandatario), y un director o consejero delegado que procede a hacer las adquisiciones (representante).[48]

49. EL MANDATO Y EL CONTRATO DE TRABAJO EN NUESTRO DERECHO

El Código del Trabajo recientemente aprobado establece que el contrato individual de trabajo "es una convención por la cual el empleador y el trabajador se obligan recíprocamente, éste a prestar servicios personales bajo dependencia y subordinación del primero, y aquél a pagar por estos servicios una remuneración determinada". Las partes son, por tanto, el empleador y el trabajador. El primero está definido como "la persona natural o jurídica que utiliza los servicios intelectuales o materiales de una o más personas en virtud de un contrato de trabajo". Y el trabajador, como "toda persona natural que preste servicios personales intelectuales o materiales, bajo dependencia o subordinación, y en virtud de un contrato de trabajo". Si el trabajador "no depende de empleador alguno" ni tiene trabajadores bajo su dependencia, es un trabajador independiente.[49]

Los servicios del trabajador pueden ser intelectuales o materiales, según la ley. De modo que si sólo se atiende a este elemento, el encargo que es objeto del mandato tiene cabida en ellos. Y no podría mirarse como elemento distintivo que permitiese diferenciarlo del contrato de trabajo.

Tampoco es la representación un elemento que pueda servir de criterio diferenciador, dado que no es de la esencia del mandato, como se ha demostrado.[49 bis] Añadiéndose a esto que la representación puede estar incorporada al contrato de trabajo, sin desvirtuarlo, sea expresamente, sea implícitamente en razón de la naturaleza de los servicios que presta el trabajador. El mismo Código del Trabajo que conforme a su artículo 1º "regula las relaciones laborales entre los empleadores y los trabajadores", excluye de la limitación horaria de la "jornada de trabajo" a los gerentes, administradores y apoderados con facultades de administración, artículo 23. Los cuales, de este modo, quedan explícitamente calificados de trabajadores y sometidos o amparados por las leyes laborales, que prevalecen sobre toda estipulación y sobre las del derecho común, artículo 2º, inciso final, y 5º de dicho Código. Y no parece necesario abundar en que los servicios que prestan los gerentes, administradores y apoderados con facultades de administración, consisten justamente en la gestión de los negocios —o de ciertos negocios— del empleador. Por modo tal que es plena, en estos casos, la correspondencia del objeto del mandato y del contrato de trabajo; y de la representación anexa al servicio debido por el mandatario o el trabajador. De aquí que desde un comienzo los comentadores de nuestro derecho hubieran seguido el criterio sustentado por Colin y Capitant, en el sentido que debía atenderse a si existe o no un vínculo de dependencia entre patrón y trabajador. En caso afirmativo, se decía, hay contrato de trabajo; en caso negativo, hay mandato si el encargo consistía en la ejecución de uno o más negocios que una persona se obligaba a realizar por cuenta y riesgo de otra; confección de una obra material si se trataba de ejecutarla para otro; arrendamiento de servicios inmateriales si el servicio consistía en una cosa intangible, inmaterial, o en una obra en que predomina la inteligencia sobre la mano de obra, como una composición literaria o la corrección tipográfica de un impreso.

[48] Vivante, Trattato di Diritto commerciale, tomo I, Nº 25 y siguientes.
[49] Código del Trabajo, aprobado por la Ley Nº 18.620 de 6 de julio de 1987, artículos 7º y 3º, letras a), b) y c).
[49 bis] Supra Nº 34: confirma Troplong, adelantándose a su tiempo, ob. cit., pág. 180, Nº 164.

La jurisprudencia se inclinó decididamente por este criterio, resolviendo que las cuestiones regidas por el Código del Trabajo, a la sazón, que daban competencia a los Tribunales del Trabajo para su conocimiento, presumían cierta relación de dependencia entre el empleador y el empleado. Los inspectores de cuentas de sociedades anónimas, se dijo, ejecutan actividades que están regidas por las leyes ordinarias y, en consecuencia, cualquiera cuestión a que den lugar esas gestiones deben ventilarse ante los Tribunales del fuero común.[50] Esta jurisprudencia es válida al tenor de las disposiciones del Código del Trabajo que hoy está rigiendo, como se verá luego.

Estableció también la Corte Suprema que "el comisionista para vender, que actúa en forma independiente, sin ninguna relación de subordinación respecto de su mandante, situación esta última que es característica del empleado particular, no tiene tal calidad".[51] Hubo otras sentencias en igual sentido.[52]

En el derecho positivo en vigencia ya no cabe la menor duda: el elemento determinante es la subordinación o dependencia

[50] Revista de Derecho y Jurisprudencia, tomo XXXIII, sec. 1ª, pág. 315; tomo XLIV, sec. 3ª, pág. 35.
[51] Revista de Derecho y Jurisprudencia, tomo XXXII, sec. 1ª, pág. 460.
[52] Revista de Derecho y Jurisprudencia, tomo XXXIV, sec. 1ª, pág. 499; tomo XXXIII, sec. 1ª, pág. 416; tomo XXXIII, sec. 1ª, pág. 75; tomo LXIX, sec. 3ª, pág. 48.

de una de las partes —el trabajador— respecto de la otra —el empleador—. Las definiciones de empleador y trabajador y del contrato de trabajo, literalmente citadas, así lo establecen en términos perentorios. Sea que se trate de un gerente, de un apoderado con facultades de administración, de un profesional de largos estudios, que desarrollen actividades intelectuales bajo la dependencia o subordinación de otra persona, todos son, al tenor del Código del Trabajo, trabajadores cuyos derechos y deberes están regulados por las leyes laborales en primer término, y por las estipulaciones del contrato en cuanto aquéllas permitan. No son, pues, la naturaleza de la actividad que se promete, ni la remuneración que se paga a título de contraprestación, ni la facultad de representar al que encarga o utiliza los servicios, los factores determinantes de la calificación del contrato: sólo la relación de subordinación o dependencia determina si existe o no un contrato de trabajo.

En ausencia de ese elemento, habrá mandato si el servicio que se presta y por el cual se paga o no remuneración, consiste en la gestión de uno o más negocios del que los encarga y por cuya cuenta y riesgo habrá de ejecutarlos el que asume la obligación de llevarlos a cabo.

50. LA RELACION DE SUBORDINACION Y DEPENDENCIA ES UNA CUESTION DE HECHO

Hemos visto que el concepto de subordinación no puede tener un sentido concreto; más bien es un principio general que el juez deberá aplicar al caso sometido a su conocimiento, de acuerdo con las circunstancias que revista la cuestión y así puede llegar a resolverse hasta en una simple relación de continuidad de prestación de servicios.

Por eso es cuestión de hecho que sentarán los tribunales del fondo dentro de sus funciones privativas y que no puede objetarse ni alterarse en los recursos de casación.

Por vía de ejemplo recordaremos que los tribunales han fallado que el contrato en virtud del cual una persona se compromete a prestar sus servicios como comisionista, sin quedar obligada a concurrir a la fábrica, ni depender de quien lo contrata, y en el cual se estipula que el convenio no le impide proseguir sus actividades de comisiones de otras casas de quien es vendedor, y vender por cuenta propia y ajena mercaderías de cualquier especie, agregándose que no acepta concurrir a un negocio a determinadas horas, ni en determinados días, importa para el comisionista actuar en forma independiente, sin ninguna relación de subordinación respecto del mandante, característica que le quita toda calidad de empleado particular regido

por el Código del Trabajo; por lo cual las relaciones jurídicas entre los contratantes se rigen por la ley general, según la cual de ellas compete conocer exclusivamente a los Tribunales del fuero común.[53]

51. DIFERENCIA INTRINSECA ENTRE MANDATO Y CONTRATO DE TRABAJO

Aparte de aquella circunstancia, que es más bien la manifestación exterior del verdadero contenido de ambos contratos, existe a nuestro entender una diferencia sustancial entre el contrato de trabajo y el mandato, diferencia que permite distinguirlos uno del otro. Consiste en que en el contrato de trabajo el trabajador se obliga a entregar su actividad personal, física o intelectual, a la ejecución de la tarea específica que el empleador le asigna, a trueque de una remuneración que se fija en consideración a su habilidad y empeño en la realización de esa tarea, además de otros factores que no conciernen a nuestro estudio. Por modo tal que el beneficio que el empleador persigue, el provecho jurídico a la vez que el provecho pecuniario que para él derivará del contrato, es el trabajo mismo del trabajador, su actividad física o intelectual en la ejecución de la tarea que le asigna, de la que obtendrá una cosa, un bien, un resultado, que el empleador no puede lograr por sí mismo o por sí solo. A diferencia del mandato, en que el mandatario asume la gestión del negocio que se le confía en términos de sustituirse al mandante para actuar como si el negocio fuese propio no obstante que es ajeno. De modo que para el cumplimiento del encargo podrá valerse de otras personas tal y como lo está haciendo el mandante al valerse del mandatario con el mismo fin. De aquí que el mandatario pueda delegar el mandato si no se le ha prohibido, artículo 2135, y en general contratar los servicios de terceros que le auxilien o le asistan en el desempeño y mejor éxito de su cometido.

El mandatario, pues, pone al servicio del mandante su tino, prudencia, celo, y su aptitud natural o adquirida para el buen manejo de todos o algunos de los negocios del mandante, valiéndose de otros si fuere necesario, que elegirá y vigilará con igual tino, prudencia y celo.

El trabajador pone a disposición del empleador su energía vital, física e intelectual, durante cierto número de horas de cada jornada, aplicada a la tarea específica que el empleador le asigna, en la que debe empeñarse personalmente, porque esa

[53] Revista de Derecho y Jurisprudencia, tomo XXXIV, sec. 1ª, pág. 449.

energía suya —física o intelectual y en verdad siempre necesariamente concurrentes, pues no es una máquina sino una persona— no puede ser desprendida, separada, seccionada del hombre o la mujer que son su fuente, que la generan, controlan y dirigen en el determinado quehacer que han de cumplir.

De aquí que el trabajador ha de ser necesariamente una persona física, natural, que trabaja directamente en la tarea asignada, con sujeción a las órdenes del empleador; y que no le esté permitido hacerse sustituir por otra a su mero arbitrio. Numerosas disposiciones del Código del Trabajo son expresiones de esta idea, entre ellas, los artículos 3º, 7º, 12, 150 y 156.

Los caracteres señalados sólo exteriorizan la naturaleza de la prestación prometida por el trabajador, que consiste, como se ha visto, en la proyección de una parte de su ser aplicada a una actividad puesta al servicio de otro; prestación, pues, que a los ojos del derecho positivo se cumple mediante el vínculo de subordinación o dependencia que se genera en el contrato de trabajo. Vínculo que no es en sustancia sino el don de mando que se atribuye al empleador y lo autoriza para exigir del trabador que produzca el servicio deseado en la cantidad, forma y calidad esperadas.

Este contrato, no obstante tener por objeto la prestación de servicios personales, no es nítidamente un contrato intuito personae, esto es, en que la consideración de una cierta y determinada persona —como en el matrimonio— es su causa determinante. Desde luego no lo es para el trabajador, al cual primordialmente interesan la naturaleza del trabajo que debe ejecutar y la remuneración que recibirá a cambio de su trabajo. Luego, y no necesariamente en este orden, las condiciones ambientales. En tanto que el empleador contempla ciertas condiciones que califican la aptitud del trabajador para rendir lo que de éste se espera: vigor físico, salud, aptitud para la faena, asistencia y conducta. Factores estos que por ser comunes a muchos, conducen a una selección de los más aptos más que a la elección de cierta y determinada persona depositaria de la "confianza" del empleador. Confianza que de existir, tiene un rol muy limitado en el contrato de trabajo. El trabajador, pues, de un modo muy general, viene a ser una especie de elemento intercambiable dentro del sector laboral de la empresa. Así es, por ejemplo, que el empleador puede cambiarle de faena o de sitio, dentro de ciertas limitaciones obviamente.

El mandato, en cambio, es típicamente un contrato de confianza y por ende intuito personae. Expira, por consiguiente, si el mandante cesa en la administración de su patrimonio, dado que en caso contrario el mandatario habría de entenderse con un extraño cuya participación posterior sería ajena a su consentimiento inicial. No sucede así en el contrato de trabajo, en que el

cambio de empleador no le afecta, artículo 4º del Código del ramo.

En fin, el contrato de trabajo satisface —o más bien registra— el modo como la generalidad de los hombres y mujeres se procuran la satisfacción de sus necesidades de subsistencia y vida. Y siendo estas necesidades comunes a todos y el trabajo por cuenta ajena el modo generalizado de cubrirlas, fuerza es concluir que el contrato de trabajo es un elemento definitorio del sistema social y económico de la comunidad organizada. Y que más allá de un contrato regulado por la voluntad de las partes, es una relación de derecho regida por las leyes, que se genera entre ellas en virtud del asentimiento que prestan al tiempo de asumir las calidades de empleador y trabajador respectivamente.[53 bis] El asentimiento del empleador y trabajador les integra, con su voluntad o sin ella y aun a pesar de su voluntad, dentro de un sistema que constituye un ordenamiento jurídico autónomo que cubre las relaciones laborales individual y colectivamente, desde el inicio y hasta su término. La voluntad de las partes es sólo el botón de partida, de puesta en marcha de un ordenamiento jurídico universal respecto de las relaciones laborales, y particular relativamente al ordenamiento jurídico general del cuerpo social, establecido en consideración a que en el contrato de trabajo —y por extensión en la relación laboral toda— está en juego y queda en evidencia la jerarquía de los valores reconocidos por el cuerpo social, en los que descansan la fuerza y capacidad de aglutinación de sus miembros. Uno de ellos es la dignidad del hombre, que es realzada a través de la dignificación del trabajo y la protección del trabajador.[53 bis 1]

En el contrato de mandato, en cambio, los intereses en juego son estrictamente privados, conciernen únicamente a las partes contratantes. De donde se sigue que éstas son libres para acordar sus términos sin más trabas que respetar el orden público, la moral y las buenas costumbres, artículos 1461 y 1466. En lo demás, su voluntad es soberana, artículo 1545.

[53 bis] Artículos 2º y 5º del Código del Trabajo; confirman William Thayer A. y Antonio Rodríguez A., Nuevo Código del Trabajo.

[53 bis 1] El inciso final del artículo 2º del Código del Trabajo declara que corresponde al Estado amparar al trabajador en su derecho a elegir libremente su trabajo y velar por el cumplimiento de las normas que regulan la prestación de los servicios.

dos los efectos legales y que el contratista aceptará su personería sin más trámite, declara que ella acredita la existencia de un mandato conferido por la empresa al ingeniero para celebrar con cualquiera persona un contrato de la especie dicha.[77]

62. EL MANDATO Y EL CONTRATO DE SOCIEDAD

Ocurre a veces que dada la libertad de las partes para determinar la forma de remuneración del mandatario, surgen dificultades para establecer la naturaleza jurídica de la convención, que a primera vista participa de los caracteres de la sociedad y del mandato. Tal cosa sucede especialmente cuando se estipula que el mandatario percibirá, por concepto de remuneración, una parte de los beneficios que se obtengan en el negocio que se le encomienda y que nada percibirá si hubiere pérdidas.

Planiol y Ripert estiman que en este caso es necesario recordar que la sociedad exige la concurrencia de un elemento subjetivo e intencional: la affectio societatis. Si falta este elemento, habría mandato. Objetivamente, este elemento aparece de la circunstancia de asociar sus aportes en un interés común, colocándose para ello en un pie de igualdad.[78]

Baudry Lacantinerie considera que en el caso propuesto existe en principio un mandato cuyo salario es determinado eventualmente. Esta solución, agrega, responde a la intención de las partes, pues es probable que el vendedor se haya reservado implícitamente el derecho de revocar el contrato y que el mandatario no haya pretendido obligarse respecto del tercer adquirente por la venta ejecutada, sino obligar al mandante. Ello no obsta, dice, a que las partes le atribuyan el carácter de una sociedad.[79]

En nuestro derecho la cuestión no presenta mayores dificultades. En principio, hay mandato, tanto porque la remuneración puede pactarse libremente y determinarse en forma proporcional a los beneficios que se obtengan, cuanto porque el artículo 2120 establece que el negocio encomendado puede interesar conjuntamente al que hace el encargo y al que lo acepta, como ocurre en el caso propuesto.

En cambio, debe rechazarse la idea de sociedad porque ésta supone necesariamente la concurrencia de aportes que ingresan a la sociedad en propiedad o en usufructo y se ponen en común, artículos 2082 y 2055.

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77 Revista de Derecho y Jurisprudencia, tomo XVII, sec. 1ª, pág. 261.
78 Ob. cit., tomo XI, Nº 1437, pág. 781.
79 Ob. cit., Del Mandato, Nº 401, pág. 204.

En el caso en discusión, el que encarga la venta de una cosa no la aporta, ni en propiedad ni en usufructo; la cosa sigue perteneciéndole en dominio absoluto y el que acepta el encargo de venderla, vende una cosa ajena, venta que obliga al mandante en virtud de la facultad que con tal objeto ha conferido al mandatario.

No habiendo aportes no hay sociedad, ni mucho menos la habrá faltando otro elemento esencial: la affectio societatis, esto es, la intención de celebrarla.

62 bis. ADMINISTRADORES DE SOCIEDADES COLECTIVAS, DE RESPONSABILIDAD LIMITADA, EN COMANDITA Y ANONIMAS

Establecida la existencia de un contrato de sociedad, es necesario esclarecer si los encargados de su administración son mandatarios de la sociedad, sujetos, por tanto, a las normas del mandato tanto en sus relaciones jurídicas con aquélla cuanto con los terceros con quienes contraten; o bien la facultad de administración que se les ha conferido descansa en otra vinculación jurídica cuyas normas particulares prevalecen sobre las del mandato y deben sujetarse a aquéllas en la determinación de sus atribuciones, derechos, deberes y responsabilidades.

Debe recordarse, en primer lugar, que en nuestro derecho la sociedad forma una persona jurídica distinta de los socios individualmente considerados, arts. 545, 547 y 2053. De ello se sigue la necesidad de que una o más personas naturales actúen y contraten por ella y la representen en los asuntos y negocios, judiciales y extrajudiciales, que le conciernan.

La representación judicial corresponde siempre al gerente o administrador de la sociedad, no obstante cualquiera limitación establecida en los estatutos o acto constitutivo de la misma, con las facultades que establece el art. 7º inciso primero del Código de Procedimiento Civil.[80] Así lo dispone el art. 8º del mismo Código. Es un caso de representación legal establecida en interés de los terceros que accionan contra la sociedad, a fin de que la relación procesal quede válidamente generada siempre que la demanda se ha dirigido contra el gerente, en su calidad de representante de la sociedad demandada y le ha sido legalmente notificada. Por lo mismo, la representación judicial que le atribuye el art. 8º del Código de Procedimiento Civil es in-

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80 Revista de Derecho y Jurisprudencia, tomo XXXIX, sec. 1ª, pág. 12; tomo LXIV, sec. 3ª, pág. 75; tomo LXXI, sec. 1ª, pág. 165. Sobre la extensión de la representación judicial de los gerentes y administradores, infra Nº 90.

dependiente de la voluntad de los socios y aun a pesar de su voluntad en contrario, art. 1448 del Código Civil.[81]

En los asuntos extrajudiciales, en cambio, prevalece la voluntad de los socios, quienes pueden confiar la administración a uno o más de ellos, sea por el contrato de sociedad, sea por acto posterior unánimemente acordado, art. 2071. Esta regla vale para las sociedades colectivas, las de responsabilidad limitada y las en comandita, aunque en estas últimas sólo respecto de los socios gestores, pues los comanditarios no pueden tomar parte en la administración, arts. 2062 del Código Civil y 4º de la ley Nº 3918.

También pueden los socios encomendar la administración a un tercero extraño a la sociedad, art. 2061, inciso segundo.

Por último, si nada se ha convenido en el contrato social ni en acto posterior, se entenderá que cada uno de los socios ha recibido de los otros el poder de administrar, con las facultades y las limitaciones que la ley establece en el silencio de las partes, art. 2081.

Interesa resolver, en el primer caso, si el socio o los socios que administran, por acuerdo de todos, son o no mandatarios de la sociedad. La respuesta no es indiferente, pues según sea la conclusión a que se llegue, sus derechos, deberes y responsabilidades quedarán sujetos a las normas del mandato, si se les califica de mandatarios, o a las disposiciones específicas del contrato de sociedad, si se les mira como socios que en este carácter han recibido el encargo de administrarla.[82]

En párrafos anteriores hemos advertido que el poder de representación puede ir unido a cualquier contrato, nominado o innominado, que entrañe para una de las partes la necesidad jurídica de actuar ante terceros en interés de la otra, tales como el mandato, la sociedad, el contrato de trabajo, etc.[83] Luego, la sola existencia de la facultad de representar no permite definir la relación jurídica que media entre representante y representado. De modo que será necesario acudir a la convención que generó el poder de representación, esto es, la facultad de una de las partes para representar a la otra.

En el caso que nos ocupa estamos en presencia de un contrato de sociedad; esto es, se ha convenido poner algo en común con la mira de repartirse los beneficios que de ello provengan, art. 2053. Mas lo cierto es que los beneficios esperados no se obtienen por el solo hecho de poner algo en común, sino serán el resultado de la capacidad y habilidad para realizar, con

[81] Revista de Derecho y Jurisprudencia, tomo LXIII, sec. 3ª, pág. 115.

[82] Véase Arturo Davis, Sociedades Civiles y Comerciales, Carlos E. Gibbs A., editor, Santiago de Chile, 1963.

[83] Supra números 14, 15 y 16; Revista de Derecho y Jurisprudencia, tomo LXIII, sec. 3ª, pág. 115.

los fondos sociales, los negocios que constituyen el objeto de la sociedad. En fin, que los beneficios o pérdidas dependerán en tan alto grado de la administración de la empresa, que si ha sido confiada a uno o más de los socios por el contrato mismo de sociedad, las facultades de administración del socio o socios forman parte de las condiciones esenciales del contrato de sociedad, art. 2071. De tal modo que la pérdida de un administrador inteligente que no pueda reemplazarse entre los socios, es grave motivo que autoriza la renuncia de cualquiera de éstos y la expiración anticipada de la sociedad, art. 2108.

Es evidente, por tanto, que quienes contratan sociedad no sólo contraen la obligación de poner algo en común, corriendo los riesgos de ganancia o pérdida, sino también la de encargarse de la administración, art. 2081; aun cuando dentro del principio de la libertad contractual pueden acordar que sólo ciertos socios la asuman, con prescindencia de los demás que prefieran dispensarse de esa responsabilidad. En cuyo caso el socio o los socios administradores toman sobre sí la obligación de llevar a cabo los negocios sociales, con arreglo a su criterio y aun contra el parecer de los que se excluyeron, art. 2075.[84] Por su parte, aquellos que asumen la administración no lo hacen con el ánimo gracioso de rendir un servicio a sus consocios sino de velar por sus propios intereses, comprometidos en la sociedad de que forman parte, arts. 2055 a 2069 y 2086 del Código Civil.[85]

Queda de manifiesto, pues, que el socio o los socios que asuman la administración, la ejercen en su calidad de tales, esto es, de partícipes de los intereses comunes, y no en la de mandatarios ajenos a la suerte que corre la sociedad. En otros términos, la relación contractual generadora de la facultad de administrar es el contrato de sociedad que se ha pactado.[86]

Luego, los derechos, deberes y responsabilidades que derivan del encargo voluntariamente aceptado, se rigen por las estipulaciones del pacto social, y en lo que éste callare, por las disposiciones legales particulares al contrato de sociedad. Conclusión esta que interesa no sólo respecto de las relaciones entre los socios sino también de las de los terceros que contratan con los socios administradores.

Cabe señalar algunos puntos en que se advierte el interés de la conclusión sentada.

Ya se ha visto que la renuncia del encargo de administrar pone fin a la sociedad misma, salvo por causa prevista o unáni-

[84] Aplica este criterio, aunque indirectamente, la sentencia publicada en la Revista de Derecho y Jurisprudencia, tomo LXIX, sec. 3ª, pág. 48.

[85] Arturo Davis, ob. cit., pág. 258, letra N.

[86] Cesare Vivante, tomo II, Nº 373, pág. 120, citado por Arturo Davis, ob. cit., pág. 259.

memente aceptada, cuando se ha encomendado en el acto constitutivo de la sociedad. Otro tanto sucede con la remoción del socio administrador, en iguales circunstancias, arts. 2071, 2072 y 2073. La remoción equivale a la revocación del mandato. Sólo que ésta pone fin al mandato por ser éste la relación contractual que genera las obligaciones correlativas y la facultad de administración; en tanto que la remoción del socio administrador pone fin a la sociedad porque de ella derivaba la obligación —y la facultad— de gestionar los negocios sociales.

El mandatario tiene derecho a la remuneración estipulada o usual; en tanto que el socio administrador no tiene derecho a remuneración alguna, ni a exigir una mayor participación en los beneficios sociales, salvo, naturalmente, voluntad en contrario manifestada expresamente por las partes, art. 2091.

Si el socio contrata a nombre de la sociedad, pero sin poder suficiente, no la obliga a terceros sino en subsidio y hasta concurrencia del beneficio que ella hubiere reportado del negocio, art. 2094, inciso tercero. La acción subsidiaria que confiere este precepto descansa en el principio del enriquecimiento sin causa, cuya vigencia amplia en nuestro ordenamiento jurídico es generalmente aceptada, según resulta de los cuasicontratos de agencia oficiosa y pago de lo no debido, arts. 2284, 2286 y 2295. Mas lo cierto es que en el caso del socio administrador existe un apoyo de texto que se silencia en el del mandatario que se ha extralimitado en sus poderes, arts. 2154 y 2160.

Si la administración de la sociedad se encomienda a un tercero, estamos en presencia de un mandato propiamente tal; o bien de un contrato de trabajo si concurren los elementos que configuran este último.[87]

Si hay contrato de trabajo, prevalecen las normas especiales de la legislación laboral, conforme lo previene el art. 4º del Código Civil.[88]

Si todos los socios administran por no haberse conferido el encargo a uno o más de ellos, quedan sujetos a las reglas particulares dadas para este caso por el art. 2081. Luego, no son mandatarios sino socios cuyas facultades, derechos, deberes y responsabilidades se regulan por las normas relativas al contrato de sociedad. Así, por ejemplo, cada socio podrá servirse para su uso personal de las cosas pertenecientes al haber social, art. 2081, regla segunda, cosa que no es lícita al mandatario sobre los bienes de su mandante.

No debe extrañarnos, sin embargo de lo expuesto precedentemente, la similitud que se advierte en la normativa legal que regula los derechos y deberes del socio administrador y los del

[87] Arturo Davis, ob. cit., pág. 246.
[88] Revista de Derecho y Jurisprudencia, tomo LXIII, sec. 3ª, pág. 115.

mandatario, en su caso. Pues en ambos hay una circunstancia común: la administración de un patrimonio ajeno, sea de la sociedad, sea del mandante. De donde se sigue que es lícito acudir a las disposiciones pertinentes del mandato allí donde las relativas a la administración de la sociedad por uno o más socios parezcan oscuras, y viceversa. Autoriza a ello la regla de interpretación de las leyes establecidas en el art. 22 del Código Civil.

Para terminar, recordemos que respecto de los terceros estaremos siempre en presencia de la modalidad representación cuando el administrador, socio o extraño, contrata a nombre de la sociedad, arts. 1448, 2079 y 2094, sin perjuicio de la acción subsidiaria que les confiere este último, ya comentada.

En lo que toca a las sociedades anónimas, su estructura jurídica es de tal grado diferente de las anteriores que en verdad constituyen una especie aparte. Tanto que se ha dado en llamar, aunque inadecuadamente, sociedades de personas a las colectivas, en comandita y de responsabilidad limitada, en oposición a las anónimas, que serían de capitales. Ello explica que las sociedades anónimas estén regidas por un estatuto legal propio y común a todas ellas, dado que conforme a lo dispuesto en el artículo 2064 del Código Civil, texto actual, se reputan siempre mercantiles aun cuando se formen para la realización de negocios de carácter civil. Ese estatuto está contenido en la Ley Nº 18.046 de octubre de 1981, rectificada el 31 del mismo mes.

En estas sociedades la administración no pertenece a los socios, a diferencia de lo que sucede en las colectivas y otras, salvedad hecha de los comanditarios, según se ha dicho. Los accionistas sólo tienen el derecho de elegir las personas a quienes se confía colectivamente la administración de la sociedad, esencialmente revocables y por un tiempo que no pase de tres años, artículos 1º, 31 y 39 de la ley del ramo.

Los encargados de la administración, denominados directores, derivan su título de la designación recaída en ellos en elección de la Junta General de Accionistas, en asamblea convocada y constituida con arreglo a la ley y los estatutos, indiferentemente de la calidad de accionistas de la sociedad, si lo fueren. Individualmente considerados, los directores carecen de facultades de administración y de representación. Sus funciones han de ejercerse colectivamente, en sala legalmente constituida, artículo 39 de la ley del ramo. La administración y la representación de la sociedad pertenecen al directorio, esto es, al cuerpo colegiado formado por sus miembros, en sala de directores constituida con los requisitos de convocatoria y el quórum prescritos en los estatutos. El directorio las ejerce mediante acuerdos que adopta con el quórum requerido para su validez. En ambos casos el quórum no podrá ser inferior a lo que establece la ley, artículos 40 y 47. En el directorio reside la voluntad de la sociedad; el directorio es el órgano que la genera y la expresa. Los directores, sus miembros, son personas naturales cuyo asentimiento concurre a generarla si la suma de voluntades individuales alcanza el quórum requerido por la ley o los estatutos si éstos exigen una cifra mayor.[89]

La designación de la Junta General de Accionistas, a través de la elección, es sólo la expresión de la voluntad unilateral de la sociedad que, por lo mismo, no obliga a los directores electos a menos que la acepten, artículo 37 inciso primero, de la ley del ramo. No cabe dudar, por tanto, que mediando la aceptación se genera entre ambos —sociedad y directores— una relación contractual, artículos 1445 y 1545 del Código Civil. Conclusión que se afirma —si fuere menester afirmarla— recordando que las funciones de director pueden ser remuneradas. La remuneración es la contraprestación de los servicios que la sociedad requiere del director electo. Y que se reafirma, si cabe, cuando la función del director es gratuita. Pues no es lícito a los particulares imponer la carga de un servicio gratuito en beneficio o provecho de otro.

Del carácter contractual de esta relación y la naturaleza del encargo que constituye su objeto, se había concluido que los directores tienen la calidad de mandatarios, aunque sin dilucidar si lo serían de la sociedad o de los accionistas que los eligen.

La Ley Nº 18.046 sobre sociedades anónimas ha sorteado el debate evitando toda calificación, según se advierte en los artículos 2064 del Código Civil, texto actual, y 1º de la citada ley. Los directores son, al tenor de esos preceptos, "miembros" del directorio que ejerce y detenta la administración y la representación de la sociedad, judicial y extrajudicial. A diferencia de los artículos 424 y 457 del Código de Comercio, hoy derogados, que los calificaban de mandatarios. La solución legislativa es acertada. Por de pronto, no son mandatarios de los accionistas que los han elegido, artículo 39 de la ley del ramo. Y respecto de la sociedad, cuyos negocios gestionan y cuyo patrimonio administran, está de sobra cualquiera calificación atendido que sus derechos, deberes, atribuciones y responsabilidades están señalados circunstanciadamente en la mencionada ley. Y siendo ésta una ley especial referida específicamente a las sociedades anónimas, sus disposiciones prevalecen sobre las del Código Civil, que gobiernan los contratos en general y entre ellos el mandato, artículos 4 y 13. De modo que cualquiera calificación sería inoperante, aparte de perturbadora.

En sustancia, pues, los directores de las sociedades anónimas son personas naturales elegidas por los accionistas con arreglo a los estatutos sociales y a la ley, que integran el directorio co-

89 Alessandri Rodríguez, Arturo, De la responsabilidad extracontractual en el derecho civil chileno, Nº 106, pág. 153.

mo cuerpo colegiado, al cual compete la administración y la representación de la sociedad con las facultades que le acuerda la ley del ramo y que según los estatutos no estén reservados a la junta general de accionistas, artículo 40. La calificación jurídica de la relación vincular con la sociedad no interesa para los efectos de determinar sus derechos, deberes, atribuciones y responsabilidades, sea con respecto de la sociedad, de los accionistas o de terceros. Pues de esto se encarga la misma ley. Ahora que para satisfacción de la doctrina hemos de admitir que son mandatarios de la sociedad cuyos negocios gestionan por encargo de la junta de accionistas. La relación contractual que los vincula con la sociedad y el objeto del encargo que cumplen por cuenta y riesgo de la misma, así como las amplísimas facultades de administración y de representación que la ley les confiere —actuando colectivamente en cuerpo colegiado— definen sobradamente y sin lugar a dudas la condición de mandatarios de la sociedad mandante, que les remunera por los servicios que le prestan, artículos 1438, oración final, 2116, 2127 y 2172 del Código Civil, 290 del Código de Comercio, y 40 y 41 de la Ley 18.046 entre otros.

El gerente o el gerente general, en su caso, son designados por el directorio, el que les fija sus atribuciones y deberes y puede sustituirlos a su arbitrio. Tienen únicamente derecho a voz en las reuniones del directorio —si bien pueden y deben representar su opinión contraria a los acuerdos para salvar su responsabilidad—; de donde se sigue que no tienen participación en la adopción de los acuerdos y decisiones del directorio, los que deben cumplir aun cuando los hubieren representado, artículo 49 de la ley del ramo. Existe, como puede advertirse, un vínculo de subordinación y dependencia del gerente o el gerente general con el directorio, cuyos acuerdos y decisiones han de acatar y ejecutar, así como el deber de sujetarse a las instrucciones que éste les imparta en el cumplimiento de su cometido. Esto sin considerar los deberes de asistencia y otros que son inherentes al cargo. De donde se sigue que la relación contractual de la sociedad con el gerente o el gerente general en su caso es la del contrato de trabajo definido en el artículo 7º del Código del ramo.[89 bis] La circunstancia de que el gerente o el gerente general en su caso tengan la representación judicial de la sociedad no modifica la naturaleza del contrato de trabajo. Así lo hemos advertido precedentemente.[89 bis 1]

89 bis Véase supra, Nº 49.
89 bis 1 Supra Nº 52.

En los últimos años, el desarrollo del intercambio comercial ha originado, entre otros fenómenos, el empleo en Chile de formas contractuales provenientes de otros ordenamientos jurídicos. Las nuevas fórmulas de contratación son, en ocasiones, diversas de las conocidas en nuestro medio y, en gran medida, llevan envueltas incógnitas tanto acerca de su validez en este país, como en cuanto a la determinación de la forma concreta en que la institución ha sido acogida por las prácticas chilenas. De ahí que es absolutamente necesario el estudio sistemático de estas nuevas materias.

El abogado Alvaro Puelma inicia con esta obra el estudio de parte del amplio terreno de las innovaciones en la contratación comercial. Así, luego de tratar aspectos generales, estudia ciertos negocios que califica como preparatorios desde un punto de vista económico: el contrato de opción o promesa unilateral, el cierre de negocio, la comisión, el corretaje, la representación comercial, la agencia y concesión mercantil, el contrato de distribución, el franchising y una modalidad mercantil de apertura de crédito.

Los tres últimos capítulos están dedicados a algunos negocios de carácter definitivo, como el suministro, el leasing, los contratos de licencia y los contratos sobre know how. También se incluyen notas explicativas sobre el trust, el contrato estimatorio, el underwriting, el factoring y el forfaiting.

Contratación comercial moderna constituye, sin duda, un importante aporte a la literatura jurídica chilena, que será de gran utilidad para todos los especialistas en esta rama del Derecho.

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Alvaro Puelma Accorsi

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documento en que se confunden cierre de negocio y promesa, que se inserta para su análisis crítico.

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CAPÍTULO IV

LA COMISION

29. *Materia a tratar*

No pretendemos estudiar en detalle el frondoso articulado sobre la comisión, contenida en los arts. 238 a 324 del Código de Comercio.

Obramos así porque gran parte de tan nutrida reglamentación contiene, más que normas jurídicas, reglas o consejos de prudencia o buen sentido comercial. Además, muchas de ellas han quedado obsoletas. En efecto, el origen de las normas sobre comisión de nuestro Código de Comercio se encuentra en el Código de Comercio español. Dicho Código y el nuestro, en cuanto reproduce su normativa, pretendieron consagrar en su articulado, en muchos casos, costumbres y situaciones que las prácticas chilenas no han conocido, ni conocerán, pues se trata de costumbres de los siglos XVIII y XIX, ya en desuso.

Sostenemos, por los fundamentos anteriores, que no es útil, ni teórica ni prácticamente, estudiar en forma pormenorizada el articulado íntegro sobre la comisión contenida en el Código de Comercio.

Sobre la comisión examinaremos los grandes principios que la inspiran, lo que haremos al analizar su concepto y las diferencias básicas que presenta respecto del mandato civil.

La materia central de este capítulo se referirá a los negocios o actos complejos que han generado las prácticas modernas, aprovechando de alguna manera la comisión mercantil.

30. *Concepto*

De acuerdo con lo prescrito en los arts. 233, 235 y 239 del Código de Comercio, la comisión mercantil es un contrato por el cual una persona llamada comitente encarga la ejecución de una o más operaciones mercantiles lícitas, individualmente determinadas, a otra persona llamada comisionista, que se obliga a cumplir el encargo por una retribución.

La comisión es, entonces, una especie de mandato, regido supletoriamente por las reglas civiles de tal tipo de contrato. Es propio de la comisión, como un tipo de mandato, que su objeto deba versar sobre el encargo de una gestión de negocios y que esta gestión deba realizarla el mandatario por cuenta y riesgo del mandante y en su beneficio. La comisión, como una especie de mandato, debe cumplir con los requisitos esenciales de todo poder, que hemos examinado, pero ella debe consistir precisamente en la realización de operaciones mercantiles determinadas.

31. *Diferencias con el mandato civil*

La comisión mercantil presenta importantes características diferenciales con el mandato civil, derivadas del motivo por el cual las partes lo celebran. En efecto, el mandato civil normalmente es un contrato que se celebra en beneficio exclusivo del mandante. Es por ello que el mandatario es considerado por el Código Civil como una persona de buena voluntad que ejecuta un encargo por cuenta y riesgo del mandante, no teniendo, ni debiendo tener, interés en los negocios encomendados. Por el contrario, la comisión es un negocio que interesa a ambas partes. El comitente pretende realizar una operación mercantil, que le importará provecho; y el comisionista, por su lado, está interesado también en la realización de ella, para ganar la retribución convenida o usual, llamada también "comisión". Esta retribución normalmente se pacta en un porcentaje o tanto por ciento calculado sobre la cuantía del negocio a realizarse. Además, es corriente que el comisionista anticipe al comitente todos o parte de los resultados del encargo, lo cual refuerza el interés de ambas partes en la ejecución y en el éxito comercial del negocio encomendado.

De lo expuesto pueden deducirse otros puntos de comparación entre la comisión y el mandato civil, a saber:

a) El carácter siempre remunerado de la comisión, que reconocen los arts. 239 y 275 del Código de Comercio, frente a la gratuidad natural del mandato civil. La remuneración de la comisión, la ley señala que es la convenida o la usual. El tribunal, en caso que le corresponda fijar la remuneración usual, debe determinarla en una

cuota o tanto por ciento calculado sobre el valor de la operación, incluidos gastos.

b) El mandato es un contrato de confianza, *intuito personae*, que expira si fallece cualquiera de las partes. La comisión no expira por la muerte de alguna de las partes si el negocio sobre el cual ella versa puede, no obstante, realizarse. Por esta razón, la muerte del comitente no pone fin a la comisión. Tal circunstancia no obsta a la ejecución del negocio encomendado, que debe realizarlo personalmente el comisionista. Ello lo reconoce el art. 240 del Código de Comercio. Por la misma razón, la muerte del comisionista pone término al contrato, pues personalmente debe realizar el negocio previsto, tal como lo prescribe el art. 261 de dicho Código. Sin embargo, la sucesión del comisionista puede delegar el encargo, de acuerdo a lo prescrito en el art. 264 del Código citado: si hubiere peligro de perjuicios en la demora para designar un nuevo comisionista por el comitente.

c) El comitente no puede revocar a su mero arbitrio la comisión, como lo señala el art. 241 del Código de Comercio. Ello importa que la ley impone al comitente la carga consistente en que para revocar la comisión debe invocar causa legal, la cual normalmente consistirá en casos de incumplimiento de obligaciones por parte del comisionista. Sin embargo, se acepta que la revocación arbitraria de la comisión ponga fin al contrato, pero en tal caso el comitente debe resarcir de los perjuicios causados al comisionista, los que consistirán al menos en pagarle la retribución pertinente. Ello lo confirma lo dispuesto en el art. 277 del Código de Comercio, al prescribir que aun en el caso de revocación fundada efectuada antes de terminar el encargo, conserva el comisionista su derecho al pago de remuneración por la parte ejecutada.

d) La comisión no debe renunciarse por la mera voluntad del comisionista, como lo señala el art. 245 del Código de Comercio. Está facultado el comisionista para renunciar a su cargo, entre otros, en los casos previstos en los arts. 272 y 273 del mismo cuerpo legal; y, en general, en caso de incumplimiento de obligaciones por parte del comitente. Sin embargo, aun tratándose de renuncia basado en causa legal, ésta no pone término a la comisión, toda vez que por ella se cause un perjuicio irreparable al comitente, sea porque no puede proveer por sí mismo a las necesidades del negocio cometido, sea por la dificultad en sustituir al comisionista, como lo indica el art. 242 del Código de Comercio. Si renuncia el comisionista, fuera de los casos autorizados por la ley y el contrato, genera responsabilidades por los perjuicios que ella cause en favor del comitente.

e) El comisionista sólo puede delegar sus funciones en un tercero si está autorizado para ello por el comitente. Se entiende existir tal autorización, que el Código llama autorización implícita, cuando el comisionista estuviere impedido para obrar y hubiere peligro de daño a los intereses del comitente por la demora en designar un nuevo comisionista. La delegación autorizada, explícita o implícita, puede ser de dos clases. Si se hace a nombre del comitente, opera una verdadera sustitución que libera al primitivo comisionista, que es reemplazado por el nuevo. Existe también otra posibilidad, una delegación propiamente tal, que deja vinculado al comitente con el comisionista y en que sólo este último tenga acción contra su delegado. Ello ocurre si la delegación se hace a nombre del comisionista. Estas normas están establecidas en los arts. 261 a 267 del Código de Comercio.

32. *Actuación del comisionista a su propio nombre*

Tanto el Código Civil, en su art. 2151, como el Código de Comercio, en los arts. 254 y 259, permiten que el mandatario, especialmente aquel que reviste el carácter de comisionista, actúe frente a terceros a nombre propio y no en el del comitente o mandante. Por ejemplo, en una comisión para vender, que el comisionista venda a su nombre y con sus propias facturas las cosas que le ha encargado el mandante. En doctrina, esta situación se denomina mandato sin representación. En las relaciones contractuales con terceros sólo queda obligado el comisionista, en quien, exclusivamente, se radican todos los derechos derivados del contrato en relación con la contraparte. Al comitente sólo le competen derechos contra el comisionista derivados del mandato, que le permiten obligar a éste a rendirle cuenta de la gestión y hacer suyas las resultas del negocio. En relación con el acto o contrato constitutivos del negocio encomendado, el comitente tiene el derecho a exigir que el comisionista le ceda los derechos y acciones que éste tenga contra su contraparte, derivados de dicho acto; pero salvo novación, que requiere, conforme a las reglas generales, acuerdo del tercer contratante, no puede sustituir al comisionista como contratante. Tanto es así, que el art. 258 del Código de Comercio pena severamente al comitente que declara que el negocio le pertenece y que toma a su cargo su cumplimiento, pues la ley, en vez de aceptar la sustitución del comisionista por el comitente que este último exige, lo

transforma en fiador del comisionista y sólo éste conserva en su patrimonio los derechos y obligaciones derivados del contrato. Es necesario para que se puedan radicar en el comitente los derechos del comisionista que actuó a nombre propio en contra del tercero, que el comisionista le efectúe cesión de derechos en regla.

Los arts. 22 y 73 del Reglamento del Decreto Ley 825, publicado en el Diario Oficial de 2 de febrero de 1977, tratan del tema en sus aspectos tributarios, señalando que el sujeto del tributo del IVA por la venta lo es el mandante, y el mandatario está obligado normalmente a enviarle una liquidación, que debe cumplir ciertos requisitos y que le sirve al mandante para hacer su propia declaración de impuestos. El comisionista emite la factura, pero ella se estima del comitente para los efectos legales del caso.

33. *Comisión unida a depósito. Consignación*

Es muy corriente que al encargarse la venta de una cosa a un comisionista, ésta le sea entregada para su exhibición en sus locales o establecimientos. Esta operación se denomina en el lenguaje comercial entrega o venta en consignación. Podría suponerse, a primera vista en este negocio, que además de la comisión para vender propiamente tal, se celebra entre las partes un contrato de depósito, el cual generaría la obligación de custodia de la cosa por mientras ella se encuentra en poder del comisionista. Sin embargo, las disposiciones del Código de Comercio establecen otra norma. En efecto, por el solo mérito de la comisión aceptada por el comisionista, le impone a éste las obligaciones de custodia y conservación de las cosas entregadas, no pudiendo, por ende, cobrar un plus adicional de remuneración por dichas labores. Así se desprende de lo prescrito en los arts. 246, 248, 249, 302, 313 y 314 del Código de Comercio. Además, y especialmente en cuanto a la posibilidad de un doble cobro como comisionista y como depositario, es decidor lo que dispone el art. 278 del mismo Código. Este precepto establece el pago de una sola prestación y prohíbe al comisionista percibir lucro alguno proveniente de la negociación que se le hubiere encomendado, aparte de su salario o retribución. Lo anterior no es óbice para que el comisionista se resarza de los gastos de custodia y conservación de la cosa materia del encargo, acorde con lo que disponen los arts. 274 y 284 del Código de Comercio y el N° 2° del art. 2158 del Código Civil. Sin embargo, dentro de estas expensas no procedería aquello de almacenaje en establecimientos propios del comisionista, salvo pacto en contrario.

34. *Comisión unida a corretaje*

Es corriente que una misma persona sea comisionista de otra en la realización de un negocio y además opere como corredor, ya sea por cuenta de la misma parte o de la otra. Ello puede ocurrir cuando un cliente, aparte de otorgar una comisión a una persona, le encarga ofrecer la cosa en Bolsas, mercados o ferias o efectuar otros tipos de mediación asalariada. También puede ocurrir que el comisionista reciba de su clientela ofertas de negocios por la vía de la correduría, que pueden ser satisfechas con las mercaderías cuya comisión de venta le han encargado. Además de las gestiones propias de la comisión de comprar o vender mercaderías, se le pueden encargar al comisionista labores de intermediación, como podrían ser, fuera de las señaladas, las de obtener ofertas en varios mercados, sean internos o externos, u organizar licitaciones, sea por el propio comitente o terceros.

El Código de Comercio reconoce en forma expresa esta posibilidad en sus arts. 75 y 76. Estos artículos le permiten al corredor que es a su vez comisionista ejercer por su mandante todos los derechos emanados del contrato y aun recibir el precio.

Es legítimamente posible pactar una operación o negocio complejo y coligado en que comisión y corretaje formen una unidad, especialmente para los efectos de su cumplimiento y también con una única remuneración para el intermediario. Asimismo es lícito que las partes pacten dos contratos independientes y no coligados, el de comisión y el de corretaje, con diversas remuneraciones, coincidiendo en la misma persona las calidades de comisionista y corredor. Evidentemente en este caso regirá la limitación relativa al mandato, derivada de aquel principio que prescribe que la representación termina cuando existen intereses contrapuestos. Lo anterior importa que una misma persona no puede, sin el consentimiento unánime, ser comisionista de las dos partes que intervienen en el negocio, pero ello no es obstáculo para que pueda celebrar con ambas partes distintos contratos de corretaje o mediación, lo que por lo demás es usual. En la última situación descrita no existen intereses contrapuestos, sino coincidentes, pues el corretaje de por sí no genera efectos de representación como el mandato, según lo veremos al estudiar más adelante la mediación.

Por último, podemos acotar que en ciertos casos, entre ellos en los corredores de bolsa, la ley exige que el corredor sea además comisionista de la persona que le encarga transar efectos en la Bolsa de Valores.

35. *La comisión y la agencia, representación y distribución*

La comisión tiene relaciones con la agencia, representación o distribución. Sin embargo, resulta difícil tratar el tópico sin antes haber estudiado el negocio a comparar y relacionarlo con la comisión. Por ende, postergamos este tema para tratarlo cuando estudiemos la agencia, representación y distribución.

36. *Comisión, contrato de trabajo y arrendamiento de servicios*

Suele ocurrir que una persona que mantiene con una empresa vínculos laborales o de arrendamiento de servicios, con ella celebre adicionalmente un contrato de comisión, en virtud del cual se le encarga vender mercaderías del giro del principal y que le otorga derecho a recibir por tal labor un porcentaje de los negocios realizados por su intermedio.

En teoría es posible concluir que no hay inconveniente legal en que un empleado o una persona que arrienda sus servicios mantenga otros vínculos jurídicos con la persona para la cual trabaja, entre ellos la comisión comercial. Sin embargo, en la práctica el asunto no es tan sencillo.

Es sabido que la retribución por el ejercicio de las labores del comisionista importa el pago de un servicio comercial y por tal causa está afecto al impuesto a las ventas y servicios (IVA) contemplado en el Decreto Ley 825, del año 1974. En este tipo de estipendio, además, no procede la retención por cargas previsionales que pueden afectar a los sueldos. Tampoco proceden respecto a ella las retenciones tributarias sobre honorarios y que en ciertos casos afectan a los sueldos. Este diverso tratamiento ha originado, en algunas ocasiones, que reales remuneraciones laborales se traten de encubrir como estipendios comerciales derivados de una comisión o de un mandato mercantil.

Cabe hacer notar que una forma de remunerar servicios, sean laborales o no, es la de pagar el equivalente a un porcentaje sobre las ventas que el asalariado efectúe; y con dinero equivalente a un porcentaje de las ventas que efectúe se paga al comisionista.

En relación con el problema planteado, pensamos que corresponde aplicar las normas de la teoría de la simulación. De acuerdo con ellas, si puede establecerse que lo pagado aparentemente a título de remuneración por un mandato mercantil es en realidad retribución de servicios laborales, no hay realmente un vínculo de comisión entre las partes, pues él cae por simulación relativa, apareciendo la relación jurídica real, el contrato de trabajo; todo ello sin perjuicio de los aspectos penales involucrados, ya que puede haber simulación ilícita.

37. *Comisión encubierta en compraventa*

Bajo este título pretendemos analizar el problema que se ha presentado en los últimos años en el comercio frutero de exportación. Este se realiza entre productores y firmas intermediarias que se acostumbra llamar "trading", que es la designación que emplearemos en este número, y que proviene del término inglés *trade*, que significa comercio.

La exportación de fruta generalmente no se efectúa mediante una compraventa internacional, en que el comprador es el importador y el exportador es el vendedor, sino que el consumidor extranjero la adquiere en establecimientos comerciales de su país. Estos establecimientos a su vez la han comprado en mercados de frutas y/o por intermedio de corredores. O sea, la fruta chilena se exporta sin tener asegurado comprador y un retorno determinado de divisas; y sin que se abra en favor del exportador un crédito documentario que caucione el pago. La fruta sale del país para ser vendida; el exportador corre el riesgo de variación de precios y aquel derivado de controles de calidad. Por ello, tradicionalmente, las modalidades comerciales de operación, en materia de exportación de la fruta, fundamentalmente son dos, según quien corra el riesgo comercial de la operación. Por un lado, se emplea la compraventa, con un precio fijo que paga en Chile la "trading" al productor. La "trading" hace la exportación y las resultas de ganancias y pérdidas de ésta son de su beneficio y riesgo. La otra modalidad consiste en que se entrega la fruta a la "trading" a título de mandato por el productor. Esta operación es habitualmente denominada "venta en libre consignación" o simplemente "consignación", en que la "trading" efectúa la exportación por cuenta del productor, recayendo el riesgo de las resultas de la exportación en el comitente y ganando a todo evento el comisionista una retribución o comisión, correspondiente a un porcentaje sobre el valor de venta.

Diversas características del mercado financiero y de las franquicias que favorecen a la exportación hicieron poco conveniente para las tradings operar con los productores mediante comisión o mandato. En efecto, los créditos para la exportación de pre y postembarque, refinanciados por el Banco Central, se otorgan a los "exportadores", que son los vendedores al exterior. Las franquicias a

la exportación, de devolución de impuesto IVA e incentivo a las exportaciones no tradicionales también favorecen a éstos. Las "tradings" actuaban como comisionistas a nombre propio del productor; y, además, recurrían a los créditos de pre y postembarque y a las franquicias a la exportación. Por ello se encontraban en una situación delicada, pues siendo la "trading" mandataria, aunque actúe a nombre propio, es discutible que tenga derecho a las franquicias relatadas que se otorgan al "exportador", que lo sería realmente el mandante o productor.

Por los motivos antes señalados, en reemplazo del contrato de mandato o libre consignación, se empezó a usar en la práctica, y actualmente es de uso corriente, un contrato denominado de compraventa. El precio de este contrato comprende dos ítem: un precio fijo por unidad, muy bajo, más un sobreprecio o precio determinable. Este precio determinable es el que arroje la colocación de la fruta que efectúe la "trading" en el exterior y que se reflejan en una liquidación de exportación. Al bruto recibido se restan los gastos, aun aquellos posteriores al contrato de venta, y un porcentaje equivalente al monto a la comisión o remuneración de la "trading". ¿Es en realidad este contrato una venta? ¿Es válido? Examinaremos el punto en el número siguiente, al estudiar los problemas jurídicos que presentan las distintas formas de comisión.

38. *Problemas jurídicos*

Analizaremos a continuación dos problemas jurídicos que originan los nuevos usos del tradicional contrato de comisión mercantil, a saber:

a) Unidad negocial. En las prácticas comerciales y de acuerdo a las tendencias modernas, cuando las partes celebran varios actos o contratos, pretendiendo realizar con ello una sola operación comercial, se estima que existe un solo negocio jurídico, como se explica en el N° 1 de esta obra. Cabe resaltar que el Código de Comercio reconoce esta tendencia cuando se celebra comisión mercantil conjuntamente con depósito y/o corretaje, como lo hemos explicado en los N^os^ 33 y 34 que anteceden; en que considera celebrado un solo contrato, el de comisión.

b) Caso de la comisión encubierta en compraventa. No se trata de un problema de validez, pues tanto la compraventa como la comisión son contratos legítimos, sino de calificación de la naturaleza jurídica del contrato. Nos parece que si el precio mínimo que se pacta en un caso determinado no reúne las condiciones de bilateralidad, conmutatividad, seriedad y realidad que la ley exige para que el acto como compraventa sea válido, y además, en el contrato, las obligaciones naturalmente propias del comprador relativas al riesgo de la cosa vendida y al pago de los gastos de conservación se traspasan al vendedor, podría el contrato calificarse de mera comisión, encubierta o simulada en una compraventa.

39. *Formularios*

Incluimos, como anexos 5 y 6, un formulario de comisión simple y también otro de un contrato de venta con precio determinable, para poder analizar con un ejemplo el tema que hemos denominado comisión encubierta en compraventa.

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SOBRE COMISION

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CAPÍTULO V

CORRETAJE O MEDIACION

40. *Reglamentación legal*

El Código de Comercio no reglamenta en forma directa el contrato de corretaje o mediación. En sus arts. 48 a 80 trata de los corredores públicos. Sin embargo, su art. 80 permite ejercer la correduría a cualquier persona que cumpla los requerimientos que establece el art. 55 del mismo Código, aunque no tenga el carácter de corredor público. Los requisitos del art. 55 citado son mínimos. En la actualidad se traducen en que puede ejercer la correduría toda persona mayor de edad que no ha sido condenada por delito que merezca pena aflictiva. En Chile no existen los corredores públicos de que trata el Código, pues la mediación puede ejercerse por corredores privados sin las trabas legales que establece el Código para el corredor público. Ello se comprueba pues transcurridos más de 100 años no ha habido interesados en optar al cargo de corredor público de comercio.

Además, lo comentado en términos generales, ha generado la inoperancia de la mayor parte de las normas sobre corredores públicos del Código, entre ellas el Reglamento de 1° de septiembre de 1866, que sólo se pueden aplicar a dichos inexistentes corredores.

Se ha reglamentado especialmente a los corredores de bolsa y también a los corredores de seguros, antes llamados "productores de seguros". (Sobre corredores de bolsa, ver Ley 18.045, sobre Mercado de Valores, Título VII, arts. 38 a 51; y en relación con corredores de seguros, arts. 57 a 64 del D.F.L. 251, del año 1931, sobre Compañías de Seguros, modificado por la Ley 18.814, del año 1989.)

Por largo tiempo rigió el Reglamento de Corredores de Propiedades creado por decreto del Ministerio de Economía publicado en el Diario Oficial de 9 de noviembre de 1944, que obligaba a la

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THE LAW OF CONTRACT

by

G. H. TREITEL, Q.C., D.C.L., F.B.A.
Honorary Bencher of Gray's Inn
Fellow of All Souls College, Oxford
Vinerian Professor of English Law

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Chapter Seventeen

AGENCY[1]

SECTION 1. DEFINITION

Agency is a relationship which arises when one person, called the principal, authorises another, called the agent, to act on his behalf, and the other agrees to do so. Generally, the relationship arises out of an agreement[2] between principal and agent. Its most important effect, for the purpose of this book, is that it enables the agent to make a contract between his principal and a third party.

1. Agreement

(1) General

The agreement between principal and agent is often a contract. But agency may also arise out of an agreement which does not amount to a contract because one of the parties lacks contractual capacity[3] or because there is no consideration. Thus the committee of a club, though they act gratuitously, may be agents of the members.[4]

(2) Agency without agreement

There may be agency without agreement in the following cases:

(a) Operation of law. The law may attribute an agent to a person: for example, when a company is first formed, its original directors are its agents by operation of law.[5] Many statutes have created public corporations, some of which are regarded as agents of the Crown[6]: such agency arises simply by virtue of the incorporating statute. Moreover, by statute, one person, or the court, may have power to appoint an agent to act on behalf of another: thus a mortgagee can in certain circumstances appoint an agent of the mortgagor[7]; an administrative receiver appointed by debenture holders is deemed to be the agent of the company[8]; and a person appointed by the court to manage the affairs of a mental patient has been

[1] *Bowstead on Agency* (15th ed.); Powell, *Law of Agency* (2nd ed.); Hanbury, *Principles of Agency* (2nd ed.); Fridman, *Law of Agency* (5th ed.); Stoljar, *Law of Agency*; Markesinis and Munday, *An Outline of the Law of Agency* (2nd ed.).
[2] *Garnac Grain Co. Inc.* v. *Faure & Fairclough Ltd.* [1968] A.C. 1130, 1137; Fridman, 84 L.Q.R. 224; *J. H. Rayner (Mincing Lane) Ltd.* v. *D.T.I.* [1989] Ch. 72, 250 (and see *infra*, n. 5).
[3] *Post*, p. 612.
[4] *Cf. Flemyng* v. *Hector* (1836) 2 M. & W. 172.
[5] *Cf.* Companies Act 1985, s.282. But English law does not regard the company as agent for its shareholders: *J. H. Rayner (Mincing Lane) Ltd.* v. *D.T.I.* [1989] Ch. 72, 188 (approved on this point [1990] 2 A.C. 418, 515).
[6] *e.g. Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* [1954] A.C. 584.
[7] Law of Property Act 1925, s.101.
[8] Insolvency Act 1986, s.44(1)(*a*).

held to be the patient's agent.[9] At common law, one person may be regarded as the agent of another, even against the latter's will, under the doctrine of agency of necessity.[10]

(b) Apparent and usual authority. Under the doctrines of apparent and usual authority[11] a principal is liable on contracts made by his agent although he has not authorised the agent to make them.

2. Intention to Act on Behalf of Principal

Whether a person intends to act on behalf of another is a question of fact. Thus a person who agrees out of friendship to ferry another's car from one place to another can be regarded as the owner's agent,[12] so that his negligent driving may make the owner liable in tort; but a person who borrows another's car for his own purposes would not be so regarded.[13] Even where the owner is liable for the driver's torts, it does not follow that the driver is his agent for other purposes, such as pledging his credit for repairs. Where a person does intend to act on behalf of another, agency may arise although a contract between the parties declares that there is no such relationship[14]; conversely the mere fact that a person says he is an agent does not make him one if he intends to act on his own behalf and not on behalf of his alleged principal.[15]

The rule that an agent must intend to act on behalf of his principal distinguishes agency from other analogous relationships, and is helpful in cases where it is clear that a person acted as agent, but not clear whose agent he was.

(1) Agency distinguished from other relationships

(a) Buyer and seller. A retailer may describe himself as the "agent" of the manufacturer whose products he sells. This description is legally accurate if the retailer accounts to the manufacturer for the price paid by the customer, and is remunerated by a commission or salary paid by the manufacturer. But generally the retailer does not negotiate a contract between manufacturer and customer.[16] He is a middleman who buys and resells on his own behalf. He is the manufacturer's "agent" only in a commercial, and not in the legal sense. Thus if the goods are defective the customer can only sue the retailer, and not the manufacturer, on the contract of sale. The manufacturer is only liable to the customer in contract if he gives a guarantee[17]; he may also be liable in tort[18] if the customer suffers loss or injury because of a defect in the goods. Again a manufacturer who con-

[9] *Plumptom* v. *Burkinshaw* [1908] 2 K.B. 572.
[10] *Post*, pp. 621 *et seq.*
[11] *Post*, pp. 615–621.
[12] *e.g. Ormrod* v. *Crosville Motor Services Ltd.* [1953] 1 W.L.R. 1120; *Vandyke* v. *Fender* [1970] 2 Q.B. 292.
[13] *e.g. Hewitt* v. *Bonvin* [1940] 1 K.B. 188; *Morgans* v. *Launchbury* [1973] A.C. 127.
[14] *McLaughlin* v. *Gentles* (1919) 51 D.L.R. 383.
[15] *Kennedy* v. *De Trafford* [1897] A.C. 180, 188.
[16] Similar problems can arise in determining whether a person who is asked to procure goods for another is his agent or a seller to him: see *Ireland* v. *Livingston* (1871) L.R. 5 H.L. 395; Hill, 31 M.L.R. 623; *Kloekner & Co. A.G.* v. *Gatoil Overseas Inc.* [1990] 1 Lloyd's Rep. 177; *cf. Customs & Excise Commissioners* v. *Paget* [1989] S.T.C. 773.
[17] *Ante*, pp. 74, 523–524.
[18] For negligence at common law and irrespective of negligence under Consumer Protection Act 1987.

tracts to make something for a customer is not the agent of the customer. Although he makes the thing at the customer's request, he acts primarily for his own profit and on his own behalf.[19]

(b) HIRE-PURCHASE. A dealer who negotiates a hire-purchase agreement between a customer and a finance company is considered at common law to act primarily on his own behalf.[20] But he may be the agent of the company for some purposes, *e.g.* to accept offers on the terms of the company's proposal form.[21] And under the Consumer Credit Act 1974 he may be treated as the agent of the company when he makes any representation in the course of negotiations as to the quality of the goods,[22] and when he receives notice from the customer that the agreement has been cancelled or rescinded, or that the customer's offer has been withdrawn.[23]

(c) PROVISION OF SERVICES. Persons who are engaged in the business or profession of supplying services may be described as "agents" in the commercial sense, without being agents in the legal sense: "To carry on the business of an 'agent' is not the same thing as saying that you are contracting as agent."[24] For example, where a "forwarding agent" is engaged to arrange for goods to be transported to a foreign destination, he may act as agent (in the legal sense) in making a contract between the exporter and a carrier; but he may equally well act as principal in undertaking to get the goods to the specified destination.[25] Whether such persons act in the legal sense as agents depends on the responsibilities that they undertake in relation to the particular transaction. The same point may be illustrated by reference to two further examples.

(i) *Client and professional man.* In *Leicestershire C.C.* v. *Michael Faraday & Partners Ltd.*[26] the plaintiffs employed a firm of valuers and later claimed to be entitled to certain documents made by the valuers in the course of the valuation. They based their claim on cases in which it had been held that a principal was entitled to documents created by his agent in the course of his employment. In rejecting the plaintiffs' claim, MacKinnon L.J. said that those cases were "radically different from the present case as being concerned with the relative rights and duties of principal and agent. . . . The present case is emphatically not one of principal and agent. It is the case of the relations between a client and a professional man to whom the client resorts for advice."[27] Some professional advisers, such as solicitors[28] and architects[29] often do act as agents for their clients. Other

[19] *Dixon* v. *London Small Arms Co.* (1876) 1 App.Cas. 632.

[20] *Mercantile Credit Co. Ltd.* v. *Hamblin* [1965] 2 Q.B. 242, 269. In *Branwhite* v. *Worcester Works Finance Ltd.* [1969] 1 A.C. 552 Lords Morris, Guest and Upjohn took the view stated in the text, but Lords Reid and Wilberforce thought that the dealer would normally be the finance company's agent.

[21] *Northgran Finance Ltd.* v. *Ashley* [1963] 1 Q.B. 476.

[22] s.56(2); by s.56(3) a provision in a regulated agreement purporting to make the dealer the *customer's* agent is void.

[23] ss.69(6), 102(1), 57(3). See also s.175 for the "agent's" duty to transmit such notices.

[24] *Elektronska etc.* v. *Transped etc.* [1986] 1 Lloyd's Rep. 49, 52.

[25] See *Jones* v. *European General Express* (1920) 25 Com.Cas. 296.

[26] [1941] 2 K.B. 205.

[27] At p. 216.

[28] *e.g. Tudor* v. *Hamid* [1988] 1 E.G.L.R. 251 (vendor's solicitor vendor's agent in receiving deposit); contrast *Hastingwood Property Ltd.* v. *Sanders Bearman Anselm* [1990] 3 All E.R. 107.

[29] *e.g. Gibson* v. *Pease* [1905] 1 K.B. 810.

professional persons are engaged simply to produce specified results: for example, to prepare a report or to paint a picture. Such persons have no power to act on behalf of their clients; and it is to this type of "professional man" that MacKinnon L.J. refers in the *Leicester* case.

(ii) *Estate agents*[30] An estate agent who is instructed to negotiate the sale of a house by private treaty has normally[31] no power to make a contract between his client and a prospective purchaser. He may for certain purposes act on behalf of the client, *e.g.* for the purpose of making representations about the property[32]; and he also owes the client certain duties similar to those owed by an agent to his principal.[33] But "an estate agent, despite the style, is an independent person"[34] who for most purposes does not normally act in the legal sense as the vendor's agent. In particular, he does not so act when he receives a deposit from a person who has agreed, subject to contract, to buy the property.[35] So long as no contract of sale has been concluded, he must not pay the deposit over to his client. He holds the money in trust for the prospective purchaser,[36] and must return it to him on demand[37]; but if he fails to do so the client is not liable for the deposit unless he had expressly authorised the estate agent to receive it on his behalf.[38]

(2) Whose agent?

It may be clear that a person is an agent, but doubtful whose agent he is. Thus it has been held that a London agent employed by a country solicitor is not the agent of the lay client, but that he is the agent of the country solicitor.[39] On the other hand counsel, though briefed by the solicitor, is the client's agent.[40]

In other cases the question is whether a person who is undoubtedly the agent of P may not also for some purposes be the agent of Q. Thus persons employed by an insurance company to solicit proposals for insurance are generally the company's agents,[41] but may become the agents of the proposer when helping him to complete the proposal form.[42] On the other hand insurance brokers are for most purposes agents of the insured persons

[30] Murdoch, 91 L.Q.R. 357.

[31] *i.e.* unless specifically so authorised, as seems to have been the case in *Spiro* v. *Lintern* [1973] 1 W.L.R. 1002, 1006. For a statutory definition of "estate agency work," see Estate Agents Act 1979, s.1(1).

[32] *Sorrell* v. *Finch* [1977] A.C. 728, 753.

[33] *e.g. Regier* v. *Campbell-Stuart* [1939] Ch. 766 (agent engaged to *find* a property for the client).

[34] *Sorrell* v. *Finch* [1977] A.C. 728, 753.

[35] *Sorrell* v. *Finch*, *supra*; *John McCann & Co.* v. *Pow* [1974] 1 W.L.R. 1643, 1647; Reynolds, 92 L.Q.R. 484; Markesinis [1976] C.L.J. 237.

[36] Estate Agents Act 1979, s.13(1)(*a*).

[37] At common law, he is not liable for interest: *Potters* v. *Loppert* [1973] Ch. 399; but regulations made under Estate Agents Act 1979, s.15 may impose such liability.

[38] *Ryan* v. *Pilkington* [1959] 1 W.L.R. 403, as explained in *Sorrell* v. *Finch*, *supra*, at p. 750; *cf. Ojelay* v. *Neosale* [1987] 2 E.G.L.R. 167.

[39] *Robbins* v. *Fennell* (1847) 11 Q.B. 248.

[40] *Grindell* v. *Bass* [1920] 2 Ch. 487.

[41] *Bawden* v. *London Assurance* [1892] 2 Q.B. 534; *Stone* v. *Reliance Mutual Insurance Soc. Ltd.* [1972] 1 Lloyd's Rep. 469; Reynolds, 88 L.Q.R. 462.

[42] *Biggar* v. *Rock Life Assurance Co.* [1902] 1 K.B. 516; *Newsholme* v. *Road Transport Insurance Co.* [1929] 2 K.B. 356; *cf. ante*, p. 303.

and not of the insurers.[43] But they may be agents of the insurers for some purposes, such as the provision of interim insurance cover until the policy is issued.[44] Again, directors of a company are primarily the agents of the company, and not of the shareholders; but they may for some purposes become agents of the shareholders, *e.g.* for the purpose of negotiating a sale of their shares.[45]

SECTION 2. CAPACITY

1. Capacity to Act as Agent

As agency is a consensual but not necessarily a contractual relationship, any person who is capable of consenting can act as agent, although his contractual capacity may be limited. In the days when married women lacked contractual capacity they could nonetheless act as agents.[46] Similarly, a minor can, it seems, be agent to make a contract which he has no capacity to make on his own behalf; and a corporation could probably act as agent in respect of a transaction which was *ultra vires*. But to say that a person of limited contractual capacity can act as agent does not mean that his agreement to do so gives rise to all the legal consequences that usually result from the relationship of principal and agent. It means that he can make a contract between his principal and a third party, but not that he acquires all the rights or is subject to all the liabilities of an agent towards his principal or the third party. The agent could not be made liable if to hold him liable would defeat the protection which the law means to give him by limiting his capacity. Thus he could not be made liable on the contract between principal and third party, even though the circumstances were such that an agent of full capacity would be so liable.[47] On the other hand, there is no reason to suppose that he would be denied the ordinary agent's right of indemnity[48] against his principal.

2. Capacity to Act as Principal

Capacity to act as principal is determined by the rules governing contractual capacity generally. Thus a minor cannot make himself liable for luxuries merely by employing an agent. But he can appoint an agent to make a contract which would have bound him if he had made it personally.[49]

This rule again applies primarily to determine the reciprocal rights and liabilities of principal and third party. It might also protect the principal from liability to the agent. Thus a principal who was under age would not be liable to indemnify an agent employed to buy luxuries. But the rule would not necessarily protect the agent: thus an under-age principal might

[43] *Anglo-African Merchants* v. *Bayley* [1970] 1 Q.B. 311, 322; *McNealy* v. *Pennine Ins. Co.* [1978] 2 Lloyd's Rep. 18. For criticism, see *Roberts* v. *Plaisted* [1989] 2 Lloyd's Rep. 341, 345.

[44] *Stockton* v. *Mason* [1978] 2 Lloyd's Rep. 430 (except in cases of marine insurance: *cf. ante*, p. 165).

[45] *Briess* v. *Woolley* [1954] A.C. 333.

[46] *Stevenson* v. *Hardie* (1773) 2 Wm.Bl. 872.

[47] *Post*, pp. 635 *et seq.*

[48] *Post*, p. 646.

[49] See Webb, 18 M.L.R. 861; R.E.M., 69 L.Q.R. 446; a contrary dictum in *Shephard* v. *Cartwright* [1953] Ch. 728, 755 (reversed without reference to this point [1955] A.C. 431) was later corrected in *G. (A.)* v. *G. (T.)* [1970] 2 Q.B. 644, 651–652.

well have a remedy against the agent if the latter accepted a bribe[50] from the third party.

SECTION 3. CREATION OF AGENCY

Agency may arise by express or implied agreement, or without agreement under the doctrines of apparent and usual authority, and where a person has authority of necessity. Finally, agency may arise *ex post facto* by ratification.

1. Agency by Agreement

(1) Express authority

An agent's authority is commonly conferred by express appointment. No formality is required. Oral appointment suffices even where the agent is appointed to make a contract which has to be in writing, or evidenced in writing.[51]

The extent of an agent's express authority depends on the true construction of the words of the appointment. If these are vague or ambiguous, the principal may be bound even if the agent, in good faith, interprets them in a sense not intended by the principal. Thus in *Weigall* v. *Runciman*[52] the principal instructed his agent to "fix" a steamer, intending the agent to *let* a steamer. It was held that the principal was bound when the agent instead *hired* a steamer. But where the terms of the appointment are vague, ambiguous or self-contradictory, the speed of modern communications will often make it reasonable for the agent to seek clarification of his instructions, and if he fails to do so he will not be able to rely on his own erroneous interpretation of his instructions.[53]

(2) Implied authority

(a) EXISTENCE OF AUTHORITY IMPLIED. The very existence of agency may be implied, either from conduct on a particular occasion, or from some other relationship. Thus a husband who lives with his wife impliedly authorises her to pledge his credit for necessary household expenses.[54] This authority is not a legal consequence of marriage, but depends on the inference of fact that the husband has permitted the wife to pledge his credit as manager of the household. The authority therefore does not arise where there is no household because the parties live in an hotel.[55] But where there is a household, the authority can arise even though the parties are not married.[56] As the authority is based on implied consent, it can be negatived if the husband forbids his wife to pledge his credit.[57] The wife's auth-

[50] *Post*, p. 648.

[51] *Heard* v. *Pilley* (1869) L.R. 4 Ch. 548.

[52] (1916) 85 L.J.K.B. 1187; *cf. Ireland* v. *Livingston* (1871) L.R. 5 H.L. 395, as explained in *Woodhouse A.C. Israel Cocoa Ltd. S.A.* v. *Nigerian Produce Marketing Co.* [1972] A.C. 741, 757, 771–772.

[53] *European Asian Bank* v. *Punjab & Sind Bank (No. 2)* [1983] 1 W.L.R. 642, 656 (where the claim succeeded on another ground).

[54] *Jewsbury* v. *Newbold* (1857) 26 L.J.Ex. 247; *Phillipson* v. *Hayter* (1870) L.R. 6 C.P. 38, 42; *Gage* v. *King* [1961] 1 Q.B. 188 (medical bills).

[55] *Debenham* v. *Mellon* (1880) 6 App.Cas. 24.

[56] *Blades* v. *Free* (1829) 9 B. & C. 167; *post*, p. 651.

[57] *Jolly* v. *Rees* (1864) 15 C.B.(N.S.) 628; *Miss Gray Ltd.* v. *Cathcart* (1922) 38 T.L.R. 562.

ority is also negatived if the husband gives her an adequate housekeeping allowance[58]; if the husband warns the tradesman not to supply goods to the wife on his credit; and if the wife already has an adequate supply of the goods in question.[59] The cases which lay down these rules are unlikely to be of much significance in modern conditions when household supplies are generally paid for either in cash or on credit terms requiring the signature of the debtor personally[60]; but they could still have some practical importance in relation to services supplied to the household. A child has no implied authority to pledge his parents' credit; but such authority may be implied if the parent stands by and acquiesces in a purchase made by the child on his account.[61]

(b) INCIDENTAL AUTHORITY. An agent who is appointed for a particular purpose may have implied authority to do acts incidental to the execution of that authority. For example, a solicitor, or counsel engaged to conduct litigation, may have implied authority to compromise the suit.[62] On the other hand, an agent employed to sell a thing has generally no authority to receive payment for it.[63] The question whether he has authority to warrant its quality is one of fact, depending on the circumstances of each case.[64]

(c) CUSTOMARY AUTHORITY.[65] A principal who employs an agent to act for him in a particular market impliedly authorises the agent to act in accordance with the custom of that market.[66] He is bound by the custom even if he is not aware of it.[67] But the inference that the principal authorised the agent to act in accordance with the custom cannot be drawn if the custom is inconsistent with the instructions given by the principal to the agent, or with the very relationship of principal and agent. The custom is then said to be "unreasonable" and the principal is not bound by it unless he knows of it. Thus in *Perry* v. *Barnett*[68] an agent who had been employed to buy bank shares failed to comply with an Act of Parliament then in force[69] by which such contracts were void unless the numbers of the shares were stated in the contract note. The principal did not know of a custom of the Stock Exchange to disregard the Act, and it was held that he was not bound by the custom. It was inconsistent with the agent's instructions since it resulted in his making a void contract when he was employed to make a valid one. Again, in some markets there is a custom by which an agent

[58] *Morel Bros.* v. *Westmorland* [1903] 1 K.B. 63; affirmed [1904] A.C. 11.

[59] *Miss Gray Ltd.* v. *Cathcart* (1922) 38 T.L.R. 562, 565; *Seaton* v. *Benedict* (1828) 5 Bing. 28.

[60] See Consumer Credit Act 1974, s.61(1)(*a*): the requirement of signature "*by* the debtor . . . and *by or on behalf* of the creditor" indicates that signature on behalf of the debtor is insufficient.

[61] *Law* v. *Wilkin* (1837) 6 A. & E. 718; some dicta in this case are too sweeping: *Mortimore* v. *Wright* (1840) 6 M. & W. 487.

[62] *Waugh* v. *H. B. Clifford & Sons* [1982] Ch. 374.

[63] *Mynn* v. *Jolliffe* (1834) 1 M. & Rob. 326; *Butwick* v. *Grant* [1924] 2 K.B. 483. *Cf. ante*, p. 611 as to deposits received by estate agents.

[64] Such authority was implied in *Alexander* v. *Gibson* (1811) 2 Camp. 555; *Howard* v. *Sheward* (1866) L.R. 2 C.P. 148; and *Baldry* v. *Bates* (1885) 52 L.T. 620; contrast *Brady* v. *Todd* (1861) 9 C.B.(N.S.) 592.

[65] *Cf. ante*, p. 194, for the view that it is artificial to base such authority on actual agreement.

[66] *Graves* v. *Legg* (1857) 2 H. & N. 210.

[67] *Pollock* v. *Stables* (1848) 12 Q.B. 765; *Cropper* v. *Cook* (1868) L.R. 3 C.P. 194; *Reynolds* v. *Smith* (1893) 9 T.L.R. 494.

[68] (1885) 15 Q.B.D. 388; contrast *Seymour* v. *Bridge* (1885) 14 Q.B.D. 460, where the principal knew of the custom.

[69] Banking Companies (Shares) Act 1867, repealed by Statute Law Revision Act 1966.

employed by several principals is allowed to buy in bulk to satisfy the needs of all. In *Robinson* v. *Mollett*[70] a custom to this effect in the tallow market was held unreasonable since its effect was to turn an agent into a seller. This was inconsistent with the relationship of principal and agent since an agent must buy for his principal as cheaply as he can, while a seller sells at the highest price he can get. But in *Scott* v. *Godfrey*[71] a custom of the Stock Exchange permitting stockbrokers to buy enough shares for several principals from a single seller was held reasonable because all the parties intended that contracts should be made between the seller and the various buyers.

2. Agency without Agreement

(1) Apparent authority

Where a person represents to a third party that he has authorised an agent to act on his behalf, he may, as against the third party, not be allowed to deny the truth of the representation, and be bound by the agent's act whether he in fact authorised it or not. In *Summers* v. *Solomon*,[72] for instance, the defendant employed a manager to run a jeweller's shop and regularly paid for jewellery ordered by the manager from the plaintiff for resale in the shop. The manager left the defendant's employment, ordered further jewellery in the defendant's name, and absconded with it. The defendant was held liable to pay for this jewellery since he had by his past conduct caused the plaintiff to believe that the manager had authority to pledge his credit, and had not informed the plaintiff that that authority had come to an end.

The following conditions must be satisfied before apparent authority arises:

(a) THERE MUST BE A REPRESENTATION OF AUTHORITY. This may be express but it is more frequently implied: for example, from a course of dealing, as in *Summers* v. *Solomon*; or from placing the agent in such a position that it is reasonable for third parties to assume that he has the principal's authority to make a contract of the kind in question[73]; or from the known relationship of the parties, so that a retiring partner continues to be liable to those who deal with the firm and know that he was a member of it, but not that he has retired.[74] In such cases, the apparent authority is said to be *general* in character since it extends generally to all transactions which a person, in the position in which the principal has placed the agent, is normally regarded as having authority to conclude.[75] Even where the agent

[70] (1875) L.R. 7 H.L. 802; *cf. North & South Trust Co.* v. *Berkeley* [1971] 1 W.L.R. 471.

[71] [1901] 2 Q.B. 726.

[72] (1857) 7 E. & B. 879; *cf. Pole* v. *Leask* (1862) 33 L.J.Ch. 155; *The Unique Mariner* [1978] 1 Lloyd's Rep. 438; *The Shamah* [1981] 1 Lloyd's Rep. 40; *Waugh* v. *H. B. Clifford & Sons* [1982] Ch. 374. The following discussion deals only with the extent to which the principal can as a result of the representation be held liable on an unauthorised contract. It is not concerned with any other form of liability for misrepresentation.

[73] *Panorama Developments (Guildford) Ltd.* v. *Fidelis Furnishing Fabrics Ltd.* [1971] 2 Q.B. 711; *The Ocean Frost* [1986] A.C. 717, 777; *United Bank of Kuwait* v. *Hamoud* [1988] 1 W.L.R. 1051; *cf. Strover* v. *Harrington* [1988] Ch. 390, 409–410; contrast *Cleveland Manufacturing Co.* v. *Muslim Commercial Bank Ltd.* [1981] 2 Lloyd's Rep. 646.

[74] Partnership Act 1890, s.14(1); and *cf. Scarf* v. *Jardine* (1882) 7 App.Cas. 345.

[75] *The Ocean Frost* [1986] A.C. 717, 777; contrast *The Suwalki* [1989] 1 Lloyd's Rep. 511 (shipbroker has no such authority).

has no such apparent authority by virtue of his position, he may have *specific* apparent authority to enter into a particular transaction; but since in such cases it must be clear to the third party that the agent does not *normally* have authority to conclude a transaction of that kind, the principal will only be liable on this basis if the third party can show that the principal expressly represented that the agent had authority to enter into the particular contract on his behalf.[76]

(b) THE REPRESENTATION MUST BE OF FACT. A representation of law does not give rise to apparent authority.[77] Thus a third party cannot rely on the doctrine of apparent authority if he has read the terms of the agent's appointment, but has misconstrued them, since the construction of a document is a question of law.

(c) THE REPRESENTATION MUST BE THAT THE "AGENT" IS AUTHORISED TO ACT AS AGENT. Apparent authority does not arise if a person is represented to be the *owner* of a business or other property. In such cases the representor may well be bound under the doctrine of usual authority, or under some analogous doctrine.[78] But these doctrines have only a limited scope, and where they do not apply, the representee can only fall back on the more general doctrine of apparent authority if the representation is one of *agency*.

(d) THE REPRESENTATION MUST BE MADE BY THE PRINCIPAL. Apparent authority can only arise out of a representation made by the principal: it cannot arise out of a representation made by some other person[79] or out of one made by the agent himself.[80] Thus in *Att.-Gen. for Ceylon* v. *Silva*[81] a Crown agent untruly represented that he had authority to sell steel plates which were Crown property. The Privy Council held that the Crown was not bound by the sale since the agent had no actual authority, and since apparent authority could only arise out of a representation made by the principal and not out of one made by the agent. Of course, a principal may represent that the agent has authority to make further representations on his behalf; and such a representation may be made by the principal's conduct, for example, by placing the agent in a position in which he would normally have authority to enter into a transaction of the type in question (even though in the particular case the agent's actual authority to do so had been negatived by the express instructions of the principal).[82] In such a case, the agent may by his own representation enlarge an existing authority,[83] but such a representation cannot create an apparent authority out of nothing.[84]

[76] *The Ocean Frost*, *ubi supra*, where the third party's claim on this basis failed.
[77] *Cf. ante*, p. 298; *post*, p. 641.
[78] *Post*, pp. 619–621.
[79] *The Rhodian River* [1984] 1 Lloyd's Rep. 373.
[80] *Lanyon* v. *Blanchard* (1811) 2 Camp. 597; *British Bank of the Middle East* v. *Sun Life Assurance Co. of Canada (U.K.) Ltd.* [1983] 2 Lloyd's Rep. 9, 17; *The Raffaela* [1985] 2 Lloyd's Rep. 36, 43; *The Ocean Frost* [1986] A.C. 717, 778; *The Suwalki* [1989] 1 Lloyd's Rep. 511.
[81] [1953] A.C. 461; and see *post*, p. 620.
[82] *United Bank of Kuwait* v. *Hamoud* [1988] 1 W.L.R. 1051.
[83] *The Raffaela* [1985] 2 Lloyd's Rep. 36, 43.
[84] *The Ocean Frost* [1986] A.C. 717, 778. *United Bank of Kuwait* v. *Hamoud* [1988] 1 W.L.R. 1051, 1064 ("cannot hold himself out").

(e) THE REPRESENTATION MUST BE MADE TO THE THIRD PARTY. The representation must be made to a third person or group of persons. The old notion of holding a person out as agent "to the world"[85] has long been discredited.[86] Nor does a representation made by principal to agent give rise to apparent authority.

(f) THE THIRD PARTY MUST HAVE RELIED ON THE REPRESENTATION. The third party must have been induced by the representation to deal with the agent in the belief that the principal had authorised the agent to enter into the transaction.[87] Two consequences flow from this requirement. First, the representation must actually be known to the third party; and this requirement cannot have been satisfied if the representation is contained in a document which has not actually come to his attention.[88] Secondly, the third party is not allowed to say that he relied on the representation if he knew that it was untrue, or if he had, but did not take, a reasonable chance of reading the agent's instructions and so of discovering the truth.[89]

These requirements have given rise to particular difficulties in cases in which a third party dealt with a corporation through an agent who had no actual authority to enter into the transaction. In the case of a company incorporated under the Companies Acts, these difficulties arose largely because the authority of such an agent might be set out in, or limited by, the company's memorandum or articles of association; and, before the changes in the law to be discussed below, the rule was that the third party had constructive notice of these documents.[90] This doctrine of constructive notice operated in favour of the company but not against it. Thus if the memorandum or articles *limited* the power of the company's officer, the third party was deemed to know of the limitation and could not rely on an appearance of authority inconsistent with it. But if they *conferred* power, the third party could not base a case of apparent authority on them, for he could not be said to have relied on something of which he was only deemed to know (but did not actually know).[91] This state of the law could cause considerable hardship to third parties, and two important changes in the law were made by the Companies Act 1989.

First, the doctrine of constructive or deemed notice of the company's registered documents has been abolished.[92] A third party may, indeed, still be "affected by notice of any matter by reason of a failure to make such inquiries as he ought reasonably to have made."[93] But the latter provision is of limited importance in the present context because "a party to a trans-

[85] *Whitehead* v. *Tuckett* (1812) 15 East 400, 411.
[86] *Dickinson* v. *Valpy* (1829) 10 B. & C. 128, 140.
[87] For cases in which this requirement was not satisfied, see *Kooragang Investments Pty. Ltd.* v. *Richardson & Wrench Ltd.* [1982] A.C. 462; *Bedford Insurance Co. Ltd.* v. *Instituto de Ressaguros do Brasil* [1985] Q.B. 966; *The Ocean Frost* [1986] A.C. 717.
[88] *The Ocean Frost* [1986] A.C. 717, 778.
[89] *Jacobs* v. *Morris* [1902] 1 Ch. 816; *Overbrooke Estates Ltd.* v. *Glencombe Properties Ltd.* [1974] 1 W.L.R. 1335; Coote, [1975] C.L.J. 17; *Rolled Steel (Holdings) Ltd.* v. *B.S.C.* [1986] Ch. 246, 295–296. The principle seems to have been overlooked in *Mendelssohn* v. *Normand Ltd.* [1970] 1 Q.B. 177.
[90] *Mahony* v. *East Holyford Mining Co. Ltd.* (1875) L.R. 7 H.L. 869.
[91] See *Rama Corp.* v. *Proved Tin & General Investments Ltd.* [1952] 2 Q.B. 147, discussing earlier authorities; for further discussion, see *Freeman & Lockyer* v. *Buckhurst Properties (Mangal) Ltd.* [1964] 2 Q.B. 480.
[92] Companies Act 1985, s.711A(1) (as inserted by Companies Act 1989, s.142).
[93] *Ibid.* s.711A(2).

action with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company *or to authorise others to do so*."[94] The third party is thus not bound to inquire whether the directors actually had the power to authorise the agent, with whom he dealt, to enter into the transaction on behalf of the company.

Secondly, in favour of a person dealing in good faith with the company, the power of the board of directors to bind the company is "deemed to be free of any limitation under the company's constitution."[95] This provision has already been discussed[96]; here it is only necessary to repeat that a person does not act in bad faith merely because he knows that an act is beyond the powers of the directors under the company's constitution.[97] Liability under this provision may therefore arise even though the requirements of the doctrine of apparent authority are *not* satisfied because the third party knows of the limitation on the directors' authority.

The common law principles governing apparent authority can, however, still apply where the third party relies, not on the apparent *existence* of powers, but on their *exercise*. The point may be illustrated by supposing that the board of directors of a company has power under the articles to appoint a managing director, but that the person with whom the third party has dealt as such has not actually been appointed to the post. The third party cannot then rely simply on the fact that the board had power to make the appointment. But the third party's claim will be upheld if he can show that there has been a representation by the persons entitled to make the appointment, to the effect that it has in fact been made. Such a representation need not be express but may be implied from conduct: for example, from the action of the board in allowing the person with whom the third party dealt to act as managing director. The company will then be bound by contracts made by him (even though he has not actually been appointed managing director) so long as those contracts are within the scope of the authority normally conferred on managing directors.[98] A company may also be bound by contracts made by its officers on the ground that they were impliedly authorised to make them; but here the liability is based on actual (implied) and not on apparent authority.[99]

(g) Forgeries by agent. In two cases company secretaries affixed the common seals of their companies to documents which they had forged. It was held that third parties who were taken in by the forgeries could not, against the companies, rely on them.[1] But in *Uxbridge P.B.S.* v. *Pickard*[2] a solicitor's clerk obtained money by way of mortgage on the strength of forged title deeds alleged to belong to a fictitious client. His principal was held liable. In the former cases, the secretaries had not been held out as having authority to execute the documents (respectively a power of attorney and a share transfer). In the latter case, the clerk had been held

[94] *Ibid.* s.35B (as inserted by Companies Act 1989, s.108(1)).
[95] *Ibid.* s.35A(1).
[96] *Ante*, p. 506.
[97] Companies Act 1985, s.35A(2)(*b*) (as inserted by Companies Act 1989, s.108(1)).
[98] *Freeman & Lockyer* v. *Buckhurst Properties (Mangal) Ltd.*, *supra*, n. 91
[99] *Hely-Hutchinson* v. *Brayhead Ltd.* [1968] 1 Q.B. 549, 573; Nock, 30 M.L.R. 705.
[1] *Bank of Ireland* v. *Evan's Trustees* (1855) 5 H.L.C. 389; *Ruben* v. *Great Fingall Consolidated* [1906] A.C. 439.
[2] [1939] 2 K.B. 248.

out as having authority to conclude mortgage transactions. Alternatively, the first two cases can be regarded as cases in which the agent, in effect, forged the principal's signature. When this happens, the third party is not induced to believe that the agent has his principal's authority, but that the signature is the act of the principal himself. Such a belief does not give rise to apparent authority.[3] The person whose signature is forged is only liable if he knew of the forgery and acquiesced in it.[4]

(h) Subsequent conduct of "principal." A person may be bound by a contract, even though the requirements of apparent authority are not satisfied, if he is precluded by his subsequent conduct from denying that the contract was made on his behalf. In *Spiro* v. *Lintern*[5] a wife purported to enter into a contract for the sale of her husband's house. She had no actual authority to do so, nor had the husband before the transaction led the purchaser to believe that she was his agent for the purpose. But afterwards the husband met the purchaser, gave him the impression that there was a binding contract and allowed him to incur expenses in connection with the property. It was held that the husband was estopped[6] from denying his wife's authority to make the contract on his behalf.

(2) Usual authority

(a) Meaning. The phrase "usual authority" is used in a number of senses. First, it may mean implied authority, and, in particular, incidental authority.[7] Secondly, it may refer to cases in which an agent has apparent authority because he has been placed by his principal in a situation in which he would have had incidental authority, if this had not been expressly negatived by instructions given to him by the principal (and not communicated to the third party).[8] But the phrase will here be used in a third sense, to refer to cases in which a principal is bound by his agent's contracts although there is no express, implied or apparent authority. This usage is based on *Watteau* v. *Fenwick*,[9] where the owner of a public-house was sued for the price of cigars bought without his authority by his manager for the purposes of the business. The manager had bought the cigars in his own name. Thus the seller could not rely on any appearance of authority since he believed, at the time of the contract, that the manager was contracting on his own behalf. But the defendant was nonetheless held liable. Wills J. said: "The principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that this is only so where there has been a holding out of authority. . . . But I do not think so."[10]

[3] *Cf. Kooragang Investments Pty. Ltd.* v. *Richardson & Wrench Ltd.* [1982] A.C. 462.
[4] *Greenwood* v. *Martins Bank Ltd.* [1933] A.C. 51.
[5] [1973] 1 W.L.R. 1002; followed in *Worboys* v. *Carter* [1987] 2 E.G.L.R. 1; *cf. Janred Properties Ltd.* v. *Ente Nazionale Italiano per il Turismo* [1989] 2 All E.R. 444.
[6] Detrimental reliance by the third party is necessary for this type of estoppel (*ante*, p. 361); while for the purposes of apparent authority, "the only detriment that has to be shown . . . is the entering into the contract:" *The Tatra* [1990] 2 Lloyd's Rep. 51, 59.
[7] *Ante*, p. 614.
[8] *The Raffaella* [1985] 2 Lloyd's Rep. 56, 41.
[9] [1893] 1 Q.B. 346.
[10] At pp. 348–349; *cf. The Ocean Frost* [1986] A.C. 717, 734 (affd. *ibid.* 773), where there was no holding out for the different reason stated at pp. 615–616, *ante*.

This decision has been criticised,[11] and has been more often distinguished than followed, but the very fact that later courts have thought it necessary to distinguish the case shows that it is still law.[12] There are, moreover, other cases in which a principal is bound by his agent's acts done outside the scope of his express, implied or apparent authority. Thus if a principal gives his agent documents and authorises him to borrow a fixed sum on the security of them, he may be liable to a third party from whom the agent borrows more, even though the third party did not think that the agent had any authority to borrow.[13] Similarly, at common law a person was bound by an unauthorised sale of his goods by a factor, though the factor sold in his own name.[14] At common law, he was not bound by an unauthorised pledge, but under the Factors Act 1889, he is bound in certain circumstances by any disposition made by such an agent. These rules are, it is submitted, based on the same principle as *Watteau* v. *Fenwick*. That principle seems to be more closely analogous to the doctrine of vicarious liability in tort (under which an employer may be liable even for forbidden acts if done by an employee in the course of employment[15]) than to the doctrine of apparent authority.

Two Privy Council decisions can be said to be inconsistent with the principle of usual authority, in that they simply did not consider it as a possible basis of liability where the requirements of apparent authority were not satisfied. But in the first[16] the question was where a principal could be held *criminally* liable for his agent's unauthorised act in purporting to enter, on the principal's behalf, into a contract which the latter was by statute prohibited from making. The negative answer given to this question can be explained on the ground that the courts are reluctant to impose criminal liability without *mens rea*. And in the second case[17] the contract was a sale of Crown property made without actual or apparent authority. The conclusion that the Crown was not bound was supported on the ground that "The subject derives benefits . . . from property vested in the Crown, and its proper protection is necessary in the interests of the subject, though it may cause hardship to an individual."[18] But this argument proves too much, for the need to give "proper protection" to Crown property would seem to extend to *all* dispositions which were actually unauthorised, *i.e.* even to those within the agent's apparent authority. In fact, the Privy Council's reasoning is an argument only against ordering the Crown to deliver the goods, and such specific relief is not available against the Crown, even where it is bound by a contract.[19] The argument does not explain why the disappointed contractor should not receive damages or compensation; and in deciding whether such a remedy ought to be available it is submitted that

[11] See Montrose, 17 Can.Bar Rev. 693; Hornby [1961] C.L.J. 239; *The Rhodian River* [1984] 1 Lloyd's Rep. 373, 379.
[12] See *Johnston* v. *Reading* (1893) 9 T.L.R. 200; *Lloyds Bank* v. *Swiss Bankverein* (1912) 107 L.T. 309; 108 L.T. 143; *Jerome* v. *Bentley & Co.* [1952] 2 T.L.R. 58.
[13] *Brocklesby* v. *Temperance P.B.S.* [1895] A.C. 173; *Fry* v. *Smellie* [1912] 3 K.B. 282. For criticism of the reasoning of these cases, see *Bowstead on Agency* (15th ed.), pp. 360–362.
[14] *Coles* v. *N.W. Bank* (1875) L.R. 10 C.P. 354. 362.
[15] *Limpus* v. *L.G.O.C.* (1862) 1 H. & C. 526.
[16] *Miles* v. *McIlwraith* (1883) 8 App.Cas. 120.
[17] *Att.-Gen. for Ceylon* v. *Silva* [1953] A.C. 461; *ante*, p. 616.
[18] At p. 481.
[19] Crown Proceedings Act 1947, s.21(1)(*a*).

the principle of usual (no less than that of apparent) authority should be taken into consideration.

(b) SCOPE. The extent of an agent's usual authority depends on the class of agent to which he belongs and on the common understanding of the trade concerning such agents. *Watteau* v. *Fenwick* should from this point of view be contrasted with *Daun* v. *Simmins*,[20] where it was held that the manager of a tied public-house had no usual authority to order spirits from any person he chose. And where the agent does not belong to a well-known class of agents, but is simply appointed for an isolated transaction, the doctrine of usual authority does not apply. Thus in *Jerome* v. *Bentley & Co.*[21] a retired army officer to whom jewellery had been entrusted for sale was held not to have the usual authority which a mercantile agent would have had in the same circumstances.

A principal is only liable under the doctrine of usual authority if there is some dealing between the third party and the agent: the doctrine does not apply if the agent's involvement in the transaction has been concealed so that the third party thinks that he is dealing directly with the principal.[22] The contract must also be made in the course of the principal's business: in *Kinahan* v. *Parry*[23] it was accordingly held that a hotel-owner was not liable for whisky bought without his authority by his manager, since it was not proved that the manager had bought it for use in the hotel rather than for his personal use. Similarly, where the manager of a tied house bought beer from outside suppliers and resold it on the premises on his own account, it was said that his employers could not have been sued for the price of the beer.[24] A person is, *a fortiori*, not liable under the doctrine of usual authority if the business in the course of which the contract was made was not his business at all. Thus in *MacFisheries Ltd.* v. *Harrison*[25] the owner of a public-house sold it as a going concern, but forgot to transfer the licence to the buyer. He was not liable for food supplied to his successor for consumption on the premises, since the latter was carrying on the business entirely on his own behalf.

(3) Authority of necessity[26]

Under this heading, we shall first discuss a number of situations in which one person acts to protect some interest of another without any previous authorisation from that other person. We shall then consider whether any useful purpose is served by attempting to bring all these, somewhat disparate, cases within the scope of a single doctrine.

(a) ACCEPTANCE OF A BILL OF EXCHANGE FOR THE HONOUR OF THE DRAWER. When a bill is not accepted by the person on whom it is drawn, a stranger

[20] (1879) 41 L.T. 783.
[21] [1952] 2 T.L.R. 58.
[22] *Kooragang Investments Pty. Ltd.* v. *Richardson & Wrench Ltd.* [1982] A.C. 462.
[23] [1911] 1 K.B. 459.
[24] *Attorney-General's Reference (No. 1 of 1985)* [1986] Q.B. 491, 506.
[25] (1924) 93 L.J.K.B. 811.
[26] Williston, 22 Can.Bar Rev. 492; Treitel, 3 W.A.A.L. Rev. 1; Wade, 19 Vanderbilt L.Rev. 1183; Birks, 10 C.L.P. 110; Matthews [1981] C.L.J. 340. The old rules under which a deserted wife had authority of necessity were abolished by Matrimonial Proceedings and Property Act 1970, s.41, and are not revived by the repeal of that section by Matrimonial Causes Act 1973: see Interpretation Act 1978, ss.15, 16; for a dispute on the point see 36 M.L.R. 638, 642, 37 M.L.R. 480.

may, with the consent of the holder, accept the bill for the honour of the drawer. If the stranger has to pay on this acceptance, he becomes entitled to the rights of the holder to sue the drawer on the bill.[27]

(b) SHIPMASTERS. Where it is necessary[28] to do so for the further prosecution of the voyage, the master of a ship has authority of necessity to borrow on the shipowner's credit, to hypothecate the ship, cargo and freight, or the cargo alone, to sell part of the cargo,[29] and to enter into a salvage agreement on behalf of the cargo-owner.[30]

(c) SALVAGE. A person who goes to the aid of a ship in distress at sea[31] and saves life or property is entitled to a reward for his efforts. The amount of the reward is, subject to certain limitations, at the discretion of the court.

(d) OTHER CASES. The courts have been reluctant to extend the doctrine of agency of necessity, because it may result in depriving a person of his property, or in subjecting him to an obligation, without his consent.[32] But the doctrine is not confined to the three situations described above. It extends to a number of other situations, in some (but not in all) of which the authority is based on some prior relationship between the parties.[33]

(i) *Powers of sale.* It has been held that land carriers can have authority of necessity to sell.[34] At common law, the courts were reluctant to hold that a bailee with whom goods had been left for storage or repair was entitled to sell them merely because the owner had failed to collect them and could not be traced. By statute, the bailee is now entitled to sell in a number of situations if he has given notice to the bailor of his intention to sell or if he has failed to trace the bailor after having taken reasonable steps to do so.[35] This statutory power extends to cases in which there was, at common law, no authority of necessity to sell.[36] There may be cases in which, though the statutory requirements are not satisfied, a sale can be justified under the common law doctrine of agency of necessity. A buyer of goods may justifiably reject them on the ground that they are not in conformity with the contract of sale. If the seller refuses to accept the return of the goods, the buyer may then have authority of necessity to sell the goods for the account of the seller.[37]

(ii) *Preservation of another's property*. A number of cases raise the question whether a person who preserves another's property has any claim

[27] See Bills of Exchange Act 1882, ss.65–68.
[28] *Post*, p. 624.
[29] See *Notara* v. *Henderson* (1872) L.R. 7 Q.B. 225.
[30] *The Winson* [1982] A.C. 939. But where the conditions stated at p. 624, *post* are not satisfied, the master has no *implied* authority to enter into such an agreement: *The Choko Star* [1990] 1 Lloyd's Rep. 516.
[31] For this restriction, see *The Goring* [1988] A.C. 831.
[32] *Falcke* v. *Scottish Imperial Assurance Co.* (1886) 34 Ch.D. 234, 248; *The Winson* [1982] A.C. 939, 962.
[33] *Re F.* [1990] 2 A.C. 1, 75.
[34] *Sims & Co.* v. *Midland Ry.* [1913] 1 K.B. 103, 112; *Springer* v. *Great Western Ry.* [1921] 1 K.B. 257, 265, 267; *cf.* Carriage of Goods by Road Act 1965, Sched., Arts. 14(2), 16(3) for statutory provisions in case of international carriage.
[35] Torts (Interference with Goods) Act 1977, ss.12, 13 and Sched. 1.
[36] *e.g. Sachs* v. *Miklos* [1948] 2 K.B. 23; *Munro* v. *Wilmott* [1949] 1 K.B. 295.
[37] *Graanhandel T. Vink B.W.* v. *European Grain & Shipping Co.* [1989] 2 Lloyd's Rep. 531, 533 (where there was no such agency as the buyer had lost his right to reject); *cf. The Olib*, *Financial Times*, February 8, 1991.

against the owner. Two eighteenth-century cases decided that such a person has no lien on the property saved[38]; but it does not necessarily follow that he has no claim for reimbursement. In *Tetley* v. *British Trade Corp.*[39] an agent who, contrary to his principal's express instruction, removed goods from Batum to Constantinople (to save them from seizure by an invading army) recovered the expense of the removal from his principal. In *The Winson*[40] a salvor of goods from a stranded ship took them to a place of safety and (to prevent them from deteriorating) had them stored in a warehouse there. It was held that he was entitled to recover the cost of warehousing the goods from their owner. And in *G.N. Ry.* v. *Swaffield*[41] a railway company claimed the cost of feeding and stabling a horse from the owner, who had failed to collect it on arrival at its destination and had not authorised the company to incur these expenses. The claim succeeded on the ground that the company "were bound from ordinary feelings of humanity to keep the horse safely and feed him."[42]

(iii) *Improvement of another's property*. A person who actually improves another's property may do so in the mistaken but honest belief that it is his own. In such a case there is no agency of necessity since the improver's intention is to act on his own behalf, and not on behalf of the owner. If the subject-matter is goods and the owner sues the improver for wrongful interference, the improver is by statute entitled to an allowance in respect of the improvements.[43] A similar rule existed at common law, and presumably applies in relation to property other than goods.[44] It is more doubtful whether the improver has an independent claim for the value or cost of the improvements,[45] *i.e.* one that he can assert even though no action has been brought against him by the true owner.

If the improver knows that he has no title to the property he may again have certain limited rights in respect of the improvements. In *Munro* v. *Wilmott*[46] the plaintiff with the defendant's permission left his car in the defendant's yard. Some years later, the defendant wanted to have the car moved, and, after trying unsuccessfully to contact the plaintiff, spent some £85 on making the car saleable, and sold it. He was held liable for conversion, but the damages were reduced by £85 "not from the point of view of payment for what he has done, but in order to arrive at . . . the true value of the property which the plaintiff had lost."[47] The case would now come within the statutory provisions authorising sales of uncollected goods,[48] so that the defendant would no longer be liable in conversion. Under the statutory provisions the bailee must account for the proceeds of sale to the

[38] *Binstead* v. *Buck* (1776) 2 Wm.Bl. 1117; *Nicholson* v. *Chapman* (1793) 2 H.Bl. 254.
[39] Cited in (1922) 10 Ll.L.R. at p. 678; for a somewhat similar statutory provision, see Carriage of Goods by Road Act 1965, Sched., Art. 14(2).
[40] [1982] A.C. 939; Samuel, 98 L.Q.R. 362.
[41] (1874) L.R. 9 Ex. 132.
[42] At p. 137.
[43] Torts (Interference with Goods) Act 1977, ss.6(1), 3(7).
[44] *Peruvian Guano Co.* v. *Dreyfus Bros.* [1892] A.C. 166, 176; *Greenwood* v. *Bennett* [1973] Q.B. 915.
[45] For a suggestion that there is such a claim, see *Greenwood* v. *Bennett*, *supra* at p. 201 (but see p. 203); Jones, 93 L.Q.R. 273.
[46] [1949] 1 K.B. 295.
[47] *Ibid.* p. 299.
[48] Torts (Interference with Goods) Act 1977, ss.12, 13 and Sched. 1; Palmer [1987] L.M.C.L.Q. 43.

bailor. He is entitled to deduct items such as the costs of sale and sums due to him under the terms of the bailment[49] but nothing is said about the value of improvements.[50] However, the bailee can apply to the court for an order authorising the sale "subject to such terms . . . as may be specified in the order."[51] These could perhaps give him the right to make a deduction in respect of improvements. Even this possibility would not be open to the bailee if he did not sell the goods but simply returned them to the bailor. In such a case he could perhaps invoke the doctrine of agency of necessity.

(iv) *Conditions to be satisfied*. In the sale, preservation and improvement cases just discussed, the common law doctrine of agency of necessity will only apply if certain conditions are satisfied.[52] It must be impossible to communicate with the owner of the goods in time to get his instructions or impossible to obtain such instructions because the owner (though he can be reached) fails to give them[53]; the agent must act reasonably, in good faith and in the interests of the owner; and his acts must have been commercially necessary. It is not "necessary" to sell goods merely because they are causing inconvenience,[54] for there may be a reasonable opportunity of storing them.[55]

(v) *Preservation of life or health*. The doctrine of agency of necessity may apply where one person preserves the life or health of another. Thus it is the basis on which a person can sue for the value of necessaries supplied to a mental patient who has no capacity for rational thought.[56] A doctor who gives medical attention to an unconscious person might recover a fee on the same ground[57]; the case for allowing him to do so would be particularly strong where the doctor's acts are not merely lawful but are done in the performance of a legal duty to render the services in question.[58] A right to payment would of course be negatived if the circumstances were such that the services would not normally be paid for: this would be the position where emergency treatment is given under the National Health Service. Special statutory provisions entitle the doctor to a fee where he gives emergency treatment to the victim of a road accident.[59]

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[49] *Ibid.* s.12(5).
[50] s.6 of the Act (*supra*, n. 43) would not apply as the defendant knew that he had no title to the car.
[51] s.13(1)(*a*).
[52] See *Springer* v. *G.W. Ry.* [1921] 1 K.B. 257; *Prager* v. *Blatspiel, Stamp & Heacock Ltd.* [1924] 1 K.B. 566. These principles also apply to a shipmaster's authority of necessity: *ante*, p. 622; *cf. The Winson* [1982] A.C. 939.
[53] *The Winson*, *supra* at p. 962; *The Olib, Financial Times*, February 8, 1991; the possibility that the owner may fail to give the instructions shows that the difficulty of obtaining them is not invariably "overcome to-day by modern means of communication" (*Re F.* [1990] 2 A.C. 1, 75); *cf. The Choko Star* [1990] 1 Lloyd's Rep. 516, 524); it may also be impracticable for a shipmaster to obtain instructions from *all* the cargo-owners.
[54] *Sachs* v. *Miklos* [1948] 2 K.B. 23, as to which see *ante*, p. 622, n. 36.
[55] As in *Prager* v. *Blatspiel, Stamp & Heacock Ltd.* [1924] 1 K.B. 566. *Semble* the statutory power of sale referred to on p. 622, *ante*, would not extend to the facts of this case.
[56] *Ante*, p. 502.
[57] *Cotnam* v. *Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907); *Re Crisan's Estate*, 102 N.W. 2d 907 (1961). For the right of an accident victim to recover damages in respect of loss suffered by a person who nurses him, *cf. ante*, p. 537.
[58] *Re F.* [1990] 2 A.C. 1, 55, where the issue was whether the treatment was *lawful* (see *ante*, p. 502).
[59] Road Traffic Act 1988, ss.158, 159.

(e) SCOPE OF THE DOCTRINE. It will be seen from the situations discussed above that "agency of necessity" can produce three quite different results. First, it may enable the agent to create a contract between the principal and a third party[60]; secondly it may entitle the agent to dispose of the principal's property[61]; and thirdly it may entitle the agent to recompense or reimbursement in respect of the efforts that he has made, or the expense that he has incurred, to protect the interests of the principal.[62] It has been suggested that the expression "agency of necessity" should no longer be used in its traditional broad sense, to refer to all these consequences, but that it should be used in a narrower sense, to refer only to cases in which the question is whether the agent has, by reason of the necessity, the power to create a contract between his principal and a third party.[63]

The purpose of this suggested departure from the traditional terminology is to emphasise the point that the three consequences described above do not necessarily depend on the same requirements.[64] Thus a person who, to prevent another's goods from deteriorating, arranges for them to be stored in a warehouse, may have a claim against the owner for reimbursement of the charges that he has paid to the warehouseman. It does not follow from this that he also has the power to make a contract between the owner and the warehouseman, so that the warehouseman can sue the owner directly for his charges.[65] On the other hand, the fact that both consequences depend on necessity makes it at least likely that similar factors will often be relevant to each of them. For example, the humanitarian considerations which enabled the railway company in *G.N. Ry.* v. *Swaffield*[66] to claim reimbursement might well have been used in support of the argument that the railway company had power to create a contract between the owner of the horse and a livery stable in which it was housed on his failure to collect it. Similarly, it is relevant for the purpose of both consequences to ask whether the agent acted in the interests of the owner or out of self-interest.[67]

Thus it is submitted that the question whether the label "agency of necessity" should be used in its traditional broad, or in a new narrow, sense is largely one of emphasis, or, as has been said, a "purely terminological"[68] one. It is part of the wider question as to the effects of non-consensual agency, to be discussed later in this Chapter.[69] Such agency scarcely ever produces *all* of the effects of agency based on agreement, but it generally does produce *some* of those effects. This is true of all forms of non-consensual agency; and it is submitted that, so long as the relationships discussed under the present heading produce at least some of the consequences that normally flow from agency by agreement, it is not inappropriate to say that they give rise to "agency of necessity."

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[60] *e.g. ante*, p. 622 at n. 30.
[61] *e.g. ante*, p. 622 at n. 34.
[62] *e.g. ante*, p. 623 at nn. 39–42.
[63] *The Winson* [1982] A.C. 939, 958.
[64] *Ibid.*
[65] *Ibid.*
[66] (1874) L.R. 9 Ex. 132; *ante*, p. 623 at n. 41.
[67] *The Winson*, *supra* at p. 962.
[68] *Ibid.* at p. 965; *cf. Re F.* [1990] 2 A.C. 1, 75 (using the expression to refer to the intervenor's right to reimbursement).
[69] *Post*, p. 649.

3. Ratification

A principal may acquire rights and liabilities as a result of his agent's unauthorised act by ratifying it.

(1) What amounts to ratification

Ratification may be express or implied. It can be implied if the principal by conduct unequivocally affirms the agent's acts even though he purports to repudiate them.[70] Some affirmative act is required, so that mere passive acquiescence does not amount to ratification.[71]

Ratification will not generally be implied from conduct unless the principal has full knowledge of the agent's unauthorised act.[72] But in *Fitzmaurice* v. *Bayley*[73] a principal in effect said to the third party: I do not know what my agent has agreed to, but I must support him in all that he has done for me. It was held that he had ratified. He did not actually know that the agent had exceeded his authority, but deliberately took the risk that this might be the case.

An act will only be regarded as ratification if the principal had a free choice whether to do it or not. Merely taking back one's own property after a third party has, in reliance on unauthorised instructions, done work on it is not ratification.[74]

(2) When ratification possible

Ratification is effective only if the following conditions are satisfied.

(a) THE AGENT MUST PURPORT TO ACT ON BEHALF OF THE PRINCIPAL. A principal can only ratify acts which the agent purported to do on his behalf.[75] The most important consequence of this rule is that if the agent purports to act on his own behalf the principal cannot ratify; or, in other words, that an undisclosed principal[76] cannot ratify. Thus in *Keighley, Maxsted & Co.* v. *Durant*[77] an agent bought corn at a price above that at which he had been instructed to buy. He intended to buy for his principal, but did not disclose this fact to the seller. The undisclosed principal purported to ratify the purchase, but later refused to accept delivery. It was held that the ratification was ineffective and that the principal was not liable. Lord Macnaghten said that "Civil obligations are not to be created by or founded upon undisclosed intentions."[78] It could be objected that this reasoning would destroy the whole law relating to undisclosed principals. But the decision is nonetheless intelligible, having regard to the doctrine of privity of contract. Ratification and the undisclosed principal are two important exceptions to that doctrine. To allow both exceptions to operate on the same set of facts would go far towards overthrowing the doctrine of privity altogether.

[70] *Cornwall* v. *Henson* (1750) 1 Ves.Sen. 509.
[71] *Moon* v. *Towers* (1860) 8 C.B.(N.S.) 611; reversed on other grounds: (1860) 9 H.L.C. 78. Contrast the now doubtful case of *Waithman* v. *Wakefield* (1807) 1 Camp. 120.
[72] *Lewis* v. *Read* (1845) 13 M. & W. 834.
[73] (1856) 6 E. & B. 868; *cf. Haseler* v. *Lemoyne* (1858) 5 C.B.(N.S.) 530.
[74] *Foreman & Co. Pty. Ltd.* v. *The Liddesdale* [1900] A.C. 190.
[75] *Wilson* v. *Tumman* (1843) 6 Man. & G. 236.
[76] For the definition of "undisclosed principal," *post*, p. 630.
[77] [1901] A.C. 240; *cf. The Astyanax* [1985] 2 Lloyd's Rep. 109; *Welsh Development Agency* v. *Export Finance Co.* [1990] BCC 393.
[78] At p. 247.

On the other hand, an unnamed principal[79] can ratify. Policies of marine insurance may be taken out "for and on behalf of any person interested"; and such persons can ratify although they are not named in the policy.[80]

The rule that the agent must *purport* to act on behalf of the principal does not mean that he must *intend* to do so. Thus the principal may ratify although the agent intended to defraud him.[81]

In *Brook* v. *Hook*[82] an agent forged his principal's signature to a promissory note. The principal's later ratification was held to be ineffective. This case has given rise to a dispute on the question whether a forgery can ever be ratified. But it does not seem that this question arises in a case of this kind. If an agent forges his principal's signature he does not say "I am signing for my principal" but "this is my principal's signature." The principal cannot ratify because the agent did not purport to act on his behalf.[83] But if the principal stands by knowing that his agent will forge his signature he may be estopped from denying its genuineness.[84]

(b) THE PRINCIPAL'S CAPACITY. At common law, a corporation cannot ratify the unauthorised act of its agent in entering into an *ultra vires* contract.[85] In relation to companies incorporated under the Companies Acts, this rule no longer applies, for two reasons. First, the validity of an act done by such a company can no longer be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.[86] Secondly, it is expressly provided that the act can be ratified.[87] Such ratification would also prevent the company from impugning the transaction on the ground that it was beyond the power of the board of directors.[88] An unauthorised act done on behalf of the company can be ratified even though, when it was done, no officer having authority to do it had been appointed.[89]

A person can become liable on a contract made by him while he was a minor if he "ratifies" it after reaching full age.[90] "Ratification" here seems to refer to confirmation by a person of a contract made by himself; but there seems to be no reason why a person should not be similarly liable on a ratification after full age of a contract made on his behalf, but without his authority, while he was a minor. There are, however, cases in which a per-

[79] For the definition of "unnamed principal," see *post*, p. 630.
[80] *Hagedorn* v. *Oliverson* (1814) 2 M. & S. 485. *Quaere* whether the requirement stated in *Watson* v. *Swann* (1862) 11 C.B.(N.S.) 756, 771, that the person seeking to ratify must be described at the time of the contract in such a way as to be ascertainable at that time is generally accepted: see *Boston Fruit Co.* v. *British & Foreign Marine Insurance Co.* [1906] A.C. 336, 338–339 (a case apparently overlooked in *Southern Water Authority* v. *Carey* [1985] 2 All E.R. 1077, 1085); Arnould, *Marine Insurance* (16th ed.), § 243.
[81] *Re Tiedemann & Ledermann Frères* [1899] 2 Q.B. 66.
[82] (1871) L.R. 6 Ex. 89.
[83] *Imperial Bank of Canada* v. *Begley* [1936] 2 All E.R. 367.
[84] *Greenwood* v. *Martins Bank Ltd.* [1933] A.C. 51.
[85] *Ashbury Ry. Carriage & Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 653; *Mann* v. *Edinburgh N. Tramways* [1893] A.C. 69; *Rolled Steel Products (Holdings) Ltd.* v. *B.S.C.* [1986] Ch. 246, 304.
[86] Companies Act 1985, s.35(1) (as inserted by Companies Act 1985, s.108(1)); *ante*, p. 505.
[87] Companies Act 1985 (*supra*), s.35(3).
[88] *i.e.* under *ibid.* s.35A(1); it seems to follow that ratification can be effective even if the third party acted in bad faith, at least if the members of the company were aware of this fact when ratifying the contract.
[89] *Alexander Ward & Co. Ltd.* v. *Samyang Navigation Co. Ltd.* [1975] 1 W.L.R. 673.
[90] *Ante*, p. 492.

son is not liable on a ratification in the sense of a confirmation of a contract made during minority by himself[91]; and it is submitted that he would equally not be liable if, after full age, he ratified a contract of this kind which had during his minority been made on his behalf but without his authority.[92]

(c) THE PRINCIPAL MUST HAVE BEEN IN EXISTENCE WHEN THE ACT WAS DONE. This rule can give rise to inconvenience when promoters contract on behalf of a projected company. It was held in *Kelner* v. *Baxter*[93] that the company could not, after its formation, ratify the promoters' contracts, since it was not in existence when those contracts were made. One possible way of evading this rule is for the promoter to enter into a draft agreement providing that the company, when formed, shall enter into a similar agreement with the third party and that the liability of the promoter shall thereupon cease. But this device is not wholly satisfactory since it creates no binding contract between company and third party: each can with the collusion of the promoter deprive the other of the expected benefit of the contract. The position is somewhat better in equity. The company may be able to enforce the contract against the third party by showing that the promoter acted as trustee for it,[94] and the third party may be able to claim a reasonable remuneration out of any sum which the company has paid, or bound itself to pay, to the promoter for initial expenses.[95] But he has no such right if the company has not made any payment or promise to the promoter[96]; nor has he any claim against the company on a purely executory contract. By statute, a contract which purports to be made by or on behalf of a company before it is formed has effect (subject to contrary agreement) as a contract between the third party and the person purporting to act for the company or as agent for it.[97] But it is still impossible to create a direct contract between the company and the third party by ratification after incorporation. It would be better if the rule in *Kelner* v. *Baxter* were wholly repealed by legislation.[98]

(d) THE PRINCIPAL MUST RATIFY IN TIME. A contract cannot be ratified after the time fixed for its performance has passed[99]; if no such time is fixed, it must be ratified within a reasonable time of the principal's acquiring notice of the unauthorised act.[1] Nor can a contract be ratified at a time when the principal could not validly have made it. Thus a person cannot insure his property after it has been destroyed; and if an agent, without

[91] A penal bond could not be ratified as it was considered to be wholly void: *Baylis* v. *Dineley* (1815) 3 M. & S. 477.
[92] On the principle that a nullity cannot be ratified: *post*, p. 629.
[93] (1866) L.R. 2 C.P. 174; *cf. Melhado* v. *Porto Alegre Ry.* (1874) L.R. 9 C.P. 503.
[94] *Ante*, pp. 562 *et seq.*
[95] *Touche* v. *Metropolitan Ry.* (1871) L.R. 6 Ch.App. 671; *cf. Re Hereford, etc., Engineering Co.* (1876) 2 Ch.D. 621 (where the third party lost his rights because of the promoter's fraud); *Re Empress Engineering Co.* (1880) 16 Ch.D. 125. *Spiller* v. *Paris Skating Rink Co.* (1878) 7 Ch.D. 368 states the equitable principle too widely.
[96] *Re Rotherham Alum & Chemical Co.* (1883) 25 Ch.D. 103.
[97] Companies Act 1985, s.36C(1), as inserted by Companies Act 1989, s.130(4); *post*, p. 637.
[98] The Companies Bill 1973 (which was lost at the dissolution of Parliament in February 1974) contained a provision (cl. 6) to this effect. And see Gross, 87 L.Q.R. 367.
[99] *Metropolitan Asylums Board* v. *Kingham* (1890) 6 T.L.R. 217; *Dibbins* v. *Dibbins* [1896] 2 Ch. 348.
[1] *Re Portuguese Consolidated Copper Mines* (1890) 45 Ch.D. 16 *cf. Bedford Insurance Co. Ltd.* v. *Instituto de Ressaguros do Brasil* [1985] Q.B. 966, 987 (and see *ante*, p. 382).

authority, insures his principal's property, the latter cannot ratify the insurance after the destruction of the property.[2] Exceptionally, a policy of marine insurance can be ratified after the destruction of the property insured.[3]

(e) A NULLITY CANNOT BE RATIFIED.[4] Although ratification is not confined to lawful acts, an act which is simply void in law cannot be validated by ratification. Similarly, a principal cannot become liable if the unauthorised contract was prohibited by statute: "life cannot be given by ratification to prohibited transactions."[5] This is an additional reason for saying that a forgery cannot be ratified.[6]

(3) Effect of ratification

The effect of ratification is to put principal, agent and third party into the position in which they would have been if the agent's acts had been authorised from the start: his authority is said to relate back to the time of the unauthorised act. Thus in *Bolton Partners* v. *Lambert*[7] an agent without authority purported to buy a house for his principal from the defendant, who later repudiated the contract. The principal then ratified. It was held that the defendant was bound by the contract. His repudiation was ineffective as the principal's ratification related back to the time of the agent's unauthorised purchase.

The rule that ratification relates back does not apply where the agent contracts "subject to ratification": in such a case the third party can withdraw at any time before ratification.[8] Nor does the rule apply where the agent and the third party have by mutual consent cancelled the unauthorised transaction before the principal ratifies.[9] And the doctrine of relation back will not be allowed to deprive a stranger to the contract of a right of property which had vested in him before ratification[10]; though it may deprive him of a right to sue the agent in tort if the agent's unauthorised act would have been lawful, had it been done with the principal's prior authorisation.[11]

The rule in *Bolton Partners* v. *Lambert* has been criticised on the ground that it puts the third party at the mercy of the principal, who is free to ratify or not as he pleases.[12] But the hardship to the third party should not be exaggerated. If the principal does not ratify, the third party has his remedy against the agent for breach of implied warranty of authority.[13] If the principal does ratify, the third party will be liable to him; but since this is precisely what he expected, he cannot complain. The only hardship is that the

[2] *Grover & Grover Ltd.* v. *Matthews* [1910] 2 K.B. 401.
[3] *Williams* v. *N. China Insurance Co.* (1876) 1 C.P.D. 757; Marine Insurance Act 1906, s.86.
[4] For a discussion of this rule, see *Danish Mercantile Co.* v. *Beaumont* [1951] Ch. 680 (where the act was held not to be a nullity).
[5] *Bedford Insurance Co. Ltd.* v. *Instituto de Ressaguros do Brasil* [1985] Q.B. 966, 986. (and see *ante*, p. 382).
[6] *Ante*, p. 627.
[7] (1888) 41 Ch.D. 295; *cf. Maclean* v. *Dunn* (1828) 4 Bing. 722; *Koenigsblatt* v. *Sweet* [1923] 2 Ch. 314.
[8] *Watson* v. *Davies* [1931] 1 Ch. 455; *Warehousing & Forwarding Co. of East Africa Ltd.* v. *Jafferali & Sons Ltd.* [1964] A.C. 1.
[9] *Walter* v. *James* (1871) L.R. 6 Ex. 124.
[10] *Bird* v. *Bird* (1850) 4 Ex. 786.
[11] *Whitehead* v. *Taylor* (1839) 10 A. & E. 210.
[12] Wambaugh, 9 Harv.L.R. 60; and see *Fleming* v. *Bank of New Zealand* [1900] A.C. 577.
[13] *Post*, pp. 640–642.

principal may be able to keep the third party waiting while he decides whether to ratify. But he must ratify within reasonable time; and the extent of such time is considerably abridged if the third party tells the principal that he wishes to withdraw from the contract.[14] Moreover, a principal cannot ratify after he has by words or conduct intimated to the third party that he does not intend to do so.[15] It is probable, therefore, that a principal would not be able to ratify if he remained silent for more than a comparatively short time after notice of the third party's intention to withdraw. Thus the third party need not be kept indefinitely in suspense. He can, in effect, say to the principal: ratify quickly or not at all.

SECTION 4. EFFECTS OF AGENCY

When an agent makes a contract on behalf of his principal with a third party, the transaction gives rise to legal effects between principal and third party, between agent and third party, and between principal and agent. In discussing these effects, we shall first assume that the agency has arisen by consent, and then consider to what extent the same effects result from non-consensual agency.

1. Between Principal and Third Party

(1) Rights of principal against third party

The rights of principal against third party depend in part on the distinction between disclosed and undisclosed principals. A *disclosed principal* is one of whose existence the third party is aware at the time of contracting. He is called a named principal if the third party also knew his name, and an unnamed principal if the third party did not know his name. An *undisclosed principal* is one of whose existence the third party is unaware at the time of contracting. Where a person makes a contract "as agent" or "on behalf of my client" the principal will generally be disclosed. But such words may not make it clear that that person is acting as agent *in the legal sense*[16]; they may merely indicate that he is acting as agent in a commercial sense. If that is the position and the person described as "agent" actually has a principal in the legal sense, that principal may be undisclosed.[17]

(a) Disclosed principal. The general rule is that a disclosed principal can sue the third party.[18] The third party is not discharged by settling with the agent unless the principal by his conduct induced the third party to do so, or unless the agent had authority to receive payment.[19] The third party cannot set off against the principal any debt which the agent may owe to

[14] *Re Portuguese Consolidated Copper Mines* (1890) 45 Ch.D. 16.
[15] *McEvoy* v. *Belfast Banking Co.* [1935] A.C. 24.
[16] *Ante*, p. 609.
[17] See a difference of opinion on this point in *Teheran-Europe Co. Ltd.* v. *S. T. Belton (Tractors) Ltd.* [1868] 2 Q.B. 545, 552, 556, 561.
[18] *Langton* v. *Waite* (1968) L.R. 6 Eq. 165.
[19] *Yates* v. *Freckleton* (1781) 2 Dougl. 623; *Linck, Moeller & Co.* v. *Jameson & Co.* (1885) 2 T.L.R. 206; *Butwick* v. *Grant* [1924] 2 K.B. 483.

the third party[20]; and a custom enabling the agent to receive payment by such set-off is unreasonable.[21]

There was at one time a usage of trade by which the general rule did not apply where an English agent contracted on behalf of a foreign principal. But modern commercial conditions have made the usage obsolete, and it is now settled that a foreign principal can sue the third party.[22]

(b) Undisclosed principal. An undisclosed principal can also, in general, sue the third party. Attempts have been made to reconcile this rule with the doctrine of privity. One view is that the contract is "in truth" made with the undisclosed principal,[23] but this is scarcely consistent with the rule that the agent is fully entitled and liable under the contract.[24] Other views recognise that the contract is between agent and third party but say that the principal can intervene because his contract with the agent entitles him to do so, or because he is a *cestui que trust* or a quasi-assignee.[25] But the better view seems to be that the undisclosed principal's right to sue is not based on the theory that he has somehow acquired the agent's right. His right is an independent right[26] which constitutes an exception to the doctrine of privity, established in the interests of commercial convenience.

The undisclosed principal's right to sue might prejudice a third party, who thought that he was dealing only with the agent. To avoid such prejudice, the undisclosed principal's right is limited in the following ways.

(i) *Consistency with the terms of the contract.* An undisclosed principal is not allowed to intervene where this would be inconsistent with the terms of the contract. In *Humble* v. *Hunter*[27] a person signed a charterparty as "owner." This was held to mean that he and he alone was owner, so that his undisclosed principal was not allowed to intervene. But in *F. Drughorn Ltd.* v. *Rederiaktiebolaget Transatlantic*[28] the fact that an agent signed a charterparty as "charterer" did not exclude his undisclosed principal's right to enforce the contract. It has been said that after this case, *Humble* v. *Hunter* is no longer law,[29] but the two lines of cases can be distinguished. Persons in general *own* on their own behalf, but often charter on behalf of others. Thus it contradicts the contract to say that someone other than the person named (without qualification) as owner is owner, but not that

[20] *Pratt* v. *Willey* (1826) 2 C. & P. 350; *Fish* v. *Kempton* (1849) 7 C.B. 687; *Mildred* v. *Maspons* (1883) 8 App.Cas. 874; *Cooke* v. *Eshelby* (1887) 12 App.Cas. 271; unless the agent has authority to receive payment in this way: *Stewart* v. *Aberdein* (1838) 4 M. & W. 211, 228.
[21] *Pearson* v. *Scott* (1878) 9 Ch.D. 198.
[22] *Teheran-Europe Co. Ltd.* v. *S. T. Belton (Tractors) Ltd.* [1968] 2 Q.B. 545; Reynolds, 85 L.Q.R. 92, 97–103; Hudson, 32 M.L.R. 207. *Semble* the rule also applies to undisclosed principals: *supra*, n. 17.
[23] *Keighley Maxsted & Co.* v. *Durant* [1901] A.C. 240, 261.
[24] *Post*, p. 636.
[25] For discussions of the basis of the doctrine, see Ames, *Essays*, 453; Seavey, 29 Y.L.J. 859; Goodhart and Hamson, 4 C.L.J. 320; Montrose, 16 Can.Bar Rev. 757; Dowrick, 17 M.L.R. 25; Higgins, 28 M.L.R. 167. *cf. The Astyanax* [1985] 2 Lloyd's Rep. 109, 113 (where "*not* a settled part of our law" should probably read "*now* a settled part . . . ," etc.).
[26] *Pople* v. *Evans* [1969] 2 Ch. 255; *The Havprins* [1983] 2 Lloyd's Rep. 356, 362.
[27] (1842) 12 Q.B. 316; *Formby Bros.* v. *Formby* (1910) 102 L.T. 116; *cf. The Astyanax* [1985] 2 Lloyd's Rep. 109.
[28] [1919] A.C. 203; *Danziger* v. *Thompson* [1944] K.B. 654.
[29] *Epps* v. *Rothnie* [1945] K.B. 562, 565.

someone other than the person named as charterer is charterer. Alternatively, a person who is described as owner may *contract that* he is owner, while a person who is described as charterer does not make any promise that he alone is the charterer.[30]

(ii) *Personal considerations.* If the third party can show that he wanted to deal with the agent *and with no one else*, the undisclosed principal cannot intervene. Thus in *Collins* v. *Associated Greyhound Racecourses Ltd.*[31] a person agreed to underwrite a new issue of shares to be made by a company, *i.e.* to take up any shares for which the public did not apply. This contract was held to involve such reliance on the business reputation and integrity of the underwriter that his undisclosed principal was not allowed to enforce it. Similarly, in *Greer* v. *Downs Supply Co.*,[32] a person bought timber from a seller who owed him money, on the terms that the debt should be set off against the purchase price: this showed that he intended to deal with the seller and with no one else, so that the seller's undisclosed principal was not allowed to intervene. This conclusion does not seem to have been strictly necessary for the protection of the buyer; for an undisclosed principal can only sue subject to the third party's right to set off any money due to him from the agent.[33]

A third party who has no particular reason for wanting to deal with the agent may nevertheless not want to deal with the principal. If the agent expressly says that he is not acting for the principal, the third party can avoid the contract for fraud.[34] If he makes no such misrepresentation, the law is less clear.

In *Nash* v. *Dix*[35] a committee of Roman Catholics wanted to buy a Congregational chapel from the defendants and to turn it into a place of Roman Catholic worship. The defendants refused to deal with the committee as they disapproved of the proposed user. The committee then told the plaintiff that if he could buy the chapel from the defendants they would buy it from him for £100 more than he had paid for it. The defendants sold the chapel to the plaintiff but repudiated the contract on discovering that the plaintiff intended to resell to the committee. North J. held that the defendants were bound (1) because the plaintiff was not an agent, but simply a person who had bought to resell; and (2) because the plaintiff had not been guilty of any misrepresentation. It appears from the judgment that the plaintiff would have failed if he *had* been the agent of the committee.

In *Said* v. *Butt*[36] the plaintiff wanted to go to the first night of a play, but knew that the proprietors of the theatre would not sell him a ticket as he had in the past strongly criticised their conduct. He therefore sent a friend to the box-office to buy a ticket for him without disclosing his name, but he was later refused admission by the manager of the theatre. In an action

[30] *Cf. Cross on Evidence* (7th ed.), p. 699. The position would be different where the word "owner" was qualified in some way. Where a person enters into a charterparty as "disponent owner" or "operating owner" it is a question of construction whether he, or the registered owner, is a party to the contract: see *The Yanxilas* [1982] 2 Lloyd's Rep. 444.

[31] [1930] 1 Ch. 1.

[32] [1927] 2 K.B. 28.

[33] *Post*, p. 633.

[34] *Archer* v. *Stone* (1898) 78 L.T. 34; *cf. Berg* v. *Sadler & Moore* [1937] 2 K.B. 158; *ante*, p. 333.

[35] (1898) 78 L.T. 445.

[36] [1920] 3 K.B. 497.

against the manager for inducing a breach of contract, McCardie J. held that there was no contract between the proprietors and the plaintiff: since the proprietors reserved the right to sell first-night tickets to specially selected persons, the "personality" of the other contracting party was a material element in the contract.

Both these cases were distinguished in *Dyster* v. *Randall & Sons.*[37] The plaintiff wanted to buy land from the defendants, who, to his knowledge, would not deal with him as they distrusted him. He employed an agent to buy the land in the agent's own name, and then claimed that he was entitled to intervene as undisclosed principal. Lawrence J. upheld the claim: he said that it would be futile to deny the plaintiff's right to sue since the agent could have assigned the benefit of the contract to him. But this argument does not satisfactorily distinguish *Said* v. *Butt*: theatre tickets can (unless they expressly provide the contrary)[38] be assigned no less than contracts to buy land. Again it was said that "personal" consideration entered into the two earlier cases but not into *Dyster* v. *Randall & Sons*. While this may distinguish *Said* v. *Butt*, it does not satisfactorily explain why the action in *Nash* v. *Dix* would have failed if the plaintiff had been an agent; for it is hard to see why an objection based on religious grounds is more "personal" than one based on distrust.

It is submitted that an undisclosed principal should not be allowed to intervene if he knows that the third party does not want to deal with him. If the principal directly concealed his identity, the contract would be void for mistake, or voidable for fraud; and the principal should not be able to improve his position by simply employing an agent.

(iii) *Other safeguards.* An undisclosed principal can only sue the third party subject to any defences which the third party has against the agent.[39] This rule is clearly necessary for the protection of the third party, who thinks that he is dealing with the agent alone. Thus if the agent owes money to the third party, the debt can be set off by the third party against the principal, and if the third party pays the agent he can rely on the payment against the principal.[40] This rule is based on the third party's belief that he is deaing with the agent alone: it therefore does not apply where the third party has no such belief. In *Cooke* v. *Eshelby*[41] the third party had no belief one way or the other whether the person with whom he was dealing was principal or agent. He was in fact an agent. The third party was not allowed to set off against the principal a debt which the agent owed to the third party.

The principal may intend the agent to disclose his existence, but the agent may fail to do so because he wants to misappropriate the proceeds of the contract, or to induce the third party to accept the principal's property in discharge of a debt which the agent owes to the third party. In such cases the third party can only rely on his settlement with, or set-off against, the

[37] [1926] Ch. 932; *cf. Smith* v. *Wheatcroft* (1878) 9 Ch.D. 223; for a discussion of these cases, see Williams, 23 Can.Bar Rev. 397.

[38] The report of *Said* v. *Butt* does not state whether the ticket contained a condition prohibiting its assignment or transfer.

[39] *Browning* v. *Provincial Insurance Co. of Canada* (1873) L.R. 5 P.C. 263, 272.

[40] *George* v. *Clagett* (1797) 7 T.R. 359; *Rabone* v. *Williams*, *ibid.* p. 360n.; *Mann* v. *Forrester* (1814) 4 Camp. 60; *Montague* v. *Forwood* [1893] 2 Q.B. 350, Derham [1986] C.L.J. 384.

[41] (1887) 12 App.Cas. 271; Reynolds [1983] C.L.P. 119.

agent, in an action brought by the principal, if the latter has so conducted himself as to enable the agent to appear as principal in the transaction.[42]

(2) Liability of principal to third party

The general rule is that a principal, whether disclosed or undisclosed, is liable to the third party. The limitations on the right of an undisclosed principal to intervene exist mainly for the protection of the third party. Hence they do not necessarily apply where the third party sues the principal. But a person who is alleged to have contracted on behalf of another may, on the true construction of the contract, have contracted solely on his own behalf. In that case he alone is liable on the contract[43]: the reason why the other is not liable is not that he is an undisclosed principal whose liability is excluded, but that he is not a principal in the transaction at all.

The principal cannot set off against the third party any money owed to him by the agent.[44] If the principal gives the agent the money with which to pay the third party, but the agent fails to pay it over, the principal remains liable to the third party: he must seek out his creditor and see that he is paid.[45] The principal is only discharged by payment to the agent if such payment is made at the third party's request,[46] or if the third party looked to the agent for payment and so induced the principal to settle with the agent.[47]

In *Heald* v. *Kenworthy*[48] it was assumed that an undisclosed principal is not (any more than one who is disclosed) discharged by settling with his agent. But in *Armstrong* v. *Stokes*[49] the court said that this rule produced "intolerable hardship,"[50] and refused to follow it. Thus it was held that an undisclosed principal who settled with his agent was not liable to make a second payment to the third party if the agent failed to pay over the money. Of course, it is hard for the principal to have to pay twice over; but it is equally hard for the third party not to be paid at all. It could be argued that the law should, in this situation, have no sympathy for the third party since he did not rely on the credit of a principal of whose existence he was unaware at the time of contracting. But this proves too much: whenever an undisclosed principal is sued the third party gets a windfall of this kind. Thus the case for applying a special rule to undisclosed principals in this context is weak. *Armstrong* v. *Stokes* was severely criticised, and doubted by the Court of Appeal in *Irvine* v. *Watson*.[51] It is submitted that an undisclosed principal who settles with his agent should remain liable to the third party.

2. Between Agent and Third Party

Agent and third party may incur reciprocal rights and liabilities under the contract which the agent makes on behalf of his principal, or under a col-

[42] *Drakeford* v. *Piercey* (1866) 14 L.T. 403.
[43] *J.H. Rayner (Mincing Lane) Ltd.* v. *D.T.I.* [1989] Ch. 72, 190–191, approved on this point [1990] 2 A.C. 418, 515.
[44] *Waring* v. *Favenck* (1807) 2 Camp. 85.
[45] *Irvine* v. *Watson* (1880) 5 Q.B.D. 414.
[46] *Smyth* v. *Anderson* (1849) 7 C.B. 21.
[47] See *Wyatt* v. *Hertford* (1802) 3 East 147.
[48] (1855) 10 Ex. 739; Reynolds (1983) C.L.P. 119.
[49] (1872) L.R. 7 Q.B. 598.
[50] At p. 610.
[51] *Supra*, n. 45.

lateral contract. The agent may also be liable for breach of implied warranty of authority.

(1) Under the contract

(a) GENERAL RULE. The general rule is that an agent is neither liable under,[52] nor entitled to enforce,[53] a contract he makes on behalf of his principal.

(b) EXCEPTIONS. An agent may enter into a contract on his own behalf as well as on behalf of the principal and so be liable or entitled under the contract. This possibility is illustrated by the following cases.

(i) *Agent contracting personally*. An agent is liable under the contract if he in fact intended to undertake personal liability. Where the contract is in writing, the question whether he had this intention is one of construction. An agent who is described in a written contract as a party to it and signs it without qualification is liable under it although the third party knew that he was acting as agent.[54] He may be liable even though such a contract also provides that it is signed on behalf of a third person, for such a provision may merely be intended to mean that that person is to be a party to the contract and not that the agent is to be absolved from liability under it.[55] At the other extreme, an agent who is described as agent in the contract and signs as agent is not liable.[56] But an agent may be described as agent in the body of the contract and sign without qualification; or he may be described as a party in the body of the contract but sign as agent.[57] A distinction has been drawn in such cases between words which merely describe the agent's profession, and words of representation, which show that he is acting as agent. The former do not, while the latter do, exonerate him from liability. Thus the words "we, as solicitors, undertake . . . " were held in *Burrell* v. *Jones*[58] to be merely descriptive; and even the words "as agent" when used in their commercial, rather than their legal, sense have been held to be descriptive.[59] The words "on behalf of" or "*per procurationem*" are generally representative. But no particular formula is conclusive; and where the description is equivocal the court will rely on other relevant circumstances in order to determine, on an objective standard, whether an undertaking of personal liability may be inferred. Thus in one case[60] a company director ordered repairs to be done to a boat which the company had hired from him. He gave the order on the company's notepaper and signed it with the addition "Director." He was, nevertheless, held person-

[52] *Robins* v. *Bridge* (1837) 3 M. & W. 114; *Ferguson* v. *Wilson* (1866) L.R. 2 Ch.App. 77; *N. & J. Vlassopulos* v. *Ney Shipping Ltd.* [1977] 2 Lloyd's Rep. 478.
[53] *Lucas* v. *Beale* (1851) 10 C.B. 739; *Fairlie* v. *Fenton* (1870) L.R. 5 Ex. 169.
[54] *Basma* v. *Weekes* [1950] A.C. 441; *cf. Davies* v. *Sweet* [1962] 2 Q.B. 300; *Sika Contracts* v. *Gill* (1978) 9 Build.L.R. 11; *Kai Yung* v. *Hong Kong & Shanghai Banking Corp.* [1981] A.C. 787, 795.
[55] *The Sun Happiness* [1984] 1 Lloyd's Rep. 381.
[56] *Mahony* v. *Kekulé* (1854) 14 C.B. 390.
[57] As in *Gadd* v. *Houghton* (1876) 1 Ex.D. 357; *Universal Steam Navigation Co. Ltd.* v. *James McKelvie & Co.* [1923] A.C. 492. (In these cases the agents were held not liable.)
[58] (1819) 3 B. & Ald. 47.
[59] *Parker* v. *Winlow* (1857) 7 E. & B. 942; *cf. ante*, pp. 609–610.
[60] *The Swan* [1968] 1 Lloyd's Rep. 5; Reynolds, 85 L.Q.R. 92; Legh-Jones, 32 M.L.R. 325; *cf. Tudor Marine Ltd.* v. *Tradax Export S.A.* [1976] 2 Lloyd's Rep. 135; *The Primorje* [1980] 2 Lloyd's Rep. 74; contrast *Astilleros Canarios S.A.* v. *Cape Hatteras Shipping Co. S.A.* [1982] 1 Lloyd's Rep. 518.

ally liable as he was the owner of the boat. But for this fact it seems that he would not have been personally liable.

Just as the agent may on the true construction of the contract, be liable, so he may be entitled.[61] The courts will, if possible, hold that "the existence of the liability on the one hand involves the existence of the correlative right on the other."[62] But it is perfectly possible for an agent to be liable without being entitled if that is the true meaning of the contract. So long as the contract is executory, however, he cannot, be entitled without being liable, for unless he is liable there is no consideration moving from him for the third party's promise to him.[63] Where the agent is liable but not entitled the third party is not faced with any similar difficulty. He provides consideration for the agent's promise by undertaking liability towards the principal and it is immaterial that the consideration does not move to the agent: consideration must move from the promisee (the third party) but need not move to the promisor (the agent).[64]

It was at one time thought that the inference that the agent intended to contract personally must be drawn whenever he acted on behalf of a foreign principal,[65] but it is now recognised that this fact is only one of many to be taken into consideration in determining whether the agent had such an intention.[66]

(ii) *Trade usage or custom.* An agent may be personally liable or entitled if that is the usual course of business either between particular parties or in relation to a particular class of agents. For example, "where one attorney does work for another, it is common practice for him to give credit to that other and not to the client."[67] A local or trade custom can have the same effect.[68]

(iii) *Principal undisclosed.* The agent is both entitled and liable where the principal is undisclosed[69]; but this rule does not apply where the agent uses words of representation and the principal is only unnamed.[70] Where an agent does not name his principal, it may be easy to infer that he intended to contract personally; but there is no general rule to that effect.[71]

(iv) *Agent in fact principal.* An agent may purport to act on behalf of a principal when he is in fact acting on his own behalf. If he purports to act for an unnamed principal, he can enforce the contract for his own bene-

61 *Short* v. *Spackman* (1831) 2 B. & Ad. 962; *Clay* v. *Southern* (1852) 7 Ex. 717; *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ltd.* [1917] 2 K.B. 784; *cf. The Yanxilas* [1982] 2 Lloyd's Rep. 444; *Fraser* v. *Thames Television* [1984] Q.B. 44; *Transcontinental Underwriting Agency S.R.L.* v. *Grand Union Ins. Co. Ltd.* [1987] 2 Lloyd's Rep. 409.

62 *Repetto* v. *Millar's Karri & Jarrâh Forests Ltd.* [1901] 2 K.B. 306, 310.

63 *Evans* v. *Hooper* (1875) 1 Q.B.D. 45.

64 *Ante*, pp. 77–79.

65 *Paterson* v. *Gandasequi* (1812) 15 East 62.

66 *Miller, Gibb & Co.* v. *Smith & Tyrer Ltd.* [1917] 2 K.B. 141; *J. S. Holt & Moseley (London) Ltd.* v. *Sir Charles Cunningham & Partners Ltd.* (1949) 83 Ll.L.R. 141, 145; Hudson, 23 M.L.R. 695; 29 M.L.R. 353; 35 Can.Bar Rev. 336.

67 *Scrace* v. *Whittington* (1823) 2 B. & C. 11. The above dictum makes the agent *exclusively* liable: *cf. post*, p. 639.

68 *Fleet* v. *Murton* (1871) L.R. 7 Q.B. 126.

69 *Sims* v. *Bond* (1833) 5 B. & Ad. 389, 393.

70 *e.g. Universal Steam Navigation Co.* v. *James McKelvie & Co.* [1923] A.C. 492; *Benton* v. *Campbell, Parker & Co. Ltd.* [1925] 2 K.B. 410.

71 *N. & J. Vlassopulos* v. *Ney Shipping Ltd.* [1977] 2 Lloyd's Rep. 478.

fit.[72] But if he purports to act for a named principal, he can only enforce the contract after giving due notice to the third party that he acted on his own behalf.[73] Even then the agent will not be allowed to sue if this would prejudice the third party.[74] These safeguards are necessary as the third party may have relied on the principal's solvency or other attributes when he made the contract. It follows that the agent cannot sue if he knew that, for some "personal" reason, the third party was unwilling to contract with him either at all, or on the same terms as those on which he was willing to contract with the principal.[75]. If the plaintiff in *Said* v. *Butt*[76] had gone in person to buy a ticket, pretending that it was not for him but for a friend, he could not later have said that his friend was in fact himself.

The present exception to the general rule, that an agent acquires no rights under the contract, can only apply where two conditions are satisfied: the agent must (i) purport to contract as agent and (ii) in fact contract as principal. The exception therefore did not apply where a father conducted negotiations for the purchase of a house and the resulting contract was drawn up in the name of his son (who was a minor). It was held that the father could not enforce the contract since the contract did not say that he had entered into it on behalf of the son, or indeed mention the father's name at all.[77]

(v) *Principal non-existent.* Where the alleged principal does not exist, it may be easy to infer that the agent intended to assume personal liability. At common law this inference was drawn in *Kelner* v. *Baxter*[78] with the result that promoters were held personally liable on a contract made by them on behalf of a company which had not yet been formed. On the other hand in *Holman* v. *Pullin*[79] it was held that the chairman of the Tunbridge Wells Medical Association could not sue on a contract made by him on behalf of the Association before it existed as a legal person. An agent is therefore not a contracting party merely because he purported to act for a non-existent principal: the question is one of intention in each case.[80] Section 36C(1) of the Companies Act 1985[81] now provides that "a contract which purports to be made . . . on behalf of a company[82] at a time when the company has not been formed has effect, subject to any agreement to

72 *Schmaltz* v. *Avery* (1851) 16 Q.B. 655; *Harper & Co.* v. *Vigers Bros.* [1909] 2 K.B. 549. See *Bowstead on Agency* (15th ed.), pp. 477–478 for the suggestion that this rule should only be applied where it was not inconsistent with the terms of the contract to allow the agent to sue.

73 *Bickerton* v. *Burrell* (1816) 5 M. & S. 383; *aliter* if the other party knows that the "agent" is the real principal: *Rayner* v. *Grote* (1846) 15 M. & W. 359.

74 See *Fellowes* v. *Gwydyr* (1829) 1 Russ. & M. 83.

75 *The Remco* [1984] 2 Lloyd's Rep. 205.

76 [1920] 3 K.B. 497; *ante*, p. 632.

77 *Hector* v. *Lyons* (1989) 58 P. & C.R. 156.

78 (1886) L.R. 2 C.P. 174; *ante*, p. 628; *cf. Phonogram Ltd.* v. *Lane* [1982] Q.B. 938; Green, 47 M.L.R. 671.

79 (1884) Cab. & El. 254.

80 *Black* v. *Smallwood* [1966] A.L.R. 744; Baxt, 30 M.L.R. 328; Lücke, 3 Adelaide L.Rev. 102.

81 As substituted by Companies Act 1989, s.130(4) for the former s.36(4) of Companies Act 1985, which had in its turn replaced European Communities Act 1972, s.9(2). The effect of s.36C(1) seems to be the same as that of the earlier provisions, in spite of slight changes in the wording.

82 *i.e.* one incorporated in the United Kingdom: *Rover International Ltd.* v. *Cannon Film Sales Ltd.* (*No. 3*) (1987) 3 B.C.C. 369, revsd. in part on other grounds [1989] 1 W.L.R. 912.

the contrary, as one made with the person purporting to act . . . as agent for" the company. Under this subsection, the agent can no longer escape liability merely on the ground that he entered into the contract "as agent"[83]; it is up to him to establish that there was an "agreement to the contrary" exonerating him from liability. The subsection puzzlingly concludes with the words "and he [*i.e.* the agent, in our examples] is personally liable on the contract accordingly." It seems these words merely spell out *one* consequence of the previous words and do not limit their operation: *i.e.* the agent may be *entitled* as well as liable.

At common law, a distinction was drawn between the cases so far considered where the agent purported to *act on behalf* of the unformed company, and those in which he said that the contract *actually was that* of the company and purported to affix the company's signature. In the latter case it was held that the resulting transaction was a complete nullity,[84] and that the agent could not acquire any rights under it.[85] But the distinction between the two situations has been criticised as highly technical[86] and one which businessmen were unlikely to appreciate. The provisions of section 36C(1) of the Companies Act 1985[87] therefore extend also to "a contract which purports to be made by a company" before it is formed. Such a contract has effect (subject to contrary agreement) "as one made with the person purporting to act for the company"; *e.g.* by the officer purporting to affix the company's signature. The concluding words of the subsection again refer only to the *liability* of such a person, but it seems that he may also be *entitled*. But the subsection does not apply where the contract purports to have been made by a company which had once existed and later been dissolved before the time of the putative contract. That contract is then a nullity and cannot be enforced either by the person purporting to have acted for the company or by a new company formed after the date of contracting to carry on the business of former company. The reason why section 36C(1) does not apply to such a case is that the agent purported to act for the old company rather than on behalf of the new company before it was formed.[88]

(vi) *Deeds*. At common law, an agent who executed a deed was personally liable on it even though the deed said that he had executed it on behalf of his principal.[89] It seems, however, that this rule has been reversed by statute.[90]

(vii) *Statute*. An agent may be personally liable by statute: for example, an administrative receiver appointed by debenture holders, who is deemed

[83] *Phonogram Ltd.* v. *Lane* [1982] Q.B. 938, 944; McMullen [1982] C.L.J. 47. And see *supra*, n. 81.
[84] *Cf. Rover International Ltd.* v. *Cannon Film Sales Ltd. (No. 3)* [1989] 1 W.L.R. 912—a position described in earlier proceedings in the same case as "a blot on English jurisprudence": [1987] 1 W.L.R. 670, 679.
[85] *Newborne* v. *Sensolid (Great Britain) Ltd.* [1954] 1 Q.B. 45.
[86] The defendants in Newborne's case escaped from a bad bargain on a technicality: see the comments of Lord Goddard C.J. reported in *The Times*, March 20, 1953. *Cf.* Lord Denning M.R. in *Phonogram Ltd.* v. *Lane* [1982] Q.B. 938, 944.
[87] *Supra*, n. 81.
[88] *Cotronic (UK) Ltd.* v. *Dezonie, The Times*, March 8, 1991.
[89] *Appleton* v. *Binks* (1804) 5 East 148.
[90] Powers of Attorney Act 1971, s.7(1), as amended by Law of Property (Miscellaneous Provisions) Act 1989, ss.1(8) and 4 and Scheds. 1 and 2.

to be the agent of the company,[91] is nevertheless personally liable on a contract into which he enters in carrying out his functions, except in so far as the contract otherwise provides.[92]

(c) ELECTION.[93] Where an agent is liable on the contract, one possible interpretation of the transaction is that he is solely liable, or, in other words, that the contract is simply between him and the third party and not between the third party and the principal at all.[94] Another possibility is that the agent and the principal are both liable under the contract.[95] This is certainly the position where the principal is undisclosed[96] and it may also be true where an agent incurs personal responsibility under a contract made on behalf of a disclosed principal.[97]

Where both principal and agent are liable on the contract, the third party may lose his right to sue one of them on the ground that he has "elected" to hold the other liable. This doctrine is most commonly discussed in relation to cases involving undisclosed principals, though there is some authority for applying it in all cases in which both principal and agent are liable on the contract.[98] The reasons for the doctrine are obscure: it is hard to see why a principal should be released merely because the third party has "elected" to hold the agent liable. It might be more satisfactory to hold that the principal should only be released if he had relied on the third party's conduct in such a way that he would be prejudiced by being subsequently held liable: for example, if the principal had adjusted his accounts with the agent in reliance on the third party's conduct.[99] Election to hold the principal liable may similarly be a ground for releasing the agent if it has led to action in reliance by the agent: for example, to his giving up rights against the principal. Where there has been no action in reliance on the third party's conduct, the courts do not in fact often apply the doctrine of election. What amounts to election is a question of fact; and in the decided cases the courts have been somewhat reluctant to find an election. Merely sending a bill to one of two parties liable has been held not to be an election[1]; and even the commencement of legal proceedings, though strong evidence of election,[2] is not necessarily conclusive. Thus in one case the third party was able to sue the principal although an overzealous clerk had, without the third party's real concurrence, filed a claim in the agent's bankruptcy.[3] In another case a third party was able to sue the agent, even though he had issued a writ against the principal, since he had

[91] Insolvency Act 1986, s.44(1)(*a*).
[92] *Ibid.* s.44(1)(*b*); for his right of indemnity, see *post*, p. 646.
[93] Reynolds, 86 L.Q.R. 318.
[94] *e.g. ante*, p. 636 at n. 67, *infra*, n. 94.
[95] See Reynolds, 85 L.Q.R. 92.
[96] *Ante*, pp. 631, 636.
[97] See *The Swan* [1968] 1 Lloyd's Rep. 5, 12; *Teheran-Europe Co.* v. *S. T. Belton (Tractors) Ltd.* [1968] 2 Q.B. 545, 558.
[98] *Debenham* v. *Perkins* (1925) 113 L.T. 252, 254. Other cases which have been cited to support the doctrine of election where the principal was disclosed may turn rather on the point that he was never liable under the contract at all because it was made solely with the agent: *e.g. Addison* v. *Gandasequi* (1812) 4 Taunt. 574; *Thomson* v. *Davenport* (1829) 9 B. & C. 78; *Calder* v. *Dobell* (1871) L.R. 6 C.P. 486.
[99] *Smethurst* v. *Mitchell* (1859) 1 E. & E. 622; *Davison* v. *Donaldson* (1882) 9 Q.B.D. 623.
[1] *Chesterton* v. *Barone* [1987] 1 E.G.L.R. 15.
[2] See *Scarf* v. *Jardine* (1882) 7 App.Cas. 345.
[3] *Curtis* v. *Williamson* (1874) L.R. 10 Q.B. 57.

also threatened to sue the agent, had never withdrawn this threat, and had not prosecuted his action against the principal.[4]

There was formerly a rule that, if the liability of principal and agent was joint, and the third party obtained judgment against one of them, he could not then sue the other, *even though the judgment was not satisfied*.[5] The rule has been abolished with respect to debts becoming due after January 1, 1979.[6] It follows that the mere obtaining of a judgment against principal or agent will not bar proceedings against the other; though it might, presumably, still amount to an "election."

(2) Under a collateral contract

There may be a collateral contract between agent and third party, quite distinct from the main contract between principal and third party. Thus when goods are sold by auction, the auctioneer undertakes certain obligations towards the buyer,[7] but they are not co-extensive with those of the seller. The seller undertakes that he has the right to sell, but the auctioneer only undertakes to give the buyer possession[8] so that he is not liable for the seller's lack of title.[9] The collateral contract may confer rights, as well as impose liabilities, on the agent. Thus an auctioneer can sue the buyer for the price of the things sold.[10]

(3) Implied warranty of authority

(a) NATURE OF LIABILITY. An agent who purports to act for a principal, knowing that he has no authority to do so, is liable to the third party in deceit, even if he believed that the principal would ratify.[11] It was at one time thought that if the agent honestly believed that he had authority when in fact he had none, he was under no liability.[12] But it was settled in *Collen* v. *Wright*[13] that the agent was in such circumstances liable for breach of an implied warranty that he had the authority which he purported to have. Thus in *Yonge* v. *Toynbee*[14] a solicitor was conducting litigation on behalf of a client who went mad. After this had happened but before the solicitor heard of it, he took further steps in the action. It was held that the other party to the litigation could recover from the solicitor the costs incurred by him in consequence of the solicitor's continuing the litigation after his authority to do so had come to an end because of his client's incapacity. It made

[4] *Clarkson Booker Ltd.* v. *Andjel* [1964] 2 Q.B. 775; *cf. The Scaplake* [1978] 2 Lloyd's Rep. 380.
[5] *Ante*, p. 513.
[6] Civil Liability (Contribution) Act 1978, s.3.
[7] *Woolfe* v. *Horne* (1877) 2 Q.B.D. 355.
[8] *Wood* v. *Baxter* (1883) 49 L.T. 45.
[9] *Benton* v. *Campbell, Parker & Co.* [1925] 2 K.B. 410.
[10] *Coppin* v. *Walker* (1816) 7 Taunt. 237; *cf. Wilson* v. *Pike* [1949] 1 K.B. 176; *Chelmsford Auctions Ltd.* v. *Poole* [1973] Q.B. 542.
[11] *Polhill* v. *Walter* (1832) 3 B. & Ad. 114.
[12] This was one basis of *Smout* v. *Ilbery* (1842) 10 M. & W. 1; see also *post*, p. 641. The view that fault is essential was still stated (wrongly) in *Salton* v. *New Beeston Cycle Co.* [1900] 1 Ch. 43.
[13] (1857) 8 E. & B. 647; approved by the House of Lords in *Starkey* v. *Bank of England* [1903] A.C. 114 and followed in *V/O Rasnoimport* v. *Guthrie & Co. Ltd.* [1966] 1 Lloyd's Rep. 1; Reynolds, 83 L.Q.R. 189.
[14] [1910] 1 K.B. 215; see *post*, p. 651, for survival of apparent authority in cases of the principal's insanity.

no difference that the solicitor had acted in good faith and with due diligence.

The rule sometimes operates harshly on the agent, and it might be more reasonable to imply a warranty that the agent should not negligently exceed his authority.[15] The agent's position has been alleviated by legislation, so that an agent who acts under a power of attorney incurs no liability if the power of attorney has without his knowledge been revoked.[16]

The agent does not warrant that the contract which he makes between principal and third party will be performed, but only that he has authority to make it. This has an important bearing on damages. If the third party could have obtained full satisfaction from the principal, had the contract been binding on him, the agent is liable to the same extent. But if the principal is insolvent, the third party cannot recover more from the agent than he would have actually got from the principal, had the agent had authority; and this may be very little, or nothing, according to the degree of the principal's insolvency.[17]

(b) RESTRICTIONS ON LIABILITY. An agent is not, or may not be, liable for breach of implied warranty of authority in the following cases:

(i) *Want of authority known to third party*. The agent is not liable where the third party knew, or must be taken to have known, that the agent had no authority.[18] The agent may also not be liable where he and the third party had equal means of knowing that the agent had no authority. In *Smout* v. *Ilbery*[19] a wife ordered goods from the plaintiff as agent for her husband, who, unknown to either party, had died in China before the order was placed. One reason[20] for holding that she was not liable to the plaintiff was that "the continuance of the life of the principal was . . . a fact equally within the knowledge of both contracting parties."[21] But although *Smout* v. *Ilbery* was argued, and discussed by the court, as if it were an action for breach of implied warranty of authority, the claim was in fact for goods sold and delivered, *i.e.* on the main contract of sale. Thus the case may not be authoritative on an agent's liability for breach of implied warranty.[22]

(ii) *Representation of law*. The agent is not liable where the representation of authority is one of law.[23] Since the construction of a document is a matter of law, an agent who misrepresents its meaning is not liable for breach of implied warranty. Thus if the director of a statutory corporation[24] which has, on the true construction of its incorporating statute, no borrowing powers, purports to borrow on its behalf, he is not liable for

[15] Negligence may lead to liability in damages at common law or under the Misrepresentation Act 1967; but the measure of such damages could differ from that for breach of implied warranty of authority: *cf. ante*, p. 322.
[16] Powers of Attorney Act 1971, s.5(1).
[17] *Post*, p. 828.
[18] *Jones* v. *Hope* (1880) 3 T.L.R. 247n.; *Lilly, Wilson & Co.* v. *Smales, Eeles & Co.* [1892] 1 Q.B. 456; *Halbot* v. *Lens* [1901] 1 Ch. 344.
[19] (1842) 10 M. & W. 1.
[20] For another reason see *ante*, p. 640, n. 12.
[21] At p. 11.
[22] See *Oliver* v. *Bank of England* [1901] 1 Ch. 652, 660.
[23] *Saffron Walden, etc. B.S.* v. *Rayner* (1880) 14 Ch.D. 406; for representations of law see *ante* ...
[24] Such corporations remain subject to the *ultra vires* doctrine: *ante*, p. 507.

breach of implied warranty.[25] But if such a corporation has a limited power to borrow up to, say, £10m., and the director purports to borrow on its behalf above that limit, he is liable for breach of implied warranty, for he has misrepresented a fact: namely, that the company has not yet borrowed £10m.[26] If a loan is made to a company incorporated under the Companies Acts by a lender dealing with the company in good faith, the contract of loan will be enforceable against the company even though the directors had, under the company's constitution, no power to enter into the contract.[27] The lender's claim for breach of warranty against the directors will therefore fail on the principle stated in the following paragraph. If the lender had *no* claim against the company because he had acted in bad faith, he would know that the loan was unauthorised. His claim for breach of warranty of authority would fail on the ground already stated, *viz.* that he knew of the agent's want of authority.[28]

(iii) *Principal liable on main contract.* An agent who has no actual authority is probably not liable for breach of implied warranty if the principal is liable to the third party on the ground of apparent or usual authority. In *Rainbow* v. *Howkins*[29] an auctioneer who had authority to sell a horse, subject to a reserve price, sold it without reserve. It was held that he was not liable for breach of implied warranty, as the buyer could have enforced the main contract against the seller on the ground that the auctioneer had apparent authority to sell without reserve.[30] Similarly, an agent would not be liable for breach of implied warranty if he did an unauthorised act which the principal later ratified.

(iv) *Crown agent.* An agent of the Crown is probably not liable for breach of implied warranty of authority. The assumption that such an agent impliedly warrants his authority is "utterly inconsistent with the facts."[31] In view of the enormous value of some government contracts, it would be extremely harsh to impose liability on a civil servant who in good faith and without negligence had misrepresented his authority.

3. Between Principal and Agent

(1) Rights of agent

(a) COMMISSION. Three questions arise in connection with an agent's right to commission.

(i) *Whether payable at all.* Whether an agent is entitled to any commission at all depends on the terms of the agreement between principal and agent. In *Taylor* v. *Brewer*[32] an agent was to receive "such commission . . . as should be deemed right" by the principal. It was held that he had no

[25] *Rashdall* v. *Ford* (1866) L.R. 2 Eq. 750.
[26] *Cherry* v. *Colonial Bank of Australasia* (1869) L.R. 3 P.C. 24; *Weeks* v. *Propert* (1873) L.R. 8 C.P. 427.
[27] Companies Act 1985, s.35A(1), as substituted by Companies Act 1989, s.108(1); *ante*, p. 506.
[28] *Supra*, at n. 18.
[29] [1904] 2 K.B. 322; criticised in *McManus* v. *Fortescue* [1907] 2 K.B. 1, 6, but that case can be explained on the ground that the third party knew of the agent's want of authority.
[30] *Cf. Mitsui & Co. Ltd.* v. *Marpo Industrial Ltd.* [1974] 1 Lloyd's Rep. 386, 393. *Quaere* whether this reasoning might have been applied in *Yonge* v. *Toynbee* [1910] 1 K.B. 215 (*ante*, p. 640). *Cf. post*, p. 651, n. 26.
[31] *Dunn* v. *Macdonald* [1897] 1 Q.B. 555, 558.
[32] (1813) 1 M. & S. 290.

legal right to commission. But where the agency is a commercial relationship the courts are reluctant to send the agent away empty-handed.[33] Thus if the agreement merely provides that the *amount* of commission is to be left to the principal's discretion, and he refuses to fix the amount, he may be liable to pay a reasonable sum.[34] On the other hand, the director of a company may agree to work for it "for such remuneration as the other directors may determine" on the understanding that he will receive nothing until the company has "got on its feet." If this never happens, he cannot claim a reasonable remuneration for his work.[35]

(ii) *When earned.* Commission is only payable in respect of a transaction which the agent was employed to bring about. In *Toulmin* v. *Millar*[36] the owner of a house employed an agent to find a tenant. The agent found a tenant, who later bought the house. His claim for commission on the sale failed, since he was only employed to let the house.

The transaction must also be caused by the agent's efforts. In *Tribe* v. *Taylor*[37] a principal employed an agent to raise a loan of money. The lender later entered into partnership with the principal and on this occasion made a further loan. The agent's claim for commission on this second loan failed, since it was not brought about by his efforts. It follows that, unless otherwise agreed,[38] the agent is not entitled to commission in respect of transactions which take place after the termination of the agency.[39] A contract may, however, provide that commission is *earned* when the agent secures the order (so that nothing more need be done by him to perfect his entitlement to it) but that it is only to *become payable* at some later stage, *e.g.* when the order is executed. In such a case the agent is entitled to commission on orders obtained before, though not executed till after, the termination of the agency.[40]

A principal may engage more than one agent: *e.g.* where an owner instructs two estate agents to find a purchaser for his house. Commission will then be due to the agent whose efforts have brought about the sale[41]; and where the efforts of both have contributed to this result, each may[42] be entitled to commission.[43]

The precise point of time at which the right to commission accrues depends on the terms of the contract between principal and agent. This question has given rise to great difficulty in cases concerning estate agents'

[33] See *Kofi Sunkersette Obu* v. *A. Strauss & Co. Ltd.* [1951] A.C. 243.
[34] *Bryant* v. *Flight* (1839) 5 M. & W. 114; *British Bank for Foreign Trade Ltd.* v. *Novinex Ltd.* [1949] 1 K.B. 623; *Powell* v. *Braun* [1954] 1 W.L.R. 401.
[35] *Re Richmond Gate Property Co. Ltd.* [1965] 1 W.L.R. 335.
[36] (1887) 12 App.Cas. 746. For a fuller report, see 58 L.T. 96.
[37] (1876) 1 C.P.D. 505; *cf. Debenham, Tewson & Chinnocks plc* v. *Rimington* [1989] 2 E.G.L.R. 26 (where, however, the agents were awarded a reasonable remuneration for their efforts).
[38] *Levy* v. *Goldhill* [1917] 2 Ch. 297; *cf. Brian Cooper & Co.* v. *Fairview Estates (Investments) Ltd.* [1987] 1 E.G.L.R. 18; *Robert Bruce & Partners* v. *Wynyard Developments* [1987] 1 E.G.L.R. 20; *Barnard Marcus & Co.* v. *Ashraf* [1988] 1 E.G.L.R. 7.
[39] *Crocker-Horlock* v. *B. Lang & Co. Ltd.* [1949] 1 All E.R. 526; *Bronester Ltd.* v. *Priddle* [1961] 1 W.L.R. 1294.
[40] *Sellers* v. *London Counties Newspapers* [1951] 1 K.B. 784.
[41] *John D. Wood & Co.* v. *Dantata* (1985) 275 E.G. 1278.
[42] Depending on the terms of the contract: see the authorities cited at nn. 45–51 *infra*.
[43] *Lordgate Properties* v. *Balcombe* (1985) 274 E.G. 493.

commission.[44] In *Luxor (Eastbourne) Ltd.* v. *Cooper*[45] the contract provided that the landowner should pay the estate agent his commission "on completion of sale." No sale took place because the owner refused to deal with the prospective purchaser introduced by the agent. It was held that the agent was not entitled to commission. Again, a contract for the payment of commission on the agent's "introducing a person ready, willing and able to purchase" does not entitle him to commission if the prospective purchaser makes a conditional offer subject to contract and satisfactory survey; or if he makes an offer and withdraws it before the vendor accepts[46]; or if he signs a contract which cannot be completed because of a defect in the vendor's title[47]; or if, before the prospective purchaser is introduced, the owner has entered into a binding contract to sell the property to a purchaser introduced by another agent.[48] Nor does a promise to pay commission "in the event of your introducing . . . a person prepared to enter into a contract" entitle the agent to commission where the person introduced only agrees to sign a contract which is subject to conditions.[49] Even a contract for the payment of commission "in the event of securing for you an offer" does not entitle the agent to commission unless a firm, unconditional offer is made.[50] But where the contract was to pay commission as soon as "any person introduced by us enters into a legally binding contract to purchase" it was held that the agent was entitled when such a contract was made although the vendor later rescinded it on account of the purchaser's breach.[51]

The law on this topic is far from satisfactory. On the one hand it is hard for the estate agent, who may have gone to much trouble and expense in advertising[52] a house and securing offers, to be deprived of all reward through the caprice of his client. On the other hand it is hard for the client to have to pay commission where it is not his fault that no sale takes place: the common understanding is that the commission should come out of the proceeds of sale. In this conflict of interests, the estate agents usually have the advantage of being able to submit a standard form of contract[53] to the client, who may accept its terms without question. The courts have to some extent redressed the balance in favour of the client. They may, in the first place, refuse to give effect to a stipulation for the payment of commission on the ground that it is too uncertain. This is one reason why the agent's

[44] Gower, 13 M.L.R. 490; Hardy-Ivamy (1951) C.L.P. 305.

[45] [1941] A.C. 108.

[46] *Dennis Reed Ltd.* v. *Goody* [1950] 2 K.B. 277; *Graham & Scott (Southgate) Ltd.* v. *Oxlade* [1950] 2 K.B. 257. Contrast *Christie Owen & Davies Ltd.* v. *Rapacioli* [1974] Q.B. 781 (where a vendor who withdrew after a firm offer had been made by the prospective purchaser was held liable for commission).

[47] *Dellafiora* v. *Lester* [1962] 1 W.L.R. 1208; *cf. Blake & Co.* v. *Sohn* [1969] 1 W.L.R. 1412.

[48] *A. A. Dickinson & Co.* v. *O'Leary* (1979) 254 E.G. 731.

[49] *A. L. Wilkinson Ltd.* v. *Brown* [1966] 1 W.L.R. 1914.

[50] *Bennett, Walden & Co.* v. *Wood* [1950] 2 All E.R. 134; *cf. Christie, Owen & Davies Ltd.* v. *Stockton* [1953] 1 W.L.R. 1353.

[51] *Scheggia* v. *Gradwell* [1963] 1 W.L.R. 1049; *cf. Midgeley Estates Ltd.* v. *Hand* [1952] 2 Q.B. 432; *Drewery & Drewery* v. *Ware-Lane* [1960] 1 W.L.R. 1204; *aliter* if the contract goes off because of the agent's misrepresentation: *Peter Long & Partners* v. *Burns* [1956] 1 W.L.R. 413, 1083.

[52] The agent can expressly stipulate for reimbursement of advertising expenses, as in *Bernard Thorpe & Partners* v. *Flannery* (1977) 244 E.G. 129.

[53] The Unfair Contract Terms Act 1977 does not affect the validity of the provisions discussed: they confer rights on the agent and do not exclude or restrict his liability.

claim failed in *Jaques* v. *Lloyd D. George & Partners*[54] where the agreement purported to make commission payable "should you [the agent] be instrumental in introducing a person willing to sign a document capable of becoming a binding contract." A second ground for the decision in that case was that the agent had said orally that commission would be payable "if we find a suitable purchaser and the deal goes through": this amounted to a misrepresentation as to the effect of the written agreement and prevented the agent from relying on it. The courts will also construe stipulations for commission very strictly against the agents.[55] But it remains possible for commission to be payable even though there is no sale. It would perhaps be better if the question when an estate agent was entitled to commission ceased to be regarded purely as one of construction. Only legislation could now achieve this result[56]; but the Estate Agents Act 1979 (which regulates the activities of estate agents) does not lay down any rules for this purpose. It merely requires the agent, before a client enters into an agency contract with him, to give the client "particulars of the circumstances in which the client will become liable to pay remuneration to the agent for carrying out estate agency work."[57]

Even where the agent is not entitled to commission, he may have other rights against the client. He may be entitled to damages where the sale goes off as a result of the client's fault.[58] If the sale goes off as a result of the purchaser's default, and the purchaser's deposit is forfeited to the client, it has been suggested that the agent should be entitled to a *quantum meruit* out of the sum so forfeited.[59]

(iii) *Whether principal must give agent a chance to earn commission.* If a principal employs an agent for a fixed period he is not, in general, bound to stay in business merely to enable the agent to earn his commission. In *Rhodes* v. *Forwood*[60] a colliery-owner employed an agent to sell his coal in Liverpool for seven years. It was held that he committed no breach of contract by selling his colliery and going out of business within seven years. But if a principal contracts to stay in business for the agent's benefit he is liable in damages if he fails to do so. This was the effect of the contract in *Turner* v. *Goldsmith*,[61] where the principal employed the agent for five years to obtain orders for shirts "manufactured or sold" by the principal. It was held that he was not justified in putting an end to the agency agreement simply because the factory in which he manufactured shirts was burnt

[54] [1968] 1 W.L.R. 625.

[55] *Ante*, p. 644 at nn. 45–51.

[56] Lord Denning's view in *Jaques* v. *Lloyd D. George, supra*, n. 54, at p. 629, that an unreasonable stipulation will not be enforced does not seem to have received any judicial support.

[57] s.18(2)(*a*).

[58] *Dennis Reed Ltd.* v. *Goody* [1950] 2 K.B. 277, 285; for this purpose the default must be wilful, and not merely inability to complete on account of a defect of title: *Blake & Co.* v. *Sohn* [1969] 1 W.L.R. 1412.

[59] *Boots* v. *E. Christopher & Co.* [1952] 1 K.B. 89, 99; *cf. Debenham Tewson & Chinnock plc* v. *Rimington* [1989] 2 E.G.L.R. 26. In the United States, there is authority for holding the prospective *purchaser* liable to the agent for commission where he defaults: *Ellsworth Dobbs Inc.* v. *Johnson* 236 A. 2d. 843 (1967). Contrast *The Manifest Lipkowy* [1989] 2 Lloyd's Rep. 138 (buyer's agent held to have no right to commission against defaulting seller.

[60] (1876) 1 App.Cas. 256; *cf. Lazarus* v. *Cairn Line Ltd.* (1912) 106 L.T. 378; *L. French & Co. Ltd.* v. *Leeston Shipping Co. Ltd.* [1922] 1 A.C. 451; Burrows, 31 M.L.R. 390.

[61] [1891] 1 Q.B. 544; *cf. Re Patent Floor Cloth Co.* (1872) 26 L.T. 467.

down. An agency agreement may, moreover, relate to a specific contract which is actually concluded between principal and third party. In such a case, a term may be implied into the agency agreement that the principal will not break *that contract* so as to deprive the agent of his commission. Thus in *Alpha Trading Ltd.* v. *Dunshaw-Patten*[62] an agent negotiated a contract for the sale of cement by the principal to the third party. The principal defaulted on that contract and settled his claim with the third party. It was held that he was, in addition, liable to the agent in damages for having prevented him from earning his commission. An agency agreement may also contain an express or implied promise not to deprive the agent of the chance of earning commission on future transactions.

A client who employs an estate agent to sell a house is, in general, under no liability if he sells it himself or through a second agent.[63] If the agent is appointed "sole agent" the client cannot sell through another agent, but he can still sell the house himself unless he gives the agent "the sole and exclusive right to sell."[64] A manufacturer's "sole agent" may simply be a buyer and not an agent at all.[65] The manufacturer's undertaking to sell all his output to such a "sole agent" would bind him not to dispose of any of it himself,[66] so long as it was not invalid for restraint of trade.[67]

(b) INDEMNITY. A principal must indemnify his agent against all liabilities reasonably incurred or discharged by him in the execution of his authority.[68] This right of indemnity exists not only where the agent incurs contractual liability, but also where he incurs tortious liability, *e.g.* as a result of selling a third person's property under the instructions of his principal.[69] The agent is not entitled to any indemnity in respect of an obviously illegal transaction,[70] nor in respect of a liability due to his own breach of duty.[71]

An agent may even be entitled to an indemnity in respect of payments which he was not legally obliged to make. In *Read* v. *Anderson*[72] an agent paid the amount of a bet which he had made on behalf of his principal, and lost. He was able to recover this payment, though, if it had not been made, the winner could not have sued for it. The actual decision has been reversed by the Gaming Act 1892,[73] but the principle would still apply to a case not concerned with a wagering contract.[74] It would, however, only entitle the agent to an indemnity if the payment, though not legally due, was made in the usual course of business, or possibly if it was made under a strong moral obligation.

[62] [1981] Q.B. 290; Carter, 45 M.L.R. 220; *cf. ante*, p. 59 and 645 at n. 58; *George Moundreas & Co. S.A.* v. *Navimpex Centrala Navala* [1985] 2 Lloyd's Rep. 515.
[63] *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108.
[64] *Bentall Horsley & Baldry* v. *Vicary* [1931] 1 K.B. 253; *Hampton & Sons Ltd.* v. *George* [1939] 3 All.E.R. 627.
[65] *Ante*, p. 609.
[66] *W. T. Lamb & Sons* v. *Goring Brick Co. Ltd.* [1932] 1 K.B. 710.
[67] *Ante*, pp. 416–420.
[68] *Thacker* v. *Hardy* (1878) 4 Q.B.D. 685; *Reynolds* v. *Smith* (1893) 9 T.L.R. 494; *cf.* Insolvency Act 1986, s.44(1)(c) and (3); contrast *Wilson* v. *Avec Audio Visual Equipment Ltd.* [1974] 1 Lloyd's Rep. 80 (payment made after termination of authority).
[69] *Adamson* v. *Jarvis* (1827) 4 Bing. 66.
[70] *Thacker* v. *Hardy*, *supra*, at p. 687.
[71] *cf. Lister* v. *Romford Ice & Cold Storage Co. Ltd.* [1957] A.C. 555; *ante*, p. 191.
[72] (1884) 13 Q.B.D. 779.
[73] *Ante*, p. 466.
[74] *Cf. Adams* v. *Morgan* [1924] 1 K.B. 751; 40 L.Q.R. 389.

(c) LIEN. An agent is (unless otherwise agreed)[75] entitled to a lien on all property of the principal which has come into his possession in the course of the agency. Every agent has a *particular* lien: that is, he can hold the property until the principal satisfies all claims of the agent arising out of the agency. An agent may by custom or by special contract also have a *general* lien, entitling him to hold the property until the principal satisfies all claims of the agent, whether they have arisen out of the agency or not.

(2) Duties of agent

(a) TO CARRY OUT HIS INSTRUCTIONS. An agent who is appointed under a contract binding him to carry out his instructions is obviously obliged to carry them out. He may be liable for failing to do so even if the contract which he was instructed to make would not, if made, have been a binding one.[76] An agent who acts gratuitously or under a unilateral contract[77] is not bound to do anything, but may be liable if he starts to perform and then leaves the task unfinished.

(b) TO ACT WITH DUE CARE AND SKILL. The degree of care and skill expected of an agent depends on the circumstances. A person who holds himself out as being skilled in some profession or trade[78] must show greater care and skill than one who merely offers to give what help he can as a friend. There is probably no rigid distinction between paid and gratuitous agents for this purpose. The fact that the agent is paid is taken into consideration, along with other circumstances, in determining the degree of the care and skill to be expected of him; but even a gratuitous agent may be liable in tort for acting negligently.[79]

(c) FIDUCIARY DUTY. An agent is not a trustee[80]; but since the principal places confidence in him he is under a fiduciary duty. The most important consequences of this are the following.

(i) *Conflict of interest and duty*. The agent must not put himself into a position where his interest and duty conflict.[81] He must not, for instance, sell his own goods to the principal when he is employed to buy: his interest as a seller is to get the highest possible price, whereas his duty as agent is to buy at the lowest possible price.[82] Similarly, he must not, if employed to sell, buy the principal's property for himself.[83] Again, he must not subject himself to conflicting duties by acting as agent for both principal and third party,[84] unless he fully discloses the position to each of these persons.[85]

[75] *Rolls Razor Ltd.* v. *Cox* [1967] 1 Q.B. 552.
[76] *Ante*, p. 465, n. 14.
[77] *Ante*, pp. 36, 138, 143; *The Zephyr* [1985] 2 Lloyd's Rep. 529, 538.
[78] *Ante*, p. 189.
[79] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, 495, 510, 526–527, 530, 538; approving *Wilkinson* v. *Coverdale* (1793) 1 Esp. 75; *ante*, p. 143.
[80] *Lister & Co.* v. *Stubbs* (1890) 45 Ch.D. 1.
[81] *Lamb* v. *Evans* [1893] 1 Ch. 218; *cf. Reading* v. *Att.-Gen.* [1951] A.C. 507.
[82] *Armstrong* v. *Jackson* [1917] 2 K.B. 822; *Tetley* v. *Shand* (1871) 25 L.T. 658; *Regier* v. *Campbell-Stuart* [1939] Ch. 766; *Guiness plc* v. *Saunders* [1990] 2 A.C 663; *cf.* Companies Act 1985, s.317.
[83] *McPherson* v. *Watt* (1877) 3 App.Cas. 254.
[84] *Fullwood* v. *Hurley* [1928] 1 K.B. 498, 502; *Anglo-African Merchants* v. *Bayley* [1970] 1 Q.B. 311, 322–323; *North & South Trust Co.* v. *Berkeley* [1971] 1 W.L.R. 470.
[85] See *Harrods Ltd.* v. *Lemon* [1931] 2 K.B. 157 (where full disclosure was made). *cf.* Estate Agents Act 1979, s.21 (imposing a statutory duty of disclosure on estate agents: the remedy is disqualification under s.3 of the Act).

A contract made in breach of this fiduciary duty is voidable at the option of the principal. The agent himself cannot avoid a transaction on the ground that it may conflict with his duties to his principal.[86]

(ii) *Bribes and secret profits.* The agent must not make a secret profit or take a bribe.[87] Thus he must not without the principal's consent[88] accept a commission from a third party.[89] Such a secret commission is called a "bribe" if the third party, at the time of paying it, knew that the payee was acting as agent for another. It is immaterial that the third party had no corrupt motive in making the payment.[90] The promise or payment of a bribe has drastic effects. The agent can (even if he has been appointed for a fixed period) be summarily dismissed[91]; he loses his right to commission on the tainted transaction[92]; and he must pay the bribe over to the principal, whether or not the latter has suffered loss.[93] If the bribe has not yet been paid, the agent cannot recover it from the third party, but the principal can do so.[94] The principal can further set the tainted transaction aside and retain the bribe, if it has been paid over to him by the agent[95]; if the bribe has not been paid, the principal can, as an alternative to claiming the bribe,[96] claim damages from the agent and the third party for the loss suffered as a result of the bribery.[97] Agent and third party may also incur criminal liability.[98] Where the secret profit is not a bribe, the third party is under no contractual or tortious liability. The agent is likewise not criminally liable[99] though he will be civilly liable to account for the payment to the principal.

[86] *Boulting* v. *A.C.C.T.* [1963] 2 Q.B. 606.
[87] Needham, 95 L.Q.R. 536.
[88] See *Anangel Atlas Compania Naviera S.A.* v. *Ishikawajima-Harima Heavy Industries Co.* [1990] 1 Lloyd's Rep. 167 (where this requirement was not satisfied as the principal knew of the payments).
[89] Or from the third party's agent acting within the scope of his authority: *The Ocean Frost* [1986] A.C. 717, 743 (affirmed without reference to this point *ibid.* 773.
[90] *Industries & General Mortgage Co.* v. *Lewis* [1949] 2 All E.R. 573.
[91] *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888) 39 Ch.D. 339. For the effect of such dismissal on the agent's rights to salary (or recompense for work actually done), see *post*, p. 685.
[92] *Solomon* v. *Pender* (1865) 3 H. & C. 639; *Andrews* v. *Ramsey* [1903] 2 K.B. 635 (but commission on other transactions remains payable if they are severable: *Nitedals Taenstickfabrik* v. *Bruster* [1906] 2 Ch. 671); *cf. Boston Deep Sea Fishing & Ice Co.* v. *Ansell, supra*, where the fact that the agent had made secret profits on two groups of contracts did not defeat a right to commission on a third group. However, the reason given for this result was not that the transactions were severable but that the right to commission accrued before dismissal; this reasoning is hard to reconcile with such cases as *Andrews* v. *Ramsey, supra*.
[93] *Reading* v. *Att.-Gen.* [1951] A.C. 507; Sealy [1963] C.L.J. 119, 128–136; *Islamic Republic of Iran Shipping Lines* v. *Denby, Financial Times*, October 28, 1986.
[94] *Harrington* v. *Victoria Graving Dock Co.* (1878) 3 Q.B.D. 549; *Industries & General Mortgage Co.* v. *Lewis, supra*, n. 90
[95] *Logicrose* v. *Southend United F.C.* [1988] 1 W.L.R. 1256; Jones, [1989] C.L.J. 22.
[96] *T. Mahesan S/O Thambiah* v. *Malaysian Government Officers' Housing Society* [1979] A.C. 374; disapproving dicta in *Salford Corp.* v. *Lever* [1891] 1 Q.B. 168; Tettenborn, 95 L.Q.R. 68.
[97] *Salford Corp.* v. *Lever* [1891] 1 Q.B. 168.
[98] Prevention of Corruption Acts 1906–1916; corrupt motive is necessary for this purpose.
[99] *R.* v. *Cullum* (1873) L.R. 2 C.C.R. 28. This decision has survived the Theft Act 1968; see s.5(3); Criminal Law Revision Committee, 8th Report (1966) Cmnd. 2977, para. 57(iii); *Attorney-General's Reference (No.1 of 1985)* [1986] Q.B. 491; *R.* v. *Cooke* [1986] A.C. 909, 934.

(d) PERSONAL PERFORMANCE. The general rule is that an agent cannot delegate the performance of his duties, unless the principal expressly or impliedly authorises him to appoint a sub-agent.[1] But an agent does not "delegate" by instructing his own employees to do various necessary acts in connection with the execution of his duty.

An agent may have authority to appoint a sub-agent and to make a contract between the sub-agent and the principal.[2] He may, alternatively, have authority to delegate, in the sense that he commits no breach of duty by performing through another, but have no authority to make a contract between principal and sub-agent.[3] In such a case the agent remains contractually liable to the principal if the sub-agent performs defectively,[4] while the sub-agent is under no contractual duty to the principal. The sub-agent may, however, be liable on other grounds, *e.g.* for breach of fiduciary duty or in tort if he negligently causes damage to the principal's property.[5] But it has been held that the sub-agent is not liable in tort merely for negligence in paying over the proceeds of the principal's property to an impostor[6] (so that the principal suffers financial loss); for such liability would be in practice indistinguishable from contractual liability and so inconsistent with the absence of a contractual relationship between principal and sub-agent.

(e) INDEMNITY. It is an implied term in a contract of employment that the employee will indemnify the employer against any liability to third parties incurred by reason of the employee's negligence in doing what he was employed to do.[7] A contract of agency will generally give rise to a similar liability to indemnify the principal.

4. Effects of Non-consensual Agency

It is a difficult and largely unsolved problem to what extent the effects of agency which have so far been discussed arise where the agency is not created by agreement between principal and agent, *e.g.* in cases of apparent and usual authority, and in cases of agency of necessity.

One effect of apparent or usual authority is to make the principal liable to the third party. But is the third party liable to the principal? When an agent acts within his apparent authority, the principal is liable because he is estopped from denying the agent's authority; but no similar estoppel need arise against the third party. If the principal wants to enforce the contract, he will usually ratify. But there may be some reason why he cannot do so,[8] and, if this is the case, it is far from clear that he could sue the third party simply because the third party can sue him. An agent who does an unauthorised act which binds his principal is clearly not entitled to commission,

[1] *e.g. John McCann & Co.* v. *Pow* [1974] 1 W.L.R. 1643.
[2] *De Bussche* v. *Alt* (1878) 8 Ch.D. 286.
[3] *New Zealand & Australian Land Co.* v. *Watson* (1881) 7 Q.B.D. 374; *Calico Printers' Assoc.* v. *Barclays Bank* (1931) 145 L.T. 51; *Royal Products Ltd.* v. *Midland Bank Ltd.* [1981] 2 Lloyd's Rep. 194, 198.
[4] *Powell & Thomas* v. *Evan Jones & Co.* [1905] 1 K.B. 11.
[5] *Meyerstein* v. *Eastern Agency* (1885) 1 T.L.R. 595; *cf. Stewart* v. *Reavell's Garage* [1952] 2 Q.B. 545.
[6] *Balsamo* v. *Medici* [1984] 1 W.L.R. 951
[7] *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* [1957] A.C. 555; contrast *Harvey* v. *R. G. O'Dell Ltd.* [1958] 2 Q.B. 78.
[8] *Ante*, pp. 628 *et seq.*; *e.g.* it may be too late to ratify.

but is probably subject to the usual liabilities if he accepts a bribe or makes a secret profit.[9] An agent of necessity often acquires rights of recompense or reimbursement against his principal, but it is less common for him to be able to create a contract between principal and third party. Thus it is impossible to make any general statement about the effects of non-consensual agency. The problems which may arise must be considered in the light of the considerations of policy which underlie each type of non-consensual agency.

SECTION 5. TERMINATION

Agency as a contract is determined by any event which terminates a contract,[10] and also in certain special ways. After discussing these, we shall discuss the effects of termination and finally consider some cases of irrevocable agency.

1. Modes of Termination

(1) Consensual agency

(a) NOTICE. An agent's authority can be determined by giving him notice: for instance, a wife's implied authority to pledge her husband's credit for necessary household expenses can be terminated in this way.[11] Where the agency is contractual it may be for a fixed term or specify a period of notice. If no term or period of notice is specified, the contract is determinable on reasonable notice.[12] A notice given in breach of contract is, in general,[13] nonetheless *effective*. It determines the agent's actual authority[14] and the relationship of principal and agent. Thus the agent cannot restrain the breach by injunction or obtain a declaration that his dismissal was void or claim his agreed remuneration in respect of periods after the wrongful termination.[15] His normal remedies are by way of damages for wrongful dismissal and a declaration that the dismissal was wrongful.[16] He may also be able to restrain by injunction the breach of a negative stipulation in the agency contract,[17] such as an undertaking by the principal not to appoint another agent to conduct the business in question.[18]

[9] *English* v. *Dedham Vale Properties Ltd.* [1978] 1 W.L.R. 93.
[10] *e.g.* by rescission, performance or frustration.
[11] *Ante*, p. 613.
[12] *Martin-Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.* [1955] 2 Q.B. 556; *cf. Re Spenborough U.D.C.'s Agreement* [1968] Ch. 139; *Richardson* v. *Koefod* [1969] 1 W.L.R. 1812, 1814. The "presumption of perpetual duration" in contracts specifying no time limit, stated in *Llanelly Ry. & Dock Co.* v. *L. & N.W. Ry.* (1875) L.R. 7 H.L. 550 (discussed by Carnegie, 85 L.Q.R. 392) does not apply to contracts of agency.
[13] For exceptions, see *post*, p. 911.
[14] *i.e.* the authority based on the wrongfully repudiated contract; as to apparent authority, usual authority and authority of necessity, see *post*, p. 651.
[15] *Denmark Productions Ltd.* v. *Boscobel Productions Ltd.* [1969] 1 Q.B. 699; *Roberts* v. *Elwells Engineering Co. Ltd.* [1972] 2 Q.B. 586; *Gunton* v. *London Borough of Richmond upon Thames* [1981] Ch. 448; *R.* v. *East Berkshire Health Authority, ex p. Walsh* [1985] Q.B. 152, 165; *Delaney* v. *Staples* [1991] 1 All E.R. 609, 616 *post*, p. 898; Freedland, 32 M.L.R. 314; Drake [1969] J.B.L. 113. Remuneration earned before the dismissal but payable thereafter could be claimed on the principle of *Sellers* v. *London County Newspapers* [1951] 1 K.B. 784.
[16] As to damages, see *Denmark Productions Ltd.* v. *Boscobel Productions Ltd.*, *supra;* as to declaration, see *Taylor* v. *N.U.S.* [1967] 1 W.L.R. 532.
[17] *Post*, pp. 919–920.
[18] *Decro-Wall International S.A.* v. *Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361.

(b) INCONSISTENT CONDUCT. It seems that agency can be determined without notice by conduct inconsistent with its continuance, *e.g.* if the principal sells the subject-matter of the agency.[19] Such conduct may again be a breach of contract but nevertheless puts an end to the agency.

(c) INSANITY. At common law,[20] agency is determined by the supervening insanity of principal or agent if the insanity is inconsistent with the consensual nature of agency. The principal's insanity terminates agency even though the agent has no notice of it.[21]

(d) DEATH. Death of principal or agent terminates agency, whether the survivor has notice of death or not.[22] Dissolution of a company has the same effect, and so has dissolution of a partnership, unless the contract is, on its true construction, with the partners constituting the firm from time to time.[23]

(e) BANKRUPTCY. The principal's bankruptcy terminates the agent's authority.[24] The bankruptcy of the agent terminates his authority if it makes him unfit to perform his duties.[25]

(2) Non-consensual agency

The events listed above terminate an agent's express or implied authority, but do not necessarily terminate apparent or usual authority, or authority of necessity. Notice to the agent obviously does not terminate apparent or usual authority: notice must be given to the third party to have this effect. Again, a principal's insanity terminates his agent's actual authority; but a third party who goes on dealing with the agent without notice of the principal's insanity may be able to sue the principal on the ground that the agent still had apparent authority.[26] In *Blades* v. *Free*[27] the death of the principal was held to terminate the implied authority of his mistress to pledge his credit. Apparent authority was not discussed and it is submitted that the principal's estate could now be held liable on the ground that this type of authority can only be terminated by notice to the third party.

Agency of necessity can sometimes be terminated by notice, *e.g.* a shipmaster's authority would be terminated, just as it could be prevented from arising, in this way. But notice would not terminate such authority where

[19] *E. P. Nelson & Co.* v. *Rolfe* [1950] 1 K.B. 139.
[20] For a statutory exception, see *post*, pp. 652–653.
[21] *Yonge* v. *Toynbee* [1910] 1 K.B. 215; *ante*, p. 640.
[22] *Campanari* v. *Woodburn* (1854) 15 C.B. 400; *Pool* v. *Pool* (1889) 58 L.J.P. 67.
[23] *Salton* v. *New Beeston Cycle Co.* [1900] 1 Ch. 43. And see *Brace* v. *Calder* [1895] 2 Q.B. 253; *Harold Fielding Ltd.* v. *Mansi* [1974] 1 All E.R. 1035; *Tunstall* v. *Condon* [1980] I.C.R. 786; *Briggs* v. *Oates* [1990] I.C.R. 473.
[24] *Elliott* v. *Turquand* (1881) 7 App.Cas. 79.
[25] *McCall* v. *Australian Meat Co. Ltd.* (1870) 19 W.R. 188.
[26] *Drew* v. *Nunn* (1879) 4 Q.B.D. 661; *Yonge* v. *Toynbee* [1910] 1 K.B. 215 is only concerned with the termination of the agent's *actual* authority and his consequent liability for breach of warranty of authority. Normally such liability would not arise if the third party could hold the principal liable on the footing that the agent still had *apparent* authority (*ante*, p. 642). The two cases can, perhaps, be distinguished on the ground that the acts done by the agent in *Yonge* v. *Toynbee* (taking steps in litigation) were acts which the insane principal had no capacity to do at all; while the contract in *Drew* v. *Nunn* was one which could validly be made with an insane principal in accordance with the rules stated at p. 501, *ante*. However that may be, the court did not in *Yonge* v. *Toynbee* consider the possibility that the principal might have been held liable on the footing of apparent authority.
[27] (1829) 9 B. & C. 167.