CHAPTER 39

Representation

I. Dependence on Municipal Doctrines

1. Three Main Doctrines

In surveying the present laws of representation in the world it is unfortunately still necessary to insert a few historical notes. The stages of evolution have left too many marks on this doctrine in numerous countries.

Originally, nowhere was it imagined that one person (Agent, A), by making a contract with a third party (Tertius, T), could create obligatory rights and duties between the third party and a principal (P). The official law of the Roman Empire, the classical Greek law, the Germanic laws, and the English law during the whole Middle Ages, were no exceptions. Needs of daily life, of course, required makeshift arrangements to approach the purposes of representation, surrogates sometimes coming very near to the legally barred result. In the seventeenth century, representation was finally recognized. Yet, as late as the nineteenth century some notable writers asserted that representation in creating obligations was logically impossible.¹ To make the strange phenomenon conceivable to the reluctant mind of the lawyers, various awkward attempts were made of which some shadows may be detected in the doctrines of conflicts law. Only at the cost of much pain was the simple truth learned that conclusion of a contract through an agent produces a threefold relationship, corresponding with the three persons involved. What happened

¹ Thöl, 1 Handelsrecht (ed. 6, 1879) 234.
to conflicts law when uncouth doctrines insisted on seeing the three-dimensional phenomenon in two dimensions, may be seen in the two theories dominating French and American laws, respectively, which are briefly described as follows.

(a) **Doctrine of mandate.** An old doctrine, widely maintained in Latin countries, is that of the two-sided "mandate." On one hand, article 1984 of the French Code states that:

"Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom."  

On the other hand, "mandate" is at the same time characterized as a contract (art. 1984 par. 2) creating obligations between principal and agent (arts. 1991, 1998). Broadly speaking, this is the same method of dealing with the problems of representation as that originally used in common law; the contract of "agency" between principal and agent at the same time includes the grant of powers to represent the principal. Speaking only of the case where the agent is to perform a legal transaction, "mandate" or "agency" and "representation" are conceived as one sole legal institution producing two relationships: one internal between the principal and the agent, the other external between the principal and the third party. The internal relationship extends to the conditions under which A, by contracting with T, causes legal effects for and against P. Consequently, these conditions are included in the law governing the contract of "mandate," which again is most frequently identified with the law of the place where the contract of "mandate" is completed.

(b) **Incident of main contract.** In an American decision

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2 In Louisiana, the Supreme Court, in one of its most drastic moves, has declared the words "in his name" of the analogous art. 2985 C. C. "not essential," so as to abandon the civil law definition and to adopt the common law concept of power of attorney. See Sentell v. Richardson (1947) 211 La. 288, 29 So. (2d) 852; Jones, Note, 7 La. L. Rev. (1948) 409.
of 1841, in order to find what law governs the effect of an authority, an elaborate attempt was made to answer the question, "what law determines whether the act (of the agent) constitutes a contract, with whom and to what effect." In other words, there is but one external relationship in which the power of the agent to affect the principal's legal situation is a mere incident. As the contract with the third party is governed according to the orthodox doctrine, by the law of the place where it is made, this also covers the agent's authority.

It has never been stated, but it appears almost certain to the present writer that the continuous American practice ultimately laid down in the Restatement comes from that decision. While in the first mentioned theory the *lex loci contractus* of the *agency* contract applies, in this view the *lex loci contractus* of the *third party contract* governs the extent of the agent's authority.

(c) *Modern theory.* The German, and to a certain degree the English, courts have recognized that the power of an agent to affect the rights and duties of the principal constitutes an independent institution and ought to have its own proper law, not necessarily coincident with those governing either of the two other relationships.

Notwithstanding other propositions advanced in this field, these three conflicts doctrines demonstrate their intimate connection with the development of representation in the municipal systems, or more exactly, in the general science of private law.

2. Agency (Mandate) and Authorization

The Roman *ius civile* did not progress to a true concept of representation in obligatory contracts, although business

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8 Carnegie v. Morrison (1841) 43 Mass. 381, 397 (issuance of a letter of credit by the agent of London bankers in Boston.)
life, protected by the praetors, furnished an increasing num­ber of auxiliary institutions and Justinian's compilation pre­
sented a treasury of scattered remedies. The Continental
commentators, sometimes unable to continue adequately the
ancient development, clung to the contract of mandatum,
which was recognized in classical and Byzantine times as
one of the four orthodox contracts concluded by consent and
enforced by corresponding civil actions. Discarding all the
more helpful possibilities that the Corpus Juris richly offered
from oriental and occidental practice, the doctrine preferred
the pattern of the classical mandatum. In Rome mandate
was a contract between principal (mandans) and agent (is
cui mandatur, later mandatarius) imposing on the agent
an obligation, originally gratuitous, to perform a factual
work or to conclude a legal transaction in the interest of
the mandator or of a third person. The agent, in making a
contract with another party in performance of his obligation
to the principal, necessarily entered alone into the contract
with the third party. The effects of this contract had to be
transferred within the internal relationship from the man­
datarius to the mandans. On this ancient foundation, the
main line of doctrinal tradition took its orientation toward
the agency contract rather than toward an institution of
representation. When, finally, on the Continent, during the
seventeenth century, as a result of various previous impulses,
representation by free persons was formally recognized in
law, the old formulations were nevertheless retained, and
the legal doctrine mirrored life in a curiously distorted
picture. Thus Puchta taught:

The effect of the mandate is partly the constitution of
representation with its effects, in this respect the mandate
is called authority, partly an obligation between the man­

4 RABEL, Grundzüge des Römischen Privatrechts (1915) 507-512, and in
subsequent articles, mostly followed in the literature.
dant and the mandatary from which the former acquires the *actio mandati directa*, the latter the *contraria*.\(^5\)

This doctrine was in force as late as 1871, when its critic, Laband, described it as follows:

Wherever someone acts instead of another upon his authority, a mandate is assumed to exist; the principal is called mandant and the agent mandatarius; agency, mandate, contract of authorization are words used synonymously by the lawyers. Those distinguishing more exactly, refer the term agency to the relationship between mandant and mandatarius, authority to the relationship between the mandant and the third party; agency indicates the internal, authority the external side of the relationship.\(^6\)

Conflicts law has experienced many strong influences of this conception. The writers, viewing representation from the angle of "mandate," without thinking assumed that the law governing this contract also determines whether and to what extent a transaction made by the agent in any country constitutes rights and duties for the principal. Hence, provided that the *main* contract is effective in all other respects, it binds the principal if the law governing the contract of agency (mandate) so determines.

The law thus specified was, moreover, schematically identified with the *lex loci contractus* of the mandate. Again, to ascertain the place of contracting of the mandate, the traditional opinion held the mandate to be completed at the place where the agent "accepts the charge," that is, in general, where the agent lives. But counterpropositions preferred the place where the mandant "receives the accep-

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\(^5\) *Puchta*, Pandekten § 323.

\(^6\) *Laband*, 10 Z. Handelsr. 183, 203 with respect to the German part of the literature.

\(^7\) *Casaregis*, Discursus de commercio, disc. 179, §§ 1, 2 n. 191 followed by *Hertius*, 1 Opuscula de Collis. Leg. 147; *Burge*, 3 Commentaries, pt. 2 ch. 20 p. 753; *Story* § 285; *Fiore* (ed. 2) §§ 129 ff.; *Despagnet* 894 § 300 (reserving contrary intention); *Rolin*, 3 Principes § 1390; *Wahl* in Baudry-Lacantinerie et Saignat 266 n. 1 § 500.
tance" from the agent, or where the mandant is established, which both come down to localizing it at the domicil of the principal.

This awkward theory has still some followers, especially in Italy and in Latin America.

Not until Laband's famous article from which I have just quoted, was it clearly understood that a sharp distinction is needed. (1) Principal and agent are connected by a relationship producing a right or a duty, or both, of the agent to act on account of the principal. This relationship may be based on a contract without consideration, as the Roman mandatum was a gratuitous promise. But in modern times it flows normally from such contracts as agency or partnership, or from an appointment of an administrator or guardian by a court, or directly from law. (2) Authority is the power of the agent to conclude a contract with a third party.

Employment, partnership, and the like may exist without authorization, and the latter may be conferred without imposing any contractual duty. Authority may exist contrary to internal directions by the principal to the agent; formalities may be prescribed only for the underlying contract or only for the authorization; death or revocation may terminate the former only, et cetera.

The distinction was fully carried out in the German doctrine and elaborated in the German Civil Code of 1896.

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8 7 Laurent 541 §§ 452 ff.
9 Asser-Rivier, Eléments § 97.
10 Probably for the same reason, the Draft submitted by Baron Nolde to the Institute for International Law, 33 Annuaire (1927) III 219, speaks merely of mandate as governed by the domiciliary law of the principal, and ignores the problem of authority.
11 Fedozzi-Ceretti 740 ff., with the only concession to the local law that it ought to safeguard its own imperative provisions.
Brazil: Espinola, 2 Lei Introd. 572 § 242; Serpa Lopes, 2 Lei Introd. 360.
13 BGB. §§ 164 ff. on "representation" and "authority" are included in the general part, separated from the sources of obligations.
and the subsequent literature. At present, it prevails in the modern currents everywhere in civil law countries, including the views of the leading French writers of private law and, although not too apparent, in most Latin-American legal literature. Numerous recent codes, among them the Italian Civil Code of 1942, have changed the former system and separated the doctrines of representation and agency.

This dualism so slowly perceived in the Continental doctrine was equally obscured in the late and difficult beginning of true representation in England. The doctrine of Principal and Agent started from that of Master and Servant and never could be entirely separated from it. Command and ratification were the first grounds for making the master liable for the contract or tort of the servant. Authority remained until recently such a ground, a condition of vicarious liability, and hence a part of the doctrine of agency rather than a clearly autonomous subject. In our times, however, despite some antiquated arrangements of encyclopedias and inappropriate definitions, English and American writers have been fully aware of the significance of

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14 France: Colin et Capitant 88, cf. 2 id. 704, 706; Demogue, 1 Obligations §§ 89-155; Esmein in Planiol et Ripert, 6 Traité Pratique 72 § 55.
16 The Italian C. C. (1865) arts. 1737-1763 is similarly replaced by C. C. (1942) arts. 1387-1400 on representation and authority, arts. 1703 ff. on mandate and related contracts.
17 Pollock & Maitland, 2 History of English Law (1911) 530; Holdsworth, 8 History of English Law (1922) 222, 227 f., 252 f. See also Holmes, Agency, in Collected Legal Papers (1920) at 96.
18 In such a modern English book as Cheshire and Fifoot, The Law of Contracts (1945) 294, agency and authority are still not called by their names but described as "the two aspects of the contract of agency." What we call authority is circuitously defined "as leading to privity between principal and third party."
authority. They even share in two theoretical developments of the German doctrine that bring the conceptual distinction to a climax.

The German Civil Code frankly admits that the principal may declare his grant of authority directly to the third party (§ 170), or by public notification (§ 171), and treats him in the same manner, if he embodies his authorization in a written instrument and the agent shows it to the third party (§ 172). These cases are plainly recognized in the American Restatement of Agency as "apparent authority" (§§ 8, 9).

Another characteristic feature of the modern system is that authorization is conceived as a unilateral act of the principal, in full contrast to the contract of agency. This construction, formulated in the German Civil Code, § 167, is likewise laid down in the Restatement of Agency. It has also not been considered too subtle by the English courts in which the point has been recently reaffirmed in a case of conflict between English and German law.

There is, of course, a fundamental difference between the two great systems. In civil law, representation requires that the agent should be authorized to act, and in fact should openly act, in the name of or at least on behalf of the principal, so as to make him from the beginning the exclusive party to the contract.

At common law, when an agent acts in his own name and

19 It is another question whether this act is "abstract," that is, may operate irrespective of the validity of the agency contract. National Socialist writers, in denying this effect, which is debatable, attacked the entire doctrine; for example, HERBERT MEYER, 2 Z. Ak. deutsches R. (1935) 53. But here Swiss law recognizes one of the rare cases of abstract acts; see ÖSER-SCHOENENBERGER art. 32 n. 27.

20 Restatement of Agency §§ 15, 16, 26 comment a. The separation is felt but not quite correctly expressed as late as in TIFFANY, Agency 9.

the other party does not know him to be an agent, the agent
becomes the party to the contract, but the "undisclosed"
principal may be sued by the third party, or may sue the
latter under certain conditions. Accordingly, the concept
of authorization must be defined broadly enough to cover
the manifestations by which the person in whose interest,
though not name, the act is to be done makes himself the
principal. It is essential for our purposes that authorization
be therefore understood in a double sense: the one for civil
law consisting in the agent's power to act in the name of
the person represented; and the other for common law con­
sisting in the agent's permission to act either in the prin­
cipal's name or as an undisclosed agent, or both. This con­
ception is no more difficult than the common law doctrine
itself, but precise terminology is not available to cover this
large ground.

Terminology. The Restatement of Agency chooses to
speak vaguely of the power "to affect the legal relations
of the principal" (§ 7). If authorization be defined as assent
of the principal that the agent should contract in his name
"or on his behalf," this identification would go counter to
the common significance of "on behalf" as indicating dis­
closed principals, named and unnamed, or only the latter. Nor is "on account" a distinctive term, although it would
admirably designate the representation of interests, since
the word seems to be employed in the Agency Restatement
sometimes also as a synonym of the term, "for a disclosed
principal."

22 See GOODHART and HAMSON, "Undisclosed Principals in Contract," 4
Cambr. L. J. (1932) 320, conclusion at 356.
23 Thus BRESLAUER, 50 Jurid. Rev. (1938) at 308 n. 7.
24 See, e.g., BOWSTEAD, Agency art. 27, "in whose name or on whose behalf,"
with respect to ratification which is not permitted to an undisclosed principal.
25 See, e.g., §§ 7 comment d, 85 (1) and illustration 1; cf. § 4. In § 199,
however, "on his account" and "on account of the principal" expressly mean
an undisclosed principal.
For international purposes, we had better revert to an old terminology as follows:

Acting in the interest of another person ("on account" of a principal in a proper sense) may be either:

1. direct (open) representation, i.e., acting "on behalf" of a principal (disclosed agency), namely, either (a) in the name of another person, or (b) on behalf of whom it may concern (unnamed agency; Restatement: partially disclosed principal); or:

2. indirect representation (representation of interest but not of right), i.e., acting in the agent's own name for an undisclosed principal.

In order to embrace all these institutions, authority broadly defined may be termed as a power to act "on account" of the principal, which seems identical with the power "to affect his legal situation." 26

Conflicts law must adopt the distinction between agency and authorization. Authority originates or survives if its law so disposes, irrespective of an accompanying agency contract following its own law. An American food concern may send an employee to Guatemala to buy bananas, and his power to bind the firm may be construed under the law of that state. This, however, is no reason why his salary and the right of the firm to dismiss him should not be subject to American law.

Conflicts rules, on the other hand, may readily combine direct and indirect representation referring both to a national law which may or may not recognize the common law doctrine.

26 Agency Restatement § 7: "Authority is the power of the agent to affect the legal relations of the principal . . ."; Conflicts Restatement § 345 "on account."
3. Fiction of Identity

Other sources of theoretical mistakes arose with the various primitive attempts to lay down the principle of open (disclosed) representation. The slogan, *qui facit per alium, est perinde ac si faciet per se ipsum*, much used in the medieval development of the English master and servant doctrine, came to embody the idea that the represented and the representing persons are deemed to be one, in a merger of personalities. That this fiction dominated the history of agency in England, is not an exact proposition according to prevailing opinion. But a distinct tradition of writers on conflicts law on the Continent took inspiration from some remarks of Casaregis. This jurist, who died in 1728, explained the transfer of property in goods sent from a seller to the buyer through delivery to a carrier, by the following construction (for which there were ancient analogies): The seller, a "correspondent" of the buyer, is his commissioner. In complying with the buyer's order, he assumes a double personality, since in consigning the goods he conveys the property from himself as vendor to himself as the buyer's agent. This dictum was read together with the same author's doctrine—which Story qualified as "so reasonable in itself,"—that the principal's order for purchase plus the ultimate consent by the agent form the contract *in loco in quo et ipse (mandatarius) et venditor existunt*.

28 The sources collected by Holmes, History of Agency, in 3 Select Essays in Anglo-American Legal History (1909) 368. In the prevailing opinion do not support Holmes' hypothesis that modern agency doctrine in general, and the rules concerning the undisclosed principal in particular, originated from the fiction of identity. See Pollock and Maitland, 2 History of English Law (1911) 532 n. 1; Young B. Smith, "Frolic and Detour," 23 Col. L. Rev. (1923) 444, at 452 and cited authors; Würdinger, Geschichte der Stellvertretung (agency) in England (1933) 241.
29 Casaregis, Discursus de commercio, disc. 38 § 51 (ed. 1737) p. 126.
30 Disc. 179 § 10 (ed. 1737) p. 192; Story § 285.
In a long chain of subsequent writings these figures of speech led to the conception that the principal, represented by half of the agent's double personality, appears himself in the conclusion of the main contract. Among the various consequences derived therefrom in municipal law, it was contended by some outstanding Romanists that the contract with the third party is exclusively and immediately concluded by the principal. In this radical view, all requisites of consent to the main contract, such as sanity of mind, serious intention, freedom from coercion, fraud, and misrepresentation, the significance of knowledge in such matters as warranty of title and quality, were exclusively referred to the principal. However, in other versions, less emphasis was laid on the principal's part, and in some the fiction had even a reversed effect of making the principal disappear behind his representative.

In 1828, the English chancellor, Lord Lyndhurst, adopted the obvious application of the fiction to conflicts law, by stating that:

"If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them."

Story found the same view accepted in two Louisiana decisions. It has been approved in the case of Milliken v. Pratt and often since. The French and Italian literature followed largely the same trend. The person of the principal merges, se confond, with that of the agent,—this

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31 Dernburg, Heidelberger Kritische Zeitschrift as cited by Laband, infra n. 32; Unger, System des österreichischen allgemeinen Privatrechts (ed. 3, 1868) 136.
32 Contra: Laband, 10 Z. Handelsr. 225 f.; Thöl, Handelsrecht (ed. 6, 1879) 236 § 70.
34 Mr. Justice Mathews in Whiston v. Stodder (1820) 8 Mart. (La.) 95, 134; Malpica v. McKown (1830) 1 La. 248, 254; Story § 285.
35 (1878) 125 Mass. 374.
36 See 3 Fiore § 1150.
dogma appears as late as in the work of André Weiss.\(^{37}\) In his words, a French principal acting through an agent in Belgium, is considered "to be on the Belgian soil."\(^{38}\)

These fictions are, like so many others, artificial and fallacious. As Bar pointed out,\(^{39}\) how can the contract be regarded as made by the principal at the place of the agent, if the agent nevertheless decides whether and on what terms the contract should be made? And moreover, with the logic employed in this traditional approach, why should we not reach the opposite conclusion, viz., that the contract is deemed made at the principal's real domicil?

As to legislative policy, of course, the overemphasis laid on the external side of agency is certainly preferable to the overstressing of the internal side of which the mandate theory is guilty. But in many respects it is important not to forget that both principal and agent contribute to the effect of representation. Although they do so by no means on the same plane in concurrent acts of consent to the main contract, as was sometimes contended,\(^{40}\) they cooperate, the one by conferring authority and the other by making the contract.

The merger theory was rather detrimental to the early formation of the American conflicts rules. As an illustration, we may remember the Louisiana case of 1830, in which a shipmaster entered into a contract in Mexico and the Mexican law affirmed his implied authority and made the shipowner personally liable, contrary to the law of Louisiana where the owner was domiciled. The court applied the Mexi-

\(^{37}\) Weiss, 4 Traité 373.

\(^{38}\) Exactly to the same effect, Valéry § 658: by charging his employee to go to France to represent him, the master transports himself in some manner to that country under guise of this representative; hence the contract is formed as though the master were present.

\(^{39}\) 2 Bar § 268. Among recent Latin-American writers, 2 Restrepo Hernández §§ 1294-6 has warned against the fiction.

\(^{40}\) See Hupka, Vollmacht 36 against Mitteis, Die Lehre von der Stellvertretung 109, 182.
can law as the law of the place where the contract with the third party was made, simply because if the owner had been personally present and had concluded that contract, the measure of his liability would be determined under Mexican law.\textsuperscript{41} That the principal was not present and did not make the contract, was forgotten under the spell of the fiction.\textsuperscript{42}

In \textit{Milliken v. Pratt},\textsuperscript{43} a case considered as leading in conflict of laws concerning both the place of contracting and agency, the fiction was extended in a particularly offensive way. A married woman who could not bind herself under her domiciliary law of Massachusetts, delivered a note to her husband, guaranteeing the debt. The husband sent it by mail to his creditor in Maine. The Massachusetts court, eliminating its own law, held her liable under the law of Maine, because "if the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person or sends an agent, or writes a letter across the boundary line between the two states." This makes the place of the recipient of a letter a place of acting by agent, treating the mail as agent although it is only a messenger. And in all the innumerable situations covered by this broad definition, the party giving a declaration is considered as quasi-present at a place where either the recipient is present or the contract is deemed to be made. The real question had nothing to do with agency\textsuperscript{44} and leads to the debatable question of the place at which a declaration by letter is localized, in order to satisfy the devious test of the place of contracting. The true issue involved the

\textsuperscript{41} Arayo v. Currell (1830) 1 La. 528, 20 Am. Dec. 286, 289.
\textsuperscript{42} See the pointed refutation by Story in Pope v. Nickerson (1844) 3 Story, U. S. Circ. Ct. Reports 465, 480.
\textsuperscript{43} (1878) 125 Mass. 374.
\textsuperscript{44} Bell v. Packard (1879) 69 Me. 105, 31 Am. Rep. 251 presents a skillful argument and leaves the mail out of it. The contrary decision in Hauck Clothing Co. v. Sophia Sharpe (1900) 83 Mo. App. 385 is equally tendentious.
territorial scope of the laws restricting or freeing the capacity of married women.\textsuperscript{46}

4. The Developed Systems

In many older and some quite recent treatises of conflicts law, all there is of agency is the eternal question where a contract through an agent is made. The question is idle, since the agent alone concludes the contract.

The true problems of voluntary representation arise from its tripartite structure. In sum, we have to distinguish the contract (if any) creating obligatory rights and duties between principal and agent; the unilateral authorization by the principal empowering the agent to make a contract (or other transaction) with a third person; and this contract itself.

It may also be recalled that civil law only considers acting on behalf of a principal as representation, and accordingly requires the principal’s authorization to act on his behalf. In the best elaborated doctrine, the agent must make it clear to the third person that he acts not only in the principal’s interest but to make him immediately the exclusive party.\textsuperscript{46} Where the agency is undisclosed, the contract exclusively regards the agent personally, and only the actions arising between agent and principal provide the means of transferring the effects of the external transaction to the principal. There are, however, important exceptions. Particularly in the case of a commission agent, claims acquired by the agent in his own name are deemed to belong to the principal as between these two persons or their creditors. The cautious provision of the German Commercial Code (§ 392 paragraph 2) to this effect has been hesitatively extended by judicial practice to other cases. Scandinavian

\textsuperscript{45} See Ch. 40 ns. 46 f. and ns. 97 f.; cf. 46 Mich. L. Rev. (1948) at 634.
\textsuperscript{46} German BGB. § 164 par. 2.
law has definitely gone (to some extent) beyond the German pattern. These modifications of the logical antithesis between representation in law and representation in interest have given rise to a suggestive comparison with the common law doctrine which confers rights and duties on an undisclosed principal. The two systems starting from opposed principles admit exceptions that diminish the contrast. They retain, however, their basically different outlooks and both leave notable gaps. Thus, they lend importance to the question what law governs.

In the international field, the opposition of the systems was once incisively diminished by the common law rules presuming that the agent of a foreign, nonresident, or absent principal is not authorized to act on behalf of the principal, and that he is exclusively personally bound when acting in his own name. The usages of trade on which these distinctions were based, have disappeared.

A remarkable divergence exists also in the types of intermediaries developed in commercial life and then constituted special legal institutions. In common law, the terms, agent, factor, broker, and commission agent have retained much of their original colloquial meaning with overlapping connotations. They are not identical with any nomenclature of a civil law country, in most of which the language equally fluctuates between commercial routine and legal exactitude. In Germany, such expressions as Prokurist, Handlungsbevollmächtigter, Kommissionär, Agent, and Filialleiter, are most rigidly legal. The language of conflicts law ought to


be broad enough to embrace all such categories in a few rules.

II. ANGLO-AMERICAN FORMULATIONS OF THE CONFLICTS RULES

1. Dicey

The two rules of Dicey have been so often cited in the English courts that they must be mentioned, though with utmost disapproval. Rule 179 predicates under the headline of "Contract of Agency" that:

"An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created."

Does this section deal with authority or the contract of agency? With respect to the latter, the application of the general subsidiary criterion of lex loci contractus would be entirely wrong. However, the notes refer to the American cases dealing with the powers of a shipmaster and a partner.

On the other hand, Rule 180 (c) says that:

"When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such other country, i.e., where the contract is made (lex loci contractus)."

If this rule, as it seems on its face, refers to the law governing the main contract, it may again be criticized insofar as it calls for the lex loci contractus. But in the notes and comment, Dicey evidently includes authority, and he presumes an intention of the parties that the agent should have authority in each country in accordance with the laws thereof. Thus, authority, totally missing in the text of the rules, is obscurely interpolated in both comments. Moreover, the
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attempt to proclaim the *lex loci contractus* for these matters is not supported by the English cases. 49

2. Restatement

The Restatement of the Law of Conflict of Laws, under the topic of "creation of a contract" establishes one rule (§ 342) concerning the obligations of a principal and his agent as between themselves, 50 unfortunately calling for "the law of the place where the agreement was made." Authority is separated and treated in three bewildering rules, which can only be approximately understood in connection with the Restatement of Agency. The latter Restatement, in an original attempt to break down the powers of agents into categories, distinguishes four classes:

(1) "authority," short-named, created by manifestation of the principal to the agent; 51

(2) "apparent authority," created by manifestation of the principal to the third party; 52

(3) estoppel, which on condition that the third party "changes his position," produces an action for him against the principal; 53 and

(4) unnamed "powers" arising in various situations, 54 which, for instance, include the acts incidental to, or usual, or necessary for conducting authorized transactions. 55

While these classes, despite certain doubts, may be helpful for analytical purposes in municipal law, it is astonishing

49 On this point of the criticism, see BRESLAUER, 50 Jurid. Rev., *supra* n. 23, at 303. See now the thorough criticism by the editors of DICEY (ed. 6, 1949), with criticisms partially similar to mine.

50 At the same time, the sections in question deal with partnership. It has been submitted before (Vol. II, Ch. 21) that this treatment is wrong insofar as the personal law of partnerships is ignored. Of course, partnership is also one of many sources of representation.

51 §§ 7, 26.

52 §§ 8, 12 comment a, 27.

53 §§ 31 (1) comment a, 159 comment e.

54 §§ 12 comment b refers in particular to §§ 161-176, 194-202.

55 §§ 161, 194.
that the Conflicts Restatement should undertake to lay down three different rules for the three groups (1), (2), and (4), omitting (3). We shall look into the confusing results of this effort.\textsuperscript{56} But we may take encouragement from the neat separation of authority from agency.

3. Encyclopedias

The various comments on the conflicts rules in practitioners' works, are unenlightening and full of contradictions. They ought to be radically reformed.

III. The Three Subject Matters of Conflicts Law

The right categories of operating facts to be subjected to conflicts rules are easily found. The three distinguishable relationships among the three persons involved in agency require three independent conflicts rules, although, of course, they by no means necessarily have to refer to different laws.

1. Authority

The law or laws governing the power of an agent to act on behalf, or on account, respectively, of the principal have to comprehend creation, extent, modification, and termination of the power. Authorization by ratification must also be included, and all shades of manifestations to the third party or the public through which authority is either really constituted or only apparently but reliably asserted.\textsuperscript{57} There

\textsuperscript{56} \textit{Infra} Ch. 40 p. 159.

\textsuperscript{57} The subject of what in common law was shortly called implied authority, has been much discussed in the German doctrine. A full and critical report on the not too happy formulations of the German Civil Code and the literature is to be found in Themistocles D. Macris, of Athens, Greece, Die Stillschweigende Vollmachtserteilung (Marburg 1941).

is no sense in differentiating in conflicts law powers conferred by the principal on the agent directly, or by declaration or conduct on which the third party relies. For, in any case where any relations between the principal and third parties should arise, the third party may only rely on some manifestation, i.e., declaration, act, real or apparent acquiescence, not of the agent but of the principal.

2. Underlying Relationship

The internal situation between principal and agent, whether based on a contract or not, extends to all their obligations toward each other, including the duty of the agent to follow the instructions of the principal and to notify all third persons concerned of modifications or termination of his authority. It would seem that also the fiduciary position of agents and the control by the principal to which they are subjected in American law, general as they appear, are incidents of the underlying relationships, such as employment and partnership, rather than of the authority.

3. External Relationship

Where an agent concludes a contract with a third party, or makes or receives a unilateral legal statement, in the principal's name, such transaction is the basis for all relationships imaginable between the principal or the agent on the one hand, and the third party on the other.

Due to the extraordinary confusion in this field, the assertion has sometimes been ventured in the United States that a contract made by an authorized agent is governed by the law of the agent's domicil or of the place where the

58 Following the common law terminology but distinguishing as we do, FALCONBRIDGE, Conflict of Laws 368, speaks of "authority," in opposition to "power"; this corresponds in the case of disclosed agency with what we call the internal instructions given within the underlying relationship.

59 See Restatement of Agency §§ 13, 14.
agent exercises his authority.\textsuperscript{60} This is true of authorization but not of the third party contract. Nor is this contract subject to the \textit{lex loci contractus},\textsuperscript{61} any more than other agreements. The governing law is simply determined according to the type or individual character of the contract itself, sale, bailment, loan, et cetera.

The law governing the “main” or “third party” contract (or other transaction), whatever law it may be, decides whether a party to it can be represented by another person at all, or under what circumstances; whether, for instance, authorization must be given by a special act or in a written document\textsuperscript{62} and whether the agent must make known his authority to the third party.\textsuperscript{63} The particular common law doctrine regarding the rights to sue and be sued when the principal is not disclosed in the contract, also belongs to the effects of the main contract, which has not always been understood.\textsuperscript{64}

The same is also true, however, with regard to the effects of the contract, if the agent’s authority is missing or insufficient.\textsuperscript{65} In this respect again confusion is frequent.\textsuperscript{66} The American courts are not in similar danger because they

\textsuperscript{60} 15 C. J. S. 886, Conflict of Laws § 11 n. 28.
\textsuperscript{61} 2 C. J. S. 1038, Agency § 8 n. 83.
\textsuperscript{62} With regard to the formal requirements, this is a delicate question; see \textit{infra} Ch. 40, III, 1, pp. 169-170.
\textsuperscript{63} 9 Répert. 21 No. 6.
\textsuperscript{64} In Maspons v. Mildred, Goyeneche & Co. (1882) 9 Q. B. D. 530, 539 the Appeal Court correctly declared that the nature and extent of the authority given by a domiciled Spaniard to another in Havana, Cuba, was to be ascertained under the Spanish law there in force but, when this was ascertained, the law governing the third party contract determined “the persons who can sue and can be sued on that contract.” Wrongly, BRESLAUER, 50 Jurid. Rev. (1938) 301, 309, 310 f. assumes that the latter question is the very question of authority, that therefore the decision is inconsistent and that it proclaims the law of the place of the main contract for authority. Also DICEY 725 is not quite clear on the classification.
\textsuperscript{65} See RABEL, 3 Z. ausl. PR. (1929) 824 (against 2 ZITELMANN 217, 1 FRANKENSTEIN 591) followed by RAAPE, D. IPR. 275, II. See also FEODORO-CERETI 751.
\textsuperscript{66} Thus, RG., 76 Seuff. Arch. 2 is confused. See RABEL, supra n. 65, at 823. The tortuous ways of the doctrine since Casaregis are still reported by such authors as ALCORTA, 3 Der. Int. Priv. 113.
apply the law of the main contract to every problem of authority. Correct classification is assured, if we remember that in the best opinion liability of an unauthorized agent to the other party is based on his fraudulent or innocent misrepresentation of authority. Common law has led the way in this construction, which is expressly formulated in the provisions of the Restatement of Agency on implied warranty of authority and has been consistently recognized by the English courts.

We shall deal next with authority (Chapter 40) and subsequently with the most typical contracts between principals and agents. The transaction with a third party with all its just-mentioned incidents, is determined by its own nature.

67 HUPKA, Die Haftung des Vertreters ohne Vertretungsmacht (1903) on the basis of comparative research. With meticulous consequence KOSTERS advocates with the Dutch H. R. (April 4, 1913) W. 9494 the law of the place where the agent warrants authority, to govern the liability of the agent to the third party. 68 § 329.

68 See Brit. Russian Gazette and Trade Outlook, Ltd. v. Ass. Newspaper, Ltd. etc. [1933] 2 K. B. 616—C. A.