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RATIFICATION BY AN UNDISCLOSED PRINCIPAL

OMNIS *ratihabitio retrotrahitur, et mandato priori aequiparatur*. Every ratification relates back, and is equivalent to a prior authority, is the second great maxim of agency, and has been said to be as well established and as simple of application as the first and fundamental one, *qui facit per alium, facit per se*. It was as well recognized in the Roman law, as it is in the common law. Whether the maxim *ratihabitio mandato comparatur* of the Roman lawyers and the early English cases is identical in meaning with the dogma *ratihabitio mandato aequiparatur* of Lord Coke, and of all English cases since, may admit of question.¹ Although both *aequiparatur* and *comparatur* are susceptible of meaning "to be placed on an equality," it seems clear that the former is a much stronger word, suggesting a complete equivalence, while the latter suggests rather a comparison based on a close likeness.

However this may be, there are at least four questions of ratification that have caused no little difficulty in recent years, and that have been the subject of lively controversy. They all suggest that ratification is scarcely to be considered in every way equivalent to prior authorization, that *comparatur* is more apt than *aequiparatur*. These four questions are, the ratification of a forgery, the effect of ratification when there are rights of third persons intervening between the doing of the unauthorized act by the pretended agent and its adoption by the would-be principal, the right of the principal by ratification to bind the third party, and the power to ratify an unauthorized act done by an agent in his own name, *intending*, but not *avowing*, that his act is on behalf of a principal. The last of these is the occasion for this paper.

Three cases, recently decided, contain very emphatic statements of the rule. One asserts that when an agent without authority does an act which he intends to be for a principal, but does not disclose the fact that he has any principal, the undisclosed principal may nevertheless adopt and ratify the unauthorized act. It is enough if the act was done by one who was in fact acting as an agent, whether he so represented himself or not.²

¹ *Dempsey v. Chambers*, 154 Mass. 330, 26 Am. St. R. 249; Dig. 46, 3, 12, sec. 4; 43, 16, 1, sec. 14; Y. B. 30 Ed. I. 128; Co. Lit. 207a; 4 Inst. 317; Bracton, de Legibus, F. 171b. See also 9 Harv. L. R. 60; 35 Am. L. R. 864.

² *Hayward v. Langmaid*, 181 Mass. 426, 63 N. E. Rep. 912. See 1 Michigan Law Review, 319.

Another holds that no consent of one (the principal) to step into the place of another (the agent), who has assumed to make a contract with a third person in his own name, would establish a privity of contract between such principal and third person unless based upon a new consideration.¹

The third case was decided by a vote of two to one in the Queen's Bench Division in favor of the first rule.² On appeal to the House of Lords this decision was reversed by a unanimous vote.³ It is worthy of remark that no one of these cases makes any reference to either of the others. So far as appears the conclusions were reached independently, and in the final opinions in the highest courts, in every case, all the judges concurred. Here then we have two of the three judges of the Queen's Bench Division and all the judges of the supreme court of Massachusetts, including Holmes, C. J., reaching one conclusion, while all the judges of the supreme court of Michigan and all the law judges sitting in the House of Lords come to the opposite conclusion. The subject seems at least to be open for discussion. We shall undertake an examination, in order, of the English cases, the American cases, and the text-books on this point, after which the way will be clear in the light of this learning to attempt to find some principles that should be decisive in settling the rule of law on this question.

The case of *Durant v. Roberts*, *supra*, affords us a very full statement, by A. L. Smith, L. J. on the one side, and by Collins, L. J. and Romer, L. J. on the other, of the English cases, from the year books to the present time.⁴ Smith, L. J. finds in them a constant stream of authority for the rule that the agent must *avow* his representative character, or his principal cannot ratify the act done in the agent's own name. Collins, L. J. after an exhaustive review, reaches the conclusion that the exact facts were not pres-

¹ *Ferris v. Snow et al.* (1902), — Mich. —, 90 N. W. R. 850. See I Michigan Law Review 140.

² *Durant v. Roberts*, [1900] 1 Q. B. 629.

³ *Keighley v. Durant*, [1901] A. C. 240.

⁴ Y. B. 30 Edw. I. 1, 128, 7 Henry IV. 34, 35, pl. 1; Anon, Godbolt, 109; Buller's Case, 1 Leon. 50; Fuller and Trimwell's Case, 2 Leon. 215; Hull v. Pickersgill, 1 Brod. & B. 282 (1819); Soames v. Spencer, 1 Dowl. & R. 32 (1822); Saunderson v. Griffiths, 8 Dowl. & R. 643 (1826); Vere v. Ashby, 10 Barn. & C. 288 (1829); Foster v. Bates, 12 Mees. & W. 226 (1843); Wilson v. Tumman, 6 Man. & Gr. 236 (1843); Buron v. Denman, 2 Ex. 167 (1848); Bird v. Brown, 4 Ex. 786 (1850); Ridgway v. Wharton, 6 H. L. Cas. 238 (1857); Woolen v. Wright, 1 Hurl. & C. 554 (1862); Watson v. Swann, 11 C. B. N. S. 756 (1862); Ancona v. Marks, 7 Hurl. & N. 686 (1862); Lord v. Lee (1868), L. R. 3 Q. B. 404; Falcke v. Ins. Co. 34 Ch. D. 234 (1886).

ent in any of the cases, that hence all the opinions relied on by Smith, L. J. are *obiter*, but rightly interpreted they are nevertheless not inconsistent with his view that, if the agent *intends* to act on behalf of his principal, it is enough, even though he does not openly avow his agency. The principal may ratify the act of one who was in fact, though not so declaring, acting for and in behalf of some principal. Further he considers that some of the opinions amount to a direct declaration of that rule. Smith, L. J., in answer, professes himself unable to regard as *dicta* the unchallenged statements in the opinions from the Year Books to the present time.

While we may with Smith, L. J. agree that what was *obiter* when uttered becomes authority when long recognized as such, yet the danger of taking for accurate statement of a rule of law chance remarks dropped by judges, who evidently did not have in mind such a state of facts as that to which the rule is to be applied, is apparent from an examination of the English cases above cited. Again and again ratification is spoken of as possible where the agent "assumes to act," or "professes to act," or "purports to act," for another, or "acts in the name of," or "on behalf of," or "by authority of," another, or "acts as agent." That this is true no one doubts. But rarely do the cases say that ratification is impossible unless he so assumes, professes, or purports to act; and when such limitations are laid down, it is clear in every instance they have no reference to a case where the agent contracted in his own name, but intended the act for a principal; they are, at least technically, mere *dicta*, usually quotations from Story on Agency,¹ or some earlier writer.

The early English cases are all trespass, the trespasser attempting to defend on the ground that he did it as bailiff of another. "Can he so father his misdemeanors on another? He cannot; for once he was a trespasser, and his intent was manifest."² So Coke,³ says: "He that receiveth a trespassse and agreeth to a trespassse after it be done, is no trespasser, unless the trespassse was done *to his use*, or *for his benefit*, and then his agreement subsequent amounteth to a commandment, for in that case, '*omnis ratihabitio retrotrahitur, et mandato equiparatur*,'" a doctrine which all accept. This statement of Coke is quoted with approval in *Hull v. Pickersgill*, *supra*, where certain creditors of a bankrupt seized his goods. They seized them, in fact, for the benefit of the creditors

¹ Sec. 251a.

² Anon, Godbolt, 109

³ 4 Inst. 317.

generally, though it does not appear that they professed so to do. A subsequent acquiescence by the assignees was held equivalent to a command in the first instance.

Holroyd, J. is claimed as authority by both Smith, L. J. and Collins, L. J., affording apt illustration of the danger of attaching too much weight to chance remarks of judges. In *Saunderson v. Griffiths*, *supra*, he says that "if the agent, when he made the agreement, had *professed* to have authority to act for the husband, ratification would have been recognition of the authority which the agent assumed to have when he made the agreement." In *Soames v. Spencer*, *supra*, the same judge says, "*omne actum ab agendis intentione est judicandum*," laying stress, thinks Collins, L. J. on the *intention*. The first case really involved the question of varying a written contract by parol evidence, and it was clear there was no *intent* even on the part of the agent to make the husband a party to the lease. In the second case, one of two joint owners sold their goods without the authority of the other, and, so far as appears, without indicating any intention to act for any one but himself. The other joint owner was allowed to ratify the sale.

A comparison of the opinions of Parke, J., afterwards Parke, B., and finally Lord Wensleydale, is instructive. In 1829, as Parke, J., he said in *Vere v. Ashby*, *supra*, "the rule as to ratification applies only to the acts of one who professes to act as the agent of the person who afterwards ratifies." This Smith, L. J., takes to be a deliberate declaration by this eminent judge of the rule that an unauthorized agent must avow his agency or a principal cannot ratify his act. This finds confirmation in the fact that the same judge as Lord Wensleydale, almost thirty years later, used similar language in *Ridgway v. Wharton*, *supra*. Collins, L. J., draws different conclusions. He points out that the partner who indorsed could not have *intended* to indorse on behalf of a person who was not then a member of the firm. Hence it is straining the meaning to say that the learned judge meant by "profess" to indicate more than that the agent had no *intention*, did not in fact take upon himself, to contract on behalf of a stranger. The language of the same judge in *Hull v. Pickersgill*, *supra*, already referred to, gives color to this view, while his opinion as Parke, B. in *Foster v. Bates*, *supra*, leaves little room for doubt that he had not intended so to limit the rule of ratification. He there says, "The sale was made by a person who intended to act as agent for a person, whoever he might happen to be, who legally represented the intestate's estate; and

it was ratified by the plaintiff after he became administrator; and when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command." In this case the agent sold goods after the death of his principal, of which neither he nor the third person had learned. The administrator was allowed to ratify the contract. Smith, L. J. prefers the report of this case in 1 Dowl. & L. 400; 7 Jur. 1093, but it is difficult to see how this helps him. The stress is laid on the *meaning*, the *intention* of the agent. Whether the opinion in *Bird v. Brown*, *supra*, is to be assigned to Parke, B. may be doubtful. The exchequer reports attribute it to Rolfe, B., the *Law Journal*,¹ to Parke, B. while the *Jurist*² assigns it to Pollock, C. B. Lord Macnaghten facetiously remarks³ that "no one gives it to the fourth judge; but then there were only three sets of reports current at the time." At all events, Parke, B. seems to have agreed with the opinion, which says, "if an unauthorized agent makes a contract on behalf of a principal, and he afterward recognize and adopt it, it amounts to the same thing as though originally made by the authority of the principal, and on ratification the condition is what it was meant to be. Or, if the third person did not believe the agent was acting for a principal, his condition is not altered by ratification, for he may sue the agent, and he has the same equities against the principal, if sued by him, which he would have had against the agent." Smith, L. J., in citing the case, omits without remark the troublesome expression, "or if the third person did not believe the agent was acting for a principal." That clearly implies that ratification is possible even though the agency may not have been avowed by the agent.

In *Bird v. Brown*, *supra*, the question really decided was that ratification could not cut off the intervening rights of third persons.

In *Buron v. Denman*, *supra*, Parke, B., said: "If an act be done by a person as agent, it is in general immaterial whether the authority be given prior or subsequent to the act." Finally, in *Ridgway v. Wharton*, *supra*, the same judge as Lord Wensleydale, made the remark that "authority may be previous or subsequent. If a man professing to act for another, makes a contract for him, and authority is afterward given by that other, the authority subsequently given is equivalent to authority given before, according to the old maxim, '*Omnis ratihabitio retrotrahitur, et mandato aequiparatur.*'"

¹ 19 L. J. (N. S.) Ex. 154.

² 14 Jur. 132.

³ [1901] A. C. 248.

That authority may be subsequently given for the act of one *professing* to act for another, no one will question. Whether the learned Lord intended to say it could not be subsequently conferred if the agent merely *intended* to act for another is far from clear. If we press the meaning of the word "profess" so far, surely the meaning of the maxim *Omnis ratihabito*, etc., must be pressed to its limit also. But Lord Wensleydale certainly did not think every ratification was fully equivalent to prior authority, as is evident from his action in *Bird v. Brown*, just noted. Prior authority would in that case have cut off the rights of the other creditors; ratification did not. If then in the use of the Latin maxim he had in mind the facts of the case before him, as seems quite clear, is it not probable the same facts were in mind when he made the first part of the same statement? In *Ridgway v. Wharton*, Lord Wensleydale was clear there never was any authority, that there was very trifling evidence, if any at all, of ratification, and that there was no estoppel. On a review of these cases is it not obvious that it is dangerous to draw any conclusions as to the opinion, on this particular question involved in *Roberts v. Durant*, of Parke, J., Parke, B., or Lord Wensleydale?

Perhaps the strongest case is the leading case of *Wilson v. Tumman*, *supra*, decided in 1843, the same year as *Foster v. Bates*, *supra*. The case really decided that the sheriff's officers, who were originally trespassers by taking the goods of the plaintiffs, were not the agents of Tumman, but of a public officer obeying a mandate from the court. If they seize the wrong person's goods, a subsequent declaration by Tumman, approving the taking, cannot alter the character of the original taking, and make it a wrongful taking by Tumman. If he had directed the sheriff to take the goods, even under a valid writ, he would have been liable as a trespasser. Here again we find the statement that an "act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him." This is undoubtedly so. But does it exactly express the limits of the rule, and did the court intend to hold that an act done by an agent not openly assuming, though secretly intending, to act for another, could not be ratified by such other? Probably these peculiar facts were not in the minds of the judges at all. They were not involved in the case.

The other cases cited, as Cotton, L. J., has so clearly shown,¹ especially at page 658, all contain general expressions like those already mentioned, but the facts of none of them involve this question. Their influence, therefore, is merely cumulative, as showing the form in which the rule usually found expression. It is probably true that most of the judges did not think of allowing ratification unless the agent had avowed his representative character. It is too much to say that there was in any of them an authoritative statement of such a rule, and indications are not wanting that more than once judges thought the rule was large enough to include cases where the unauthorized agent merely *meant* to act for a principal, but contracted in his own name.²

The last English case to note is that of *Falcke v. Insurance Co.*³ One Emanuel, to keep alive his equity of redemption in some insurance policies assigned by him to secure a debt, paid the premiums. He brought suit to recover these back, on the ground that the assignee had ratified his act by accepting the benefits. The court held that Emanuel had paid the premiums to protect his own equity of redemption. He not only did not profess, but did not intend to act for another. He was acting for himself entirely. In the course of the opinion, Bowen, L. J., made some sweeping statements. "Nothing is more vague than the way in which the word adoption is used in arguments at law, and sometimes ambiguous language used about adoption is imported into arguments about ratification. There is no such thing in law as adopting or ratifying anything, except where there is the sanctioning of an act professedly done on your behalf, in such a sense as to make you liable for it. A man can ratify that which purports to be done for him, but he cannot ratify a thing which purports to be done for somebody else. Ratification only takes effect in law from its being equivalent to previous authority, and a previous authority is an incident which only arises in the relation of principal and agent. There have been many attempts to make people liable by what is called adoption of a contract, or some other act, which never purported to be made, or done, on their behalf, and such attempts have failed." This has no uncertain sound. It leaves no room for doubt that this very learned judge meant to say that the agent must have openly avowed that he was an agent, or ratification cannot take effect. But

¹ [1900] 1 Q. B. 630.

² See also *Walker v. Hunter*, 2 C. B. 324 (1845).

³ 34 Ch. Div. 234.

he fails to make any distinction between adoption and ratification. As to adoption, at least, it seems reasonable that any two parties should be permitted to *adopt* the terms of any contract, by whomsoever drawn up, if they find those terms express the conditions of the contract they wish to make. But that is not ratification, it does not relate back, but dates from the time of the adoption, and must be supported by a consideration between the principals.¹ If this be a proper distinction between adoption and ratification, and if the judge, having in mind the facts of a case to which his remarks might well be applied, has neglected to notice this distinction, it is at least possible that his view of ratification may not be taken as a full statement of the law as to conditions which were not present in the case which he was considering. But one other opinion in that case said anything about ratification, and Bowen, L. J., seems to have been the only one struck with the thought that the question of ratification was of any importance in considering the facts of the case before them. Clearly there was no ratification in that case on any doctrine that has been advanced in any case.

This brings the inquiry to the case of *Durant v. Roberts*,² and *Keighley v. Durant*.² Roberts was authorized by Keighley, Masted & Co. to buy wheat at a certain price. He bought of Durant & Co. at a higher price, contracting in his own name, but intending it to be on the joint account of himself and Keighley, Masted & Co. That intention was not disclosed to Durant. Subsequently, Keighley, Masted & Co. agreed to take the wheat jointly with Roberts, but failed to do so. Durant sold at a loss, and sued for damages. From a judgment in plaintiff's favor in the Queen's Bench Division, Keighley, Masted & Co. appealed to the House of Lords, where the decision was reversed.

On the one hand it was urged that "there is a stream of authority, all tending in one direction, which it is impossible to gainsay or resist, and which has been treated as conclusive by text-writers of acknowledged eminence both in England and America." Quoting from the opinion of Tindal, C. J., in *Wilson v. Tunman*, *supra*, Lord Macnaghten added, "It would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intention locked up in his own breast; for it cannot be said that a person who so conducts himself does assume to act for

¹ *McArthur v. Times Printing Co.*, 48 Minn. 319, 31 Am. St. R. 653; *Hamlin v. Sears*, 82 N. Y. 327; *Ferris v. Snow*, — Mich. —, 90 N. W. R. 850.

² [1900] 1 Q. B. 630.

³ [1901] A. C. 240.

anybody but himself. . . . Civil obligations are not to be created by, or founded upon, undisclosed intentions. . . . 'It is common learning,' said Brian, C. J., 'that the thought of a man is not triable, for the Devil has not knowledge of man's thoughts.'"¹ Other Lords rendered opinions in which it was urged that the whole doctrine of ratification is that the ultimate ratifier is already in appearance the contractor, and that by ratifying he holds as done for him what already bore, purported or professed to be, done for him. There seems no room for ratification till the credit of another than the agent has been pledged to the third party. How the agent is marked out is little matter, but an agent he must be known to be, and as agent he must act. Allowing an undisclosed principal to sue and be sued on a contract made in his behalf is an anomaly, and to extend it to the case of a person who accepts the benefit of an undisclosed intention of a party to a contract, would be adding another anomaly to the law. To give weight to such an undisclosed intention would be to open wide a doorway to fraud and deception. It would enable one person to make a contract between two others, by creating a principal and saying what his own undisclosed intentions were, and these could not be tested.

Just what deception and fraud might result, what objection there is to the addition of this anomaly to the already anomalous, but satisfactory, doctrine of ratification, why the agent must, when he acts, be known to be agent, we are left to discover, with less chance for success than is open to the Devil in discovering the intentions locked in the breast of the agent after he has unlocked them and disclosed them to the principal and the third party. Of course until such disclosure neither the law nor the Devil can try a man's thoughts, and of course until such disclosure ratification can not take place. The question is whether there is any valid objection to allowing the ratification, after such disclosure of intentions, to relate back to the time when the act was done.

That there is no such objection Collins L. J. urges at length. Concluding that there has been no actual decision of the question, he thinks it should be settled by reason and common sense. The law permits an undisclosed principal to sue and be sued on a contract made on his behalf by an agent. One who ratifies a contract made by the agent in his own name, but intended to be on behalf of the principal, is in the same position as any other undisclosed principal. Whether the intention of the contractor be

¹ Y. B. 17 Ed. IV. 2 pl. 2.

expressed or not, its existence is mere matter of evidence, and once it is proved the conclusion ought to follow.

Such, then, is the state of the question in England. It has been settled there by the last authority, and by a unanimous vote, that except by estoppel there can be no ratification by an undisclosed principal, of an unauthorized act of an agent. What is the state of the law in the United States?

A statement of the rule,¹ which is cited by several American cases, appears in the American and English Encyclopedia of Law.¹ "Ratification by the principal can only be effectual between the parties when the act was done by the agent on account of his principal, not on his own account, or on account of some third person. Where one buys in his own name *for himself*, another cannot adopt the transaction as principal." Some of the English cases already considered are cited to support the doctrine, and in addition a list of cases in several of the states of this country as well as one federal case. It is not certain that the rule has in mind the case of an agent who intends to act for a principal but does not disclose his agency, though, unexplained, it seems to exclude such a case from the domain of ratification. But the cases cited² support the rule no better than the English cases before *Keighley v. Durant*, and in one case at least, Massachusetts, the decisions are clearly the other way. Few if any involve the question of *Durant v. Roberts*.

In *Johnson v. Johnson* it was decided that a ratification of an affidavit in suing out a writ of attachment made by an agent *who assumed to be such* did not satisfy the code, which required that the relation of principal and agent should exist at the time the affidavit is filed. The present question was not involved, though there were some remarks as to the necessity that the thing done should have been done in a representative character. The court said these and other remarks, and some cases cited, were not in point except to illustrate that there must be some mutuality between the ratifying principal and the third party, else the ratification will not have retrospective effect as against the interest of such third party. This

¹ 1 Am. & Eng. Enc. Law (2d ed.) 1188.

² *Johnson v. Johnson*, 31 Fed. Rep. 700; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237; *Grund v. Van Vleck*, 69 Ill. 478; *Collins v. Waggoner*, 1 Ill. 51; *Beveridge v. Rawson*, 51 Ill. 504; *Crowder v. Reed*, 80 Ind. 1; *Meiners v. Munson*, 53 Ind. 138; *Richardson v. Payne*, 114 Mass. 429; *Mitchell v. Minn. Fire Assoc.*, 48 Minn. 278; *Hammerslough v. Cheatham*, 84 Mo. 13; *Collins v. Suau*, 7 Robt. (N. Y.) 623; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; *Kichner v. Schmid*, 7 Misc. R. (N. Y.) 455; *Commercial Bank v. Jones*, 18 Tex. 811.

view is equally in accord with *Durant v. Roberts* and *Keighley v. Durant*. The California case of *Lumber Co. v. Krug* seems to have been the usual case of the undisclosed principal, the court saying that the husband had authority to contract for the wife, though he did not disclose the agency to the plaintiff. The court, however, refused to interfere with the instruction of the lower court that the ratification is effectual only when the act is done by a person professedly acting as agent of the party sought to be charged as principal. No reasons are given and the only authority cited which touches this point is this same rule in the Am. & Eng. Encyc. of Law for which the California case is cited as authority.

The Illinois cases merely decide that the subsequent approval by a third person of a trespass by an officer serving a process will not affect such third person unless the act was originally done "in his name, or for his use." The sheriff was the agent of the state not of the individual. Further the view of the Illinois courts on ratification of a forgery seems inconsistent with the rule. Of this more in another place.

The Indiana courts take position against the ratification of a forgery, and it is not surprising to find the Indiana court quoting with approval Story on Agency.¹ The actual point decided however in *Crowder v. Reed, supra*, was that if Patton was the agent of appellee, and not of appellant, the latter could not ratify his acts, a statement with which all must agree.

The Massachusetts case of *Richardson v. Payne* decided that a sheriff acted officially, and not as the agent of any one. He had no intention to act as agent, and even expressly "declared" that he acted because the pretended principal had neglected to act. Massachusetts is clearly for the rule of *Durant v. Roberts*. In *Schendel v. Stevenson*² it appeared that the defendant put one Palfrey in charge of a hotel as his agent. Plaintiff sold him goods supposing him to be the proprietor. It was held that it was not necessary that Palfrey should represent himself as agent to make defendant liable. If in fact he was the agent of defendant, it was immaterial whether he so represented himself or not. The case might have been decided on the doctrine of estoppel, though estoppel was not mentioned in the opinion.

*Sartell v. Frost*³ was a case where defendants took the stock of a bankrupt, leaving him in control as agent with no authority to buy on credit. Plaintiffs sold to the agent on credit supposing him

¹ Story on Agency, § 251a.

² 153 Mass. 351.

³ 122 Mass. 184.

to be principal. The court held that defendants by accepting benefits had ratified the unauthorized act of the agent who bought in his own name. Here again the doctrine of estoppel might have been invoked. The grounds of the decision in *Ford v. Lineham*¹ are not clear, though the case has been cited to this point. Apparently the father did not previously authorize, such was his testimony, but he was held liable because of later acquiescence. In *New England, etc. Co. v. Rockport Granite Co.*, a contract under seal was made in which another party later took an interest. Holmes, J. held that this last company was not a party to the main contract "when made, and if when made, the contract was not made on behalf of said company, it could not become a party to it by ratification. The meaning of ratification is, and always has been, the adoption of an act purporting to be done, or, at least, done in fact, on behalf of the ratifier. In order to bind the said company a new and substituted contract would be necessary."

Here is the distinction. The act must be one purporting to be done, or, at least, *done in fact*, on behalf of the ratifier. That this fact need not be known to the third person becomes clear from the very recent case of *Hayward v. Langmaid*.² Morton, J. delivered the opinion, in which Holmes, C. J. seems to have concurred. The facts are not stated. The judge in the lower court had refused an instruction asked for "that the meaning of ratification in law is the adoption of an act which has been done by one purporting, or assuming, to act as agent." In overruling the exception to the refusal so to charge the court said, "it is evident, we think, that the instruction was understood (and rightly) by the presiding justice to mean that it was necessary to a ratification that the act ratified should have been done by one who represented, or held himself out, as agent in respect to the matter to which it related. But such is not the law. It is necessary, in order to a ratification, that the act should have been done by one who was in fact acting as an agent, but is not necessary that he should have been understood to be such by the party with whom he was dealing." No reasons are given, and only Massachusetts authorities are cited. But the decision seems in accord with the statement, to be noticed later, in *Greenfield Bank v. Crafts*,⁴ that a contract "may be ratified where there was no pretence of agency."

¹ 146 Mass. 283.

² 149 Mass. 381.

³ 181 Mass. 426, 63 N. E. R. 912.

⁴ 4 Allen (Mass.) 447.

In contrast with *Hayward v. Langmaid*, *supra*, may be cited the very recent Michigan case of *Ferris v. Snow*.¹ Ferris and wife joined in a land contract under seal. It was in the name of the Ferrisses and Snow, though two others, Woodruff and Jackson, joined Snow in keeping up the interest for a time, and may have been real parties to the purchase from the first, though their names did not appear upon the contract. If they were not interested *ab initio*, it is of course a case where strangers to a contract at the time it is made seek to secure its benefits by becoming really, though not nominally, parties to it. But whatever the actual facts, the court said that "aside from the question of whether a contract under seal can be ratified by acts in pais, or by one not mentioned in it, the theory of ratification is that the principal adopts the action of his agent. No consent of C to step into the shoes of A, who has assumed to make a contract on his own behalf, would establish privity of contract between B and C, unless based upon a new consideration. It is different when A assumes to contract with B on behalf of C. In such case the contract is not changed in terms, but is vitalized by a ratification of the unauthorized act of the agent." Query, does the court mean to say that if A make a contract with B nominally *on his own behalf*, but *intending* it for the benefit of C, then by ratification it would not be possible to establish privity of contract between B and C unless based upon a new consideration?

To return to the American authorities cited in the Am. and Eng. Encyc. of Law,² the Minnesota case evidently approves the doctrine of the Encyclopedia, since it cites it. It also cites the still stronger statement of Story on Agency.³ There was, however, no evidence in the case of approval by the principal of the acts of the agent, but steadfast repudiation instead. Neither did the evidence "tend to show that the agents were authorized, or pretended to be authorized, to act for defendant company." The Missouri case cited was like this in that no assent by the principal at any time was shown. The court said "if in point of law and fact Crandall was not an agent at all of defendant, then there could be no ratification of an act never authorized, *Ferry v. Taylor*"⁴ (a case deciding that a forgery could not be ratified). The doctrine quoted cannot of course be disputed under such facts. *Herd v. Bank*⁵ was not cited, but it uses language more nearly to the point. It was held that where

¹ — Mich. —, 90 N. W. R. 850.

² 1 Am. and Eng. Enc. Law (2d ed.) 1188.

³ § 251 a.

⁴ 33 Mo. 323.

⁵ 66 Mo. App. 643.

a purchase was made by an agent for himself, not for a principal, there could be a confirmation, on a consideration, but not ratification. But a later Missouri case¹ holds that a forgery may be ratified, and also announces the seemingly inconsistent doctrine that ratification is impossible, if the act was not done by one *professing* to be an agent. A forger certainly makes no such profession.

The New York case of *Collins v. Swan*, *supra*, related to the ratification of acts done before the principal, a corporation, was in existence. In the decision it was said that "no act is capable of ratification which was not performed by the agent as agent and in behalf of the principal."² The case of *Vanderbilt v. Richmond Turnpike Co.*, *supra*, was not in point at all. *Kirchner v. Schmid*, *supra*, cited Story Ag. § 251a; *Farmer's Loan and Trust Co. v. Walworth*³ and 1 Am. and Eng. Encyc. of Law 1188, saying that ratification is not predicable of acts assumed to be done by one as the agent of third persons. Better New York cases are *Condit v. Baldwin*⁴, *Fellows v. Commissioners*,⁵ *Thompson v. Craig*,⁶ *Evans v. Wells*,⁷ in all of which there are expressions to the effect that, when an agent does not assume to act for another, but acts for himself, and for his own benefit, there is no room for ratification. There is no discussion of the case where the agent intends, but does not so avow, to act for another. The leading case of *Hamlin v. Sears*⁸ voices the same opinion. Here, too, the agent had no intent to act for any one but himself. "One may wrongfully take the property of another, not assuming to act as agent, and sell it in his own name and on his own account, and in such case there is no question of agency and there is nothing to ratify. The owner may subsequently confirm the sale, but this he cannot do by a simple ratification. His confirmation must rest upon some consideration upholding the confirmation, or upon an estoppel."

The last state referred to in 1 Am. and Eng. Encyc. of Law 1188 is Texas. The case of *Commercial Bank v. Jones*, *supra*, quotes with approval Story Ag., § 251a, but clearly had no thought of applying it to such a case as *Durant v. Roberts*, for it finds no pretense that the agent ever represented, or pretended for one moment, that it was his money, or that he had a right, or a wish, to have it placed

¹ First Nat'l Bank of Trenton v. Gay, 63 Mo. 33; Cravens v. Gillilan, 63 Mo. 28. See also Planing Mill Co. v. Brundage, 25 Mo. App. 268.

² Citing 1 Parsons on Contracts, 287, 443, note.

³ 1 N. Y. 433, at p. 444.

⁴ 21 N. Y. 225.

⁵ 36 Bar. (N. Y.) 655.

⁶ 16 Abbott N. S. (N. Y.) 29.

⁷ 22 Wend. (N. Y.) 324.

⁸ 82 N. Y. 327.

to his credit or his own account. The agent avowed that he acted as agent, and the third persons had full knowledge of his relation.

The cases of *Ballock v. Hooper*¹ and *Rawlings v. Neal*² might be added to the list of cases in which it has been said that there is no room for ratification where the agent did not purport to act for the principal, but contracted in his own name. Connecticut, too, in *Shoninger v. Peabody*³ and in *Plumb v. Curtis*⁴ approves the doctrine of *Hamlin v. Sears, supra*, although in *Union Bank v. Middlebrook*⁵ it was held that a forgery, which is certainly not an "act done, or an engagement made, as agent for and on behalf of the person whom it is alleged to bind,"⁶ could be ratified.

If, now, we turn to the text-books we shall find them in general not raising the question of ratification by an undisclosed principal where the agent *intended* but did not *avowedly profess*, to act for such principal. But so far as they bear on the question, their authority is certainly with *Keighley v. Durant*, rather than with *Durant v. Roberts*.⁶

It must be confessed then, that there is a long, and fairly continuous, stream of authority against the ratification of unauthorized acts by an undisclosed principal, unless the agent had at least avowed that he acted for some principal. On the other hand, few of the cases have had under consideration the condition that the agent *intended* to act for a principal, some having such cases in mind have hinted that ratification might be made effectual, and some courts of high authority have expressly held that there need be no avowed agency, if in fact the agent acted as agent, though he did not profess so to do. The question can scarcely be considered, in this country at least, a closed one. Nor can we say, because few cases involving just these facts have arisen, that the question is not likely to be of particular consequence. There are too many examples of similar rules of law as to commercial transactions which have waited till recent times for authoritative statement, but which, once stated, have become the basis for a multitude of decisions. In the brokerage business that has but recently assumed such huge proportions the question is likely to be an every day one, and on

¹ 6 Mackey (D. C.) 421.

² — N. C. —, 35 S. E. R. 597.

³ 57 Conn. 42, 14 Am. St. R. 88.

⁴ 66 Conn. 154.

⁵ 33 Conn. 95.

⁶ Story Ag. Sec. 251a, states the case in strong terms. See also Mechem on Agency, Sec. 127; Wharton on Agency, Secs. 77, 78; Fry on Specific Performance, sec. 528 (but compare appendix p. 711, where the strict application of the dogma *omnis ratihabitio, etc.*, is criticised); 1 Chitty on Contracts, 293; 1 Parsons on Contracts, 348; 2 Greenleaf on Evidence, sec. 67.

its decision important consequences may depend. If the tendency of the courts was toward a more rigid interpretation of rules, there can be no doubt the domain of ratification would never be enlarged so as to include this case. The strict limitations and rigid application of the doctrine of ratification in England in such cases as *Bolton Partners v. Lambert*, and in *Brooke v. Hook*, to be noticed later, point to an adherence by the English courts to the rule of *Keighley v. Durant*. But in this country with the tendency of the courts to be guided by principle and conditions rather than by strict definition and technical construction in deducing new rules of law, and with the numerous examples of relaxation of rules for centuries regarded as unalterable that marks the whole course of the contest of the law merchant for a place in the common law of the land, there can be little doubt that ultimately this question will be settled on principle and reason based on commercial advantage, rather than on authority, if such reason and authority be in conflict.

In concluding, inquiry is directed to the nature of ratification, especially as it appears in questions somewhat kindred to the present one.

Is there anything in the nature of ratification contrary to the rule of *Durant v. Roberts*? "Ratification is an agreement to adopt an act performed by another for us."¹ It comes from words meaning literally "to make valid," and is equivalent to the Latin *ratihabitio*, "a holding valid." Legal ratification takes place when the law allows one to make valid a contract to which he was not originally legally a party, although one of the original parties may have assumed to make him so, but without authority so to do. It is an anomaly in the law, in that a mere stranger may by his own act become a party to a contract made by two other parties, and by his act he may bind a third party who perhaps did not previously know of his existence, and then the contract has life, not merely from the date of this adoption, but from the time when the act of the unauthorized agent was done. It is not a mere adoption then. It is an adoption and more, for it relates back to a time before such adoption, while an adoption or confirmation has force only from the date of such confirmation.² The fundamental maxim of ratification is *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*. Relying on this, many cases have stated, in effect, that "such

¹ Bouvier's Law Dictionary.

² *McArthur v. Times Printing Co.*, 48 Minn. 319, 31 Am. St. R. 653.

adoptive authority relates back to the time of the original transaction, and is deemed, in law, the same to all purposes as if it had been given before."¹ That such is the effect so far as the liability of the principal is concerned cannot be doubted.² But the relaxation of this rule in several classes of cases, suggests the possibility of further relaxation, if the needs of business demand it. That ratification is not "in every way plenary to prior authority" is too plain for contradiction. In the very case³ in which this language is used the court pointed out that, if the third person had revoked or withdrawn his offer prior to the ratification by the principal, the ratification would not have been effectual to bind such third person, although if the agent had been properly authorized, the contract would have bound both parties in the first instance. In *Dodge v. Hopkins*⁴ the court went farther and held that ratification imposed no obligation on the third person until he actually assented to it.

The courts in England have been much more rigid in adhering to the maxim, and in *Bolton Partners v. Lambert*⁵ approved an instruction that when a principal adopts and ratifies a contract, "the ratification is referred to the date of the original contract, and the contract becomes from its inception as binding on him as if he had originally been a party, and he may enforce it against the third party even though before the ratification the third party had repudiated it." But even in this extreme case Cotton L. J. recognizes that there are exceptions to the maxim.

A universally recognized exception to the dogma is that ratification cannot cut off the rights of intervening third parties.⁶ An estate once vested cannot be divested, nor can an act lawful at the time when it was done be rendered unlawful by the operation of ratification.⁷ Other exceptions are noticed in *Harvard Law Review*⁸ and in *Johnson v. Johnson*, where it is said there must be some mutuality between the ratifying principal and the third party who is to be affected by the ratification, else ratification will not have a retrospective effect as against the interest of such third party.

¹ *Savings Fund Society v. Savings Bank*, 36 Pa. St. 498, 78 Am. Dec. 390. See also *Hawkins v. McGroarty*, 110 Mo. 546; *Shoninger v. Peabody*, 57 Conn. 425, 14 Am. St. R. 88.

² *U. S. Express Co. v. Rawson*, 106 Ind. 217.

³ *McClintock v. Oil Co.*, 146 Pa. St. 144, 28 Am. St. R. 785.

⁴ 14 Wis. 686.

⁵ 41 Ch. Div. 295.

⁶ *Cook v. Tullis*, 18 Wall. (U. S.) 332.

⁷ 23 Ir. L. T. 449.

⁸ Vol. 9 p. 60.

⁹ 31 Fed. Rep. 700. See also *Bank of Owensboro v. Western Bank*, 13 Bush 526, 26 Am. R. 211.

These instances will suffice to show that the general statements found in multitudes of cases to the effect that ratification is equivalent to plenary prior authority must all be understood as applying to particular conditions. They certainly do not correctly define the limits of the law, if interpreted with any degree of literalness. May it not be that we shall be led quite as far afield, if we take similar general statements in the cases reviewed as an accurate definition of the limits of ratification by an undisclosed principal? Further illustration of relaxation from the strict statements as to the conditions of ratification is afforded in decisions as to the ratification of a forgery.

In England¹ and a few American states² consistency has been maintained by insisting that "one who commits the crime of forgery does not assume to act as the agent of the person whose name is forged. Upon principle there would seem to be no room to apply the doctrine of ratification in such a case. There can be no ratification where the act is done for, or on account of, the agent himself. This is an obvious deduction from the nature of ratification. If this note was a forgery, there was no agency, and it never was authorized by the defendant as principal."³ On the other hand the courts in many of the states have reached the opposite conclusion. In *Greenfield Bank v. Crafts*⁴ it is said, "the contract receives its whole validity from the ratification. It may be ratified when there was no pretense of agency. It is difficult to perceive why an understanding and unequivocal adoption of the note should not bind the party whose name has been placed on the note as promiser, as effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent, as indicated by the form of the signature, but who in fact had no authority." Mr. Mechem, in his work on agency, sec. 116, says that "viewed as a mere unauthorized writing, no satisfactory reason is perceived why it may not be ratified like any other unauthorized act."

It is everywhere agreed that the principal may by approval of the paper estop himself to deny its genuineness to the injury of third persons who, relying on his adoption, have changed their positions to their prejudice. And it is also recognized that public policy for-

¹ *Brooke v. Hook*, L. R. 6 Ex. 89, 31 Am. R. 550, but cf. *McKinzie v. Linen Co.*, L. R. 6 A. C. 82.

² *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. R. 613, 618, note, and cases cited.

³ *Marks v. King*, 6 Alb. L. J. 193. Contra, *Howard v. Duncan*, 3 Lans. (N. Y.) 174.

⁴ *Allen* 447. See also *Workman v. Wright*, 33 Ohio St. 405, 31 Am. R. 546, 549, note; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. R. 106, 108, note; *Fay v. Slaughter*, 194 Ill. 157, 62 N. E. R. 592, 88 Am. St. R. 148.

bids ratification for the purpose of preventing prosecution of the offender. For this last reason, more than any other, some courts have held that a forgery cannot be ratified, and indeed the reason is a potent one. What other reason can one have for assuming obligation on forged paper, except that he may shield the forger? And as a matter of practical experience in what does such ratification result? Is not the prosecution for forgery nearly always lost sight of, when the civil obligations of the forger are provided for? No doubt on grounds of ratification alone, apart from public policy, the number of courts holding that a forgery may be ratified would be larger. Now while it is admitted the question of ratification of a forgery and ratification by an undisclosed principal are not identical and may be distinguished, yet it is submitted that each involves giving validity to an act done without authority by one who neither professes, purports, nor assumes to act in behalf of, or for the benefit of another person. He does not even *intend* to act for such person. If there may be ratification where there was no pretence of agency, may there not, without greater violation of the doctrine, be ratification where agency was *intended*, though not avowed? Though the questions differ, the latter seems to present less difficulty than the former, and to be less a departure from that "long and continuous stream of authority" of which so much has been made.

One other consideration demands attention. The undisclosed principal may sue and be sued on contracts made with authority by his agent though there was *no professing* to act as agent, but only an *intention* to do so. He may furthermore be held by the third party on contracts made by his agent outside his authority;¹ though on the authority of *Keighley v. Durant*, he could not hold such third person to the same contract. He may be estopped to deny his liability to such third person, and is equally estopped to hold such third person to any liability whatever. How slight a change might give him a claim against the third person! If the agent *intends* to buy for the principal, but does not disclose his representative character, the principal can acquire no rights against the third person, though he may incur obligations to him. But if the agent drops the remark that he is buying *for another, though he does not mention his name*, and though the third party may never have heard of such a person, then the principal may ratify and, in England at

¹ *Hubbard v. Tenbrook*, 124 Pa. St. 291, 10 Am. St. R. 585; *Watteau v. Fenwick* (1893) 1 Q. B. Div. 346.

least,¹ hold the third party to the contract even though meantime he may have utterly repudiated it. Nay more! The supposed principal may meantime have died, and his administrator not have been selected, and still the administrator when appointed, on the doctrine that his appointment relates back to the death of the intestate, may ratify an act done when he was not, as administrator, even in existence.² Is it a greater strain on the doctrine of ratification to say that a principal who is known to the agent, and who is in the agent's mind, as principal, when he makes the original contract, may subsequently ratify that contract made in his behalf, though not avowedly so, by one who assumed to be his agent in fact, though he did not disclose his representative character? It is admitted that this is the utmost stretch to which agency can go. If the agent did not *intend* to act as agent of course there is no agency, and there can be no ratification of the act of one not acting as agent. Any attempt to become a party to a contract in such a case would be an attempt to introduce a mere stranger to the contract, and this has never been allowed by any court, for reasons growing out of the idea of contract which have been regarded as fundamental and conclusive by every court, whether they should be so or not.³

But it is objected that a man's *intentions* cannot be a basis of legal rights. That is true till a man's intentions find expression in an overt act. But to say that when an agent's intentions to act for another have been made known, and that other has acted on them, there can be no relation of the act to the time of the original contract, because that would be giving legal effect to mere intention, is to beg the question. If the ratification is not permitted in such a case, then, clearly, such effect can not be given to a man's contractual intentions. But if the reverse be the rule, then such intention will enable a subsequent act to be effectual by relation back to the time when there was mere *intention*. The man with malice in his heart is thus affected when his malice leads to the overt act of murder. His previous intention then becomes a matter of life and death to him on a trial for the homicide.

Finally, it is urged that such a power of ratification "would open wide the doorway to fraud and deception."⁴ It is difficult to see how this can be so. The ratifier, having full knowledge of all the

¹ Bolton Partners v. Lambert, 41 Ch. Div. 295.

² Foster v. Bates, 12 M. & W. 225.

³ But compare Greenfield Bank v. Crafts, 4 Allen (Mass.) 447.

⁴ Keighley v. Durant, [1901] A. C. at p. 258.

facts, would seem to have no ground of just complaint. He enters the relation with his eyes open, or he cannot be bound. The third person is no worse off by the ratification, and his condition may be better. He has still, if he prefers, his action against the agent, and in addition he has a claim on the ratifier. Furthermore he may interpose against such ratifier all the equities he would have had against the agent. He seems to have no reason to complain of this rule. What other parties can be interested in it?

In a strict construction, then, of ratification, as it has been usually understood and spoken of by the courts and text-writers, there can be little doubt that the case of *Durant v. Roberts* has not been generally thought of as within the province of ratification. But there are not a few opinions looking the other way, some definitely announcing an opposite rule. No good reason, except a technical one, growing out of definition rather than business conditions, has ever been advanced against such an extension of the doctrine of ratification, nor would such extension be destructive of anything in the nature of ratification itself. In this state of the authorities and the principles involved, the ultimate limitation of the rule should be determined by the convenience and necessities of business. What rule of the law of ratification the best interests of commercial relations may demand, perhaps only future cases, as they may come before the courts, can determine. But that such considerations, and not mere supposed precedents of doubtful application, and technical definitions, unnecessarily narrowed, demand first attention by the courts in settling the law on this at present unsettled question, seems plain beyond dispute.

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