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## PRINCIPAL AND AGENT - EXTENT TO WHICH AN AGENT MAY TESTIFY AS TO THE EXISTENCE OF THE AGENCY

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PRINCIPAL AND AGENT — EXTENT TO WHICH AN AGENT MAY TESTIFY AS TO THE EXISTENCE OF THE AGENCY — The legal concept that opinions of lay witnesses are not admissible evidence is of comparatively recent origin,<sup>1</sup> and a matter of historical accident.<sup>2</sup> The theory underlying the exclusion of opinions of laymen is not one of qualification, but of policy.<sup>3</sup> If the witness testifies as to the facts, his opinion or

<sup>1</sup> 4 WIGMORE, EVIDENCE, 2d ed., § 1917 (1923).

<sup>2</sup> *Ibid.*

<sup>3</sup> 4 WIGMORE, EVIDENCE, 2d ed., § 1918 (1923).

inference is superfluous, as it is the function of the jury to draw the inferences. The testimony of the agent to the existence of the agency relation is limited by this general rule. It is the purpose of this discussion to determine the line of demarcation between opinion and fact in this situation when the existence of agency is a contested issue. If the agency issue is uncontested, it is adherence to legal formalism to raise the question.<sup>4</sup>

It is uniformly agreed that the agent is a competent witness to testify to the facts that created, or failed to create, the agency relationship.<sup>5</sup> He can testify as to basic or fundamental facts.<sup>6</sup> That is, he can state any or all of the facts which in legal contemplation create the agency relationship. Precisely what information may the attorney elicit from the agent-witness? If the relationship was created by parol, he can state what was said to create the relationship,<sup>7</sup> just as a writing creating the relationship could be introduced in evidence.

“If the authority was in writing, the writing itself was the best evidence; if it was oral, the witness could have stated the instructions and directions that were given to him, and the sources from which and the circumstances under which they were received. . . . If the witness had been permitted to answer the questions above set out [“What was your authority from the company—what authority did you have?”] it is manifest that his answer would have been merely the expression of an opinion, or legal conclusion.”<sup>8</sup>

<sup>4</sup> If the existence of the agency relationship is not contested, it is tacitly admitted, and the reason for excluding the opinion is not present. 4 WIGMORE, EVIDENCE, 2d ed., § 1960 (1923).

<sup>5</sup> ABBOTT ON FACTS, 5th ed., § 145 (1937); 21 R. C. L. 821-822 (1918); Woodmen of the World v. Alford, 206 Ala. 18, 89 So. 528 (1921); Lektophone Corp. v. Philadelphia Storage Battery Co., (D. C. Pa. 1934) 8 F. Supp. 46; Wright v. Wheat, 224 Ky. 386, 6 S. W. (2d) 458 (1928); Dubois v. Powdrell, 271 Mass. 394, 171 N. E. 474 (1930); Pesis v. Burdman, 190 Minn. 563, 252 N. W. 454 (1934); Goodyear Tire & Rubber Co. v. Marhofer, 38 Ohio App. 143, 176 N. E. 120 (1930); Motley v. Standard Oil Co., 61 N. D. 660, 240 N. W. 206 (1932); Northeastern Nash Auto Co. v. Bartlett, 100 Vt. 246, 136 A. 697 (1927). See, Steuerwald v. Jackson, 123 App. Div. 569, 108 N. Y. S. 41 (1908), where the court notes that the rule in regard to agent's extra-judicial declaration often leads to the false contention that agency cannot be proved by testimony of the agent. However, Lucas v. Rader, 29 Ind. App. 287, 64 N. E. 488 (1902), holds that a *subagent's* testimony is not sufficient to establish his agency.

<sup>6</sup> Union Bag & Paper Corp. v. Bischoff, (D. C. N. Y. 1918) 255 F. 187; 3 C. J. S. 275 (1936). Since authority must be derived from the principal, it is an indication of what the courts consider basic facts.

<sup>7</sup> Ibid.

<sup>8</sup> American Tel. & Tel. Co. v. Green, 164 Ind. 349 at 354-355, 73 N. E. 707 (1905).

His testimony as to the facts that determined the scope of his authority is equally admissible.<sup>9</sup> The courts usually say that agency is a mixed question of law and fact, and although it is competent for the witness to state all the facts surrounding and concerning the various transactions that created the relationship, the agent may not go further and state his opinion.<sup>10</sup> It is apparent that if the attorney confines himself to questions that elicit the primary or basic facts in their elementary form, they will be acceptable.

The confusion arises when an attempt is made to draw the line between opinion and fact in the mass of cases where the statement is not strictly primary fact, but lies in that uncertain field where opinion and shorthand rendering of fact are indistinguishable. A discussion of the statement, "I was agent," or analogous statements, serves to illustrate the confusion. Neither the courts nor text writers have placed any emphasis on the problem, but are content to say without logical justification, that the question called for an opinion (or fact).<sup>11</sup> There

<sup>9</sup> *Lincoln Reserve Life Ins. Co. v. Fowler*, 222 Ala. 348, 132 So. 37 (1931); *McCormick v. Queen of Sheba Gold Min. & Mill. Co.*, 23 Utah 71, 63 P. 820 (1900).

<sup>10</sup> *McCormick v. Queen of Sheba Gold Min. & Mill. Co.*, 23 Utah 71 at 76, 63 P. 820 (1900).

<sup>11</sup> The following courts have upheld the lower court that admitted the statement of the witness that he was agent. *Georgia*: *Floyd v. Taylor Cotton Co.*, 26 Ga. App. 96, 105 S. E. 646 (1920) ("Q. Were you the agent of the Taylor Cotton Co. in Atlanta in 1916? A. Yes, Sir."); *Scott v. Kelly-Springfield Tire Co.*, 33 Ga. App. 297, 125 S. E. 773 (1924) (where the witness was allowed to state that a certain person was the defendant's "duly authorized representative"). *Indiana*: *Blackstone Theatre Corp. v. Goldwyn Distributing Corp.*, 86 Ind. App. 277, 146 N. E. 217 (1925). *Contra*, in regard to scope of authority, *American Tel. & Tel. Co. v. Green*, 164 Ind. 349, 73 N. E. 707 (1905) ("What was your authority from the company—what authority did you have?"). *Iowa*: *Hoadley v. Hammond*, 63 Iowa 599, 19 N. W. 794 (1884). Q. "What authority, if any, did you have to sign the name of Charles Hammond?" A. "I had direct authority, and also general authority by reason of the relation between Hammond and myself." The court said (63 Iowa at 603): "While a witness cannot be permitted to testify to a conclusion of fact, yet if he incidentally states a conclusion necessary to a clear understanding of his testimony, this will not be regarded as a violation of the rule." In a subsequent case this qualification was not made. *Fritz v. Chicago Grain & Elev. Co.*, 136 Iowa 699 at 705, 114 N. W. 193 (1907). A year later this court held that a witness could not testify that the defendant was working for him, as it would be a conclusion. *Aughey v. Windrem*, 137 Iowa 315, 114 N. W. 1047 (1908). *Kentucky*: *Sympson Bros. Coal Co. v. Coomes*, 248 Ky. 324, 58 S. W. (2d) 594 (1933). *Michigan*: *Spears v. Black*, 190 Mich. 693, 157 N. W. 382 (1916). *Minnesota*: *Stanger v. Pandolfo*, 144 Minn. 294, 175 N. W. 912 (1919). *Oregon*: *Larkin v. Carstens Packing Co.*, 80 Ore. 104, 156 P. 578 (1916) ("Q. Did you, at any time act for the Oregon corporation?"). *Washington*: *Singer v. Guy Invest. Co.*, 60 Wash. 674, 111 P. 886 (1910).

The following states have held such testimony inadmissible. *Arizona*: *Benton v. Regeser*, 20 Ariz. 273, 179 P. 966 (1919). *Colorado*: *Crawford v. Birkins*, 16 Colo.

App. 532, 66 P. 687 (1901). *Connecticut*: Young v. Newark Fire Ins. Co., 59 Conn. 41, 22 A. 32 (1890) ("Q. In placing these policies did you act as agent of George N. Young & Co., or as agent of Dillingham or the companies he represented? A. We acted as agent of the insurance companies."); State v. Kirschenbaum, 109 Conn. 394, 146 A. 837 (1929). *Illinois*: Smoot v. Hollingsworth, 265 Ill. App. 447 (1932) ("Were you working at any matter that evening for your father Oakley? Were you on any transaction involving any duty for your father on the night of Feb. 11, 1930?"); Evans v. Dickey, 117 Ill. 291, 7 N. E. 263 (1886). *Massachusetts*: Providence Tool Co. v. Mfg. Co., 120 Mass. 35 (1876). In its dictum, this court seems to distinguish between a case of apparent and implied-in-fact authority. The dictum of a recent case may indicate a more liberal tendency. White v. Beacon Trust Co., 277 Mass. 75 at 82, 177 N. E. 853 (1931) ("An agent on the stand can testify to facts which show his authority, and for whom he was acting."). *Missouri*: J. R. Watkins Medical Co. v. Holloway, (Mo. App. 1916), 181 S. W. 602. *New Jersey*: Sutro v. Jacobson, 96 N. J. L. 555, 115 A. 79 (1921). *Ohio*: Ohio Southern Ry. v. Morey, 47 Ohio St. 207, 24 N. E. 269 (1890) ("Did you ever do any work for the Ohio Southern Ry. Co. as the agent or servant of said company?"). *Oklahoma*: Ford Motor Co. v. Livesay, 61 Okla. 231, 160 P. 901 (1916); Sanley v. Wilkinson, 107 Okla. 54, 229 P. 574 (1924) ("Q. He was your agent and representative there?"). *South Dakota*: Chaplin v. Mutual Cash Guaranty Fire Ins. Co., 26 S. D. 632, 129 N. W. 238 (1910). *Utah*: McCormick v. Queen of Sheba Gold Min. & Mill. Co., 23 Utah 71, 63 P. 820 (1900). *Wisconsin*: Tesch v. Industrial Comm., 200 Wis. 616, 229 N. W. 194 (1930).

In the following states there is confusion in the decisions. *Alabama*: The evidence was allowed in Parker v. Bond, 121 Ala. 529, 25 So. 898 (1898); Mobile, J. & K. C. R. R. v. Hawkins, 163 Ala. 565, 51 So. 37 (1909) (whether authority had been withdrawn); Roberts & Sons v. Williams, 198 Ala. 290, 73 So. 502 (1916); Woodmen of the World v. Alford, 206 Ala. 18, 89 So. 528 (1921). But in the case of Guy v. Lee, 81 Ala. 163, 2 So. 273 (1886), it was held that a husband could not testify that he acted as agent of his wife in receiving a mule. *California*: It was allowed in Baker v. Baker, 9 Cal. App. 737, 100 P. 892 (1909); Winslow v. Glendale Light & Power Co., 12 Cal. App. 530, 107 P. 1020 (1910), reversed in 164 Cal. 688, 130 P. 427 (1913), on the ground that it has no weight where the evidence showed without conflict that he was agent. The evidence was excluded in Pryor v. Industrial Accident Comm., 186 Cal. 169, 198 P. 1045 (1921). *Montana*: Nyhart v. Pennington, 20 Mont. 158, 50 P. 413 (1897) (evidence excluded); Wells-Dickey Co. v. Embody, 82 Mont. 150, 266 P. 869 (1928) (admission of evidence objectionable, but may be considered where timely objection not made). *New York*: It was allowed in Knapp v. Smith, 27 N. Y. 277 (1863), where the court said, at pp. 281-282, "But *prima facie* the inquiry whether a person engaged in a particular employment was doing business on his own behalf or as the agent of another, involves only the question of fact whether he had been employed by that other person, and it is, therefore, a competent question. . . ." It was denied in McKenna v. Snare & Triest Co., 147 App. Div. 855, 133 N. Y. S. 107 (1911); McCluskey v. Minck, 18 Misc. 565, 42 N. Y. S. 462 (1896). *Texas*: It was admitted in San Antonio, U. & G. R. R. v. Dawson, (Tex. Civ. App. 1918) 201 S. W. 247 ("Q. Whom were you collecting that money for? Whom were you collecting tickets for?"). The court qualified its admission in Federal Surety Co. v. Scott, (Tex. Civ. App. 1929) 22 S. W. (2d) 157, by allowing the statement where the witness stated the facts on which he based his conclusion. The contrary result was reached in Sackville v. Storey, (Tex. Civ. App. 1912) 149 S. W. 239; Gulf, C. & S. F. Ry. v. Kempner, (Tex. Civ. App. 1925) 275 S. W. 459.

is conflict among the jurisdictions,<sup>12</sup> and apparently some confusion exists within the same state.<sup>13</sup>

In one case<sup>14</sup> the beneficiary sued a mutual benefit society and the court held that it was proper to ask the witness whether he was "the only man in Montgomery representing that camp, the Sovereign Camp" on the theory that it called for the rendering of a fact. The court distinguished this question from one that would call for a conclusion as to the scope of his authority. In an action by the agent against his alleged principal for services rendered, it was held proper for the agent to testify that the principal had given her authority to procure certain work to be done.<sup>15</sup> There are many states that adhere to this rule,<sup>16</sup> and many contra.<sup>17</sup> One court said that it was improper for a miner who had performed certain labor to state for whom he was working.<sup>18</sup> The Illinois court held that an attorney suing for his fees could not state that the defendant employed him,<sup>19</sup> whereas, when the question was whether or not the attorney-client privilege existed, the California court held that the attorney could so testify.<sup>20</sup> The court said that ordinarily it was a matter that must be determined from facts and circumstances, but that here counsel intended to ascertain whether or not the witness had been employed by her to act.

By way of comparison it should be noted that the witness may testify directly that there was no agency or authority where no facts are introduced from which agency can be deduced.<sup>21</sup> An analogous situation has arisen where the question is whether or not the authority has been withdrawn. Alabama has held that in such a case the witness may so testify on the ground that it is a shorthand rendering of fact.<sup>22</sup> There is at least dicta to the effect that if the statement is not objected to, it is a prima facie case of agency.<sup>23</sup>

It is apparent that a generalization is impossible. In all questions of opinion or fact, it is a matter of degree, as is illustrated by the proposition that in the generic sense, as opposed to the legal connota-

<sup>12</sup> Cases cited in the preceding note.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Woodmen of the World v. Alford*, 206 Ala. 18 at 26, 89 So. 528 (1921).

<sup>15</sup> *Stanger v. Pandolfo*, 144 Minn. 294, 175 N. W. 912 (1919).

<sup>16</sup> See references, *supra* note 11.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Crawford v. Birkins*, 16 Colo. App. 532, 66 P. 687 (1911).

<sup>19</sup> *Evans v. Dickey*, 117 Ill. 291, 7 N. E. 263 (1886).

<sup>20</sup> *Collette v. Sarrasin*, 184 Cal. 283, 193 P. 571 (1920).

<sup>21</sup> *Wheeler & Motter Mercantile Co. v. Lamerton*, (C. C. A. 8th, 1925) 8 F. (2d) 957; *Larkin v. Carstens Packing Co.*, 80 Ore. 104, 156 P. 578 (1916).

<sup>22</sup> *Mobile, J. & K. C. R. R. v. Hawkins*, 163 Ala. 565, 51 So. 37 (1909).

<sup>23</sup> *Sanley v. Wilkinson*, 107 Okla. 54, 229 P. 574 (1924); *Hendrickson v. International Harvester Co.*, 100 Vt. 161, 135 A. 702 (1927).

tion, fact is a matter of opinion.<sup>24</sup> From a brief survey of the authorities<sup>25</sup> it can be said that in the majority of the cases the appellate court upholds the ruling of the trial court. Although the reasoning of the courts do not support this theory, it is perhaps logical to infer that there is a tendency to uphold the trial court. It is in a better position to apply the discretion which any court must apply when the question of opinion is raised, on the basis of the facts in the particular case, the complexity of the issue of agency, and the weight of the evidence.<sup>26</sup>

The decisions as a body of law in this field do stand for the proposition that the careful attorney will confine himself to primary basic facts in so far as it is feasible. Care must be exercised in the form of the question so that the response will connect the authority to the principal.<sup>27</sup> The answer to the question, "Were you the agent of the principal?" aids the inquirer's case but little, if at all, and may result in a ruling that its reception was error.

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<sup>24</sup> The perception of a fact involves the mental processes; therefore a statement that a thing or condition exists is, necessarily, the statement of an opinion.

<sup>25</sup> See references in notes 1-23, *supra*.

<sup>26</sup> 4 WIGMORE, EVIDENCE, 2d ed., § 1960 (1923).

<sup>27</sup> If the attorney asks, "What did *A* say to you in this regard?" the question would be admissible. However, a question in this form, "What authority did you have?" although intended to elicit the same answer, would be inadmissible.