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PRINCIPAL AND AGENT - LIABILITY OF AGENT TO THIRD PARTY FOR CONTRACT MADE WITHOUT AUTHORITY

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PRINCIPAL AND AGENT — LIABILITY OF AGENT TO THIRD PARTY FOR CONTRACT MADE WITHOUT AUTHORITY — The defendant conducted a real estate agency and had been requested from time to time to find a purchaser for a certain tract of land. The defendant negotiated to sell this land to the plaintiffs, who knew the defendant was acting as an agent. The land had before the time of this negotiation been conveyed to a third party by the principal. It was found that the defendant was acting in good faith. *Held*, that the defendant was not personally liable for the loss and damage sustained by the plaintiffs. *King v. Russell*, 278 Mich. 529, 270 N. W. 775 (1936).

In so far as the court has decided that when an agent contracts without authority he is not liable upon this contract itself, it has decided in accord with the generally accepted rule.[1] However, a few early Michigan cases seem

[1] Hermann v. Clark, 108 Ore. 457, 219 P. 608 (1931); Kent v. Addicks, (C. C. A. 3d, 1903) 126 F. 112; Empire City Job Print v. Harbord, 148 Misc. 231, 265 N. Y. S. 450 (1933); Keskal v. Modrakowski, 249 N. Y. 406, 164 N. E. 333 (1928); Herold v. Pioneer Trust Co., 211 Mo. App. 194, 242 S. W. 124 (1922); Cory v. Conqueror Trust Co., (Mo. App. 1935) 86 S. W. (2d) 611; Farmers & Merchants State Bank v. Ratliff's Estate, 222 Mo. App. 215, 297 S. W. 84 (1927); Hall v. Crandall, 29 Cal. 568 (1866); Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340 (1899); Groeltz v. Armstrong, 125 Iowa 39, 99 N. W. 128 (1904); Ogden v. Raymond, 22 Conn. 379 (1853), cited in the principal case, 278 Mich. at 533.

Contra, holding contractual liability: Grafton Bank v. Flanders, 4 N. H. 239 (1827); Lagrone v. Timmerman, 46 S. C. 372, 24 S. E. 290 (1895); Lasater v. Crutchfield, 92 Ark. 535, 123 S. W. 394 (1909); Royce v. Allen, 28 Vt. 234 (1856); Wells v. Maley, 6 Ky. L. Rep. 77 (1884).

For an excellent note and collection of cases, see 34 L. R. A. (N. S.) 518 (1911). See also, 1 MECHEM, AGENCY, 2d ed., § 1395 (1914).

to point toward a different result.[2] When the agent uses language of personal responsibility, adding recitals of agency, but there is no principal, actually or in legal contemplation, the agent has been held on the contract itself.[3] Of course, the agent could by appropriate language contract to be held personally liable on the contract,[4] and likewise it would seem he could exclude personal responsibility by the express terms of the contract. Where the agent has committed an actual fraud, no doubt is expressed that an action of deceit will lie.[5] However, it would seem that the principal case was really a suit for damages for breach of implied warranty of authority of the agent, although the court in the opinion does not explicitly say that is the nature of the action.[6] The rather universal opinion of the courts is that an agent representing to act for a principal, but actually having no authority to act, is liable for damages upon an implied warranty of authority.[7] The fact that the agent was acting in good faith

[2] Holland v. Stewart, 2 Brown N. P. 39 (Mich. 1871); Newberry v. Slafter, 98 Mich. 468 at 471, 57 N. W. 574 (1894), where the court says: "It is well settled that where an agent undertakes to contract on behalf of another, and contracts in a manner which is not binding on his principal, he will be personally responsible, as he is presumed to know the exact extent of his authority." This seems to say liability on the contract. And see Solomon v. Penoyar, 89 Mich. 11 at 14, 50 N. W. 644 (1891), where the court says, "Having signed the name of his principal without authority, and thereby giving others to understand that his principal was interested, it is but just and equitable to hold him for that which would otherwise have been chargeable to his principal."

[3] Comfort v. Graham, 87 Iowa 295, 54 N. W. 242 (1893); Hurt v. Salisbury, 55 Mo. 310 (1874); Booth v. Wonderly, 36 N. J. L. 250 (1873); Lagrone v. Timmerman, 46 S. C. 372, 24 S. E. 290 (1895). Cf. Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 79 N. W. 261 (1899); Ashe v. Vaughan, 159 Okla. 32, 14 P. (2d) 231 (1932).

[4] Empire City Job Print v. Harbord, 148 Misc. 231, 265 N. Y. S. 450 (1933); Hancock v. Yunker, 83 Ill. 208 (1876); Herman v. Clark, 108 Ore. 457, 219 P. 608 (1931); Ashe v. Vaughan, 159 Okla. 32, 14 P. (2d) 231 (1932); Camp v. Barber, 87 Vt. 235, 88 A. 812 (1913); Stevens v. White, 107 Vt. 337, 179 A. 213 (1935); Emmert v. Jelsma & Holdebrand, 191 Iowa 424, 182 N. W. 652 (1921); Shoe & Leather Nat. Bank v. Dix, 123 Mass. 148 (1877); 1 MECHEM, AGENCY, 2d ed., § 1396 (1914).

[5] Hallett v. Gordon, 128 Mich. 364, 87 N. W. 261 (1901); Groeltz v. Armstrong, 125 Iowa 39, 99 N. W. 128 (1904); Oliver v. Morawetz, 97 Wis. 332, 72 N. W. 877 (1897). And see 34 L. R. A. (N. S.) 518 (1911).

[6] The trial court said, as quoted at 278 Mich. 532: "Therefore, the principal question in this case is: 'Is the defendant Russell personally liable for the loss and damage sustained by plaintiffs when Russell, in signing said contract as agent, believed in good faith yet erroneously that he had authority to act as agent for the owner of said real estate?'" In addition the court says just above, "Plaintiffs brought this suit to recover damages from defendant for loss of the pecuniary advantage which they would have gained had defendant been the agent of the owner of the land. . . ." However on page 534 the court held "defendant was not liable as upon contract and breach thereof. . . ."

[7] 1 MECHEM, AGENCY, 2d ed., § 1398 (1914); Hermann v. Clark, 108 Ore. 457, 219 P. 608 (1931); Goldfinger v. Doherty, 153 Misc. 826, 276 N. Y. S. 289 (1934); Kent v. Addicks, (C. C. A. 3d, 1903) 126 F. 112; Clements v. Citizen's

is immaterial.[8] The principal case presents a strong picture in favor of the innocent agent and yet he possessed the greater facility to determine the true nature of his authority at any particular time.[9] The fact that the courts have so consistently held the agent liable impresses one that the more sound policy favors placing the burden upon the agent. It is believed that the defendant in the principal case should have been held liable on an implied warranty of authority.

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Bank of Booneville, 177 Ark. 1085, 9 S. W. (2d) 569 (1928); Mueller v. Nugent, 187 Ky. 61, 218 S. W. 730 (1920); Emmert v. Jelsma & Holdebrand, 191 Iowa 424, 182 N. W. 652 (1921); Conant v. Alvord, 166 Mass. 311, 44 N. E. 250 (1896), citing many cases; Sullivan v. Mancini, 103 Conn. 110, 130 A. 79 (1925); Herold v. Pioneer Trust Co., 211 Mo. App. 194, 242 S. W. 124 (1922). The leading English case is Collen v. Wright, 7 El. & Bl. 301, 119 Eng. Rep. 1259 (1857), affd. in 8 El. & Bl. 647, 120 Eng. Rep. 241 (1857).

[8] Mueller v. Nugent, 187 Ky. 61, 218 S. W. 730 (1920); Lagrone v. Timmerman, 46 S. C. 372, 24 S. E. 290 (1895); Magaw v. Beals, 242 Mass. 321, 136 N. E. 174 (1922); Jackson v. Watkins, 128 Ohio St. 407, 191 N. E. 483 (1934); Sullivan v. Mancini, 103 Conn. 110, 130 A. 79 (1925); Kroeger v. Pitcairn, 101 Pa. 311 (1882).

[9] 1 MECHEM, AGENCY, 2d ed., § 1362, pp. 1001-1002 (1914), says that as between the agent and the third party, "the agent is the one who takes the initiative; he is usually in the better situation to know of the existence of the authority, and where he undertakes either expressly or by implication, to induce action, in reliance upon its existence, he would seem to be the party upon whom the risk of its non-existence should fall."