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PRINCIPAL AND AGENT-LIABILITY OF PRINCIPAL TO THIRD PERSONS FOR ACTS WITHIN THE APPARENT AUTHORITY OF THE AGENT

PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL TO THIRD PERSONS FOR ACTS WITHIN THE APPARENT AUTHORITY OF THE AGENT—In the recent case of *Diuguid v. Bethel African M. E. Church of Pittsburgh*[1] the plaintiff, a painting contractor, had entered into a written agreement with the board of trustees of the defendant, a religious corporation, providing for painting and decorating the interior of the latter's church building. The work was to be supervised by a "house committee" consisting of three members selected from the board of trustees of the church.[2] After completing this work, plaintiff proceeded to make

[1] (Pa. 1935) 180 A. 737.

[2] The report of the case does not set out the duties or authority of this committee. The court, however, does say that the designation of the committee as "the house or building committee" *implied* that they had charge of the maintenance of the church building.

additional improvements in the basement of the church, purporting to act in pursuance of a subsequent oral contract which plaintiff alleged had been made between himself and the defendant, acting through its "house committee." The "house committee" had not been expressly delegated with authority to make such contracts, such authority being reserved, by the by-laws, to the board of trustees, acting as a board. Plaintiff sued on the oral contract for the additional work done. The court held that, although the members of the "house committee" had no express authority to do so, they at least had apparent authority to make such a contract, and that, therefore, the defendant was liable.[3]

That a principal may become bound to third persons by acts within the apparent authority of the agent is quite generally admitted.[4] Unfortunately, however, the meaning of the term "apparent authority" has not always been clear,[5] owing to the fact that the courts have cast the term in a dual rôle in the decisions, allowing it to masquerade, at times, as "agency by estoppel" [6] and, at other times, as "implied-in-fact" authority.[7] As a result, it is frequently difficult in a given case to

[3] The case is on appeal from the lower court. Apparently the jury had found, (1) that the house committee had made the oral contract, and (2) that said committee had authority to make such contract. With respect to the latter point the court said: "Even if these trustees did not have express authority to do so—and it was testified that under the by-laws of the church . . . only the board of trustees, acting as a board, could make such a contract—it cannot be said as a matter of law that they did not apparently have such authority." Diuguid v. Bethel African M. E. Church of Pittsburgh, (Pa. 1935) 180 A. 737 at 738.

[4] 1 MECHEM, AGENCY, 2d ed., § 720 (1914).

[5] 1 MECHEM, AGENCY, 2d ed., §§ 720-726 (1914). The author indicates several uses to which the term "apparent authority" has been put: (1) to designate that class of incidental authorities which are implied from the express authority, and which the third person dealing with the agent may reasonably assume to go with the declared authority unless the contrary is made known; (2) to designate those cases where the principal intentionally or by want of ordinary care leads a third person to believe another to be his agent who is not really employed by him; (3) to designate authority which, though not actually granted, the principal *knowingly* permits the agent to exercise, or holds him out as possessing. Some cases take the view that where the principal *negligently* permits the agent to exercise powers, though not actually granted—that is the basis for an "agency by estoppel." In Dispatch Printing Co. v. Nat. Bank of Commerce, 109 Minn. 440, 124 N. W. 236 (1910), the court said, at p. 450: "Apparent authority is not founded in negligence of the principal, but in the conscious permission of acts beyond the powers granted, whereas the rule of estoppel has its basis in the negligence of the principal in failing properly to supervise and control the affairs of the agent." The distinction sought to be drawn by these cases does not seem entirely satisfactory.

A close analysis of the situations referred to in this note will reveal that they fall into one or the other of two categories, viz., agency by estoppel or implied in fact authority.

[6] See Zummach v. Polasek, 199 Wis. 529, 227 N. W. 33 (1929).

[7] See Dobbs v. Zink, 290 Pa. 243, 138 A. 758 (1927).

determine whether the court is using the term in the one sense or in the other,[8] and this difficulty is not absent from the principal case. The distinction between agency by estoppel and implied-in-fact authority has, of course, an important practical consequence. In the former case the person seeking to enforce the "authority" must be able to prove that he was led by the particular circumstances in question to rely upon the existence of such authority at the time that he dealt with the agent.[9] In the latter instance such reliance need not be established [10] (any more than it is necessary in any case of actual authority that the person who ultimately seeks to enforce it shall have relied upon it at the time). Admittedly, this distinction would have only a theoretical significance in those cases where the evidence was sufficient to permit the application of either doctrine,[11] but where the "authority" which the third person seeks to enforce has been specifically denied to the agent at the time of creating the agency relationship, it would seem that the third person may predicate liability of the principal, if at all, only upon the estoppel theory, since an express denial of power would negative any claim that such power might be implied in fact.[12]

[8] Bowman v. Press Pub. Co., (Pa. 1934) 175 A. 483. It has been suggested by some writers that the term "apparent authority" be applied solely in connection with the doctrine of estoppel, a position which would at least have the merit of eliminating much of the confusion that prevails under the present dual status of the term. See EWART, ESTOPPEL, c. 26 (1900); also Cook, "Agency by Estoppel," 5 COL. L. REV. 36 (1905). The latter article purports to be an answer to Ewart's position.

Another possibility of equal merit would be to confine the use of the term to the case of implied in fact authority.

[9] 1 MECHEM, AGENCY, 2d ed., § 722 (1914).

[10] 1 MECHEM, AGENCY, 2d ed., § 722 (1914).

[11] 1 MECHEM, AGENCY, 2d ed., § 723 (1914).

[12] In Herman Nelson Corp. v. Welty, 313 Pa. 123, 169 A. 74 (1933), an agent had been specifically denied authority to receive payments on accounts sold to customers. *C*, a customer, had paid the agent for some goods, though the bills which *C* had received from the principal stated that payments should be made directly to the principal. In defense, *C* tried to introduce evidence to the effect that the agent had received payments from other accounts on prior occasions. Under this state of the case, *C* was in a dilemma. On the one hand, he could not prevail under an estoppel approach since he had not in fact relied on the prior conduct of the agent. On the other hand, he was not permitted to argue implied-in-fact authority in the face of the specific denial of authority of the agent to receive such collections. On this latter point the court said, at pp. 126, 127, "here the contracts between appellant and defendants definitely provided that payment should be made not to the agent but directly to the principal. This was as strong a negation as it was possible to make of any authority in Rinkenberger to collect any sums due appellant under the contracts. Under these circumstances there can be no room for such an argument as defendants make. . . ."

It would seem that *C* might have used the evidence of the agent's prior conduct to show that the principal did not really intend to deny the agent's authority to make

It should be observed that the doctrine of estoppel as applied in this group of cases may not always conform with the technical requirements of a "true" estoppel.[13] While in the "apparent authority" cases the estoppel-asserter is normally required to establish (1) a holding-out by the principal, and (2) a reasonable reliance thereon, it is not necessary that he prove an actual detriment,[14] although the latter element is frequently found in the cases.

In the principal case the court relied upon two facts from which it concluded that the making of the contract by the "house committee" would be within the latter's apparent authority: (1) the persons with whom the plaintiff dealt were members of the "house committee" which the board of trustees had created, and (2) one member of the "house committee" had been at all times present during the operations. In support of its conclusion the court referred to sections 27 [15] and 161 [16] of the *Restatement of the Law of Agency*, in both of which is found a requirement of "reasonable belief" on the part of the third person. In view of the fact that the first contract in the instant case was made between the plaintiff and the *board of trustees*,[17] it seems difficult to accept the finding that it was reasonable for the plaintiff, under these circumstances, to believe that the "house committee" had apparent authority to make the subsequent oral contract,[18] and this whether the court was

such collections. *C* would then be justified in contending that the authority was implied in fact.

[13] See EWART, ESTOPPEL 146-149 (1900).

[14] See Kidd v. Thomas A. Edison, Inc., (D. C. N. Y. 1917) 239 F. 405, where the contract into which the third person had entered was wholly executory at the time of suit and no showing of actual damages was made. Query: whether loss of anticipated benefits under a wholly executory contract might not still constitute an "actual" detriment?

[15] The pertinent language of section 27 of the RESTATEMENT OF THE LAW OF AGENCY is as follows: ". . . apparent authority to do an act may be created by written or spoken words or any other conduct of the principal which, *reasonably interpreted*, causes a third person to believe that the principal consents to have the act done on his behalf by the persons purporting to act for him." (Italics the writer's.) 1 AGENCY RESTATEMENT (1933).

[16] "A *general* agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which he is authorized to conduct if, although they are forbidden by the principal, the other party *reasonably* believes that the agent is authorized to do them and has no notice that the agent is not so authorized." (Italics the writer's.) 1 AGENCY RESTATEMENT, § 161 (1933).

[17] This fact may be gathered inferentially from the report of the case, and a reading of the briefs of counsel tends to support such inference.

[18] As was pointed out in note 3, supra, the jury had found that the house committee had authority to make the oral contract. One of appellant's grounds of appeal was, apparently, that the evidence did not support this finding. The appellate court held

using the term "apparent authority" in the sense of estoppel or in the sense of implied-in-fact authority.[19] Finally, the application of section 161 [20] to the facts of this case seems questionable in any event, inasmuch as that section deals with unauthorized acts of a *general* agent.[21]

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that even if there were no express authority, there was at least apparent authority in the house committee to make the oral contract. If it be true, as supposed, that the first contract was made between plaintiff and the *board of trustees*, there is a serious doubt whether plaintiff can be said to have *reasonably* believed that the "house committee" had authority to make contracts.

[19] Under either theory, of course, the third person is held to a standard of reasonableness with respect to the inferences which he will be permitted to draw from the agent's position and surrounding circumstances. 1 MECHEM, AGENCY, 2d ed., § 726 (1914).

[20] See note 16, supra.

[21] The distinction between a general and special agent is not always easy to draw. See 5 MICH. L. REV. 665 (1907). But there might be some quarreling as to whether the "house committee" would be properly characterized as a *general* agent of the board of trustees of the church.

It should be noted that whatever infirmities might have attached to the plaintiff's case under an agency approach, it would still seem possible for plaintiff to sue on a quasi-contract theory for "benefits" conferred. This would eliminate the problem of proof of the agent's authority. See WOODWARD, QUASI CONTRACTS, § 72 (1913).