COMMERCIAL TRANSACTIONS I: LAW OF AGENCY

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The relationship between a principal and an agent is fundamental in the modern commercial law. According to Robert Lowe, "it lies at the very heart of the subject and without it modern commerce would not exist." (Commercial Law 6th ed pg. 6). Yet others believe that "commerce will literally come to a standstill if businessmen and merchants could not employ the services of factors, brokers, forwarding agents, estate agents, auctioneers and the like and were expected to do everything themselves." The questions that arise then are; what is the purpose of agency, why would anyone need an agent; who is this agent? A variety of reasons have been given for the important role that an agent plays in the conduct of commerce. The agent may possess special skill or expertise for which he is needed; he/she may have special knowledge of a particular market, area or commodity; the principal may need someone on the spot to negotiate a contract, particularly in a international context; the principal may simply be too busy to make every contract personally.

Whatever reason that may be advanced for the importance of the concept of agency, one point is very clear namely, the employment of someone to perform certain tasks on behalf of another creates problems of many kinds in respect of the rights and duties of the various interested parties. Instead of two persons directly legally connected with each other by their act or acts, the employment of an agent introduces another person, whose conduct can affect in a variety of ways the legal position of the one on whose behalf he acts and the one with whom he deals. The complications produced by this introduction of a third person need special rules of law to regulate them. These rules of law are what the law of agency is all about.

DEFINITION AND CHARACTERISTICS OF AGENCY

Several attempts have been made to define "agency"; and it has been notoriously difficult to produce a definition which adequately covers all legal uses of the concept. In other words, the nature of the subject is such that the whole law cannot be compressed into a phrase or sentence that embraces all aspects of the subject matter so as to come out with a universally accepted brief description of the subject matter. The tendency therefore has been to embark on an intricate

analysis of the facts and the nature of the relationship between the parties, in order to understand the subject.

Nevertheless, this (difficulty) does not render it idle (or useless) to attempt to summaries succinctly what is involved in the concept of agency. Such a summary is needed to provide a guide in our search for the features which distinguish agency from other legal relationships.

Fridman talks of agency as,

> "… the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property."

On his part *Bowstead* sees it as:

> "… the relationship which exist between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf, and the other of whom similarly consents to represent the former or so to act. The one who is to be represented or on whose behalf the act is to be done is called the principal. The one who is to represent or act is called the agent. Any person other than the principal and the agent may be referred to as a 3rd party."

Another attempt by the *American Restatement of the Law of Agency* talks of:

> "… the relationship which results from the manifestation of consent, by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."

However whatever forms a definition takes; a number of characteristics of agency are usually ascertained:

(i) The agent's capacity to affect the principal's legal position (i.e. to say his rights and liabilities towards other people) by the making of contracts or the disposition of property. The law of agency thus has no relevance to social and other non-legal obligations.

(ii) The definitions are based on consent. That is, several of the definitions revolve around the idea that the principal and the agent have agreed either by way of contract or otherwise that the agent should represent the principal. (e.g. *Bowstead* and *Restatement*).
There is even Nigerian jurisprudence in support of this approach. In *Ofodile v Chinwuba* (1993) NWLR (Pt 268) 151 at pg. 166 *Ejiwunmi* J.C.A. Said:

> "*In the ordinary law of agency, the paradigm in which the agent and the principal agree is that one should act for the other. And the term "agency" is assigned to this*

> *basic relationship which involves the consent of both parties. It is therefore trite law that agency arises mainly from a contract or agreement between the parties express or implied.*"

Niger Progress Ltd v. North East Line Corp. (1989) 3 NWLR (Pt 107) 68.
Bamgboye v. University of Ilorin (1991) 8 NWLR (Pt 207) 1 at pg. 29.

The main draw-back in this statement or in this approach as a whole is that it seems to exclude from the scope of agency situation in which no consent and certainly no contract can be found between the principal and the agent. Yet as we shall see later that there are circumstances in which the relationship may arise for certain purposes against the real wishes of one, if not both, of the parties. In situation of this kind the agency relationship, at least as far as certain of its effects are concerned, has no contractual, or even consensual basis.

The conclusion to be drawn from this is simply that a study of the instances that can bring about the existence of a principal and agent relationship leads to the conclusion that, even though, in many instances, consent is relevant, and possibly a determining factor in the existence as well as the scope of an agency relationship, it is not completely satisfactory to base agency upon consent alone. The relationship and its effects do not always arise from and determined by agreement.

However, notwithstanding the difficulty in formulating a precise definition, the idea behind the concept of agency is the recognition by the common law that a person need not always do things that change his legal relations himself. He may utlise the services of another to change them, or to do something during the course of which they may be changed. Thus when one person (the agent) is recognized by the law as having the power to affect the legal rights, liabilities and relationship of another person (the principal) the act or acts of the person so recognized are seen by the law as the act or acts of the other person. In other words, the acts are not treated as the agents own acts, but are treated as if they were the acts of the principal.

The fundamental purpose of an agent's activities is thus the establishment of a contractual bond between his principal and a 3rd party. Once that bond has been established, the agent drops out of the scene, and has neither rights nor liabilities under the contract. The act of the agent will on the other hand bring about the same consequence on the principal as if he had contracted for himself. This common law rule is often expressed in the maxim *qui facit per alium facit per se.* (He who acts through another act by himself).

By this the principal steps into the shoes of the agent and becomes a party to the contract through the agent

The primary role of agents is the negotiation and conclusion of contracts. But "agency" is a very flexible concept. In commerce, for example, the word agent is also very often used in a different sense. For example, a car dealer is referred to as an agent or distributor of a certain make of car. Indeed, he may be described as the manufacturer's "sole agent" in a given area. This does not necessarily mean that such a person is an "agent" in the strict legal sense in the sense that he brings about contractual relations between the manufacture (principal) and customer (third party). In practice, such a car dealer would usually buy the cars from the manufacturer and sell on his own account to the purchasers. In other words, he is an independent contractor who buys and sells the cars on his own behalf to his customers. When he sells, he does so in his own right as a principal and therefore there is no privity of contract that exists between the manufacturer and the ultimate purchaser.

The existence of agency relationship in the true legal sense is a matter of law, in that there is no need for the parties to intend to create a relationship of agency to exist. The law may hold such a relationship to exist even when the parties did not contemplate it.

Similarly, the fact that the parties have labeled (or called) their relationship as one of agency is not conclusive. *Lamb WT & Sons v Goring Brick Company*. [1932] 1 KB 710

If then it is a matter of law as to whether a relationship of agency exists, how do the courts reach a decision? What are the essential elements of a relationship which identify it as being one of agency? Unfortunately, this is a question to which there are no easy answers, and indeed considerable disagreement among the leading authorities on the subject.

However, in determining the true nature of an agency, the question often turns on whether the agent acts for himself for a profit or account to another person (i.e. seller) in return for a commission or remuneration of some other sort. Thus A manufacturer may contract to sell his goods only through a "sole agent"; if on the construction of the agreement, the sole agent is actually a buyer; then the manufacturer may be in breach of the contract if he sells himself. But if he is an agent in the strict legal sense, then the manufacturer would be entitled to sell personally as well.

Lamb(W.T) & Sons v. Goring Brick Co. Ltd (1932) I K.B 710.

Agency distinguished from other Relationships

There are several other relationships recognized by law which show some of the features of an agency relationship. In fact for a long time during the period of its early development no great differentiation was made between agency and these other classifications. But in the course of time the law hardened into more rigorously defined categories of relationships each governed by special rules. Even though recent commercial developments have tended to assimilate these distinct relationships, it is still important to separate and distinguish the relationship of principal and agent from other similar ones.

Agency and Trusts:

Trust involves and equitable obligation binding on a person called a trustee to deal with the property over which he has control for the benefit of other person called the beneficiary. An agent bears a number of similarities to trustees. In both cases they are part of a fiduciary relationship in that both are persons who act on behalf and for the benefit of others. In this regard their duties are similar in that both of them must not allow their interest to conflict with their duties. Further, in both cases they may be able a transfer a good title to a *bonfide* purchaser in good faith. Again, certain equitable remedies in respect of property in the hands of an agent may be pursued by the principal against an agent, in the same way that they are available to the beneficiary against a trustee. For ex, an agent who makes a secret profit must account for it in equity, in the same way as a trustee who makes a secret profit out of his trust. There are several other areas of similarities but an agent also differs from a trustee in various ways.

The first and important distinction is that a trustee is the legal owner of property but an agent is only authorized on behalf of the principal. Secondly, an agent represents his principal, and can create contractual relations between his principal and 3rd persons. But a trustee is not in any way the representative of his beneficiaries: hence does not involve his beneficiary in personal responsibility for the trustee's acts, whether in contract or tort. Thirdly, an agency can generally be created between parties without any special form, but in many cases a trust must be created in writing.

Agency and Bailment:

A bailment is the delivery of personal property by one person to another for a specific purpose in the understanding the property would be returned after the special purpose is achieved. A bailee is the person who receives possession of goods from the owner for the specific purpose. *Ipso factor* a bailee is not normally an agent of the bailor. However when exercising some of his powers over the property, e.g. to have them repaired or serviced, the bailee incidentally involves the bailor in liability on contract made for the purpose just as an agent can involve a principal. However, there are two important distinguishing features between agency and bailment. First, the bailee does not represent the bailor. He merely, exercises with leave of the bailor certain powers in respect of the property. Secondly, the bailee has no power to make contracts on the bailors's behalf; nor can he make the bailor liable, simply as bailor for any of his acts.

Agency, Servants and Independent Contractors:

Agency also overlaps with two other relationships which appear at first sight to be somewhat similar, namely, that of master and servant and an independent contractor and the people who engage him, but which are really of a different dimension. A servant is one who, by agreement, whether gratitutiously or for reward *gives his service* to another. An independent contractor on the other hand, is one who by agreement, usually for reward *provides services* for another. Both terms describe people who (like agents) have power to act for others. The distinction between them is usually not an easy one to apply in particular cases and a number of tests have been suggested from time to time. The one currently favoured is to treat a person as an independent contractor if he is "in business on his own account." The test then is usually given as being one of 'control." The servant is said to be someone who is completely subject to the control of his master as to what he does and how he does it; whereas an independent contractor is his own master, but must provide what he has contracted to provide in the way of work or services.

In the light of the above, the question arises whether "agents" can be distinguished in any way from servants and independent contractors; or can be regarded as being synonymous with either servant or independent contractor, or both. It has been suggested that the distinction between servants and Independent contractors on the one hand and agents on the other is essentially one of action, in that agents are mainly employed to make contracts and to dispose of property, while servants and independent contractors are often employed for other tasks. It is not surprising

therefore that in the law of contract agency is all important while the distinction between servant and Independent contractors has little significance, whereas in the law of tort the employer's liability turn primarily on the distinction between servants and independent contractors and the doctrine of agency has little importance except with respect to torts connected with connected or with the transfer of property.

CLASSIFICTION OF AGENTS

1. CLASS OF AGENTS:

   Agents are generally divided into 3 main classes namely; Special Agent, general and Universal agents

(a) **Special Agents:**

A special agent is one who is appointed for a particular purpose, such as the performance of a particular act, or to represent his principal in some particular transaction, and such transaction not being in the ordinary course of his trade profession or business as an agent. A special agent has no authority to bind his principal in any other matter than that for which he is engaged E.g. A appoints B to purchase a horse. The authority may even be so narrow as to limit the agent to the purchase of a particular horse at a particular price. The only authority given to B as agent is that necessary to procure the type of horse mentioned and at that price. Person who deal in him are bound to ascertain the extent of his authority.

(b) **General Agent:**

A general agent is one who has authority:-

(i) to act for his principal in all aspect matters concerning a particular trade or business, or of a particular nature or

(ii)to do some act in the ordinary course of his, trade profession or business as an agent on behalf of his principal; e.g. where a lawyer or broker is employed as such.

The scope of the authority of a general agent extends to the usual acts of such an agent in a like position. However a general authority may extend beyond his actual instructions; i.e. it will not

matter to those dealing with the agent if the principal has actually limited the agent's authority to a narrower range of action than the ordinary scope of the business or trade in which the agent is acting, unless those dealing with the agent are notified of the limitation. If they have no such knowledge they are entitled to assume that any act done by the agent in the ordinary scope of the business is authorized by the principal.

(c) **Universal Agent:**

A universal agent is one where authority is unlimited, i.e. he has authority to act for his principal in all matters without restrictions. Such types of agents are rare in practice. But when they do exist, they are appointed by extensive power of attorney. The only limits which are imposed upon the authority of a universal agent are those of which the law imposes with regard to the legality of the objects and the capacity of the parties in relation to contracts in general.

KINDS OF AGENTS:

Within the general classification of agents seen above can be found particular types of agents. Some of these types distinguished by name and function have been invested, as a matter of law, with varying functions stemming from the authority they posses as agents employed in a particular trade, business or profession. Some of the main characteristics of a number of special classes of agents are s follows:

1. **Mercantile agents**

   Section 1 of The Factors Act 1889 defines a mercantile agent as a person:

   > "…having in the customary course of his business as such agent authority to sell goods or consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

This definition encompasses two types of agent recognised by the common law namely, factors and brokers.

(i) *Factor*:

At common law a factor was defined by Abbott C.J. in *Baring v. Corrie* (1818) 2 B & Ald 137 at145 as:

> "a person to whom goods are assigned for sale by a merchant residing abroad or at a distance away from the place of sale…… He normally sells in his own name without disclosing that of his principal."

A factor is therefore simply an agent to whom goods are consigned for the purpose of sale. He has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale. He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer.

The distinctive mark of a factor is possession of the goods or of documents of title to the goods. It follows that he has certain implied authority. First he may sell the goods in his own name as though he were the principal. Further, the (mercantile agent or) factor is entitled to receive payment for the goods from the purchaser and give receipt. In this case the purchaser is absolutely protected provided he had no notice from the principal requiring payment to him personally. Lastly, a factor has implied authority to sue on the contract in his own name and can exercise a lien over goods whilst in his possession if his expenses and commission are outstanding.

A factor or a mercantile agent is also deemed to have power to pledge the goods. In this connection, sec. 2 of the Act provides that where he is:

> "with the consent of the owner, in possession of goods or of documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business as a mercantile agent, is as valid as if it were expressly authorized by the owner of the goods."

Thus persons who in good faith take the goods under such disposition, and who have not at the time notice that the agent has not the required authority to dispose of them acquire a good title to them.

The goods the mercantile agent must be in possession of the goods or of the documents of title to the goods with the consent of the owner. In such a case any sale, pledge or any other disposition of them, made by the mercantile agent or his clerk in the ordinary course of business, is as valid as if the owner of the goods had expressly authorized it. Where such is not the case any disposition by the mercantile agent is not valid. For example, in *Pearson v Rose & Young Ltd* [1951] 1.K.B. 275, a car was left with the agent to show to prospective purchaser, but without instruction to sell. The agent obtained possession of the registration book from the plaintiff by

trick and sold the car to a *bonafide* purchaser. It was held that the purchaser acquired no title because the agents though in possession of the car with the owner's consent, he was in possession of the registration book without his consent.

However, the person taking under the disposition must act in good faith and must not have notice that the person making the disposition has no authority to wake it.

(ii) *Brokers:*

Brokers like a factor is a mercantile agent employed to make contracts between principal and others for a commission usually called a brokerage. According Brett L.J in *Fowler v Hollins* (1872) L.R 7 Q.B 616, at page 623 a broker is

> "an agent employed to make bargains and contracts between persons in matter of trade commerce and navigation. Properly speaking a broker is a mere negotiator between other parties…. He himself has no possession of the goods, no power actual or legal of determining the destination of the goods, no power or authority to determine whether the goods belong to buyer or seller or either'.

The distinguishing feature of a broker is that unlike a factor a broker is not entrusted with the possession of the goods or merchandise in which he deal. Also he cannot sell in his own name. Therefore he has no authority as a broker to receive the price, and ordinarily not being entrusted with the goods he has no right of lien.

2. **Del Credere Agents**:

A *del credere* agent is also a mercantile agent but the special feature of this type of agency is that the agent in return for extra commission called *del credere* commission promises to indemnify the principal if the 3rd party introduced by the agent fails to pay what is due under the contract.

Two points should be noted with regards to an agent of this type. In the First place, a *del credere* agent is in the position of a surety to his principal for the due performance by the persons with whom he deals of contracts made by him with them on his principals behalf. In other words, he undertakes to ensure that if the goods entrusted to him are sold, they will be paid for if not by the buyer then by the *del credere* agent himself. This brings the transactions very close to contracts of guarantee but the undertaking of a *del credere* agent is not strictly speaking such a contract. It

is rather a contract of indemnity. Hence it is therefore not necessary that such an agreement should be evidenced in writing as required by s.4 of the statute of frauds 1677. Such as agency can in principle even be enforced from the course of conduct between the parties. Our Supreme Court however, sounded a note of caution in this regard. In *Omoregie v B. Portland Cement Fabrik* [1962] All NLR 156, the Court held that in the absence of clear words or something definite in the parties' course of conduct a *del credere* agency could not easily be inferred.

Secondly the obligation *del credere* agency is confined to answering for the failure to pay any ascertained sums which may become due as debts. In other words liability does not extend to other breaches of the contract by the other parties e.g. where the other parties breach the contract in some other manner such as refusal to take delivery of the goods.

Thomas Gabriel & Sons v Churchill & Sim [1914] 3 K.B. 1272;
Churchill & Sim v Goddard [1936] 1 ALL E.R 675; [1937] I K.B. 92

The *del credere* agent would often in modern conditions involve liabilities which an ordinary commercial agent acting for a commission would be reluctant to undertake. In more recent times more use has been made of credit guarantees and of confirming agents who accept liability not merely for payment but for the contract being completed *vis-à-vis* the confirmer.

3. AUCTIONEERS:

Auctioneers are agents whose ordinary course of business is to sell goods or other property by public auction, for a reward generally in the form of a commission. They may or may not be given possession of the goods but it is clear that when given such possession auctioneers are "mercantile agents" within the Factors Act 1889. A peculiarity of auctioneers is that they are agents for both parties to the sale which they negotiate. The auctioneer is primary the agent of the seller but after the sale but after the sale has taken place he is the agent of the purchaser for the purpose of signing the memorandum of sale on behalf of the purchase another peculiarity of auctioneer is that even though they are agent they can personally sue for the price of goods sold and delivered as auctioneer even if their commission has been paid.

Chelmsford Auction Ltd V Poole [1973] I ALL.E.R 810.

4. Attorneys or Legal Practitioners

A legal practitioner or attorney appointed to act for another in legal matters is often referred to as "attorney at law." Such a person has legal authority to act on behalf of someone engaged in legal proceedings. However the effect of his/her action will depend on the nature of the authority. A legal practitioner, acting under a general retainer has authority to accept service of process and appear for the client, but has no authority to commence an action unless he is specifically instructed to do so, or, such authority may be reasonably inferred from the terms of the retainership. Once so instructed he has an implied authority to take every step to enforce or defend the legal interest of his client. He can compromise an action unless expressly forbidden. In this connection, the client is bound by every act of his lawyer, done, in the ordinary course of practice. Furthermore, being an agent he has authority to receive money on behalf of his client and cannot be made personally liable to repay to the 3rd party money so received and paid to his client. While acting in his capacity as a legal practitioner, the attorney at law can however be liable in negligence. Any contract with his client relieving him of such liability is void. See Legal Practitioner Act 1975 S. 9. Cap. L11 LFN 2004. The exception is where he acted gratuitously or his negligence arises from the conduct of his client's case in court or tribunal. ibid

5. Shipmaster:

The shipmaster has authority to enter into contracts in matters relating to the usual employment of the ship, e.g. contract for repairs of the ship or the purchase of necessaries when he cannot communicate with the owner; and where he can in no other way obtain money thereafter he has authority to give customary bond for such necessaries. This would only bind the owner if given strictly for necessaries and bonafide.

6. Confirming Houses:

Confirming Houses play an important role in International trade. They normally act on behalf of an overseas client who wishes to import goods, thus providing local knowledge. A Confirming House however may act in different ways according to its instructions from its client. At the simplest it may buy goods in the domestic market and resell them to its client overseas; in which case it enters into two contracts of sale. Alternatively, it may act simply as an agent, negotiating

a purchase on behalf of its client and revealing its capacity as agent; in that case there is one contract of sale between the domestic supplier and the overseas buyer.

In most cases however, the seller may not know the credit standing of the overseas buyer and therefore may be unhappy about dealing solely with an overseas customer whose reputation and credit standing may be unknown. In this situation the confirming house may make the contract to purchase the goods as agents on behalf of its overseas principal but enter into a separate contract with the supplier to confirm, or guarantee, that the buyer will perform its obligations under the sale contract. In this case, the confirming house's obligation to pay is independent of that of the overseas customer; the domestic seller thus has the security of being able to claim the price direct from the confirming house which is both within the jurisdiction of domestic courts and known to be creditworthy.

8. Some other Commercial Marketing Arrangements:

From what we have seen so far, it is apparent that agency is only one of the possible arrangements which may be used by a business as a means of marketing its products or services. Again, as stated earlier, it is necessary in any given case to examine the arrangement closely in order to decide if it does amount in law to an agency. In this regard, some of the other possible relationships that may be used are:

(a) Distributorship:

A business may enter into contracts of distributorship with one or more dealers. The distributorship contract is likely to impose obligations on both parties: the manufacturer will agree to supply the dealer with products, and may well agree not to appoint any other distributor for its products in the dealer's area. In return, the dealer will normally agree to develop the market for the manufacturer's products, and, possibly, not to sell competing products, the relationship between the manufacturer and the dealer will largely depend on the terms of the distributorship agreement. As regards products supplied by the manufacturer, the relationship will be that of seller and buyer, a separate contract of sale being made each time the dealer orders goods. The dealer will be responsible as seller for the products its resells to customers.

(b) Franchising:

Franchising has become increasingly common in recent time. It's operation is usually in such a way that an entrepreneur with a product or service to market may, instead of selling direct to the public, authorizes other businesses to supply the product or service. In general franchisees in return and for payment of a franchise fee, are given the right not only to supply the product or service but also to use the trade name, style or logo of the franchisor, and may thus benefit from the goodwill built up by the franchisor. Each franchisee is a separate business, but the outward appearance is of a uniform organization. The franchisor normally agrees to supply the franchisee with goods to sell, as well as with support; their relationship in respect of such goods is therefore that of seller and buyer, and the franchisee deals with the public as a seller.

(c) Subsidiaries:

Another method often used is for a business to establish a network of subsidiaries to market its products and/ or services. This course is often taken by companies, which market products through a network of trading subsidiaries. Each subsidiary company will have a separate legal personality from the holding company or proprietor. The subsidiary may act as agent for the holding company or proprietor, but it is more common for the relationship between them to be that of seller and buyer, leaving the subsidiary to act as seller vis-à-vis its customers

(d) Licensing

In a licensing model you are selling the right to use your intellectual property (IP), brand, or business processes to another party. Licenses do not typical come with restriction in terms of providing a territory or a market for the exclusive use of the licensee. Additionally you do not retain control over the licensee once you have sold the right to use your IP or brand, though limits can be in place over how they use it specifically. Examples of licensed products include Microsoft Office and sports teams giving merchandise sellers a license to use their brand.

Licensing arrangements are governed by standard contract law so there are less administrative burdens than in a franchising arrangement.

CAPACITY TO ACT AS PRINCIPAL AND AGENT

The general rule is that both principal and agent must be capable of acting as such. In this regard, the ordinary rules of contract apply to the contract of agency. It follows therefore that:

(i)The third party must have capacity to contract in order that the contract which the agent makes with him on behalf of the principal may be enforceable.
(ii) Generally, the agent must have capacity to contract if his contract with the principal is to be enforceable; otherwise the agent and principal may not be able to enforce the rights and duties arising under the contract of agency.
However, as we shall see shortly, a person does not require contractual capacity merely to act as an agent. In other words, there is a marked distinction between a person's capacity to act as principal and his capacity to act as agent.

Capacity to act as Principal:

The capacity to contract or to do any other act by means of an agent is co-extensive with the capacity of the principal himself to make the contract or to do the act which the agent is authorized to make or do. Hence only those persons with full contractual capacity (with certain limited exceptions) may employ an agent; the rule being that anyone may appoint an agent to do any act which he has capacity to do himself. If the principal is under some disability, the powers of the agent are accordingly limited to the extent of the disability. For example, a principal who lacks capacity either through infancy, insanity or some other disability cannot make a valid contract even by employing an agent who has full contractual capacity. But whether such capacity exists is a matter for the general law of contract.
In that connection, by the general law of contract, mentally incompetent persons, corporations and infants either have no capacity or only a limited capacity to appoint an agent.
A mentally incompetent person can only appoint an agent during a lucid interval *Drew v Nunn* (1879) 4. Q.B.D 661. Nevertheless, there may be cases where a mentally incompetent person (or a drunkard) can be treated as a principal; for instance, if the 3rd party contracts in ignorance of his condition and without taking advantage of it. *Moulton v Camroux* (1849) 4 Exch. 17. Furthermore, there is also the rule in *Imperial Loan Co v Stone* (1892) 1 Q.B 599, to the effect that where a party to a contract is of unsound mind, the contract is nevertheless binding on him

unless he can prove that he was so insane as not to know what he was doing and that this fact was known to the other party.

As regards corporations the common law position is that a company must have the power to appoint an agent by virtue of its memorandum of association. In other words, the memorandum must specify the appointment of an agent as one of its objects; and where such is not the case any such appointment would be *ultra vires* the corporation. This position seems to have now been affected by recent legislation on companies. The Companies and Allied Matters Act, Cap C20 LFN 2004, s. 38, now gives a company all the powers of a natural person of full capacity for the furtherance of its authorized business or objects unless its memorandum or any other enactment otherwise provides; section 39 abolishes the harsh effects of the doctrine of *ultra vires* as so that the *ultra vires* acts of a company are not now *ipso facto* void.

As for an infant, he can only appoint an agent in circumstances in which he himself has the power to act. This restricts an infant's capacity to appoint an agent only to the kinds of valid contracts which he himself can make. So while an infant may appoint an agent to contract on his behalf in respect of those contracts which are enforceable by and against him, he cannot do so in respect of those contracts which are void against him. In other words, a minor or person of unsound mind is bound by a contract made on his behalf by his authorized agent where the circumstances are such that he would be bound if he had med the contract himself (Per Lord Denning in *G v G* [1970] 3 All E. R. 546.).

Capacity to act as an agent:

As noted earlier, a person does not require contractual capacity merely to act as an agent. All persons of sound mind, including infants and other persons with limited or no capacity to contract on their own behalf are competent to act or contract as agents. The rationale is that the agent is a mere instrument or link between his principal and 3rd party; an agent is only an intermediary in bringing the contracting parties together, so, anyone may be an agent even though he is incapable of contracting validly himself. In other words, there is no need for him to have full contractual capacity. In the case of an infant however, the infant must have sufficient understanding to consent to the agency and do the required act. It is therefore, irrelevant to his

capacity to act as an agent, that because of his infancy he may not be liable to the 3rd party on the contract, where an adult agent would have been personally liable.

Formalities

The general rule is that there is no particular form required for the appointment of an agent. As expressed by Lord Cranworth in an early case:

> "No one can become on the agent of another person except by the will of that other person. His will may be manifested in writing or orally or simply by placing another in a situation in which according to the ordinary usage of mankind that other is understood to represent and act for the person who has so placed him." *Pole v. Leask*(1963) 33 L.J. Ch. 155 at 161-162.

There is therefore no particular form required for the appointment of an agent, though in order to make the agency binding upon the principal and the agent the ordinary rules of contract are applicable. A great number of agencies are created orally, and very often without any express arrangements at all. This is so even if the agent is appointed to make a contract which is required by law to be evidenced in writing or to be evidenced by a note or memorandum in writing signed by the party to be charged or his lawfully authorized agent. However, writing is always advisable even where it is not required. Care must be taken, however, to include in the document all the terms of the agency on the ground that parol evidence cannot be given to vary a contract evidenced by writing.

The general rule is however subject to some qualification in that there are few cases where an agent's appointment must be by deed and a few cases where it must be in writing.

CREATION OF AGENCY

The relationship of principal and agent may arise in one of the following 4 ways:

(1) by agreement, whether contractual or not between the principal and agent which may be express or implied from the agreement.
(2) by subsequent ratification by the principal of acts done on his behalf
(3) by virtue of the doctrine of estoppel
(4) by operation of law under the principles of agency of necessity and matrimony.

I. EXPRESS AGREEMENT:

The commonest and by far the simplest and most encouraged way of creating an agency relationship is by express agreement in the form of a contract i.e. arising from consent usually expressed in the form of a contract. In modern times, states Fridman, "it is correct to say that in most instances of an agency relationship there is a contract of agency between the principal and agent." In such a case the ordinary rules of contract demands that the parties must consent freely to the creation of the relationship between them, i.e. their minds must be *ad idem*, there must be no fraud, duress, misrepresentation or mistake.

As seen earlier there is no particular form required for the appointment of an agent. So it is of little consequence whether an agent who is expressly appointed as such is appointed orally, or in writing or under seal. In fact, as stated by one author, the majority of agencies are created orally, and very often without any express arrangements at all. But writing is advisable because a written appointment will facilitate the solution of the question on what terms and with what authority was the agent appointment? So subject to this, an oral express appointment is just as effective for its purpose as an appointment in any other form.

Nevertheless, there are a few cases in which an agent's appointment must be under seal and a few where it must be in writing. Appointment under seal (or by deed) is necessary where the agent is given power on behalf of his principal to make contracts under seal. An appointment in this form is termed a *power of attorney*, which may be described as an authority, given under seal, authorizing the person to whom it is given(the attorney) to act for the principal for the purpose therein set out. It is commonly given by a person temporarily leaving the country to an agent who is to look after his affairs during his absence. A power of attorney can be made irrevocable. This may be so for example, where it is granted to a purchaser for value who gives consideration for the power; the power is permanently irrevocable and is not even determined by the death disability or bankruptcy of the principal. The purchaser of land that is let to tenants, for instance, can receive such a power to collect arrears of rent. However, a power of attorney can also be made irrevocable without the purchaser giving consideration, but then it must be limited to a fixed time not exceeding one year. (Law of Property Act 1925, secs. 126, 127).

Appointment in writing is necessary in certain cases e.g. where the disposition of land or an interest in land is concerned. In this connection section 78 of the Property and Conveyancing Law 1959 which was applicable in the states of former Western region of Nigeria and Bendel State, provided that an agent could not create or dispose of an interest in land or dispose of an equitable interest or trust on behalf of a principal unless he himself had been appointed in writing.

Although agency is a consensual relationship, resulting from agreement between the parties, it does not follow that all such agreements are strictly contractual manifesting all the features of the common law contract. An agency may be gratuitous. If so, it is not truly contractual. The main deference between purely consensual and contractual agency lies in the absence or presence of consideration, in the form of remuneration of the agent for what he undertakes to do.

Implied Contract

Apart from expressly creating the relationship an agency relationship may be implied from the conduct of the parties. This simply represent in the sphere of agency, the proposition that contracts are not always expressly made, but often inferred by the court from the circumstances. The court will imply such an agreement if the parties have by their conduct consented to a state of affairs which is explicable only in terms of agency. In general, however, it will be the assent of the principal which is more likely to be implied, for, except in certain cases, "It is only by the will of the employer that any agency may be created. Such assent may be implied where the circumstances clearly indicate that he has given authority to another to act on his behalf. This may be so even if the principal did not know the true slate of affairs.
Biggar v Rock Life Insurance [1902] 1 K.B 516;

The effect of such an implication is to put the parties in the same position as if the agency had been expressly created.
A distinction should be mention here between an implied contract of agency and agency by estoppel. The former is an instance of agency created by agreement between the parties before the agent acts on behalf of the principal. The principal is willing that the agent should act on his behalf. The agent in fact has authority so to act. But the existence and scope of his authority are

discoverable by reference only to the conduct of the parties, and not by the examination of any express agreement. On the other hand, as will be seen later, agency by estoppel exist even where the principal did not want or appoint, the agent to act on his behalf. There is no contract of agency implicitly in existence between the parties. None the less, the law considers the agency relationship to exist and gives effect to such a relationship.

II. RATIFICATION

Agency by contract as seen earlier is usually created before anything has been done by the agent. That is, the agent's authority to act is granted before the exercise of that authority. But with ratification, the situation is reversed. In ratification, what is done on behalf of the principal is done at a time when the relationship of principal and agent does not exist; in that the agent has no authority to do what he does at the time he does it. But it so happens that subsequent to the act, the person on whose behalf it is done accepts or adopts it. The process of adopting the act or transaction is known as ratification.

Ratification may occur by one of two ways. First, it may occur when the agent though contracting as an agent and having a principal in contemplation was not in fact given such authority to so act.
Secondly, it may occur when the agent was in fact given authority to act by a principal but exceeded the authority so given. So it may be safe to say that this kind of agency usually comes about when a person without authority or who having an authority, exceeds that authority and act on behalf of another and that other afterwards confirms and adopts that act. In either case, ratification duly made, puts the parties in exactly the same position in which they would have been if the agent had the principals authority at the time that the contract was made.

Ratification need not take a particular form. In most cases any act or statement which clearly shows the intention of the principal may be a sufficient act of ratification (even for a written

contract). But if the contract made by the agent is in the form of a deed, then the principal's ratification must be by deed. *Oxford Corp. v. Crow* (1893) 3 Ch. 535.

A problem which sometimes arises is whether ratification must be in writing where the agent has entered into a contract which itself must be in writing or evidenced by some writing. In *Soames v. Spencer* (1822) 1 Dow & Ry K.B. 32 it was held that a parol ratification was good even though the agent's contract with the third party had to be in writing.

Mutual Aid Society Ltd. V. Akerele 1965 All N.L.R. 336.

Requirements for Ratification:

In order to constitute a valid ratification the following must be satisfied:

(i) **The Agent must expressly contract as an Agent:** This simply means that the agent must purport to act as agent for a principal who is in contemplation. In other words, the agent must profess at the time of making the contract that he is acting on behalf of and intending to bind the person who subsequently ratifies the contract. This based on the principle that a man may not incur liability on his account and then assign it to someone else under colour of ratification. Thus the question whether the principal can validly ratify the agent's act is determined by reference to the way the transaction appears to the 3rd party, and this depends upon what the agent has shown his intention to be. Therefore the possibility of ratification does not depend upon what the agent's state of mind actually was, but upon the way his statements and conduct were reasonably understood by the 3rd party. Hence, only the person under whose authorization the agent has purported to act can take the benefit of, or be made liable under the agent's act.

See for example the leading case of *Keighley Maxsted & Co v Durant* [1901] A.C.240,. The point to be decided was laid down by Lord Davey in the following words:

> "The question of law is whether a contract made by a man purporting and professing to act on his own behalf alone and not on behalf of a principal but having an undisclosed intention to give the benefit of the contract to a third party, can be ratified by that third party, so as to render him able to sue or be liable to be sued on the contract."

The House of Lords were unanimous in saying that this could not be done. The rationale of the judgment is succinctly summarized by Lord Macnaghten's remark that "civil obligations are not

to be created by, or founded upon, undisclosed intentions." If the a relationship of principal and agent is to exist and affect third parties, it must be based upon knowledge on the part of all concerned, and their joint intentions that such a relationship should exist and affect right and liabilities.

Folashade v Duroshola 1961 All N.L.R 87.

(ii) **The Principal must be in Existence**: In order that the intended principal may ratify the contract, he must have been in existence, and ascertainable at the time the contract was made. " No one" says Fridman's Law of Agency, 7th ed. at pg. 86 "can purport to act as an agent for a person who will come into existence at some future date, even if the agent can reasonably expect that his acts will be adopted" This means that the principal must be a live human being or a juristic person.

This rule is important for example in its bearing on the liabilities of Companies for pre-incorporation contracts, i.e. contracts made by the promoters on behalf of a company before incorporation. Where a company is not yet in existence but is still in the process of birth, the common law position is still that such a company will not be able to ratify a contract made on its behalf once the company has achieved legal existence. In other words, since a company has no legal existence before incorporation, the common law position is still that the company cannot ratify any contract made prior to incorporation. So in *Kelner v. Baxter* (1866) L.R. 2 C.P. 174 the court rejected the purported ratification of a contract by a company which had not been formed at the time the contract was made. Willes J. reiterated this point when he said: "ratification can only be by a person in existence either actually or in contemplation of law…."

See also *Caligara v. Gionvani Sartori & Co Ltd* (1961) All N.L.R 534;
Newborne V Sensolid (GB) Ltd (1953) 1 All E R 708;
Urhobo v Chief J.S. Tarka 1976 CCHCJ2629

The common law position caused some inconveniences and so some jurisdictions with common law traditions have enacted statutes that have greatly enlarged the capacity of such companies to ratify pre-incorporation contracts so as to make them liable thereon. The Nigerian Law Reform Commission in its review of the Nigerian Company Law in the late 80s recommended a statutory modification of the common law rule. This was accepted and the result is the subject of sec. 72 of the CAMA which provides that:

(1) Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to it formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereof.

(2) Prior to ratification by the company, the person who purported to act in the name of or on behalf of the company shall in the absence of express agreement, to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.

This section has no doubt greatly enlarged the capacity of such companies to ratify pre-incorporation contracts so as to make them liable thereon. In other words, unlike the common law ratification of pre-incorporation contracts is now possible. However, it must be noted that even in this case ratification is neither automatic nor compulsory. It is entirely at the discretion of the company. But upon ratification the company becomes subject to the liabilities and entitled to the benefits of the contract as if it was in existence at the time of the contract.

Section 72 of CAMA can be said to have given statutory backing to a decision rendered by Ikpeazu J as far back as 1965 in *Firgos (Nig) Ltd. v. Zetters (Nig) Pools Ltd.* (1965) LL.R 113. The plaintiff before the incorporation of the plaintiff company supplied goods to the defendant company and continued to do so even after the incorporation. Subsequently, the plaintiff company took action to recover the sums of money due on some of he transactions during pre-incorporation and post-incorporation. Defendants argued that the pre-incorporation transactions were not the contracts of the plaintiff company and that they were strangers to them and so could not take them over on incorporation.

But Ikpeazu J. denied them that line of defence and said that it was only of academic interests because they were bound by their pleadings. Based on the defendant company's pleadings, the learned judge said that they could not be heard to say that they did not adopt earlier transactions as transactions between them and the plaintiff company.

It must be borne in mind that at the time that this decision was rendered the common law rule prevailed and a company could not ratify a pre-incorporation contracts. It can only be imagined the kind of heat or criticism that the learned judge would have been subjected to until the

CAMA. As it has now turned out, it would appear that Justice Ikpeazu lived far ahead of his times and it can be said that he laid the foundation to what is now sec. 72(1) of CAMA.

Furthermore, not only must the principal be in existence at the time the act was done, the law also requires that he must be a person capable of being ascertained at the time . This means that the principal must either be known, or must be capable of being identified. It is not necessary that he should be named, but there must be such a description him as shall amount to a reasonable designation of the person intended to be bound as principal. For it is essential that third parties should know with whom they are contracting.

Watson v Swann (1962) II CBNS 736 per Willes J at P.771

It follows from this that the only person who can ratify an agent's act is the person on whose behalf the act was expressed to be done. The agent must purport to act on behalf of an identified, or identifiable person, and under the authority of that person, before that person can ratify the agent's act. Hence, only the person under whose authorisation the agent has purported to act can take the benefit of, or be made liable under the agent's act. For example, in *Wilson v Tumman* (1843) 6 Man & G 236.

> A sheriff's, under a writ of execution, wrongly seized goods which were not the property of the judgment debtor. When it was sought to make the execution creditor liable for this trespass it was held that he was not liable because the execution creditor could not ratify the sheriff's act so as to become liable for the sheriff's trespass. This was because the sheriff acted in pursuance of a public duty, under the authority of the law which ordered him to seize the debtor's goods, not under the authority, and on behalf of the execution creditor.
>
> See also *Barclays Bank Ltd v Roberts* [1954] 3 All ER 107

(iii) **Capacity of the principal to contract:** At the time of the act was done, the agent must have had a competent principal. This means that a principal must be qualified in law to act in the way the agent has acted. In this case, the agent must contract only for such things as the principal can, and lawfully may do, both at the time of contracting and at the time of ratification. If an agent enters into a contract on behalf of a principal who is, at the time, incapable of making it, no ratification is possible. Therefore, infants, mentally incompetent, and other incapacitated persons for example, may not be able to ratify acts purported to be done on their behalf, if at the time when the acts were done, they were incapable of doing them, even a prior agreement between the parties would not cure this defect.

A case that illustrates this is *Boston Deep Sea Fishing & Ice Co v Farmham* (1957) 3 All ER 205.

(iv) **Knowledge of the facts:** The principle is that summerised in the phrase that acquiescence and ratification must be founded on a full knowledge of the facts. This simply means that before ratification can validly take place the principal must be aware of all the material facts. In other words, the principal must have full knowledge of the transaction that he is proposing to adopt. See *Savery v King* (1856) 5 HL Cas 627

However, there may be liability for some acts by the agent even in the absence of complete knowledge. This may be so were it can be shown that the principal made no inquiry as to the true state of affairs and consequently assumed the risk involved or where there was negligence on the part of the principal. See *Marsh v Joseph* (1897) 1 Ch 213

(v) **The legal quality of the act:** The issue here is the act itself i.e. whether it is one that can be ratified. In other words, is the act one that apart from the question of the principal's capacity can be ratified? Theoretically, provided the principal is aware of the facts, every act whether lawful or unlawful which is capable being done by means of an agent is capable of ratification by the person in whose name or on whose behalf it is done. It must however be emphasised again that the doctrine of ratification as used here is primarily applicable to contract. Thus the use of the phrase "lawful or unlawful" acts must always be taken in this sense. In this connection, the making of a contract on behalf of another without authority could perhaps be regarded as an unlawful act, but such a contract can certainly be ratified.

However, there can be no ratification of a legal nullity or as it was put more recently 'life cannot be given by ratification to prohibited transactions.' So acts which are illegal or void cannot be ratified. For example, if the directors of a company enter into a contract that is not within the scope of its memorandum of association, the contract cannot be ratified even with the assent of every shareholder, because it is *ultra vires* and therefore void. *Ashbury Rly Carriage & Iron v Riche* (1875) LR 7 HL 653. Similarly, acts which amount to crimes cannot generally be ratified. In the words of Lords Fitzgarald in *La Banque Jacques-Cartier v La Banque d'Epargne de Montreal* (1887) 13 App. Cas 111 at 118, when he said:

> "Acquiescence and ratification must be in relation to a transaction which may be valid in itself and not illegal and to which effect may be given as against the party by his acquiescence in and adoption of the transaction."

It is therefore in this regards that illegal acts like forgeries cannot be ratified. The leading case in this area is that of *Brook v Hook* (1871) LR 6 Exch. 89.

There, the agent forged his principal's signature as the maker of a promissory note. Before the note matured the holder discovered the forgery and threatened to prosecute the agent. Whereupon the principal purported to ratify the agent's act. Later the principal refused to pay on the note. The question before the court was whether he was liable.

The majority of the court thought that the attempt at ratification was void because the act sought to be ratified was illegal.

The proposition that an illegal act cannot be ratified was accepted and applied in *Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil* [1985] QB 966; [1983] 3 All ER 766

A further problem created by this distinction is that between acts which are void *ab initio* and voidable acts. In the case of void acts, it is said that ratification cannot affect their nullity and so make them valid. Voidable acts, on the other hand, not being complete legal nullities before avoidance has taken place, can be ratified. Even assuming that this is correct, the problem arises how to determine whether the act in question is properly to be regarded as void *ab initio* or merely voidable. See *Danish Mercantile Co v Beaumont* [1951] Ch 680; [1951] 1 All ER 925

The better view would appear to be that voidable acts are capable of being given effect to by ratification, while void acts cannot ever be ratified.

(vi) **Ratification of the whole contract.** The rule is that the principal must ratify the whole contract. In other words, ratification must be of the totality of the act of the agent. A principal cannot adopt whatever is advantageous to him in the acts of his agent, while repudiating whatever is onerous.

See *Union Bank of Australia v McClintock* (1922) 1 AC 240;
Presentaciones Musicales SA v Secunda [1994] 2 All ER 737 at 750

(vii) **Reasonable time:** Ratification must be within a reasonable time.

(viii) **Proof of Ratification:** Generally speaking ratification need not be expressed in writing. Any act or statement which clearly shows the intention of the principal is sufficient. But if the

contract made by the agent is in the form of a deed then the principal's ratification must be by deed.

Furthermore, any conduct on the part of the principal showing clearly that he has approved or adopted what has been done on his behalf may constitute a sufficient act of ratification. Usually the principal must perform or do some positive or unequivocal act which indicates ratification. At first it was believed that merely standing by without objecting will not be sufficient. In other words, silence was not ratification. But in *Suncorp Insurance and Finance v Milano Assecurazioni SpA* [1993] 2 Lloyd's Rep. 225 at 234, Waller J stated that mere acquiescence or inactivity may be sufficient to establish ratification. According to him:

> "If the principal is aware of all the material facts and appreciated that he was being regarded as having accepted the position of principal and took no steps to disown that character within a reasonable time, or adopts no means of asserting his rights at the earliest time possible that can amount to sufficient evidence of ratification."

The English view is therefore that in certain circumstances, the inactivity of the principal can constitute implied ratification of an unathorised act

EFFECT OF RATIFICATION

The effect of ratification is in general to put all persons in the legal position they would have been had the unauthorised act been authorised. In other words, it renders the contract as binding on the principal and third party as if the agent had been properly authorized before hand. "Ratification as we all know" said Harman J in *Boston Deep Sea Fishing Co. v Farham* (Supra) 1957 3 All ER 204 at 209 "has a retroactive effect". Thus it furnishes the authority lacking at the time of the commission of the act. "When once you get a ratification" said Lord Sterndale in *Koenigsblatt v Sweet* [1923] 2 Ch. 314 at pg. 325, " it relates back, it is equivalent to an antecedent authority; when there has been ratification the act that is done is put in the same position as it had been antecedently authorized.

This principle that ratification is retroactive may sometimes cause some curious situation. For instance could a 3rd party i.e. the person with whom the agent deals, withdraw from the transaction before ratification takes place. The better view and that supported by case law is that not withstanding that the 3rd party has given notice to the agent of his withdrawal from the transaction, the ratification is nevertheless effective. To hold otherwise would be to deprive the

doctrine of its retrospective effect. Thus in the troublesome case of *Bolton Partners v Lambert* (1888) 41 Ch.D 295,

> A third party made an offer to X's agent which the agent without authority, accepted on behalf of X. The third party later purported to revoke his offer. However, later still X ratified the agent's acceptance. It was held that notwithstanding the third party's attempt at revocation he was bound by the contract with X because the ratification related back to the time of the agent's acceptance and so prevented the third party's revocation.

This is a decision which appears at first sight to be anomalous and difficult, considering the principle of contract that an offer may be revoked at any time before acceptance by the offeree. But who was the offeree? It was not the agent personally, because, as far as the 3rd party knew, the offer was being made to the agent's principal, and irrespective of the true state of affairs between the principal and agent, the position must be taken in the way in which it appears to the 3rd party. Hence, so far as the 3rd party was concerned there was a binding contract the moment the agent accepted the offer. On the other hand, if the principal had never ratified the agent's acceptance of the offer, there could have been no valid contract. Thus, at one and the same time it would appear that there was a contract between principal and the 3rd party, and there was not such a contract.

In order therefore to avoid such a chaotic situation, it seemed more reasonable to regard the agent's acceptance as an act which can be repudiated or adopted by the principal at will, and so can give rise to a binding contract, which may be taken as having come into existence before the offeror attempted to revoke.

The third party can escape this problem by expressly or impliedly making his offer "subject to ratification." In such circumstances, the offer is conditional and there is no binding contract until ratification of the agent's acceptance.

Watson v Davies (1931) 1Ch. 455.

III. AGENCY BY ESTOPPEL

Estoppel is a rule of evidence which precludes a person from denying the truth of certain matters under his or her control and upon the strength of which others have altered their position. Thus a person who has allowed another to believe that a certain state of affairs exists, with the result that

there is reliance upon such belief, cannot afterwards be heard to say that the true state of affairs was far different, if to do so would involve the other person in suffering some kind of detriment. Being a rule of evidence the applications of the principle of estoppel are not limited to the law of agency. It has for instance been much to the fore in recent developments of the law of contract. However, as applied to agency, this means that a person who by words or conduct has allowed another to appear to the outside world to be his agent, with the result that 3rd parties deal with him as his agent, cannot afterwards repudiate this apparent agency, if to do so would cause injury to 3rd party; for at this point, he is treated as if he had in fact authorised the agent to act in the way he has done.

So everything depends upon the way the situation appears to the outside world, in the light of what is usual and reasonable to infer, and upon the reliance which is placed by third parties upon the apparent authority of the person with whom they are dealing. An agent under such conditions is called an ostensible agent, and the agency is said to arise by estoppel.

Requirements for Estoppel:

Before an agency by estoppel can arise, the following conditions must be fulfilled:

(i) There must be a representation: This simply means that the principal must make a statement or conduct himself in such a manner as to lead 3rd parties reasonably to belief that an agency exist. But such statement or conduct must be clear and unequivocal. If the conduct by the principal is capable of being interpreted in a way which does not accord with the granting authority to an agent no estoppel can arise.

Colonial Bank v Cady (1890) 15 App. Cas 267**;**
Farquharson Bros. v King & Co (1902) AC 325.

(ii) There must be a reliance on the representation: The 3rd party must know of such conduct or representation, and act in reliance on the representation. This means that it must be made either to the particular individual who transacts business with the agents, or to the public at large in circumstances in which it is to be expected that the general public or members of the public in general would be likely to transact business with the agent. No estoppel can arise except where 3rd party relies upon facts known to him at the time he transacts business with the agent. “The

holding out" said Lord Lindley in *Farguharson Bros v King & Co* Supra at P. 341, "must be to the particular individual who says he relied on it or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it. (In other words this representation must be"the proximate cause of leading the party into that mistake").

(iii) There must be an alteration of a party's position resulting from the reliance.

The effect of this doctrine of agency by estoppel may be observed in several kinds of cases. First an agency by estoppel may arise from a course of dealing on the part of the agent which is constantly ratified by the principal; or it may result from the agent holding himself out as such without dissent on the part of the principal and under conditions where the principal owed a duty to speak. If for instance, a person allows another to order goods on his behalf and habitually pays for them, the relationship of agency will be implied and the person habitually paying will be estopped by his conduct from denying the existence of an agency relationship and will be liable on any contract entered into on his behalf. *Spiro v Lintern* (1973) 3 All ER 319

The operation of the doctrine of estoppel also frequently operates in cases of partnerships. In a partnership, partners are deemed to be each other's agent for contracts made in the ordinary course of the partnership business. A retiring partner must therefore give reasonable public notice of his retirement. If he retires without making a public announcement of that fact and the remaining partner enters into a contract with persons who had previously dealt with the partnership and who are unaware of his retirement he will be bound by such contract because he had by his conduct held himself out as a continuing partner.

Scarf v Jardine (1882) 7 App. Cas 345;
Tower Cabinet Co. Ltd v Ingram [1949] All.E.R 1033; [1949] 2 K.B. 397

IV. AGENCY BY OPERATION OF LAW

In certain circumstances although no relationship of principal and agent exist, the law regards what has been done by someone as having been done with the authority of some other person and therefore as his agent. Two instances clearly illustrate such circumstances: Agency of Necessity and Agency presumed from Cohabitation.

Agency of Necessity

Agency of necessity often arises when in emergency conditions a person is obliged to act in order to prevent an irreparable loss to the property or similar interest of the person on whose behalf the act is performed. In such a situation, even though the person who so acts, has no authority to do so, yet because of the urgent need, the law regards what has been done by someone as having been done with the authority of some other person, and therefore as his agent.

Agents of necessity are a very limited class and the courts are very reluctant to increase their number. However, if an agency of necessity is to be conferred, the following conditions must be satisfied:

(i) Prior contractual relationship: This kind of agency is very readily implied in situations where there is in existence a prior contractual relationship between the parties and the act constituting the agency of necessity is a mere extension of that relationship by the agent who in the unforeseen circumstances that have arisen is compelled to exceed his authority. Examples of such pre-existing contract is usually seen in the cases of common carriers entrusted with another's property who find it necessary to do something to prevent that property from total loss. The master of a ship for example, has wide powers in relation to the ship or its cargo if either is in danger. In an emergency situation, the master of a ship may sell or otherwise deal with the cargo or the ship itself as he deems fit, and his act though not authorised will bind the owners. Carriers of goods by land have also sometimes been treated in a fashion similar to shipmasters in respect of goods they carry.

Thus in *Great Northern Rly Co v Swaffield* (1874) L.R. Ex 132 the plaintiffs a railway company had carried a horse to its destination. But due to delays for which the railway company was not responsible, it was not possible for the horse to be delivered to its consignee as agreed. There was nowhere on the company's premises to keep the horse, so the plaintiffs placed it with a stable keeper and paid the stable keeper's charges. It was held that the defendants were liable to ay the plaintiffs the expenses incurred. Although the company had no express or implied authority to incur such charges, it had acted in an emergency as an agent of necessity and was therefore entitled to claim an indemnity from the owner of the horse.

It is important to note that there already was a contractual relationship in existence between the railway company and the defendants.
Sims & Co v Midland Rail Co [1913] I K.B 103

Apart from cases where prior contractual relationships exist, the doctrine of agency of necessity hardly applies. Thus where someone gratuitously interferes to protect another's property, as for example, where a stranger, not bound by an existing contract with the owner, looked after a stray animal, no liability to reimburse the stranger could be imposed on the owner; for the general principle is that benefits (or burdens) cannot be imposed on a person behind his back.
Binstead v Buck (1777) 2 WN BL 1117

(ii) There must be an actual or imminent commercial necessity or genuine emergency to warrant of the agency. This requirement is often construed strict and so would usually apply in cases "where the goods are perishable or consist of say livestock which has to be tended, fed or watered". So the reason for the decision in *Swaffield* case supra was therefore the need to look after the horse which otherwise might have perished through lack of food and care. Where therefore goods are not of a perishable nature and are not likely to deteriorate in quality if properly stored, an agency of necessity will not easily be implied. In this connection, mere inconvenience for example, will not create an agency of necessity. In *Sachs v Miklos* [1948] 1 All ER 67, [1948] 2 KB 23, S stored his furniture on M's premises free of charge. Three years later M wanted the space which was occupied by the furniture for other purpose. But he was unable to communicate with S. He sold the furniture. There was certainly no emergency and therefore M was liable in conversion.

Similarly in *Munro v Willmot* [1948] 2 All E.R. 983 the defendant allowed plaintiff to park her car in his garage. It was left there for some years, after which time the defendant found it too inconvenient to keep it further. He was unable to locate the plaintiff to take her car away. The defendant sold the car. The defendant was held not justified in selling the car, for no state of emergency, but only of inconvenience had arisen. The defendant was therefore liable for conversion.

(iii) It must be impossible or impracticable to communicate with the owner of the goods in order to get his instructions. In *Springer v Gt. Western Rly Co* [1921] I K.B 257 the plaintiff one Mr. Springer consigned tomatoes from Jersey to London. The ship delivered the consignment of tomatoes at one of the London docks 3 days later than expected and owing to a railway strike the tomatoes could not be unloaded until a further two days later. When unloaded, they were found to be bad and the railway company decided to sell them locally. No attempt was made to communicate with Mr. Springer. The railway company was held liable in damages to Mr. Springer as they should have communicated with him and asked for his instructions as soon as the ship arrived.

However, the modern means of communication where there is widespread use of telephone, telegram, telex and fax has greatly minimised the occasions where anyone can successfully claim to be an agent of necessity in this circumstance.

(iv) The agent must act bonafide in the interest of all the parties. *Prager v Blastspiel Stamp & Heacock Ltd* [1924] I K.B 566. In 1915 & 16 the defendant as agent bought skins to be dispatched to the plaintiff a fur merchant in Romania. But owing to the German occupation of Romania, it was impossible to send the skins to him or to communicate with him. Thereupon the defendant sold the skin which meanwhile had appreciated in value. It was held that as the skins were not likely to deteriorate in value if properly stored, the defendant had not acted bonafide in selling the skin.

But whether the doctrine will be carried beyond its present scope remains to be seen. McCardie J. in *Prager v Blatspiel* (supra) was all for such extension. The learned Judge was of the view that since it was designed to meet commercial convenience, the doctrine of agency of necessity was not limited to previously accepted instances, but was capable of extension to cover new ones, provided that the requirements of the doctrine are fulfilled, i.e. there is 'necessity': communication with the principal is impossible: the agent has acted bona fide and in the principal's interest.

The general trend nevertheless, has been much more conservative than this. In particular Scrulton LJ in *Jebara v Ottoman Bank*, [1927] 2 KB 254 considered that the doctrine should only be applied where there was a subsisting principal agent relationship at the time of the act in

question. In other words, apart from cases where a prior contractual relationship exist the doctrine of agency of necessity hardly applied.

In conclusion, it must be said that in spite of the attempts to limit the scope of the doctrine to the classical situation mentioned above, the doctrine has also been held to arise where a person carries out the moral duty of another. Thus a railway police inspector who took an injured passenger in a railway collision to an inn was held to be an agent of necessity of the railway company for board and lodging supplied to the injured passenger. *Langan v Great Western Railway Co*. (1873) 30 LT 173.

Agency Presumed From Cohabitation

Where a married woman is cohabiting with her husband and both maintain a household establishment there is a presumption that she has (implied) authority to pledge the husband's credit for necessaries suitable to the style which they live. This is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husbands credit in respect of matters coming within those departments. The question whether goods are necessaries is one fact. But in determining this (i.e. whether goods supplied are necessaries), it seems regard is had to the man's style of living rather then his actual means. This may be so because in defining necessaries for this purpose Willes J said in *Phillipson v Hayter* (1870) LR 6 CP 38 of 42.

> "What the law does infer is that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife."

It would appear therefore that it is the ostensible and not the justifiable mode of living that sets the standard, and if a husband chooses to live beyond his mean his liability may be correspondingly increased.

However the liability of the husband even in this circumstance is always subject to the proviso that the goods are suitable and reasonable not only in kind but also in quantity.

Necessaries would then include clothing, both for the wife and her children, articles of household equipment, food, medicines and medical attendance, and even the hiring of servants.
So if a wife orders things which are not suited to the husband's style of living, or she orders things of an extravagant nature or excessive in quantity, there is no presumption of authority and action cannot be maintained against the husband.

Requirements for such agency

Despite what is said above, the presumed agency rests essentially on two major factors namely:

(i) Cohabitation:
Since the wife's agency is presumed to be authorised by her husband there must be some basis upon which this presumption may be drawn. In this connection, the law requires that the husband and wife must be cohabiting i.e. the husband and wife are living together in such a circumstance from which it is reasonable to infer that the wife is acting on behalf of her husband when she orders necessaries. Marriage is not a prerequisite, i.e. the person alleged to have authority need not be married to the person sought to be held liable as principal. The presumption applies equally in the case of a woman living with a man as his mistress. So, as long as there is cohabitation between a man and woman in circumstances in which the outside world takes them for a man and wife, the woman will be in the same position as a wife.
The only basis for the presumption is the fact that the husband and wife are living together, if therefore the wife is separated from her husband, she has *prima facie*, no authority to pledge his credit and this form of agency cannot be invoked to create liability in the husband. But the appreciation of the presumption will depend on the reason for separation. Where the parties are living apart by reason of wife's misconduct e.g. where she is guilty of desertion, or committed adultery, the wife does not have his authority. Secondly, where the parties are separated as a result of a court order, the husband is not liable for necessaries supplied to her so long as he complies with the order for alimony or maintenance. Thirdly where the separation is by mutual consent without any formal judicial decree, the existence of the presumption will depend upon whether there has been an agreement between the parties on the subject of maintenance. If there, is then the wife does not have the authority to pledge his credit unless the agreement is not kept.

But if there is no maintenance agreement then she has presumed authority unless the wife has other adequate means of support, whether coming from her husband or elsewhere.

(ii) Domestic Establishment

The fact that the parties cohabit is in itself insufficient. They must in addition be living together as man and wife in circumstances which show that they are a family. This point is very illustrated by *Debenham v Mellon* (1880) 6 App Cas 24. Husband and wife were manager and manageress of a hotel where they lived and cohabited. The wife had an allowance for clothes, but the husband forbade her to pledge his credit for them. The wife bought clothes from the plaintiff in her own name and paid the bills. Then she incurred a debt with the plaintiff who demanded payment of it from the husband. It was held by the House of Lords that the husband was not liable. One of the reasons given for that decision was that no presumption of agency could be drawn because the parties were not cohabiting in a domestic establishment but in a hotel.

Even where all the ingredients for such an authority exist, the tradesman still bears the burden of proving affirmatively to the satisfaction of the court that the goods supplied to the wife are necessaries. If he is unable to do this, as for instance where the goods consist of jewels or articles of luxury, his only action lies against the wife, unless he can show an express or implied assent by the husband to the contract.

Factors which deprive the wife of authority:

Even where the goods are undoubtedly necessaries, the husband is only presumptively liable, and he may rebut the presumption and so escape liability. The presumption is rebutted if he proves any of the following:

(a) that the goods were supplied exclusively on the wife's credit.

(b) that the trader has been expressly warned not to supply goods to the wife on the husband's credit.

(c) that the wife was forbidden to pledge his credit whether or not the supplier knew of this. However, it is important to observe here that if the husband has held his wife out in the past to the plaintiff so as to invest her with apparent authority under the doctrine of estoppel, then a mere private prohibition addressed solely to

the wife, will not relieve him from liability in respect of her future purchases of a similar nature. In such a case it is his duty to convey an express warning to the tradesman.

(d) that the goods though necessaries are excessive or extravagant having regard to the husbands income.

(e) that the wife was already supplied with sufficient articles of that kind or with sufficient allowance with which to purchase them.

What is the relevance of the wife's independent means?

Lord Denning in *Biberfield v Berens* [1952] 2 All E.R. 237 suggested that in computing the husbands liability for necessaries a "means state" must be applied. The reasoning is, that it must follow from the modern equality of the sexes, that the wife, if she can afford it must help in discharging the household accounts, and that a wife who is well off is not entitled to spend all her money on luxuries and throw all domestic liability on the shoulders of her husband.
Hutchinson v Olagide (1970) 2 NCLR 330

THE SCOPE OF THE AGENT'S AUTHORITY

Authority is the central and most important feature of the whole of agency relationship. Once it is determined that an agency relationship has been created, it is necessary to establish the scope of such relationship. By this, it is meant the exact nature and extent of the power possessed by the agent. This is easily understood by reference to the agent's authority. The scope of the agent's authority determines not only the legal relations of the principal and his agent, but also the relations which may emerge between the principal and the 3rd party or the agent and the 3rd party.

Generally speaking an agent's authority is conferred by the same method leading to the formation of the contract of agency. Thus express agency confers actual or express authority and agency by estoppel confers apparent authority. The principle however, is that regardless of the type of authority conferred on the agent it must not be ambiguous (where for instance, express instructions given to an agent are ambiguous, the agent will not be liable. The principal on the other hand, will be bound as long as the agent acts in good faith and in accordance with a

reasonable construction of those instructions even if the agent's construction is not the one intended by the principal).

In the same way the principal will not be bound by the acts of his agent which are done in excess of the agent's authority unless the principal adopts what the agent has done in accordance with the doctrine of ratification. So a person who has no authority to contract on behalf of another or who having such authority exceeds that authority may be personally liable to any third party with whom he contracts for breach of warranty of authority. This will be so whether or not he knew that he had no such authority. The rational is that everyone who professes to act as an agent on behalf of somebody else impliedly warrants that he has the authority to act as he did. If it turns out that he lacks such authority he will be liable in damages to the third party who is induced to contract with him unless the third party knows or ought reasonably to have known of his lack of his lack of authority. *Collen v Wright* (1857) E & B 647.

The elucidation of the notion of the agent's authority is usually made complicated by the fact that there is hardly one unique and integrated notion of authority. In fact, there are several varieties of authority, and as noted earlier, the particular authority involved in any given agency relationship depends on the type of agency being considered.

(i) EXPRESS AUTHORITY:

This type of authority also known as the actual or real authority as the name implies arises directly from the authority expressly or directly given by the principal to the agent under an agreement or contract between them. It may be given orally or in writing or by deed i.e. under seal. In the latter case, it is known as "Power of Attorney". Lord Diplock in *Freeman & Lockyer v Buchurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630 at 644 said of this type of authority.

> "An actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts; including any proper implications from the express words used, the usages of the trade or the course of business between the parties."

So, if the agent's authority is contained in a deed (i.e. a power of attorney), the instrument or deed will be strictly construed according to the rules of construction which are usually applicable to deeds of all kinds.

But where the agent's authority is contained in a document not under seal, i.e. it is written or is given by parol, the agent's authority is to be construed having regards to the purposes of the agency i.e. the surrounding circumstances and the usual course of the business in which the agent is concerned. Thus in *Ashford Shire Council v Dependable Motors* [1961] All ER 86 at P. 101 the Privy Council said that "the extent of an agent's authority if in doubt, must be determined by inference from the whole circumstances."

Written documents containing the agent's authority is of prime importance. The scope of such documents is to be ascertained by applying ordinary rules of construction. Again if there is any ambiguity about the wording of the agent's authority then, as long as the agent act in good faith and in accordance with a reasonable construction of his authority, he will be considered to have acted within his authority, whether or not what he did was what the principal intended he should do.

Boden v French (1851) 10 CB 886;
Ireland v Livingston (1872) LR 5HL 395;
Blandy Bros & Co. Ltd v Nero Simon Ltd [1963] 2 Lloyds Rep 24;
Stafford v Conti Commodity Services Ltd [1981] 1 Lloyds Rep 466 .

(ii) IMPLIED AUTHORITY:

It is hardly possible for an express agency to spell out the full extent of the authority of the agent. And as was said in *Ghandi v Pfizer International Products Ltd* [1970] NCLR 362, a term which is not expressed in a contract will be implied if it is so necessary that had the parties averted to the situation, they must have intended that it should be a term of the contract. This type of authority is therefore derived from the express authority of the agent, and simply means that the agent has authority to do whatever is necessary for, or ordinary incidental to the effective execution of his expresss authority. Thus where an agent is appointed to conduct a particular trade or business he can do all such things as are necessarily incidental to the conduct of such trade or business. For instance an agent employed to sell certain property has implied authority to describe the property and state to an intending purchaser any facts which may affect its value.
Mullens v Miller (1882) 22 Ch.D 194; *Ryan v Pilkington* [1959] 1 All ER 689.

(iii) USUAL AUTHORITY:

This type of authority goes hand in hand with the agents implied authority. It is the type of authority possessed by agents employed to act for a principal in connection with matters concerning a particular trade or business or to act for the principal in the ordinary course of his trade business or profession. In other words, such an agent is authorized to do what is usual in his trade, profession or business for the purpose of carrying out his authority or anything necessary or incidental thereto. Thus a commissioned agent employed to make a bet for his principal is impliedly authorised to pay the bet if he lost. *Read v Anderson* (1884) 13 QBD 779.

The theoretical justification for this is to be found in *Watteau v Fenwick* (1893) 1 QB 346 at 348 where Wills J. said, "the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character."

The principal will be liable for the acts of the agent unless he has prohibited or restricted the agent from acting in the way he has done and the third party has notice of the prohibition or restriction. This is in keeping with the well established principle that "if a person employs another as an agent in a character which involves a particular authority he cannot by secret reservation deprive him of that authority."

Edmunds v Bushell & Jones (1865) LR 1 QB 97; *Daun v Simmins* (1879) 41 LT. 783 *Watteau v Fenwick* (supra)

(iv) CUSTOMARY AUTHORITY:

Where an agent is employed to act for his principal in a certain place, market or business, then the agent is impliedly authorized to act according to the usages and customs of such place, market or business. Such is customary authority which itself is a variety of usual authority, but the difference between the two being that whereas the essence of usual authority is an inference from the ordinary cause of a particular trade, business or profession, the essence of customary authority is the custom and practice of a particular place, market or business. "If there is, said Parke B in *Bayliffe v Butterworth,* "at a particular place, an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way."

However, the principal can only be bound where the custom is known to him, or be so notorious that he (i.e. the principal) cannot be heard to say that he had no knowledge of it. Moreover the

custom must be reasonable and lawful. If, while lawful, it is not a reasonable custom then the principal will not be bound by it unless he expressly consents to be bound by it.

Cunliffe-Owen & Teather & Greenwood [1967] 3 All ER 561 at pg.. 573
Anglo-African Merchants Ltd v Bayley [1969] 2 All ER 421 at 429-430
North & South Trust Co. v Berkeley [1971] 1 All ER13 980 especial 992-993

(v) APPARENT AUTHORITY:

An agent's apparent authority or ostensible authority as it is also usually called, is the authority which the principal by his words or conduct has led 3rd parties acting as reasonable and prudent persons justifiably to believe is conferred on the agent by the principal. The principle of a apparent authority is in fact, an application of the principle of estoppels; for estoppel means only that a person is not permitted to resist an inference which a reasonable man would draw from his words or conduct.

Thus where one person expressly or impliedly represents another to have authority to act on his behalf so that a third party reasonably believes him to possess that authority and deals with him in reliance on the representation the person making the representation will be bound to the same extent as if actual authority had in fact been conferred. He is estopped from denying the ostensible authority which he has created.

Just as the case of agency by estoppel, it is extremely important to note three things. First, a representation must be made by or with the authority of the principal. Ostensible authority cannot be created simply by a representation of the agent himself. Secondly, the 3rd party must rely on a representation of the agent's authority to act as agent; the doctrine cannot apply where the third party does not know or believe him to be an agent e.g. if the existence of the principal is unknown to him. Thirdly, the alteration of position as a result of such reliance.

See *Rama Corp. v Proved Tin & General Investments Ltd* [1952] 1 All ER 554, Per Slade J. at P. 556

Again as seen earlier, the words or conduct must convey a clear unambiguous message that the agent has authority to do a particular act on behalf of the principal *Colonial Bank v Cady; President Clothing & Co Ltd v Anyanwu* (1975) I CCH CJ/I

In view of the limitations (stated above), ostensible authority is seldom applicable where a person has never at any time had authority to contract. So the doctrine of ostensible authority is

more likely to apply where an authorized agent goes beyond the limits of his actual authority, yet acts within an authority which he is made to appear to possess. Thus if an employer, for example, allows his employee habitually to purchase goods for him on credit from X, so that X becomes accustomed to look to him for payment for such things as are supplied in the usual cause of dealing, he (i.e. the employer) cannot privately revoke the employee's authority and claiming in an action against him by X, that the agency thereupon immediately determined. His conduct in "holding out" his employee to be his agent estopps him from denying that his authority was not still in existence.

Similarly, if a husband recognizes and taken upon himself the liability in respect of his wife's past dealings with tradesmen, he holds her out to be his agent and to have his authority to contract on his behalf. He will be liable on such contracts as she may make with the tradesman unless and until he actually makes known to the tradesman the fact that her agency has been determined.

Other ways by which apparent authority can arise are many. For example, it may be based on standard practices of a trade or it may result from principal entrusting certain property or documents thereto to the agent; or from the appointment or placement of the agent to a position which carries with it the implication of authority. *Nasidi v Mercury Assurance Co Ltd* (1971) 2 NCLR 381 at P. 394-395; *NPA V. Cogefar SPA* (1972) NCLR 199 at 225-226.

Even, sometime the fact that person is entrusted to certain duties in the normal course of his work may amount to an implied representation of authority to act in certain way. *Lloyd v Grace Smith & Co.* (1912) A.C. 716; *Essenkay (Nig) Ltd v. Leventis Stores Ltd* [1973) CCHCJ/1.

Also apparent authority may be established by showing that the agent has been conducting similar transactions or doing similar acts to the knowledge of the principal without his objection thereto. *Raccah v Standard Co of Nigeria* (1922) 4. NLR. 48.

DUTIES OF AGENTS TOWARDS THEIR PRINCIPALS

Where an agency relationship is consensual, as it is often the case, there are usually express and implied terms which govern the rights and liabilities of the parties. In other words, the internal obligations of the principal and agent are governed by the terms. In the absence of such terms or

any relevant express or implied terms, those obligations are regulated by rules of law applicable to the relationship of principal and agent. Thus once there is an agreement giving rise to an agency relationship, then in the absence of an express contractual terms, the agent, as a matter of law, owes certain implicit duties to his principal. Some of these duties include the following:

(i) **Performance:**

The agent must first and foremost do what he has been appointed to do. In contractual agency, this amounts to a duty to carry out the contract which the agent has made with the principal. In this connection, he will be personally liable for breach of contract if he fails to perform what he contracted to do (*Turpin v Bilton* (1843) 5 Man & G 455). The agent is however not obliged to perform where the undertaking is illegal, nor is he obliged to carry out a transaction which is null and void either at common law or statute. *Cohen v Kittell* [1889] 22 Q.B.D 680 distinguished by the Court of Appeal in *Fraser v BN Furman (Productions) Ltd* [1967] 3 All ER. 57.

Where the agency is not contractual, i.e. to say a gratuitous agreement, the agent is not obliged to perform the undertaking at all and thus will not be liable for failure to perform. But where he decides to perform he could be liable for negligent performance.

(ii) Obedience:

In the performance of the undertaking an agent must act in accordance with the authority given to him. In other words, he must obey the express instructions written or verbal of his principal as long as they are lawful. In the absence of express instructions, he must act in accordance with the general nature of his business i.e. to say within his implied authority, or he must act in accordance with trade, or other customs or usages where they can apply in the performance of the undertaking. No matter the circumstance, the paramount consideration says Fridman's Law of Agency 7th edition at page. 157, particularly where there are neither express instructions nor usages or customs to guide the agent, is the benefit of the principal, and as long as he acts for the principal's benefit, the agent in such circumstances may use his discretion.

(iii) Care & Skill:

In addition to performing his duty an agent is also required to exercise the requisite skill and diligence in the performance of the duties. All agents whether contractual or gratuitous owe this

duty to their principals. However, a distinction is often made between the standard of care to be observed by contractual and gratuitous agents. In the case of contractual agency, the standard of care to be observed by the agent is the skill which an agent in his position would usually possess and exercise. Thus as long as he has behaved with normal care and skill, having regard to the nature of his business, and has acted in as reasonable a manner as could be expected from an agent employed in such an undertaking, the agent will not be liable for negligence even if his efforts were not successful. In this connection, the Privy Council in *Omotayo v Ojikutu* (1961) All N.L.R 901, held that:

(i) a principal who appoints an agent knowing his skill and experience is not entitled to expect or require from that agent a higher measure of skill or knowledge than one of his position and experience could reasonably be expected to possess.

(ii) the agent does not guarantee the successful outcome of transactions undertaken by him on behalf of his principal, and provided he acts honestly, no more can be demanded of him than that he should show a measure of skill and diligence which could be expected of one of his position and experience.

Thus if an agent is employed to sell, it is his duty to obtain the best price reasonably obtainable. It has been held that this duty to obtain the best price obtainable does not cease when the agent had procured an offer which has been conditionally accepted by the principal. *Keppel v Wheeler* [1927] I K.B 577.

A gratuitous agent as seen earlier is under no obligation to act. But if he does act, the degree of care and skill required of him is that which a reasonable man would exercise in respect of his own affairs. Where the agent has expressly or impliedly held himself out to his principal as possessing skill adequate to the performance of a particular undertaking, he must show such skill and care as would normally be shown by one possessing the skill.

(iv) Duty to account:

Money or property entrusted to the agent must be accounted for to the ppal. Because of this fact the agent is required to keep proper records showing receipts and expenditures in order that a complete accounting may be rendered. Any money collected by an agent for his principal should not be mingled with funds of the agent.

(v) Non- Delegation

The agent may not, as a general rule delegate to another person that which he has undertaken to do. This is usually expressed in the Latin maxim *delegatus non potest delegare* (a delegate cannot delegate). The origin of the rule is to be found in the assumption (or in the fact)) that the relationship between the principal and agent is a confidential one in which the principal imposes trust in the agent of his choice. Hence the obligation of the agent is to act personally, in conformity with the maxim.

The principal is entitled to have the benefits of the skill of the person whom he has selected as his agent. The reason for this rule, and its limitations were outlined by Thesiger L.J. in De *Busshe v Alt* (1878) 8 Ch.D 286 at P. 310 in the following words:

> "As a general rule no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a 3rd person; but this maxim when analysed merely imports that an agent cannot without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfill; and that inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract".

See also Buckley J in *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 All ER 826 at 832.

The fact of these cases and the extract from the judgments referred to reveal not only the basic principles of the law in regard to delegation by an agent but also the recognition by the law that there are circumstances in which it is permissible for the agent to delegate the performance of the undertaking to another. There are, therefore, a number of occasions when because of exigencies of business, the above rule is relaxed in order to enable the agent to delegate his powers. This may be so in the following cases:

(i) Where the duties to be performed are purely ministerial acts, which do not involve any special care and skill they can normally be delegated.

(ii) Where the usage or custom of the trade or nature of the business permits delegation.

(iii) Where unforeseen circumstances arise which necessitates the agent delegating.

(iv) Where the principal expressly sanctions or consents to the delegation.

But assuming that delegation is proper, what is its effect?

The employment by the agent of a sub-agent does not normally bring into being any privity of contract between the principal and the sub-agent. In this case, the sub-agent is responsible to the agent alone and cannot be sued directly by the principal.

Kahler v Midland Bank [1952] A.C 24;

See also the case of *Calico Printers Association v Barclays Bank* (1931) 145 L.T. 51 where it was held that where an agent has power to appoint a delegate or a sub-agent, the sub-agent becomes the agent of the agent and not of the principal, unless the principal has given authority to his agent not merely to appoint a delegate or sub-agent but to appoint someone to act as agent for the principal. Thus, where the principal expressly or impliedly authorizes the delegation or where he ratifies a delegation which has already taken place, privity of contract is established. The sub-agent becomes responsible to the principal for the due discharge of the duties which his employment casts upon him, and a fiduciary relationship arises between them.

De Busshe v Alt (Supra).

(vi) Duties arising from the fiduciary nature of the agency:

Besides those ordinary duties which are implied by law into an agency relationship there are certain other duties that are owed by the agent to the principal which arise from the fiduciary nature of the relationship between them. These duties are equitable in character and are usually lumped together under one general principle namely; *that an agent must not let his own personal interest conflict with the obligations he owes to his principal*.

This general idea is manifested in the following ways.

(a) Fidelity

No agent may enter into any transaction in which he has a personal interest which might conflict with his duty to his principal, unless the principal, with full knowledge of the agent's interest, consents. In other words, where the agent is in a position in which his own interest may affect the performance of his duty to the principal, the agent is obliged to make a full disclosure of all the material circumstances, so that the principal with such full knowledge can choose whether to consent to the agent's acting. (If this is not done, then the principal may set aside the transaction and claim from the agent any profit the agent may have obtained from such transaction).

It follows from this that an agent may not depart from his exact character as agent and become a principal party to the transaction even though this change of attitude may not result in injury to his principal. An important illustration of this is usually provided by the situation where an agent employed to sell the principal's property purports to buy it himself. If he does so, he puts himself in a position where his interest is in direct conflict with his duty. In such a situation, the principal may set-aside the transaction and claim from the agent any benefit which he may have obtained from the(transaction. For example, in *McPherson v Watt* (1877) 3 App cas. 254, the agent of two ladies, who wanted to sell their house, bought it in the name of his brother, so as to conceal that he was really buying it for himself. Specific performance of the contract of sale was refused.
Where such is the case, it is immaterial that the contract is really fair or that a long time has elapsed as long as the principal without fault on his part, is in ignorance of what has happened.
Furthermore, an agent must not make use for his own personal benefit of information acquired in the course of his employment as an agent unless he has his principal's consent. Thus an employee who has access to his employer's processes or lists of customers and has sought to make use of knowledge gained there from after termination of the employment may be liable to his employer. In other words, the agent is not allowed to make use of such confidential information to engage in competition with the principal.
Boardman &Anor v Phipps [1966] 3 All ER 721. There it was held that knowledge as to the value of shares in a company, which the agent gained while acting as solicitor for the principals, was something like property belonging to the principal, the use of which made the agent accountable to the principal for profit thereby gained, even though the principal had earlier refused to use the knowledge for his own benefit.

Robb v Green [1895] 2 QB 315;
Sanders v Parry [1967] 2 All ER 803.

But this depends upon whether the agent's position was such that it gave him access to special information which he would otherwise not have obtained *Nordisk Inulinlaboratorium v C.L. Bencard Ltd* [1953] 1 All E12 986 .
Difficult question however arise where the agent deals with his principal after he has ceased to be an agent. It appears that the duty to disclose can continue but whether it does so in any particular case will depend on all the circumstances of the case. For example, if the confidence

created by the agency relationship still exists at the time of the transaction; (or if he has acquired special knowledge during his employment relating to the subject-matter of the transaction, a court will be inclined to hold that the duty of disclosure is still binding on the agent.

Allison v Clayhills [1907] L.T. 709;
Demrara Bauxite Co v Hubbard [1923] AC.

If again the principal becomes an alien enemy, it may well be that the agent's duties of loyalty comes to an end. *Nordisk Insulinlaboratorium v Georgate Products Ltd* [1953] Ch. 430 at P. 442

Finally the agent may not when employed to bring his principal into contractual relations with a third party also act as agent for that third party without disclosure of that fact to both parties and obtaining their consent *Fullwood v Huley* (1928) 1 KB 498.

Where the agent fails to make full disclosure, his principal may take one of the following courses appropriate to the particular circumstances of the case. He may rescind the contract, or affirm it and claim the profit the agent has made. Where rescission is no longer possible he must affirm, but he will usually be able to claim the profit the agent has made or damages for breach of contract. Thus, where an agent has bought his principal's property, the principal can claim the profit on the resale, or the difference between the value of the property and the price the agent gave.

De Busshe v Alt (Supra)

(b) Secret Profit

Still related to what has just been discussed is the idea that an agent must not make secret profit out of the performance of his duties as agent. It is his duty to account for all such profit. Failure to do so might result in the loss of commission as well as dismissal of the agent.

Secret profit explains Fridman's law of Agency, refers to any financial advantage which the agent receives over and above what he is entitled to receive from his principal by way of remuneration. Such profit may therefore include rebates, bonuses, bribe or payment of a secret commission. But there need be no bribery involved in the making of a secret profit; nor need there be corruption of the agent on the part of a third person. It is sufficient if the agent without the complicity of a 3rd person, secretly gains financial advantage to himself from the exercise of

his authority. The agent will be liable to account for the profit received; because the contract between principal and agent is one of utmost good faith.

De Busshe v Alt (supra)
Hippisley v Knee Bros (1905) 1 K.B 1.

Even if the agent is not being paid commission for acting on the principal's behalf he may still not secretly profit from his position *Turnbull v Garden* (1864) 20 LT 218.

The position of agents who make secret profits was considered at length in *Boardman v Phipps* supra.

Industrial Development Consultants Ltd v Cooley (1972) 2 ALL E.R 162

Similar doctrine has been applied to those who are not agents in the strict sense but are in a similar fiduciary relationship. Thus it has been held to apply to policemen, soldiers who have used their positions to make a secret and illegal profit.

Where the secret profit takes the form of a bribe i.e. "the payment of a secret commission" by a 3rd party or the receipt by the agent of a "secret advantage for himself from the other party to a transaction in which the agent was acting for his principal," he is liable to account for it and pay over the amount to his principal as money had and received to his use. See *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch.D 339.

Furthermore, other remedies are available to the principal against both the bribed agent and the briber. At first, it was held that a principal could obtain from his corrupt agent the amount of the bribe he had accepted since this was secret profit, and also sue the agent and the third party giving the agent the bribe, jointly or severally for any loss or damage resulting from the agents acceptance of the bribe;

See *Salford Corp v Lever* (1891) 1 Q.B 168.

But the Privy Council in *Mahesan v Malaysia Government Officer's Co-operative Housing Society Ltd* (1978) 2 ALL ER 405 decided that as against the agent and the briber, the affected principal had alternative, not cumulative remedies. He has to make an election which one he wishes to pursue. His alternatives in this regard are between:

(i) claiming the amount of the bribe from the agent as money had & received by the agent and

(ii) suing for damages for fraud in respect of the actual loss sustained by the principal in consequence of entering the transaction in relation to which the bribe had been given.

THE DUTIES OF THE PRINCIPAL

(i) Remuneration.

The primary right of every agent is to receive a remuneration for the services that he rendered to the principal. The remuneration of an agent is usually in the form of commission and represents his reward in respect of the duties performed by him. The obligation to pay the agent's remuneration and the amount to be paid is usually found in a contract express or implied between the principal and agent.

Where the contract expressly provides for remuneration, the term must be very clear and the agent can only claim in accordance with those terms. So where the agreement provides for the payment of "such remuneration as should be deemed right" such a term will be too vague and uncertain to confer a right to remuneration. T*aylor v Brewer* (1813) M & S 290. But where as in *Bryant v Flight* (1839) 5 M & W 114, the agent leaves the amount of payment he is to receive entirely to the principal, it was held that there was an implied term for some remuneration and that the agent could recover on a *quantum meruit* basis.

Where nothing is said on the subject of remuneration but the nature of the employment and the situation of the panties show that payment was intended, remuneration will be paid and the fact that nothing was expressly agreed is immaterial. Payment will be received on a *quantum meruit* basis i.e what is reasonable in the circumstances. If there is a trade or other usage or custom which indicates that remuneration is to be paid, the amount of remuneration may be calculated by what is customary in the trade, profession or business in which the agent is employed. Thus in *Badawi v Elder Dempster Agencies Ltd* 1968 N.C.L.R. 394 it was held that where an estate agent is employed to sell property, he is entitled to commission at the standard rate charged by the profession if that is known to his principal.

Even where it is expressly or impliedly agreed by the principal that he will pay remuneration, another problem which arises is to determine at what stage remuneration is payable. In general an agent is only entitled to commission or remuneration if he has been the direct, effective or

efficient cause of the event upon the occurrence which the principal has agreed to pay the agent's remuneration. In other words, the agent must show not only that he has achieved what he was employed to do but also that his acts were not merely incidental to that result but were essential to its happening i.e. he must in effect have been the means whereby the two contracting parties were brought together and entered into a legally binding contract. But whether in a particular case an event has occurred which entitles the agent to his commission is essentially a question of construction of the contract.

Luxor (Eastbourne) Ltd v Cooper [1941] 1 All E.R. R. 33

It is however immaterial to the payment of remuneration that the principal has derived no benefit from the agents acts. As long as the agent has performed what he was employed to do, and has not been at fault in failing to benefit his principal, the latter will be bound to pay the agreed commission.

Fisher v Drewett (1879) 48 LJ Q.B 32

A question that arises at this point is whether a principal can prevent the agent from earning his commission? This was the central issue raised by the *Luxor (Eastbourne) Ltd v Cooper* (supra). In that case, L. engaged C, to negotiate the sale of property. £10,000 Commission was to be paid to C, "on completion of the purchase". Offers were secured for the properties but the agreement made with the purchasers was expressed to be "subject to contract." A binding agreement between L and the purchaser was not completed because L decided not to sell. C sued L claiming damages for an implied term that L would not, without just cause, do anything to prevent him earning his commission. It was held that C would not succeed because no sale had been effected and there was no implied term in the contract that L should not act so as to prevent C from earning his commission. Lord Wright exposed the unreasonableness of such an implied term when he said:

> "It is well known that, in the ordinary course, a property owner intending to sell may put his property on the books of several estate agents with each of whom he makes a contract for payment of commission on a sale. If he effects a sale to the client introduced by one, is he to be liable in damages to all the others for preventing them from earning their commission? Common sense and ordinarily business understanding clearly gives a negative answer. Alternatively, suppose that, having employed one agent whose client has made an offer, he receives a better offer from a buyer introduced by another agent and conclude the purchase with him, it seems out of the question that he is hereby rendering himself liable in damages to the former agent. Again,

> suppose that owing to changed circumstances, he decides that he will not sell at all, and breaks off negotiation with the agent's client, is he to be liable for damages to the agent? I can find no justification for such a view."

See the case of *Alpha Trading Ltd v Dunshaw – Pattern Ltd* [1981] Q.B 290, [1981] I All ER 482

Even where there is an agreement to pay remuneration and the agent obtained what the principal wanted, there may still be no liability to pay the agreed remuneration. This will be so where the transaction on which the agent was employed was illegal. But the liability to pay remuneration depending upon whether or not the agent knew the undertaking was illegal. For example, in *Haines v Busk* (1814) 5 Taunt 521, a commission was recoverable by a broker for procuring freight, even though the charter party arranged by the broker was illegal. This was because although to make it legal the charterer had to obtain certain licences (which he had not done), the broker did not have to obtain the licences but was entitled to rely upon the charterer's doing so. Furthermore the agent may be unable to receive remuneration when he has acted in breach of his duties under the contract of agency or is otherwise guilty of misconduct.

(ii) Indemnity:

The principal is also obliged to indemnify the agent against all losses and liabilities and to be reimbursed for all expenses incurred in the lawful execution of his duties. Accordingly, an agent may set-off the amount of any losses, liabilities or expenses incurred by him on behalf of the principal unless the money due to the principal is money which was deposited with the agent for a specific purpose which has failed, or is the balance of money so deposited which remains after such purposes has been fulfilled. The right of indemnity exists whether the agency is contractual or quasi contractual. Where it is contractual, the right may be express, but even if it is not, it will be implied as regards payments made within the authority of the agent. Such payments are not confined to those which the principal is legally bound to make but includes those which the agent is compelled to make although the principal is not liable. The normal limit on this right is that it is lost if the loss was caused by the agent's own default or breach of the duty or if he knowingly acted illegally or acted outside the scope of his authority.

(ii) Right of Lien

The general rule is that "every agent has a general or particular possessory lien on the goods or chattels of his principal in respect of all lawful claims he may have as such agent against the principal, for remuneration earned, or advances made, or losses or liabilities incurred in the cause of the agency or otherwise arising in the course of the agency provided (1) that the possession of the goods or articles was lawfully obtained by him in the course of the agency, and in the same capacity as that in which he claims the lien (2) that there is no agreement inconsistent with the right of lien and (3) that the goods and chattels were not delivered to him with express directions or for a special purpose inconsistent with the right of lien" Bowstead on Agency. 13th ed. Pg. 218

The agent's lien will be lost where

(a) the agent waives the lien
(b) the agent voluntarily parts with both actual and constructive possession of the goods or chattels. This is so because possession is of the essence of the right of lien.
(c) the agent enters into any agreement or acts in any capacity which is inconsistent with the continuance of the lien.

Estate Agent's Commission

The issue of an agent's remuneration has frequently in recent years in relation to commission payable to estate agents, i.e. agents whose functions are primarily to effect the sale of landed property. It is very common in estate agents contracts to use phrases the determinations of which have caused difficulties. The courts as a result of the decision in *Luxor (Eastbourne) Ltd v Cooper* (supra) have construed such provisions very strictly, and have said that a claim to commission, if no sale is actually made, must be established by the use of clear and unequivocal language. The principle laid down by the House of Lords in that case is fully illustrated in the cases concerning this matter which came before the court since 1941.

The first of these is Jones v Lowe [1945] All ER 194 where the agent was to be paid commission in the event of "*introducing a purchaser*." It was held applying the *Luxor* case that these words meant that the agent was only entitled to commission if he introduced someone who was not only ready and willing to purchase but "goes so far as to sign a legal contract binding him through with the purchase." This had not happened and therefore the agent was not entitled to his

commission. Similarly, in *Murdoch Lownie Ltd v Newman* [1949] 2 All ER 783, the commission was to be paid "in the event of business resulting." The agents introduced a prospective purchaser, with whom an agreement was made subject to his being able to arrange a mortgage. That agreement was subsequently rescind. Slade J concluded that the phrase was ambiguous and since it had been used by the agents it could be construed *contra proferentem*. But that was held to be unnecessary in the light of the learned judges conclusion that the words required a binding contract of purchase before commission was payable. Such a contract had not resulted from the agents acts therefore the house owner was not liable for any commission. In *EP Nelson & Co v Rolfe* [1949] 2 All ER 584 the agents were to earn their commission if they introduced "a person, able, ready and willing to purchase" the principal's property. This they did but before a contract was struck, the principal granted an option to purchase to another person introduced to him by other agents. He therefore refuses to deal with the other potential purchaser. The agents sued for their commission. The Court of Appeal held that the agents had fulfilled the contract and were entitled to their commission.

The principles again were discussed in several other cases of the Court of Appeal in 1950. For example in *Graham & Scott (Southgate) Ltd v Oxlade* [1950] 2 KB 257; [1950] 1 All ER 865, a commission was to be paid to the agents in the event of the agents "introducing a person…..willing and able to purchase." The agents were not entitled to commission where they introduced someone who offered to buy the principal's property "subject to contract." The court held that the mere introduction of a prospective purchaser was sufficient but the purchaser at least had to make a firm offer, i.e. one which did not leave him free to avoid completion without legal liability. In arriving at this decision Cohen LJ distinguished *E.P. Nelson & Co v Rolfe* (supra) on the ground that in this case a firm offer had been made. Similarly, in *McCallum v Hicks* (1950) I All ER 864, where the principal instructed the agents to "find someone to buy" his house, it was held that the expression was only a more colloquial way of saying "find a purchaser" Hence no commission was payable where the agents introduced someone who made an offer "subject to formal contract" but subsequently withdrew.

The same result was reached in *Dennis Reed Ltd v Goody* [1950] I All ER 919. The important of this case however lies in the formation by Denning LJ of the general law on estate agents

commission which provides the background for the interpretation of an estate agent's contract with his principal. Fridman summarises these principles in the following points:

(i) The agent is only to receive commission if he succeeds in effecting a sale.

(ii) Any language that is used in the contract will have this effect, as long as it shows that the agent is to introduce a purchaser.

(iii) If the agent is to be given commission on offers only, he must use "clear and unequivocal language.

(iv) The normal arrangement, the common understanding of men "is that the agent's commission is payable out of the purchase price.

(v) If a binding contract of purchase is signed by the principal and the 3rd party then, if the principal repudiates the contract, he is still liable to pay commission, not because it has been earned and is payable but because it is his own fault that the sale has not been completed.

(vi) But no commission is payable if it is the 3rd party, not the principal who has defaulted on a binding contract, unless the principal sues for specific performance and gets damages, in which event, he will probably be liable to pay the commission out of such damages.

RELATION OF PRINCIPAL AND AGENT & THIRD PARTIES

Whether the principal or agent can sue or be sued upon the made by an agent depends upon the circumstance of the case. In general the rights and liabilities of the principal and agent depend upon whether agency was disclosed when the contract was made. Three situations usually arise:

(a) Where the principal is named:

This is the case where the agent contracts as agent and reveals the name of the principal to the 3rd party. In this case the 3rd party knows that the agent is contracting as an agent and knows also the person for whom the agent is acting. The general rule is that only the principal acquires rights or assume liabilities. The agent having made the contract on behalf of a named principal drops out of the contract.

However, an agent would incur personal liability in the following cases.

(i) If he signs a bill of exchange in his own name, he is liable on the bill. But if he wishes to avoid personal liability he must negative personal liability by adding words to his signature that clearly discloses his representative character.

(ii) Where he executes a deed in his own name, he is liable on the deed.

(iii) If though purporting to act as an agent, he is shown to be the real principal.

(vi) Where the particular custom of the trade makes the agent liable.

(b) **Where the agent act for an Unnamed principal**.

In this case the agent discloses the existence of the principal to the 3rd party but does not disclose the name of his principal. The position here is like the case of named principal and the presumption is that the principal alone incurs obligations and takes the benefits under the contract.

Universal Steam Navigation Co.v. J Mckelvie & Co [1923] AC 492

However the presumption will be more readily rebutted where it is shown that it was the intention of the parties that the agent should be bound by the contract. In such a case, he and not the principal will be bound by it. In those cases where an agent will incur personal liability when contracting for a named principal, he will also incur liability when contracting for an unnamed principal.

(c) **Where neither the existence nor the name of the principal is disclosed.**

This is the case of the undisclosed principal. This is the situation whereby neither the identity if the principal nor the fact that the agent is acting on behalf of someone else is revealed to the 3rd party with whom the agent contracts. In such a case the 3rd party believes that he is contracting personally with the agent and only after the contract has been made does the 3rd party become aware that there war was an agency relationship in existence.

The 3rd party when he discovers the true state of affairs is entitled to enforce the contract either against the principal or against the agent with whom he actually contracted. The rule is that the

3rd party must make his election of the party he wants to sue within a reasonable time of discovering the principal. Once the 3rd party elects to hold either principal or the agent liable he cannot afterwards change his mind and sue the other. This is because the liability of the principal is not a joint liability with that of his agent but an alternative liability. *Kendal v Hamilton* (1879) App cas. 504.

On the other hand the undisclosed principal can seek to enforce the contract against the 3rd party. By so doing however, he also renders himself personally liable to the 3rd Party.

An undisclosed principal cannot however enforce a contract against the 3rd party under the following circumstances.

(i) Where the principal could not have been a party to the contract at the time it was made.

(ii) Where the identity of the principal was so important to the 3rd party that he (i.e. 3rd Party) could not have entered into the contract had he known the principal's real identity. For example in *Said v Butt* [1920] 3 K.B. 497, the principal wanted a ticket for a theatre. He knew that the management would not sell him a ticket, so he sent an agent to purchase one in his own name. When the principal arrived at the theatre with the ticket he was refused admittance. He sued for breach of contract. It was held that no contract had been made with the principal because the manager would not have contracted had he known for whom the agent was acting. Hence the principal could not sue.

SETTLEMENT WITH THE AGENT

It may happen that either the principal or the 3rd party settles with the agent who however by reason of bankruptcy or fraud fails to pass the money on to the creditor. The question then arises whether the payer is liable to pay over again. There are two separate cases.

(i) Where the principal settles with the agent:

This may arise where for example; the principal having instructed his agent to buy goods pays the purchase price to the agent who fails to pass it to the seller. The general rule is that the principal remains liable to the seller, provided that the agent was known by the seller to be acting as agent.

The seller, however, may be estopped by his conduct from taking advantage of this rule, If his conduct unequivocally showed that he looked to the agent alone for payment and thereby

induced the principal after the debt became due, to settle with the agent. The principal on his part must show that he was reasonably misled by the sellers conduct into settling with the agent. The general principle and the underlying reason for this was expressed by Park B in the case of *Heald v Keworthy* (1855) 10 Exch 739 at 746, in the following words:

> "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal."

In that case it was held that the principal was still liable to pay the third party, even though he had already paid the agent. The same was held in *Irvine & Co v Watson & Co* (1880) 5 QBD 598.

The question remains whether the rule is different if the seller is unaware of the agency and deals with the agent as principal. It was decided In the *Heald v Kenworthy* case (supra), it was held that even here the general rule still applies and the principal may be compelled to make a several payment.

(ii) Where the Third Party settles with the agent.

This is the case where for instance, the agent having sold his principal's goods receives payment from the buyer but does not pay the money over to his principal. Whether the buyer is in those circumstances liable to pay over again depends entirely upon whether or not the agent is authorized to receive the purchase price. If he possesses this authority, the buyer is discharged from further liability, if not the liability remains.

Where the agency relationship is undisclosed it would seem that the 3rd party is entitled to treat the agent as principal and settle with him as long as he had no notice that any other principal exists. Hence if settlement with agent would have discharged the third party if the agent really had been the principal, then it will operate as a discharge as against the real undisclosed principal *Coates v Lewes* (1808) 1 CAMP 444.

TERMINATION OF AGENCY

Agency relationship may be determined by one or two bread ways namely: by acts of the parties or by the operation of Law:

I. **Acts of the Parties:**

(a) Agreement of the Parties

The must obvious way by which an agency relationship may be terminated is by mutual agreement between the principal and the agent. Since the relationship of principal and agent is usually created by agreement between the parties, it follows that the relationship can also be determined by mutual agreement.

However, where an agency has been created to accomplish a certain purpose or for the duration of a definite period then the agency automatically ends with the completion of the specific purpose, or when the period has elapsed.

(b) Revocation or Renunciation

The agency relationship can be determined by the unilateral revocation of the authority by the principal. In this case, express notice must be given to the third party with whom the agent has been dealing, otherwise the agent will be assumed to have continuing authority to contract for the principal.

Similarly the agent can unilaterally renounce the authority of the principal and must give notice to the effect. But the notice of revocation or renunciation will not affect any rights or liabilities which may have been created between the principal and third party prior to the notice.

Irrevocable Agencies:

There are however certain cases in which the principal cannot revoke the agent's authority. The first is the case of agency coupled with an interest. An agency or authority coupled with an interest is where such agency was created or authority given either by deed or for valuable consideration as a security in respect of a liability of the principal to the agent. This may be of two types namely those in which the agent has a legal or equitable interest in the subject-matter, and those in which the agency is crated as a source of reimbursement to the agent of money owed him by the principal. In both cases the authority is conferred on him (i.e. the) agent for the purpose of protecting and securing that interest.

In *Raleigh v Atkinson* (1840) 6 M&W 70, P entrusted goods to A for sale. From time to time A made advances to P and received authority to dispose of the goods at market value and to repay himself to advances out of the proceeds. Held: the authority was coupled with an interest and was irrevocable.

See also, *Gaussen v Morton*. (1830), B & C 731; 109 E.R. 622. A was indebted to B. In order to discharge the debt, A authorised B by a power of attorney to sell certain lands. It was held that being an authority coupled with an interest, it could not be revoked.

But in *Smart v sanders* (1848) 5 CB 895; (1843-60) All E.R. 758, a factor who had goods of his principal in his possession for sale, made advances on account of the principal. Later on the agent gave notice to the principal that he required repayment of the advances made by him (the agent). The principal failed to repay the sum due and instructed the agent not to sell the goods at a price below a certain figure. But the agent, in order to reimburse himself for the payments made by him on the principal's account, sold the goods at a lower price. It was held that after the principal withdrew the agent's authority, the agent had no right to sell the goods in breach of the principal's orders; even if the agent's reason was to recoup out of the proceeds of sale the advances that he made to the principal. The ratio of the decision was simply that at the time agent was given authority to sell he did not then have an interest.

In these circumstances even the death bankruptcy or insanity of the principal will still not revoke the authority.

Secondly, where the agent acting in pursuance of his authority has incurred liability for which he has to be indemnified by the principal, the principal cannot revoke the agent's authority so as to avoid the obligation of indemnifying the agent. See *Read v Anderson*. (1884) 13 QBD 779

Thirdly where the agent has made a contract on behalf of the principal, and, if he sued on that contract would be able, as against the principal, to exercise a *lien* over any money or goods recovered as a result of such action, then the agent's authority is irrevocable. Thus in *Drinkwater v Goodwin* (1775) 1 Cowp. 251; (1775-1802) All ER 87, a factor who became a surety for his principal was held to have a lien on the price of goods, sold by him for his principal to the amount or the sum for which he had so become a surety.

Fourthly,some statutes, under certain circumstances prohibit the revocation of an agency relationship e.g. conveying Act 1882 sect. 8.

II By Operation of Law

(a) Death

The death of the agent obviously terminates his authority. Except in cases of irrevocable agencies, the death of the principal or the liquidation of the principal (in case of corporation), puts an end to the agency relationship. This is so even if the agent had no knowledge of the death of his principal. The agent cannot sue for remuneration or indemnity.
In addition the agent may be liable to the third party for breach of warranty of authority.

(b) Insanity

Once either the principal or agent is insane the contract of agency automatically comes to an end except of course in cases of irrevocable agencies. But the rights of third parties are unaffected provided that the third party knew nothing of the principal's condition.

Drew v Nunn (1879) 4 QBD 661

(c) Bankruptcy

The bankruptcy of an agent or also terminate the agency relationship.

(d) Subsequent Illegality

The occurrence of an event that renders the continuance of the agency unlawful may also bring an agency to relationship to an end.

(e) Frustration

The destruction of the subject-matter of the agency for example, or the occurrence of any other frustrating event may terminate an agency relationship.

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