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Principal and Agent--Burden of Proof--Inquiry as to Authority of Agent (Ferro Concrete Construction Co. v. United States for Use and Benefit of Luchini, et al., 112 F.2d 488 (1st Cir. 1940))

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PRINCIPAL AND AGENT—BURDEN OF PROOF—INQUIRY AS TO AUTHORITY OF AGENT.—Defendant made a contract with the United States for the construction of a public building at Newport, Rhode Island. Plaintiffs, as subcontractors, agreed in writing with defendant to furnish the stone for the building for a certain sum. During the progress of the work defendant made payments to plaintiffs in an amount substantially more than the contract price. After completion of the work, plaintiffs demanded, by reason of a modification of the contract, a larger sum than they had received. Their claim is based on a conversation had with defendant's superintendent of construction to the effect that they were having too great a difficulty in carrying on under the existing contract and needed more money. The superintendent of construction, plaintiffs aver, replied to this by saying that "he would see that they get paid what it was worth to do the job." Plaintiffs base their argument upon two main points: (1) That defendant's superintendent had authority as an agent to modify the written contract previously entered into; and (2) that the oral modification was ratified by defendant. *Held,* for defendant. *Ferro Concrete Construction Co.* v. *United States for Use and Benefit of Luchini, et al.,* 112 F. (2d) 488 (C. C. A. 1st, 1940).

To constitute a ratification the principal must have knowledge of all the material facts and circumstances relating to the unauthorized act of the person who assumed to act as agent.[1] According to the evidence the defendant did not know that the statement had been made by its construction superintendent until the year following, when a claim, based upon it, was made by plaintiff which defendant immediately rejected. A party who seeks to charge a principal for the contracts made by his agent must prove that agent's authority, and it is not for the principal to disprove it.[2] It is an elementary rule of law that a person dealing with an alleged agent is bound to ascertain his authority, and that, when suit is brought against the principal in respect to an act of such agent, the burden is upon the plaintiff to establish not only the fact of agency but that the act upon which he relies was within the agent's authority.[3] In the instant case the evidence is clear to the effect that, so far as actual express authority of the superintendent to change the contract was concerned, he had none. It is also quite clear that no implied authority was conferred upon him by reason of his being a construction superintendent. The written contract stated, "Any extra work done under this agreement must be on written order only and time and material work must be approved daily by the superintendent or timekeeper of the party of the first part. Blanks for this purpose will be furnished by the party of the first part on the job" and "All agreements are subject to the approval of one of

[1] Williams v. Thrasher, 62 F. (2d) 944 (C. C. A. 5th, 1933), *cert. denied on other grounds,* 289 U. S. 748, 53 Sup. Ct. 691 (1933).

[2] Schutz v. Jordan, 141 U. S. 213, 11 Sup. Ct. 906 (1891).

[3] Owens Bottle-Machine Co. v. Kanawha, 259 Fed. 838 (C. C. A. 4th, 1919).

the officers of the company." The construction superintendent was not one of defendant's officers. It is clear under these circumstances that the alleged agent had no implied authority.[4] Furthermore, the authority he did have, which was to carry out the terms of the written contract, did not give him implied authority to alter or modify the same.[5] From a power to make an agreement or to perform it or carry it out no power to cancel or vary it is inferable particularly where a provision which would be affected by waiver or alteration is one intended for the benefit of the principal.[6] Presumptively, an agent is employed to acquire interests, not to give them up.[7] The only arguable question is whether the evidence showed that such an act was within the scope of his apparent authority. The court decided plaintiffs were placed in a position where they were bound to inquire as to the extent of the alleged agent's authority.[8] It is settled that, where one contracts with an agent who apparently has a limited rather than a general authority, he is bound to make inquiry and ascertain the extent of the agent's authority to act.[9] If one has notice that the authority of an agent is limited, he deals with the agent at his peril.[10] Where the nature of the transaction to which an agent purports to agree is extraordinary, in view of the previous conduct of the agent with respect to the principal and in view of the circumstances of the relationship, that is enough to put the person relying on such authority on inquiry; and as a matter of law the individual is compelled to inquire of the principal as to the extent of the agent's authority before

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[4] Coal & Iron Ry. v. Reherd, 204 Fed. 859 (C. C. A. 4th, 1913), *cert. denied on other grounds*, 231 U. S. 745, 34 Sup. Ct. 319 (1913) (Plaintiff company was to do certain excavation for defendant. Unexpected difficulties were encountered in that it required plaintiff to excavate a very heavy substance called "gumbo". The engineers who had charge of the job for defendant were alleged by plaintiff to have made an oral agreement that plaintiff should receive more compensation than provided for in the written contract. The court reversed judgment for plaintiff on ground that the engineers had no such authority as would permit them to alter the contract); Baltimore & Ohio R. R. v. Jolly Bros. & Co., 71 Ohio St. 92, 72 N. E. 888 (1904).

[5] Coursey v. Firestone, 33 F. (2d) 49 (C. C. A. 8th, 1929); Morton v. Albers Bros. Milling Co., 66 Cal. App. 391, 226 Pac. 809 (1924); Eastern Advertising Co. v. Standard Nut Co., Inc., 264 Mass. 238, 162 N. E. 339 (1928); Dudley v. Perkins, 235 N. Y. 448, 139 N. E. 570 (1923).

[6] Morton v. Albers Bros. Milling Co., 66 Cal. App. 391, 226 Pac. 809 (1924).

[7] Thomas v. Anthony, 30 Cal. App. 217, 157 Pac. 823 (1916); Hutchings v. Munger, 41 N. Y. 155 (1869).

[8] The written contract had been made between plaintiffs and an officer of defendant corporation. Defendant's letterhead contained the following statement: "All agreements are subject to the approval of one of the officers of the company." Whenever plaintiffs asked for money the request had to be sent to the home office. One of the officers of defendant corporation "followed the job very closely."

[9] Cauman v. American Credit Indemnity Co., 229 Mass. 278, 118 N. E. 259 (1918).

[10] Kyte v. Commercial Union Assurance Co., 144 Mass. 43, 10 N. E. 518 (1887); Hill v. Commercial Union Assurance Co., 164 Mass. 406, 41 N. E. 657 (1895).

he may rely on it.[11] The general rule is: that one cannot rely on an agent's assumption of authority, but one must investigate and ascertain the nature and extent of the agent's powers.[12] Such an agent as defendant's is by no means a universal agent, but is restricted "to those acts and contracts usually exercised by other agents in the same line of business under similar circumstances, and must conduct the particular business of the principal in the manner usually employed by other agents of the same kind." [13] One dealing with an agent with knowledge of limitations on the agent's authority cannot hold the principal for acts of the agent outside those limitations.[14] A third person dealing with one known to be an agent is not relieved of all obligation in the matter, but is held to the exercise of reasonable prudence, and, if an agent, though a general one, departing from legitimate effort in his employer's interests, tenders a contract so unusual and remarkable as to arouse the inquiry of a man of average business prudence, the third party is not allowed to act upon assumptions which ordinarily obtain; he is put upon notice and must ascertain if actual authority has been conferred. Any substantial departure by an agent from the usual methods of conducting business is ordinarily a sufficient warning of lack of authorization.[15] The person dealing with the agent should ascertain the extent of his authority from the principal or from some other person who will have a motive to tell the truth in the interests of the principal, and he cannot rely upon the agent's statement or assumption of authority or upon the mere presumption of authority.[16]

R. E. B.

SCHOOL BOARDS—DISCRETIONARY POWER—APPOINTMENT OF PROFESSORS—JUDICIAL REVIEW.—The petitioner, a citizen and taxpayer of the City of New York, seeks an order under Article 78 of the New York Civil Practice Act [1] revoking the appointment of Dr. Bertrand Russell by the Board of Higher Education of the City of New York to the Chair of Philosophy in the College of the City of New York and discharging the appointee from said position. The

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[11] Hill v. James, 148 Minn. 261, 181 N. W. 577 (1921).

[12] W. W. Marshall & Co. v. Kirschbraun & Sons, 100 Neb. 876, 161 N. W. 577 (1917).

[13] A. H. Stephens v. John L. Roper Lumber Co., 160 N. C. 107, 109, 75 S. E. 933, 939 (1912).

[14] Southwestern Bell Telephone Co. v. Coughlin, 40 F. (2d) 349 (C. C. A. 5th, 1930).

[15] RESTATEMENT, AGENCY (1932) § 166a.

[16] Metropolitan Casualty Ins. Co. v. Potomac Builder's Supply Co., 61 F. (2d) 407 (App. D. C. 1932).

[1] N. Y. CIV. PRAC. ACT § 1283.