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CONTRACT LIABILITY OF UNAUTHORIZED AGENT TO THIRD PARTY IN SOUTH CAROLINA

It is generally well understood that one who purports to contract as agent, but acts without the scope of his authority (and therefore does not bind his principal), is liable to the third party for the injury done thereby.¹ The English case of *Smout v. Ilbery*² states three general situations in which the agent would be held liable:

[1] In the case of a fraudulent misrepresentation of his authority, with an intention to deceive . . . [2] Where the Agent has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case on the plainest principles of justice he is liable . . . [3] Where a party making the contract as agent bonâ fide believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences.³

1. 3 AM. JUR. *Agency* §298 (1962); see MECHEM., *OUTLINES ON AGENCY* §322 (4th ed. 1952); *PERSON, PRINCIPLES OF AGENCY* §289 (1954).

2. *Smout v. Ilbery*, 10 Mees. & W. 1, 152 Eng. Rep. 357 (1842). A wife whose husband had authorized her to purchase meat for the family was held not to be liable for the cost of meat delivered to her by Plaintiff between the time of her husband's death while upon an ocean voyage and the time that news of his death reached her in England. She originally had full authority to contract, and had done no wrong in representing her authority as continuing. There was no omission, on her part, to state any fact within her knowledge relating to her authority, the revocation itself being by the act of God. The court held that the continuance of the life of the principal was equally within the knowledge of both parties.

3. *Id.* at 360.

Assuming that the agent is liable, what form should the liability take? Three theories have been suggested by the courts: (a) the agent is liable on the contract, (b) the agent is liable for fraud and deceit, and (c) the agent is liable for breach of warranty. The South Carolina view is that the agent is liable on the contract.

The earlier rule laid down by many jurisdictions, including South Carolina, was that one who contracted for another without authority was himself liable on the contract.⁴

In *Miller v. Stock*⁵ Justice Harper, speaking for the S. C. Supreme Court, said that "There is no doubt that if a party takes up goods representing himself to be the agent, and directing them to be charged to his principal, he will be liable personally if, in truth, he was not authorized to take them as agent."⁶ Two years later *Lance v. Barret*⁷ was decided. In that case an unauthorized agent had bought certain slaves, some of which were unsound, taking a bill of sale for them in the name of the principal and paying for them with the principal's money. The principal had recovered damages from the agent because of the unsoundness of the slaves. In this suit brought by the agent against the third party vendor it was held to be error to order judgment for the defendant upon the production of the bill of sale to the original principal, the Court again through Justice Harper stating that the bill of sale was a nullity, and that the contract still remained unimpaired as between the plaintiff (agent) individually and the defendant (vendor). Thus, the unauthorized agent was able to avail himself of a contract made outside the scope of his employment.

Then, in the case of *Edings v. Brown*⁸ the Court held that "All the authorities agree, that the measure of damages must be the injury sustained, whether the action be in tort or on the contract, and the conflict of authorities is resolved

4. *Andrews & Co. v. Tedford*, 37 Iowa 314 (1873); *Hatch v. Smith*, 5 Mass. 42 (1809); *Meech v. Smith*, 7 Wend. 315 (N.Y. 1831); *Dusenbury v. Ellis*, 3 Johns. Cas. 70, 51 Am. Dec. 144 (N.Y. 1802); *Bank of Hamburg v. Wray*, 4 Strob. 87, 51 Amer. Dec. 659 (S.C. 1849); *Edings v. Brown*, 1 Rich 255 (S.C. 1845); *Lance v. Barret*, 1 Hill 204 (S.C. 1833); *Miller v. Stock*, 2 Bailey 163 (S.C. 1831); *Rosendorf v. Poling*, 48 W. Va. 621, 37 S.E. 555 (1900).

5. 2 Bailey 163 (S.C. 1831).

6. *Id.* at 163.

7. 1 Hill 204 (S.C. 1833).

8. 1 Rich. 255 (S.C. 1845).

into a question of the *form* of the action. An action on the instrument affords the most direct and just measure of compensation."⁹ (Emphasis added.) Four years later the Court held that where an agent states as true that which he does not know to be true, producing injury to a third person who is ignorant of the grounds on which the belief of the supposed agent is founded, then it is *summum jus* that the agent who makes the assertions should be personally liable for the consequences.¹⁰

The South Carolina Supreme Court seemed to base its earlier decisions on those of New York and England.¹¹ In *Dusenbury v. Ellis*,¹² Dusenbury was being sued by Ellis on a promissory note signed: "For Peter Sharpe, Gabriel Dusenbury, attorney." The note was in the usual form. Dusenbury contended that he was not liable, having signed the note merely as attorney for Sharpe. But the letter of attorney appeared to be nothing more than the power to collect debts, and contained no authority to give notes, or bind the principal in that way. "The only question then is, whether Dusenbury was not personally responsible for his own note. On this point we are of the opinion that if a person under pretense of authority from another executes a note in his name he is bound; and the name of a person for whom he assumed to act will be rejected as surplusage. The party who accepts a note under such mistake or imposition, ought to have the same remedy against the attorney, who imposes on him, as he would have had against the pretended principal if he had been really bound."¹³ And in *Meech v. Smith*,¹⁴ where an agent contracted to haul goods and his principals would not honor the contract, it was contended that, if liable, the agent must be charged in an action on the case, but Chief Justice Savage was of the opinion that such an action could not be maintained, his reason being that there had been no tort committed. The transaction between the two parties was a contract, and such contract, be-

9. *Id.* at 258.

10. *Bank of Hamburg v. Wray*, 4 Strob. 87, 51 Am. Dec. 659 (S.C. 1849).

11. See dissent by Cockburn, C. J. in *Collen v. Wright*, 8 E. & B. 647, 120 Eng. Rep. 241 (1847) for discussion of early English law. *Meech v. Smith*, 7 Wend. 315 (N.Y. 1831); *Dusenbury v. Ellis*, 3 Johns. 70, 51 Am. Dec. 144 (N.Y. 1802).

12. *Supra* note 11.

13. *Dusenbury v. Ellis*, 3 Johns. 70, 51 Am. Dec. 144, 146 (N.Y. 1802).

14. *Supra* note 11.

ing valid at law, must be obligatory on someone, and the agent having made the contract without authority from his principals, they were not bound. It follows then that the agent himself is bound, and therefore the action must be in *assumpsit*.

After the opinion of Justice Wiles was written in the English case of *Collen v. Wright*,¹⁵ in 1857, in favor of the warranty form of action, many jurisdictions in the United States began to look more closely at the reasoning of their earlier decisions. At least four jurisdictions which were early proponents of the theory of liability on the contract, Massachusetts,¹⁶ Iowa,¹⁷ New York,¹⁸ and West Virginia,¹⁹ repudiated, overruled, or ignored their earlier decisions and later held that liability did *not* rest on the contract.²⁰ It will be noted that in Massachusetts the change from contract liability occurred even before *Collen v. Wright*.²¹

15. *Supra* note 11.

16. *Hatch v. Smith*, 5 Mass. 42 (1809); *Lewis v. Friend*, 1 Dane Abr. 217 (Mass. 1790).

17. *Andrews & Co. v. Tedford*, 37 Iowa 314 (1873); *Winter v. Hite*, 3 Iowa 142 (1856).

18. *Meech v. Smith*, 7 Wend. 315 (N.Y. 1831).

19. *Cobb v. Glenn Boom & Lumber Co.*, 57 W. Va. 49, 47 S.E. 1005 (1905); *Curry v. Hale*, 15 W. Va. 867 (1879).

20. *Miller v. Hartford Fire Ins. Co.*, 102 N.W.2d 368 (Iowa 1960). "It is elementary that an agent who purports to enter into a contract for a disclosed principal is not himself liable on the contract unless the terms of the contract itself provide for such liability." *Haupt v. Vint*, 68 W.Va. 657, 70 S.E. 702 (1911). A person who signs the name of another to a contract, as agent of the latter, without authority to do so, is not personally liable on the contract as promisor or covenantor, but is liable in an action of *assumpsit*, upon the implied warranty of his authority, or in trespass on the case, for fraud and deceit.

21. *Ballou v. Talbot*, 16 Mass. 460 (1820). "The question in this case is not whether the defendant is liable for having undertaken to make the promise for Perry, but whether the note declared on is the note of the defendant. It is obvious, from the signature, that it was neither given nor received as the defendant's note. It is found by the jury, that he had no authority to sign it for Perry, but the legal inference from this fact is, not that it became his promise directly, but that he is answerable in damages for acting without authority. What is stated in the case of *Long v. Colburn*, as an intimation of the Court, was undoubtedly a settled opinion, viz., that, in such case, a special action upon the case would be the proper action. One way, and perhaps the best way, to ascertain whether a party is sued in the right form of action, is to see of what fact the declaration gives him notice, and whether that constitutes substantially the contract to which he is called to answer. In the case before us, the defendant is charged with having made a promissory note to the plaintiff. The evidence produced is apparently the note of another. But he wrongfully made this note for the other. This is entirely new ground, of which the declaration gave him no notice, and which he cannot be expected to be prepared to answer. Besides, if the note is to be considered as evidence of the defendant's own promise, he must pay according to the tenor of it; whereas, if he were sued for

In *White v. Madison*²² the New York court reasoned that to hold the agent directly liable would often put the courts into a position of making contracts for the parties which were not intended, and contracts which neither party would have consented to make. But even though these later New York cases have held that the agent is *not* liable on the contract, and is liable instead on an implied warranty of authority,²³ some of the inferior courts in New York have apparently overlooked or ignored this change.²⁴

The landmark case of *Collen v. Wright*²⁵ started a great stampede in this area of the law, and after the dust had cleared it was discovered that only a few jurisdictions—South Carolina and Alabama as two examples—remained in favor of the contract theory of liability. These two states seemingly let their tenacity rest on the principles of *stare decisis*,²⁶

falsely assuming an authority, he might defend himself by showing that the person, for whom he assumed to act, had afterwards ratified his act, or that he had otherwise satisfied the debt for which the note was given, or, perhaps, he might show that no debt was due for which the note was given, or that he had authority to make it. It is, in short, a proper subject for a special action, in which damages will be recovered according to the injury sustained." See also *Mendelsohn v. Holton*, 149 N.E. 38 (Mass. 1925); *Jefts v. York*, 64 Mass. 392, 50 Am. Dec. 791 (1852); *Salem Mill Dam Corp. v. Roper*, 26 Mass. 187 (1830); *Abbey v. Chase*, 6 Cush. 54 (Mass. 1850).

22. 26 N.Y. (12 Smith) 117 (1862).

23. *Taylor v. Nostrand*, 134 N.Y. 108, 31 N.E. 246 (1892); see also *Dung v. Parker*, 52 N.Y. 494 (1873).

24. Annot., 42 A.L.R. 1310 (1926).

25. 8 E. & B. 647, 120 Eng. Rep. 241 (1857), "I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise."

26. *Gillis v. White*, 106 So. 166 (Ala. 1925), "If the principal was bound, as intended, the agent cannot be held liable on any principle of law or justice. But if the agent, though assuming and intending to bind a designated principal, and not himself, fails for want of authority to do so, then the agent is himself liable on the contract as if he were nominally a principal . . ." (Citing Alabama cases.) "This form of liability seems to be thoroughly established by our decisions though in most jurisdictions such an assumption of agency gives rise only to an action for damages

the South Carolina Supreme Court even going so far as to say that a remedy in contract was the *only* remedy allowed.²⁷

It does not appear that a single new member has joined the camp of the pro-contract liability jurisdictions since the 1857 *Collen v. Wright* case,²⁸ but many jurisdictions have since spoken out against the contract theory, declaring that wherever the agent's liability may lie, it does not lie in contract.²⁹

WHY NOT HAVE LIABILITY ON THE CONTRACT?

Why shouldn't the liability of the agent be on the contract? Both parties meant to contract and had the necessary intent. The contract was meant to bind someone, and if not the principal, then the agent—this was the reasoning of the early New York cases and some of the jurisdictions which followed New York's example. (South Carolina cases seemed to concentrate more on the relief granted than on the form involved.³⁰)

In the New York case of *White v. Madison*³¹ Justice Selden poses the problem of A (agent), without authority from P (principal), giving a note payable at a very distant day to X (a third party). Then X discovers that the acts of A are unauthorized. Now, Justice Selden asks, should X be bound

as for breach of an implied covenant that the agent is duly authorized, or as for deceit practiced by means of the false assumption of agency?"

Medlin v. Ebenezer Methodist Church, 132 S.C. 498, 129 S.E. 830 (1925). "In view of the fact that the divergence of opinion relates simply to the form of the remedy, conceding that the agent is liable, we prefer to follow the rule laid down in our own cases of *Edings v. Brown*, 1 Rich. 255 (S.C. 1845); *Bank of Hamburg v. Wray*, 4 Strob. 87 (S.C. 1849); *Lagrone v. Timmerman*, 46 S.C. 372, 24 S.E. 290 [1895], which hold the agent liable upon the contract."

27. *Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S.C. 478, 191 S.E. 337 (1937). "It therefore follows that in this state the remedy against an agent acting *ultra vires* is on the contract, and this remedy is exclusive."

28. *Abel, Some Spadework on the Implied Warranty of Authority*, 48 W.Va.L.Q. 96, 112 (1942).

29. *Fieschko v. Herlich*, 177 N.E.2d 376 (Ill. 1961); *Mueller v. Nugent*, 187 Ky. 61, 218 S.W. 730 (1920); *Gulf South Enterprises v. Delta Material Op. Co.*, 137 So.2d 427 (La. 1962); *King v. Russell*, 278 Mich. 529, 270 N.W. 775 (1936); *Brawley v. Anderson*, 80 Ohio App. 15, 74 N.E.2d 428 (1947); *Hermann v. Clark*, 108 Ore. 457, 219 Pac. 608 (1923); *Roby First State Bank v. Hilburn*, 61 S.W.2d 521 (Tex. 1933); *Forrest v. Hawkins*, 169 Va. 470, 194 S.E. 721 (1938); *Haupt v. Vint*, 68 W.Va. 657, 70 S.E. 702, 34 L.R.A.(N.S.) 518 (1911) (agent not liable on contract unless it contains apt words to bind him personally).

30. *Edings v. Brown*, 1 Rich. 255 (S.C. 1845).

31. 26 N.Y. (12 Smith) 117 (1862), a case which occurred in the middle of New York's about-face.

to wait until the note becomes due and then sue A on the note as his contract, or can X repudiate the contract and immediately sue A on the warranty of authority, implied in the execution of the note. Since this was a "later" case the New York court decided that it was the better view to allow X to repudiate the primary contract and to prosecute on the subordinate contract of implied warranty. (Perhaps the court reasoned that if X were not allowed to sue now then A may become judgment proof before X could bring an action on the original contract.)

But it would seem that X has suffered no injury up until the time for the contract to be performed. To allow him to sue immediately would place him in a better position, in this respect, than if A had in fact been authorized.

Granted that A is not really an agent for this particular unauthorized act, but by ratification the relation of principal and agent is created and thus P would absolve A from any liability to the P which would otherwise result,³² and would also absolve A from any liability to X.³³ To allow the third party to sue before performance of the contract is due, as suits brought under the theories of fraud and deceit or breach of an implied warranty allow, would mean that the agent who purposefully, or *innocently*, exceeded his authority could be subjected to overhasty prosecution by the third party; while, by proceeding more slowly, time and a possible ratification may solve all problems without a lawsuit. *Quaere*: what would the result be if the third party sued on an implied breach of warranty and collected his judgment *before* performance was due on the contract, and then the principal sought to ratify? Would the principal be allowed to ratify?³⁴ *Should* the principal be allowed to ratify and perform which is what the third party sought to contract for to begin with?³⁵

32. *Hathaway v. First Nat. Bank*, 134 U.S. 494, 33 L.Ed. 1004 (1890); *Strader v. Haley*, 216 Minn. 315, 12 N.W.2d 608, 150 A.L.R. 970 (1943).

33. Restatement (Second), Agency §338 (1958); MECHEM, OUTLINES OF AGENCY §§542, 1402 (1952); *Savage v. Friedberg*, 322 Mass. 321, 77 N.E.2d 213, 216 (1948); *Hopkins v. Everly*, 150 Pa. 117, 24 Atl. 624 (1892).

34. Apparently not. "If the third person has indicated withdrawal from the transaction, as by instituting suit against the agent or by setting up a defense based upon the agent's lack of authorization, a subsequent affirmation is ineffective." (Emphasis added.) Restatement (Second), Agency §§92(c), 88(a) (1958).

35. *Savage v. Friedberg*, 322 Mass. 321, 77 N.E.2d 213 (1948), where ratification occurred *before* suit was brought by the third party. The court, allowing the ratification, states that "the plaintiff then got what

What about the already-collected judgment against the agent? These and other needless problems possibly could be avoided by not allowing a premature suit to be brought.

THE STATUTE OF LIMITATIONS

As a general rule, the Statute of Limitations begins to run when the cause of action accrues. The question as to when the period begins to run as against an action by one who has relied on the misrepresentation of an agent, concerning his authority to contract for another, of necessity must depend on the form of remedy which is permitted the aggrieved party.

Where the action is for deceit upon false representations the period of the Statute begins to run from the discovery of the fraud.³⁶ In *Flack v. Haynie*,³⁷ the defendant falsely represented that he had the authority to act for another in opening an account with the plaintiff in favor of a fourth person. Under the agreement, the goods were to be paid for by the principal at the end of the year, but later the principal notified the plaintiff that the defendant had no authority to bind him. It was held that the Statute began to run against the plaintiff's cause of action for misrepresentation of authority at the time he was apprised of the defendant's want of authority.

But where the action lies upon a breach of warranty it seems that a different rule applies. It has been held that the cause of action accrued in this case, not at the time of misrepresentation, nor at the time of the discovery of the false representation, but at the time the wrong to the injured party was complete and he suffered actual damages,³⁸ the court stating in the *Moore* case that "The cause of action accrued

it had originally bargained for and what the defendant did caused no harm." It would seem that this same reasoning should be applied to cases where there had already been a suit brought. After all, the third party is obtaining what he sought. To allow the principal to ratify and thus perform what was sought by the third party and yet still permit the judgment to stand would be a gross injustice. It would allow the third party to have his cake and eat it too — an extreme example of unjust enrichment.

36. *Pierson v. Holdridge*, 92 Kan. 365, 140 Pac. 1032 (1914); *Flack v. Haynie*, 18 Tex. 468 (1857).

37. *Supra* note 36.

38. *Moore v. Maddock*, 251 N.Y. 420, 167 N.E. 572, 64 A.L.R. 1189 (1929); *Kennedy v. Stonehouse*, 13 N.D. 232, 100 N.W. 258, 3 Ann. Cas. 217 (1904); 3 AM. JUR. 2d *Agency* §341 (1962).

when the wrong to the plaintiff was complete, not, as in an action for fraud, when the wrong was discovered."³⁹

In South Carolina where the remedy appears to be exclusively upon the contract,⁴⁰ an action resting on breach of contract, other than for the recovery of realty, generally accrues at the time the contract is broken, although substantial damages are not sustained until afterwards. Nominal damages can be recovered immediately, and the Statute of Limitations then begins to run; its operation is not delayed until substantial or consequential damages result.⁴¹ Whether a suit for specific performance could be had against the unauthorized agent in any jurisdiction is questionable, but if such a case were allowed in South Carolina then the Statute of Limitations, §10-143 of the S.C. Code, would not be applicable.⁴²

It is well stated by Lord Redesdale, in *Bend v. Hopkins*, 1 Sch. & Lef. 428, "The statute of limitations does not apply in terms to proceedings in courts of Equity. It applies to particular actions at common law, and limits the time within which they shall be brought, according to the nature of those actions, but it does not say there shall be no recovery in any other mode of proceeding."⁴³

MEASURE OF DAMAGES

The measure of damages in a suit for breach of an implied warranty is analytically very different from that applicable were the principal bound by the contract and the third party suing him for breach, though in practice the result is doubtless much the same in both instances.⁴⁴

In an action on an implied warranty . . . the action is not on the contract purported to have been authorized, but it is on the unauthorized conduct of the supposed agent, who acted under claim of authority. The object

39. *Moore v. Maddock*, 251 N.Y. 420, 167 N.E. 572, 573 (1929).

40. *Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S.C. 478, 191 S.E. 337 (1937).

41. S.C. CODE §10-143(1) (1962). *Livingston v. Sims*, 197 S.C. 458, 15 S.E.2d 770 (1941); *Executors of Sinclair v. Bank of S. C.*, 2 Strob. L. 344, 126 Am. St. Rep. 944, 13 Ann. Cas. 692, 15 L.R.A.(N.S.) 156 (S.C. 1848).

42. *Parrott v. Dickson*, 151 S.C. 114, 148 S.E. 704 (1928); *Fanning v. Bogacki*, 111 S.C. 376, 98 S.E. 137 (1917); *Blackwell v. Ryan*, 21 S.C. 124 (1883). §10-143 of the S.C. CODE applies only to actions at law and has no application to suits in equity.

43. *Smith v. Smith*, McMull Eq. 126, 134 (S.C. 1841).

44. MECEM, OUTLINES OF AGENCY §331 (4th ed. 1952).

is to recover damages for the actual losses sustained by the plaintiff as the natural and proximate result of the breach by the defendant of his implied warranty that he was authorized to make the contract. Whether it be *ex contractu* or *ex delicto*, the gist of the action is the misrepresentation made by the defendant to the plaintiff's pecuniary injury; and the purpose of the action is compensation. In such cases the rule of compensation seeks to put the party misled back in to the condition in which he was before he acted on the asserted authority of the defendant to make a contract for another. Where a misrepresentation has been relied on by the plaintiff to his detriment the measure of recovery is not the difference between the plaintiff's pecuniary condition if the representation had been true and his condition under the actual facts, but rather the difference between what the plaintiff had before he acted on the representation and what he had afterward.⁴⁵

In *Tedder v. Riggin*⁴⁶ the plaintiff brought suit for commissions which he would have made had the defendant agent been authorized to contract with him for the sale of 52,000 acres of land at \$1.25 per acre to a third party — defendant supposedly being authorized by his principal to make such an arrangement. It was held that the proximate results of the misrepresentation for which recovery could be had were the pecuniary losses actually sustained by the plaintiff by reason of the misrepresentation and not the anticipated profits which he expected to make. Had the plaintiff, in reliance on the defendant's representation as to his authority, brought a former suit against the principal to recover such commissions, and, upon failure of such suit been compelled to pay the costs of the action, then these costs, including attorney's fees, would have been allowed as special damages in a suit against the defendant agent.⁴⁷ These special damages must be alleged.⁴⁸

In an action for deceit where the defendant had falsely represented that he had authority from the owners to sell

45. Justice Whitfield speaking for the court in *Tedder v. Riggin*, 65 Fla. 153, 61 So. 244, 245 (1913).

46. 65 Fla. 153, 61 So. 244 (1913).

47. *Groeltz v. Armstrong*, 125 Iowa 39, 99 N.W. 128 (1904); *White v. Madison*, 26 N.Y. 117 (1862); *SEDGWICK, DAMAGES* §240 (1934).

48. *Ibid.*

a certain tract of land, the plaintiff was also not allowed to recover profits which he would have made had the transaction been completed, the reason given being that the plaintiff lost no bargain, and no profits because of the defendant's alleged deceit, for he would not have had the same in the absence of such deceit. The plaintiff had merely failed to obtain the profits, and the court felt that such failure was not due to the defendant's representations. The court reasoned that the plaintiff was not prevented by the defendant from negotiating with the owners or some truly authorized agent for the purchase of the property.⁴⁹

Sometimes the courts seem to have treated the implied warranty theory as if it were a promise of indemnity for damages caused by reliance upon the assertion of authority.⁵⁰

A few states have even codified the amount of damages allowed: "The detriment caused by the breach of a warranty of an agent's authority is deemed to be the amount which could have been recovered *and collected* from his principal if the warranty had been complied with, and the reasonable expenses of legal proceedings taken, in good faith, to enforce the act of the agent against his principal."⁵¹ (Emphasis added.)

In the English case *In Re National Coffee Palace Co.*⁵² defendant brokers subscribed on behalf of a supposed client for fifty shares in a new corporation. They were in fact without authority and when the new corporation went bankrupt and was liquidated the liquidator was allowed to recover the subscribed price of the shares from the defendants. Brett, M. R., said that in various cases it had been decided that the measure of damages was what the plaintiff actually lost, and it does not depend upon the amount which would have been awarded to the plaintiff in an action against the alleged principal if the contract had been broken by him because that may not be the amount actually lost. "We may test it in this way. If the action were brought against the principal because he had broken the contract, the amount

49. *Flora v. Hoeft*, 71 Colo. 273, 206 Pac. 381 (1922).

50. *White v. Madison*, 26 N.Y. 117 (1862); *Taylor v. Nostrand*, 134 N.Y. 108, 31 N.E. 246 (1892), for services rendered and disbursements incurred, affirmed 12 N.Y.Supp. 180 (1890); *Anderson v. Adams*, 43 Ore. 62, 74 Pac. 215 (1903).

51. CAL. CIV. CODE §3318 (1949).

52. 24 Ch.D. 367 (1883).

actually recovered would be quite different if he were solvent and if he were insolvent; if he were solvent the plaintiff would recover the whole loss, if he were insolvent he might not recover a shilling. Therefore, it is what the plaintiff actually lost, not what the verdict of a jury would have given him, for the execution might have produced nothing."⁵³ This same reasoning was used in a later case where the court allowed recovery against one who had bona fide mistaken his authority in negotiating an insurance settlement with a United States company, the court stating that it had no doubt that payment would have been made without delay by the United States insurance company had the agent in fact been so authorized.⁵⁴

The South Carolina Supreme Court has held that the defendant agent is liable for such damages as flow from the act, and that the measure of damages must be the injury sustained.⁵⁵ In discussing whether the form of action should be in tort or in contract, Justice Frost, in *Edings v. Brown*⁵⁶ says that in either form of action if the contract sued on is for payment of money then the damages must be the sum stipulated, and if the contract is for the performance of any other act then compensation for the breach or neglect of the duty may as fairly be decided in the one form as the other.

Since South Carolina holds the agent liable as if he himself had made the contract, an unfortunate result could occur where the agent has bona fide misrepresented his authority and the supposed principal is in fact an insolvent. The third party finds himself the beneficiary of quite a windfall in that because of the unauthorized act he can now sue on the contract against a solvent defendant and collect the judgment, whereas if the agent had in fact been authorized the third party, after suing the principal, would find himself the holder of an empty judgment. However, where both parties (the agent and the third party) are innocent, the courts might say that it is equitable to let liability fall on the one whose actions made the loss possible — in this case the unfortunate agent.

A New York case⁵⁷ proffers the Statute of Frauds question.

53. In *Re National Coffee Palace Co.*, 24 Ch.D. 367, 372 (1883).

54. *Meek v. Wendt & Co.* [1888], 21 Q.B. 126.

55. *Lagrone v. Timmerman*, 46 S.C. 372, 24 S.E. 290 (1895); *Edings v. Brown*, 1 Rich. 255 (S.C. 1845).

56. *Supra* note 55.

57. *Dung v. Parker*, 52 N.Y. 494 (1873).

In that case the agent had made an unauthorized oral contract for the two-year leasing of a store. The plaintiff had gone to some expense in procuring fixtures to fit up the store. The court, discussing both the implied warranty and the deceit theories held that plaintiff was not injured by the representations of the defendant agent and could not maintain an action because he was not damaged. Even if the agent had had authority to make the contract, since it was by parol, it would have conferred no right upon the plaintiff — being barred by the Statute of Frauds. The court held that the plaintiff had lost nothing for he would have gained nothing had the representation been true. His expenses were his misfortune but they did not furnish grounds for a suit. Contrary to the opinion expressed in a preceding article on this subject,⁵⁸ it would appear that in South Carolina the same result would be reached. The agent, being personally liable on the contract, should be able to raise the same defense of the Statute of Frauds.

But what about situations where the principal is an infant or a mental incompetent?⁵⁹ Since an agent does not necessarily guarantee that his principal has full contractual capacity, any more than he warrants that his principal is solvent, then in absence of misrepresentation, either tortious or innocent, certain prerequisites must exist in order to hold the *authorized* agent liable. It must appear that (1) the agent knew or had reason to know of the principal's lack of capacity, and (2) it must also appear that the third party had no such knowledge.⁶⁰ Unless these two requirements are met the authorized agent will not be liable. Not so with the unauthorized agent. While the Statute of Frauds is a defense of the contract itself and follows the terms of the contract to different parties, infancy and insanity are personal defenses and attach to the party and not to the contract. It does not seem that these defenses are transferable. Thus, the third party who deals with the agent of an infant in South Carolina, when such agent has exceeded the scope of his

58. Folk, *Survey of South Carolina Law, Agency*, 15 S.C.L.REV. 30, 34 (1963).

59. By the term "mental incompetent" it is meant a person who is in fact *non compos mentis*, but one who has not been so adjudged by the Court. MECHEM, *OUTLINES OF AGENCY* §§20, 21 (4th ed. 1952); 3 AM. JUR. 2d *Agency* §§9, 10, 12 (1962); Restatement (Second), *Agency* §20 (1958).

60. Restatement (Second), *Agency* §332; 3 AM. JUR. (2d) *Agency* §296 (1962).

authority in the execution of a contract, finds himself in a very advantageous position. He can sue the agent directly on the contract with damages based not on what was actually lost (as is the case in a breach of implied warranty jurisdiction⁶¹) but based instead on the personal contract liability of the agent.

CONCLUSION

The contract liability theory adhered to by South Carolina courts is a very workable rule and extremely easy to apply. It has been stated, concerning the use of the contract liability theory, that "It is not worthwhile to be learned on very plain matters. The cases show that if an agent goes beyond his authority and employs a person, his principal is not bound, and in such cases the agent is bound."⁶² This type reasoning⁶³ and stare decisis⁶⁴ appear to form the basis for the South Carolina decisions.

Contract Liability, as has been pointed out, metes out justice as well as any other theory, except perhaps in the rare instance where because of some defect in the principal — insolvency, infancy, insanity — it places the third party in a better position than he would have been had the agent in fact been authorized.

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61. *Meek v. Wendt & Co.* [1888] 21 Q.B. 126; *In Re National Coffee Palace Co.*, 24 Ch.D. 367 (1883).

62. *Layng v. Stewart*, 1 Watts & S. 222 (Pa. 1841).

63. "An action on the instrument affords the most direct and just measure of compensation." *Edings v. Brown*, 1 Rich. 255, 258 (S.C. 1845).

64. *Medlin v. Ebenezer Methodist Church*, 132 S.C. 498, 129 S.E. 830 (1925).