South Carolina Law Review

Volume 19 | Issue 5 Article 8

1967

Agency--Ratification of an Unauthorized Act

Arthur Gregory

NOTES

AGENCY—RATIFICATION OF AN UNAUTHORIZED ACT

I. Introduction

The doctrine of ratification is often employed by the courts to bind a purported principal to an unauthorized act done in his behalf. Because it has been applied primarily in two distinct situations, two branches of the doctrine have come to be recognized, namely, express and implied ratification.

Express ratification comprehends those cases in which the principal *voluntarily* becomes a party to the obligation.[1] Illustrative of such a ratification is a South Carolina case in which a clerk endorsed a note for his principal without the latter's authority; upon being informed of the act the principal replied, "It is all right."[2] Liability in such instances is predicated upon the willingness of the principal to be bound to the agreement.

Implied ratification, on the other hand, is based on conduct of the principal which is inconsistent with any position other than a confirmation of the act done in his behalf. The inconsistent conduct is viewed by the courts as manifesting an affirmation of the transaction.[3] Ratification is implied in order to deny the principal an advantageous position over the third person contractor. Absent implied ratification, the principal, after discovering the execution of the unauthorized act, could either ratify or reject depending on whether the transaction subsequently resulted in profit or loss.

Implied ratification is employed in two fact situations: First, the principal is considered to have ratified an act done in his behalf if with full knowledge of the facts he *accepts property* which is a consequence of the unauthorized act or *retains* such property after he discovers the material facts and before he has changed his position with respect to the property; second, ratification can be implied from conduct other than the receipt or retention of property.

Throughout this article the aforementioned classifications will be developed focusing on the law of South Carolina. Attention is directed in advance to the fact that while many of the

1. "It is elementary that lack of authority *can be supplied by express ratification.*" Dubuque Fire & Marine Ins. Co. v. Miller, 219 S.C. 17, 26, 64 S.E.2d 8, 12 (1951).

2. Brown v. Wilson, 45 S.C. 519, 23 S.E. 630 (1896).

3. For an informative coverage of the various categories of ratification, see Seavey, *Ratification by Silence,* 103 U. Pa. L. Rev. 30 (1954).

propositions of law presented apply equally to express and implied ratification, some relate only to one type. The distinctions are made whenever applicable. Moreover, express ratification understandably involves comparatively fewer complexities and, hence, does not require as detailed treatment.

II. RATIFICATION GENERALLY

In South Carolina "[r]atification as it relates to the law of agency [is] defined as the expressed or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent. Whether or not there has been a ratification . . . is usually a question of fact."[4]

A. *Parties*

For an unauthorized act to be ratified, the party affirming the act must have possessed the power to have authorized the act in the first instance.[5] Accordingly an agent may not ratify his own unauthorized act and thereby bind his principal.[6] This does not prevent the principal, however, from specifically authorizing the agent to ratify a prior unauthorized act.[7] If no principal is disclosed at the time of the act, the party for whom the agent intended to act is the one who must affirm the transaction.[8] If the party making the contract did not intend to do so as agent for the person claiming or claimed to be the principal, there can be no ratification.[9]

B. *Knowledge of Material Facts*

A principal who affirms an unauthorized act, either expressly or impliedly, must have full knowledge of the material facts at the time of ratification.[10] South Carolina applies an objective

4. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 86, 124 S.E.2d 602, 608 (1962); *accord,* Brazell Bros. Contractors v. Hill, 245 S.C. 69, 138 S.E.2d 835 (1964).

5. Amalgamated Clothing Workers v. Kiser, 174 Va. 229, 6 S.E.2d 562 (1939); 7 C.J.S. *Associations* § 20 (1936).

6. 3 AM. JUR. 2d *Agency* § 161 (1962); 2 C.J.S. *Agency* § 36 (1936).

7. RESTATEMENT (SECOND) OF AGENCY § 93, comment *c.* at 242 (1958).

8. *Id.* § 87.

9. Williams v. Jacobs, 237 S.C. 183, 116 S.E.2d 157 (1960); *see* Miles v. Gadsden, 139 S.C. 52, 137 S.E. 204 (1927) (dissenting opinion); RESTATEMENT (SECOND) OF AGENCY § 85 (1958).

10. *E.g.,* Gantt v. Belk-Simpson Co., 172 S.C. 353, 174 S.E. 1 (1934); Yawkey v. Lowndes, 150 S.C. 493, 148 S.E. 554 (1929); Sumter Trust Co. v. Moser, 116 S.C. 446, 107 S.E. 918 (1921).

test in determining whether the principal possesses such knowledge. In *Moore v. Hardaway Contracting Co.*[11] the court stated the South Carolina rule as follows: "[I]n the absence of circumstances putting a reasonably prudent man on inquiry ratification cannot be implied as against a principal who is ignorant of the facts."[12] This implies that ignorance of material facts is not a defense where the principal intentionally acts without inquiry under circumstances which would put the proverbial reasonably prudent man on notice.

C. *Acts Capable of Ratification*

It is settled that a principal may ratify the voidable acts of his agent[13] and such ratification may be express or implied.[14] A principal may not, however, ratify a transaction declared by positive law or public policy to be illegal and void *ab initio*.[15] In such a case no subsequent ratification can give the act force or effect.[16]

Liability for an act such as a tort, however, may be incurred by ratification. Generally, it is not the tort liability itself which is ratified but rather the agency which imposes the liability for the tort committed in its course. "Without power to bind P thereby, A drives P's truck in delivering goods to T, intending to act as P's servant. While delivering the goods, A negligently injures B, a stranger, and breaks a window in T's house. With knowledge of the facts P affirms A's conduct. P is subject to liability to T and to B."[17] South Carolina has applied the doctrine of ratification to charge the principal for the tort of his purported agent in actions for trespass[18] and personal injuries[19] and has strongly indicated that it is applicable to an action for slander.[20] As was explained in the previous section the princi-

11. 193 S.C. 299, 8 S.E.2d 511 (1940).

12. *Id.* at 305, 8 S.E.2d at 513.

13. Rice v. Shealy, 71 S.C. 161, 50 S.E. 868 (1905).

14. Dubuque Fire & Marine Ins. Co. v. Miller, 219 S.C. 17, 64 S.E.2d 8 (1951).

15. *Id.* (dictum).

16. 2 C.J.S. *Agency* § 37 (1936).

17. RESTATEMENT (SECOND) OF AGENCY § 218, illustration No. 1 (1958).

18. Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960); Manson v. Dempsey, 88 S.C. 193, 70 S.E. 610 (1911).

19. Laughlin v. Southern Pub. Serv. Corp., 83 S.C. 62, 64 S.E. 1010 (1909).

20. Gantt v. Belk-Simpson Co., 172 S.C. 353, 174 S.E. 1 (1934) (dictum); Hypes v. Southern R.R., 82 S.C. 315, 64 S.E. 395 (1909) (dictum). In these cases the court discussed ratification but decided that the doctrine was irrelevant since the acts were committed within the scope of the employment or agency.

pal's knowledge of the tort prior to ratification is a prerequisite to recovery.

D. *Ratification of Sealed Instruments*

Since South Carolina still requires a seal on certain documents, an express ratification of such documents requires an act of equal dignity. "If the purpose to be effected by the writing could only have been accomplished by a deed, then its execution by an agent must be ratified by the deed of the principal, if no previous power, by deed, authorized the act in his name."[21] This formality is not required, however, in the case of an unauthorized sealed paper of a partnership; in such a case an express oral ratification is possible.[22]

Of particular importance is the inapplicability of the requirement of sealed ratification to option contracts involving real estate. Inasmuch as no seal is required on an option contract of real property, none is necessary for a ratification of such an instrument. This is the case notwithstanding the presence of a surplusage seal,[23] and such an instrument may "be ratified by the principal by any writing, acts or words which would be sufficient to confirm a simple contract. . . ."[24]

III. Implied Ratification

A principal, upon receiving information of an act committed without authority in his behalf by one purporting to act as his agent, is not bound unless he ratifies it. Generally, however, the courts will not permit the purported principal, after maintaining silence beyond a reasonable time, to ratify what develops into a profitable transaction or to repudiate if otherwise.[25] "[U]nder such circumstances the principal will be held to have ratified the unauthorized act of the agent. . . ."[26] Accordingly, the law is firmly established in South Carolina that an unauthorized act may be impliedly ratified by the purported principal's silence, acquiescence, or failure to repudiate.[27]

21. State v. Spartanburg & Union R.R., 8 S.C. 129, 170 (1874).
22. McGahan v. National Bank, 156 U.S. 218 (1895).
23. State v. Spartanburg & Union R.R., 8 S.C. 129 (1874).
24. *Id.* at 170.
25. Foxworth v. Murchison Nat'l Bank, 136 S.C. 458, 134 S.E. 428 (1926).
26. *Id.* at 469, 134 S.E. at 431.
27. *E.g.*, Hinson v. Roof, 128 S.C. 470, 122 S.E. 488 (1924); Moyer v. East Shore Terminal Co., 41 S.C. 300, 19 S.E. 651 (1894); State v. Spartanburg & Union R.R., 8 S.C. 129 (1874).

As previously explained, implied ratification embodies two classes of cases. The first to be explored concerns inconsistent conduct on the part of the purported principal reflected by his acceptance or retention of property resulting from the act in question. This form of implied ratification is clearly recognized in South Carolina[28] and is, perhaps best illustrated by the case of *Mortgage & Acceptance Corporation v. Stewart.*[29] In that case the defendant, Stewart, borrowed money to purchase an automobile. According to the terms of the mortgage contract, the defendant was to make the payments directly to the holder of the mortgage, the plaintiff. Apparently in ignorance of this provision, however, Stewart made the payments to the automobile agency from which he purchased the car. The agency received all of the payments but forwarded less than that number to the plaintiff. The court, in absolving Stewart of any further financial obligation, held that the acceptance of benefits by the plaintiff from the automobile agency resulted in the automobile agency becoming the plaintiff's implied agent, and payment to the automobile agency was payment to the plaintiff-principal. "They cannot retain these benefits and deny the very consequences of the agency"[30] for "with the benefits [they accept] also the liabilities and burdens resulting therefrom."[31]

In the second class of implied ratification cases, the purported principal is not a recipient of property, but his conduct nevertheless indicates confirmation of the agent's act. In *Bethea v. Beaufort County Lumber Company,*[32] the silence or acquiescence of the wife, with full knowledge that her husband in two instances had acted for her in extensions of timber contracts, constituted an implied ratification.

> In the instant case, the wife admits that she knew her husband got the interest money and for an extension, and that he accepted and used it. The wife's testimony beyond cavil

28. *E.g.,* Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962); Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960); Dubuque Fire & Marine Ins. Co. v. Miller, 219 S.C. 17, 64 S.E.2d 8 (1951); Associated Seed Growers v. South Carolina Packing Corp., 186 S.C. 118, 195 S.E. 107 (1938).

29. 142 S.C. 375, 140 S.E. 804 (1927).

30. *Id.* at 379, 140 S.E. at 805; *see* Barber v. Carolina Auto Sales, 236 S.C. 594, 115 S.E.2d 291 (1960); Powell v. Easley, 213 S.C. 574, 50 S.E.2d 921 (1948); Cook v. C.I.T. Corp., 191 S.C. 440, 4 S.E.2d 801 (1939).

31. Mortgage & Acceptance Corp. v. Stewart, 142 S.C. 375, 380, 140 S.E. 804, 805 (1927), *quoting* 2 C.J. *Agency* § 114, at 494 (1915).

32. 111 S.C. 97, 96 S.E. 717 (1918).

> concludes her present right. It is plain that with full knowledge of what her husband had done, and the effect of his doing it, she thereby ratified his act.[33]

Parenthetically it should be noted that *Bethea*, in addition to providing a classic example of this particular form of implied ratification, also illustrates the comparative ease with which a court can find ratification when dealing with a strong kindred relationship such as husband and wife.[34]

Just as the purported principal's conduct in the *Bethea* situation was held to be an implied ratification, the principal's conduct in judicial proceedings may constitute an implied ratification.

> There is affirmance if the purported principal, with knowledge of the facts, in an action in which the third person or the purported agent is an adverse party:
>
> (a) brings suit to enforce promises which were part of the unauthorized transaction or to secure interests which were the fruit of such transaction and to which he would be entitled only if the act had been authorized;
>
> (b) bases a defense upon the unauthorized transaction as though it were authorized; or
>
> (c) continues to maintain such suit or base such defense.[35]

The bringing of a suit or the basing of a defense constitutes an election by the principal which once made cannot be retracted.[36]

Often, in cases where the issue of implied ratification by silence, acquiescence, or failure to repudiate is present, another question arises: How long must the purported principal remain silent before his conduct effects a ratification? In *Foxworth v. Murchison National Bank*,[37] the court indicated the necessity for a flexible standard, one that would allow a determination on the particular facts of the case in question. "[U]pon being informed that its agent had gone beyond what it now claims was his authority, it was [the principal's] duty within a *reasonable* time either to ratify or disclaim the action of its agent. . . . This is

33. *Id.* at 105-06, 96 S.E. at 719.

34. Bethea v. Beaufort County Lumber Co., 111 S.C. 97, 96 S.E. 717 (1918); *see* 2 C.J.S. *Agency* § 23(a) (1936).

35. RESTATEMENT (SECOND) OF AGENCY § 97 (1958).

36. Miles v. Gadsden, 139 S.C. 52, 137 S.E. 204 (1927); Stoney v. Schultz, 1 Hill Eq. 465 (S.C. 1834).

37. 136 S.C. 458, 134 S.E. 428 (1926).

based upon elementary principles of good conscience and fair dealing."[38] The delay found to be unreasonable in *Foxworth* was a period of less than two months.

IV. Effect of Ratification

Obviously, "[i]f the [agent's] act [is] within the scope of the agency, and [is] done by the agent while exercising those powers, there [is] no necessity for ratification."[39] Ratification relates to prior acts which did not bind the principal but which were done or professedly done in his behalf. However, "a subsequent ratification is equal to a previous command"[40] and is as binding on the principal as if in the first instance he had entered into the transaction in question or authorized someone else to do so for him.[41] This means that the affirmance once made, if not voidable for fraud, duress, illegality, or lack of capacity, and if not avoidable by the principal for lack of knowledge or a similar cause, cannot be withdrawn by either party.[42] In *Breithaupt v. Thurmond*[43] the court stated that

> after the [principal] assents to the contract, and offers to perform everything which his supposed agent had undertaken he shall do, it is too late for the defendant to disclaim the contract on the ground that it was originally not binding on the plaintiff. For at the time he makes the objection, it is the contract of both the plaintiff and the defendant in law, and binding on them.[44]

The same result is reached whether the principal seeks to withdraw from an express or an implied ratification.[45]

The principal, upon discovering an unauthorized act committed in his name, frequently attempts to affirm only a part of it. Generally he will seek to ratify only the provisions benefi-

38. *Id.* at 469, 134 S.E. at 431 (emphasis added); *see* United Timber Corp. v. Mullins Lumber Co., 142 S.C. 477, 141 S.E. 15 (1927).

39. Sparkman v. Supreme Council American Legion of Honor, 57 S.C. 16, 34, 35 S.E. 391, 397 (1900); *accord*, Gantt v. Belk-Simpson Co., 172 S.C. 353, 174 S.E. 1 (1934); Mann v. Life & Cas. Ins. Co., 132 S.C. 193, 129 S.E. 79 (1925).

40. Bethea v. Beaufort County Lumber Co., 111 S.C. 97, 105, 96 S.E. 717, 719 (1918).

41. Hinson v. Roof, 128 S.C. 470, 122 S.E. 488 (1924).

42. Restatement (Second) of Agency § 102 (1958).

43. 3 Rich. L. 216 (S.C. 1832).

44. *Id.* at 219.

45. Sirrine v. C. E. Graham Trust Fund, 136 S.C. 448, 134 S.E. 415 (1926).

cial to him, to make the ratification conditional upon his suffering no loss, or to accept the transaction but to reject the representations employed by the agent in executing the agreement. In both express and implied ratification, however, the principal cannot "ratify that part of the contract which is advantageous to [him] and repudiate that which is burdensome. If the [principal] ratifies in part, [he] ratifies the whole."[46] This prohibition of a ratification in part is generally applied in cases in which the purported agent has executed a single transaction. When the purported agent has entered into several independent transactions, a ratification of one would not in and of itself represent a complete ratification of all the transactions.

The principal also cannot make the ratification conditional upon his suffering no loss and "a principal who ratifies the unauthorized act of his agent also ratifies his representations and warranties, as well as other instrumentalities employed by the agent as an inducement to the action of the third person involved in the unauthorized transaction."[47]

V. Right of Third Party to Withdraw

In previous sections attention was directed to the conduct on the part of the purported principal that may constitute confirmation of the agent's unauthorized act. In those sections, in an effort to avoid confusion, the assumption was made that the third party had expressed no objection to being bound to the transaction. It is significant to mention now that to effect a ratification it is imperative that the affirming conduct occur prior to a communication to either the purported principal or agent by the third party of his intention not to be a party to the transaction.[48] The relationship of the third party to the principal before the principal's ratification is identical to that of an offeror to an offeree.[49] Accordingly, the third party is free to withdraw *for any reason* before the affirmance occurs.[50] In the

46. Southern Bell Tel. & Tel. Co. v. WRNO, Inc., 216 S.C. 533, 535, 59 S.E.2d 146, 147 (1950); *accord*, Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962); Armour Fertilizer Works v. Burckhalter, 141 S.C. 232, 139 S.E. 465 (1927).

47. Southern Bell Tel. & Tel. Co. v. WRNO, Inc., 216 S.C. 533, 536, 59 S.E.2d 146, 147 (1950), *quoting* 2 C.J.S. *Agency* § 66 (1936).

48. Restatement (Second) of Agency § 88 (1958).

49. *Id.*, comment *a* at 226; *see* Masonic Temple, Inc. v. Ebert, 199 S.C. 5, 18 S.E.2d 584 (1942).

50. *See* Masonic Temple, Inc. v. Ebert, 199 S.C. 5, 18 S.E.2d 584 (1942).

very early case of *Breithaupt v. Thurmond*[51] the South Carolina Supreme Court stated: "[I]f, *before* [the purported principal] *had assented to it*, [the third party] had refused to abide by it, he could not have been compelled to do so."[52]

The court in *Masonic Temple v. Ebert*[53] had occasion to reinforce this principle. In that case, the corporate plaintiff through its agent negotiated the sale of property to the defendant. Because the property constituted substantially all of the corporation's assets, in order to consummate the sale it was necessary for the stockholders of the plaintiff to meet and approve the contract. During the negotiations the defendant was told of the necessity for stockholder ratification. Before the stockholders met, however, the defendant both informed the plaintiff's attorney that he did not wish to continue and stopped payment on the check given as part payment and earnest money. Subsequently, the stockholders met and approved the contract, and the corporate plaintiff sought to specifically enforce it. The court denied the action on the grounds that the defendant had clearly withdrawn prior to the attempted ratification. The defendant had written the corporation, had verbally expressed his unwillingness to proceed with the transaction to the plaintiff's agent, and had withheld payment on his check. The court concluded that a valid withdrawal could be effected either expressly or impliedly and that any one of the defendant's acts was sufficient to accomplish withdrawal.[54] While *Masonic Temple* did not involve an unauthorized act by the agent, the court, by way of dictum, cites with approval numerous authorities which cogently endorse the proposition that in order to constitute a ratification affirmance by the principal must precede the third party's withdrawal.

VI. Conclusion

Although the doctrine of ratification was accepted by our courts at an early date, its elaboration continues today. The underlying objective of the doctrine is to find a contract whenever it is reasonably possible to do so and in so doing to stabilize the positions of the purported principal and the third party. In a word, ratification achieves a result based on principles of

51. 3 Rich. L. 216 (S.C. 1832).
52. *Id.* at 219 (dictum) (emphasis added).
53. 199 S.C. 5, 18 S.E.2d 584 (1942).
54. *Id.*

equity and fair play. Assertion of ratification simply requires the allegation of facts sufficient to raise the issue[55] as "it is well established that it is not necessary that ratification . . . be pleaded."[56] If ratification can not be established, other doctrines such as adoption, restitution, or novation may be availing.

It is submitted that the doctrine of ratification has not been employed in all instances when applicable. Possibly too much focus on whether the initial contract by itself is valid coupled with an unfamiliarity with many of the possibilities of this doctrine account for this situation.

ARTHUR GREGORY

55. Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960); Walker v. Peake, 153 S.C. 257, 276, 150 S.E. 756, 763 (1929).

56. Walker v. Peake, 153 S.C. 257, 150 S.E. 756 (1929).