

BOOK REVIEWS

Restatement of the Law of Agency. St. Paul: American Law Institute Publishers, 1933. Pp. xxxiv, 1390. \$12.00.

The Restatement of the principal subjects of the common law, which has been proceeding since 1923, is a task of equal magnitude and importance. If the multiplicity of jurisdictions in the United States makes the work of more urgent necessity than a similar undertaking in England, its progress has been viewed by English lawyers with a mixture of admiration and envy. Few English lawyers would fail to welcome a competent analysis of the vexed subjects of the common law, even if no serious suggestion exists of codification. The Restatement of the Law of Agency, published in 1933, which might suitably be dedicated to the memory of Professor Floyd R. Mechem, provides, within a comparatively narrow compass, an example which English lawyers would be happy to emulate.

It is clear that of a work which extends into two volumes and covers 1390 pages no attempt can profitably be made to offer detailed criticism. The only practicable course is to select certain passages as typical of the whole. The present reviewer hopes he will be forgiven if he approaches his task from the point of view of English law and thus offers the most obvious standard of comparison to assist the task of examination. In this manner it is proposed to deal successively with the following subjects: (1) Ratification; (2) Undisclosed Principal; (3) Liability for Fraud; (4) Liability of Agents to Third Parties.

(1) RATIFICATION

The doctrine of ratification was thus stated by Chief Justice Tindal in *Wilson v. Tumman*, 6 Man. & G., 236, 242 (c. p. 1843): "That an act done for another by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or for his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority." In the dog Latin which lawyers affect, *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*. Now the question immediately arises, if the ratification refers back to the time of the formation of the original contract between the agent and the third party just as if the agent were equipped *ab initio* with conclusive authority, can the third party withdraw his offer in the interval between its acceptance by the agent and its affirmance by the principal?

The question arose in the English Court of Appeal in 1889 in the case of *Bolton Partners v. Lambert*, 41 Ch. D. 295 (1889). In that case the defendant had made an offer of purchase to a certain Scratchley, who was agent to the plaintiff company, but was not authorized to make any contract of sale. Scratchley accepted the offer on behalf of the plaintiffs. The defendant subsequently withdrew his offer, whereupon the plaintiffs ratified Scratchley's acceptance. The Court of Appeal held that the de-

fendant's withdrawal was inoperative and that the plaintiffs were entitled to specific performance. The decision, though apparently a logical deduction from the doctrine of ratification, was severely criticised by Lord Justice Fry in his book on "Specific Performance" and was distinguished by Mr. Justice Maugham in 1931 in *Watson v. Davies*, [1931] 1 Ch. 455. In the *Bolton Case* he said: "The decision of the court was founded on the view that there was a contractual relation of some kind which could be turned into a contract with the company by a ratification," while in *Watson v. Davies* the agent had told the third party that he had no authority to accept his offer and there was thus no contract which the principal could by ratification appropriate for his own benefit. The decision in the *Bolton Case*, therefore, though its authority has not been directly impugned, is recognized as a source of difficulty and as an injustice to the third party in a complicated issue of facts. He may find himself bound by his offer while the intended principal is free to accept or reject it as he pleases. In these circumstances section 88 is of peculiar interest to the English lawyer." To constitute ratification, the affirmance of a transaction must be before the third person has manifested his withdrawal from it either to the purported principal or to the agent, and before the offer or agreement has otherwise terminated or been discharged." In other words, Lord Justice Fry's strictures upon *Bolton Partners v. Lambert*, 41 Ch. D. 295 (1889), are justified and the reasoning in this case rejected. The result, if it is not strictly logical, gratifies common-sense and would be received with pleasure by English lawyers.

(2) UNDISCLOSED PRINCIPAL

The anomalous doctrine of the undisclosed principal has long disturbed the harmony of Anglo-American law. It was introduced by Chief Justice Lee in the middle of the eighteenth century in circumstances which still await adequate explanation, it manifestly disregards the principle of privity of contract, and it has been attacked with severity bordering on ferocity by such writers as Ames, as at once misleading and superfluous. In the face of all these disadvantages it obstinately retains its hold on the law, and the draftsmen of the Restatement, no less than English judges, recognize that it is too late to do more than regret its existence. One of the complicating factors in its evolution has been the necessity of distinguishing two possible cases: where the existence as well as the identity of the principal remains undisclosed, and where the third party realizes that he is in fact dealing with a principal, but is ignorant of his personality. In the former case the Restatement refers to the principal as "undisclosed" and in the latter as "partially disclosed." The nomenclature is convenient and will be adopted.

An important distinction between these two cases is brought out in the two English cases of *Armstrong v. Stokes*, L.R. 7 Q.B. 598 (1872) and *Irvine v. Watson*, 5 Q.B.D., 102 (1879). In both cases the question to be decided was this: Suppose between the time when the agent B made the contract with the third party C and the time when C discovers the principal to be A, A has paid or otherwise settled with B. How does this affect the rights of C? On the one hand, is A to pay twice over? On the other hand, is C to be deprived of his rights by a private course of dealing between A and B? It was decided in *Irvine v. Watson*, 5 Q.B.D. 102 (1879), that, in the case of the *partially disclosed* principal the fact of payment or settlement between A and B is immaterial. In spite of such payment, C, when he discovers A's identity, can sue him if he so prefers. But in the case of the *undisclosed* principal, according to *Armstrong v. Stokes*, L.R. 7

Q.B. 598 (1872), such payment is decisive and effectually prevents C from suing A. The reasons for the distinction are plausible. In the case of the partially disclosed principal, the third party, when he entered the contract, knew at least of the principal's existence and relied to some extent upon his credit. The principal cannot, therefore, by his own act, lessen this credit. But where the third party is ignorant of the very existence of a principal, no question of reliance upon his credit can arise and he is not unfairly damnified by arrangements between the principal and the agent.

The distinction and the reasoning given in its support are virtually adopted by sections 183 and 208 of the Restatement. The conclusion was perhaps inevitable, but may still be regretted by an academic lawyer. The arguments are specious rather than sound. The amount of credit given to the nebulous figure of the partially disclosed principal cannot be satisfying to the business man, and the reasoning becomes almost ludicrous when read in conjunction with the doctrine known in England as the Rule in *Schmaltz v. Avery*, 16 Q.B. 655 (1851). According to this doctrine, where a party contracts as agent for a principal whom he does not name, he may afterwards disclose the fact that he has in reality no principal at all, but was acting for himself. The reasoning offered by Mr. Justice Patteson in support of this conclusion is that "the defendant cannot have been in any way prejudiced in respect to any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him and he did not think it necessary to enquire who he was." How is this position to be reconciled with the arguments adduced to support the distinction between the *Irvine v. Watson* and *Armstrong v. Stokes* cases? It would seem, if generally applicable, to make the position of an undisclosed principal untenable. It is some slight matter for regret that the draftsmen of the Restatement could not have expressed their conclusions in more guarded terms.

(3) LIABILITY FOR FRAUD

Difficult questions have arisen in determining the liability in fraud of a principal when the misrepresentations have been made by the agent in the course of his authority. According to the English authorities, four points are now clear. (a) If the principal instructs his agent to make the false statement, the principal is liable, though the agent is innocent of deceit. (b) If the principal purposely employs an agent ignorant of the truth in order that the latter may innocently make the false statement, the principal is similarly liable in fraud. (c) The principal cannot enforce or take the benefit of a contract induced by the material misrepresentation of an agent, whether such misrepresentation be fraudulent or not and whether it be authorized or not. (d) The principal, though he may be personally innocent, will be liable for his agent's fraud, even if this was perpetrated for the agent's benefit, provided that the principal placed him in the position to accomplish the deceit. These rules are substantially embodied in sections 256-263 of the Restatement and the comments and illustrations contained therein. But there remains a doubtful point in English law on which the opinion of the draftsmen of the Restatement is of interest. Is the principal liable in fraud for a statement known by him to be false, but made by his agent innocently and without his knowledge or authority?

The only English decision directly in point is the case of *Cornfoot v. Fowke*, 6 M. and W. 358 (1840). The facts in this case appear to have formed the model for the illustration set out on page 567 of the Restatement, and the decision of the court was that the

principal could not be made liable in fraud, because "though he knew the fact, he was not cognisant of the misrepresentation being made nor ever directed the agent to make it." The decision, however, has not escaped criticism. Lord Halsbury in *Pearson v. Dublin Corporation*, [1907] A.C. 351, said, "If it was supposed to decide that the principal and agent could be so divided in responsibility that, like the schoolboy's game of 'I did not take it, I have not got it,' the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. The case is not law if it is supposed to affirm the proposition to which I have referred." The answer is that *Cornfoot v. Fowke*, 6 M. and W. 358 (1840), does not assume to affirm any such proposition. The decision only emphasises the fact that there can be no fraud where there is no evidence of the absence of honest belief in the person sought to be made liable. From the wording of section 256 of the Restatement, coupled with that of the comment and illustration on pages 566 and 567, American law would seem to accept the decision in the *Cornfoot v. Fowke* case. It differs, however, from the English law in that it contemplates the possibility of an action for negligent misrepresentation, a doctrine rejected, at least as a general proposition, by the English courts.

(4) LIABILITY OF AGENTS TO THIRD PARTIES

Difficulties have arisen in determining the rights and liabilities of the parties when an agent acts on behalf of a principal who labours under some legal incapacity which prevents him from implementing the contract. According to the orthodox view of the English law, the agent becomes personally liable on the transaction in the principal's place, and the authority usually cited in support of this statement is *Kelner v. Baxter*, L.R. 2 C.P. 174 (1866). The facts in this case were substantially those given in the first illustration on page 722 of the Restatement. The defendant accepted the plaintiff's offer on behalf of a company not yet incorporated, and, in giving judgment against the defendant, Chief Justice Erle said: "As there was no company in existence at the time that the contract was made, the contract would be wholly inoperative unless it were held to be binding on the defendants personally." The company, when incorporated, could not ratify because of the rule that ratification is only permissible when the party on whose behalf the agent ostensibly acted was in existence at the formation of the contract.

Section 326 of the Restatement seems substantially to accept the decision in *Kelner v. Baxter*, L.R. 2 C.P. 174 (1866). It is presumed that an agent "purporting to make a contract with another for a principal whom both know to be non-existent or wholly incompetent" is a party to the contract, though the presumption is not irrebuttable. It is further stated in the comment to this section that "where a promoter makes a contract in the name of an as yet nonexistent corporation, it is permissible to find either that the promoter is intended to be a party or that an offer is being made which may be accepted by the corporation after its birth."

The difficulties of accepting this view, however, are not negligible. Why should the agent be made liable on the contract? It was never intended to be made with him, but with the company which it was sought to promote, and to foist a liability upon him simply because the original intention of the parties has failed seems perilously like an *inelegantia juris*. The difficulty was appreciated by Mr. Justice Williams in the later English case of *Hollman v. Pullin*, 1 Cababe and Ellis 254 (Q.B. 1884). In that case the plaintiff had contracted on behalf of an association which in fact had no legal capacity

to contract as it had failed to comply with statutory requirements of registration. The learned judge distinguished *Kelner v. Baxter*, L.R. 2 C.P. 174 (1866), on the ground (supported, it may be added, only too scantily by the facts of the case) that the defendant might there be taken to have contracted *personally* in addition to the supposed liability of the company, and then proceeded to lay down the general rule in the following words: "If an alleged agent professes to conclude a contract in the name and on behalf of an alleged principal and without using language expressing that he contracts personally, no rule of law can convert his position into that of a contracting party, by reason only of there not having been at the time any principal in existence who could be bound."

The view thus expressed would seem at least to be more logical. One is tempted to assert that the draftsmen in section 326 and the accompanying comment sought to beg the question by making the issue a question of fact and adding a presumption in favour of the agent's liability. It is not intended to deny the possibility, on the facts of any particular case, of an acceptance by the agent of a personal liability in addition to his position as agent, but, if a presumption were needed, it would surely have been better to raise it in favour of, rather than in opposition to, the general principle of the law. The whole question, however, is admittedly one of difficulty, and here, as elsewhere, the draftsmen, pursuing their function of "stating clearly and precisely in the light of the decisions the principles and rules of law," are too often faced with the Herculean task of making order out of a mass of chaotic decisions. One English lawyer, at least, concluded his examination of the present volumes with envy at their opportunity and admiration for their achievement.

C. H. S. FIFoot*

Bonds and Bondholders, Rights and Remedies, with Forms. By Silvester E. Quindry. Chicago: Burdette Smith Co., 1934. 2 Vols. Pp. 1381. \$20.

Mr. Quindry is a member of the Chicago Bar and this book is apparently the result of his practice in that city since the collapse of 1929. The bulk of Volume One is devoted to a discussion of the remedies of holders of defaulted corporate bonds. It is a comprehensive survey of all of the remedies available to trustees, protective committees and majority bondholders; it should prove useful to minority bondholders seeking a catalogue of the means of asserting their rights or of harassing the majority. Fortunately the corporate reorganization amendment to the Bankruptcy Act has now been passed. The book is recommended to younger members of the Bar and to lawyers not specializing in corporate practice as a convenient means of acquiring background information and as suggesting remedies for consideration. For lawyers specializing in the field it should prove a convenient guide to the authorities. Of particular interest is the chapter on Liquidating Trusts—a vehicle for salvaging the investment of holders of real estate bonds which has several advantages and which should come into more general use.

The book does not purport to be an authoritative treatment of the underlying legal theories involved or of their historical development. It is designed for practicing lawyers rather than for law students or instructors.

The book will not be particularly useful to lawyers engaged in drafting papers for

* Fellow of Hartford College and Lecturer at Law at the University of Oxford.