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DELEGATION OF AUTHORITY BY AN AGENT*

§ 1. DELEGATUS NON POTEST DELEGARI.—The appointment of an agent in any particular case is made, as a rule, because he is supposed by his principal to have some fitness for the performance of the duties to be undertaken. In certain cases his appointment is owing to the fact that he is considered to be especially and particularly fit. The undertaking demands judgment and discretion, which he is supposed to possess; or it requires the skill and learning of an expert, which he assumes to be; or personal force and influence are desirable, and these the agent is thought to be able to exercise. Here is the *delectus personæ*, and it is obvious that unless the principal has expressly or impliedly consented to the employment of a substitute, the agent owes to the principal the duty of a personal discharge of the trust.

§ 2. GENERAL RULE.—Hence it is the general rule of the law that in the absence of any authority, either express or implied, to employ a subagent, the trust committed to the agent is presumed to be exclusively personal and cannot be delegated by him to another so as to affect the rights of the principal.¹

The principal may, of course, expressly authorize the appointment of subagents, the delegation of the authority or the substitution of another in the place of the agent named; and formal powers of attorney quite frequently expressly confer "full power of substitu-

*Adapted from the forthcoming second edition of the writer's treatise on Agency.

§ 2. ¹ *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *McCormick v. Bush*, 38 Tex. 314; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319; *Smith v. Sublett*, 28 Tex. 163; *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Loomis v. Simpson*, 13 Iowa 532; *Connor v. Parker*, 114 Mass. 331; *Gillis v. Bailey*, 21 N. H. 149; *Furnas v. Frankman*, 6 Neb. 429; *Harralson v. Stein*, 50 Ala. 347; *Springfield F. & M. Ins. Co. v. DeJarnett*, 111 Ala. 248; *Bromley v. Aday*, 70 Ark. 351, 68 S. W. 32; *North American Trust Co. v. Chappell*, 79 Ark. 507, 69 S. W. 546; *Harris v. San Diego Flume Co.*, 87 Cal. 526, 25 Pac. 758; *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574; *National Cash Register Co. v. Ison*, 94 Ga. 463, 21 S. E. 228; *Fudge v. Seckner Contracting Co.*, 80 Ill. App. 35; *Ruthven v. American Fire Ins. Co.*, 92 Iowa 316, 60 N. W. 663; *Floyd v. Mackey*, 112 Ky. 646, 66 S. W. 518, 23 Ky. L. Rep. 2030; *Plummer v. Green*, 49 Neb. 316, 68 N. W. 500; *Carroll v. Tucker*, 2 N. Y. Misc. 397; *Fargo v. Cravens*, 9 S. Dak. 646, 70 N. W. 1053; *Tynan v. Dulling* (Tex. Civ. App.), 25 S. W. 465; *Smith v. Lowther*, 35 W. Va. 300, 13 S. E. 999; *Rohrbough v. United States Exp. Co.*, 50 W. Va. 148, 40 S. E. 398; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 17 Am. St. Rep. 178, 6 L. R. A. 121; *Kohl v. Beach*, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600. "One who has a bare power of authority from another to do any act, must execute it himself, and cannot delegate it to a stranger; for this being a trust or confidence reposed in him personally, it cannot be assigned to one whose integrity or ability may not be known to the principal, and who, if he were known, might not be selected by him for such a purpose. The authority is exclusively personal unless from the express language used or from the fair presumptions growing out of the particular transaction a broader power was intended to be conferred." *BELL, J.*, in *Wright v. Boynton*, *supra*.

tion and revocation," and in terms confirm whatever the attorney named "or his substitute" may lawfully do in the premises.

The general rule is, also, as will be seen, subject to be modified by the peculiar circumstances and necessities of each particular case, from which or from the usage of trade, a power to delegate the authority may be inferred;² but in the absence of such express authority or such circumstances the general rule is fixed, imperative and inflexible, resting upon ample foundation and constantly enforced by the courts.

The same rule applies to a servant as to an agent.³

§ 3. SAME SUBJECT—JUDGMENT AND DISCRETION NOT TO BE DELEGATED.—The reasons for this rule are particularly applicable to those cases where the performance of the agency requires, upon the part of the agent, the exercise of special skill, judgment or discretion. Such relations are obviously created because the principal places special confidence in the particular agent selected, and there is abundant reason why the trust should not be transferred to another of whose fitness or capacity the principal may have no knowledge, without the latter's express consent.¹

Thus where an agent had been entrusted with the general administration of the affairs of a trading company, but no power to substitute others in his place had been given him, it was held that no such power could be implied, because there was evidently a confidence reposed in him which the company might not be willing to repose in others.² And so where one was appointed general agent to conduct the sale of subscription books in a certain territory under circumstances showing that the principal "depended upon the experience, skill and energy, as well as the resources and facilities of the general agent," it was held that his powers and duties could not be assigned or delegated without the principal's consent.³ For the same reasons the agent who has been given the important

§ 2. ² See post, § 10, *et seq.*

§ 2. ³ *Gwilliam v. Twist* [1895] 2 Q. B. 84; *Engelhart v. Farrant* [1897] 1 Q. B. 240; *James v. Muehleback*, 34 Mo. App. 512. See also 3 MICHIGAN LAW REVIEW, 198.

§ 3. ¹ *Emerson v. Providence Hat Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Paul v. Edwards*, 1 Mo. 30; *Lewis v. Ingersoll*, 3 Abb. (N. Y.) App. Dec. 55; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501; *Dorchester, &c., Bank v. New England Bank*, 1 Cush. (Mass.) 177; *Planters, &c., Bank v. First National Bank*, 75 N. C. 534; *Pendall v. Rench*, 4 McLean (U. S. C. C.) 259; *Titus v. Cairo, &c., R. Co.*, 46 N. J. L. 393; *North American Trust Co. v. Chappell*, 70 Ark. 507, 69 S. W. 546; *Plummer v. Green*, 49 Neb. 316, 68 N. W. 500; *McConnell v. Mackin*, 22 N. Y. App. Div. 537; *Carroll v. Tucker*, 2 N. Y. Misc. 397; *Smith v. Lowther*, 35 W. Va. 300, 13 S. E. 999; *Tynan v. Dulling*, (Tex. Civ. App.), 25 S. W. 465; *Kohl v. Beach*, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600; *Rohrbough v. U. S. Exp. Co.*, 50 W. Va. 148, 40 S. E. 398.

§ 3. ² *Emerson v. Providence Hat Co.*, *supra*.

§ 3. ³ *Bancroft v. Scribner*, 72 Fed. 988, 44 U. S. App. 480, 21 C. C. A. 352.

power to bind his principal by the execution of promissory notes,⁴ or to settle disputed claims,⁵ or to adjust losses by fire,⁶ or to loan money⁷ or receive or collect money⁸ cannot delegate the power to a subagent.

A bailment of personal property to an agent with power to sell, also creates a personal trust which cannot be delegated.⁹ And so does authority to sell real estate.¹⁰ So where an agent had been authorized to sell real estate, but in his absence and without his knowledge, the land was sold by one falsely assuming to be a subagent, it was held that the sale was binding neither upon the principal nor the agent, as the principal was entitled to the judgment and discretion of the agent in making the sale.¹¹ For similar reasons, authority to lease real estate cannot be delegated.¹²

§ 4. ATTORNEYS CANNOT DELEGATE PERSONAL UNDERTAKING.—The appointment of an attorney to argue or conduct a cause, compromise a dispute, or enforce a claim, creates a personal trust, and he can not entrust the performance of this duty to another attorney of his own selection, or let the case out on shares, or in any other wise delegate the performance, without the consent of his principal.¹

This rule, however, does not demand that the attorney shall perform, in person, all of the merely mechanical or ministerial work involved in the case. As will be seen in a subsequent section, the

§ 3. ⁴ *Emerson v. Providence Hat Co.*, *supra*; *Brewster v. Hobart*, 15 Pick. (Mass.) 302.

§ 3. ⁵ *Fargo v. Cravens*, 9 S. Dak. 646, 70 N. W. 1053.

§ 3. ⁶ *Ruthven v. American Fire Ins. Co.*, 92 Iowa 316, 60 N. W. 663.

§ 3. ⁷ *Kohl v. Beach*, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600.

§ 3. ⁸ *McConnell v. Mackin*, 22 N. Y. App. Div. 537; *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574; *Lewis v. Ingersoll*, 1 Keyes (N. Y.) 347; *Yates v. Freckleton*, 2 Doug. 623; though the authority may be so restricted as to amount to no more than a power to do a merely mechanical act, in which event the rule would not apply. *Grinnell v. Buchanan*, 1 Daly (N. Y.) 538.

§ 3. ⁹ *Hunt v. Douglass*, 22 Vt. 128; *Drum v. Harrison*, 83 Ala. 384, 3 So. 715.

§ 3. ¹⁰ *Floyd v. Mackey*, 112 Ky. 646, 66 S. W. 518, 23 Ky. L. Rep. 2030; *Bromley v. Aday*, 70 Ark. 351, 68 S. W. 32; *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953; *Carroll v. Tucker*, 2 N. Y. Misc. 397; *Bonwell v. Howes*, 15 Daly (N. Y.) 43; *Bocock v. Pavey*, 8 Ohio St. 270.

§ 3. ¹¹ *Barret v. Rhem*, 6 Bush (Ky.) 466.

§ 3. ¹² *Fairchild v. King*, 102 Cal. 320.

§ 4. ¹ *Eggleston v. Boardman*, 37 Mich. 14; *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59; *Hilton v. Crooker*, 30 Neb. 707, 47 N. W. 3; *National Bank v. Oldtown Bank*, 112 Fed. 726, 50 C. C. A. 443; *Sloan v. Williams*, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496; *City of New York v. Dubois*, 86 Fed. 889; *Meany v. Rosenburg*, 32 N. Y. Misc. 96; *Reese v. Resburgh*, 54 N. Y. App. Div. 378; *Lucas v. Rader*, 29 Ind. App. 287, 64 N. E. 488; *Sedgwick v. Bliss*, 23 Neb. 617, 37 N. W. 483; *Dickson v. Wright*, 52 Miss. 585; *Danley v. Crawl*, 28 Ark. 95; *King v. Pope*, 28 Ala. 601; *Ratcliff v. Baird*, 14 Tex. 43.

If he does so, the client may declare the contract at an end, and recover whatever he has given for the services: *Hilton v. Crooker*, *supra*. The client may, however, ratify it with full knowledge of the facts: *Reese v. Resburgh*, *supra*.

performance of such duties through the agency of others, falls under a well recognized exception to the general rule.²

§ 5. ARBITRATORS CANNOT DELEGATE THEIR POWERS.—This rule also applies with special force to arbitrators. They are selected by parties who have placed particular confidence in their personal judgment, discretion and ability, and it would be a palpable injustice if they were to be permitted to delegate their responsibilities and powers to others.¹ But it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information.² They may also avail themselves of such mechanical or ministerial assistance as the nature of their duties may require.³

§ 6. AUCTIONEERS, BROKERS AND FACTORS CANNOT DELEGATE.—As will be seen also when these various forms of agency are taken up, the same rule applies to auctioneers, brokers and factors, who are forbidden to delegate without the principal's consent the powers confided to them not merely mechanical or ministerial.

§ 7. EXECUTORS, ETC., CANNOT DELEGATE PERSONAL TRUSTS.—This principle is, likewise, of frequent application to the case of persons upon whom the *law* has devolved discretionary or fiduciary powers, such as executors, guardians and public trustees. Such powers cannot be delegated without express authority.¹

§ 8. SAME RULE APPLIES TO MUNICIPAL CORPORATIONS.—The same rule applies to the powers and duties conferred upon municipal corporations and municipal officers. Wherever judgment and

§ 4. ² See *post* § 11; *Eggleston v. Boardman, supra*.

§ 5. ¹ *David Harley Co. v. Barnefield*, 22 R. I. 267, 47 Atl. 544; *Allen-Bradley Co. v. Anderson, etc., Co.*, 99 Ky. 311, 35 S. W. 1123; *Lingwood v. Eade*, 2 Atk. 501; *Proctor v. Williams*, 8 C. B. (N. S.) 386; *Whitmore v. Smith*, 5 H. & N. 824; *Little v. Newton*, 2 Scott N. R. 509. Arbitrators have no inherent power to select an umpire unless they are authorized by the terms of the submission: *Allen-Bradley Co. v. Anderson, etc., Co., supra*.

§ 5. ² *David Harley Co. v. Barnefield, supra*; *Soulsby v. Hodgson*, 3 Burr. 1474; *Cal-edonia Ry. Co. v. Lockhart*, 3 Macq. 808; *Anderson v. Wallace*, 3 Cl. & Fin. 26; *Eads v. Williams*, 4 DeGex, Mac. & Gor. 674.

§ 5. ³ *Thorp v. Cole*, 2 Cr. M. & R. 367; *Harry v. Shelton*, 7 Bev. 455; *Moore v. Barnett*, 17 Ind. 349.

§ 7. ¹ *Berger v. Duff*, 4 Johns. (N. Y.) Ch. 369; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Hicks v. Dorn*, 42 N. Y. 51; *St. Peter v. Denison*, 58 N. Y. 421; *Curtis v. Leavitt*, 15 N. Y. 190; *The California*, 1 Sawyer, 603; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Merrill v. Farmers, &c., Co.*, 24 Hun (N. Y.) 300; *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236; *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2; *Whitlock v. Washburn*, 62 Hun (N. Y.) 369.

discretion are to be exercised, the body or officer entrusted with the duty must exercise it; it cannot be delegated or farmed out.¹

§ 9. AND TO PRIVATE CORPORATIONS.—“The general supervision and direction of the affairs of a corporation,” says Mr. Morawetz, “are especially intrusted by the shareholders to the board of directors; it is upon the personal care and attention of the directors that the shareholders depend for the success of their enterprise. It follows that authority to delegate these general powers of management cannot be implied.”¹

§ 10. EXCEPTIONS AND MODIFICATIONS.—But the general rule above given of course gives way before an express power of delegation or substitution; and it is also subject, as has been stated, to certain exceptions and modifications growing out of the nature of the authority or the exigencies and necessities of the case, or based upon the custom and usage of trade in similar cases. Thus—

§ 11. I. SUBAGENT MAY BE EMPLOYED WHEN DUTIES ARE MECHANICAL OR MINISTERIAL MERELY.—Where in the execution of the authority an act is to be performed which is of a purely mechanical, ministerial or executive nature, involving no elements of judgment, discretion or personal skill, the reason for the general rule does not apply, and the power to delegate the performance of it to a subagent may be implied.¹

Thus an agent empowered to execute a promissory note,² or to bind his principal by an accommodation acceptance,³ or to sign his

§ 8. ¹ *State v. Hauser*, 63 Ind. 155; *State v. Bell*, 34 Ohio St. 194; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *Brooklyn v. Breslin*, 57 N. Y. 591; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Clark v. Washington*, 12 Wheat. (U. S.) 54; *Thompson v. Schermerhorn*, 6 N. Y. 92; *Davis v. Read*, 65 N. Y. 566; *Supervisors v. Brush*, 77 Ill. 59; *Thompson v. Boonville*, 61 Mo. 282; *State v. Fiske*, 9 R. I. 94; *State v. Paterson*, 34 N. J. L. 168; *Hydes v. Joyes*, 4 Bush. (Ky.) 464; *Oakland v. Carpentier*, 13 Cal. 540; *Whyte v. Nashville*, 2 Swan (Tenn.) 364; *Lord v. Oconto*, 47 Wis. 386; *Lauenstein v. Fond du Lac*, 28 Wis. 336; *Gale v. Kalamazoo*, 23 Mich. 344; *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396; *Ruggles v. Collier*, 43 Mo. 353; *Meuser v. Risdon*, 36 Cal. 239; *Darling v. St. Paul*, 19 Minn. 389; *St. Louis v. Clemens*, 43 Mo. 395, S. C. 52 Mo. 133; *State v. Garibaldi*, 44 La. Ann. 809, 11 So. 36; *Blair v. Waco*, 75 Fed. 800, 21 C. C. A. 517; *People v. McWethy*, 177 Ill. 334, 52 N. E. 479; *Zanesville v. Zanesville Telephone & Tel. Co.*, 63 Ohio St. 442, 59 N. E. 109; *McCrowell v. Bristol*, 89 Va. 652, 16 S. E. 867; *Knight v. Eureka (Cal.)*, 55 Pac. 768; *State v. Ocean Grove Camp Meeting Ass'n*, 59 N. J. L. 110, 35 Atl. 794; *State v. Common Council*, 62 N. J. L. 158, 40 Atl. 690; *Lyth v. Buffalo*, 48 Hun (N. Y.) 175; *Trenton v. Clayton*, 50 Mo. App. 535.

§ 9. ¹ Morawetz on Corporations, § 536.

§ 11. ¹ *Williams v. Woods*, 16 Md. 220; *Grinnell v. Buchanan*, 1 Daly (N. Y.) 538; *Eldridge v. Holway*, 18 Ill. 445; *Joor v. Sullivan*, 5 La. Ann. 177; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *Newell v. Smith*, 49 Vt. 255; *Lord v. Hall*, 8 C. B. 627.

§ 11. ² *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Lord v. Hall*, *supra*; *Weaver v. Carnall*, 35 Ark. 198, 37 Am. Rep. 22.

§ 11. ³ *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501.

name to a subscription agreement,⁴ or to execute a deed,⁵ having himself first determined upon the propriety of the act, may direct another to perform the mechanical act of writing the note or signing the acceptance, subscription or deed, and the act so performed will be binding upon the principal.

So an agent authorized to sell real estate, who exercises his own discretion as to the price and the terms, may employ a subagent to look up a purchaser,⁶ or to point out the land to one contemplating a purchase.⁷

So, in a different field, a city council having power to adopt ordinances may adopt a code compiled by the city attorney. "The adoption, not the compilation, was the legislative act."⁸

§ 12. II. WHEN THE PROPER CONDUCT OF THE BUSINESS REQUIRES IT.—It is obvious, too, that notwithstanding the general rule, there are many cases wherein from the very nature of the duty, or the circumstances under which it is to be performed, the employment of subagents is imperatively necessary, and the principal's interests will suffer if they are not so employed. In such cases, the power to employ the necessary subagents will be implied.¹ The authority of the agent is always construed to include the necessary and usual means to execute it properly.

Thus if a note be sent to a bank for collection, and for the protection of the principal it becomes necessary to have the note protested, the authority of the bank to employ the proper officer will be implied;² and so if a note or draft be sent to a bank or other agent,³ to be collected at a distant point, the authority of the bank

§ 11. ⁴ *Norwich University v. Denny*, 47 Vt. 13.

§ 11. ⁵ *Smith v. Swan*, 1 Tex. Civ. App. 115, 22 S. W. 247.

§ 11. ⁶ *Renwick v. Bancroft*, 56 Iowa, 527.

§ 11. ⁷ *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 17 Am. St. Rep. 178, 6 L. R. A. 121.

§ 11. ⁸ *Western, etc., R. Co. v. Young*, 83 Ga. 512, 10 S. E. 197; *Garrett v. Janes*, 65 Md. 260.

§ 12. ¹ *DeBussche v. Alt*, 8 Ch. Div. 286; *Dorchester, &c., Bank v. New England Bank*, 1 Cush. (Mass.) 177; *Johnson v. Cunningham*, 1 Ala. 249; *Rossiter v. Trafalgar Life Assur. Ass'n*, 27 Beavan, 377; *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *McCroskey v. Hamilton*, 108 Ga. 640, 34 S. E. 111; *Strong v. West*, 110 Ga. 382, 35 S. E. 693; *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573; *Kuhnert v. Angell*, 10 N. Dak. 59, 84 N. W. 579; *Breck v. Meeker*, 68 Neb. 99, 93 N. W. 993; *McCants v. Wells*, 4 S. C. 381; *Canfield v. Chicago, etc., R. Co.*, 59 Mo. App. 354; *Tennessee River Transp. Co. v. Kavanaugh* (Ala.), 13 So. 283; *Rohrbough v. U. S. Express Co.*, 50 W. Va. 148, 40 S. E. 398; *The Guiding Star*, 53 Fed. 936.

§ 12. ² *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Commercial Bank v. Martin*, 1 La. Ann. 344, 45 Am. Dec. 87.

§ 12. ³ *Breck v. Meeker*, 68 Neb. 99, 93 N. W. 993.

or other agent to employ a subagent at the place of collection, and to forward the note or draft to him there, would be presumed.⁴

So an agent employed to collect a demand by suit would have implied power to employ the necessary attorneys;⁵ or if authorized to sell goods, to employ a necessary broker or auctioneer;⁶ or if authorized to charter a vessel, to employ a vessel broker to assist him in securing the charter.⁷

§ 13. —So an agent of an insurance company given charge of a large territory or of an extensive business in a smaller territory and expected to accomplish results which could not reasonably be demanded of his individual and personal efforts, would have implied power to appoint such subagents and assistants as the contemplated results reasonably required.¹ The mechanical and ministerial parts would, of course, be delegable within the rule already considered; but even the discretionary portions might also be delegable in such a case upon the ground of an implied authority.

§ 12. ⁴ Whether the bank or other agent really undertakes to act as an agent merely or rather as an independent contractor is a disputed question. See *post*, § 23, where the cases are collected.

§ 12. ⁵ *Commercial Bank v. Martin*, *supra*; *Buckland v. Conway*, 16 Mass. 396; *Davis v. Matthews*, 8 S. Dak. 300, 66 N. W. 456.

In *Strong v. West*, 110 Ga. 382, 35 S. E. 693, it is said: "If the services of an attorney are necessary to execute the duties of a created agency, the person intrusted with those duties, if not himself an attorney, is invested with the power to procure the services of an attorney for his principal, and * * * the attorney so employed is the attorney of the principal and not of the agent."

§ 12. ⁶ *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Harralson v. Stein*, 50 Ala. 347. See also *McCants v. Wells*, 4 S. C. 381.

§ 12. ⁷ *Saveland v. Green*, 40 Wis. 431.

§ 13. ¹ *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. Rep. 721, 10 L. R. A. 609; *Deitz v. Ins. Co.*, 33 W. Va. 526; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116; *Insurance Co. v. Eshelman*, 30 Ohio St. 647; *Krumm v. Insurance Co.*, 40 Ohio St. 225; *Swan v. Insurance Co.*, 96 Pa. 37; *McGonigle v. Insurance Co.*, 168 Pa. 1, 31 Atl. 875; *Insurance Co. v. Thornton*, 130 Ala. 222, 30 So. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30.

In *Bodine v. Exchange Ins. Co.*, *supra*, it was said: "We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them; and that they could not transact their business if obliged to attend to all the details in person, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums and to take payments of premiums in cash or securities, and to give credit for premiums or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person." This rule has sometimes been cited as authority for a sort of general power in the ordinary insurance agent to employ clerks who would thereby be vested with all his powers, discretionary as well as mechanical. Such a view is believed to be both unsound and dangerous unless the insurance business is to be put upon a different footing from others. See *Waldman v. Insurance Co.*, 91 Ala. 170, 8 So. Rep. 666, 24 Am. St. Rep. 883; *Springfield F. & M. Ins. Co. v. De Jarnett*, 111 Ala. 248, 19 So. 995; distinguished in *Insurance Co. v. Thornton*, 130 Ala. 222, 30 So. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30; *Ruthven v. American F. Ins. Co.*, 92 Iowa 316, 60 N. W. 663.

For similar reasons an agent whose employment involves the performance of duties at various places may be found to have implied power to employ assistants because of the physical impossibility of his performing in person.²

And, generally, an agent put in charge of a business or a department of a business which can regularly and properly be carried on only by the employment of assistants and subordinates, would, where no other arrangement is made, have implied power to appoint them.³

§ 14. III. WHEN JUSTIFIED BY USAGE OR COURSE OF TRADE.—Again, the appointment of a subagent may be justified by a known and established usage or course of dealing.¹ Parties contracting in reference to a subject-matter concerning which there is such a usage may well be presumed to have it in contemplation. *In contractis tacite insunt quae sunt moris et consuetudinis*, is a maxim of law.²

Thus where goods were entrusted by the plaintiff to a merchandise broker to sell, deliver and receive payment, and the broker deposited them in accordance with a usage with a commission merchant connected with an auctioneer, taking his note therefor, and some of the goods were afterward sold at a less price than the broker was authorized to sell them for, it was held that the principal was bound by such act of the broker and that he could not maintain trover against the commission merchant. Said the court: "Business to an immense amount has been transacted in this way, and the usage being established, it follows that when the plaintiff authorized his broker to sell, he authorized him to sell according to the usage; and when the defendants dealt with the broker, even if they had known that the goods were not his own, they had a right to consider him as invested with power to deal according to the usage."³

The power of a bank receiving a note for collection at another place, to forward the note to a bank at that place for payment, may

§ 13. ²The Guiding Star, 53 Fed. 936.

§ 13. ³*Breck v. Meeker*, 68 Neb. 99, 93 N. W. 993; *Tennessee River Transp. Co., v. Kavanaugh* (Ala.), 13 So. 283; *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573; *Canfield v. Chicago, etc., Ry. Co.*, 59 Mo. App. 354; *McCroskey v. Hamilton*, 108 Ga. 640, 34 S. E. 111.

§ 14. ¹*Buckland v. Conway*, 16 Mass. 396; *Smith v. Sublett*, 28 Tex. 163; *Lynn v. Burguoyne*, 13 B. Mon. (Ky.) 400; *Moon v. Guardians*, 3 Bing. N. Cas. 814; *Gray v. Murray*, 3 Johns. (N. Y.) Ch. 167; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Johnson v. Cunningham*, 1 Ala. 249; *Breck v. Meeker*, 68 Neb. 99, 93 N. W. 993; *Rohrbough v. U. S. Exp. Co.*, 50 W. Va. 148, 40 S. E. 398; *DeBussche v. Alt*, 8 Ch. Div. 286.

§ 14. ²See *Ewell's Evans' Agency*, 58.

§ 14. ³*Laussatt v. Lippincott*, 6 Serg. & R. (Penn.) 386, 9 Am. Dec. 440. See also *Wallace v. Bradshaw*, 6 Dana (Ky.) 383; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Jackson v. Union Bank*, 6 H. & J. (Md.) 146; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137.

also be derived from the same source, as may other powers referred to in the preceding section.⁴ Usage, however, will not be permitted to contravene express instructions, and if the agent has been denied the power of delegation, usage can not confer it.⁵ Nor can usage justify the agent in violating the fundamental duties which he owes to his principal or change the intrinsic character of the contract existing between them.⁶

§ 15. IV. WHEN NECESSITY OR SUDDEN EMERGENCY JUSTIFIES IT.—So there may be cases in which supervening necessity or sudden emergency may justify the employment of subagents.¹ Thus, for example, if a railroad train in transit should suddenly be deprived of its fireman or brakeman, the authority of the conductor to employ someone else to fill the place until the necessity was past or the company could act would doubtless be sustained.² In England it is held that the power can not exist if the circumstances are such that the principal may be communicated with and his instructions procured. "The impossibility of communicating with the principal," said SMITH, L. J., "is the foundation of the doctrine of an agent of necessity."³ This is a salutary principle, though not always recognized in the American cases.

§ 16. V. WHEN ORIGINALLY CONTEMPLATED.—And so, if the appointment of a subagent was contemplated by the parties at the time of the creation of the agent's authority, or if it was then expected that subagents might or would be employed, this would be treated as at least implied authority for such an appointment.¹

§ 17. VI. RATIFICATION OF AN UNAUTHORIZED APPOINTMENT.—And, finally, even though authority to appoint subagents cannot be deduced by any of the methods already enumerated, it may be

§ 14. ⁴ *Wilson v. Smith*, 3 How. (U. S.) 763, where the court speaks of it as an authority fairly to be implied from the usual course of trade or the nature of the transaction.

§ 14. ⁵ *Barksdale v. Brown*, 1 Nott. & McC. (S. C.) 517, 9 Am. Dec. 720; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Hall v. Storrs*, 7 Wis. 253; *Day v. Holmes*, 103 Mass. 306; *Parsons v. Martin*, 11 Gray (Mass.) 112; *Clark v. Van Northwick*, 1 Pick. (Mass.) 343; *Leland v. Douglass*, 1 Wend. (N. Y.) 490; *Catlin v. Smith*, 24 Vt. 85; *Hutchings v. Ladd*, 16 Mich. 493.

§ 14. ⁶ *Robinson v. Mollett*, L. R. 7 H. of L. 802, 14 Eng. Rep. 177; *Minnesota Cent. R. R. Co. v. Morgan*, 52 Barb. (N. Y.) 217.

§ 15. ¹ *Gwilliam v. Twist* [1895], 2 Q. B. 84; *Georgia Pac. R. Co. v. Propst*, 85 Ala. 203, 4 So. 711; *Sloan v. Central Iowa Ry. Co.*, 62 Iowa 728, 16 N. W. 331; *Fox v. Chicago, etc., Ry. Co.*, 86 Iowa 368, 53 N. W. 259, 17 L. R. A. 289.

§ 15. ² So held in *Georgia Pac. Co. v. Propst*; *Sloan v. Central Iowa Ry. Co.*; *Fox v. Chicago, etc., Ry. Co.*, *supra*.

§ 15. ³ In *Gwilliam v. Twist*, *supra*.

§ 16. ¹ *Johnson v. Cunningham*, 1 Ala. 249; *Duluth Nat. Bank v. Fire Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 744; *National Steamship Co. v. Sheehan*, 122 N. Y. 461, 25 N. E. 858; *DeBussche v. Alt*, 8 Ch. Div. 286.

found that such an appointment has subsequently, with knowledge of the facts, been either expressly or impliedly ratified;¹ and here, as in other cases, such a ratification is equivalent to a prior authority. Knowledge of the facts and voluntary action, however, are as essential here as elsewhere, and the principal by accepting what he was entitled to from the agent, in ignorance that a subagent had been employed, does not ratify his appointment.²

§ 18. CARE REQUIRED IN MAKING AUTHORIZED APPOINTMENT.—Where the appointment of a subagent is authorized, the agent appointing him does not impliedly warrant that the person selected by him will be in all respects a fit and proper agent. The measure of his duty in that regard is to exercise reasonable care and skill to appoint a suitable person.¹

§ 19. WHOSE AGENT IS THE SUBAGENT.—Wherever a subagent has been lawfully appointed, in pursuance of the foregoing rules, he undoubtedly acts so far with the consent of the principal that the latter is bound by the act of the subagent done within the scope of the authority conferred upon the original agent. Whether, however, he is the agent of the principal in such sense that there is a privity of contract between them—so that, for example, the principal may or must look to the subagent for redress if the authority be improperly exercised, or that the subagent may or must look only to the principal for indemnity or compensation—is another matter. The principal may clearly be willing to consent that his agent may perform the duty through a substitute employed at *the agent's* risk and expense, when he would not be willing, at *his own* risk and expense, to have such a substitute employed. The familiar case of the independent contractor furnishes an analogy. The employer here expects that the contractor will avail himself of agencies and means selected by himself and for which he is responsible; but the employer does not expect to answer for the defaults of the contractor's servants or to pay them for their services. The principal may consent to the employment of subagents on such terms as please him, and where he has consented only upon the express or implied condition that the subagent shall not be deemed his agent, that condition, as between the parties, must control.

§ 20. ———This distinction has been made in many cases. Thus it

§ 17. ¹ *Teucher v. Hiatt*, 23 Iowa 527, 92 Am. Dec. 440; *Sedgwick v. Bliss*, 23 Neb. 617, 37 N. W. 483; *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670; *Bellinger v. Collins*, 117 Iowa 173, 90 N. W. 609. See also *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2.

§ 17. ² *Rice v. Post*, 78 Hun (N. Y.) 547.

§ 18. ¹ *Kuhnert v. Angell*, 10 N. Dak. 59, 84 N. W. 579; *Baldwin v. Bank*, 1 La. Ann. 13, 45 Am. Dec. 72; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83; *Conwell v. Voorhees*, 13 Ohio 523, 42 Am. Dec. 206.

is said by Senator VERPLANCK in a leading case¹ in New York: "There is a wide difference made as well by positive law as by the reason of the thing itself between a contract or undertaking to do a thing, and the delegation of an agent or attorney to *procure the doing* of the same thing—between a contract for building a house, for example, and the appointment of an overseer or superintendent, authorized and undertaking to act for the principal in having the house built. The contractor is bound to answer for any negligence or default in the performance of his contract, although such negligence or default be not his own, but that of some sub-contractor or under workman. Not so the mere representative agent who discharges his whole duty if he acts with good faith and ordinary diligence in the selection of his materials, the forming of his contracts and the choice of his workmen."

§ 21. —The same distinction is also stated in much the same way by MR. JUSTICE BLATCHFORD in the Supreme Court of the United States. "The distinction," he says, "between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one. If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant under-contractors or subagents when defaults occur injurious to his interest. * * * The nature of the contract is the test. If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But when the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used."¹

§ 22. —So where the question was as to the liability of a factor for the defaults of another to whom he had sent the goods for sale, the latter [the defendant] contended that if plaintiffs [the principals] told him to "do with the goods as with his own," or if "the employment of a subagent was necessary, and that fact was known to plaintiffs," then, in either event, defendant has a right to send the goods to a factor of good credit, to whom and not to the defendant, plaintiffs should look for their proper disposition. But the court said, "We do not think that if the jury had found both of these facts in favor of defendant it necessarily followed that he would not be liable for the default of the person so selected. The inquiry still

§ 20. ¹ *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215.

§ 21. ¹ *Exchange National Bank v. Third National Bank*, 112 U. S. 276.

remained, was this person selected as the servant of the agent or factor, or did he become the agent of the principal? It by no means follows, where produce, for instance, is intrusted to a commission merchant in Dubuque, and sent forward by him to his correspondent or agent at Chicago or St. Louis, that a privity of contract exists between such correspondent and principal, to the extent that the original factor is released and the subagent only is liable. Nor does it make any difference that the principal or consignor knows that it must and will be sent forward to find a market. He has a right to, and is presumed to repose confidence in, the financial ability and business capacity of the person so employed, and if such factor employs other persons, he does so upon his own responsibility; and, having greater facilities for informing himself and extending his business relations, upon him and not upon the principal should fall the loss of any negligence or default. If, however, another person has been substituted who, with the knowledge and approbation of the principal, takes the place of the original factor, or if such substitution is necessary from the very nature of the business, and this fact is known to the principal, the liability of the substitute may be direct to the principal, depending upon questions of good faith and the like on the part of the factor in selecting the substitute."¹

§ 23. —The form in which the question most frequently presents itself is in determining the liability of a bank for the defaults of its correspondent banks in the process of collecting checks, notes and the like delivered to it for collection. Upon this question the authorities are hopelessly in conflict—not, however, as to the rule of liability when the nature of the undertaking is determined but as to the proper construction of the facts in deciding upon the nature of the undertaking.¹

§ 24. EFFECT OF APPOINTMENT.—It is not the purpose here to go minutely into the mutual rights and obligations of the principal,

§ 22. ¹ *Loomis v. Simpson*, 13 Iowa 532.

§ 23. ¹ See *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *Mackerey v. Ramsay*, 9 Cl. & Fin. 818; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Bank v. Butler*, 41 Ohio St. 519, 52 Am. Rep. 94; *Titus v. Bank*, 35 N. J. L. 588; *Power v. First Nat. Bank*, 6 Mont. 252, 12 Pac. 597; *Streissguth v. Nat. Bank*, 43 Minn. 50. Compare *Fabens v. Mercantile Bank*, 23 Pick. 330, 34 Am. Dec. 59; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Jackson v. Union Bank*, 6 H. & J. (Md.) 146; *Aetna Ins. Co. v. Alton Bank*, 25 Ill. 243; *Stacy v. Dane County Bank*, 12 Wis. 629; *Guelick v. Nat. State Bank*, 56 Iowa 434, 41 Am. Rep. 110; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112, 48 Am. Rep. 78; *Daly v. Bank*, 56 Mo. 94, 17 Am. Rep. 663; *Bank of Louisville v. First Nat. Bank*, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691; *Merchants Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Hyde v. Planters' Bank*, 17 La. 560; *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101, 48 N. E. 601. This list does not purport to be exhaustive.

agent, and subagent. This subject is reserved for subsequent consideration. But—

In general.—If, under the circumstances, it appears that the agent employed the subagent *for* his principal, and by his authority, expressed or implied, then the subagent is the agent of the principal and is directly responsible to the principal for his conduct; and if damage results from the conduct of such subagent, the agent is only responsible in case he has not exercised due care in the selection of the subagent.

But if the agent, having undertaken to transact the business of his principal, employs a subagent on his own account to assist him in what he has undertaken to do, he does so at his own risk, and there is no privity between such subagent and the principal. The subagent is, therefore, the agent of the agent only and is responsible to him for his conduct, while the agent is responsible to the principal for the manner in which the business has been done, whether by himself, or his servant or his agent.¹

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§ 24. ¹ *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Sexton v. Weaver*, 141 Mass. 273; *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Commercial Bank v. Jones*, 18 Tex. 811; *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Pownall v. Bair*, 78 Penn. St. 403; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Stephens v. Babcock*, 3 B. & Adol. 354; *McCants v. Wells*, 4 S. C. 381; *Hoag v. Graves*, 81 Mich. 628, 46 N. W. 109; *Davis v. King*, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104. Where it is understood that a steamship agent is to have subagents, and the agent distributes tickets among them, he is not liable in replevin for the tickets in the hands of subagents after the termination of his agency, as the subagents are also agents of the company. *National Steamship Co. v. Sheahan*, 122 N. Y. 461, 25 N. E. 858. A sales agent, whose duty is to take orders for his principal's goods within a certain territory, and who can delegate his authority only to the extent of employing his own salesmen, cannot make a contract with a salesman which will bind the principal to pay the salesman for his services in making sales. *National Cash Reg. Co. v. Hagan* (Tex. Civ. App.) 83 S. W. 727.