Washington Law Review

Volume 10 | Number 1

1-1-1935

Agency—Liability of Undisclosed Principal for Unauthorized Acts of Agent; Constitutional Law—Delegation of Legislative Power to a Foreign Body; Evidence—Parol Evidence Rule—Collateral Agreements

E. G. N.

RECENT CASES

AGENCY—LIABILITY OF UNDISCLOSED PRINCIPAL FOR UNAUTHORIZED ACTS OF AGENT—Defendant, with other defendants, executed two promissory notes, secured by a deed of trust to certain property owned by the defendants, to the agent of the plaintiff. The application for the loan was made to the agent. The property subsequently twice changed hands, each new grantee assuming and agreeing to pay the incumbrance, and paying interest to the agent. The last real owner made a settlement with the agent, turning over to him the deed, a lease on part of the rented property and some cash. Defendant contended that by the acts of the agent in accepting the settlement, there was a merger of title and indebtedness in the principal, and he is released from liability on the notes. *Held*: That it was a question for the jury, whether or not the principal, by his silence, impliedly authorized the acts of the agent. *Goldblatt v. Cannon*, 37 Pac. (2d) 525 (Okla. 1934).

The foregoing decision raises the question as to just how far the courts will go in holding an undisclosed principal liable for the unauthorized acts of his agent. It is obvious that the theory of apparent authority will not apply, since apparent authority is the power which results from acts which appear to the third person to be authorized by the principal, and if such third person does not know of the existence of a principal there can be no apparent authority.

A general agent, for an undisclosed principal authorized to conduct transactions, subjects his principal to liability for acts done on his account, if usual or necessary in such transactions, although forbidden by the principal to do them. Restatement of Agency, section 194. The question then arises, was the agent a general agent, and if he was, were the acts usual or necessary in such transactions? In the instant case, it is apparent that the agent was not a general agent, nor were the acts usual or necessary in such transaction.

If the act of the agent has in fact been unauthorized, and not even within the usual power of agents of that type, the liability of the principal must depend upon some theory whereby the principal ratifies the acts of the agent, or in some way acts in such a manner as to be estopped from asserting that the agent was not, in fact, authorized to do the acts which he did. Usually a condition precedent to the ability of the principal to ratify, is that the agent *purported* to act as an agent. This is, of course, impossible where the principal is undisclosed. The weight of authority excludes a ratification by an undisclosed principal. *Keighley v. Durant*, (1901) A. C. 240; *Schlessinger v. Forest Prod. Co.*, (1910) 78 N. J. Law 637, 76 Atl. 1024, *Brown Realty Co. v. Myers*, (1916) 89 N. J. Law 247, 98 Atl. 310; *Ankeny v. Young Bros.*, (1909) 52 Wash. 235, 100 Pac. 736. The theory upon which an agent can act for an undisclosed principal so as to bind him to a third person, is itself an anomaly of the law, and to allow ratification in such cases would be to heap one anomaly of the law of agency upon another. Despite this fact Massachusetts distinguishes the cases in which the agent *intended* to act on behalf of the undisclosed principal and permits ratification. *Hayward v. Langmaid*, (1902) 181 Mass. 426, 63 N. E. 912; *Hixon v. Starr* (1922) 242 Mass. 371, 136 N. E. 186.

In Washington, the modern trend has been to hold the undisclosed principal liable, where the acts of the agent have been unauthorized. It is admitted that some of the earlier cases are contra, but the more recent decisions have revealed that the principal will be held wherever the court can find any reasonable ground upon which to base their decision. In the early case of *Murphy v. Clarkson*, (1901) 25 Wash. 585, 66 Pac. 51 the court held that the principal could not be held liable, where he gave his agent the power to convey land, and the evidence showed that the contract was executed in the name of the agent, as if the latter were the owner; that the contract nowise disclosed the relation of principal and agent; that nothing was shown that the plaintiff believed he was dealing with an agent. The basis of the decision was that the court thought that it was an impossibility for an agent, by unauthorized acts, to bind his undisclosed principal. But see, *Kraus v. Dowell* (1922) 119 Wash. 90, 204 Pac. 795 (where it was held that a loan agent is shown to be the agent of the assignee of a mortgage, with authority to collect principal as well as interest of a mortgage in which it was the mortgagee, although it did not have possession of the mortgage note, where its practice was to make loans in its own name, indorse them to its customers, collect and remit interest and the assignee was familiar with this practice, took a note without recording any assignment and had no dealings with the mortgagor, until after the agent had collected part of the principal and become insolvent.) *First Nat'l Bank of Seattle v. Hessell* (1925) 133 Wash. 643, 234 Pac. 662 (where a bank assigned a promissory note to another bank, the court held that the assignor had authority to collect the note, where the note was payable to the assignor, and it was the custom for this bank to collect such notes, even though the note was not in its possession.) *Pfeiffer v. Heyes* (1932) 166 Wash. 125, 6 Pac. (2d) 612, (an action by the mortgagor to cancel three notes and a mortgage delivered to Osner & Mehlhorn, as payee and mortgagee. The latter sold the notes and assigned the mortgage to Heyes, but the assignment was never recorded. The mortgagor was never advised of the assignment, and continued to make payments of principal and interest, when due, to Osner and Mehlhorn, assuming and believing that the latter was still the owner of the notes and mortgage.)

It is submitted, that the theory upon which the actual principal should be held liable should be based upon the fact that by permitting the agent to hold himself out as the principal, with full power to contract, and thereby innocent third parties are thus led into dealing with such apparent principal, they will be protected. Their rights under such circumstances should not depend upon the actual authority of the party with whom they are directly dealing, but are derived from the act of the real principal which precludes him from disputing, as against them, the existence of the authority, which through negligence or mistaken confidence he has allowed to vest in the party with whom they are dealing, especially where such third party has substantially changed his position in reliance thereon.

E. G. N.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER TO A FOREIGN BODY. Lasswell was convicted of violating various sections of the code of fair competition of the cleaning and dyeing trade including charging

less than the minimum price of cleaning fixed by the code. This code was made law in California by a state statute (act 8775, sec. 2, 1933 Laws California) decreeing that the federal N.R.A. codes should become state law as soon as formulated by the federal government. Relying on the *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398 (1934), which upheld a state statute under the "emergency" doctrine, and *Nebbia v. New York*, 291 U. S. 502 (1934), which upheld a state statute fixing prices in a "paramount industry," the court in the *Lasswell* case decided that price-fixing by the state in the cleaning and dyeing industry did not violate the Fourteenth Amendment to the Federal Constitution. The court next dealt with the problem of delegation of legislative power and ruled (1) that a "primary standard" had been fixed by the state statute and (2) that delegating the legislative power of "filling in details" to a foreign body did not violate the state Constitution. *Ex parte Lasswell*, 36 Pac. (2nd) 678, (Cal. App., Sept., 1934).

John Marshall stated in one of his decisions, *Wayman v. Southard*, 10 Wheaton 42 (1825), that because the Constitution separated distinctly the three departments of government, there could be no delegation from one department to the other. But because the affairs of governmnt became so expanded and intricate towards the latter part of the 19th century, the United States Supreme Court declared that Congress, after setting forth a "primary standard," could delegate the task of "filling in details" to executive agencies. *Union Bridge Co. v. U. S.*, 204 U. S. 364 (1906) *U. S. v. Grimaud*, 220 U. S. 506 (1910) *Hampton Jr & Co. v. U. S.*, 276 U. S. 394 (1927). Soon the state courts adopted the same principles. 12 C. J. 840.

In the *Lasswell* case the state legislature delegated the "filling in details" to the federal Congress, a body foreign to the state legislature. Likewise, the California legislature impliedly delegated to the President of the United States, a foreign official, authority to bind California with his decrees since the federal N.R.A. codes gave him that power and California adopted those codes in toto. The *Lasswell* case cited as authority for the constitutionality of such delegation *Ex Parte Gerino*, 143 Cal. 412, 77 Pac. 166 (1904) where a state statute required a certificate from some medical school whose requirements were no less than those prescribed by the Association of American Medical Colleges (a foreign body) as a prerequisite to practice medicine. The *Gerino* case merely adopts the foreign body's list of schools as expert opinion of a first-class medical school that meets the Association's requirements; whereas the *Lasswell* case permits the foreign body to legislate what actions shall constitute a crime in the state. It is submitted that *Ex Parte Gerino* is too narrow to support the *Lasswell* case.

The following cases have held that delegation of the legislative power of "filling in details" to a foreign body is unconstitutional. The case of *State v. Webber*, 125 Me. 319, 133 Atl. 738 (1926), held that incorporation in statutes, by reference, of future pharmacopoeial revisions or enactments of Congress was an unconstitutional delegation of legislative power. *State v. Intoxicating Liquor*, 121 Me. 438, 117 Atl. 588 (1922), decided that adoption by state statute of future definitions of intoxicating liquor by Congress was an unconstitutional delegation of legislative power. *In Re Opinion of the Justices*, 239 Mass. 603, 133 N. E. 453 (1921), held that a state statute which, to give effect to the Eighteenth Amendment in Massachusetts, created criminal offenses, not by definition, but by reference to

present and future Congressional laws in these particulars, was an unconstitutional delegation of legislative power. The only reason the court gave for their decision in these three cases was that to hold the statute constitutional would destroy the fundamental conceptions of our government.

As a consequence of the National Industrial Recovery Act, many of our states have adopted statutes similar to the one in the *Lasswell* case calling for wholesale incorporation of federal codes as state law as soon as formulated by the federal government. In the last two years this constitutional problem of the delegation of "filling in details" to a foreign body has been adjudicated by many state and several lower federal courts, but their decisions reveal a conflict of authority. In *People v. Capitol Cleaners & Dyers*, Superior Court, Los Angeles County February, 1934, Leading Decisions VII B, V E 43, the court held the California Recovery Act invalid insofar as it purported to adopt as state laws those N.R.A. codes which were adopted after the passage of the state act, or which will be adopted in the future. But the Superior Court, Santa Clara, California, held the contrary in *People v. Economy Cleaners*, Leading Decisions VII B, V E 43. A state statute adopting federal codes with power in the President was held a constitutional delegation of legislative power to the President in *State v. Dusha*, Ohio No. 140434, October, 1934, Leading Decisions VII B, V E 44c. In *Cline v. Consumers' Cooperative*, 152 Misc. 653, 274 N. Y. S. 362 (Sept., 1934), the opposite conclusion from the *Lasswell* case was reached with a substantially similar statute. Without citing any case authority, the New York court held the state statute incorporating by reference present and future N.R.A. codes unconstitutional and stated, "There is no power in the Legislature of the State of New York to delegate any of its legislative powers to any outside agency as to the Federal Government or to the President of the United States. To do so is to impair the sovereignty of the state itself." The case of *Darweger v. Staats*, 275 N. Y. S. 394 (Nov., 1934), involved the same statute as *Cline v. Consumers' Cooperative* and reached the same result—that the statute was unconstitutional. The court said, "The Legislature cannot delegate the sovereign powers of the state to an administrative or executive authority of a foreign jurisdiction. It cannot surrender the sovereignty of the state to declare the acts constituting a crime to federal executive or administrative authority." The only reasons the court gave were that the Constitution of New York set up legislative powers in two distinct houses, and prohibited incorporation of laws in statutes by reference, which two provisions the statute violated, and, in addition, the statute was contrary to every principle upon which our republican institutions are based. *Darweger v. Staats* cited *Cline v. Consumers' Cooperative* with approval.

The recent case of *Spielman Motor Sales Co. v. Dodge*, 8 F Supp. 437 (October, 1934) decided in a federal district court of New York, held that the New York N.R.A. statute was constitutional, which same statute was decreed unconstitutional by two state courts in *Cline v. Consumers' Cooperative* and *Darweger v. Staats*. The *Spielman* case avoided the constitutional difficulty of delegation of legislative power by declaring, "The code is but an administrative product of the executive's application of N.I.R.A.—it is not a law" *Spielman v. Dodge* is now pending appeal to

the United States Supreme Court (55 Sup. Ct. 237) and the Supreme Court may possibly decide whether or not this delegation of legislative power to a foreign body is a violation of the Constitution of the State of New York. Should the Supreme Court see fit to decide this state constitutional problem, they probably would follow the state court's construction of the New York statute as given in *Cline v. Consumers' Co-operative* and *Darweger v. Staats* because the federal courts follow the state courts in the construction of state statutes. *Green v. Frazier* 253 U. S. 233 (1920) 25 C. J. 832; *Porter v. Investors' Syndicate*, 287 U. S. 346 (1932). Should the Supreme Court reverse the *Spielman* decision on this ground, its decision would, no doubt, carry weight with state courts faced with similar problems. C. C.

EVIDENCE—PAROL EVIDENCE RULE—COLLATERAL AGREEMENTS. P was employed by D as an automobile salesman, the employment being terminable at the will of either party. In March, 1932, D informed all of the salesmen, including P that in order to hold their jobs, they must purchase new cars from D, under conditional sales contracts providing for a down payment and six monthly installments, balance to be paid at the end of that period. D agreed to take in P's old car at a sufficient price to cover the down payment and the six installments. P did not wish to purchase a new car, but D promised to save him harmless from any money loss on the deal by taking the car back at the end of six months and selling it for enough so that after deducting the balance of the purchase price, P would have left an amount equal to the value of the car which he traded in. It was never intended that P should make any payments beyond trading in his old car. On the faith of this oral agreement and in order to hold his job, P signed a conditional sales contract which contained a provision to the effect that no warranties, representations or agreements had been made by the seller unless specifically set forth therein. At this time, D was in bad financial condition and the clear purpose of forcing sales to the salesmen was to enable D to raise money by selling the conditional sales contracts so obtained to a finance company. In P's case, this was done shortly after he signed the contract. A few days prior to the expiration of the six months period, P was discharged. When the balance became due on the conditional sales contract, P was unable to pay it, and the finance company repossessed the car. P sued to recover on the oral promise to save him harmless, and D set up the parol evidence rule. The trial court refused to make any finding of fraud. Held: The oral promise may be shown. *Champlin v. Transport Motor Co.*, 77 Wash. Dec. 531, 33 Pac. (2d) 82 (1934).

The court apparently bases its conclusion on four different reasons which may be termed as follows: Pennsylvania rule, constructive fraud, business compulsion, and the rule on collateral agreements.

Briefly, the Pennsylvania rule is to the effect that where a person enters a written contract on the faith of a prior or contemporaneous oral agreement, it is fraudulent for the other party to attempt to enforce the written contract without reference to the oral agreement. The obvious effect of this is to abrogate the parol evidence rule. Wigmore on Evidence (2d Ed.), sec. 2431 (c), where the doctrine in question is treated as having been applied only in Pennsylvania.

The second basis, constructive fraud, rests mainly on the case of *Stanley v. Parsons*, 156 Wash. 217, 286 Pac. 654 (1930), where it was held that an honest misrepresentation should have the same effect as a fraudulent one, since the result to the injured party was the same. This is not dissimilar from the Pennsylvania rule noted above and is open to the same criticism.

Business compulsion, the third basis relied upon, is apparently based on duress, and as such, it may be a valid exception to the parol evidence rule. However, the instant case seems to go much farther than the previous cases in this jurisdiction. *Ramp Building Corp. v. Northwest Building Co.*, 164 Wash. 603, 4 Pac. (2d) 507 (1931) *Ferguson v. Associated Oil Co.*, 173 Wash. 672, 24 Pac. (2d) 82 (1933). This phase of the instant case, while dealt with rather lightly by the majority, forms the basis for a vigorous dissent by four judges who treat it as the sole point in controversy

Lastly, the court refers to the oral promise as being "collateral" and also as involving different subject matter which amounts to the same thing. If this is correct, then the parol evidence rule does not apply. To determine whether an oral promise is collateral, the proper test is the intent of the parties, to be gathered from their language and conduct and the surrounding circumstances. Wigmore on Evidence (2d Ed.), sec. 2430. Applying this to the instant case, it is clear that integration of the two agreements would have rendered the conditional sales contract worthless for defendant's purpose; and yet keeping this purpose clearly in mind, it cannot be said that the oral promise and the written contract are necessarily inconsistent. Hence, it may be correct under Wigmore's test, *supra*, to hold that the oral promise is collateral. However, the Washington court appears to have adopted the view that the writing itself is the sole test. *Gordon v. Parke & Lacy Machinery Co.*, 10 Wash. 18, 38 Pac. 755 (1894) *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124 (1917). Since this test excludes consideration of the surrounding circumstances, it is difficult to see how the oral promise in the instant case can be considered as collateral.

R. Y.