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THE INDEPENDENT DOCTRINE OF RATIFICATION

v.

THE RESTATEMENT AND MR. SEAVEY

Aaron D. Twerski †

If one were to ask any student of the law who has even a passing familiarity with fundamental agency concepts to explain the basic rationale underlying those concepts, one could expect for the most part a lucid explanation. In the main, the rules of agency make good common sense. They generally conform to the exigencies of the business community with comparative ease and rarely conflict with the contract and tort principles which provide the matrix for their operation.¹ The doctrine of ratification is an exception. Simply stated, it provides that a principal who subsequently consents to the unauthorized act of his agent or one who purports to be his agent can acquire rights and be subjected to liabilities with the same effect as if the act were originally authorized.²

It is apparent from the mere exposition of the doctrine that its rules of operation are not reconcilable with those of contract and tort law.³ That one can bind himself to a contract retroactively,⁴ without

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1. The doctrine of "inherent agency power" imposes liability on a principal for acts of an agent even though there is no tort, contract, or restitutional theory to account for such liability. RESTATEMENT (SECOND) OF AGENCY § 8A (1957) [hereinafter cited as RESTATEMENT]. The Restatement acknowledges that liability under this doctrine is purely a product of the agency relationship; *i.e.*, the principal is held liable for certain unauthorized acts of an agent as a cost of doing business through an agent. *Id.* comments *a, b.* See also *Kidd v. Thomas A. Edison, Inc.*, 239 F. 405 (S.D.N.Y. 1917) (L. Hand, J.).

2. RESTATEMENT § 82; W. SEAVEY, LAW OF AGENCY § 32A (1964) [hereinafter cited as SEAVEY].

3. SEAVEY § 32A.

4. RESTATEMENT §§ 100, 100A.

receiving consideration,⁵ and without communication to the other contracting party⁶ is clearly violative of fundamental contract principles.⁷ Nor did traditional tort law recognize that a person could become liable for compensatory⁸ or even punitive damages⁹ after the completion of a tort, when the tortfeasor was not his agent at the time the tort was committed.¹⁰ Given these incongruities, it is not at all difficult to sympathize with those commentators who have attacked ratification as being an anomaly in the law,¹¹ absurd,¹² or a foolish fiction.¹³ Although they had before them a doctrine which worked at cross-currents with well-established common law concepts, they could not discover a coherent and comprehensive rationale to justify its existence.

In truth, even the staunchest defenders of the ratification doctrine can be described as mildly uncomfortable with its operation in certain instances¹⁴ and utterly at loss to explain its complexities in others.¹⁵ For example, courts were early faced with the question whether a principal could bind a third party who had dealt with a purported agent if the third party learned of the agent's lack of authority and sought to withdraw prior to ratification by the principal.¹⁶ Under the rules of ratification the rights and liabilities of both parties to the contract relate back to the time when the third party contracted with the purported agent.¹⁷ To be consistent, the withdrawal of the third party should be ineffective, since "relation back" goes into effect as soon as

5. RESTATEMENT § 82, comment c.

6. RESTATEMENT § 95.

7. See generally RESTATEMENT OF CONTRACTS § 19 (1932); 1 A. CORBIN, CONTRACTS §§ 67, 109 (1963). A contract is deemed made at the time when the last act necessary for its formation is done. RESTATEMENT OF CONTRACTS § 74 (1932).

8. *Dempsey v. Chambers*, 154 Mass. 330, 28 N.E. 279 (1891); F. MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 212-13 (4th ed. 1952) [hereinafter cited as MECHEM].

9. *Gindin v. Baron*, 11 N.J. Super. 215, 78 A.2d 297 (App. Div. 1951); *Tauscher v. Doernbecher Mfg. Co.*, 153 Ore. 152, 56 P.2d 318 (1936).

10. For the reasons offered for vicarious liability see W. PROSSER, LAW OF TORTS § 68 (3d ed. 1964). The reasons all place heavy emphasis on the ability of the master to control and select the servant. This rationale obviously will not explain the ratification of a tort since the master enters the scene after the tort has been committed.

11. MECHEM § 145.

12. Holmes, *Agency*, 5 HARV. L. REV. 1, 14 (1891).

13. J. EWART, WAIVER DISTRIBUTED 129 n.1 (1917).

14. RESTATEMENT § 82, comment d. Mechem takes the position that ratification of a purported agent's tort makes no sense at all and rests solely on the mechanical application of the maxim, *Omnis rati habitio retrotrahitur et mandato priori aequiparatur* (every ratification relates back and is equivalent to a prior authority). MECHEM §§ 212-14.

15. MECHEM § 251.

16. *Equity Mut. Ins. Co. v. General Cas. Co.*, 139 F.2d 723 (10th Cir. 1943); *Bardusch v. Hofbeck*, 139 N.J. Eq. 327, 51 A.2d 231 (Ch. 1947); *Atlee v. Bartholomew*, 69 Wis. 43, 33 N.W. 110 (1887); *Dodge v. Hopkins*, 14 Wis. 630 (1861); RESTATEMENT, Reporter's Notes to § 88 and cases cited therein.

17. RESTATEMENT §§ 100, 100A.

the principal ratifies.¹⁸ To avoid this result the argument has been made that it would be unfair to permit the principal to ratify when he has paid no consideration to the third party to hold the offer open.¹⁹ The problem with this approach is that it relies on a principle of contract law. Yet the doctrine of ratification itself is in violation of contract principles.²⁰ The result is a doctrine of ratification that is disjointed rather than unified.

One might hope that such eclecticism would not have been tolerated for long and that an attempt would have been made to develop some fundamental principles which would impose order in this seemingly chaotic area of the law. Instead one finds apology in the place of reason and tortured analogy substituted for painstaking analysis. We are told that the "unique"²¹ doctrine of ratification is a "beneficent" one that "hurdles the technicalities of torts and contracts";²² that its inconsistencies should be tolerated because it "has been found for the most part to satisfy the needs of the commercial community";²³ and that it is justified because "in most cases, it corrects minor errors of agents without harm to anyone."²⁴ Lest our historical sensibilities be offended we are assured that the "relation back" doctrine is not a novel concept at all: a third party beneficiary contract in which *A* has promised *B* to pay *C* relates back and becomes enforceable by *C* only after he has elected to bind *A*.²⁵ "Estoppel by deed" is brought forth

18. Seavey contends that to permit "relation back" to bind a third party wishing to withdraw prior to ratification "is to worship the fiction of relation back as a transcendental shrine . . ." He sharply criticizes the English cases for permitting a principal to ratify under these conditions. Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 891 (1920). Wambaugh, *A Problem as to Ratification*, 9 HARV. L. REV. 60 (1895), correctly points out that logic only dictates that if ratification takes place, then it relates back; but in the withdrawal cases we are faced with the question of whether or not a principal may ratify. Nevertheless, we cannot hide from the fact that after seventy years of comment by courts and scholars the only reasoning which supports the American cases which refuse a principal the right to ratify if the third party has withdrawn is the principle of contract law that an offer may be withdrawn at any time prior to acceptance, except in the cases of promissory estoppel and option contracts. For the author's suggested solution to the dilemma see text pp. 13-14 *infra*.

19. SEAVEY § 35.

20. See text accompanying notes 3-7 *supra*.

21. 1 F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 345 (2d ed. 1914).

22. Seavey, *Ratification—Purporting to Act as Agent*, 21 U. CHI. L. REV. 248, 250 (1954).

23. SEAVEY § 32A.

24. *Id.*

25. Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 890 (1920). The view that the rights of a third party beneficiary do not vest until the beneficiary knows of the contract and assents to it has met with strong criticism. See *Hughes v. Gibbs*, 55 Wash. 2d 791, 350 P.2d 475 (1960); Annot., 53 A.L.R. 178 (1928). One author states that those courts which have taken the position that the assent of the beneficiary is a necessary element have been motivated by the unrealistic desire to make the beneficiary privy to the contract. He forcefully argues that the interests of third parties should be deemed mere expectancies unless the beneficiaries have changed their positions before being notified of any attempted discharge. G. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS § 242 (J. Murray ed. 1965). If we were to draw the analogy to ratification pursuant to the above reasoning, the third party could withdraw after ratification unless the principal had somehow acted to his detriment. Permitting

as a close analogy: if a person purports to convey property which he does not own but later acquires, the transferee's title dates from the time of the attempted transfer because that was "the manifest intent of the parties."²⁶

Perhaps Professor Seavey is correct in his assumption that the longevity of the ratification doctrine is indicative of its expediency and utility,²⁷ but one can hardly be satisfied with *ex post facto* legal reasoning which stops at the fact that a legal concept works without inquiring *why* it works. Furthermore, the failure to articulate clearly a sound rationale for a legal doctrine and the willingness to live with rules that are not clearly understood inevitably extend once-useful concepts by analogy to areas of the law in which they do not properly belong. An examination of the ratification doctrine has led this writer to conclude that it merits independent recognition as a viable *agency* concept. The failure to recognize its independent significance has unfortunately led to its misapprehension and misapplication and has caused needless confusion to generations of students who have sought to reconcile ratification with traditional common law rules.

A HYPOTHETICAL CASE AND A SUGGESTED RATIONALE

On a hot summer day *T* wanders onto a construction site looking for work, and is hired by *A*, who purports to be in charge of hiring

the third party to withdraw after ratification by the principal would destroy the utility of the doctrine. It is not intended that this analogy be taken seriously since the policy considerations which determine when the rights of a third party beneficiary vest and when ratification becomes effective are so divergent that there is no good reason for the results in the two cases to be similar. In the case of a third party beneficiary there is no injustice in permitting the promisor and promisee to rescind the contract if the third party has not acted to his detriment because of his expectancy. He was not a party to the transaction which gave rise to the underlying obligation and can lay no claim to a right which he did not bargain for. In the case of ratification the question is, Does *T*, who bargained with one purporting to be the agent of *P*, receive the benefits of a contract *for which he bargained* if *P* has ratified the agent's act? If the analogy is intended merely to convey that the "relation back" concept was extant at common law, one can hardly find fault with it, but if that is all it signifies, it is of little aid in discerning the reasons underlying the ratification doctrine.

26. See SEAVEY § 32A. The analogy to estoppel by deed was apparently considered to have special merit because once the grantor receives title to the property it is automatically transferred by operation of law to the grantee. Thus, the grantee becomes the owner of the property and loses his right of action for breach of contract against the grantor. Similarly, when a principal ratifies a contract, the contract relates back to the time of the original agreement between the third party and the purported agent, and the third party loses his cause of action against the agent for breach of warranty of authority. It should be noted that this analogy holds only if we adopt the view that the title acquired by the grantor passes to the grantee by operation of law. According to another view, the grantee may maintain an action against the grantor for breach of covenant or at his election rely upon the estoppel. 3 AMERICAN LAW OF PROPERTY § 15.23 (A. J. Casner ed. 1952). Furthermore, the doctrine of estoppel by deed has its roots in the old common law actions of restoration and warrant. 22 HARV. L. REV. 136 (1908). That the concept of "relation back" may be borrowed from an area of the law so heavily laden with tradition is highly suspect.

27. See SEAVEY § 32A.

for *P*, but is actually an ordinary workman out on a romp.²⁸ *T* is hired to haul concrete blocks on the job for two days at the wage of \$5.00 per hour. After completing his work *T* approaches *P* for payment. *T* informs *P* that he was hired by *A* at \$5.00 per hour and that he now wishes to be paid. *P* replies, "Bring me a note from *A* stating that you have worked the number of hours you claim and I will pay you." *T* returns with the note. In the interim *P* has had second thoughts on the matter since the going rate for construction workers is only \$4.00 per hour. He informs *T* that *A* had no authority to hire workers and refuses payment.

Let us assume that *T* is intent on exercising his full contractual rights and will not be satisfied with a mere restitutionary action. Given these circumstances, there is no question that *P* would not be bound on the contract but for the doctrine of ratification. There never was an offer made to *P* which he could accept. An offer is an expression of willingness that a contract shall be made in the future (upon acceptance). *T* only assented to a contract which he believed to be binding at the moment he concluded his conversation with *A*. To say that *T* contemplates that *A* may not have the power to contract and therefore is bargaining in the alternative for a contract to be formed when the alleged principal consents is sheer sophistry.²⁹ That was clearly not *T*'s intent. Furthermore, since *T* has completed performance before his encounter with *P*, there is no present consideration passing from *T* to *P* to support *P*'s promise to pay.

Why then is the law so insistent that *T*, whose contractual rights are nonexistent, be handed gratis a contract valid ab initio under the doctrine of ratification?³⁰ Clearly *T* cannot plead estoppel since he did not act to his detriment as a result of *P*'s statement that he would be paid. *A* acted without authority from *P*, and *P* was not responsible for clothing *A* with indicia of apparent authority. Furthermore, *A* did not act within the scope of any "inherent agency power" since *A*'s act was not incidental to a transaction he was authorized to undertake.³¹

To answer an agency problem that cuts across the disciplines of both contract and tort and is therefore likely to cause confusion in

28. Connoisseurs of agency law will recognize a striking resemblance between this case and that perennial casebook favorite, *Evans v. Ruth*, 129 Pa. Super. 192, 195 A. 163 (1937).

29. Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 887 (1920).

30. The usual approach to the problem of ratification has been to ask why the principal should be given the option to accept or reject a contract in a changing market. See RESTATEMENT § 82, comment *d*; Seavey, *supra* note 29, at 888. Mechem points out that the error in this approach is that it conjures up the image of a principal "who wishes in cold blood to become bound on a contract made in his name but by a purported agent who lacked authority to bind the purported principal. . . ." In reality, the vast majority of cases focus on a third party who seeks to hold the principal from avoiding the consequences of his ratification. MECHEM § 197.

31. RESTATEMENT § 161.

both, it would seem particularly appropriate to examine whether there are *agency* values that are being furthered by the ratification of a non-existent or unauthorized agency. It might be helpful to imagine ourselves in the place of *T* immediately after *P* ratified the transaction. *T* was hired to work on a construction job by one who purported to have the authority to hire and who subsequently appeared to have been confirmed in that authority by *P*. Although *A* had usurped without *P*'s knowledge whatever authority he appeared to have at the time of contracting by virtue of his dress and demeanor, it would nonetheless offend our sense of justice if after the ratification *T* were denied the benefits of a contract he believed to be in existence. As noted earlier, classical estoppel will not explain our sense of outrage, since *T* has already performed his side of the "contract" and has not acted to his detriment subsequent to the ratification.

It is submitted that a value peculiar to agency is the crucial determinant that has escaped examination in this set of circumstances. For better or worse, it is a fact of life that the vast majority of business transactions are conducted through agents properly operating within the scope of their authority. The case in which an agent exceeds his authority or a person purports to act as an agent without any authority whatsoever is an aberration rather than the norm. Thus, a third party who deals with a person who appears to be an agent acting within the scope of his agency is justified by the usual state of affairs in doing so. If we refuse to hold a principal liable when someone purports to act as his agent or when a real agent acts outside the scope of his authority, it is because we must balance equities to protect an *innocent* principal. It is in this setting that we have made the judgment that a principal will only be held if he has been responsible for giving an agent the trappings of authority,³² or if a general agent has acted not unlike agents with similar authority.³³ Now, however, we are faced with the case of a principal who has confirmed an unauthorized act and who therefore cannot wrap himself in the cloak of innocence. *P* has confirmed *T* in his belief that a transaction which had all the markings of a regular business deal was in fact authorized. The transaction appears to be completed. *T* dealt with a person whom he believed to be an agent and whose credentials he did not investigate in the faith that most agents operate within the bounds of their authority. When *P* himself has acted as though the transaction were in order, *T*'s faith in its regularity is reinforced. No doubt crosses his mind that he has in fact been a party to an enforceable contract. In this light, *it is only*

32. *Id.* § 8.

33. *Id.* § 161.

fair that a transaction which has been stamped with regularity from its very inception and whose regularity has been confirmed come to a complete close and be beyond the recall of all parties. It is this value—the bringing to a close a business transaction whose appearance of normalcy has been confirmed—which is promoted by the doctrine of ratification.

In a sense the suggested thesis is one that has already met with considerable approval in traditional agency thinking. The doctrine of apparent authority is based on the theory that when a principal appoints an agent he must live with the consequences arising from the appearance of authority with which the agent is clothed. When *T* deals with an agent who has apparent authority, *P* is bound whether or not *T* has acted to his detriment. If he had so acted, there would be no need for an independent theory of apparent authority since the doctrine of estoppel would suffice.³⁴ Nonetheless, *P* is bound even if there has been no detrimental reliance by *T*, and even if the act of the agent may be disavowed without hurting any of the parties involved.³⁵ It has been argued that the doctrine of apparent authority is nothing more than an expression of the objective theory of contract—that one should be bound by what he says rather than by what he intends.³⁶ But one cannot slide so easily over the fact that when an agent with apparent authority acts outside the scope of his real authority it is the objective manifestation of the *agency* with which we are dealing and not the objective manifestation of the principal's contractual will.³⁷ Thus, if we bind a principal to the unauthorized acts of his agent under the doctrine of apparent authority, it is because we put a premium on finding an agency wherever there is the appearance of one. The business world insists that it be able to rely on the state of affairs as they appear to the normal businessman.

This policy requires little stretching to explain the doctrine of ratification. Once the principal confirms the purported agency relationship to the business world, it should be considered final. Since the agency relationship is such a regular feature of normal business activity, the businessman should have a right to expect that it will not be recalled once confirmed. As agency law recognizes apparent authority to be an independent ground for binding a principal, so can it recognize an independent doctrine of ratification.

34. *Id.* § 8, comment *d.*

35. *Id.*

36. *Id.*

37. See Mearns, *Vicarious Liability for Agency Contracts*, 48 VA. L. REV. 50, 53 (1962).

THE RULES ANALYZED

If the above-proposed thesis has merit, it should facilitate the explanation not only of the basic theory of ratification but also of its rules of operation, which have been followed more from a sense of tradition than from understanding. Although an exhaustive study of minutiae will not be undertaken here, it is hoped that the more troublesome rules will be seen as indeed furthering the objectives of the ratification doctrine.

A. Purporting to Act as Agent

It is well settled today that a consensual transaction with a third person can be ratified only if the agent purported to act for another.³⁸ The rationale offered for this rule is that when there is a transaction between the purported agent and a third person, ratification grants to the third party what he expected to get through his dealings with the agent. Thus, if *T* did not intend to deal with the principal there is no reason for the doctrine of ratification.³⁹

What of the case, however, where the agent admits to the third party that he does not have the authority to act for his principal? Is it a requisite for effective ratification that the agent, in addition to purporting to be an agent, must also purport to have adequate authority for the transaction? Strangely enough, it is the position of both the First⁴⁰ and Second Restatements of Agency⁴¹ that a principal may ratify an agreement made by an agent who admitted to the third party that he was without authority to act for his principal.

The Restatement itself offers little in the way of reasoning for this somewhat strange proposition. In 1952, however, the case of *Hirzel Funeral Homes, Inc. v. Equitable Trust Co.*⁴² produced a professor's classroom hypothetical upon which the late Professor Seavey felt bound to comment.⁴³ A young man died and his divorced mother sought to arrange a funeral service for him with a local mortician. The mother admitted to the mortician that she was not authorized to arrange the funeral service at the father's expense, but would attempt to prevail on him to bear the cost of the funeral. After the funeral, the father agreed to pay for the burial out of the proceeds of the boy's life insurance policy of which he was the beneficiary. He later reneged on the

38. RESTATEMENT § 85 and cases cited in Reporter's Notes thereto.

39. RESTATEMENT § 85(1), comment *a*.

40. RESTATEMENT (FIRST) OF AGENCY § 85(1), comment *c* (1933).

41. RESTATEMENT § 85(1), comment *e*.

42. 46 Del. 334, 83 A.2d 700 (Super. Ct. 1951).

43. Seavey, *Ratification—Purporting to Act as Agent*, 21 U. CHI. L. REV. 248 (1954).

agreement. The court held that the father's promise created no obligation to the mortician.

The person who acts as agent must purport to be the agent of the principal, and the contract must be made upon the faith and credit of the principal. Ratification means adoption of that which was done for and in the name of another; hence, the contract, at its inception, must purport to be the contract of the principal. It is not sufficient to constitute ratification that the contract may have enured to the benefit of a person sought to be charged as principal.⁴⁴

The Seavey Critique

The *Hirzel Funeral Homes* case is especially valuable since it focuses directly on the issue of ratification. The father could not be held on traditional contract theory since he had agreed to pay the cost of the funeral only after the funeral had been performed. There was, therefore, no present consideration to support his promise to pay.

Seavey argues that there is no reason to require that the third person believe the agent to be authorized.⁴⁵ He contends that recovery based on ratification is beneficent and is designed to hurdle the technicalities of tort and contract so as to carry out the intent of the parties involved. If so, what harm is incurred in allowing the mortician to recover what he expected to receive? Furthermore, Seavey points out that according to the reasoning of the court the mortician would have been better off if the mother had lied to him and said that she was the authorized agent of her husband who had asked her to arrange for the funeral. Then there would have been the necessary purporting to act under the authority of another and the ratification would have been valid. As it was, there was no warranty of authority by the wife, and the mortician had no claim against the estate of the son since he did not intend to charge the estate and was not acting in the public interest; the mortician therefore paid for his folly by performing unrewarded labor.

Seavey charges that the court in *Hirzel* reached a result which was both unjust and unsupported by the authorities. He concludes:

The typical situation comparable to that in the case under discussion is that where a traveling representative having only power to make offers, as the other party knows, makes a tentative agreement, subject to approval by the principal.

44. 46 Del. at 337, 83 A.2d at 702 (quoting from *Minnich v. Darling*, 8 Ind. App. 539, 544, 36 N.E. 173, 175 (1894)).

45. Seavey, *supra* note 43, at 250.

In this situation the courts properly ignore the fact that the transaction does not purport to be a contract.⁴⁶

Purporting in Perspective

It is this writer's opinion that *Hirzel Funeral Homes* reached a correct result and that Professor Seavey's analysis is mistaken in that it fails to account for the crucial value of agency involved in the doctrine of ratification.

In *Hirzel*, when the mother attempted to arrange for the funeral of her son, she informed the mortician of her lack of authority to bind the father to pay the funeral expenses. There was no attempt to induce the mortician to rely on an agency relationship. Nor was there any affirmation to the parties involved or to the business community at large⁴⁷ that the mother was the agent of the father to arrange for the funeral. If the mortician decided with full knowledge of the facts to take a calculated business risk that he might not be paid, he cannot complain when the father, after agreeing to pay, reverses his position. Unless we are to frontally assault the contract doctrine that past consideration will not support a contract, there is no quid pro quo with which to hold the father to his promise.

Seavey expresses displeasure with the notion that the result in *Hirzel* would differ if the mother had lied and represented to the mortician that she was authorized to act for her husband. But it is submitted that it is entirely just for a different result to follow. If the mother had represented herself as an authorized agent and the father had then ratified, the transaction would have taken on the color of a normally completed business deal in which an agent had acted for a principal. As noted earlier, to disrupt the agency relationship once it has been confirmed is to foist a cruel hoax on the business community which of necessity must conduct the majority of its transactions through agents.

Under the above analysis, a principal is held if he ratifies an "agency" even though he receives no consideration; he is not bound if

46. *Id.*

47. Although cases on point are few, it seems to be the generally accepted rule that ratification will be effective if clearly made to any person and need not necessarily be made to the agent or third party involved in the transaction. See MEACHEM § 216; RESTATEMENT § 95. This is generally in line with the proposed analysis since any statement to the business community that one who purported to be an agent was in fact authorized should bring the question of the existence of the agency relationship to a close. This author regards as sheer folly the assertions by some courts and commentators that ratification is "merely an act of the mind" and that communication is only necessary for evidentiary purposes. See, e.g., *Miller v. Chatsworth Sav. Bank*, 203 Iowa 411, 212 N.W. 722 (1927); *Bailey v. Bryant*, 41 Mass. (24 Pick.) 198 (1839); RESTATEMENT § 95, comment a.

he adopts a "contract" without consideration. This result is quite justifiable. If the person with whom the third party deals makes it clear that there is no agency relationship,⁴⁸ then the third party should suspect a subsequent promise from the "principal." He should know that the "principal" is making a promise without consideration, which is to say the least unusual in the world of commerce and invalid under the law of contract. One has the impression that too much attention has been directed to the underlying "contract" or "tort" which the principal is ratifying.⁴⁹ It would be far more helpful to focus on the *agency* relationship; it is that relationship which may be ratified.⁵⁰

48. If there is an agency, and the agent merely cautions the third party that he may be acting outside the scope of his authority, the principal may be bound when he ratifies. Although the third party took a calculated risk in dealing with the agent, the principal should be bound *if the risk was reasonably induced by the existence of the agency relationship*. He should not be bound, however, *if the transaction was so far outside the scope of the agency that it bore no reasonable relation to it*. This is consistent with the theory that the basis of the ratification doctrine is the fulfillment of the expectations of the business community in relying on the agency relationship. Cf. text accompanying notes 53-54 *infra*, where the third party and the agent agree that the formation of a contract is conditioned on the principal's acceptance.

49. If one views the ratification doctrine as a preserver of the integrity of the agency relationship once it has been confirmed by a purported principal, it becomes possible to construct a theoretical justification for ratification of a tort. The problem of tort ratification has been viewed with some concern by the most noted authors in the agency field. See MECHEM §§ 212-14; SEAVEY § 33E. The usual situation in which the master benefits from the act of the servant which results in a tort does not present serious theoretical difficulties. It is at least possible to rationalize liability to the principal on the ground that *respondeat superior* is designed to place the cost of doing business at the door of the entrepreneur chiefly benefiting from the activity which led to the tort. If the master has decided to accept the servant's activities as within the scope of his business even after the tort has been committed, then it is not unjust that he bear the burdens of the damage which the agent has wrought. See *Dempsey v. Chambers*, 154 Mass. 330, 28 N.E. 279 (1891).

It is the case of negligence by an unauthorized person, usually a servant not acting within the scope of employment, that provides the most serious theoretical problem. Why should the law impose liability on a master for having approved the tortious act of a servant acting outside the scope of his employment or of a person who was not even a servant at the time the tortious act was committed? If we assume that subsequent to the tortious act *A* purported to have acted for *P* and *P* confirms that a master-servant relationship did in fact exist at the time of the tortious act, it does not appear unjust to bind *P* to his statement confirming the agency. Although the policy reasons for ratification are not as strong as in the contract area, they are not without validity. The master-servant relationship occurs with such frequency and its consequences are so far-reaching that once representations of its existence are confirmed *T* should be able to rely on the finality of such a statement. It should be noted that again this author finds himself in substantial opposition to the Restatement of Agency position which permits ratification of a tort if "the one doing the act *intends* or purports to perform it as the servant of another." RESTATEMENT §85(2) (emphasis added). Unless the master benefits from the activity of the servant, the mere intention of the servant to act for the master without purporting to *T* that such was his intent should not suffice for the imposition of liability.

50. Cf. *Keighly, Maxsted & Co. v. Durant*, [1901] A.C. 240; M. FERSON, PRINCIPLES OF AGENCY § 234 (1954); MECHEM § 204. If this view is taken of the ratification doctrine, there is no difficulty at all in explaining why an undisclosed principal may not ratify a contract. When an agent secretly intends to act for an undisclosed principal who gave him no authority to contract, there is no representation to anyone in the business community that he intended to act as agent. To permit the principal to ratify would serve no purpose whatsoever.

Ratification Mislabeled

Contrary to Seavey's assertion the cases do not support his position that there may be ratification where the agent admits to the third party that he is not authorized to contract for the principal. *Wilkins v. Waldo Lumber Co.*⁵¹ is cited as typifying the case in which courts are willing to find ratification without the agent purporting to be authorized. In *Wilkins* a traveling representative having power only to make contracts subject to approval by his principal offered to purchase an entire lot of sawed wood lumber from the plaintiff. A contract with the plaintiff was signed by the agent subject to confirmation by the principal. Although the defendant-principal never formally confirmed the contract, several days after it was executed a company began removing the lumber from the plaintiff's lot at the principal's direction. Subsequently the defendant sought to alter the terms of the contract as agreed upon between the agent and the plaintiff. The court held that the defendant had ratified the contract by removing and hauling the lumber from the plaintiff's lot. That the agent's lack of authority to contract was known to the plaintiff is claimed to be proof that an agent's act may be ratified even if the third party knows of the agent's lack of authority.

It must be conceded that the court in *Wilkins* does find for the plaintiff on the basis of ratification, as do other courts in very similar fact situations.⁵² But it is indeed difficult to understand why courts in these situations strain for the rather esoteric doctrine of ratification when simple contract law could resolve the cases with ease. When a third party contracts with an agent whose sole function is to make offers subject to confirmation by a principal and the principal subsequently manifests to the third party by either word or deed that he agrees to the contract, there is offer and acceptance in the traditional sense.⁵³ It is ludicrous to talk in terms of ratification of an agency in

51. 130 Me. 5, 153 A. 191 (1931).

52. Cases frequently cited as supporting the proposition that ratification is applicable even when the agent admits his lack of authority are *Slater v. Berlin*, 94 A.2d 38 (D.C. Mun. Ct. App. 1953); *Public Sav. Ins. Co. of America v. Greenwald*, 68 Ind. App. 609, 121 N.E. 47 (1918). See also *Gran v. Board of Educ.*, 274 Minn. 220, 143 N.W.2d 246 (1966); *McCrillis v. A & W Enterprises, Inc.*, 270 N.C. 637, 155 S.E.2d 281 (1967). Under closer scrutiny these cases are easily explained on strict contract theory without resort to tortured analysis based on ratification. The analysis would be similar to that in *Wilkins*.

53. *Cole-McIntyre-Norfleet Co. v. Holloway*, 141 Tenn. 679, 214 S.W. 817 (1919), often cited together with *Wilkins* for the "purporting" rule, is really a prototype of contract cases in which acceptance of a contract is accomplished by silence due to extenuating circumstances. The facts indicate that in March 1917, a Cole-McIntyre traveling salesman solicited and received a written order from Holloway for 50 barrels of meal. The order expressly stated that the salesman had no power to make a contract and that the order would not be binding until accepted by the seller at its own office. From the court's statement it may be presumed that this order was received by the seller, but it said and did nothing in consequence thereof until two months later

these cases when all parties were apprised of the fact that the agent was not contracting in his capacity as agent but was merely transmitting the offer to the principal for confirmation. The contract is valid as between the principal and the third party because they have objectively manifested to one another their consent to contract. Of course, under a simple contract analysis, the contract is formed when the principal manifests his consent to the third party. However, in the case of the traveling agent who contracts subject to confirmation by his principal, the contract is often considered to be in force from the date of the original agreement with the agent. This would appear to be more consistent with the ratification doctrine and the "relation back" concept than with contract analysis. There is no real difficulty here, however, for the principal and the third party may include in their present agreement a term that the contract be considered made as of the time and place of the agreement with the agent.⁵⁴

B. *Withdrawal Before Ratification*

One of the most troubling problems with the ratification doctrine is the rule that if *T* learns of the agent's lack of authorization prior to *P*'s ratification, *T* may withdraw, thus denying *P* the right to ratify.⁵⁵ The rationale supporting this rule has been that it would be unfair to hold *T* to an offer for which no consideration has been given.⁵⁶ On the other hand, it has been clearly recognized that ratification is not based in any way on traditional offer and acceptance analysis.⁵⁷ The resulting inconsistency in the application of contract principles may be avoided, however, if the rule of ratification is explained by the principle that a business transaction completed through an agent and confirmed should not later be called into question. There is then no difficulty in explaining the "withdrawal" rule. It is only after confirmation of the agency that the business world takes offense when a principal seeks to revoke the agency. Prior to ratification nothing is lost if *T* wishes to withdraw since no confirmation has been made to the business com-

when the buyer asked for the meal to be shipped. At that time, the seller notified the buyer that the order was rejected. In the meantime, war had been declared and prices had risen. The court held that the seller's delay in informing the buyer was unreasonable and that it operated as an acceptance of the order. For a discussion of this case see Comment, *When Silence Gives Consent*, 29 YALE L.J. 441 (1920). It is indeed difficult to see how this case even relates to the problem of ratification. *But see* RESTATEMENT, Reporter's Notes to § 85.

54. Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 890 (1920). If the parties do not include such a term, the court may nonetheless conclude that the earlier date is more consistent with ordinary business practice and is therefore the implied intent of the parties.

55. See text accompanying notes 16-18 *supra*.

56. See text accompanying notes 18-19 *supra*.

57. See text accompanying notes 3-7 *supra*.

munity that a transaction which was stamped with regularity was in fact regular. Once *P* affirms the agency, both *T* and *P* must be bound; to permit *T* to withdraw subsequent to ratification would permit him to avoid a contract which at the moment of ratification appeared to the business community to be a normally completed transaction.

To discover a single principle which explains the operation of the doctrine of ratification in all cases, it is necessary to reflect on the function of the agent within the world of commerce. Agency is an indispensable tool for the completion of the vast majority of business transactions. When one purports to be an authorized agent and his agency is confirmed by the purported principal, there should be no further attack on the bona fides of the relationship. The entire transaction undertaken by the agent has now been stamped with regularity. It ought not be recalled at the whim of either party.