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COMMENTS

REVOCATION OF AGENCY BY DEATH OF PRINCIPAL

The 1941 Florida statute, which validates the acts of an agent done after the death of the principal in the absence of knowledge of the death by the third party,¹ abolishes a rule of common law long established and confirmed by judicial decision in this and the great majority of other jurisdictions. Under the common law rule, the death of a

¹ Sec. 709.01, Fla. Stat. 1941 "Power of Atty; If any agent, constituted by power of attorney or other authority, shall do any act for his principal which would be lawful if such principal were living, the same shall be valid and binding on the estate of said principal, although he or she may have died before such act was done; provided, the party treating with such agent dealt bona fide, not knowing at the time of the doing of such act that such principal was dead. An affidavit, executed by the attorney in fact or agent setting forth that he has not or had not,

principal is considered as an instantaneous and absolute revocation of the authority of his agent,² with the singular exception of those agencies wherein the agent's power is coupled with an interest.³ The fact that the agent and third party have dealt in good faith and have not, or even could not have, apprised themselves of the death of the principal is considered insufficient grounds for avoiding the application of the rule.⁴

Pearl Harbor cast a legal spotlight on the impracticability of this ancient common law doctrine. The war converted death from a remote but ascertainable possibility into a common occurrence which often took place on the other side of the globe and often remained undisclosed for weeks, months, and even years. It quickly became manifest that adher-

at the time of doing any act pursuant to the power of attorney, received actual knowledge or actual notice of the death of the principal, or notice of any facts indicating his death, shall in the absence of fraud be conclusive proof of the absence of knowledge or notice by the agent of the death of the principal at such time. If the exercise of the power requires the execution and delivery of any instrument which is recordable under the laws of the state, such affidavit shall likewise be recordable. No report or listing, either official or otherwise, of "missing" or "missing in action" regarding any person in connection with any activity pertaining to or connected with the prosecution of any war in which the United States is then engaged, as such words "missing" or "missing in action" are used in military parlance, shall constitute or be interpreted as constituting actual knowledge or actual notice of the death of such principal, or notice of any facts indicating the death of such person, or shall operate to revoke the agency. (Laws 1945, c.23011, 1.)."

² Long v. Thayer, 150 U.S. 520, 37 L.Ed. 1167, 14 S.Ct. 189 (1893); Dallam v. Sanchez, 56 Fla. 779, 47 So. 871 (1909); McGriff v. Porter, 5 Fla. 373 (1853); Harper v. Little, 2 Me. 14, 11 Am. Dec. 25 (1822); Brown v. Cushman, 173 Mass. 368, 53 N.E. 860 (1899); Clayton v. Merritt, 52 Miss. 353 (1876); Weber v. Bridgman, 113 N.Y. 600, 21 N.E. 985 (1889); Davis v. Windsor Savings Bank, 46 Vt. 728 (1873); Watson v. King, 4 Campb. 272, 170 Eng. Reprints 87 (1815); Kent, Commentaries, Vol. 2, P. 646; Story, Agency (7th Ed.) Sec. 488; Tiffany, Agency (2d Ed.) Sec. 87.

This rule is supported by the Amer. Law Inst., RESTATEMENT, AGENCY, Sec. 120.

³ Hunt v. Rousmanier, 8 Wheat. (U.S.) 174, 5 L.Ed. 589 (1823); McGriff v. Porter, 5 Fla. 373 (1853); Farmers Loan and Trust Co. v. Wilson, 139 N.Y. 284, 34 N.E. 784 (1893); Halloran-Judge Trust Co. v. Heath, 70 Utah 124, 258 Pac. 342, 64 A.L.R. 368 (1927); Lane Mortgage Co. v. Crenshaw, 93 Cal. App. 411, 269 Pac. 672 (1928); See RESTATEMENT, AGENCY, Secs. 138, 139; as to what constitutes a Power coupled with an Interest, see Annotation, 64 A.L.R. 380.

⁴ Dallam v. Sanchez, 56 Fla. 779, 47 So. 871 (1909); Farmer's Loan and Trust Co. v. Wilson, 139 N.Y. 284, 34 N. E. 784 (1893).

ence to the common law rule made dealings by and with agents of members of the armed forces an unwarranted risk for all parties concerned. Taking notice of the exigencies of the times, many states enacted legislation during the war years modifying the common law rule by giving binding effect to the acts of an agent or attorney in fact performed subsequent to the death of the principal where the transaction was entered into in good faith without knowledge of the death. The majority of these statutes, however, were expressly restricted to members of the military forces, were terminable at the end of the war, and were effective only as concerned written and recorded powers of attorney.⁵ In general then, these statutes were temporary measures, enacted as wartime expedients. They did not repudiate the common law doctrine, but merely suspended its operation in a special limited class of cases for a limited period of time. By negative inference, the fact that the law making bodies refused to alter permanently the common law rule when the opportunity was ripe and the problem brought clearly to issue, seems rather to imply a general concurrence in its continued utility. The Florida statute, although by no means unprecedented, is couched in terms of permanency and represents an express rejection of the common law doctrine.

As in many cases where a venerable doctrine of the common law is modified or supplanted by statute, judicial decisions pointed the direction for the legislative change. Expressly deviating from the rule of the civil law which renounced the distinction, common law courts have attributed to the revocation of an agency different characteristics according to whether such revocation was effected by action of the principal or by operation of law. The general rule that an express revocation is effective as against innocent third parties dealing in good faith with the erstwhile agent only from such time as the third party has notice of the revocation⁷ was held inapplicable in those instances where the revocation

⁵ See, for example, Ala. Code, Tit. 37A, Sec. 46 (1943); Conn. Cum. Supplement (1946); Ga. Code, P. 398 (1945); Ill. Statutes, Sec. 30-27A; Ind. Statutes, Sec. 59-1201; Iowa Code, Chap. 66 (1945); Kentucky (1944) H.B. 1603; New Jersey Stat., Tit. 46, Sec. 2B-1; Pa. Statutes, Sec. 21-304; Ohio (120 Ohio L. 1943); Va. (Michie's Code, 1943—Supp. 1944, Sec. 2673); Wyoming (1943 Sess. Laws, Ch. 78).

⁶ The first sentence of the Florida statute is substantially the same as that of S. C. Code (Sec's. 7018-7019) (19—); Other states with statutes of permanent effect are California, Calif. Code Sec. 2356; Maryland (Art. 10, Sec. 41, Flach's Code 1938 and 1943; Miss. (Miss. Code 1942—Sec. 248; Wisconsin (Wis. Statutes, Sec. 235.54, 234.06 (1943); Louisiana (Civil Code, Sec. 3032); So. Dakota (Code, 1939 Sec. 3.0109).

⁷ "Persons who deal with an agent before notice of the recall of his powers are not affected by the recall." *Hatch v. Coddington*, 95 U.S. 48, 24 L.Ed. 339. See also *Johnson v. Christian*, 128 U.S. 374, 32 L.Ed. 412, 9 S.Ct. 87 (1888); *Cooper v. Cooper*, 206 Ala. 519, 91 So. 802 (1921); *Carr v. Moragne*, 136 S.C. 218, 131 S.E. 424 (1926); Annotation, 43 A.L.R. 1218.

was effectuated by operation of law, the courts attributing to death, lunacy, or other legal incapacity of the principal, an instant and complete termination of the agency.⁸ Notwithstanding the great number of decisions strictly applying this dogmatic distinction, the frequent inequitable consequence of its application were found too bitter and impractical a legal pill for many courts to swallow. Attacking the common law doctrine insofar as it applied to innocent third parties as illogical, unjust and contrary to public policy and the needs of the times, those courts by their dicta would abolish the distinction, and by their decisions would restrict the application of the common law doctrine to those acts which the agent was incapable of doing except in the express name of his principal.⁹

"Undoubtedly the rule is that the death of a principal instantly terminates the agency. But it by no means follows that all dealings with the agent thereafter are absolutely void. Where, in good faith, one deals with an agent within his apparent authority, in ignorance of the death of the principal, the heirs and representatives of the latter may be bound, in case the act is not required to be performed in the name of the principal."¹⁰

Other courts, finding the common law rule so firmly entrenched as to make any deviation therefrom an unjustifiable invasion of the legislative realm, adhered to the common law, but with open reluctance:

"The common law rule has become too firmly established in this state to be disturbed by judicial action, although a change by the law making power would be in harmony with more enlightened views and would promote the interests of justice."¹¹

The Florida statute carries this trend to its logical conclusion. It is permanent and general. It further transcends the restrictive scope of most of the liberalizing decisions by validating "any act" done by the agent with a third party ignorant of the principal's death, and not merely those which could be done in the agent's name.

In view of the honorable antiquity of the common law doctrine, the plethora of respectable decisions sustaining it, and the refusal of other state legislatures to effect a change similar to that in Florida, we must consider anew the rationale of the common law rule in order to determine whether the new statutory modification is actually more in harmony with the needs and policies of modern times. Why was it that the common law on the one hand recognized as valid acts of an agent done after the revocation of his authority but before notice to third persons, but on the other hand excepted from this general and equitable

⁸ *Farmers Loan and Trust Co. v. Wilson*, *supra*.

⁹ *Dick v. Page*, 17 Mo. 234, 51 Am. Dec. 267 (1852); *Carrington v. Whittington*, 26 Mo. 311, 72 Am. Dec. 212 (1858); *Deweese v. Muff*, 57 Neb. 17, 77 N.W. 361 (1898); *Ish v. Crane*, 8 Ohio St. 520 (1858), 13 Ohio St. 574 (1862); *Catlin v. Reed*, 141 Okla. 14, 283 Pac. 549, 67 A.L.R. 1410 (1929); *Cassiday v. Mackenzie*, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76; See Annotation, 67 A.L.R. 1421.

¹⁰ *Deweese v. Muff*, *supra*, cited in *Catlin v. Reed*, 283 Pac. 553.

¹¹ *Farmers Loan and Trust Co. v. Wilson*, 34 N.E. 784, 785.

rule acts done after the principal's death? One factor contributing to the special attributes accorded death as an absolute determinant of an agency was the common law notion that death is a notorious event of which every person is presumed to be aware. However justified this view may have been at one time, it is a complete fiction in the ever-expanding far-flung business world of today. Most courts, however, justified the common law distinction by expounding the professed impossibility of having an agent without a principal, dismissing as a "manifest absurdity" the valid execution of an act on behalf of a dead man.¹² As one commentator expressed this argument, "The absurdity of the opposite rule appears from this,—'I, P, some time dead, by A my agent do this act.'"¹³

Even on this unrealistic level of theory, however, the common law doctrine is of dubious merit. By admitting that in the case of ordinary revocations subsequent acts are valid where made in good faith and without knowledge of the revocation, it necessarily follows that the validity of the contract does not depend upon the technical existence of the agency status. The fundamental fact that the agent has ceased to have authority to represent his principal obtains whether the revocation be actual or by operation of law.

The reason why transactions are considered binding upon a principal who has revoked an agency as respects those ignorant of the termination are evident. The transactions having been made on behalf of the principal, who constituted the agent as such, held him out to the public and invited confidence to be reposed in him, and thus caused others to deal with him as agent, the principal should be deemed precluded from denying the existence of the agency upon the equitable principle of estoppel in pais.¹⁴

"Where a person by his statements, conduct, behavior, concealment, or even silence has induced another who has a right to rely upon those statements, etc., and who does rely upon them in good faith to believe in the existence of a certain state of facts with which they are compatible and act upon that belief, the former will not be allowed to assert as against the latter the existence of a different state of facts from that indicated by his statements or conduct if the latter has so far changed his position that he would be injured thereby."¹⁵

This reasoning applies equally where the revocation is effected by death and no cogent reason appears why the rule of estoppel in pais should not govern equally in both cases. Death may hush the voice of the principal and so prevent him from informing the world of the revocation thus effected, but why should not the onus of giving notice of the termination of the agency pass to the principal's successors, instead

¹² *Hunt v. Rousmanier*, *McGriff v. Porter*, *Davis v. Windsor Savings Bank*, *supra*.

¹³ See Note, 9 Va. Law Rev. 644.

¹⁴ *Ish v. Crane*, 13 Ohio St. 616 (1862).

¹⁵ *Ish v. Crane*, *supra*; *cf. Moyers Coal Corp. v. Whited*, 157 Va. 302, 160 S.E. 43 (1931).

of falling upon innocent third parties dealing with an agent whom they may have known and dealt with for years in his recognized capacity? This appears to be a case involving equal equities and calling for an application of the maxim of law and equity that where one of two innocent persons must suffer, he shall suffer who by his silence or misconduct has permitted the injury to occur. The principal's successors succeed to all of his liabilities and assets. In reason and good sense why should they not also succeed to the responsibilities he has assumed by the appointment of an agent?

But even if legal theory were so aligned with the common law doctrine as to "enjoin" judicial dissension, the inequitable results necessarily flowing from its application would suffice in themselves to require statutory modification.

"... the so-called common law rule must always and frequently result in cases of terrible injustice and wrong; cases not exceptional in their character, but flowing naturally and generally from the inherent viciousness of the rule itself."¹⁶

Examples are plentiful. In *Farmers Loan and Trust Co. v. Wilson*,¹⁷ heirs of a deceased landlord brought an action for rent. The landlord was a resident of Cuba who had entrusted the collection of rents to an agent of many years standing. Unknown to the tenants and the agent, the landlord died. The rental payments made subsequent to the death of the landlord were not accounted for by the agent, and plaintiffs sued on the theory that the payments to the agent being unauthorized after the death of the principal, the rent was still owing. The court held for the plaintiffs, thus imposing upon the tenants a double liability. In *Weber v. Bridgman*,¹⁸ a mortgagor paid off a mortgage note to a mortgagee's agent in ignorance of the death of the mortgagee and received a satisfaction from the agent. In a subsequent foreclosure suit by the successors of the mortgagee, it was held that the satisfaction was invalid, the debt still owing, the mortgagor's defense of payment unavailing.

The astounding contention was once made by a proponent of the common law rule that "in the normal case, justice to the third person demands the common law rule contended for."¹⁹ To prove this point, the hypothetical case is cited wherein goods are sold to a person solely upon his personal credit, the vendor realizing that the principal vendee's liabilities exceed his assets but going through with the transaction solely because of his personal faith in the vendee. It must be admitted that if the principal had died unbeknown prior to the execution of the transaction, the vendor would have the onerous problem of collecting a just debt from an insolvent estate. But do not the peculiar facts of this hypothetical case impress upon the vendee the burden to inquire into the continued life of the principal? If the life of the principal is

¹⁶ Brinkerhoff, J. concurring in *Ish v. Crane*, 13 Ohio St. 574.

¹⁷ Note 3, *supra*.

¹⁸ Note 2, *supra*.

¹⁹ See Note, 9 Va. Law Rev. 646 (1922).

the sole stimulus of the transaction, should not the third party check his stimulus before committing himself?

The arguments against the new Florida statute are purely formal and technical. The conclusion is inescapable that the modification of the common law rule is an intelligent and progressive step, and one which—in the words of Chief Justice Teehee in *Catlin v. Reed*,²⁰ “will best subserve the conditions and wants of the people of this state, and thus enable them to transact the business of our ever-expanding commercial life now conducted through multiplied agencies, with a proper sense of safety and security.”

It would be improper to end this comment, however, without mentioning what appears to be a serious inconsistency in the statute itself. By its express terms the statute makes the knowledge of the party dealing with the agent the fulcrum upon which the validity of acts consummated subsequent to the death of the principal rests. The statute first states:

“If any agent. . . . shall do any act for his principal which would be binding if such principal were living, the same shall be valid and binding notwithstanding . . . ; provided the *party dealing with the agent* dealt bona fide not knowing at the time of doing such act that the principal was dead.”²¹ (*Italics supplied*)

This would seem to make the knowledge of the agent immaterial. Nevertheless the statute goes on to provide:

“An affidavit, executed by the *attorney in fact or agent* setting forth that he has not or had not at the time of doing any act pursuant to the power of attorney, received actual knowledge or actual notice of the death of the principal or notice of any facts indicating such death, shall in the absence of fraud be conclusive proof of the absence of knowledge by the agent of the death of the principal at such time.” (*Italics supplied*)

Since it is the knowledge of the party dealing with the agent—not that of the agent—that determines the validity of the action taken, it is submitted that the affidavit provision as it stands is meaningless surplusage. A legislative amendment giving similar effect to an affidavit executed by the third party would be more in consonance with the purpose and intent of the statute.²²

²⁰ Note 10, *supra*.

²¹ See Note 1, *supra* for entire text.

²² Such an amendment would be particularly welcomed by title and abstract examiners since an affidavit of the grantee of a deed or the assignee of a mortgage executed under a power of attorney would then relieve the examiner of the task of inquiring into the continued life of the principal.