dressed. Lord Mansfield and his associates had twice decided that it could. Mr. Justice Story and the Supreme Court of the United States had followed suit, and it was confessed that those decisions of the King's Bench had never been overruled. Yet it appeared on the oaths of such men as Pollock and Hill, that this was no longer the law, and indeed never had been law but during Mansfield's presidency, and the fact was decided accordingly.

What would have been the effect of Mr. Justice Story attempting to ascertain from books the law of England, on a subject that he probably deemed himself as well informed on as any English judge? Why merely to make a man liable under a contract which by the law of the land never existed. So in a case of the greatest practical importance, the right of a pledgee to tack a subsequent advance, the same learned judge, 2 Story's Equity, sec. 1034, evidently laying down the English rule, for eighteen English decisions and but one American are cited, is so wide of the mark, that when the point really came up for discussion in *Chilton* vs. *Carrington*, 15 Com. Bench, 102, counsel familiar with their municipal law could not cite one of his eighteen authorities in support of the proposition, nor would the court hear an argument against the alleged rule, so utterly was it without foundation in their law.

When, therefore, we find, that even such a writer as Kent cannot make himself sufficiently clear to a Scotch jurist, to enable him to give an outline of the American law not absolute nonsense, and that so anxious a seeker for English law as Mr. Justice Story, should have fallen into such palpable blunders on such apparently plain and practical questions, it really seems that it would be safer to proceed in the old way of ascertaining *facts*, by inquiring of competent witnesses under oath, rather than trust to the chance of the judge's knowledge, either acquired or intuitive.

LIABILITY OF AGENT OF KNOWN PRINCIPAL.

It seems curious that the liability of an agent on contracts entered into by him on behalf of a known principal should be so often a matter of doubt as it is. Contracts of this sort are of every day occurrence, and it may be assumed the agent knows whether he

intends to pledge himself personally or not; yet every term cases arise in which the effect of the agreement is as much disputed as if there could be no certainty in the meaning of English words. A review of the recent cases upon this point may therefore be of some practical interest.

There never was any doubt, that where an agent contracts in his own name, without stating that he has a principal, or without disclosing the name of his principal, the other party to the contract might hold him personally liable. 2 Smith's L. C. 223; *Franklyn* vs. *Lamond*, 4 C. B. 637. The rule has even gone further; for where a party on the face of the agreement said that he contracted as agent for the freighter, (*not naming him,*) and stipulated, that "the agreement being concluded on behalf of another party, all responsibility on his part should cease on the cargo being shipped," it was held, that when he turned out to be really the principal he might be treated as such, because the limitation only applied to him in his character as agent, and it involved no contradiction of the written document to suppose that he might contract as agent for the freighter, whoever that freighter might be, and might still adopt the character of freighter himself if he chose. *Schmalz* vs. *Avery*, 16 Q. B. 655. But in such a case it rests on the party who wishes to fix him with personal liability to negative the assertion that he is agent. Therefore, where on a similar form of agreement, the evidence failed to prove that the defendant was principal, it was held that he was not responsible. *Carr* vs. *Jackson*, 7 Exch. 382.

There is much greater difficulty, however, where the party not only states that he is an agent, but mentions the name of his principal. The cases upon this point may be divided into two classes—first, those in which the professing agent had no authority to bind his assumed principal; and, secondly, those in which he had.

On the first state of facts the following rules may be laid down: Where the agent has contracted on the faith of an authority which once existed, but which has ceased, and of whose cessation he has no means of knowledge, he is not liable. The well known case of *Smout* vs. *Ilberry*, 10 M. & W. 1, settled that point. On the other hand, he will be personally responsible where he never had any authority; and in such a case it makes no difference whether he

fraudulently misrepresented his authority with intent to deceive, or without fraud, assumed an authority which he did not know to exist, or even acted upon authority which he bona fide believed to be vested in him, as in the case of agents acting upon forged warrants of attorney which are supposed to be genuine. Per Cur., 10 M. & W. 9, 10. And then the further question arises, how is the agent, when liable, to be sued? A dictum of Bayley, B., is reported, (2 Cr. & M. 530, note *a*,) to the effect, that in such case the agent may be sued on the contract; and so it is held in some of the States of America. Story on Agency 226. But this doctrine was impliedly denied in *Polhill* vs. *Walter*, 3 B. & Ad. 114, and has been directly overruled in later cases. It is now laid down, that where it clearly and expressly appears that a person, really acting as agent, contracts as such agent in the name of his principal, professing and intending to bind his principal only, he cannot himself be sued upon the contract as if he were a party to the instrument; though it would be different if, though professing to be agent, he were in fact the principal. *Jenkins* vs. *Hutchinson*, 13 Q. B. 744; *Lewis* vs. *Nicholson*, 21 L. J., Q. B. 311. The remedy against an agent, who contracts as such without authority, may be either by an action on the case for a false representation of authority, or by an action on an implied contract for the existence of the authority which he professes to have. But to say that he is personally liable upon a contract which he really makes as agent would be to make a contract, instead of construing that which the parties themselves have made. *Lewis* vs. *Nicholson*, ubi sup.

Some of the decisions upon bills of exchange illustrate this doctrine. In *Polhill* vs. *Walter*, before referred to, the defendant accepted a bill by procuration of the drawee, believing that the latter would sanction his act, which he did not. It was held that he could not be sued upon the acceptance, as no one could be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honor. Two later cases, apparently at variance, are not really so. In one a bill was directed to "The A. C. Mining Co.," and was accepted "For the A. C. Mining Co., W. Van Uster, manager." *Owen* vs. *Van Uster*, 10 C. B. 318. In the other, the bill was addressed to "J. D., purser, W. D. Mining Co.," and

accepted by him in the terms, "J. D., accepted per proc. W. D. Mining Co." *Nicholls* vs. *Diamond*, 9 Exch. 154. In neither case was the acceptor authorized to accept, and in both he was held liable; but this was on the express ground, that as in both cases he was a member of the company, his acceptance, was in fact, an undertaking on his own behalf and that of others. He could not bind the others, but he was not the less bound himself. It was admitted that were it not for this fact he would not be responsible as a party to the bill.

The second state of things, however, is much more common—that, namely, in which the agent is really authorized to contract, but does so in such a manner that a claim is set up against him individually. "In this, as in all similar cases, whether the agent contracted as agent or not is a question of fact, and not a conclusion of law. Each case must depend on its own circumstances." Per Willes, J., in *Green* vs. *Kopke*, 2 Jur., N. S. part 1, p. 1050. It may, however, be possible to deduce some general principles from the decisions on this subject.

In the first place, a party who contracts in his own name by seal will always be liable, though he states that he contracts on behalf of another, *Appleton* vs. *Binks*, 5 East, 148, because no one can be sued upon the covenant but himself. But even where the contract is not under seal, the agent will not be secured by stating in the body of the agreement that he contracts on behalf of, or as solicitor of, a third party, if he signs simply in his own name. "Prima facie, a party who signs his own name must be taken as the contracting party, unless there is something very strong in the contract to release him. Per Cresswell, J., in *Cooke* vs. *Wilson*, 2 Jur., N. S. part 1, p. 1095; *Burrell* vs. *Jones*, 3 B. & Al. 47. And the inference of personal liability will be rendered irresistible if the contract contains some stipulations which are to be performed by the defendant individually; *Taner* vs. *Christian*, 4 El. & Bl. 591, *Cooke* vs. *Wilson*, ubi sup., or if it is so framed that the supposed principals are not bound by it, so that there would be no remedy against any one if the agents are not liable. *Wilson* vs. *Zuleta*, 14 Q. B. 405. On the other hand, even where a contract, expressed to be made on behalf of another, was signed by the defend-

ant in his own name; he was held not to be personally bound, where the act stipulated for could only be done by his principal, *Lewis* vs. *Nicholson*, 21 L. J., Q. B. 311, and where, upon the whole contract, coupled with the previous negotiations, it appeared to be the understanding of the parties that he only entered into the undertaking as agent. *Downman* vs. *Williams*, 7 Q. B. 103.

It is in general conclusive in favor of the defendant, that he has signed per procuration, or on behalf of, or as agent for, the professed principal. Per Cresswell, J., in *Cooke* vs. *Wilson*, ubi sup.; *Ex parte Buckley*, 14 M. & W. 469; *Jenkins* vs. *Hutchinson*, 13 Q. B. 744. And in such a case it makes no difference that the principal is a foreigner residing abroad. The question is still one of intention, to be gathered from the circumstances appearing on the contract; and although, where the seller deals with an agent resident in the country, and acting for a foreign principal, the presumption is that the seller does not contract with the foreigner, and trust him, but with the party with whom he makes the bargain, still this is a presumption of law and not of fact, and cannot be set up against the plain words of the contract. *Green* vs. *Kopke*, 2 Jur., N. S., part 1, p. 1049; *Mahony* vs. *Kekulé*, 14 C. B. 390.

Even in the last-named case, however, the defendant will be treated as principal, if it would be a contradiction of the entire agreement to treat him as agent. A charter party stated to be made between the plaintiffs and defendants, went on in the usual way, without any intimation that the defendants were not the principals, till at the end it was signed by them, "by authority of and as agents for, S. of Memel." They were held personally liable. Lord Campbell, C. J. and Coleridge, J. seemed to attach a different degree of weight to the fact that the alleged principals were foreigners. Both agreed that as the defendants were contracting parties, by whom it was agreed that every thing was to be done, they were personally bound and that the concluding words were only intended for their security, as between themselves and S. *Lennard* vs. *Fleming*, 5 El. & Bl. 125. And so, where a bill of exchange was stated to be for goods supplied to the adventurers of the H. mines, and was addressed to the defendant, and accepted by him, "For the companies, W. Charles, purser," it was held that he was