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THE ACTS OF AN AGENT AFTER DEATH OF HIS  
PRINCIPAL.

Do the acts of an agent dealing with third parties, *bona fide* and without notice, after the death of the principal, bind the estate of the principal?

The actual state of the law on this head at the present time is this: In France, Scotland and other countries where the principles of the civil law prevail, the death of the principal is not held to be an absolute and instantaneous revocation of the power of his agent, making all the latter's subsequent acts entirely void. Ignorance of the death of the principal will protect third parties in a *bona fide* transaction and make the acts of the agent binding on the estate of the principal.

In England, and generally in this country, the common-law rule exists, which considers the death of the principal as an instantaneous revocation of the agency as to all subsequent acts of the agent, whether with or without notice. It regards the acts of an agent whose principal is dead, as simply void.

Pennsylvania and Missouri have adopted the rule of the civil law, and the Supreme Court of the state of Ohio have placed the law of their state in a unique condition upon the question under discussion, by deciding in the case of *Ish v. Crane*, 13 O. S. 574, that if the authority was to do an act *in the name* of the principal, then it terminated immediately on the death of the principal, with-

out regard to notice or *bona fides* on the part of third parties; but if the act were not necessarily to be done in the name of the principal, but was *in pais* merely, then the rule of the civil law was to apply.

We have then first: The civil law, deciding this question on so called equitable principles. Second: The common law, standing by its rigid and technical rule, that a dead man cannot act. Third: What may be called the Ohio rule—a compromise between the claims of a hard case, and a reluctance to adopt the principle of the civil law.

Both the civil law and the common law agree that though an authority may generally be revoked by a principal in his lifetime; yet, when the agent has meanwhile dealt with third parties, in ignorance of such revocation, the principal is bound by the acts of the agent. This is fair enough. The clearest principles of estoppel would prevent a man from denying the validity of his agent's acts with those who had been induced to part with their money upon the faith of the authority given to the agent. But when the revocation is by the death of the principal, the question of the rights of third parties is a more difficult one, and on it the common law and the civil law courts have differed.

Whether the civil law rule is the more equitable or not, it certainly is the more irrational and absurd of the two.

Both systems of law recognise in all agencies, the principal as speaking and acting through his agent. He is, in theory, constantly ratifying his acts. Every act of the agent is the act of the principal. When, therefore, the principal dies, his will is gone, he does not speak any more, he can not act any more, nor ratify. What becomes of the agent's authority then? The logical conclusion would be, that it ceases, instantly. The civil law prefers to swallow the absurdity of a dead man acting, ratifying, &c., rather than let an innocent third party suffer.

A good deal can be said on both sides, in favor of the justness of either rule. The representatives of the deceased principal have some claims upon his estate which can be reasonably compared with those of an innocent third party who has had dealings with the agent. Is the agent of the deceased principal in any sense the agent of those to whom his estate has descended, at the instant of his death? Have they had any voice in his selection? Why should they be bound by the acts of an entire stranger?

Just here is the difference between the application of the rule at common law in the two cases; first, when the revocation is by the principal in his lifetime; second, when the revocation is by act of law, by his death. In the first case, as against the claim of the innocent third party without notice, the rights of no *other* third party are involved. It is, therefore, quite reasonable that the principal shall be presumed to give his consent and ratification to acts of the agent with *bona fide* parties, without notice of any revocation of the authority of such agent. But, in the second case, the question is by no means so clear as to the rights of those innocent third parties. For at the instant the principal dies, new rights, to what *was* his property, have come into existence. The claim is that of the innocent third parties against the equally innocent heirs or other possessors of the principal's estate. His personal representatives had nothing to do with the appointment of the agent and they may be quite as ignorant of the subsequent action of the agent at the time they acquire their rights and begin to act in their new condition, as the third parties were of the principal's death. They come in for their share of the equities, in the consideration of the question under discussion.

At the time an authority is given, a power granted or an agency established, it can be well understood between principal and agent, as it afterwards may be understood by those dealing with the agent, what the nature and extent of the agency is; whether the same is a personal power to perish with the death of the principal or the agent (for without the question of the want of notice, there is no dispute as to the effect of death upon an ordinary authority), or whether the power is united with an interest which the agent has in the thing upon which, or about which the power is to be exercised, in which case even death is no revocation, for by the granting of the power, coupled with an interest, a specific estate, a property, passes to the agent, which, on his death, goes not to his principal, but to his, the agent's, heirs or personal representatives; and consequently on the death of the principal, since he has parted with something which he could not recall, if he would, the heirs and representatives of the principal take no more than he had, and consequently take subject to the agency and all acts of the agent. But the case of a naked power, granted without interest, is quite different from this. On the death of the agent such a power reverts instantly to the principal. The agency being a personal one with

no vested rights or property involved, dependent simply and entirely upon the will of the principal, will cease to exist when the mind that originated and sustained it ceases to exist. True, this same mind may change, and, to save the rights of third parties without notice, the law refuses to recognise the change, but compels the necessary ratification to proceed from the principal to make good the subsequent acts of his agent. In effect the law says to the principal, "You have induced the world to regard A. as you yourself, for certain purposes, now we won't let *you* disturb this arrangement before you let the world know it also, but God may disturb it by causing your death, and we won't protect the world; all men take the chances of death." And death, being a public fact, like war between two countries, all men are *bound* to take notice of it.

Now, the question is, can the law go one step further and by performing a miracle on the dead principal, re-vitalize the posthumous acts of the agent, and, at the expense of one set of innocent parties, protect another from damage at the hands of an agent whose authority has been cut off by the act of God.

The common law plainly says no, and we cannot help thinking this view does less violence to logical rules, technicalities and the natural order of things, and quite as little to one's sense of justice. See *Cleveland v. Williams, Administrator*, 29 Texas 204; *Michigan Insurance Co. v. Leavenworth*, 30 Vt. 10; *Davis, Administrator, v. Windsor Savings Bank*, 46 Vt. 728; *Galt v. Galloway*, 4 Pet. 341; *Marlett v. Jackman*, 3 Allen 287; *Lewis v. Craig*, 17 Iowa 73; *Harper v. Little*, 2 Greenleaf 14; *Rigs v. Cage, Administrator*, 2 Humph. 350; *Hunt v. Rousmanier's Administrator*, 8 Wheat. 174; *Primm v. Stewart*, 7 Texas 178; *Easton v. Ellis & Morton*, 1 Handy 70 (Superior Court of Cincinnati; before the decision of *Ish v. Crane*); *Travers v. Crane*, 1 Cal. 12; *Wilson, Administrator, v. Edmonds*, 24 N. H. 517.

The decisions in Pennsylvania and Missouri that have been referred to, adopting the civil law, are: *Cassidy v. McKenzie*, 4 W. & S. 282; *Dick v. Page*, 17 Mo. 234.

The language used by the court in these two cases goes to show, how little regard was had in deciding them, for the precedents and the known rule of the law, and how much for the hardship of their peculiar circumstances.

In *Dick v. Page*, Judge SCOTT says: "To hold that this transaction is void, would shock the sense of justice of every man, and

we cannot be persuaded that a principle which would produce such a result should be applied to the facts which exist in this case."

And in *Cassidy v. McKenzie*, the court, with the authorities squarely before them, decline to be bound by them, and say: "Can it be that a payment made to an agent from a foreign country, and from one of our cities to the Western States, employed for the special purpose of collecting debts, is void because his principal may have died the very day before the actual receipt of the money? That a payment may be good to-day, or bad to-morrow, from the accidental circumstance of the death of the principal, which he did not know, and which by no possibility could he know? It would be unjust to the agent and unjust to the debtor." "The same rule (*i. e.* that acts done *bona fide* and in ignorance, &c., are binding on estate of principal), holds good in the Scottish law, and I cannot believe the common law is so unreasonable, notwithstanding the doubts expressed by Chancellor KENT." And these, by the way, are the chancellor's doubts: "By the civil law and the law of those countries which have adopted the civil law, the acts of an agent done *bona fide*, after the death of the principal, and before notice of his death, are valid and binding on his representatives. But this equitable principle *does not prevail* in the English law, and the death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be conferred with an interest:" 2 Kent Comm. 646. If KENT had any doubts about what the English law on this subject was, he certainly does not express them in this statement.

The Ohio doctrine, which has been stated above, is found in the case of *Ish v. Crane*, 8 O. S. 521; s. c. 13 O. S. 574. The court in this case were unwilling to acknowledge that even at common law the authority of the agent would be held to terminate immediately on the death of the principal. It is difficult to see how they have avoided the effect of such language, as, for instance, that of the Supreme Court in the case of *Galt v. Galloway*, 4 Pet. 341.

Most of the early cases on this point which are cited by the court in *Ish v. Crane*, were cases of authority to execute deeds, or do some act in the name of the principal. But the power in such cases was held to be terminated by the death of the principal, *not* because of the impossibility of the agent to use *the name of* a dead principal to do a valid act, but because it was, in the eye of the

law, impossible and absurd to conceive of a dead man doing a valid act. And this applies as well to acts done by an agent in his own name, or acts *in pais*, as it does to acts to be done in the name of the principal. Admitting, for the sake of argument, that there is nothing for the common-law rule to rest upon, but a technicality, the technicality that a dead man cannot act, and that therefore, immediately on the death of the principal, all subsequent acts are void—the technicality is as fatal to any power of the agent after his principal's death to do an act in his own name, as it is to the power to act in the name of the principal. The idea of a dead man acting in another's name, is no more reasonable than his acting in his own. The cases do not recognise any such distinction, and there would be no grounds, as it seems to me, for them to rest it on. The distinction they do draw, and that clearly and for substantial reasons, is between powers coupled with an interest, and powers not coupled with an interest. The former are not, and the latter are, held to be extinguished by the death of the principal, *ipso facto*, by operation of law.

It may be, because many cases of powers coupled with an interest are likewise powers that may be executed in the name of the agent, as for instance, the authority exercised by factors, brokers, supercargoes and the like, that the court in *Ish v. Crane* have been led to suppose that the test to be applied in such cases to determine whether the authority survived or not, was whether or not the act could be done in the name of the principal. This never has been recognised as the test, though some cases have been so decided, that it might be thought that this was the principle upon which they turned. But all such cases can be much more reasonably explained on the theory of interest coupled with the power. For this is a real and substantial distinction, for which there is a good reason, as has been noticed in the first part of this discussion.

But what does the difference between an act to be done in the name of the principal, and an act to be done in the name of the agent, amount to in this connection? Is it anything more than an empty technical distinction? If the common-law rule is a technical one, it is at least founded on precedent. This distinction is even more technical, and is almost, if not entirely, without authority. It is not easy to understand why the court was at such pains to construct such a theory to justify their decision in *Ish v. Crane*.

On page 613, SUTLIFF, C. J., says: "I confess I am utterly unable to perceive any reasonable ground of distinction between an actual revocation in fact and a revocation, resulting by operation of law, from the death of the principal, in such a case as the present." This distinction constitutes the difference between the civil and the common law, and if the court cannot, as they say they cannot, see this difference, why not rest their decision squarely on the rule of the civil law, as the court in Missouri did.

Though the Supreme Court of Ohio had some doubts as to the existence even in England of the rule that the death of the principal instantly revoked the authority of the agent, it is safe to say, that there is in that country a pretty general understanding that such a rule prevails, since it has been thought necessary to protect from the operation of such a rule of law, trustees, executors and the like, by an act of Parliament as follows: No trustee, executor, or administrator, making any payment, or doing any act, *bona fide*, under or in pursuance of, any power of attorney, shall be liable for the moneys so paid, or the act so done, by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided, that the fact of the death, or of the doing of such act, as last aforesaid, at the time of said payment or act *bona fide* done as aforesaid by such trustee, executor or administrator, was not known to him; provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money, against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made, as he would have had against the trustee, executor or administrator if the money had not been paid away under such power of attorney," 22 & 23 Vict. ch. 35, S. 26.

There is also a special provision in the power of attorney for the transfer of stock of the Bank of England, that the death of the grantor of the power shall not be an instantaneous revocation of the power, but it shall be binding on his executors and administrators so far as the bank is concerned, unless the bank shall have had written notice thereof.

And in the Indian Contract Act 1872, 208, Illustration (C), it is provided that payment by a third party without notice, to an agent,

after death of his principal, is good against the executor of the principal.

All of these statutory provisions would seem to argue very strongly that there existed a different rule at common law, the doubts of the Supreme Court of Ohio to the contrary notwithstanding. And one is at a loss to find in all of these statutes any trace or mention of any question as to whether the act to be done by the agent is to be done by the agent in the name of the agent or that of his principal.

A very recent case, *Drew v. Nunn*, decided in the High Court of Justice in England (which, with a concise and learned note by Judge BENNETT, is reported in the American Law Register, *ante*, p. 98), contains a dictum by BRETT, L. J., in favor of the rule of the civil law in case of the death of the principal without the knowledge of the party dealing with the agent. The case at bar, however, was one of lunacy of the principal, and nothing further was even argued by counsel. It may be, that the English courts of law, following the spirit of some special enactments on the subject by Parliament, are prepared to decide the question under discussion upon the principle of the civil law. Justice BRETT is a high authority. However, until the actual question is brought squarely before them, the rule at common law in England, resting firmly on undoubted authority is, that the death of the principal is an instantaneous revocation of authority. Nor does the case of *Drew v. Nunn*, upon the facts presented, and upon which it was decided, necessarily conflict with it.

The effect upon the authority of the agent, of the insanity or death of the principal may be distinguished on several grounds. For example, the notoriety, which death is presumed to have in law, is wanting in the case of insanity; actual notice might with much more reason be required in the one case than in the other. This is true even where the insanity of the principal dates from an inquest of lunacy in due form. Still more necessary might actual notice be regarded in cases like the one under discussion where there had been no inquisition. The principal had gradually become insane. His wife was his agent, and knew when her husband's mental derangement reached the point of insanity; she did not disclose the fact to the plaintiff when he innocently and in good faith dealt with her. She therein was guilty of a wrongful act, but being a married woman could not be made liable. All the

circumstances, therefore, in the case of *Drew v. Nunn*, made out a strong case for the plaintiff; and in deciding as they did, the court cannot be said to have disturbed the established rule as to the effect, at least of the death of a principal, if even of his insanity, upon the authority of his agent.

Space is wanting for a further statement of the differences in the legal effect of insanity and death upon delegated authority.

In South Carolina it is provided by statute (Revised Statutes S. C., ch. 56, p. 322), that the death of a principal shall not be an instantaneous revocation of authority, if third parties dealing *bona fide* with the agent had no notice thereof.

Two things seem clear, then, upon an examination of the authorities.

First: That there exists in the common law the general rule that the death of a principal is an instantaneous revocation of authority, without regard to notice or *bona fides*.

Second: That the only exception to this is when the power is coupled with an interest.

The fact that the power is or is not to be executed in the name of the principal is by no means decisive of the question, whether the power survives or not. Such a distinction is not warranted by the authorities or justified by reason.

A very respectable ground for an exception to the general rule is, that the acts of the agent with *bona fide* parties without notice work an estoppel, which binds the heirs and personal representatives of the deceased principal, as privies. But whatever claim this equitable principle ought to have upon the attention of our courts and legislatures, it is in no way identified or connected with, the difference in the manner in which the power is executed.

Attention is called in closing to the laws affecting partnerships, between which and agencies there are some strong analogies, inasmuch as each partner is regarded as the agent of his fellow partner in the matters of the partnership business. It is the clearly established rule at common law that the dissolution of a partnership dates from the instant of the death of the partner, both as to the other partners, and as to third parties, without regard to notice thereof: Story on Partnership, § 319.

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