THE RATIONALE OF RATIFICATION*

By Philip Mechem †

INTRODUCTION

Omnis ratificationem retrotractorit et mandato priori aequiparatur. Every ratification is dragged back and treated as equivalent to a prior authority.

The doctrine expressed by this ponderous maxim is well-settled in Agency law.1 The subject, however, is a difficult and puzzling one. Just as in the case of undisclosed principal, recourse is often had to the adjective "anomalous." In the one case it is asked: how can you contract with some one you never heard of? In the other: how can a contract, admittedly not binding on the principal when made, become so at a later time by his mere assent, without new consideration, without the assent of the third party (as distinguished from his dissent) and indeed often without his knowledge? 2

One answer that might be given is that, just as in the case of undisclosed principal, the doctrine is more anomalous in theory than in practice. The issue of the agent's authority will not be settled until the matter is litigated, at a time substantially subsequent to the making of the contract; as a practical matter does it then make much difference when the principal expressed his willingness to be bound, as long as it is retroactively clear that at some time he has expressed it? The third party proceeded on the assumption that the contract bound the principal (as did the agent to the extent that his behaviour might be involved); the principal's assent, though subsequent, now merely makes it clear that the transaction is to be treated as what it appeared to be all along. Such a consequence is, if anything, less anomalous than the contrary one would be.

It is believed, however, that a more basic answer can be given. The difficulties and anomalies of the subject, it is suggested, arise chiefly

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* This article is drawn from the chapters on Ratification of Professor Mechem's forthcoming 4th edition of Mechem, Outlines of Agency, to be published this spring by Callaghan & Company.
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2. "As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorized agent, can sue or be sued on the contract. A stranger can not enforce the contract, nor can it be enforced against a stranger. That is the rule but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in English law." Lord Macnaghten in Keighley, Maxsted & Co. v. Durant, [1901] App. Cas. 240.
from the difference between terminology and practice. The maxim, supra, and the various "requirements" of ratification as given in the books, sound largely in terms 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, at least in the way in question.

This is quite unrealistic and, so, misleading. Not one case in a hundred deals with such a situation. Discussion of the law applicable to it is largely academic. Rarely indeed is the principal trying to ratify; he is trying to escape from ratification.

A realistic statement of the problem that goes under the name of ratification might be this: what are the acts and facts by which a purported principal may be precluded from denying that the agent who purported to bind him had no authority to do so? As the statement suggests, estoppel, at least in the broad sense, is often involved. So is mistake. So is election; so is unjust enrichment. These are familiar topics and in no sense anomalous. Once the matter is put, for example, in terms of the proposition that ordinary principles of equity preclude a principal from retaining the consideration given in reliance on his promised performance and at the same time refusing to give the promised performance on the ground that the promise was unauthorized—all mystery, all anomaly disappear from the situation. (And, it might be added, it is only where the attempt is made to handle matters solely by the application of the maxim as a rule of law that the result is likely to be anomalous.2a)

The Conventional Requirements and Limitations.—First, a brief statement will be made of some of the more familiar requirements and limitations as found in the books. As suggested above, they tend to sound in terms of an intentional and willing affirmation; later discussion will deal with the matter from a somewhat different angle and it may then be considered how realistic these propositions are.

(a) Present Capacity of P.—It is scarcely more than a truism to say that the principal must be legally competent at the time of ratification. Ratification is a jural act, having consequences as important as those of making a contract, and as much capacity is plainly necessary to ratify a contract as would have been necessary to authorize it in the first place.3

2a. Conspicuously so, for example, as in the cases discussed, infra, in which there is said to be ratification of a tort.

3. See Armitage v. Widoe, 36 Mich. 124 (1877). That the ratification must be of equal dignity with the required prior authorization, see Stetson v. Patten, 2 Greenleaf 338 (1823, Me.); Halland v. Johson, 42 N.D. 360, 174 N.W. 874 (1919);
(b) Original Validity of the Contract; Supervening Illegality.—
Since the doctrine of ratification causes the transaction to be treated
as if there had been authority in the first place, it follows (in logic, at
least) that if the transaction would have been initially invalid, though
authorized, ratification cannot subsequently make it valid. Since an
unborn person can scarcely contract, it must follow that a contract pur-
porting to bind a principal not yet born could not be ratified. (From a
practical standpoint, it is not inconceivable that in such a case the prin-
cipal when born might act in such a way as to be subject to liability.)
The same would be true of a contract purporting to bind one then totally
without contractual capacity but later acquiring it. A very common
instance of this is a contract made by promoters on behalf of an as yet
non-existent corporation. Since by conventional dogma ratification is
impossible, courts have been forced to exercise great ingenuity to find
formulae permitting the corporation to be held when formed. Con-
siderations of space forbid more than mentioning this problem here;
reference must be made to authorities on corporation law.

The contract likewise must have been a legal one when
made.

More difficult is the question whether a contract may be ratified
which was legal when made but illegal at the time of the attempted
ratification. Here perhaps the criterion is the effect of ratification. If
it would be to bind the parties to a performance now illegal, plainly
there can be no ratification. If, on the other hand the result is simply
to enforce obligations resulting from an agreement legal when made,
the ratification may operate. The Restatement illustrates this by say-
ing that a contract to sell and deliver liquor, legal when made, but illegal
at the time of the attempted ratification, plainly could not be ratified.
On the other hand if the liquor had been delivered (and perhaps con-
sumed) at a time when such was legal, but payment for it had not been
made, a ratification whereby the seller became entitled to payment would
not be objectionable, since thereby the seller simply becomes entitled to
payment for services which were legal when rendered, and does not
attempt to enforce an act in violation of public policy.

Allegheny Gas Co. v. Kemp, 316 Pa. 97, 174 Atl. 289 (1934); Dunbar v. Farnum,
109 Vt. 313, 196 Atl. 237 (1937); Fulton County Fiscal Court v. Southern Bell
Telephone & Telegraph Co., 289 Ky. 159, 158 S.W.2d 437 (1942); Wyman v. Utech,
256 Wis. 234, 42 N.W.2d 603 (1950).

4. Many cases on the problem are collected in 123 A.L.R. 726.

5. See Zottman v. City and County of San Francisco, 20 Cal. 96 (1862); San-
ford v. Johnson, 24 Minn. 172 (1877); Goldfarb v. Reichert, 112 N.J.L. 413, 171
Atl. 149, aff'd, 113 N.J.L. 399, 174 Atl. 507 (1934); Sullivan v. Hardin, 102 S.W.2d
1110 (1937); Board of Education v. Baugh, 240 Ala. 391, 199 So. 822 (1941);

6. Restatement, Agency § 86.
(c) Undisclosed and Partially Disclosed P.—A second proposition scarcely more than a truism is that a contract ostensibly and actually made by a person solely on his own behalf, cannot be appropriated by another by "ratifying" it. There is nothing to ratify; it would be mere larceny of another's contract.

More difficult is the question how far the contract must go in disclosing and identifying the principal. Is it enough that a party ostensibly binding himself and himself only, privately intends to contract on behalf of a principal? Must it be a principal or a particular principal? May he simply be described in such a way as to permit identification or must he be named?

A substantial majority of the cases has refused to permit ratification where the contract as made in no way purports to bind a principal, although the agent privately intends to do so. The law of undisclosed principal, it is said, is an anomaly; to permit him to ratify would be to add one anomaly to another. Furthermore, it is said in the same case, practical considerations forbid a rule which would require ascertaining the intent of the contractor at the time the contract is made.

7. See, e.g., Mitchell v. Minnesota Fire Ass'n., 48 Minn. 278, 51 N.W. 608 (1892); Keighley, Maxsted & Co. v. Durant, [1901] A.C. 240, noted in 15 Harv. L. Rev. 221 (1901); Ferris v. Snow, 130 Mich. 254, 90 N.W. 850 (1902); Knapp v. Baldwin, 213 Iowa 24, 238 N.W. 542 (1931); Fay v. Doyle, 68 App.D.C. 159, 95 F.2d 110 (1938); Valaske v. Wirtz, 106 F.2d 450 (6th Cir. 1939); Pullen v. Dale, 109 F.2d 538 (9th Cir. 1940); Hizel Funeral Homes v. Equitable Trust Co., 83 A.2d 700 (Del. 1951). But it seems there can be ratification where the agent purports to be acting on the principal's behalf but is secretly acting on his own behalf: In re Tiedemann and Freres, 2 Q.B. § 66 (1889).

8. In Keighley, Maxsted & Co. v. Durant, supra note 7, Roberts bought wheat from plaintiff, intending to buy as defendants' agent, but without authority and without disclosing his intent. Defendants ratified but later refused to take the wheat. Judgment for defendant. Lord Davy said: "The argument seems to be that as the law permits an undisclosed principal, on whose behalf a contract has been made to sue and be sued on the contract, and as the effect of ratification is equivalent to a previous mandate, a person who ratifies a contract intended but not expressed to be made on his behalf is in the same position as any other undisclosed principal. Further, it is said that whether the intention of the contractor be expressed or not, its existence is mere matter of evidence, and once it is proved the conclusion ought to follow. Romer, L. J. held that on principle it ought to be held that ratification (in the case before the court) is possible, and that to hold the contrary would be to establish an anomaly in the law, and moreover a useless one. My Lords, I cannot agree. There is a wide difference between an agency existing at the date of the contract which is susceptible of proof, and a repudiation of which by the agent would be fraudulent, and an intention locked up in the mind of the contractor, which he may either abandon or act on at his own pleasure, and the ascertainment of which involves an inquiry into the state of his mind at the date of the contract. Where the intention to contract on behalf of another is expressed in the contract, it passes from the region of speculation into that of fact, and becomes irrevocable. In what sense, it may be asked, does a man contract for another when it depends on his own will whether he will give that other the benefit of the contract or not? In the next place, the rule which permits an undisclosed principal to sue and be sued on a contract to which he is not a party, though well settled, is itself an anomaly, and to extend it to case of a person who accepts the benefit of an undisclosed intention of a party to the contract would, in my opinion, be adding another anomaly to the law, and not correcting an anomaly."
A few jurisdictions have taken the contrary view, usually without discussion of the point. It is to be noted that in a number of these cases the "ratification" found was based on the retention by $P$ of benefits received by him under the unauthorized contract. In such cases, where $P$ obviously must either restore the benefit received or keep it on the terms on which it is given, it seems not very material that in the original transaction no mention of a principal was made. Doubtless this is another of the "requirements" which presupposes an intentional ratification and makes little sense where the question is whether $P$ has put himself in such a position as to equitably preclude him from disaffirming the contract.

(d) $P$'s Knowledge of Material Facts.—One of the most common clichés of the subject is that there can be no ratification unless at the time of the ratification the purported principal had full knowledge of all the pertinent facts. This, if true, is curious. The doctrines of fraud and mistake give protection, but within rather narrow limits, to one who makes a contract or, in fact, to one who authorizes the making of one on his behalf. For the most part if he acts without knowledge of, or under mistaken assumptions as to, material facts, he does so at his own risk. Is the case really different with one who ratifies?

The Restatement states: 10 "In other consensual transactions, lack of knowledge by both parties as to the essential facts upon which the transaction is based constitutes a ground for rescission, but where manifestations of consent have been exchanged creating a contract, ordinarily the mistake of one of the parties not induced by a misrepresentation of the other is not a ground for rescission. A contract which results from ratification, however, may be rescinded by the person affirming, if he affirms under a unilateral mistake as to a material fact, unless he assumes the risk of mistake, or unless the third person has changed his position in reliance upon the ratification."

The comment quoted gives no reason for this distinction, although it would seem that some reason is needed. It is believed that the common statement, and this expansion of it in the Restatement is, if not erroneous, at least misleading. There appears to be only one type of situation where mistake does have the effect attributed; in the situations to which the statement would most naturally appear to be applicable, it appears not to be true. Two situations need to be considered.

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10. RESTATEMENT, AGENCY § 91, Comment b.
(i) **Mistake as to Basic Inducing Fact.**—First, suppose that $P$ ratifies a contract, under some misapprehension as to factors affecting the wisdom of doing so, although not under such misapprehension as would justify a rescission for mistake if he were making rather than ratifying the contract. Is the ratification inoperative?

It would seem that this is the precise situation suggested by the customary statement, and by the language of the Restatement. It is believed however, that this ratification neither should nor would be invalidated for $P$'s failure to have knowledge of the material facts. No case so holding has been found. Such small authority as deals with the problem points in the opposite direction. Thus, in a well-known Pennsylvania case, $P$'s agent in this country without authority advanced $P$'s money to a mutual friend, to enable her to save stock that she was carrying on a margin account. $P$, in Europe, on being informed of $A$'s action, expressly approved. Later, however, he attempted to disavow the ratification on the ground that he had not realized in what a critical condition the friend's account was. The court denied this contention saying it was well settled that a principal could ratify without knowledge of material facts “if he intentionally and deliberately does so, knowing that he does not possess such knowledge and does not make further inquiry into the matter.” This “exception” to the ordinary rule is often repeated; it would seem to cover nearly all cases where the facts would not warrant rescission for mistake.12

(ii) **Ignorance of Unauthorized Term in a Contract Otherwise Authorized.**—The second situation to be considered, and the only one where any substantial number of cases can be found, purporting to apply the quoted rule, is that where $P$ has approved a contract made for him but in ignorance of the fact that it contains an unauthorized provision. Thus, where a landlord approved a lease made on his behalf by his son, not knowing that the son had promised to make certain repairs, it was held that the landlord was not bound by the agreement to make repairs.13

So in a North Carolina case, $P$ approved a sale of a note made for him by $A$, on the assumption (semble) that it was transferred without recourse; on learning that $A$ had indorsed it in $P$'s name, $P$ was held not bound by ratification.14 In a number of such cases, $P$ is held to

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have ratified because of his carelessness in failing to avail himself of readily accessible information.\textsuperscript{16}

These cases, it is thought, do not require justification by any doctrine peculiar to ratification. They appear to be natural applications of fundamental contract law. Is there a "meeting of minds?" The part played by the agent makes it difficult to find an exact contractual analogue; is it too far-fetched to consider the case of the two good ships Peerless as in point? It seems reasonable to say that the supposed contract (in the ratification case) is made by the concurrence of the consent of the third party to the contract as proposed to him by the agent and the consent of the principal, as expressed by his ratification, to the contract as then presented to him. Plainly there has been no real consensus \textit{ad idem} nor any apparent one. However the principal ratifies, it is not necessary to treat him as saying: "I ratify the proposition as made to T." He says: "I ratify the contract as I reasonably suppose it to be, in the light of my authorization and of the information given me by my agent." Since in all such cases the agent will normally have acted misleadingly if not fraudulently, it may be not inappropriate to compare them to a famous Massachusetts illustration of the "Peerless" doctrine, namely the bathhouse case, \textit{Vickery v. Ritchie}\textsuperscript{16} where the architect fraudulently gave the contracting parties two different estimates, each naming a different price, on the basis of which the parties purported to contract. Obviously no contract was made; the court so held.

If these cases are in point, there appears to be no deviation from fundamental contract principles in holding that the $P$ is not bound to the unknown term by his ratification.


If the failure to achieve a meeting of minds prevents the formation of any contract and so relieves P of an obligation to perform with the unauthorized term included, does it not follow that T is likewise relieved of any obligation to perform with the unauthorized term excluded? Normally the answer would seem to be clear: yes. In a few instances, particularly where there has been part performance and change of position, equitable considerations may justify the principal in standing on the authorized contract and repudiating the unauthorized part. Such cases will be considered later.\textsuperscript{17}

\textit{Ratification of Tort.}—May a person become a servant, or may the act of a servant not in the course of employment, become so, so as to charge a master, by a subsequent ratification on the part of the purported master? Such a proposition seems more anomalous than ratification by a principal, but the relatively few cases\textsuperscript{18} are in agreement that there may be a ratification, as long as a supporting nexus is established by showing that the tortfeasor was intending to act for the purported master.\textsuperscript{19} The leading case is \textit{Dempsey v. Chambers}\textsuperscript{20} where, under circumstances not stated, one not in fact defendant's servant, was delivering, without his knowledge or consent, a load of coal plaintiff had ordered from defendant. In so doing he negligently broke plaintiff's window. With knowledge of these facts, defendant presented to plaintiff a bill for the coal and was paid. It was held (semble because of the demand for payment, though this is nowhere explicitly stated) that defendant had ratified the stranger's act, and Holmes, J. said that "consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts."

Perhaps such a case can be justified by saying that coal delivering was defendant's business, that the law of respondeat superior makes him bear the cost of negligent delivery, and that there was no evidence to suggest that the interloper was more likely to be negligent than one of defendant's regular servants. On the other hand there seems to be no great inherent equity in the result. If one buys a horse with a war-

\textsuperscript{17} See Note 41, \textit{infra} and text.
\textsuperscript{19} See Matulis v. Gans, 107 Conn. 562, 141 Atl. 871 (1928); Ernshaw v. Roberge, 86 N.H. 451, 170 Atl. 7 (1934); Bryan v. Pommert, 37 N.E. 720 (Ind. App. 1941); \textit{Restatement, Agency} § 85.
\textsuperscript{20} 154 Mass. 330, 28 N.E. 279 (1891).
ranty from an agent, it is unfair for the principal to keep the price and repudiate the warranty since that was part of the consideration for the price. It is less plausible to say that the price of the coal was in part paid on the understanding that defendant would be responsible for its careful delivery; non constat that plaintiff could have complained had defendant had the coal delivered by an independent contractor. 21

If the result of the Chambers case appears anomalous, what is to be said of the cases 22 holding a servant's assault ratified by the master's subsequent approval of it by his retention of the servant in his employ? In a recent Federal case from Alaska 23 defendant's barkeeper violently assaulted T, obviously from motives strictly personal. On encountering T subsequently defendant said to him: "If I had been there, I would have broke your God damn neck." From this statement and the fact that defendant did not discharge the barkeeper, the jury were allowed to find that he had ratified the assault.

What considerations of justice or policy justify such a decision, is hard to say. The result seems purely punitive. Defendant is punished

21. An interesting and perplexing question that suggests itself in connection with such a case as Dempsey v. Chambers is this: what is the effect of the ratification on the relation between M & S? No doubt P can no longer treat the taking of the wagon as a conversion. However, if S had been originally M's servant, he would now be liable to indemnify M. Has M by ratifying both obligated himself to pay for the broken window, and lost his right of indemnity? Is there any reason why he should? S was originally liable to T; he does not appear to be prejudiced if M, having paid T, is subrogated to T's rights against S. Or it might be suggested that S's intent to act as M's servant, which is a pre-requisite to ratification, carries with it an assumption of the liabilities of the position. The case is not such a one as Holloway v. Arkansas City Milling Co., 77 Kans. 76, 93 Pac. 577 (1908), where P's so-called ratification merely means that by his careless dealing with A, P has precluded himself from complaining against A of A's violation of instructions.

It must be admitted that the writer has found no authority to support the position suggested. And §§ 416 and 430 of the Restatement appear to be inconsistent with it.


In a number of the above-cited cases, it is said that punitive damages may be recovered against the master.

Cf. Gulf, C. & S. F. R. Co. v. Kirkbride, 79 Tex. 457, 15 S.W. 495 (1891), where it is said: "We think it would be extending the doctrine of ratification too far to apply to such a case as the one before us. Notwithstanding his one fault, the servant may be a useful and deserving one, and worthy of promotion and encouragement. We do not think it either just to the individual, necessary for the general good, or a wise public policy, to so arbitrarily punish the master for lenity to a servant, otherwise deserving, and perhaps penitent. The rule invoked might lead to the discharge of an innocent and useful servant, when wrongfully accused or suspected, because his employer might ascertain in advance what would be the result of a future trial, and, instead of taking the risk of being charged with a pecuniary liability for which he was not otherwise liable, might discharge the servant."

And see Judge Burch's masterful opinion in Kastrup v. Yellow Cab & Baggage Co., 129 Kans. 329, 282 Pac. 742 (1929).

for being a bad man and glorying in his servant's viciousness rather than condemning it and discharging the servant. Perhaps the most charitable thing that can be suggested is that the court is using ratification where they think the master should pay but where they find it difficult to put the assault in the course of employment. Courts sometimes bolster a dubious case by a dubious holding that the master was at fault in hiring a servant whose bad qualities he knew or should have known. Here it may be that the master will be deterred from congratulating and retaining his vicious servant.

No doubt these tort cases are in a sense unimportant since they are infrequent and usually involve small amounts. However, they seem to the writer to be doctrinally significant as tending to substantiate the basic thesis of this essay. The contract cases normally make good sense because normally they rest ultimately on solid principles of fair dealing and good sense; it is of little moment that they can be rationalized, after the fact, in terms of the mouth-filling maxim omnis ratihabitio and so on. The tort cases, on the other hand, mostly make no sense, and it is precisely because they rest on nothing but the maxim.

Voluntary Ratification

It has already been suggested that in the great majority of instances ratification is simply the name given to the consequence when in some way the purported P has precluded himself from repudiating the transaction done by the purported agent. Such a ratification may be treated as involuntary, since it rests not on the principal's wish to be bound but on some other doctrine such as estoppel, unjust enrichment or the like. There are, however, some instances in which ratification can be based either on the expressed approval of the principal or something that can be treated as equivalent. Ratification by silence

24. A logical dilemma may be involved here. According to § 85 of the Restatement, and the cases that have considered the point, there can only be ratification if the wrongdoer "intends or purports to perform [the act] as the servant" of the one ratifying. (See note 19 supra.) In such a case modern authorities have little difficulty in considering the act as within the course of employment.


To whom must expression of assent be made? The cases are few which deal with this problem. Logic seems to suggest that neither the agent nor the third party need be notified, and that the essence of the act is simply some unequivocal expression of intent to be bound. See Bayley v. Bryant, 24 Pick. 198 (Mass. 1839); Rutland v. Burlington Ry. Co., 29 Vt. 206 (1857); Sheffield v. Ladue, 16 Minn. 346, 10 Am. Rep. 145 (1871); Shinn v. Smiley, 1 N.J. Misc. 459, 122 Atl. 531 (1922); Restatement, Agency § 95. It is equally clear that notification of the agent or third party would be the most unequivocal form of ratification, and that statements
is generally considered to be such an equivalent, and this is a topic that calls for some comment.

Ratification by Silence.—Suppose that \( P \) discovers that \( A \), without authority, has purported to act, or is purporting to act, on his behalf; \( P \) does nothing. Does his silence amount to ratification? \(^{28}\)

In *DiLorenzo v. Atlantic National Bank,*\(^{27}\) plaintiff turned over to one Del Buono, as he had before, certain bank books in which Del Buono was to have the interest added. Del Buono, by forging the plaintiff's name, sold the books to defendant bank which bought them in good faith and proceeded to collect the amounts due. A few months later, plaintiff discovered what had happened. Thereafter, for four or five years, plaintiff negotiated with Del Buono, trying to get the money repaid, but never notified, nor made any demand on, the defendant. He now sues for conversion of the books. The case was tried to the court without a jury and the court found for defendant. This was affirmed, the court pointing out that there was no evidence of injury sustained by defendants by reason of plaintiff's delay, and so no basis for an estoppel, but saying that on the evidence the court below could reasonably have found that plaintiff had "assented" to the wrongful act of his agent.

Did plaintiff "assent"? Perhaps not, if all he did was procrastinate through shiftlessness and stupidity. More likely, he was unwilling to have his agent and friend prosecuted for forgery. Had plaintiff been asked by the bank: are you going to press your claim against us or are you going to be content with trying to get the money back from Del Buono, and had he answered: "The latter" there could be little doubt of its being a ratification; perhaps what happened could reasonably be found to be the equivalent of this.

Should plaintiff be precluded if defendant has in fact sustained no injury? Probably not. The money is still equitably the plaintiff's and defendant cannot technically claim the position of bona fide purchaser.

to anyone else must be rather strictly scrutinized to be sure that \( P \) really meant to be bound.

The writer has elsewhere suggested that in many instances where courts speak of "implied authority" they are in reality speaking of real authority proved by circumstantial evidence. Likewise, not infrequently courts speak of ratification meaning merely that subsequent events make it clear that there was real authority all along. *See* Haluptzok v. Great Northern Ry. Co., 55 Minn. 446, 57 N.W. 144 (1893); Kirkpatrick Finance Co. v. Stotts, 185 Ark. 1089, 51 S.W.2d 512 (1932); Irving Tanning Co. v. Shir, 295 Mass. 380, 3 N.E.2d 841 (1936); Gindin v. Baron, 11 N.J. Super. 215, 78 A.2d 297 (1951).

26. Obviously, many of the cases discussed are not cases where \( P \) really wished to ratify. However, since some of them are nominally instances of the proposition that silence gives consent, they are lumped here for convenience as illustrations of voluntary ratification.

However, in spite of the court's statement, one is inclined to doubt the proposition that the defendant has sustained no injury. This seems taking a characteristically arbitrary and unrealistic view of what amounts to a change of position. To the present writer it seems that anyone who receives money in the good faith belief that he is entitled to it and, after a substantial lapse of time, is called upon to give it back, suffers a real injury. If the defendant here were an individual of modest means instead of a big city national bank, it is hard to doubt that he would regard it as a cruel hardship to be asked suddenly to produce five thousand dollars.

Affirmance by Silence and Estoppel.—The Restatement, writers, and occasionally courts, have stressed the importance of distinguishing affirmation by silence from estoppel. The distinction might be of practical importance; e.g., it might affect the measure of damages. If the unauthorized act is one which leads $T$ to a series of reliances (as where $P$'s name is forged or signed without authority to a guaranty) $P$ as a matter of estoppel would be liable for injury suffered by $T$ only after $P$ knew of the unauthorized guarantee, whereas it might be argued that he was liable for all $T$'s losses if his silence is treated as a ratification.

If estoppel is to be talked, plainly we must posit a duty to speak. One cannot be responsible for the consequences of silence if one was under no obligation to speak. If on the other hand we are talking of "affirmance" or "assent" by silence ("Silence gives consent.") we are

29. See Mechem, Agency § 349 (2d ed. 1914).
30. See Depot Realty Syndicate v. Enterprise Brewing Co., 87 Ore. 560, 170 Pac. 294, 171 Pac. 223 (1918), where defendant's agent, authorized to secure saloon-keepers who would sell defendant's beer exclusively, guaranteed, on defendant's behalf, the payment of rent by such a saloon-keeper. Defendant, being informed of this, did nothing. Moore, J., said: "Ratification by a principal of an unauthorized act of his agent has occasionally been grounded upon the doctrine of an equitable estoppel. A clear distinction, however, exists between an estoppel in pais and ratification. The substance of ratification is confirmation of the unauthorized act or contract after it has been done or made, whereas the substance of estoppel is the principal's inducement to another to act to his prejudice. Acts and conduct amounting to an estoppel in pais may in some instances amount to a ratification; but on the other hand ratification may be complete without any elements of estoppel": 2 C. J. 469; 31 Cyc. 1247. In the case at bar, it is possible the extension of the term of the lease and the reduction of the monthly rent might be regarded as creating an equitable estoppel, but however that may be, we rest our decision upon an implied ratification by the defendant of its agent's unauthorized assumption of authority, by failing, when fully notified thereof, promptly to deny his power to consummate the agreement.
31. "Acquiescence," "consent," "approval" and the like are words used by courts as almost interchangeable in this context. By the Restatement affirmation is the manifestation of an election to treat the act as authorized (§ 83) and ratification is the result of affirmation, whereby the act is given effect as if originally authorized (§ 82).
32. See Note, 42 Harv. L. Rev. 124 (1928).
perhaps talking of psychology rather than duty. Silence binds the party not because he should have spoken but because under the circumstances the natural reaction is that his silence is tantamount to consent.

Whether or not this somewhat refined distinction is valid, the cases talk mostly in terms of duty. A few hold that there is in general no duty to speak and find no special factors creating such a duty.\(^3\)

One of the best known and best reasoned cases so holding is *Myers v. Cook*.\(^4\) There it appeared that husband and wife lived apart. He bought logging equipment and gave a promissory note for the price, signing her name as surety. This was done without her knowledge or authority. The husband had never done it before nor acted as her agent in any way. When she heard of the facts, she “grumbled” to some extent but gave no notice to the payee of the note. The court set aside a judgment against the wife, saying: “The husband acted for himself in the transaction, not the wife. He acted against her in signing her name to a note for his debt. The plaintiff was as well aware of that fact as he was. The former acted at his peril in taking the note without knowledge as to whether the husband had authority to bind his wife. He was bound to inquire and could not rely upon the supposed agent’s representation. *Rosendorf v. Poling*, 48 W. Va. 621; *Rohrbough v. Express Co.*, 50 W. Va. 155. The plaintiff omitted this duty, and, presumptively, wronged the wife by his acceptance of the note with her name on it. He could have ascertained by inquiry whether her signature was authorized, in time to have saved himself all she could have saved him by her disavowal. In other words, he could have done for himself what he thinks she should have done for him. To permit him to make her mere failure to do that prove ratification would allow him the benefit of his own wrong. If he had made the inquiry and she had induced him to forego right of rescission by an express ratification or, possibly, by silence, when required to speak, and thus caused him loss, it would no doubt be otherwise. And, on the other hand, if she had disavowed the act, he could have asserted his rights against the husband at once. By rescission, he might have acquired the property he had sold.”

Also well known, though it is not easy to characterize it as well-reasoned, is the case of *Furst v. Carrico*.\(^5\) There defendant’s name was

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\(^4\) 87 W.Va. 265, 104 S.E. 593 (1920).

\(^5\) 167 Md. 465, 175 Atl. 442 (1934).
forged to a guaranty of payment, in reliance on which plaintiff sold several bills of goods. Plaintiff notified defendant by registered mail of the supposed guaranty and that he was selling goods in reliance thereon, but defendant gave no answer; some of the goods were sold after the defendant had had ample time to answer. The forger was not defendant's agent and it is said there was no special relationship between him and defendant which might impose a duty to speak. Defendant's demurrer was sustained below, and this action was affirmed. It was significant, the court said, that the failure was to answer a letter, rather than to respond to an oral statement, since "men use the tongue much more readily than the pen." And "the duties of strangers to transactions are duties of forbearance, not of exertion and assistance."

Other cases involving the same factual set-up as that in Furst v. Carrico have unanimously reached a different conclusion.

The Prevailing View.—By and large, juries have found duty and so ratification where one who "should in good conscience speak" fails to do so, and appellate courts have affirmed the finding. Probably this
THE RATIONALE OF RATIFICATION

THE RATIONALE OF RATIFICATION does not involve disagreement with the reasoning of Myers v. Cook, supra, so much as it reflects a difference in setting. The Myers case is uncommon in that the factors seeming to call for repudiation were at a minimum. Where the actor is known to be the principal's agent or has often acted as such, or where the geographical or other relationship between the parties makes repudiation easy, it is hard to persuade courts that there is no duty to speak. The doctrine of the Myers case posits an actor who is nearly a pure interloper; such instances are rare.

INVOLUNTARY RATIFICATION

As has already been pointed out, the generality of cases to which the tag "ratification" is applied are not cases where the principal with full knowledge of the consequences, deliberately elects to ratify; they are cases where the principal has not the least wish to ratify but where he has put himself (or chosen to remain) in a situation where he cannot equitably refuse to treat the contract as ratified.

To such cases the name "involuntary ratification" has herein been given and the following discussion will be devoted to an analysis of the problem and an attempt to classify the cases.

If the contract is wholly executory, the only likely basis for holding \( P \) will be that he has ratified by silence or has estopped himself from denying ratification. (The latter, obviously, is a case of involuntary ratification but for reasons given above it has been lumped with ratification by silence, commonly assumed to be a form of voluntary ratification.) On the other hand, since we mean by "the contract" the unauthorized contract or, as is more likely, the authorized contract with unauthorized terms, if the contract is completely executed that will mean that \( P \) has performed, although not bound so to do, and hence will normally neither wish to nor be in a position to object to the unauthor-


40. "A distinction has been made between the acts of an agent who has gone beyond his authority, and those of a mere stranger intermeddling in affairs with which he is in no way concerned. In the case of a stranger, it has been said that the act will not be binding upon the principal unless expressly ratified by him. Ward v. Williams, 26 Ill. 447. But the better opinion appears to be, that in this, as in the case where an agency exists, the approval of the principal may be inferred from his silence and acquiescence when informed of what has been done in his name. Philadelphia, Wilmington & Baltimore R.R. Co. v. Cowell, 28 Penn St., 329; Ladd v. Heilderbrant, 27 Wis. 135. But all agree that the relations of the parties are of great consequence in determining the question of ratification, the presumption arising from acquiescence being very much stronger where the agency exists than in the case of a mere stranger. Story on Agency, § 256." Hallett, C. J., in Union Gold Mining Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248 (1873).
ized contract or the unauthorized portion of it. Hence the problem will chiefly arise where the contract is partly executed, the unexecuted portion naturally being the performance by P, promised by A but without authority.

**A Matter of Election.**—In such a case the position of P will be, basically, very much like that of a defrauded person. True, the third party is not assumed to have done any deliberate wrong but, *ex hypothesi*, he has chosen to deal with an agent who had neither real nor apparent authority, and hence he has no rights on which he can stand. It is perhaps fair to say that his position, legally, is no better than that of a contracting party guilty of fraud.

The injured party, in a fraud case, normally has an election. He is not compelled to repudiate the transaction; he may affirm it and (what is not pertinent to the present analogy) sue for damages. On the other hand he may if he chooses disaffirm; in such a case he is entitled to the return of any performance rendered on the assumption that the contract was valid and would stand, and must normally himself return any performance received under the contract. The latter requirement is plainly based on principles of unjust enrichment: if he were allowed to terminate the contract and receive back what he has given, and at the same time to keep what he had received, he would be unjustly enriched to the extent of the benefit retained.

It is to be remembered that in the ratification case just as in the fraud case, there is only one contract involved: that actually made between T and A. Since it was in whole or in part unauthorized, P need not be bound by it. If he elects to affirm, however, he can only affirm the contract as made; he cannot affirm, *i.e.*, enforce, the authorized part, and not affirm the unauthorized part. To do so would be forcing on T a contract he never made.

It follows, thus, that in the typical case of the partly-executed contract, the P has two choices and two only. He may disaffirm, in which case he must return what he has received. Or he may affirm, in which case he necessarily ratifies the unauthorized part of the contract. In the latter case the typical result is to bind him to perform the unauthorized part of the contract, which he had hoped to repudiate, although retaining the benefit of the third party's performance.

In the fraud cases the election to affirm (and, in both the fraud and the ratification cases, it is the election to affirm which is more decisive

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41. Rarely the case is presented where A has made several authorized contracts at the same time or where, although there is nominally only one contract, it is clearly and fairly severable. In such a case one of the contracts, or a severable part, may be ratified. See Meeks v. Adams Louisiana Co., 49 F. Supp. 489 (S.D. Ga. 1943).
and more vital) is commonly made in one of two ways: (a) by affirm-
ance in pais and (b) by affirmance by suit. The same is commonly
true of election to ratify.

Affirmance in Paris.—By this is simply meant conduct incon-
sistent with the obligation of the party to disaffirm, if he ever means
to do so, promptly on his discovery of his right to elect. Plainly
rescission is more drastic and more upsetting to the other party than
affirmance (and this is particularly true in the ratification cases since
there, as distinguished from the fraud case, the ratification imposes
no burden but on the contrary leaves the other party in the situation
he has all along assumed he was entitled to be in) and plainly each day
during which the dominant party fails to make his choice to rescind
adds to the actual or possible hardship to the other party. Hence
courts are rather quick to find that P’s failure either to return what he
has received or to demand a rescission, justifies treating him as having
affirmed.

So where the agent of a lumber company without authority con-
tracted to buy standing timber and the lumber company contracted to
sell it to a third party in the form of lumber, had part of it milled and
delivered to the third party, it was held too late for the company to
insist that the contract of purchase was unauthorized.43

And so where the manager of plaintiff’s racing stable sold a race
horse without authority, and some months later, after the horse in the
hands of its new owner had won several races, plaintiff challenged the
sale as unauthorized and demanded a return of the horse (but without
tendering a return of the price) it was held that he had ratified.44

And so where plaintiff corporation’s agent, authorized to rent
property but not for more than two years, leased it to defendant for
four years, the lease being put in plaintiff’s safe although plaintiff never
bothered to examine it, and plaintiff accepted rent from defendant for
nearly two years, it was held that plaintiff must be charged with having
ratified and could not eject defendant at the termination of two years.45

Land Contracts Induced by Unauthorised Misrepresentations.
—As a real estate broker is only authorized to find a possible buyer,
with whom the principal then negotiates, it is assumed that statements
as to the character and attributes of the land will be made by the prin-

42. There can, of course, be an express affirmance just as there can be an ex-
press ratification, but this is not pertinent in the present context.
45. Payne Realty Co. v. Lindsey, 91 W.Va. 127, 112 S.E. 306 (1922). See also
Sargent v. Drew-English, Inc., 12 Wash.2d 320, 121 P.2d 373 (1942); Marian v.
Peoples-Pittsburgh Trust Co., 149 Pa. Super. 653, 27 A.2d 549 (1942); Cannon v.
Blake, 353 Mo. 294, 182 S.W.2d 303 (1944).
principal in person while negotiating. It follows that the incidental or apparent authority of the broker to make representations is very limited and scarcely goes beyond identifying the land. Where the broker has thus no power to bind the principal by his representations, it follows that the principal cannot be held liable for them in tort. A majority of cases however (and the Restatement)\(^{46}\) to prevent unjust enrichment of the principal, allow the third party to rescind in such a case.

Suppose that the third party, on discovering that he has been deceived, demands a rescission from the principal; the principal refuses and says that he stands on the contract. Will this have the effect of ratifying the representations so as to make the principal liable in tort?

An affirmative answer might be expected. In other situations courts are quick to say that a principal cannot retain the benefits of a transaction and at the same time disavow the means by which the benefits have been obtained. A little authority applies this view here. Thus in *Light v. Chandler Improvement Company*,\(^ {47}\) the court says that the buyer, on discovering the fraud, may go to the seller and offer to rescind. "If the owner, after due notice of the fraud and offer of rescission, insists upon holding the purchaser to his bargain, he will then be deemed to have ratified the alleged representations of the agent and the purchaser may pursue as against such owner and remedy which he would have had, had the false representations been made by the owner in person."\(^ {48}\)

In most instances, however, it seems to be assumed that the purchaser is adequately protected by his right to rescind and that the seller's unwillingness to rescind will not be treated as an affirmance. It is not quite clear what is the basis of this attitude. Perhaps it is thought that in such a case since the sale itself is as authorized (i.e., the agent was unquestionably authorized to find a buyer) and the principal has performed all *promises* made on his behalf, that the principal is not keeping anything to which he is not entitled by the contract. Such an argument is plainly fallacious, however, particularly where the loss of bargain theory of damages is applied, since his liability is the same as if he had promised to sell a property of the type represented, which he plainly has not done. In substance the case seems to be like one involving an unauthorized warranty, where retention or attempt to enforce will normally be treated as ratification. Perhaps, in view of the traditional reluctance of courts to hold an innocent principal for fraud, it can be said that they are simply expressing a

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47. 33 Ariz. 101, 261 Pac. 969 (1928).
feeling that the third party should have known better and is given all the protection he deserves by being given a right to rescind.

Restitutionary Relief Based on Receipt of Benefits.—In a number of cases a principal who has received money as the result of the unauthorized act of his agent, is held liable to $T$ in an action of assumpsit for money had and received. In such cases it is seldom said that the defendant's liability rests on a theory of ratification. It is apparent, nevertheless, that the basis of the liability is the same as would exist in slightly different circumstances where it would be said that defendant had ratified. The retention of benefits, that is, is the basic operative fact charging defendant with liability; what form, technically, the relief takes is relatively immaterial.

A typical instance is afforded by the case of *First National Bank v. Oberne*, where defendant, a Chicago firm dealing in hides and pelts, had an agent in Las Vegas who was authorized to draw checks, for their business, on their account in plaintiff, a Las Vegas bank. The agent received a note from *J. S.*, for a personal debt; he indorsed and guaranteed payment of the note in defendant's name, discounted it with the bank, and put the proceeds into defendant's account. Thereafter he withdrew the money on various checks, two of which, amounting to $560.27, were given in payment for pelts bought for defendant and which, apparently, were shipped to them and used by them in the ordinary course of their business. The guaranty of the note was conceded to be outside the authority of the agent, but defendant was held liable to the extent of $560.27, namely the extent to which they received the proceeds of the unauthorized act. The court said that they could not "be permitted to repudiate a contract made in their name by an assumed agent, on the ground of a want of authority in the agent to make it, without restoring the money received by them under the contract, and as the result of an agent's act." 50

It is clear that in such a case this is more realistic than to speak of ratification. Defendants have neither prospectively nor retrospectively approved the conduct of their agent; this is, however, money (in the form of pelts) received by their agent, ostensibly on their behalf, and if they elect to keep it, it can be argued that they are as much obligated to account for it as if it had been in fact received on their account.

The question might be asked: suppose defendant's account with the bank was overdrawn because of improper drafts on it made by the

49. 121 Ill. 25, 7 N.E. 85 (1886).
A, so that the pelts in fact represented payment by A to P for prior improper transactions—could it then be argued that the value was received in payment of an antecedent debt, making defendant a bona fide purchaser for value? It could be asked: is defendant barred from asserting such a claim by virtue of the knowledge of the agent who was the active party? These and other questions involving restitution, bona fide purchase, and the like, can only be suggested here, and a few typical cases cited. Any more detailed discussion must be sought in works on Equity and Restitution.

**Affirmance by Suit.**—As already pointed out, there is in these cases only one contract: the contract as made by the agent. It is not possible to sue on part of a contract. Hence, a suit brought by the principal on the contract can only be taken as a suit brought on all the contract; it is necessarily brought on the (hitherto) unauthorized portion as well as on the authorized portion. This, it should be stressed, is not the same as saying that P has evinced his wish to affirm. Quite the contrary. No doubt in most instances he is either deliberately taking a chance or acting in ignorance of probable consequences. A party with an election must make it sooner or later; sooner, in fairness to the other party. And when he has taken an unequivocal step which is only consistent with an affirmance it is difficult to say that he can escape the consequences by showing that he did not intend them.

The party who has affirmed by bringing suit may have had only the alternative of suing or not suing, or he may have had a choice of several remedies, one or more of which would not necessarily have been an affirmance.

In a Minnesota case the agent of plaintiff corporation had sold T shares of plaintiff’s stock, taking his note therefor, and promising that plaintiff would employ him as local representative, and furnish him with a place of business and equipment; the latter part of the agreement was unauthorized. Without furnishing the place of business or equipment (although a certificate of stock had been given) plaintiff sued T on the note. It was held that the effect was to ratify the unauthorized portion of the contract; plaintiff was then necessarily in default, having neither given the promised consideration nor evinced any readiness and willingness to do so.


In a well known Connecticut case plaintiff was a dealer in musical instruments; his agent sold and delivered a piano to defendant, the latter to pay for the same by cancelling certain brokerage debts which the agent owed or expected to owe him. Such a sale was of course unauthorized; when plaintiff discovered the sale he repudiated it and brought an action of assumpsit to recover the price of the piano. The court said that they could have recovered the piano in replevin or its value in trover. "But, knowing the terms of the sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant. . . . The argument for the plaintiff (though it is not so stated) seems really to involve the fallacious assumption that the plaintiffs could affirm the contract in part and repudiate it in part; that is, that the contract is to be treated as good for the agreed price but bad as to the agreed mode of payment. But the law requires a contract to be affirmed or repudiated in its entirety. There was no contract at all relative to the piano except the one made by Day as their agent; and when the plaintiffs, knowing the facts, sued on that contract, they affirmed it in every essential particular, both as to price and as to the terms of paying the price."

Of the two cases just stated the first at least seems to reach an eminently satisfactory result. Plaintiff's attempt to enforce the contract without the authorized term failed. In effect the result was a rescission, leaving the parties where they should be, unless plaintiff were willing to be bound by the contract as made by their agent. The result of the second is more questionable. It leaves defendant with a piano to which, as against plaintiff, he had no claim; plaintiff is out a piano, not from any attempt to be grasping or to force on defendant a

made a deed of its property to plaintiff as trustee for its creditors, and plaintiff liquidated the assets and applied them pro rata among the creditors. Thereafter he was appointed receiver and brought an action to enforce the stockholders' statutory liability. Defense, that one Lacy, who had negotiated the deed of trust, had secured it on the agreement that the creditors would waive the stockholders' liability. Held, no ratification. "The evidence discloses no other benefit to the creditors of the company except a part payment of their debts, something they were legally entitled to receive and retain irrespective of any contract."


contract he never made, but solely because of a mistake of law as to the proper form of relief to be invoked. Perhaps plaintiff should be allowed to dismiss and start again, or to amend. However, where the action is brought with knowledge of the facts it is hard to say how far the court should go in allowing a plaintiff to change his ground because of his own mistake as to the merits of the course of action he has deliberately chosen. 56

54. A later hearing in the case, 59 Conn. 588, 22 Atl. 437 (1890), suggests that P may not really have known what contract he was ratifying.

55. The doctrine of the Shoninger case appears to be approved by the Restatement. See § 97, Illustration 1. It may be suggested that in the fraud cases the party presumably gets something of value, whichever alternative he elects; here he just elected himself out of his piano.

Instructive to contrast with the Shoninger case is United Australia, Ltd. v. Barclays Bank, [1941] A. C. 1, [1940] 4 All. E.R. 20. "E. was the secretary and a director of the plaintiff company. Without authority, he indorsed a cheque, made payable to his company, to M. F. G. Trust, Ltd. The defendant bank accepted it for collection, and credited the proceeds to the account of M. F. G. Trust, Ltd. Subsequently, the plaintiff company commenced an action against M. F. G. Trust, Ltd., to recover the value of the cheque as a loan, or, in the alternative, as money had and received. Before final judgment, M. F. G. Trust, Ltd., went into liquidation. The plaintiffs put in a proof for the sum alleged to be due in the liquidation, but the proof was not admitted, as the funds to meet the demands of creditors were merely trivial. They then brought the present action against the bank for wrongful conversion of the cheque. The defence pleaded was, inter alia, that the plaintiffs had ratified E.'s indorsement of the cheque by suing the M. F. G. Trust, Ltd., and had, therefore, waived the tort." This defense was successful below, but was denied by the House of Lords, which held that there was no election or ratification. Lord Atkin said: "I will deal with election later, but at present I wish to deal with the waiver of the tort which is said to arise whenever the injured person sues in contract for money received. If the plaintiff in truth treats the wrongdoer as having acted as his agent, overlooks the wrong, and, by consent of both parties, is content to receive the proceeds, this will be a true waiver. It will arise necessarily where the plaintiff ratifies, in the true sense, an unauthorised act of an agent. In that case, the lack of authority disappears, and the correct view is, not that the tort is waived, but that by retraction of the ratification it has never existed. In the ordinary case, however, the plaintiff has never the slightest intention of waiving, excusing, or in any kind of way palliating the tort. If I find that a thief has stolen my securities and is in possession of the proceeds, when I sue him for them, I am not excusing him. I am protesting violently that he is a thief, and, because of his theft, I am suing him." ... Concurrently with the decisions as to waiver of tort, there is to be found a supposed application of election, and the allegation is sometimes to be found that the plaintiff elected to waive the tort. It seems to me that in this respect it is essential to bear in mind the distinction between choosing one of two alternative remedies and choosing one of two inconsistent rights. As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one, you could not claim on the other. Real actions have long disappeared, and, subject to the difficulty of including two causes of action in one writ, which has also now disappeared, there has not been, and there certainly is not now, any compulsion to choose between alternative remedies. You may put them in the same writ, or you may put one in first and then amend and add or substitute another."...

... "On the other hand, if a man is entitled to one of two inconsistent rights, it is fitting that, when, with full knowledge, he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which, after the first choice, is by reason of the inconsistency, no longer his to choose. Instances are the right of a principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal, the right of a landlord whose lease has been committed to exact the forfeiture or to treat the former tenant as still tenant, and the like."... "I think, therefore, that, on a question of alternative remedies, no question of election arises until one or the other claim has been brought to judgment."... "Verschures Creameries v. Hull & Netherlands S. S. Co. [1921]
Change of Position. The election angle of ratification has been stressed because of its usefulness in explaining certain cases otherwise hard, if not impossible, to explain. These involve the matter of change of position. A person wishing to rescind normally must restore what he has received. This is obviously because of the unjust enrichment that would otherwise accrue to the rescinding party. However, there may be cases in which forcing him to restore would in fact unjustly enrich the other party. In such a case $P$ should be able to rescind, i.e., repudiate the unauthorized agreement or portion thereof, without restoration.

Among other instances given in §99 of the Restatement, is this: 
"4. Purporting to represent $P$ but without power to bind him thereby, $A$ contracts with $T$ to deliver to $P$ a case of grapefruit. $P$, supposing that the grapefruit came as a gift from a friend in Florida, eats some of them and the rest are destroyed in a fire before he learns the facts. There is no affirmance."

Plainly in such a case to make $P$ pay would be to unjustly impoverish $P$. He has in fact received no substantial benefit from the grapefruit. And $T$ would be unjustly enriched by escaping a loss resulting from his own carelessness and which, as between him and $P$, $T$ should bear.

A not uncommon case involves the agent of a corporation who travels selling its stock. He is likely to be carrying blank certificates which he is authorized to fill in and deliver. In such a situation an unscrupulous agent, dealing with a housewife or other possible purchaser little familiar with business practices, is likely to clinch the sale by making the obviously quite unauthorized promise that at the end of a period the company will on request repurchase the stock at a named price, usually its par value or even more. The salesman thereby earns a commission and expects to be on another job in another part of the country before the named time elapses and the company discovers what has been done.

Practically all possible solutions may be found in the cases dealing with such a practice. The principal may be held on a theory of ap-

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2 K.B. 608, upon which both the courts below founded their decision, has, with great respect, very little bearing on the matter. A firm of carriers, being authorised by the plaintiffs to carry goods to $A$, delivered them to $B$. The plaintiffs invoiced the goods to $B$, sued him for the price, recovered judgment, and took bankruptcy proceedings against him. They afterwards sued the carriers for misdelivery. It was the plainest case of ratification of an act done by the carriers purporting to deliver on behalf of the plaintiffs, and, as such, there could be no complaint against the carriers for breach of authority."

56. Obvious, that is, to a lawyer or business man, but not likely to be so to the unsuspecting victim.
parent authority or of ratification; the principal may be held on a quasi-contractual theory; the principal may not be held on any theory. The last solution seems most readily justified on a change of position theory. The matter will not come to light for a period of years after the sale. The company will long since have spent the money. The purchaser naturally will not be seeking to enforce the agreement unless the stock is now worth less than the promised price. The election presented - between rescission and affirmance is now purely nominal, since either way the company will have to pay out for the stock more than its value. In the light of these circumstances it seems that the purchaser has no compelling equity against the company. Rescission is normally assumed to mean no loss to either party, but here one party or the other has to take the loss in value and it seems fair to put it on the one who allowed himself to be tricked by the agent.

The case of Johnson v. City Company affords a striking instance of change of position in a situation analogous to those just discussed. In November of 1929 defendant's agent sold plaintiff certain stock for $450 a share, warranting that its market value would be $650 a share within three days. The warranty was fantastic, except perhaps in the hysteria of the moment; it was plainly unauthorized. Three days later the value of the stock had gone, not up but down, two hundred dollars a share. Plaintiff sued for his loss, alleging among other things, that defendant could not retain the benefits of the transaction and at the same time repudiate the authority of the agent to make it. Such a doctrine, the court replied, does not apply where the principal has changed his position before learning of the agent's unauthorized act.

57. See Wright v. Iowa Power & Light Co., 223 Iowa 1192, 274 N.W. 892 (1938).
59. In Seifert v. Union Brass & Metal Mfg. Co., 191 Minn. 362, 254 N.W. 273 (1934), the purchaser was allowed to recover the purchase price back in a quasi-contractual action. The court said: "The findings establish that Mr. Michel had no authority to bind defendant by offer of monthly bonus or to repurchase. But, nevertheless, that agreement was both term and condition of the supposed contract under which plaintiff parted with his money. Defendant cannot affirm in part and repudiate in part. Failure of the agreement to bind defendant according to its terms makes a clear case of no contract. Plaintiff did not get what he paid for; there was failure of consideration for his payment, and so he is entitled to recover it in order to prevent the unjust enrichment of defendant which otherwise would result. One of the long recognized heads of such recovery is 'where the money was paid under a mistake as to the creation, existence, or extent of an obligation.' Keener, Quasi-Contracts, 112. This is just such a case."

61. 78 F.2d 782 (10th Cir. 1935).
To be contrasted with this is the famous case of *Wheeler v. the Northwestern Sleigh Company*. P's agent, authorized to sell P's stock, did so but, without authority, threw in gratis a dividend already declared on the stock and so not normally passing with a sale of the stock. P was allowed to enforce the sale of the stock without the dividend, making T pay for the stock alone the price he had agreed to give for the stock and the dividend. No facts appear which would warrant a justification of the decision in terms of change of position. Less than three months elapsed between the sale and P's discovery of the unauthorized term. It is not suggested that the value of the stock had changed significantly; indeed there is no suggestion that it had changed at all. This decision and some others like it, appear to overlook the fundamental equities of the problem, and it is believed that they must be treated as unsound.

**Ratification Against an Unwilling Third Party**

The case sometimes, though infrequently, arises, where a principal, finding out about the unauthorized contract and thinking it a profitable one, wishes to ratify, but the third party (perhaps for the same reason that the principal wishes to ratify) repudiates the contract and insists he is not bound. Can the principal effectively ratify in such a case?

The few cases on this point illustrate three different views.

*The English View.* The English cases have applied the maxim *omnis ratihabitio* with strict logic. Since the effect of the ratification is to treat the contract as if it had been authorized in the first place, and since the third party was plainly willing to be bound by the contract at the time it is made, it follows automatically that once the contract is

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62. 39 Fed. 347 (E.D. Wis. 1889).
63. In Bolton Partners v. Lambert, 41 Ch. D. 295 (1889), plaintiff's manager, Scratchley, without authority leased defendant property belonging to plaintiff. Later, defendant attempted to withdraw from the contract; thereafter plaintiff ratified. Specific performance was granted. Lopes, L. J., said: "If there had been no withdrawal of the offer, this case would have been simple. The ratification by the plaintiffs would have related back to the time of the acceptance of the defendant's offer by Scratchley, and the plaintiffs would have adopted a contract made on their behalf."

"It is said that there was no contract which could be ratified, because Scratchley at the time he accepted the defendant's offer had no authority to act for the plaintiffs. Directly Scratchley on behalf and in the name of the plaintiffs accepted the defendant's offer, I think there was a contract made by Scratchley assuming to act for the plaintiffs, subject to proof by the plaintiffs that Scratchley had that authority."

"The plaintiffs subsequently did adopt the contract, and thereby recognized the authority of their agent Scratchley. Directly they did so the doctrine of ratification applied and gave the same effect to the contract made by Scratchley as it would have had if Scratchley had been clothed with a precedent authority to make it."

"If Scratchley had acted under a precedent authority the withdrawal of the offer by the defendant would have been inoperative, and it is equally inoperative where the plaintiffs have ratified and adopted the contract of the agent. To hold otherwise would be to deprive the doctrine of ratification of its retrospective effect."
ratified, the third party must be treated as being as much bound as if there had been authority originally. This seems reasonable and, unless a long time has elapsed (and the later English cases say that $P$ must ratify within a reasonable time), there seems no great hardship on the third party.

American courts have been slow to follow this view, however, and it has been rigorously criticized by writers. Thus Mr. Seavey says that the effect "is to worship the fiction of relation back as a transcendental shrine and justifies the harshest language used by the critics of the doctrine. It creates an offer when none was intended and imposes upon the mistaken party an obligation not imposed upon an offeror. The English court creates before ratification a contract subject to disaffirmance, a one-sided obligation created elsewhere only where it has been paid for, where protection is afforded to a dependent class, or where there is fraud." 65

The Wisconsin View. The extreme opposite view has been taken by some early Wisconsin cases, supposed still to be law. In *Dodge v. Hopkins*, 66 where the principal sought to enforce a land contract made by an agent whose power of attorney, the court found, did not authorize the sale in question, the court said that if (at the time the purported contract is made) "either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory on the other." Furthermore "no subsequent act of the party, who has neglected to execute it can render it obligatory on the party who did execute it without his assent. . . . The principal in such case may, by his subsequent assent, bind himself; but if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the principal which, if he does, the contract, by virtue of such mutual ratification, becomes mutually obligatory." 67

On this view the principal's attempted ratification amounts virtually only to an offer, which the third party may accept or not as he chooses. Under it ratification becomes a one-sided proposition by which a principal may bind himself but not the other party. If the English view seems to carry Agency doctrines to their logical extreme at the expense of contract concepts, it may be said that the Wisconsin view carries Contract doctrines to their logical extreme at the expense of Agency

64. See *In re Portuguese Consolidated Copper Mines*, 45 Ch. D. 16 (1890).
66. 14 Wis. 630 (1861).
67. See also *Atlee v. Bartholomew*, 69 Wis. 43 (1887). A note in [1947] *Wis. L. Rev.* 394 remarks: "This unique view has not been repudiated by any later Wisconsin decision. But neither has it been reiterated in recent years."
THE RATIONALE OF RATIFICATION

concepts. Of course the Wisconsin view could be justified as taking the blunt and realistic view that there really is no such doctrine as ratification; there are only cases where equitable considerations preclude someone, usually the principal, from relying on the agent's lack of authority. No strong equitable considerations appear to require that an unwilling third party be held bound where the principal originally was not; hence there is no occasion for lumping this situation with others really unlike it, and invoking the name "ratification." As already appears the present writer would find little difficulty in agreeing with this. However, if we are to continue to assume that the maxim *omnis ratihabitio* and so on really expresses something in the nature of a rule of law it is hard to think of the Wisconsin cases as anything but deviations.

The "Prevailing" View. In as far as the few American cases permit speaking of a majority rule, it would seem to be a compromise between the English and the Wisconsin doctrines. The principal may ratify if he does so before the third party withdraws from the contract. On this view the original purported contract is in substance an offer by $T$ to $P$; like any other offer it may be accepted before, and only before, withdrawal.

This view is thus expressed in § 88 of the Restatement: "To constitute ratification, the affirmance of a transaction must be before the third party has manifested his withdrawal from it either to the purported principal or to the agent, and before the offer or agreement has otherwise terminated or been discharged."

As is often the case with compromises, this position seems to have no particular logic to recommend it. Either the English or the Wisconsin view appears more logical. However, as a matter of policy and psychology, it eliminates the lack of mutuality characteristic of the English view and at the same time does not completely repudiate the doctrine of ratification nor prevent the principal in most instances from taking advantage of it.

Suppose insurance on the principal's property to be effected by one purporting to be but not in fact authorized to do so. May the principal, after loss has occurred, ratify so as to collect the insurance? Under the English rule as to ratification against an unwilling third party, the

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insurance company's objection is no defense, and a line of cases, mostly
dealing with marine insurance, have settled it that the principal may
ratify after loss. Conversely, under the Wisconsin view, there could
be no ratification unless the company was willing, which it would
scarcely be likely to be.

Under the prevailing American view there could be no ratification
if the company learned of the lack of authority and withdrew before
the principal ratified, but if the principal attempts to ratify before the
company withdraws the weight of the scant authority is that he may.

One striking consequence is that this permits the principal to do
by ratification what he could not do directly, namely, insure lost prop-
erty. The result, however, is not as anomalous or as hard on the
insurance company as it might seem to be at first sight. The premium
will have been paid (or must be accounted for); the transaction, from
the standpoint of the insurance company, will be completely routine and
will present none of the apparent hardship there is in the case of an
individual third party forced to pay a claim that might have been
averted had the agent's lack of authority been known.

The Restatement does not subscribe to this view. By § 89 ratifica-
tion is not effective, at the third party's election, "if it occurs after the
situation has so materially changed that it would be inequitable to sub-
ject him to liability thereon."

70. See Hagedorn v. Oliverson, 2 M. & S. 485 (1814); Williams v. North
China Insurance Co., 1 C.P.D. 757 (1876); Grover and Grover, Ltd. v. Mathews

71. See Watson v. Southern Ins. Co. of New Orleans, 31 So. 904 (Miss. 1902);
Bontwell v. Globe & Rutgers Fire Ins. Co., 193 N.Y. 323, 85 N.E. 1087 (1908);
Marqusee v. Hartford Fire Ins. Co., 198 Fed. 475, 1023 (2d Cir.); cert. denied,
229 U.S. 621 (1912); Parr v. Western Assurance Co., 30 Cal. App. 489, 159 Pac. 609 (1916);
Norwich Union Fire Ins. Society v. Paramount Famous
Laskey Corp., 50 F.2d 747 (9th Cir. 1931), noted in 22 HARV. L. REV. 139 (1932).

72. See Mallard v. Hardware Indemnity Ins. Co. of Minn., 216 S.W.2d 263

73. In the Marqusee case, supra note 71, it is said: "Before ratification an un-
authorized contract is not binding, because it is not mutual. The party discovering
the lack of authority may therefore withdraw. When he has done so there is
nothing to ratify. What shocks us at first blush is that one may ratify an un-
authorized contract after he knows that it is to his own advantage to do so, and so
bind the other party to his apparent disadvantage. Further reflection, however,
causes this apparent unfairness to disappear. The other party, having agreed to be
bound by this contract and not having withdrawn from it, has no ground to com-
plain if compelled to perform; the original lack of authority having been cured."
74. See Cook v. Tullis, 18 Wall. 332 (U.S. 1874); Pollock v. Cohen, 32 Ohio
St. 514 (1877); Kempner v. Rosenthal, 81 Tex. 12, 16 S.W. 639 (1891); Norton
716, 40 S.E. 790 (1902); People ex rel. Goldschmidt v. Board of Education, 217
N.Y. 470, 112 N.E. 167 (1916); Tashie v. Industrial Commission, 71 Utah 33, 262
Pac. 281 (1927), noted in 41 HARV. L. REV. 792 (1937); Forrest v. Hawkins, 169
Va. 470, 194 S.E. 721 (1938); Pape v. Home Ins. Co., 139 F.2d 231 (2d Cir. 1943).
thought to be true in the insurance cases, unless the consideration has been paid before loss. Query, whether this factor has much to do with the fairness of the matter, since the principal will naturally have to pay or account before receiving the insurance.

**Conclusion**

Latin phrases, once learned, are hard to forget. Lawyers who could not ask the way or order a drink in Rome, still talk learnedly of *vi et armis* and administrators *cum testamento annexo de bonis non*. It would not be difficult to treat most of the matters herein discussed, as simply a part of the law of authority, apparent authority, and agency powers (with bits of straight and quasi Contracts tossed in). And, it is suggested, it would be much, much better to do so than to keep on asserting that a ratification is equipollent to a prior mandate.