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Vicarious Liability for Fraud and Deceit in Iowa

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IN MATURE legal systems persons are held individually responsible for the harmful results of their acts; indeed, such a concept seems indispensable in the maintenance of an ordered society. And likewise when a person directs another to do an act, and it is done as directed, the person directing the act is held to the same responsibility as if he had done the act personally; for whatever the result is in criminal law, the civil law does not distinguish between an act done personally and one which, although accomplished through the instrumentality of another is accomplished as intended by the one directing it. In such cases, however, the legal problems involved cause no difficulty to those interested in the three-party relationship called agency.

The moment, however, the one who has been directed to act, does an act for which he has not been directed, or does an act in a manner different from that directed, the question of the responsibility of his principal for these acts becomes more difficult. In general these acts may be divided into acts imposing contractual obligations on the principal and those subjecting him to tort liability. In the first of these classes the act results from the agent dealing with the third party, in the second class the act is normally independent of such dealings. In either case the principal may be liable for the act, although he has not directed it or it has been done contrary to his direction, but the basis of his liability will largely depend upon the type of act his agent performed.

Each class has its own problems, but when an agent in dealing with a third party makes deceitful representations of which his principal had no knowledge the difficulties of both classes are combined. In such cases the act arises out of a contractual dealing with the third party which is in itself tortious; so that the remedy is frequently sought in an action of tort rather than in contract. The situation because it involves both tort and contract necessitates a consideration of the liability of the principal for each.

In considering this problem two more or less interrelated inquiries must be answered: What are the reasons for imposing liability on the principal? and What is the extent of that liability? Although it may be as Mechem says, “an obvious natural and
moral necessity as well as a legal one, founded upon manifest doctrines of good faith and moral and legal responsibility that the principal should be liable for the acts which he directs his agent to commit, it is equally obvious that such natural law concepts are unprofitable in explaining why a principal who was both ignorant and innocent of the deceit of his agent should stand the responsibility for its consequences.

**Principal’s Liability for Deceits He Neither Contemplated Nor Directed**

Principals though personally innocent are almost universally held responsible in an action of deceit for some of the frauds and deceits of their agents. The reasons for this liability are our first consideration; the limits of liability will be considered later.

One explanation of the principal’s liability is founded on the maxim that where one of two innocent parties must suffer he that has placed the deceiver in a position to do harm must bear the loss. This suggestion appears attractive as a simple explanation of the principal’s liability, but like so many maxims it is more the statement of a result than of the reasons for it. It apparently borrows much from the tort concept that where one person establishes or sets in motion a conceivably dangerous instrumentality, he must accept responsibility for the harm that it occasions although he himself is personally innocent of any wrongdoing. This requirement of innocence is of significance, however, only in regard to the one injured, for as applied to the one who “put the deceiver in a position to do harm” innocence is an unnecessary element in liability and its use merely emphasizes the extended degree of liability to which the principal may be subjected. The proposition might be more accurately stated in this fashion: Where a person has placed a deceiver in a position to do harm he must bear the loss suffered by innocent third parties who have dealt with the deceiver. It should be noted, however, that regardless of the manner in which the proposition is stated it offers no reason for the result which it proposes.

Other cases suggest that the principal is liable because the

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1 Mechem, Agency, §704.

2 Hem v. Nichols, 1 Salk 289 (K. B. 1708); Locke v. Stearns, 1 Met. 560 (Mass. 1840); Lee v. Sandy Hill, 40 N. Y. 448 (1869); Sanford v. Handy, 23 Wend. 260 (N. Y. 1840).
agent’s acts or representations may be imputed to him. This suggestion is of course not helpful; it is merely another way of stating in a fictitious manner that the principal is liable.

Again some courts say that the principal will be liable in the same manner as if he had made the statement, if the statement was made within the scope of the agent’s employment. As a direct statement this adds nothing: by implication, however, it suggests that the principal is liable either because he himself is making a representation that the agent represents his will, or that he is liable because the employment included the making of such statements. The first suggestion is alluring until we discover that the principal may be liable for his agent’s deceits when no representations on his part can be found; and the second is unattractive for it merely substitutes one undetermined phrase for another—‘‘scope of employment’’ is quite as illusory as the determination of liability.

Perhaps the reasons for holding the principal responsible for the deceits of his agent are in final analysis social and economic; based on the concept that within certain limits the principal should pay for deceits just as he pays for other business mistakes. In other words, that it is good policy to require the business which profits from honest dealings to stand the loss occasioned by its dishonest transactions. The basis of such a conclusion is a reasonable one, for the business transactions from which this type of loss result indicate that while the principal may be and often is entirely innocent of any fraudulent conduct of his agent in a particular case, he must nevertheless anticipate the possibility of

3 Hopkins v. Hawkeye Ins. Co., 57 Iowa 203, 10 N. W. 605 (1881) (the agent’s acts in regard thereto must be considered as the acts of his principal); Hathaway v. Johnson, 55 N. Y. 93 (1873) (‘‘the fraud of the agent acting within the scope of his authority is, in law, imputed to his principal’’); Merrit v. Huber, 137 Iowa 135, 114 N. W. 627 (1908); Fulton v. Fisher, 151 Iowa 429, 131 N. W. 662 (1912); Campbell v. Park, 128 Iowa 161, 101 N. W. 861 (1904); Hollinsworth v. Holbrook, 80 Iowa 151, 45 N. W. 561 (1890).


5 See Warren A. Seavey, ‘‘Rationale of Agency,’’ 29 Yale L. J. 858, 881 (1920).
such occurrence. He thus has the choice of doing everything personally and transacting a small business safely or conducting his business through others and accepting a degree of responsibility for their acts. Thus if he employs agents he must realize that regardless of his care, some of them may be tempted by a natural and human desire to make sales and commissions, to exceed their authority, fail to disclose the limitations on their power, or even in some cases to make false and deceitful representations. The principal must also apprehend that the acceptance of his agent in the business world will depend in a large measure on the use of his name, and that by and large his agent will be dealt with in reliance on that name.

Further, the principal is the aggressor; with all of the instrumentalities at his disposal he has selected one, and for that one he should stand responsible, not only because it is he that has set it in motion, but also because third parties will inevitably accept that instrumentality as his. And of course where the business is corporate, it must of necessity act by and through agents, so that it would seem difficult to contemplate business operation without including the mistakes, errors and deceipts of its agents as one of the incidents of that type of business.

The complexity of modern business organization, likewise, forecloses any thorough investigation by the third party of the source of an agent’s power or the truth of his representation; indeed, in the normal transaction the press of other business demands that the parties deal with each other in reliance on their respective good faith. And even in the small individual transaction where the considerations of large scale business are not present, the psychological phenomenon that the normal human being is essentially a trusting individual who is accustomed to deal honestly with honest individuals, is a sufficient reason for the law to protect third parties rather than to impose upon them the duty of exercising a suspicious inquisitiveness with which nature has not endowed them. On the other hand, the placing of liability on the principal does not place this unnatural duty of suspicion upon him; it rather declares that because he has undertaken to accomplish a result in the manner of his own selection and for his own individual profit, it is proper that he who will benefit from honest endeavor should stand the loss occasioned by deceit. It is believed that such considerations as these lie behind the reasons which the courts suggest as the basis of the principal’s liability.
Indeed, most courts have on one theory or another held principals responsible for some of the fraudulent acts and representations of their agents. The third party is universally granted the right of rescission.\(^6\) This, however, frequently fails to return him to his original position; consequently some courts have allowed third parties to maintain an action on deceit.\(^7\) The purpose has not been, however, to give him the benefit of his bargain, but only to grant him the protection that rescission fails to give.

A few states have, nevertheless, refused to give any relief in deceit to third parties.\(^8\) These states do so on the theory that liability in deceit arises only from the conscious expression of the will of the person to be bound. In other words, they refuse to impose liability without fault. They stigmatize this type of liability as an anomaly in the law. It is not. Many jurisdictions hold persons for loss occasioned by their animals,\(^9\) for damage caused


\(^8\) Kennedy v. McKay, 43 N. J. L. 288 (1881); State v. Fredericks, 47 N. J. L. 469, 1 Atl. 470 (1885); Keefe v. Sholl, 181 Pa. St. 90, 37 Atl. 116 (1897); Dello v. Peterson, 32 Idaho 172, 180 Pac. 167 (1919); see also, Erisman v. McCarty, 77 Colo. 289, 236 Pac. 777 (1925); Hodson v. Wells & Dickey Co., 31 N. D. 395, 154 N. W. 193 (1915); Samson v. Beale, 27 Wash. 537, 18 Pac. 180 (1902); Ellison v. Stockton, \textit{supra} n. 6.

\(^9\) While it is not suggested that there is any analogy between the animal cases and the agency cases, the animal cases, the "Fletcher v. Rylands cases," and employer's liability cases have been included merely to show that liability of this type is not unusual. Noyes v. Colby, 30 N. H. 143 (1855); Manton v. Brockelbank, [1923] 2 K. B. 212, 199 L. T. 135; Vredenburg v. Behan, 33 La. Ann. (1881); Dickson v. McCoy, 39 N. Y. 400 (1868).
by things kept upon their land,\textsuperscript{10} for the acts of their servants\textsuperscript{11}—
in short persons are held liable for many torts where there is no
personal fault. A deceit is a tort, and the degree of liability
should be no less than that for other torts, merely because the
deceit may result in a relationship which gives rise to certain con-
tractual obligations in which at least an apparent expression of
the will is required.

The view of the minority, though apparently unsound, has been
accepted by a fairly recent Iowa case, with the result that in cer-
tain situations the action of deceit is no longer a protection to de-
ceived third parties who have dealt with defrauding agents, when
they seek recovery against the principals. The case in which this
limitation was suggested was \textit{Ellison v. Stockton}.\textsuperscript{12} The principal
had listed his land with real estate agents for the purpose of secur-
ing a purchaser. The agents showed the land to the plaintiff and
made false representations which were alleged to have induced the
sale. At a later date the plaintiff went to the defendant and agreed
to purchase the land. The plaintiff now asks damages for the in-
jury he sustained because of the agent's deceitful representations
that the land would not overflow. The court in reviewing the case
assumed that the representations were not true; that they were
unknown to and unauthorized by the principal; and that the plain-
tiff purchased the land in reliance upon them. The court said:

"It is undoubtedly true that whatever an agent says or does,

\textsuperscript{10}Fletcher v. Rylands, L. R. 3 Hurl. & Colt. 774 (Ct. of Exchequer 1865); Francis H. Bohlen, "Rule in Rylands and Fletcher," 59 U of Pa. L. Rev. 298 (1911); Ezra Ripley Thayer, "Liability Without Fault," 29 Harv. L. Rev. 801 (1916).

\textsuperscript{11}Ives v. South Buffalo R. R., 201 N. Y. 271, 94 N. E. 431 (1911); Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553 (1918); liability may also be imposed for the acts of independent contractors; Thompson v. Lowell Ry. Co., 170 Mass. 577, 49 N. E. 913 (1898); Vanzie v. Penobscot R. R., 49 Maine 119 (1860).

\textsuperscript{12}Supra n. 6. The Ellison Case also suggests an attitude expressed in the
much earlier case of Roberts v. Rumley, 58 Iowa 301, 12 N. W. 393 (1889),
in which the court said, "... to hold that the principal is bound by agree-
ments between the special agent and the person with whom he contracts, not
authorized by the agent's appointment, and of which he had no knowledge
when he accepted the benefits of the contract, would be entirely subversive of
the whole doctrine of special agency; and instead of requiring the person
dealing with the agent to ascertain, at his peril, that the agent has kept within
his special authority, would require the principal to inquire, at his peril,
whether the agent had gone beyond it."
within the scope of his authority, binds his principal, and is deemed his act. The authority must be either express or implied—expressly given or implied from the relationship created and existing. The scope of the agents' authority was to sell, or procure a purchaser for the land. Thus far, they bound their principal by their acts. They could not bind him by untruthful and unauthorized representations touching the character of the thing which they were authorized to sell. The authority to make these representations was not necessarily included within the terms of the agency. . . When the agent procures a purchaser, ready, willing, and able to buy on the terms proposed, or on terms satisfactory to the seller, he had done all that his contract calls on him to do; all that his contract authorizes him to do. Representations made by an agent possessing this limited authority, touching the character of the property offered for sale, are not binding upon his principal. 13

The court suggests that liability in deceit must arise from authorization, that is, from the expression of the principal’s will. They are willing to assume authorization from “the relationship created and existing” so long as the representation is truthful, but refuse to extend the fiction where subsequent events have shown the representation to be false and deceitful. Thus “apparent authority” tends to release principals from liability in case the act was not “authorized” or would not have been authorized had the principal foreseen its consequences.

In this case the court argued that the act was not authorized, either directly or by implication, because the power “to procure a purchaser” does not include the power to represent the quality or condition of the thing offered for sale. But it is submitted, that although the question whether the power of representation is included within the powers of the agent is largely dependent on the business custom of the community in which the agent operates, it is difficult to postulate a situation in which the power to make such representations would not accompany the power to procure purchasers. Certainly it would be the utopia of which all salesmen dream if purchasers could be found who made no inquiries—asked no questions—required no persuasion. Unfortunately, however, purchasers are not so easily found, or so easily convinced of the desirability of purchase. Principals must anticipate that their agents will have to use certain persuasive talents to secure purchasers; and likewise, third parties normally expect that agents will have the power to show and represent that which they desire

13 Supra n. 6 at 984, 986.
to sell; indeed, it seems difficult to maintain in the light of actual practice that an agent appointed to sell land or to procure a purchaser has no power to make representations. In the instant case it is hard to imagine how the land could be sold without showing it to prospective buyers. If this could be done, does it not also seem reasonable that the one showing the land could make representations in answer to inquiries concerning its character? Certainly we should not require the agent to stand mute once he has taken his prospect to the property he wishes to sell. To say that if he makes such representations in this instance and they are untruthful, they will be considered unauthorized, whereas they will be valid and authorized if truthful, is only to say that the court is unwilling to impose liability without fault.

It is suggested in this case, that the principal should not be liable for the agent's representation because the actual transaction was consummated directly with the principal. This view is similar to that of Haskell v. Starbird,\textsuperscript{14} where it was said that the principal should not be liable unless the agent "had full authority to complete the transaction."\textsuperscript{15} There is some merit in this position, for when the third party closes the deal with the principal, he has ample opportunity to make such investigation as is necessary to discover the character and validity of the agent's representations. If such inquiry is made it places the principal in a position where he must either affirm the fraud and make it directly on his own responsibility or else warn the third party that the representations are unauthorized and made entirely on the agent's own responsibility. If the third party fails to inquire it might reasonably be assumed that the representation was not the inducing cause of contracting or that the third party was so indifferent to its truth and accuracy as to prevent recovery upon it at a later date. Desirable as this result may seem, it has not been accepted. Even in the Haskell Case, the principal completed the transaction and yet was held for the agent's representation, for the court said that:

"While a principal may not have authorized the particular act, he has put the agent in his place to make the sale, and must be responsible for the manner in which he has conducted himself in doing the business which the principal entrusted to him."\textsuperscript{15}

Thus the result reached in the Ellison Case hardly seems justified by the legal principles it purports to adopt or by the factual con-

\textsuperscript{14} Supra n. 7. \hspace{1cm} \textsuperscript{15} Supra n. 7 at 120.
dions upon which it is based. The more familiar rule announced in *John Gund Brewing Co. v. Peterson*\(^{16}\) that "Misrepresentations made in connection with an authorized sale are binding upon the principal, although the agent who made them was not expressly authorized to do so" still seems to announce the more desirable rule, and the attempt to depart from it under the authority of the "minority cases"\(^{17}\) and a distinction between power of sale and of procuring purchasers seems ill advised.

**The Extent of the Principal’s Liability**

Accepting as a general proposition the principal’s liability for some of the frauds and deceits of his agents, there still remains the problem of the extent of his liability. The problem is twofold: For what acts is the principal liable? and What is the amount of his liability?

In considering this problem some of the materials considered previously must be reviewed, for the extent of liability should not of course exceed the reasons for it. Thus it is clear that on the one side the principal is liable for all acts which he directs his agent to perform; and on the other he is not liable for acts committed by those who are not agents, or for acts which the third party knew were not authorized, or for acts or representations upon which the third party did not rely. The difficult problem is to determine what acts relied on by the third party but not directed by the principal will create liability in the principal and what ones will not.

Courts have generally tried to describe the acts which create

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\(^{16}\) 130 Iowa 301, 304, 106 N. W. 741, 742 (1906). See also: Belau v. Bryan, 89 Iowa 348, 56 N. W. 512 (1893) "If it be true that Welliver was the agent of the defendant in making the trade and procuring the land for her, she would be bound by any fraudulent representations he made to the plaintiffs, whether the defendant authorized him to make the representations or not."

Hollinsworth v. Holbrook, 80 Iowa 151, 45 N. W. 561 (1890) "It may be conceded that such alteration was not contemplated by his instruction as agent, but it was not forbidden, and it operates as a legal fraud upon the plaintiffs. Cf. Krause v. Meyer, 33 Iowa 566 (1871) "The good faith of plaintiffs is not questioned. They cannot be held responsible for their agent’s acts in the matter of his false representations. His fraud cannot be considered theirs. It would be a great hardship and against conscience, to impose upon them the penalty of a fraud of which they were in fact innocent and knew nothing, and in no way aided, directed or sanctioned."

\(^{17}\) *Supra* n. 8.
liability as acts which are "apparently authorized" by the principal, or as acts committed within the "scope of employment" of the agent. When courts seek to find apparent authority they of course do not mean to suggest that the principal intended the agent to perform the act, but rather that because of the nature of the agency third parties may reasonably believe the principal so intended his agent to act. Unfortunately, however, to use "apparent authority" as the test of the extent of liability is to use, as already pointed out, an uncertain measure.

The difficulties of terminology inherent in "apparent authority" might be remedied by recruiting from the master and servant cases the term "scope of employment." This term, however, without further definition adds little in explaining the limits of the principal's liability. If the "scope of employment" comprehends those acts which the principal authorized the agent to do, it means no more than actual authority and has done nothing to solve the problem of liability for unanticipated acts. If "scope of employment" includes all situations in which the third party reasonably believes the agent has authority to make the representation that he has made, then it is but a test of apparent authority with the usual complication that the term "reasonably" is left undefined. If "scope of employment" includes only those representations or acts which a diligent principal might know his agent would make, that is, those representations which are authorized by the business custom of a particular community, it fails to include representations which are not reasonably foreseeable or which go beyond the particular custom, and yet are the reasonably inducing influence to those unfamiliar with business practice. This definition of scope of employment would deprive the very individuals in greatest need of protection from the protection which the law affords. Scope of employment, then, means no more than its definition. To generalize from the common use of "scope of employment" we can say little more than that it is the phrase used when courts wish to impose liability upon principals for the fraud and deceit of their agents.\footnote{For cases in which no liability was imposed because the act was not within the scope of employment see: Balkema v. Searle, 116 Iowa 374, 89 N. W. 1087 (1903); Boddy v. Henry, 113 Iowa 462, 85 N. W. 771 (1901); Lamm v. Port Defense Homestead Ass'n, 49 Md. 233 (1878); Stimpson v. Aehorn, 158 Mass. 342, 33 N. E. 518 (1893); Brauchman v. Leighton, 60 Mo. App. 38 (1894). But in Moore v. Abbey, 213 App. Div. 787, 210 N. Y. Supp. 766 (1925).}
What then is the limit of liability? "Apparent authority" and "scope of employment" have proved to be no more than descriptive of a condition and no guide to its determination. Behind these symbols of liability are social and economic beliefs that business which profits by honest transactions should bear the loss of the dishonest. The extent of the application of this doctrine can be more easily defined by reason than by rule. Thus the reason for protecting the third party continues only so long as he deals honestly with the agent and in innocence of the fraud committed upon him, and completes the transaction relying upon false or fraudulent representation of the agent. To limit the extent of liability by such a test is more desirable than limiting it by such abstract concepts as "apparent authority" or "scope of employment." The test does not leave the principal unprotected. Liability depends on the honesty and reasonableness of the third party's reliance and that is determinable by the customary business practice of the community, postulated against the intelligence, business experience, and care of the third party. This should afford either judge or jury a satisfactory background upon which to consider the third party's credibility when he testifies to his belief that the representation he relied upon was the inducing motive for contracting.

The test "honest reliance" is perhaps so simple as to discourage those who look for legal doctrine dressed in fine cloth, but it serves the end of limiting liability by a means which is easily ascertainable and which makes the extent of liability co-existent with the reasons for it. It may be objected that this is no limit on the principal's liability. It is quite the contrary. It will be, for example, 

the court suggested that if the representation of the agent was the inducing cause of the contract it was not material that the representation was beyond the scope of the agent's authority. In that case the agent represented to the prospective purchaser of the principal's land that he, the agent, would personally finance the building of a bungalow upon the land. The agent entered into a contract to this effect, and the principal knew of the agreement. The court, however, said that this was "immaterial" and allowed rescission because, "The statement and agreement of Nett (the agent) was intended to, and did, influence the plaintiffs to enter into the contract." Here the representation of the agent was beyond the scope of his employment and no attempt was made to conceal that fact. Unquestionably this collateral contract was an inducement for the formation of the contract of purchase, but unless it was made collusively with the principal, the purchaser's only right of action should be against the agent, for the law cannot give relief from every inducing element in the formation of a contract which in the subsequent course of events turns out to be unwise.
difficult for the average business man to convince a court that he has reasonably relied upon an agent's representation when the representation is not customary to the business usage of the community. On the other hand, liability might very justly be imposed upon the principal where the third party was a woman untutored in business affairs. The rule of reason does not seek to protect ignorance, but rather to give equal protection to all, not regardless of, but dependent on, their business acumen.

Considerations such as these must of course lie behind the more legalistic phrases in which liability is expressed. Thus earlier Iowa decisions have imposed liability in many situations where third parties have been defrauded by dishonest agents. Even in land cases closely analogous to the Ellison Case innocent third parties have been allowed an action in deceit. Thus an agent for the sale of land may make representations concerning the perfection of its title and incumbrances upon it, although he cannot waive title to it. Further an agent appointed to show land to prospective purchasers binds the principal if he shows the customer the wrong

20 James v. Grill, 186 Iowa 1300, 173 N. W. 897 (1919) (representation inducing the sale of paint); Good Roads Mach. Co. v. Ott, 186 Iowa 908, 171 N. W. 721 (1919) (representations inducing the signing of contract of purchase of road graders); Houge v. St. Paul Fire & Mar. Ins. Co., 174 Iowa 607, 156 N. W. 862 (1916) (representations inducing the purchase of insurance); Pictorial Review Co. v. Fitz Gibbon & Son, 163 Iowa 644, 145 N. W. 315 (1914) (representation that goods could be returned if not sold); Shores-Mueller Co. v. Knox, 160 Iowa 340, 141 N. W. 948 (1913) (representation that instrument was only a recommendation when it was in fact a guaranty); Providence Jewelry Co. v. Fessler, 145 Iowa 74, 123 N. W. 957 (1909) (representation that contract was one of bailment and not of sale); John Gund Brewing Co. v. Peterson, 130 Iowa 301, 106 N. W. 741 (1906) (representation concerning encumbrance on saloon); Bonewell v. Jacobson, 130 Iowa 170, 106 N. W. 614 (1906) (representation that vendors would care for fruit trees sold as "advertising orchard"); Higbee v. Trumbauer, 112 Iowa 74, 85 N. W. 812 (1900) (representation concerning stock food); McCormick Harvesting Mach. Co. v. Williams, 99 Iowa 601, 68 N. W. 907 (1896) (representation that machine had all brass bearings); Savin v. Savings Ass'n, 95 Iowa 477, 64 N. W. 401 (1895) (representation concerning character of stock purchased); Lindmeier v. Monahan, 64 Iowa 24, 19 N. W. 839 (1884) (representation as to value of business and stock of goods); Hornish v. Peck, 53 Iowa 157, 1 N. W. 641 (1880) (representation inducing the purchase of stock in railway construction company).

John Gund Brewing Co. v. Peterson, supra n. 19; Iowa R. R. Land Co. v. Fehring, 126 Iowa 1, 101 N. W. 120 (1904).
land and represents it as the land his principal wishes to sell.\textsuperscript{21} Likewise an agent for the sale of land binds his principal by representations concerning the acreage of the land.\textsuperscript{22} But since the Ellison Case, representations concerning the character of the land to be sold, if the agency is merely for the securing of purchasers, are not binding upon the principal.\textsuperscript{23} The singularity of this result is emphasized by a later case concerning the same facts, in which the opposite result was reached because the principal was a corporation.\textsuperscript{24} Thus in Iowa an act done by the agent of an individual may create no liability in his principal, but if the principal be

\begin{itemize}
\item \textsuperscript{21} Shuttlefield v. Neil, \textit{supra} n. 4; Weise v. Grove, 123 Iowa 585, 99 N. W. 191 (1904).
\item \textsuperscript{22} Day v. Merrick, 158 Iowa 287, 138 N. W. 400 (1916); Gray v. Sanborn, 178 Iowa 456, 159 N. W. 1004 (1916). For other cases involving fraudulent representations concerning land see: Harris v. Polk Cty. Inv. Co., \textit{supra} n. 7 (representation that land never overflowed); Edwards v. Foley, 187 Iowa 5, 173 N. W. 914 (1919) (representation concerning character and value of land and situation of wells); Fulton v. Fisher, \textit{supra} n. 3 (representation that other purchasers were ready to buy at $70 per acre); Belau v. Bryan, \textit{supra} n. 16 (representation concerning character of land); Gate City Land Co. v. Heilman, 80 Iowa 478, 45 N. W. 769 (1890) (representation that land was well located, that a cable car line was being extended to the land, and that railway shops would be erected within a half mile); Heitman v. Clancy, 167 Iowa 58, 148 N. W. 1011 (1914) (representation that land to be exchanged was already sold, so that defendant would not have to take it); Grittenden v. Armour, Barbee & Co., 80 Iowa 221, 45 N. W. 888 (1890) (representation concerning and inducing sale of land); Butler v. Barkley, 67 Iowa 491, 25 N. W. 747 (1885) (fraud in the sale of land).
\item \textsuperscript{23} \textit{Supra} n. 6 at 984, 170 N. W. at 437.
\item \textsuperscript{24} Harris v. Polk Cty. Inv. Co., \textit{supra} n. 7, at 1261, 177 N. W. at 476. In this case the defendant was a corporation, one of whose agents made the representation, and another completed the transaction with the knowledge of the representation made by the first. The court said, "We may assume, without deciding, that these representations were not within the scope of the authority of Newton (the agent) to make, and we may assume, without deciding, that, if the defendant knew nothing of these representations, was not a party to the fraud and deceit practiced by Newton, it is not bound by the fraud. Such assumption, it is claimed, is in line with the holding in Ellison v. Stockton, . . . and would follow though Newton was employed by the defendant to find a purchaser . . . But the record shows that the defendant is a corporation . . . All that it does, all that it says, all that it thinks, must be done through representatives; and it concedes that Frost (another agent) was its representative in the transaction . . . We think there was no ground for holding on the part of the court that the representations charged to have been made, shown to be false, and material to the trade, were not made by the defendant itself." 
\end{itemize}
corporate the same act creates liability. Liability should not be dependent on such niceties of personality or upon the vagaries of corporate or physical existence.

**THE PRINCIPAL'S POWER TO LIMIT LIABILITY**

If the third party's right to recover against the principal depends on the reasonableness of his reliance on the agent's representations, it would seem that the principal could limit his liability by giving notice to the third party of the limited character of his agent's authority. Principals to protect themselves from their agent's fraud have incorporated into the written contract which their agents tender, a statement that no representations other than those contained in the contract have been made, or a statement that the agent executing the contract is without authority to make any representations other than those contained in the written form, or the contract may include both such provisions. The purpose of such provisions is twofold: to protect the principal from claims that the agent prevented the contract from being read, or claims that the contract was induced by false or deceitful representations of the agent; and secondly, to protect the principal against warranties read into the contract by oral agreements of the agent. The courts, while recognizing these provisions as useful and efficacious in accomplishing the second purpose, and within the contractual power of the principal as regards the first, refuse to enforce such agreements when they shield a principal

25 A common form of expressing this limitation is: "The above stipulations comprise the entire contract between the parties, which has been read over by the purchaser before signing, and it is expressly agreed that no terms or condition different therefrom or supplemental thereto shall be binding upon either party, and that all of the statements and representations not herein expressed in writing shall be absolutely inoperative to effect the right of either party hereto." Universal Fashion Co. v. Skinner, 64 Hun 293, 19 N. Y. Supp. 62 (1892).

20 Bonewell v. Jacobsen, supra n. 19, is representative of the second form: "It is also expressly understood that no agent nor any person or persons representing any party hereto have any right or authority to make any representation in any wise or manner to change or modify this agreement."

27 But see, Peterson v. Reaping Mach. Co., 97 Iowa 148, 66 N. W. 96 (1896) ""... the contract provides 'no one has any authority to add to, abridge, or change this warranty in any manner'... [this prohibition]... which prohibits action in any event by the corporation is unreasonable. ... Such an agreement is not binding, and any competent agent could bind the parties by waiving the provisions of the warranty.""
from the fraud which induced the contract. As was said in the Bonewell Case,

"It is perhaps true that by a stipulation in a written contract collateral agreements or warranties attempted to be made by the agent may be prevented from becoming portions of the contract between the parties, but no such stipulation can, as we understand it, prevent the interposition of the defense of fraud which has induced the making of the contract." 28

This result may appear unduly severe when applied to a principal who is attempting to protect himself from unauthorized and fraudulent representations of his agents. This is particularly true when it is considered that the contract bears notice of the agent's limited authority, for it would seem that if a third person relied upon the representations of the agent, he did so entirely upon the responsibility of the agent. But unfortunately the use of such provisions is as effective in shielding principals who, if they have no actual knowledge, have good reason to believe that their agents will be deceitful, as it is in shielding honest principals engaged in legitimate business. Indeed, the Iowa court has suggested that "such unusual precaution in drawing a contract may sometimes justify suspicion of the good faith of the party preparing it." 29

If the representations of the agent prevent the third party from reading the contract so that he cannot acquaint himself with the terms of its provisions then of course the principal should be afforded no rights thereunder. Further the Iowa court has also been unwilling to allow a principal to plead the negligence of the

28 Supra n. 19 at 172, 106 N. W. at 615.
third party in defense to the agent's fraud. In *Providence Jewelry Co. v. Fessler*, they said,

"It is urged, however, that defendants were at least negligent in signing the writing prepared by Waggoner and therefore cannot be heard to deny its obligation. As between the perpetrator of a fraud or his principal who seeks to profit by it . . . and the defending party . . . the rule here contended for is one which does not appeal to an enlightened sense of justice . . . we are not disposed to enlarge the scope of a rule which permits a party to say, 'I admit that the contract sued upon was procured by my fraud and misrepresentation or by trick or fraud of my agent, nevertheless you were too easy a mark; you should not have believed me; you should have been on guard for the trap I set for your feet; and therefore the law will effectuate my fraud by enforcing against you a contract to which your mind never gave its assent.'"

If the third party reads the contract and either overlooks the limitation provision or else relies on a further representation by the agent that notwithstanding such provision he still can make certain representations not included in the written contract, then the reasonableness of the third party's reliance, as tested by his business experience, and the nature of the representations made, should determine whether or not the principal should still be responsible for the representation in spite of the warning given by the principal. For if the third party understood the character of such limitations or had conducted himself in so careless a manner as to be indifferent to the terms of the contract, the principal should not be responsible for the fraudulent representations of his agent.

**The Kinds and Amount of the Principal's Liability**

Third parties have been universally allowed to rescind their contracts and exchange that which they have received for that which they have given.\(^\text{31}\) Recovery in an action of deceit has been afforded at least to the same degree as recovery on contract for breach of warranty. In case, however, it is sought to hold the principal to a greater degree, the doctrine of the retention of benefits is usually invoked rather than imposing the liability by an action of deceit.\(^\text{32}\) This type of recovery, which is of course

\(^\text{30}\) *Supra* n. 19 at 80, 123 N. W. at 959.

\(^\text{31}\) *Supra* n. 6.

\(^\text{32}\) The retention-of-benefits doctrine has been used in Iowa to enforce liability against a principal for both the fraudulent and the unauthorized acts of his agents. *Eadie, Guilford & Co. v. Ashbaugh*, 44 Iowa 519 (1876), the
on the theory of unjust enrichment, has not been logically used, for liability has been imposed in cases where the principal has had no opportunity to rescind after discovery of the fraud, and in cases where his liability was greater than the benefit he retained. Apparently many courts have used this more painless method of imposing liability to reach the same results that they believed would be accomplished by an action in deceit. This attitude was expressed by Weaver, J. concurring specially, in *Ellison v. Stockton*, when he said,

"... it is wholly immaterial whether defendants are chargeable for damages 'as for deceit,' or because they have ratified the fraud of their agents by approving the sale they have negotiated, or because he cannot be permitted to retain the fruits of the fraud practiced by them, and at the same time deny his liability for the injury so perpetrated upon the plaintiff.'

While it may be true that in a great many cases the result will

leading Iowa case, unfortunately speaks with much confusion concerning the necessity of retaining the benefits with knowledge. Consequently some of the cases indicate that knowledge is necessary. *Higbee v. Trumbauer*, *supra* n. 19; *National Improv. & Const. Co. v. Maiken*, 103 Iowa 118, 72 N. W. 431 (1897); dissenting opinion *Eadie, Guilford & Co. v. Ashbaugh*, *supra*. Some cases have required knowledge but imputed the agent's knowledge to the principal unless the agent also sought to defraud the principal. *Russ v. Hansen*, 119 Iowa 375, 93 N. W. 502 (1903); *Campbell v. Park*, *supra* n. 3; *Harris v. Polk Cty. Inv. Co.*, *supra* n. 7. Some cases apparently required no knowledge. *St. Louis Refrigerator Co. v. Vinton Wash. Mach. Co.*, 79 Iowa 239, 44 N. W. 370 (1890); *Hollinsworth v. Holbrook*, *supra* n. 3; *Mankin v. Mankin*, 91 Iowa 406, 59 N. W. 292 (1894); *Moyers v. Fogerty*, 140 Iowa 701, 119 N. W. 159 (1908). See also *Bennet v. Judson*, 21 N. Y. 238 (1860); *Elwell v. Chamberlain*, 31 N. Y. 611 (1864). Much the same problem is raised where the principal sues upon a contract or note obtained by fraud. But in case of loans procured by agents where the agents have demanded a bonus which if imputable to the principal would make the contract usurious, the early Iowa cases, following New York decisions, allowed the principal to avoid the unauthorized act and recover on the note. *Gokey v. Knapp*, 44 Iowa 32 (1876); *Brigham v. Meyers*, 51 Iowa 397, 1 N. W. 61 (1879); *Greenfield v. Monaghan*, 35 Iowa 211, 52 N. W. 193 (1892); *Condit v. Baldwin*, 21 N. Y. 219 (1860); *Bell v. Day*, 32 N. Y. 165 (1865). The later cases have tended to hold the principal to a greater degree of responsibility by looking behind the external form of the agreements. *France v. Munro*, 138 Iowa 1, 11, 115 N. W. 577, 580 (1908) "'The workmanship of the plan employed is entirely too elaborate and artistic to be the natural accompaniment of an ordinary business transaction, in which there is nothing to conceal.'" See also, *McNelly v. Ford*, 103 Iowa 508, 72 N. W. 672 (1897).

3 Supra n. 6 at 995.
be the same whether suit is for retained benefits or for deceit, there are nevertheless, certain important cases in which the amount and the character of the recovery depends entirely upon the action under which it is recovered. For example, if recovery in deceit is allowed the defrauded party, he may keep the land and sue for the difference between the value of the land as represented and its value as it actually existed, while if recovery can only be had in rescission he must surrender the land and take back his consideration, and if recovery is for retained benefits, he must theoretically at least, be subject to the possibility that the principal will tender a return of the consideration. Further the amount of recovery may be much greater in deceit than in rescission or for retained benefits. While there are apparently no Iowa cases illustrative of this problem, several cases from other jurisdictions furnish striking examples of the difference in the amount of recovery that results from an action in deceit and an action for retained benefits.

In Jeffrey v. Bigelow, the agent of the principal sold sheep to the plaintiff without informing him that the sheep were infected with disease. The sheep were mixed with those of the plaintiff and as a result of the disease all of the sheep died. The principal did not know of the condition of the sheep or that his agent had made false representations concerning them. The agent knew that the sheep were infected. The principal was held responsible for all of the damages which "necessarily and naturally flow" from the act of his agent, and so was held to recompense the third party not only for the sheep which he had purchased but also for the loss sustained to his own flock.

Again, where an agent for the collection of rent and the care of the principal’s property represented to a tenant that the ceiling in the tenement had been examined and found safe, the principal was held responsible for the damages resulting from the personal injuries to the tenant occasioned by the falling of the ceiling.

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34 13 Wend. 518 (N. Y. 1835). See also, Lutz v. Forbes, 13 La. Ann. 609 (1859) in which case the principal was held for the loss of six horses owned by the plaintiff the loss resulting from a disease communicated by a horse purchased from the defendant’s agent and represented by him to be sound. And also, see Gibson v. Colt, 7 Johns. 390 (N. Y. 1811).

35 Williams v. Goldberg, 58 Misc. 210, 109 N. Y. Supp. 15 (1908). The later case of Renard v. Grenthal, 51 Misc. 135, 142 N. Y. Supp. 328 (1913), though apparently reaching an opposite result, is distinguishable on the ground that the representation was substantially true, and the agent’s remark that “there was no danger” was mere statement of opinion.
The court said, that as the plaintiff's injuries, though "not the immediate results of the defendant's agent's deceit . . . were . . . the indirect result of the deceit, a natural and probable effect of the agent's wrongful act . . . the representations having been made in the scope of the agent's authority the principal is responsible."

It should be noted that in this case unless the recovery was allowed in deceit the injured party would be without means of recompensing his injuries.

Cases such as these show that it is of considerable importance to determine whether recovery should be for deceit or whether it should be for profits of the fraud which the principal retains, or whether it should be rescission only, and in lieu of rescission a money judgment. In the cases outlined above an action of deceit is the only means by which the injured party can be adequately protected.

To allow recovery on the retention-of-benefits theory in those cases where recovery for deceit is also permissible, though not wrong, seems undesirable for it is more logical that the principal be held responsible on the basis of the act or representation of his agent, rather than on the basis that he is withholding that which it is inequitable for him to retain, for if it is inequitable it is because of the agent's representation. The liability arises from the agency relationship and the fact that the principal retains the profits of such relationship creates no additional legal obligations on his part.

**Conclusion**

In general, the Iowa court imposes liability in deceit upon a principal for some of the acts of his agent, even though he has neither contemplated nor directed them to be done. This liability normally extends to all acts which arise from the nature of the agent's employment and which have been reasonably relied upon by the third party. The case of *Ellison v. Stockton* sought to limit this liability in case the agent was appointed only for the purpose of procuring a purchaser and the power of completing the transaction was reserved to the principal. It is submitted that it is undesirable to deny an action of deceit in these cases for it reverts to doctrines of no liability without fault and ignores the practice of modern business.

To allow principals to contract with third parties limiting their
liability has been wisely limited so that such contracts cannot be urged as a basis for preventing evidence of fraud in the inducing of the contract. That such a rule is a hardship on some principals does not overshadow its benefits—apparently principals must accept such liability as an incident of doing business.

Finally it is urged that the action of deceit be used where it is applicable, rather than attempting to reach a similar result by the only partially satisfactory remedy for retained benefits. The action for the retention of benefits should not be used where liability arises from the deceitful action of the principal’s agent. In other words, it is urged that the doctrine of the Ellison Case be abandoned as out of line with the majority of jurisdictions, and more fundamentally because it fails to reach its results by valid legal reasoning.

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