

Missouri Law Review

Volume 12
Issue 1 *January 1947*

Article 9

1947

Comments

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Recommended Citation

Comments, 12 MO. L. REV. (1947)

Available at: <https://scholarship.law.missouri.edu/mlr/vol12/iss1/9>

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MISSOURI LAW REVIEW

Published in January, April, June, and November by the
School of Law, University of Missouri, Columbia, Missouri.

Volume XII

JANUARY, 1947

Number 1

If a subscriber wishes his subscription to the Review discontinued at its expiration, notice to that effect should be sent; otherwise it is assumed that a continuation is desired.

Subscription Price \$2.50 per volume

85 cents per current number

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Comments

DEATH OF PRINCIPAL AS TERMINATING AGENT'S POWER TO ACT—DICK v. PAGE¹

As a general rule the authority of an agent, not coupled with an interest,² is instantly terminated by the death of the principal, and any attempted execution of the authority after that event is not binding upon the heirs or representatives of

1. 17 Mo. 234 (1852).

2. It is not within the scope of this comment to consider powers coupled with an interest.

the deceased principal. This was said to be the Common Law rule,³ but while the Civil Law adopted the same rule, it made an exception, namely, where agent performed some act, within the scope of his authority, in good faith and without knowledge of principal's death, the authority would not be terminated.⁴ Of this Civil Law exception, Chancellor Kent said, ". . . this equitable principle does not prevail in the English law . . ." and as a consequence the strict Common Law rule was adopted by a majority of the states.

Obviously the Common Law position is a harsh one⁵ and to relieve this harshness some states have enacted statutes⁶ requiring that a third party or agent have knowledge of principal's death before the agency power is terminated. But by and large the legislatures have left the problem with the courts, some of which have severely criticized Kent's conception of the Common Law rule. By two exhaustive opinions in *Ish v. Crane*,⁷ Judge Sutcliffe analyzed all the cases cited by Kent and decided that in regard to the so-called Civil Law exception, the English authorities do not deny its existence, but in fact recognize it to a limited extent.⁸ He also pointed out that in the usual case where principal revokes agent's authori-

3. 1MECHEM, AGENCY (2d ed., 1914) §§ 652,664; STORY, AGENCY (9th ed. 1882) § § 488, 495; 2 Kent, Commentaries (13th ed., 1884) § 646; 2 C. J. § § 179, 181; 2 C. J. S. § § 85, 87 (a, l. b, c.). The classic reason for the rule is that since *P* cannot act for himself after death, *A* cannot act for him. MECHEM, *op cit supra* at § 651.

4. MECHEM *op. cit. supra* note 3 at § 651; STORY *opcit supra* note 3 at § 488.

5. Farmer's Loan and Trust Co. v. Wilson, 139 N. Y. 284, 34 N. E. 784 (1893) (*P* died and *T* continued to pay *A* the rents, neither *T* nor *A* knowing of *P*'s death; *held*, *P*'s representative could recover from *T* the rents paid to *A* after death of *P*); Clayton v. Merrett, 52 Miss. 353 (1876) (Pursuant to *P*'s authority, *A* sued *T* and recovered, but *P* had died before recovery without *A* or *T* knowing of it; *held*, *T*'s payment to *A* did not satisfy the debt); Seavey, in (1934) 11 Proc., A. L. I. 86, says that, "The agent is in a dilemma—to act or not to act. If he acts and his principal is dead, he is liable (on his implied warranty of authority). If he does not act and his principal lives, he is liable." Note (1930) 44 Harv. L. Rev. 265.

6. MD. ANN. CODE (Flack, 1939) art. 10, § 41; PA. STAT. (Purdon, Compact ed., 1936) tit. 21, § 304; S. C. CODE OF LAWS (1942) § 7018. The language of other codes would seem to lend itself to this interpretation: CAL CIV. CODE (Deering, 1941) § 2356; MONT. REV. CODES ANN. (1935) § 7975; N. D. Rev. Code (1943) § 3-0111; S. D. CODE (1939) § 3.1109.

7. 8 Ohio St. Rep. 521 (1858), reheard 13 Ohio St. Rep. 574 (1862). These two cases present a thorough study of the problem. Judge Sutcliffe champions the Civil Law exception, but he has scrutinized all the authorities.

8. 13 Ohio St. Rep. 574, 599 (1862). Note must be taken of the authority stating that it has not been accepted by the Common Law. *Supra* note 3. Barristers arguing these cases were aware of the Civil Law of Scotland (Campbell v. Anderson, IV Bligh N. S. 513 (1829)) as well as STORY'S WORK ON AGENCY (cited by counsel in *Smout v. Ilbery*, 10, 10 M. & W. 1, 5 (1843)). It is hard to believe that Common Law adopted the Civil Law exception, even to a "limited extent" and these cases involving notice were not settled on that point. *Infra*, note 14. The best that can be said for Judge Sutcliffe's thesis is that the question of notice does not appear to have been carefully argued. Everyone seemed to take it for granted that the Common Law made no exception on that ground.

ty, it is not binding until principal notifies agent. Until he is so notified, *A* can continue to act under the authority. Then why, he asks, should there be a contrary rule where authority is terminated by operation of law, by the death of principal?⁹

Seavey has also criticized the Common Law rule, but he does not attempt to reconcile the two rules as Sutcliffe and Story did. He says that the Common Law was immersed in its theory of the identity of principal and agent, and therefore could not consider knowledge as a requisite of terminating *A's* power.¹⁰

The rule that *P's* death terminates *A's* power seems to originate in Littleton¹¹ in a case where the feoffor's death terminated the power he gave his attorney to deliver seisin to *T*. The assigned reason is that if the feoffor dies the land descends to his heirs, so that there is nothing for the attorney to deliver should he attempt to exercise his power. About the same time the Common Law maxim *qui facit per alium facit per se* was making its presence felt and the logicians of the Common Law conceived that by applying this maxim when principal had died, agent could not act because principal could not. Littleton's help was not necessary for this exercise in logic, but his rule added weighty authority. Thus this rule, which may have had its origin in the law of descent of property, by the 18th century applied to fields other than realty, but in none of the English cases is the question of notice raised.¹² However, in the 19th century one case seems to hold squarely that the power is terminated by principal's death even though agent had no notice thereof and acted in good faith,¹³ another seems to question this rule,¹⁴ and by

9. *Id.* at 613. But see MECHEM, *op. cit. supra* note 3 at § § 651, 720, 721.

10. Seavey, *The Rationale of Agency* (1920), 29 YALE L. J. 859, 893; Seavey, *Termination by Death of Proprietary Powers of Attorney* (1922), 31 YALE L. J. 283; Seavey, *Problems in Restatement of the Law of Agency* (1930), 16 A. B. A. J. 117, 120; SEAVEY (1934) 11 PROC. A. L. I. 85-94. See HOLMES, *THE COMMON LAW* (1st ed., 1881) p. 232; HOLMES, *Agency* (1891), 4 HARV. L. REV. 345, cont'd HARV. L. REV. 1.

11. CO. LITT. § § 66, 52. Prior to the 13th century, assignment of contract rights was effected by means of attorney. 2 WILLISTON, *CONTRACTS* (rev. ed., 1936) § 408. These powers were terminable by operation of law, as by death, for instance. *Id.* at § 409. However, there seemed to be no authority as to the effect of death on the power prior to Littleton.

12. (Assignment of contract cases. *Mitchell v. Eades*, Pre. Ch. 125 (1700), power to collect seaman's wages; *Shipman v. Thompson*, Willes 103 (1738), power to collect rents. See Seavey, "Termination by Death of Proprietary Powers of Attorney," (1922), 31 YALE L. J. 283.

13. *Blades v. Free*, 9 B. & C. (1829). But see *Ish v. Crane*, 8 Ohio St. Rep. 521, 521 (1858), which says that in the *Blades* case the question of notice, as a condition to *P's* death terminating *A's* authority, was not argued by counsel; Therefore the case cannot in truth be said to hold that notice is immaterial.

14. *Smout v. Ilbery*, 10 M. & W. 1 (1843) (*T* sued *A* on a contract *A* executed for *P* after *P's* death, of which neither *A* nor *T* had knowledge; held, *A* cannot be held personally liable on a contract purporting to bind *P*, there is no warranty by *A* that her husband would remain alive.) See *Tate v. Hilbert*, 2 Ves. Jr. 111 (1793) (Lord Loughborough, by dictum, said that if *T* the payee of the check, had presented the check to *A*, the bank, for payment after *P*, the maker, had died, before *A* or *T* knew of the death, and it had been paid, no court in the world would take the payment away from *T*.)

dictum a third approves the Civil Law exception.¹⁵ These English cases at least contain caveats to warn against the strict rule, but only in the Civil Law countries and seven states¹⁶ are there square holdings making exceptions to it.

Judge Story was probably responsible for American courts adopting the Civil Law exception. He agreed that the Common Law did not seem to make any exceptions, but impressed by the hardship arising from application of the strict rule to cases where agent continued to act in ignorance of principal's death, he concluded that there was actually no difference in principle between the two rules on the question of notice.¹⁷ He suggested that the Civil Law exception applied only to the case where *A* acted in his own name and that in the Civil Law countries it was the custom for *A* to act in his own name; that, therefore, whenever *A*'s act must be done in *P*'s name, under the Civil Law *P*'s death prior to such act would terminate *A*'s authority, irrespective of notice. The next step in his argument is that in the Common Law countries it is customary for *A* to act in *P*'s name, hence the Common Law is in line with the Civil Law when it rules that death of *P* terminates *A*'s authority without notice thereof. Since, then, Common Law agents like the factor, supercargo and ship's master are authorized to act in their own names, death of *P* does not terminate their authority without notice. Assuming the validity of his position with respect to the difference in modes of executing *A*'s authority, his case falls apart on the last point. He admits that in the case of the factor, supercargo and master, they ". . . seem in truth to be disposed of by the single consideration, that they either are, in fact, cases of powers coupled with an interest, or are governed by like analogy."¹⁸ This obvious fault in his logic was not overlooked by the courts¹⁹ but still many cases adopted the Story rationale:²⁰

15. *McDonnell v. McDonnell*, Buck 399 (1819) (This is a bankruptcy case, but the court bases its decision on a case where a power of attorney, sent to India, was exercised by *A* after death of *P* in England, but without notice of *P*'s death; held, by Lord Kenyon that *A* validly exercised the power). However, this case cannot be found, nor did the *McDonnell* court give a citation to it.

16. *Lewis v. Kerr and Craig*, 17 Iowa 73 (1864); *supra* note 1; *Deweese v. Muff*, 57 Nebr. 17 (1898); *Ish v. Crane*, 8 Ohio St. Rep. 520 (1858); *Catlin v. Read*, 141 Okla. 14, 283 Pac. 549 (1929); *Cassiday v. McKenzie*, 4 Watts & S. (Penn.) 282 39 Am. Dec. 76 (1842; and *Lenz v. Brown*, 41 Wisc. 172 (1876).

An effort was made to incorporate the Civil Law exception into the RESTATEMENT OF THE LAW OF AGENCY, (1934 11 PROC. A. L. I. 87-94; Seavey, *Problem in Restatement of the Law of Agency* (1930), 16 A. B. A. J. 117, 120. But see (1927) 5 PROC. A. L. I. As finally adopted a mere caveat was added leaving a "loophole" for courts wishing to follow the Civil Law exception. RESTATEMENT, AGENCY (1933) § 120..

17. STORY, AGENCY (9th ed., 1882) § 495: "The difference on this subject between our law (Common Law) and the latter (Civil Law) seems to rest, not so much upon a difference of principles, as upon the difference in the modes of executing the authority."

18. *Id.* at § 496: ". . . cases must constantly have arisen . . . when the death of the principal must have been known." This was Judge Story's case authority for his theory.

19. *Ish v. Crane*, 8 Ohio St. Rep. 521, 536 (1858); *Clayton v. Merrett*, 52 Miss. 353, 359 (1876).

20. *Supra* note 16. This is not the pure Civil Law exception which makes

When the act is one that must be performed in principal's name, his death terminates A's power to perform the act, following the strict Common Law rule; but if it is an act that, while done for P, need not be done expressly in his name, death of P does not terminate A's authority so to act until notice is given, following the Civil Law exception.²¹

The Missouri Supreme Court in an early case, *Dick v. Page*,²² was decidedly influenced by Judge Story. There the action was in the nature of assumpsit for money had and received by the deceased principal's executor against T, the third third party. In the presence of T, principal had authorized A to borrow from T and to transfer such securities to T as were necessary to secure the debt. After his death A borrowed from T, the money being used in P's business, and secured the debt by transferring to T several notes payable to P. Some time after this transaction the parties first learned of P's death. All but one of the notes were paid to T, and it was for these sums that P's executor sued T. The issue was whether P's death terminated A's authority to borrow money and secure this debt for P. It was held that it did not; that, therefore, there could be no recovery. The opinion is brief. It cited Kent's proposition about the strict Common Law rule, then stated that, "This principle, which is sustained by American and English authorities, is to be applied to those cases in which a right is claimed through an act done by an Agent *in the name of his Principal* (italics mine) who was dead at the time the act was done." After citing a few English cases allegedly supporting that proposition, the court mentioned Russell and Chitty to emphasize that where A acted pursuant to his authority from P without notice of P's death, he acted with color of authority good as against strangers. Then the court recited

no distinction between acts done in P's name and those done in A's name, so far as the notice requirement is concerned. *Supra* note 4. It is believed that *Cassiday v. McKenzie*, 4 Watts & S. 282 (1842) is the only American case which purports to, and actually does, adopt the pure Civil Law exception, as distinguished from Story's attempted rationalization of the Civil and Common Law rules. *Accord*: RESTATEMENT, AGENCY (1936) § 120; RESTATEMENT, AGENCY, Commentary (Tent. Draft. no. 2, 1927) § 200. *Contra*: Seavey (1934) 11 PROC. A. L. I. 88 (William Draper Lewis reports that Mechem stated positively that there were no cases against "the old rule," presumably meaning the strict Common Law rule); Note (1923) 9 VA. L. REV. 644. See MECHEM *op. cit. supra* note 3 §§ 651, 664.

21. There appears to be some ground for such distinction where A's authority is to execute a deed in P's name and convey land to T. Then when P dies, title to the land vests at once in P's heirs and a conveyance from A to T in T's name conveys nothing. But note that the reason is not any magic in names, but rather that the property has descended to P's heirs, and any conveyance by A would be a nullity. *Infra*. note 11. Aside from this one situation which does not involve notice at all, it is submitted that Story's attempted rationalization is meaningless. Story admits himself out of court when he says that all powers should be exercised in P's name, thus eliminating any opportunity to utilize his attempted rationalization. STORY, AGENCY (9th ed., 1882) § 147.

But see Seavey, *The Rationale of Agency* (1920), 29 YALE L. J. 859, 893: "Story makes the distinction between the acts which must be done in the name of the principal and those which may be done in the name of the agent, and if we treat form alone, this may be of some importance."

22. *Supra* note 1.

the Story exception to the Common Law rule: The holding of the case is in the final paragraph: *A* could impart an equitable interest in the notes *without using the name of P*; in maintaining a defense, *T* insists on no acts of *A* in the name of *P*; *A* may be regarded as *P*'s factor with authority to pass the notes by delivery, so as to warrant *T* receiving the money due on them; and finally,, "To hold that this transaction is void would shock the sense of justice of every man, and we cannot be persuaded that a principle which would produce such a result should be applied to the facts which exist in this case."

Unfortunately no Missouri case has been found which mentions the *Dick* case (although *Carriger v. Whittington*²³ seems to follow it squarely), so its meaning is not clear. Courts from other jurisdictions differ as to its holding;²⁴ nor is there agreement among the writers.²⁵ The decision seems to adopt the Story view of the Civil Law exception.²⁶ Kent and Story were the acknowledged authorities of that time. Their pronouncements were accepted as authoritative.²⁷ Thus the Missouri Court gave lip-service to Chancellor Kent's version of the Common Law rule, but it did not subscribe to that as has been alleged. On the contrary, the court immediately limited the application of the principle to acts which agent must do in principal's name.²⁸ Next it referred to Russell and Chitty to lend some sup-

23. 26 Mo. 311 (1858) (In a suit by *P*'s administrator against *A*'s administrator to recover money collected pursuant to a contract he executed for *P* after *P*'s death, *A* being ignorant of the death, it was held that *P*'s administrator could recover on equitable grounds.) Obviously the broad holding of the *Dick* case is not questioned here since *P*'s administrator approves *A*'s authority to bind the estate after *P*'s death. Indeed, decided six years after the *Dick* case and with one judge sitting on the bench during both cases, this case seems to presuppose acceptance of the Civil Law exception.

24. *Dick v. Page* was said to hold: in *Clayton v. Merrett*, 52 Miss. 353 (1876), Principal's estate would be estopped to deny agent's power to bind; in *Cleveland v. Williams*, 29 Tex. 204 (1867), Pure Civil Law rule; in *Ish v. Crane*, 8 Ohio St. Rep. 520 (1858); and *Deweese v. Muff*, 57 Nebr. 17 (1898), the Story rationalization of the Civil and Common Law rules; this latter view is generally accepted.

Oddly enough, two landmark cases following the Civil Law exception in one form or another do not even mention the *Dick* case: *Lewis v. Kerr and Craig*, 17 Iowa 73 (1864) and *Lenz v. Brown*, 41 Wisc. 172 (1876).

25. STORY, *op. cit. supra* note 3, § 498 (the Story rationalization of the Civil and Common Law rules); MECHEM, *op. cit. supra* note 3, § 664 (Where *A* deposited collaterals as security for advance made after *P*'s death, all parties being ignorant of it, the deposit was valid as against the executor of *P*). Cf. Draper's statement in n. 20 *supra*; Seavey. "Termination by Death of the Proprietary Powers of Attorney" (1922), 31 YALE L. J. 283, 297 n. 70 ("The Missouri rule is explicitly limited to real property"): Note (1923) 9 Va. L. Rev. 644, 648 (The Common Law Rule).

26. ACCORD: RESTATEMENT, AGENCY, *Commentary* (Tent. Draft no. 2, 1927) § 200, p 10.

27. Of all pertinent cases read, only one questioned Kent's statement that mental inconsistencies between Kent and Story. *Ish v. Crane*, 13 Ohio St. Rep. the strict Common Law rule was the rule in the states and pointed out the fundamental, 611 (1862).

28. *Supra* note 1. There is nothing in Kent to justify such limitation. It is simply the Story rationalization applied to Kent.

port to the Story proposition, and held that here *A could act in his own name*, so that death of *P* did not terminate his authority. It even used Story's example of the factor to prove the point. But observe that the word "notice" is not mentioned in that paragraph. The court apparently based its opinion on *A's* authority to execute the power in his own name.²⁹

Two other cases adopting the Story view are *Ish v. Crane* and *Deweese v. Muff*.³⁰ Their facts and issues are similar to those of the *Dick* case. Both courts commingle with the Story rationalization the rule that where principal by act revokes agent's authority but does not notify agent of such revocation, *A* may continue to act for *P* within the scope of his apparent authority.³¹ The reason given for following this view is that public policy and the requirements of business and commerce demand that *A* have power to bind *P* until he is notified that his authority is terminated.

These three cases briefly illustrate the reasons given to justify support of the Civil Law exception in the teeth of the nearly overwhelming authority of the majority rule. The real question they raise is, should the agent be empowered to bind the deceased principal's estate?³² Seavey proposes a possible answer.³³ He suggests that *P's* estate be obligated to the extent of *A's* right of exoneration. This right exists where *A* is about to be injured, through no fault of his own, because he obeyed *P's* orders. Admitting that the agent's power terminated when principal died, there is no reason why the right of exoneration should cease. Therefore, if *A*, acting innocently, has subjected himself to claims by a third party, the principal's estate should exonerate him. Thus the third party could reach the estate.³⁴ However, the Common Law, the Civil Law and Judge Story's rationalization have provided the three principal answers to the question.

JERRED BLANCHARD

29. It should be noted that this opinion seems to presuppose Story's theory which applies only to cases where agent acted in good faith, without notice of *P's* death. STORY, *op. cit. supra* note 3, § 492.

30. *Supra* note 24.

31. *Id.* at 20; 8 Ohio St. Rep. 521, 527-536; *Supra* note 9.

32. Seavey, *Problems in Restatement of the Law of Agency* (1930), 16 A. B. A. J. 117, 120. In France this is carried one step further. Where the agency relationship involved commerce it continued after *P's* death until revoked by *P's* heir or other successor. 1 POTHIER ON OBLIGATIONS (3rd Am. ed., 1853) p. 365.

33. A means of relieving *A* of liability is suggested by *Carriger v. Whittington*, 26 Mo. 311 (1858) and Seavey, *Termination by Death of Proprietary Powers of Attorney* (1922), 31 YALE L. J. 283, 291. This rule presupposes acceptance of the strict Common Law view, but where *A* acts pursuant to his supposed authority, in good faith, and ignorant of *P's* death, equity should enter to hold him harmless in a suit against him, as by *T*, for instance, on *A's* warranty of authority. This would seem an appropriate situation in which to exercise equity's power to alleviate hardship. *Supra* notes 5 and 14.

34. Seavey, *The Rationale of Agency* (1920), 29 YALE L. J. 859, 894. The author comments that a simpler way to achieve the result would be to eliminate the equitable steps and treat the power as continuing until the agent has been notified (the Civil Law exception). Such is now the rule in England under the CONVEYANCING AND LAW OF PROPERTY ACT, 44-45 Vict. p. 110 (1881).