

trigger off certain legal results apply to both; and that these are rules which create a special form of agency or authority by operation of law. It is suggested below that the first proposition does not now appear to be true: that the emergency rules do not apply to all the cases. It is also suggested that even if the second proposition was formerly regarded as true, the notion of a special type of authority by operation of law is in this context at the present time no longer necessary or appropriate.

4-003 The traditional cases: the shipmaster and the acceptor for honour. The two traditional cases from which the concept of agency of necessity derives are those of the shipmaster, who has wide powers to bind by contract his owner, and also sometimes the cargo owners, in situations of emergency²; and the person who accepts a bill of exchange for honour and succeeds to the rights of the holder against the person for whom he accepts.³ The second case appears to originate from the law merchant⁴ and is now statutory⁵; it may in effect confer a right to reimbursement on the acceptor but its relation to agency is tenuous from the start. The dissimilarity between these two cases is enough to indicate immediately that a category comprising them both is unlikely to be a satisfactory one.

4-004 First category: the shipmaster. The first category, based on the case of the shipmaster, creates full agency in that it involves both the external and the internal aspects of the agency relationship. As to the external aspect, the master can create contracts binding and conferring rights on his principal (usually the shipowner or demise charterer), make dispositions of his principal's property and receive money and property for his principal also. He has also the internal entitlement to reimbursement and indemnity against his principal in respect of what he has done⁶; even if that is not needed, he has a defence to any action brought against him by his principal in respect of his acts. And the act will be valid where validity is in issue. Thus there is old authority that the master can sell⁷ or hypothecate⁸ the ship, enter into a salvage agreement regarding it⁹ and contract for the cargo to be transhipped and carried forward.¹⁰ He can also sell or hypothecate the cargo, whether together with or separately from the ship,¹¹ and

² See below, para. 4-004.

³ Bills of Exchange Act 1882, ss.65-68; and see *Hawtayne v. Bourne* (1841) 7 M. & W. 595 at 599.

⁴ See *Hawtayne v. Bourne*, above, at 599.

⁵ See n. 3, above.

⁶ See Article 62.

⁷ *The Glasgow* (1856) Swab. 145; *The Australia* (1859) Swab. 480; *Atlantic Mutual Insurance Co. v. Huth* (1880) 16 Ch.D. 474.

⁸ *The Gratitude* (1801) 3 Ch. Rob. 240; *The Bonaparte* (1853) 8 Moo.P.C. 459; *The Hamburg* (1864) 2 Moo.P.C.(N.S.) 289; *The Onward* (1873) L.R. 4 A. & E. 38; *Gunn v. Roberts* (1874) L.R. 9 C.P. 331 at 337; *Kleinwort, Cohen & Co. v. Cassa Maritima of Genoa* (1877) 2 App. Cas. 156 (cases of bottomry, viz. hypothecating the cargo also).

⁹ *The Rempor* (1883) 8 P.D. 115; *The Unique Mariner* [1978] 1 Lloyd's Rep. 438, Illustration 3, discussed also below.

¹⁰ See *The Soblomsten* (1866) L.R. 1 A. & E. 293; Scrutton, *Charterparties* (21st ed.), Arts. 124-126.

¹¹ As to sale, see *Tronson v. Dent* (1853) 8 Moo.P.C. 419; *Australasian S.N. Co. v. Morse* (1872) L.R. 4 P.C. 222; *Acatos v. Burns* (1878) 3 Ex. D. 282; *Atlantic Mutual Insurance Co. v. Huth*, n. 7 above. As to hypothecation, see cases cited above, n. 8.

enter into a salvage agreement regarding it.¹² There are a few cases suggesting that these powers may apply also to land carriers.¹³ The actual decisions concerning the latter type of carrier involve only claims to reimbursement and indemnity between principal and agent and so may only be examples of the second category: they are further referred below in that connection. It is there submitted, however, that they should in fact be attributed to the first category if that category can be enlarged and re-explained on a broader basis than that of agency by operation of law.

In respect of the shipmaster selling, hypothecating or contracting for salvage of the ship, this can be treated as involving no more than the extension of the authority of one who is already an agent in the full sense, for the master obviously has already in many situations actual authority, express or implied, from the shipowner (or demise charterer) to make normal trading contracts. However, where the action taken relates to the cargo, the master as such has no legal relationship with the cargo owner; and it can therefore be said that the master is by the emergency created an agent where he was not before, and that this requires special rules. Yet he is still agent for the shipowner, who is bailee of the cargo; and although the shipowner may well have had no agency powers prior to the emergency, his position as bailee means that he has a legal relationship with the cargo owner which is in principle capable of giving rise to powers, which can be exercised through the master, who is his agent. So the significance of the distinction between ship and cargo is doubtful.

Rules determining necessity. The traditional rules applicable to the exercise of this authority may be stated as follows. They derive largely from the shipmaster case, and it will be obvious later that they are in large measure inapplicable to the second category. Indeed in *The Winson*,¹⁴ discussed below, Lord Diplock said that they should be confined to cases of the first category.¹⁵

- (a) It must be impossible, or at any rate impracticable, for the agent to communicate with the principal. Some cases imply that communication must be impossible,¹⁶ but this seems too strict: as long ago as 1851 Parke B. spoke of the principal's being unable to be "conveniently communicated with",¹⁷ and in 1895 Lord Esher M.R. of an "opportunity to consult",¹⁸ In *Springer v. Great Western Railway Co.* Bankes L.J. approved the phrase "practically impossible"¹⁹ and Scrutton L.J. spoke of

¹² *The Winson* [1982] A.C. 939, Illustration 1. See below, para. 4-008.

¹³ *Great Northern Ry Co. v. Swaffield* (1874) L.R. 9 Ex. 132 (stabling uncollected horse); *Sims & Co. v. Midland Ry Co.* [1913] 1 K.B. 103 (sale of uncollected goods); cf. *Springer v. Great Western Ry Co.* [1921] 1 K.B. 257.

¹⁴ *China Pacific S.A. v. Food Corp. of India (The Winson)* [1982] A.C. 939, Illustration 1, also discussed below.

¹⁵ At 958.

¹⁶ e.g. *Prager v. Blatspiel, Stamp & Heacock Ltd* [1924] 1 K.B. 566 at 571.

¹⁷ *Beldon v. Campbell* (1851) 6 Exch. 886 at 890. See also *Australasian S.N. Co. v. Morse* (1872) L.R. 4 P.C. 222.

¹⁸ *Gwilliam v. Twist* [1895] 2 Q.B. 84 at 87.

¹⁹ [1921] 1 K.B. 257 at 265.

communication as being "commercially impossible".²⁰ This would include situations where there are too many principals to consult (e.g. owners of cargo shipped under bills of lading on liner terms²¹).

- (b) The action taken must be necessary²² for the benefit of the principal.²³ The agent's opinion as to the necessity is irrelevant. It is, however, sufficient if a reasonable person would think there was a necessity.²⁴ Mere inconvenience does not create necessity.²⁵ The necessity must of course be for the protection of the interests of the principal, not of the agent.
- (c) The agent must have acted bona fide in the interests of the principal.²⁶
- (d) The person in whose interest the agent is acting must be competent; for example, a dissolved corporation,²⁷ or an alien enemy,²⁸ cannot be a principal under these rules. This limitation is inevitable if the doctrine is one of agency, but its results can be criticised.²⁹
- (e) It would also seem that in both types of situation the authority could not prevail against express instructions to the contrary: this follows from the fact that it does not operate where the principal can be consulted.³⁰ The inference is that the principal could forbid the action at the time: if so, he can do so in advance.³¹

4-006

Second category: the acceptor for honour. The second type of case involves situations where a person who acts for another in an emergency seeks only reimbursement or indemnity from the person benefited, or to defend himself in respect of what he has done in an action for breach of contract (if there is a contract) or in tort (usually conversion, which he might otherwise have committed by his dealing with property of the principal). No issue arises

²⁰ *ibid.* at 268. And see *Barker v. Burns, Philp & Co. Ltd* (1944) 45 S.K. (N.S.W.) 1 (communication possible despite wartime conditions); *Sachs v. Miklos* [1948] 2 K.B. 23.

²¹ See *The Choko Star* [1990] 1 Lloyd's Rep. 516, Illustration 2, also discussed below.

²² For the meaning of "necessary" see *Prager v. Blatspiel, Stamp & Heacock Ltd* [1924] 1 K.B. 566 at 571-572; *The Australia* (1859) Swab, 480; *Australasian S.N. Co. v. Morse*, n. 11 above; *Atlantic Mutual Ins. Co. v. Huth* (1879) 16 Ch.D. 474. And see *Phelps, James & Co. v. Hill* [1891] 1 Q.B. 605.

²³ See *Burns, Philp & Co. Ltd v. Gillespie Bros Pty Ltd* (1947) 74 C.L.R. 148 (doctrine inapplicable where measures undertaken (in wartime) for security of ship and cargo considered as one adventure).

²⁴ *Tetley & Co. v. British Trade Corp.* (1922) 10 Ll. Rep. 678.

²⁵ *Sachs v. Miklos* [1948] 2 K.B. 23.

²⁶ *Prager v. Blatspiel, Stamp & Heacock Ltd*, n. 22 above, at 570; *Tronson v. Dent* (1853) 8 Moo.P.C. 419 at 449-452; *The Winson* [1982] A.C. 939, Illustration 1, discussed also below; *Re F (Mental Patient: Sterilisation)* [1990] 2 A.C. 1 at 75, per Lord Goff of Chieveley.

²⁷ *Re Banque des Marchands de Moscou* [1952] 1 T.L.R. 739.

²⁸ *Jehara v. Ottoman Bank* [1927] 2 K.B. 254 (decision reversed [1928] A.C. 269).

²⁹ See Goff and Jones, *Law of Restitution* (7th ed.), para. 17-006.

³⁰ See Illustrations 1, 2. See also *Goddard* [1984] L.M.C.L.Q. 255; but cf. *Great Northern Ry Co. v. Swaffield* (1874) L.R. 9 Ex. 132.

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regards third parties: if this is an example of agency reasoning, it involves only the internal relationship between principal and agent. Although in 1841 Parke B. said that the acceptor for honour was, after the shipmaster, the only other example of agency of necessity,³² it is clear that the second category is not in fact confined to the acceptor for honour. Thus it has been held that a carrier may make a contract for the stabling of an uncollected horse and recover the charges from the consignor³³; that he is justified in selling perishable goods which remain uncollected and are deteriorating³⁴; and that a salvor may warehouse goods on behalf of their owner at the termination of the salvage service and recover the cost of doing so.³⁵ These cases may in fact be examples of the first category: it may be that these carriers made or could have made contracts binding the goods owners to third parties. The actual decisions, however, relate only to the internal relationship between principal and agent. It has also been held that an agent for sale was justified in shipping the goods elsewhere, even contrary to instructions, where they were in danger because of potentially hostile conditions.³⁶ On the other hand it has been held that a bailee of furniture was liable in conversion when he sold it after fruitless attempts to contact the owner: though in this case it appears that necessity, as opposed to inconvenience, had not arisen.³⁷ It should be noted that in these cases the supposed agent may have no prior relationship with the principal, as in the leading case of the acceptor for honour: but equally he may already be an agent, and is at any rate likely to have some relationship with the person for whom he acts, such as that of bailee.

Since cases in the second category only give rise to internal rights, duties and defences between the person acting and the person benefited, they are not dissimilar to the *negotiorum gestio* of Roman law, which is a quasi-contractual institution entitling the *gestor*, a person intervening in situations of necessity, to reimbursement and also making him liable for acting inappropriately.³⁸ As such they seem in the modern law more appropriately dealt with as part of the law of restitution. The second category in fact contains a limited number of rather miscellaneous situations where the law of agency was pressed into service long ago to provide a way of dealing with problems which probably ought nowadays to be approached differently. The cases usually involve an inappropriate use of agency reasoning, as in another context does the use of a notion of irrevocable

³² *Hawthorne v. Bourne* (1841) 7 M. & W. 595 at 597.

³³ *Great Northern Ry Co. v. Swaffield* (1874) L.R. 9 Ex. 132.

³⁴ *Sims & Co. v. Midland Ry Co.* [1913] 1 K.B. 103; cf. *Springer v. Great Western Ry Co.* [1921] 1 K.B. 257.

³⁵ *The Winson* [1982] A.C. 939, Illustration 1; see below.

³⁶ *Tetley & Co. v. British Trade Corp.* (1922) 10 Ll. Rep. 678. See too *Liu Wing Ngai v. Lui Kok Wai* [1996] 3 Singapore L.R. 508.

³⁷ *Sachs v. Miklos* [1948] 2 K.B. 23; followed in *Anderson v. Erlanger* [1980] C.L.Y. 133. See also *Munro v. Wilmott* [1949] 1 K.B. 295 (similar facts). In *Ridyard v. Roberts*, (CA unreported), May 16, 1980 a bailee of ponies was held justified in selling them when the owner in breach of contract failed to remove them. In *Coldman v. Hill* [1919] 1 K.B. 443 at 456 Scrutton L.J. suggested that a bailee of cattle from whom they are stolen ought, if he cannot contact the owner, to "act as agent of necessity on behalf of and at the expense of the owner". Sometimes statute gives a power of sale: e.g. unpaid seller's right to resell: Sale of Goods Act 1979, s.48(3); Protection of Animals Act 1911, s.7; Unsolicited Goods and Services Act 1971 as amended; Torts (Interference with Goods) Act 1977, ss.12, 13.

³⁸ See Buckland, *Textbook of Roman Law* (3rd ed.), pp. 537-538.

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4-006

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agency to create what are really property or security interests.³⁹ The problems of this category should nowadays, therefore, be considered against the background not of agency but of a possible general principle of necessitous intervention within the law of restitution.⁴⁰

4-007 **Only first category a true example of agency.** Thus only the first category is a true example of agency reasoning, and only that category is therefore really relevant for discussion in this book. It is also much less significant than it was, for modern communications will normally make dramatic actions by shipmasters, or indeed others, unnecessary even in remote places: even in maritime salvage situations a master may often be in touch by radio. Situations can obviously still arise, however, where communication is impossible or impracticable; and as regards cargo, where the ship contains goods covered by many bills of lading it may be impracticable to trace and/or communicate with all the cargo owners.⁴¹ Cases may also arise where the cargo owner does not answer, or does not answer clearly, requests for instructions.⁴²

This type of agency of necessity seems in origin to be a primitive example of what would now be regarded as vicarious liability reasoning. To impose liability on the principal in such cases was more important than to think of any correlative rights for him. A justification given in 1808 was that the master "is seldom of ability to make good a loss of any considerable amount"⁴³; hence the owner should be liable. The idea of authority arising in specified circumstances by operation of law is not, however, so satisfactory as the combination of the more general rules of implied and apparent authority, which (particularly the latter) have been developed subsequently to the old cases. For the old rules require that the third party dealing with the agent take the risk as to whether the circumstances creating authority by operation of law have arisen—whether there really is an emergency and whether it really is impracticable for the agent to communicate with his principal. Furthermore, if it is correct, as is suggested above, that there is no possibility of authority if the principal has been communicated with and has forbidden the act in question, this also is not easy to reconcile with the idea of authority by operation of law. Yet as the law at present stands, if the full requirements are not complied with, the agency power does not exist, whatever the appearance to the third party. Such an approach is much less sensitive to the merits of the cases than the normal rules of implied and apparent authority.⁴⁴ It is true that under the doctrine of apparent authority the third party cannot rely merely on the statement of the agent that he has authority, so that if the requirements for operation of the doctrine have not arisen but the master says that they have, the third party will not on that ground alone be protected.⁴⁵ But if there was an appearance of authority, modern doctrine would make the shipowner liable in some cases where old cases would not—for example, where

³⁹ See Article 118.

⁴⁰ See Goff and Jones, *op. cit.* n. 1 above.

⁴¹ See *The Choko Star* [1990] 1 Lloyd's Rep. 516, Illustration 2, also discussed below.

⁴² As in *The Winson* [1982] A.C. 939, Illustration 1, also discussed below.

⁴³ Abbott, *Merchant Ships and Seaman* (3rd ed.), cited in Holdsworth, *H.E.L.* VIII, p. 250.

⁴⁴ See in general below, para. 4-008. The same can in fact be said of the Factors Acts: see Article 89.

⁴⁵ *Armagas Ltd v. Mundogas S.A. (The Ocean Frost)* [1986] A.C. 717.

it appeared that the act was justified; where the act had been forbidden by the principal but this was not known to the third party; and perhaps where the agent gave the impression that the principal could not be consulted.⁴⁶

The old English rules were much more elaborately worked out than the corresponding law in the United States, which has been content with the idea of implied (incidental) authority to act in emergency.⁴⁷ There is, however, some other English case law which approaches the question of emergency powers simply on the basis of implied (and hence in appropriate cases apparent) authority, suggesting that the authority of an agent may be enlarged in situations of emergency. This reasoning has been used to justify delegation by an agent of his powers,⁴⁸ lending on unusual terms⁴⁹ and giving credit in circumstances where this would not be normal.⁵⁰ It is submitted that this is the correct approach. If it is correct, it entails that the person acting already has a legal relationship with the principal. It is necessary, however, to add to it the proposition, to be derived from *Tappenden v. Artus* and *The Winson*, discussed below, that a person already in some other legal relationship with the principal which is not one of agency (such as a bailee) may likewise have agency powers in certain situations, some of which may involve emergencies. If such an approach is followed, the supposedly separate notion of agency of necessity, or at any rate much of it, could, and, it is submitted, should be absorbed into the general law relating to implied and apparent authority.

4-008 **Salvage contracts: an opportunity for improved analysis.** In the case of salvage agreements, where rapid decisions may be required, the advantages of detaching from the ancient, strict rules and subsuming the problem under the general rules of authority can readily be seen. The first step in doing so was taken by Brandon J. in *The Unique Mariner*,⁵¹ where in a salvage situation he held owners bound by the master's signature on Lloyd's Open Form on the basis of apparent authority, without reference to the old rules (which probably were not satisfied, because the master had already been in touch with the owners at the time). The case only concerned salvage in respect of the *ship*, for whose owner the master is certainly agent. Subsequently however in *The Choko Star*⁵² the Court of Appeal applied the ancient case law to hold that the master's signature

⁴⁶ *cf. United Bank of Kuwait Ltd v. Hammoud* [1988] 1 W.L.R. 1051, where a solicitor was held liable on an unauthorised and fraudulent transaction by an assistant where the transaction could have been authorised had a certain background of facts existed: the third party was entitled to assume from the conduct of the agent that it did. "The bank, knowing that [X] was a practising solicitor with established firms, were entitled to assume the truth of what he said unless alerted to the fact that the contrary might be the case"—*per* Lord Donaldson of Lynton M.R. at 1066. But *cf. Hirst v. Etherington* [1999] Lloyd's Rep. P.N. 938 and below, para. 8-023.

⁴⁷ See *Restatement, Third*, § 2.02, Comments *e, f*.

⁴⁸ *De Bussche v. Alt* (1878) 8 Ch.D. 286, Illustration 7 to Article 34. See also *Walker v. G.W. Ry Co.* (1867) L.R. 2 Ex. 228; *Langan v. G.W. Ry Co.* (1873) 30 L.T. 173 (railway officials ordering medical attention for passengers: company liable: but here the emergency is not that of the principal, the company).

⁴⁹ *Montaignac v. Shitta* (1890) 5 App. Cas. 357, Illustration 15 to Article 72.

⁵⁰ *Gokal Chand-Jagan Nath v. Nand Ram Das-Atma Ram* [1939] A.C. 106.

⁵¹ [1978] 1 Lloyd's Rep. 438, Illustration 3.

⁵² [1990] 1 Lloyd's Rep. 516, Illustration 2; noted [1991] L.M.C.L.Q. 1; (1992) 55 M.L.R. 414; followed in *The Pa Mar* [1999] 1 Lloyd's Rep. 338.

special case it may be that he could recover the principal's loss as an exception to the normal rules for *damages*: the problem is discussed below.⁶⁹

Some special situations are now discussed.

9-012 Undisclosed principal. Where the principal is undisclosed at the time of contracting, the contract is made with the agent, and he is personally liable and entitled on it. The principal also may intervene to sue, and may be sued, but the latter only subject to the general rule that nothing must prejudice the right of the third party to sue the agent if he so wishes.⁷⁰ This is therefore a case where both agent and principal are liable and entitled. The doctrine of election, referred to above, may raise problems when the agent is sued.

In this context it is often said that the right of the principal is superior to that of the agent, and it is a defence for the third party to prove that the principal has intervened and claimed payment or damages, or that the agent's authority to sue is otherwise terminated. On principle this seems correct⁷¹; though some of the cases usually cited for the proposition would now be otherwise explained.⁷² This subordination may also apply where the agent of a *disclosed* principal is a joint and several creditor of the third party; his right is presumably secondary to that of the principal.⁷³

9-013 Damages. The fact that the agent of the *undisclosed* principal appears to be and is regarded as a party to the contract can raise serious problems in the law of damages. The agent can certainly sue for specific performance, at any rate in his own favour⁷⁴; but if he sues for damages he may be met by the fact that in general the victim of a breach of contract (or indeed a tort) can in general only recover his own loss.⁷⁵ In the case under consideration, any loss may be suffered by the agent's principal. If the agent was a trustee, he could recover his beneficiary's loss; but it has been held that the agent of an undisclosed principal cannot be regarded as a trustee for this purpose.⁷⁶

Exceptions to the main rule have long existed, and were recognised in the leading case of *The Albazero*,⁷⁷ which concerned an action by a person who was the shipper of goods and charterer of a vessel to recover the loss of the consignee. The exceptions were principally identified in the context of goods in transit which were likely to pass into hands other than those of the original contracting

⁶⁹ See below, para. 9-013.

⁷⁰ See Comment to Article 76; *O'Herlihy v. Hedges* (1803) 1 Sch. & Lef. 123; *Montgomerie v. U.K. Mutual S.S. Assn* [1891] 1 Q.B. 370 at 372. See also *Sargent v. Morris* (1820) 3 B. & Ald. 277 at 281. As to principal's liability where agent lacks capacity, see above, para. 8-076.

⁷¹ *cf.* *Restatement, Second*, § 302, Comment c; § 368, Comments d, e, f; § 370; *Maynegrain Pty Ltd v. Compafina Bank Ltd* [1982] 2 N.S.W.L.R. 141 at 150 (reversed without reference to this point (1984) 58 A.L.J.R. 389, PC). See Dal Pont, para. 19.2.

⁷² e.g. *Rogers v. Hadley* (1821) 2 H. & C. 227.

⁷³ *cf.* *Restatement, Second*, § 370.

⁷⁴ A claim for an order in favour of another might be met by the defence that the third party had not promised to perform in favour of that party.

⁷⁵ A proposition accepted in the leading case, *Alfred McAlpine Construction Ltd v. Panatown Ltd* [2001] 1 A.C. 518 at 522-523, 575, 580-581, discussed below.

⁷⁶ *Allen v. F. O'Hearn & Co.* [1937] A.C. 213 at 218 ("the supposed agent's rights would be to recover the damage suffered by him on the footing that he had been principal"); but this is a puzzling passage.

⁷⁷ [1977] A.C. 774.

party.⁷⁸ More recently decisions in the context of construction have permitted contracting hands in a way that had parallels with goods in transit,⁷⁹ but the next case did not.⁸⁰ The matter came to a head in *Alfred McAlpine Construction Ltd v. Panatown Ltd*,⁸¹ where the House of Lords accepted in principle⁸² the availability of an action for defective performance by the party engaging a construction firm where the person doing so was in effect a nominee and the loss was suffered by another, associated firm which owned the land on which the building was erected.

Unfortunately the reason for permitting such recovery was not agreed. The majority view was that the contracting party had an interest in the performance which enabled him to sue when it was defective.⁸³ The minority view was that the loss was that of a third party but that in this and other exceptional cases the contracting party could sue for loss suffered by another. He would then be accountable to that other⁸⁴; which would not be so (in the absence of other special arrangements) under the first view. Either view, but especially the first, encounters difficulties with the basic rule of remoteness of damage in contract, which confines damages to what had been in the contemplation of the parties when the contract was made. Where the contract has a value which can be assessed objectively, its breach, whether by way of supply of inferior goods or services, can be assessed on the basis of that value and the problem can be met.⁸⁵ But when what is claimed is loss idiosyncratic to the third party, it may be difficult to say that such loss was in the contemplation of the parties. There are nevertheless in the *Panatown* case suggestions that, whichever view is adopted, the rule is one of law, and that such loss can be taken in on an objective basis.⁸⁶ In the context of undisclosed principal such theoretical problems are acute, as the third party has no contemplation of the existence of another party to the contract, let alone of special losses which that party might suffer. It is however assumed that some sort of objective assessment is to be applied as a matter of law.⁸⁷

⁷⁸ See p. 847 *per* Lord Diplock.

⁷⁹ *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85.

⁸⁰ *Darlington B.C. v. Wiltshire Northern Ltd* [1995] 1 W.L.R. 68.

⁸¹ [2001] 1 A.C. 518. See in general Chitty, *Contracts* (30th ed.), paras 18-049 *et seq.* See also Unberath, *Transferred Loss* (2003), Chap. 7, indicating (at p. 178) similar difficulties in German law.

⁸² The majority also held the action excluded because of the presence of a separate contract between contractor and site owner.

⁸³ A view strongly put forward by Coote [1997] C.L.J. 537; (2001) 117 L.Q.R. 81; see also Ian Duncan Wallace Q.C. (1999) 115 L.Q.R. 394; and Friedmann (1995) 111 L.Q.R. 628.

⁸⁴ A proposition for which there is surprisingly little authority. See however *The Albazero* [1977] A.C. 774 at 846; *Joseph v. Knox* (1813) 3 Camp. 320; *Allen v. F. O'Hearn & Co.*, n. 76 above, at 218.

⁸⁵ See *Leif Hoegh & Co. v. Petrolsea Inc. (The World Era)* [1992] 1 Lloyd's Rep. 45 at 52-53, *per* Hobhouse J.

⁸⁶ See pp. 535-536 (Lord Clyde), 554-555 (Lord Goff), 591 (Lord Millett).

⁸⁷ See pp. 530, 535-536 (Lord Clyde), 555-556 (Lord Goff), 591-592 (Lord Millett). See also p. 581, where Lord Millett cites the *Bovis* case, n. 92 below, as authority for the undisclosed principal situation. Despite this, in *Rolls-Royce Power Engineering Plc. v. Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC): [2004] 2 All E.R. (Comm) 129 it was held that recovery was limited to situations where the third party was aware of the interest of the principal. This seems doubtful: see Tettenborn, *Amicus Curiae*, Issue 60, July/August 2005. See also *Welburn v. Dibb Lupton Broomhead* [2002] EWCA Civ 1601; [2003] P.N.L.R. 28; *Family Food Court v. Seah Boon Lock* [2008] SGCA 31.

though it cannot be said that the matter is exhaustively argued. There is Scottish authority to that effect, albeit conditioned by procedural considerations.⁸⁸

9-014 **Indirect representation.**⁸⁹ In this situation the principal specifically did not authorise the agent to bring him into privity with the third party (as with the old foreign principal rule⁹⁰) or the contract with the third party excluded the intervention of anyone else.⁹¹ Here again the agent may wish to sue for the principal's loss. In this context a rather vague reference to agency has been used to give the same result as that above.⁹² The proper analysis of both situations awaits further development.

9-015 **Interrogatories as to existence of undisclosed principal.** It has been held that in an action by the vendor for specific performance of a contract of sale of land, the plaintiff is not entitled to interrogate the defendant for the purpose of ascertaining whether he was acting as agent for an undisclosed principal.⁹³ And in general it would seem that, the contract being that of the agent, he is under no duty when suing or sued to disclose the existence of his principal.⁹⁴

9-016 **Unidentified principal.** Difficult problems must frequently occur in the case of unidentified principals. Where the agent gives the third party to understand that he acts for another, as by reference to "our principals", "our clients", etc., there may indeed be cases where the third party can be regarded as being willing to deal with the principal, whoever he is. Indeed it has been said that in an ordinary commercial transaction such willingness may be assumed by the agent in the absence of other indications.⁹⁵ But this may sometimes be an improbable construction to put on the situation; at the other end of the scale, therefore, such facts may give rise, or assist in giving rise, to the inference that the third party deals only with the agent (the problem of the agent's position vis-à-vis his principal being irrelevant to the third party). But there is a middle course. The *Restatement, Third*⁹⁶ provides that when the agent acts for a principal whose existence is known but who is not identified at the time of contracting, the agent is unless otherwise agreed a party to the contract, and the inference is that he is liable in addition to and not in substitution for the principal (though sometimes

⁸⁸ *Craig & Co. v. Blackater* 1923 S.C. 472; *James Laidlaw & Sons v. Griffin* 1968 S.L.T. 278; and see *Corfield v. Grant* (1992) 29 Con.L.R. 58.

⁸⁹ See above, paras 1-020, 1-021.

⁹⁰ See below, para. 9-020.

⁹¹ See above, para. 8-081.

⁹² See *LM International Construction Inc. (now Bovis International Inc.) v. The Circle Ltd Partnership* (1995) 49 Con.L.R. 12 at 23-24 (Staughton L.J.), 32-33 (Millett L.J.). In the *Panatown* case, above, Lord Millett referred to the *Bovis* case as a case of undisclosed principal: [2001] 1 A.C. 518 at 581.

⁹³ *Sebright v. Hanbury* [1916] 2 Ch. 245. But as to discovery against the principal, see above, para. 8-083.

⁹⁴ See below, para. 9-017; *IVI Pty Ltd v. Baycrown Pty Ltd* [2007] 1 Qd R. 428 at [26] and [98] (no duty to reveal identity of undisclosed principal in pleadings, nor during trial).

⁹⁵ *Teheran-Europe Co. Ltd v. S.T. Belton (Tractors) Ltd* [1968] 2 Q.B. 545 at 555, per Diplock L.J., referred to as a "beneficial assumption in commercial cases" by Lord Lloyd of Berwick in *Siu Yin Kwan v. Eastern Insurance Co. Ltd* [1994] 2 A.C. 199 at 209. See also *Thomson v. Davenport* (1829) 9 B. & C. 78.

⁹⁶ § 6.02.

his liability may cease on disclosure of the principal's identity). Though the fact that the agent does not name his principal is obviously relevant in determining whether he contracts personally, such a general proposition has actually been rejected in England in respect of unwritten contracts,⁹⁷ and in the Supreme Court of Canada in respect of a written contract.⁹⁸ In view of the weakness, or at least uncertainty, of the law as to demanding to know the identity of the principal,⁹⁹ this is perhaps unfortunate. But the wording of written contracts may certainly give rise to the agent being a party to the contract in such a case.¹⁰⁰ And there are many cases showing that in such situations the court will recognise a trade usage that a commercial agent, e.g. a broker, is personally liable, particularly if his principal is unidentified.¹⁰¹ Here again the exact terms of the agent's engagement with the third party require careful analysis. The trade custom cases, which arise mostly in the context of the rules of evidence, on the whole do seem to assume that the agent's liability is additional to that of his principal¹⁰²; a collateral contract¹⁰³ and suretyship¹⁰⁴ are also sometimes suggested. The doctrine of election, referred to above,¹⁰⁵ may again cause problems.

The most difficult cases may perhaps be those where the third party deals with an agent who is known normally to act for principals or in a situation where persons dealing frequently act for principals, but there is no indication as to whether or not that is so on this occasion. This was of course a common situation with the nineteenth-century factor, who was distinguished from a broker on the basis that a broker could be assumed to be dealing on behalf of a principal¹⁰⁶; and cases of this type are associated with the growth of the undisclosed principal doctrine.¹⁰⁷ Problems may also arise in connection with bidders at auction

⁹⁷ *N. & J. Vlassopoulos Ltd v. Ney Shipping Co. (The Santa Carina)* [1977] 1 Lloyd's Rep. 478, Illustration 3 to Article 101. But equally it may make clear that he acts as agent: see the *Chartwell Shipping* case, below; *Southwell v. Bowditch* (1876) 1 C.P.D. 374.

⁹⁸ *Chartwell Shipping Ltd v. Q.N.S. Paper Co. Ltd* [1989] 2 S.C.R. 683; (1989) 62 D.L.R. (4th) 36, Illustration 9 to Article 99, on the basis that "to add a burden of proof on the mandatary would blur the focus of analysis: the goal is to identify the intentions of the parties" (per L'Heureux Dubé J. at pp. 745, 78).

⁹⁹ See below, para. 9-017.

¹⁰⁰ e.g. *Tudor Marine Ltd v. Tradax Export S.A. (The Virgo)* [1976] 2 Lloyd's Rep. 135, Illustration 6 to Article 99; *Seatrade Groningen BV v. Geest Industries Ltd (The Frost Express)* [1996] 2 Lloyd's Rep. 375, Illustration 7 to Article 99.

¹⁰¹ *Dale v. Humfrey* (1858) E.B. & E. 1004 (oil); *Cropper v. Cook* (1868) L.R. 3 C.P. 194 (wool); *Fleet v. Murton* (1871) L.R. 7 Q.B. 126 (fruit); *Hutchinson v. Tatham* (1873) L.R. 8 C.P. 482 (charterparty); *Imperial Bank v. London & St Katharine Docks Co.* (1877) 5 Ch.D. 195 (fruit); *Bacmeister v. Fenton, Levy & Co.* (1883) C. & E. 121 (rice); *Pike v. Ongley* (1887) 18 Q.B.D. 708 (hops); *Thornton v. Fehr & Co.* (1935) 51 Ll.Rep. 330 (tallow); *Anglo Overseas Transport Ltd v. Titan Industrial Corp. (United Kingdom) Ltd* [1959] 2 Lloyd's Rep. 152; *Perishables Transport Co. v. N. Spyropoulos (London) Ltd* [1964] 2 Lloyd's Rep. 379; *Cory Bros Shipping Ltd v. Baldan* [1997] 2 Lloyd's Rep. 58 (forwarding agents). cf. *Wilson v. Avec Audio-Visual Equipment Ltd* [1974] 1 Lloyd's Rep. 81 (no such custom as to insurance brokers). See further Article 98.

¹⁰² See, e.g. *Pike v. Ongley*, n. 101 above.

¹⁰³ *Hutchinson v. Tatham*, n. 101 above (collateral contract coming into effect if name of principal not given; *Reid v. Dreaper* (1861) 6 H. & N. 813).

¹⁰⁴ *Imperial Bank v. London and St Katharine Docks Co.*, n. 101 above.

¹⁰⁵ Para. 9-007.

¹⁰⁶ *Baring v. Corrie* (1818) 2 B. & A. 137. The factor's contract could perhaps also be treated as collateral: above, para. 9-009.

¹⁰⁷ e.g. *Armstrong v. Stokes* (1872) L.R. 7 Q.B. 598; see Articles 76, 80.

sales.¹⁰⁸ Such cases may indeed fail to be considered under the undisclosed principal doctrine, in which case the contract is with the agent, subject to the principal's right to intervene and liability to be sued. But more rigorous analysis may require them to be considered in connection with the possible rules for unidentified principal cases.¹⁰⁹

If there is in unidentified principal cases not even a prima facie rule that the agent is liable together with the principal, the agent may sometimes appear to be free from liability in cases where he should arguably be regarded as undertaking it. In such cases the courts have sometimes classified the principal as undisclosed rather than unidentified in order to secure the liability of the agent. The undisclosed principal rules may then themselves be confused by considerations which are really relevant to the unidentified principal situation. For example, it has been held that a third party cannot set off against the principal a debt accruing before he had notice of the principal's existence unless the principal was in some way at fault in misleading him¹¹⁰—a rule appropriate to unidentified principal situations where the existence of a principal is from the start envisaged, but not to true undisclosed principals. It is therefore submitted that the courts should be willing to adopt a rule of at least prima facie liability together with an unidentified principal unless it is absolutely clear that the person concerned acted as agent only.¹¹¹

An action by the agent of an unidentified principal, where available, would be an action in accordance with the contract into which he had entered. It would not involve the problems of recovery of another's loss discussed in connection with undisclosed principals.¹¹²

9-017

Interrogatories as to name of unidentified principal. It is not clear whether an agent acting for an unidentified principal can be compelled to disclose his principal's name by interrogatory.¹¹³ In some countries an agent who does not name his principal becomes personally liable¹¹⁴; but outside trade custom this would in England require legislation. Even if the question can usually be answered in practice, the lack of a proper formal mechanism for ascertaining the principal of a person who acts "for principals" or equivalent is a weakness of English common law, particularly in view of the lack of any presumption that such a person contracts together with his principal.¹¹⁵

¹⁰⁸ See Illustration 4.

¹⁰⁹ See the differing views taken by Lord Denning M.R. and Diplock L.J. in *Teheran-Europe Co. Ltd v. S.T. Belton (Tractors) Ltd* [1968] 2 Q.B. 545; *Marsh & McLennan Pty Ltd v. Stanyers Transport Pty Ltd* [1994] 2 V.R. 232; Comment to Article 76.

¹¹⁰ *Cooke & Sons v. Eshelby* (1887) 12 App.Cas. 271; see Comment to Article 80.

¹¹¹ See Reynolds [1983] C.L.P. 119. See *Ferryways NV v. Associated British Ports* [2008] EWHC 225 (Comm); [2008] 2 All E.R. (Comm) 504; [2008] 1 Lloyd's Rep. 639 at [69]. *cf. Lundie v. Rowena Nominees Pty Ltd* (2007) 32 W.A.R. 404 (see n. 498 to para. 8-089, and n. 514 to para. 9-089).

¹¹² See para. 9-013, above.

¹¹³ See *Hersom v. Bennett* [1955] 1 Q.B. 98; *Thöl v. Leask* (1855) 10 Exch. 704; *Hancocks v. Leblache* (1878) 3 C.P.D. 197; *Sebright v. Hanbury* [1916] 2 Ch. 245.

¹¹⁴ See PECL, Art. 3:203 and material there cited.

¹¹⁵ See above, para. 9-016.

Fictitious or non-existent principal. Such situations have given rise to specialised case law in the context of companies in the course of formation and unincorporated associations. This is discussed separately.¹¹⁶ 9-018

Agent his own principal. Some cases suggest that where the agent has no principal, *viz.* is his own principal, he is personally liable and entitled. This seems contrary to general principle; but since such a proposition is not infrequently put forward, this topic also is separately discussed.¹¹⁷ It may certainly assist in providing a remedy in situations where the name of the principal is difficult or impossible to discover. 9-019

Foreign principal.¹¹⁸ There long existed a strong presumption of fact¹¹⁹ (so strong that a court was "justified in treating it as a matter of law"¹²⁰) that in the context of sale where an agent in England contracted on behalf of a foreign principal, disclosed or undisclosed, the agent assumed personal liability to his English suppliers and had no authority to pledge the principal's credit by establishing privity of contract between the principal and the third party¹²¹; and conversely, where a merchant in England contracted for a principal abroad, that merchant was not to be regarded as having authority to bring his principal into privity of contract with the home supplier. Several of the cases associate this rule with the "commission merchant", in some respects an equivalent of the civil law *commissionnaire*.¹²² The presumption could be displaced by clear evidence of authority. Further the effect of the presumption was to render the agent alone liable and entitled on the contract; so that when it was clear that the agent contracted only as agent, and that it was not intended that he should be personally liable, there was no room for the presumption, which could not operate inconsistently with the clear purport of the contract.¹²³ The presumption was not affected by the fact that the contract was in writing: most, if not all, of the cases concern such contracts. 9-020

The status of this presumption was discussed in many cases, and though it could be questioned,¹²⁴ it was said to reflect both a preference by foreign merchants to use an intermediary who did not bring them into privity of contract

¹¹⁶ See Article 107.

¹¹⁷ See Article 108.

¹¹⁸ *Hudson* (1957) 35 Can.B.Rev. 336; (1960) 23 M.L.R. 695; (1966) 29 M.L.R. 353; (1969) 32 M.L.R. 207. The term "foreign principal" does not seem to be a very precise one, but it is normally taken to mean a principal who does not reside or carry on business in England or Wales. However, the purpose of the rule indicates what sort of person might be regarded as a foreign principal, and it is very doubtful whether principals in Scotland, Northern Ireland or even the Irish Republic should be treated as foreign.

¹¹⁹ *Paterson v. Gandasequi* (1812) 15 East 62; *Smyth v. Anderson* (1849) 7 C.B. 21; *Dramburg v. Pollitzer* (1872) 28 L.T. 470; *Glover v. Langford* (1892) 8 T.L.R. 628; *Malcolm Finn & Co. v. Hoyle* (1893) 63 L.J.Q.B. 1; *Harper & Sons v. Keller, Bryant and Co. Ltd* (1915) 84 L.J.K.B. 1696.

¹²⁰ *Armstrong v. Stokes* (1872) L.R. 7 Q.B. 598 at 605.

¹²¹ *Armstrong v. Stokes*, above; *Elbinger, etc. v. Claye* (1873) L.R. 8 Q.B. 313; *Hutton v. Bulloch* (1874) L.R. 9 Q.B. 572; and see cases cited in n. 119 above.

¹²² See above, paras 1-020, 1-021; and the cases cited in nn. 120, 121 above. See also *Munday* (1977) 6 Anglo-Am.L.Rev. 221 at 232-242.

¹²³ *Miller, Gibb & Co. v. Smith & Tyrer Ltd* [1917] 2 K.B. 141.

¹²⁴ See *Miller, Gibb & Co. v. Smith & Tyrer Ltd*, above, at 162; *Holt & Moseley v. Cunningham & Partners* (1949) 83 Ll.Rep. 141.

with a merchant in another country, especially where the contract involved bulk supplies from several foreign sources; and also the reluctance of English merchants to enter into transactions which might involve them in problems of the conflict of laws or the possibility of having to sue in a foreign jurisdiction, or both,¹²⁵ especially where the contract concerned bulk supplies from overseas sources. The latter reasoning seems more significant to modern eyes, since the foreign merchant's contract with his English intermediary may not be governed by English law. The banker's commercial credit system performs a similar function in to some extent localising the transaction. Later cases tended to treat the fact that the principal was foreign as one to be taken into account but no more.¹²⁶ In *Teheran-Europe Co. Ltd v. S. T. Belton (Tractors) Ltd*,¹²⁷ where air compressors were ordered for use in Iran, the Court of Appeal finally held that the presumption itself no longer exists, for "the usages of the law merchant are not immutable". But the fact that the principal is foreign is not irrelevant, Diplock L.J. said¹²⁸:

"The fact that the principal is a foreigner is one of the circumstances to be taken into account in determining whether or not the other party to the contract was willing, or led 'the agent to believe' that he was willing, to treat as a party to the contract the agent's principal, and, if he was so willing, whether the mutual intention of the other party and the agent was that the agent should be personally entitled to sue and liable to be sued on the contract as well as his principal. But it is only one of many circumstances, and as respects the creation of privity of contract between the other party and the principal its weight may be minimal, particularly in a case such as the present where the terms of payment are cash before delivery and no credit is extended by the other party to the principal. It may have considerably more weight in determining whether the mutual intention of the other party and the agent was that the agent should be personally liable to be sued as well as the principal, particularly if credit has been extended by the other party".¹²⁹

9-021

Confirming houses in international sales.¹³⁰ A confirming house provides specialised agency functions for an overseas buyer who wishes to import goods. The normal purpose of the intervention of a confirming house is so that the seller, in a transaction between himself and an overseas buyer, shall have someone in his own country to look to in respect of performance of the contract: like the banker's commercial credit, it performs the function of reducing the possibility of becoming involved in questions of the conflict of laws or of suing in foreign jurisdictions. A confirming house may, on instructions, act for the buyer as agent only, and if so is not liable to the seller.¹³¹ Alternatively, it may act as merchant,

¹²⁵ See *Armstrong v. Stokes* (1872) L.R. 7 Q.B. 598 at 605; Hill (1968) 31 M.L.R. 623 at 637-639; Munday (1977) 6 Anglo-Am.L.Rev. 221 at 235 *et seq.*

¹²⁶ *H.O. Brandt & Co. v. Morris & Co.* [1917] 2 K.B. 784; *Rusholme and Bolton and Roberts Hadfield v. S.G. Read & Co.* [1955] 1 W.L.R. 146; *Cox v. Sorrell* [1960] 1 Lloyd's Rep. 471; *Anglo African Shipping Co. of New York Inc. v. J. Mortner Ltd* [1962] 1 Lloyd's Rep. 610 at 617, 621; *Maritime Stores v. H.P. Marshall & Co. Ltd* [1963] 1 Lloyd's Rep. 602.

¹²⁷ [1968] 2 Q.B. 545.

¹²⁸ At 558.

¹²⁹ As to which see *Fraser v. Equitorial Shipping Co. Ltd (The Ijaolo)* [1979] 1 Lloyd's Rep. 103.

¹³⁰ Hill (1972) 3 J. Maritime Law and Commerce 307; Schmitthoff (1970) 1 *Hague Recueil des Cours* at pp. 154-157; *The Export Trade* (11th ed.), paras 27-018 *et seq.*; [1957] J.B.L. 17.

¹³¹ *cf. Bolus & Co. Ltd v. Inglis Bros Ltd* [1924] N.Z.L.R. 164; *Stunzi Sons Ltd v. House of Youth Pty Ltd* [1960] S.R.(N.S.W.) 220.

viz. by buying from the seller and reselling to its principal, the buyer.¹³² Neither of these arrangements really involves confirmation. A transaction involving confirmation will normally be intended to result in privity of contract being established between seller and confirming house.¹³³ In some cases the confirming house may be liable on a collateral contract whereby it answers in some way for the performance of the buyer's contract.¹³⁴ In other cases the confirming house may be solely liable to the seller, creating no privity between buyer and seller, but still remaining as an agent in relation to the buyer rather than a seller to its own principal: this possibility, which again involves the notion of what is sometimes called the commission merchant or *commissionnaire*, has not been fully explored.¹³⁵ It is clear that the fact that a confirming house acts as principal in one respect does not mean that it cannot act as agent in another, e.g. as a forwarding agent, and vice versa.¹³⁶ A confirming house that does undertake liability to the seller may answer for more than the mere solvency of the buyer: subject to the terms of the particular contract and to the commercial understanding of the transaction, it is subject to litigation on the contract in general.¹³⁷ So also it may sue the seller, or assign its rights of action to the buyer.

Del credere agents. The position of a *del credere* agent is to be contrasted with that of a confirming house. A *del credere* agent is normally the agent of the seller, not of the buyer. Thus, though he answers to the seller, he is not undertaking to the third party that his principal will perform a contract, but is undertaking to his principal that the third party will.¹³⁸ Equally, he cannot sue the third party.¹³⁹ A confirming house on the other hand is normally agent of the buyer, and thus answers to the seller not as agent but as a party to a contract with him.¹⁴⁰ Its duty to the buyer is therefore usually greater than that of a *del credere* agent, whose obligation is confined to answering for the failure by the other contracting parties, owing to insolvency or the like, to pay ascertained sums which may become due from them as debts.¹⁴¹ However, situations may occur where it is difficult to distinguish between the two.¹⁴²

9-022

¹³² See the dissenting judgment of Diplock L.J. in *Anglo-African Shipping Co. of New York Inc. v. J. Mortner Ltd* [1962] 1 Lloyd's Rep. 610.

¹³³ *Sobell Industries Ltd v. Cory Bros & Co.* [1955] 2 Lloyd's Rep. 82 at 89.

¹³⁴ *Sobell Industries Ltd v. Cory Bros & Co.*, above (Illustration 7).

¹³⁵ *Rusholme and Bolton and Roberts Hadfield v. S.G. Read & Co.* [1955] 1 W.L.R. 146 and *Anglo-African Shipping Co. of New York Inc. v. J. Mortner Ltd*, n. 132 above, may be examples of this. See paras 1-020, 1-021 above; Hill, *op. cit.* n. 130 above, at 318-324; (1968) 31 M.L.R. 623; *Bolus & Co. Ltd v. Inglis Bros Ltd*, n. 131 above, at 174-175; *Downie Bros v. Henry Oakley & Sons* [1923] N.Z.L.R. 734; *Scott v. Geoghegan & Sons Pty Ltd* (1969) 43 A.L.J.R. 243; *Isaac Gundle v. Mohanlal Sunderji* (1939) 18 Kenya L.Rep. 137; Comment to Article 69.

¹³⁶ *Anglo-African Shipping Co. of New York Inc. v. J. Mortner Ltd*, n. 135 above, at 616-617; *Sobell Industries Ltd v. Cory Bros & Co.*, n. 133 above, at 90.

¹³⁷ *Sobell Industries Ltd v. Cory Bros & Co.*, n. 133 above (Illustration 7); *Rusholme, etc., v. Read*, n. 135 above.

¹³⁸ *Churchill & Sim v. Goddard* [1937] 1 K.B. 92.

¹³⁹ *Bramwell v. Spiller* (1871) 21 L.T. 672; Article 2. But sometimes a *del credere* agent may by special arrangement or by the usage of trade answer to both parties to a sale: see Hill (1968) 31 M.L.R. 623 at 639 note 64. And see Illustration 22.

¹⁴⁰ See above, para. 9-021.

¹⁴¹ *Thomas Gabriel & Sons v. Churchill & Sim* [1914] 3 K.B. 1272; *Rusholme, etc., v. Read*, n. 135 above.

¹⁴² See Hill, *op. cit.* above, n. 130. See further as to *del credere* agents, Comment to Article 2.