PERSONAL LIABILITY OF AGENTS

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The words 'agent' and 'agency' are notoriously slippery to define, but in general it is probably acceptable to say that an agent is one who acts for another. The common law takes this in what may be termed a legalistic way, in saying that an agent is one who has had power conferred on him to act for another so as directly to alter that other's legal position. This emphasis on the power of the agent has been prominent since the work of the American writers Hohfeld[1] and Seavey[2] in the inter-war period: thus the *Restatement*, s.12, states: "An agent or apparent agent holds a power to alter the legal relations between the principal and third person and between the principal and himself". But reasoning of this sort can of course be traced much further back.[3]

This concentration on the power of the agent makes the basic common law doctrine very simple, at any rate in contractual situations, where it is primarily applicable. The agent directly affects the legal position of his principal and himself (normally) drops out of the transaction. "There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal the contract is the contract of the principal, and not that of the agent; and, prima facie, at common law the obly person who may sue is the principal, and the only person who can be sued is the principal."[4]

This doctrine is one of great power, and appears to have many advantages over civil law doctrines in this area by virtue of its simplicity. Thus, though the difference between the relation of principal and agent and the power of the agent was clearly made in Germany as long ago as 1866,[5] the utilisation of the distinction does not appear to have been entirely successful.[6] The common law doctrine indeed proceeds further than normal representation situations and applies also though the agency is undisclosed: the undisclosed principal is liable and entitled on the contracts of his agent, provided that the agent had authority.[7] There are, of course, difficulties in this doctrine, which is even by common law reasoning anomalous,[8] and which appears to represent in the last resort a policy decision that the principal may intervene in the bankruptcy of his undisclosed agent, and likewise be held personally liable in such a situation.[9] There are indeed signs that lawyers in the later nineteenth century began to be unhappy about it: "it has often been doubted" said Blackburn J. in 1872,

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1. See *Fundamental Legal Conceptions,* (4th printing 1966), p.52.
2. See 'The rationale of agency', 29 Yale L.J. 859 (1920).
3. See, *e.g., Towle v White* (1873) 29 L.T. 78, 79 *per* Lord Selborne L.C.
4. *Montgomerie v UK Mutual S S Assn Ltd* [1891] 1 Q.B. 370, 371 *per* Wright J.
5. In a famous article by Paul Laband, *Die Stellvertretung bei dem Abschluss von Rechtsgeschäften nach dem Allgemeinen Deutschen Handelsgesetzbuch*: see Müller-Freienfels, 13 Am. J Comp. L 193, 197 *et seq.* (1964).
6. See Müller-Freienfels, *op. cit. supra*; Schmitthoff, 1970 I Hague *Recueil des Cours* 120 *et seq.* It seems that the separation may have been more effectively built upon in Swedish law: see Grönfors, "Powers of position in the Swedish law of agency"; 6 *Scandinavian Studies in Law* 95 (1962).
7. *Keighley, Maxsted & Co. v Durant* [1901] A.C.240.
8. See Bowstead, *Agency,* 14th ed., Comment to Article 82.
9. Goodhart and Hamson, 4 C.L.J. 320 (1932); Stoljar, *Law of Agency* (1961), pp.203-211.

"whether it was originally right so to hold; but doubts of this kind come now too late".[10] This may account for the limits put on the doctrine by notions of election;[11] by cases stemming from ***Humble v Hunter;***[12] and by ***Armstrong v Stokes,***[13] the case in which the above doubts were expressed. But whatever the merits and difficulties of the doctrine, the generality of the basic principle of agency facilitates it: it is said that its simplicity is admired by continental lawyers.[14]

The common law has some difficulty over making a principal liable for the unauthorised acts of an agent, for the power of the agent is normally accounted for on the basis that it was conferred on him by the principal.[15] One might expect the civil law, with its distinction between authorisation and power, to deal with the matter with more facility, but this does not appear always to be so.[16] The common law overcomes the difficulties by a somewhat vague application of the notion of estoppel[17] – or at least of the objective theory whereby persons are held to the expectations which their acts reasonably create.[18] There is, however, an uneasy frontier here: the doctrine of vicarious liability in the law of tort appears to be more widely based and has for many years had little difficulty with unauthorised acts, even those done in fraud of the employer.[19] Thus suggestions are from time to time made that the idea of authorisation in agency should be abandoned in favour of wider reasoning more akin to that found in tort cases. In ***Branwhite v Worcester Works Finance Ltd,***[20] one of the many cases on liability of a finance company for the acts of a motor dealer, Lord Wilberforce said:[21] "It may be that some wider conception of vicarious responsibility other than that of agency, as normally understood, may have to be recognised in order to accommodate some of the more elaborate cases which now arise when there are two persons who become mutually involved or associated in one side of a transaction." But this was a dissenting speech, and no such doctrine was applied; similarly the House of Lords has recently held the vendor of property not liable on the unauthorised acts of an estate agent.[22]

10. *Armstrong v Stokes* (1872) L.R. 7 Q.B. 598, 604.
11. Bowstead, *op. cit.,* Article 86.
12. (1848) 12 Q.B. 310 (holding that the principals intervention was excluded by the terms of the contract). See Bowstead, *op. cit.,* pp.259-260; McLauchlan, *The Parol Evidence Rule* (Wellington 1976), chap. 13.
13. *Supra,* note 10; see also *infra,* text at note 52.
14. Müller-Freienfels, 16 M.L.R. 299 (1953); see also 18 M.L.R. 33 (1955).
15. "No one can become the agent of another person except by the will of that other person": *Pole v Leask* (1863) 33 L.J. Ch. 155, 161 *per* Lord Cranworth.
16. Müller-Freienfels, *op. cit. supra,* note 5.
17. *Rama Corp v Proved Tin & General Investments* [1952] 2 Q.B. 147, 149-150; Bowstead, *op. cit.,* p.240.
18. Conant, 47 Nebraska L. Rev. 678 (1968); *The Santa Carina* [1977] 1 Lloyds Rep. 478, 483.
19. *Lloyd v Grace, Smith & Co.* [1912] A.C. 716.
20. [1969] 1 A.C. 552.
21. At p.587. See also *Heaton's Transport (St Helens) Ltd v Transport & General Workers Union* [1973] A.C. 15, 99-100, a case on the liability of a union for shop stewards: the Court of Appeal distinguished between vicarious liability and agency but the House of Lords refused to do so. Similar suggestions have been long current in the United States: see *e.g.* Mearns, 48 Va. L. Rev. 50 (1962). The breadth of agency courses in that country some years ago tended to promote such reasoning: see the discussion between Conard and Mechem in 1 J Legal Ed. 540 (1949); 2 J Legal Ed. 203 (1949).
22. *Sorrell v Finch* [1976] 2 W.L.R. 833 (H.L.).

Nevertheless, the simplicity of agency doctrine undoubtedly makes such extension possible; there is perhaps less doctrinal separation of tort and contract than in the civil law.[23]

However, it may be suggested that this concentration on the legal power of the agent, which has long been the preoccupation of writers on the subject, has despite its simplicity, a defect. With its consequent assumption that the agent normally drops out of the transaction, it attracts attention away from his position and thus leaves certain important questions unattended to, or at least under-emphasized. Three aspects of the agent's position, two of them illustrated by recent cases, may be suggested as ripe for consideration. They are as follows:

(i) There are various intermediaries who are often in common speech referred to as agents, and discussion of whose position would be expected in a book on agency; yet they may have no power to affect the principal's legal position. Are they then not agents, so that, e.g., the fiduciary duties of an agent do not apply to them? It is usually thought that this is not so; yet how then is the position of one to whom these duties apply to be defined?

(ii) There are various situations where an agent deals as such, but where the commercial expectation might be that he is personally liable, whether as well as or instead of his principal. Traditional analysis makes these cases appear exceptional; but they may require a more sympathetic analysis.

(iii) There are other situations where the person who uses the services of an agent may expect and wish that the agent deal on his own account, yet also intend that the relationship between him and his representative be that of agency rather than some other, such as that of seller and buyer. Is it, and should it be, possible for an intermediary to deal as principal with the outside world while remaining an agent towards his own principal?

1. **The intermediary who has no power to affect his principal's legal position.**

The obvious example here is the position of an estate agent in England. He has normally no power to contract on behalf of his principal;[24] and indeed the received analysis of the position of any estate agent but one acting under a 'sole agency' agreement is that he is the offeree of a unilateral contract, has no duty to do anything, and makes no contract with his principal till he produces a purchaser who buys the land, or is ready, willing and able to do so (depending on the terms of his particular contract).[25] In other jurisdictions his position may be different, particularly as regards authority to sell: but he will suffice for an example. Such a person does not appear to be legally an agent at all, and the point is from time to time made. Yet it is not unreasonable to assume that the general principles as to the contractual and fiduciary duties of agents apply to him, and there is authority that they do. In *Regier v Campbell-Stuart*[26] the defendant agreed to give the plaintiff particulars of houses suitable for purchase. He purchased a house through a nominee for £2,000 and resold it to the plantiff for £5,000 disclosing that it was his but representing that he had paid £4,500 for

23. Müller-Freienfels, 6 Am. J Comp. L 165, 169 (1957).
24. *Hamer v Sharp* (1874) L.R. 19 Eq. 108.
25. *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, criticised by Atiyah, *Consideration in Contracts: A Fundamental Restatement* (Canberra 1971) at pp.22 *et seq.*
26. [1939] Ch. 766. See also *W.A. Phillips, Anderson & Co. v Euxine Shipping Co.* [1955] 2 Lloyd's Rep. 512.

it. It was argued for the defendant[27] "The scope of the defendant's agency was limited to informing the plaintiff about suitable houses. He was not an agent for the purpose of making any contract. Before the plaintiff and the defendant entered into the contract for resale, she was informed by him that the property belonged to him and that he himself was the vendor. That was sufficient to determine the relationship of principal and agent." Not surprisingly, the defendant was held liable to account for his profit, Farwell J. saying "I cannot doubt that at any rate up to the time of sale there did exist the relationship of principal and agent between the plaintiff and the defendant. No doubt the scope of that agency was limited."

The traditional definition of an agent does not, however, cover such an intermediary, nor many other persons whose function it is to introduce business; nor those who make contracts for their principals at certain times but presumably remain under fiduciary duties for the rest of the time (e.g. stockbrokers), or whose functions as a contract-making agent have terminated, but whose fiduciary duties persist. More overt discussion of the functions and duties of (what may be called) representatives is required in order that it may be determined to what type of person the fiduciary duties of an agent attach.[28]

2. **Situations where the third party might expect the personal liability of the agent.**

There must obviously be situations where the third party deals with a known agent, but may not regard the normal legal construction of the event, whereby the agent drops out of the transaction, as appropriate. This may, to take some examples, be because the principal is simply the agent's one-man company, the solvency or continued solvency of which is not beyond doubt; because the principal is unidentified at the time of dealing (as by reference to "our principals" or "our clients", etc.); or because the principal is out of the jurisdiction. There are lines of cases which can assist here. Thus persons acting for companies not yet formed have been held to contract personally;[29] and in 1968 in *The Swan*[30] Brandon J. held the director of a one-man company personally liable on a contract placed for his company, for repairs to a boat, on the basis that he was the owner of the boat. A number of ninteenth century cases accept usages that agents dealing in particular types of trade are personally liable.[31] There was long a presumption that the agent of a foreign principal was personally liable.[32] Finally, the agent of an undisclosed principal is personally

27. By Mr E. Holroyd Pearce, later Lord Pearce.
28. Professor Brian Coote has drawn my attention to the fact that a failure to make clear the sense in which the terms 'agency' and 'agent' are used is responsible for confusion in cases concerned with the extent to which third parties can rely on exclusion clauses: see *The Eurymedan* [1974] 1 N.Z.L.R. 505, [1975] A.C. 154; *The Suleyman Stalskiy* [1976] 2 Lloyds Rep. 609.
29. *Kelner v Baxter* (1866) L.R. 2 C.P. 174; Bowstead, *op. cit.,* Article 119; a recent case is *Marblestone Industries Ltd v Fairchild* [1975] 1 N.Z.L.R. 529; [1976] 1 N.Z.L.R. 545.
30. [1968] 1 Lloyd's Rep. 5; noted, 32 M.L.R. 325 (1969); 85 L.Q.R. 92 (1969); criticised by Prentice, 89 L.Q.R. 518, 531 as being inconsistent with *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 Q.B. 45 and *Henry Browne & Sons v Smith* [1964] 2 Lloyds Rep. 276. See also *H.J. Lyans & Sando Ltd v Houlson* [1963] S.A.S.R. 29 (repairs to car).
31. *e.g., Fleet v Murton* (1871) L.R. 7 Q.B. 126.
32. *Elbinger Actiengesellschaft v Claye* (1873) L.R. 8 Q.B. 313.

liable: and sometimes in such cases the principal can be treated as undisclosed.[33]

However, apart from the decision in *The Swan* above referred to, these lines of authority have not been developed. Thus in *Teheran-Europe Co. Ltd v S I Belton (Tractors) Ltd*[34] the English Court of Appeal held the 'foreign principal' rule outdated. This may well have been appropriate in view of the standing of, and easy communication with, many foreign and international business concerns. But one might expect some tendency to develop a role of personal liability for agents of unidentified principals. This the English Court of Appeal has recently shown itself disinclined to do. In *The Santa Carina* (1977)[35] brokers on the Baltic Exchange placed an order over the telephone for the bunkering of a ship at Penang with the plaintiffs, who were also brokers on the Baltic Exchange and acted for a bunkering concern. The bunkers were supplied but not paid for, and the shipowner for whom they had been ordered became insolvent. The plaintiff sought to hold the defendant personally liable. At first instance they succeeded.[36] Mocatta J. took the view that much business was done on the telephone between persons who do not state whether they are acting as a principal or as agent, and that the "business requirements of the situation" require personal liability: he also likened the contract to a written contract signed by an agent without reference to agency, on which the agent would be liable.[37] The Court of Appeal, while affirming that it is a question of a fact in each case as to what was intended, preferred to apply normal doctrine of agency, that where a contract is made by a known agent he incurs no personal liability. Lord Denning M.R. quoted a dictum of Diplock L.J. from the *Teheran-Europe* case that in such a situation the third party "may be willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract."[38] This may well be a correct decision on the facts: indeed Lawton L.J. said that the argument had suffered from a surfeit of case law.[39] But the possibility of the agent's liability is one that needs thought. Is it not possible to lay down general rules for such a situation? If not, the starting point adopted by the law is crucial. If it is that the agent drops out, then the result will be non-liability in the absence of other factors. But is this the normal commercial expectation, or would it be expected that the agent should be liable unless there are specific indications that he had undertaken no personal liability?[40] If there should be a rule that he is liable, should he be liable as sole principal (as Mocatta J. seems to have envisaged),[41] or additionally to his principal?[42] If the latter,

33. *e.g., Teheran-Europe Co. Ltd v S.T. Belton (Tractors) Ltd* [1968] 2 Q.B. 545, where there were frequent references by buyers to 'our clients' but Lord Denning M R treated the principal as undisclosed rather than unidentified.
34. *Supra.*
35. [1977] 1 Lloyds Rep. 478.
36. [1976] 2 Lloyds Rep. 223.
37. For a recent example of which see *The Virgo,* [1976] 2 Lloyds Rep. 135, where agents who signed a charterparty were held liable despite the presence of a clause: "This vessel is chartered by and on behalf of General Organisation for Supply Goods, Cairo".
38. [1968] 2 Q.B. 545, 555.
39. At p.484.
40. As in *Restatement, Second, Agency,* s.321.
41. See p.226: "The party placing an order though in some ways, of course, an agent, and not being a user of bunkers for his own ship. . .is nevertheless under an obligation to see that the supply of bunkers is available." For another recent example of this interpretation see *Format International Security Printers Ltd v Mosden* [1975] 1 Lloyds Rep. 37. For a statutory example of a similar policy, See Sea Carriage of Goods Act 1940, s.11.

should his liability be in some form of collateral contract[43] (which might mean that though he could be sued, he could not be sued) or as joint and several contracting party (a construction that might be more difficult to achieve)?[44] In this area there is a troublesome set of cases which suggest that where agent and principal are potentially liable, the third party must elect whom to sue:[45] it is arguable that these cases are an aberration,[46] but they nevertheless remain to plague practitioners.

This then is a second area where attention given to the position of the agent might, if not lead to a new formulation of the law, at least elucidate the problems involved.

3. **Situations where the principal may wish the agent to deal on his own account, while remaining liable to his principal on the basis of agency.**

In a number of articles Dr D.J. Hill, an expert on transport law, has drawn attention to the desirability of the common law recognising a category of what continental lawyers would call "indirect representation"[47]: of situations where the principal wishes the agent to deal on his own account, but nevertheless wishes his own relationship with his representative to be on an agency basis — *viz,* the agent is remunerated on commission; does not contract to produce results but to use his best endeavours; and is not in a position commercially adversary to that of his principal, but owes him fiduciary duties which may result in the principal being entitled to the remedies of a beneficiary against his trustee — an important point in bankruptcy situations.

42. As in *The Swan* [1968] 1 Lloyd's Rep. 5: see p.14.

43. On existing case-law the agent probably does not promise that he has a principal: if he has not he may instead be treated as contracting personally — *Kelner v Baxter* (1866) L.R. 2 C.P. 174 (but see *Black v Smallwood* (1966) 117 C.L.R. 52, 64-65; *Hawkes Bay Milk Corp Ltd v Watson* [1974] 1 N.Z.L.R. 236). He promises that he has authority: *Collen v Wright* (1857) 8 E. & B. 647. He does not promise that his principal will pay, for it has been held that if his principal is insolvent the action for breach of warranty of authority may produce no damages: *Re National Coffee Palace Co.* (1883) 24 Ch. D. 367, 372. Sometimes he may be held to promise his own liability if he does not name a principal: *Grissell v Bristowe* (1868) L.R. 4 C.P. 36. And sometimes he may be treated as a surety for his principal: *Imperial Bank v London & St Katharine Docks Co.* (1877) 5 Ch. D 195, 200; *Fleet v Murton* (1871) L.R. 7 Q.B. 126, 132. See in general Bowstead, *op. cit.,* Article 112. A *del credere* agent answers to his *own*, principal for the default of the third party, and only for liquidated sums: *ibid.,* p.14.

44. Principally on the ground that it is an unusual interpretation to put on a situation where principal and agent do not indicate in any way that they are plural contracting parties: see, *e.g., Murray v Delta Copper Co. Ltd* [1925] 4 D.L.R. 1061, 1067. There may also be difficulties in suing: see *Jung v Phosphate of Lime Co. Ltd* (1867) L.R. 3 C.P. 139. Support could perhaps be obtained from cases like *Fleming v Bank of New Zealand* [1900] A.C. 577 (where a customer was held able to sue the bank for dishonouring a cheque contrary to an agreement secured by a warrant deposited by the customer's agent); and from dicta in *Coulls v Bagot's Executor and Trustee Co. Ltd* (1961) 119 C.L.R. 460. The liability of partners is joint: Partnership Act 1908, s.12.

45. *e.g., Clarkson Booker v Andjel* [1964] 2 Q.B. 775; *Barrington v Lee* [1972] 1 Q.B. 326 (noted, 88 L.Q.R. 184 (1972)).

46. Reynolds, 86 L.Q.R. 318 (1970); Bowstead, *op. cit.,* Article 86. In undisclosed principal cases the only clear cases are based on merger; in unidentified principal cases most of the problems seem really to relate to the question, 'With whom was the original contract formed?'

47. Principally in 31 M.L.R. 623 (1968); see also [1964] J. Business Law 304; [1967] J. Business Law 122.

A number of cases in the later nineteenth century, many associated with Blackburn J., do in fact seem to recognise the position of such a representative. Most noteworthy is his exposition of the role of the 'commission merchant' in *Ireland v Livingston.*[48] But there are other cases which allow the remedies of an unpaid seller to such an agent while still regarding him as an agent.[49] The now obsolete cases on the non-liability of a foreign principal seem to have the same idea in mind.[50] Finally, the agent of an undisclosed principal may be regarded as acting on this basis, and the common law makes him liable accordingly: but it also makes the principal liable and entitled. Perhaps this was why, as above mentioned, Blackburn J. expressed doubts about the doctrine in *Armstrong v Stokes*[51] and held the principal not liable on the contract because he had paid his agent — a decision regularly doubted in later cases.[52] The position of the nineteenth century factor, which is associated with the undisclosed principal doctrine, is also relevant.[53]

A certain amount of support can be produced from more recent cases for this interpretation as regards a *buying* agent: most notably the judgement of Salmond J. in *Bolus & Co. v Inglis Bros Ltd*[54], where he accepted this as a possible construction of the arrangement whereby a New Zealand merchant procures goods of an English manufacturer through an intermediary in England. There is little support in *selling* agency situations.[55] More recent cases have however tended to assume in both situations that if the agent deals on his own account he is an independent principal: if he is a distributor of goods he buys from his principal and resells, if he is a person concerned in the obtaining of goods he buys and resells to his principal.[56] Thus, as Dr D.J. Hill has again pointed out,[57] the position of a confirming house has not received adequate analysis, though reasonable decisions may have been reached on the facts.[58]

48. (1872) L.R. 5 H.L. 395.
49. *e.g., Cassaboglou v Gibb* (1883) 11 Q.B.D. 757.
50. *e.g., Elbinger Actiengesellschaft v Claye, supra,* note 32.
51. *Supra,* note 10.
52. *Irvine & Co. v Watson & Sons* (1880) 5 Q.B.D. 414; *Davison v Donaldson* (1882) 9 Q.B.D. 623. See discussion of these cases by Higgins, 28 M.L.R. 167 (1965).
53. See Stoljar, *Law of Agency* (1961) pp.204-211, 242-247. See also Miller, 'Bills of lading and factors in nineteenth century English overseas trade': 24 U.Chi. L. Rev. 256 (1957).
54. [1924] N.Z.L.R. 164, 175. See also *Butlers (London) Ltd v Roope* [1922] N.Z.L.R. 549; *Downie Bros v Henry Oakley & Sons* [1923] N.Z.L.R. 734; *Witt & Scott Ltd v Blumenreich* [1949] N.Z.L.R. 806; *Teheran-Europe Co. Ltd v S T Belton (Tractors) Ltd* [1968] 2 Q.B. 53, 59-60.
55. See *Towle & Co. v White* (1873) 29 L.T. 78; *International Harvester Co. of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co.* (1958) 100 C.L.R. 644. But the nineteenth century factor could be a selling agent: see above, note 53.
56. See *Brown & Gracie Ltd v F.W. Green & Co. Pty Ltd* [1960] 1 Lloyd's Rep. 289 *per* Lord Denning.
57. 'Confirming house transactions in Commonwealth countries', 3 J. Maritime Law and Commerce 307 (1972) (a most valuable article).
58. *e.g., Rusholme & Bolton & Roberts Hadfield v S.G. Read & Co.* [1955] 1 W.L.R. 146; *Sobell Industries v Cory Bros & Co.* [1955] 2 Lloyd's Rep. 82, in both of which confirming houses whose overseas correspondents cancelled their orders were held liable to suppliers. In *Anglo-African Shipping Co. of New York Inc. v J. Mortner Ltd* [1962] 1 Lloyd's Rep. 610 a confirming house which had accepted personal liability was held entitled to recourse against its principal: but the Court of Appeal, which split 2-1, was only willing to consider two possible analyses — that it was a true agent (Sellers and Danckwerts L. JJ.) or that it bought for resale (Diplock L.J., dissenting).

A recent case brings this problem to life, this time in connection with selling agency. In *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd* (1976)[59] Dutch manufacturers sent aluminium foil to English distributors under standard terms which to a common lawyer appear of an unusual nature. The ownership in the foil was to remain in the manufacturers until the distributor had "met all that is owing to" the manufacturers. Where the foil was made up into new objects or mixed with other material, the distributor was to hold the product as fiduciary owner, as "surety", again for the full payment of what was owed to the manufacturer, though with a power of sale. The distributor went into liquidation and the manufacturer claimed the proceeds of sale of certain aluminium sold by the distributors, which had been held by the receiver in a separate bank account.

Although the clauses concerned were not skilfully drafted, the English Court of Appeal, affirming Mocatta J., held that the intention of the whole scheme was that the distributors held the manufacturers' foil as the manufacturers' property, and later held the proceeds of sale on trust for the manufacturers under the principle of *Re Hallett's Estate.*[60] The decision is a complex one because the clauses were strangely drafted: the above account is over-simplified. It has caused considerable disquiet in England because of repercussions on accountancy, receivership and banking practice,[61] and because it appears a successful device to give trade creditors a higher priority in bankruptcy than that which the law allocates to them.[62] It is obvious also that the mere mechanics of its application, especially as regards mixed goods, may give trouble. It will only be examined here from the point of view of agency.

Viewed from this aspect, what the decision appears to allow is that a manufacturer utilises the services of a distributor who acts to the outside world as a seller, but yet who is, as regards the manufacturer, an agent who accounts on an agency basis. Should this intention be permitted and implemented? If so, it goes far to recognise the situation recognised by Blackburn J. in the 1870's but rarely acknowledged since. In favour of such recognition is the simple argument that it gives effect to the intention of the parties; that the law should not be dominated by arbitrary categories; and that this is only a slight extension of the device of the trust receipt, the document whereby a pledgee can release goods to his pledgor as agent for sale and trustee of the proceeds, while retaining his pledge interest.[63]

Against this are the arguments that the device alters the established priorities in bankruptcy: and that it dresses up what is essentially an adversary relationship of buyer and seller as being the confidential relationship of principal and agent.

59. [1976] 2 All E.R. 552.
60. (1880) 13 Ch. D.696.
61. There is a valuable article on the case by H.C. Rumbelow in 73 Law Society's Gazette (London) p.837 (1976). The existence of goods held under *Romalpa* clauses may make accounts misleading, hamper the activity of receivers, and render it difficult for banks to assess security. There is implication also for factoring companies (for some debts factored may not belong to the company concerned) and conceivably, if the profits are those of the principal, in taxation.
62. See [1977] C.L.J. 27. Similar problems arose in *British Eagle International Airlines Ltd v Cie. Nationale Air France* [1975] 1 W.L.R. 758 (H.L.) and *Re Kayford* [1975] 1 W.L.R. 279.
63. See *North Western Bank v Poynter* [1895] A.C. 56; *Re David Allester Ltd* [1922] 2 Ch. 211; *Benjamin's Sale of Goods* (1974), ss.1422 *et seq.*

The special fiduciary duties of an agent, and the fact that the principal can sometimes assert against him proprietary claims both at common law and in equity, stem from this relationship, which arguably should not be available for adoption by the free act of the parties in a commercial context.

One final problem remains. If there is an agency relationship, does not this mean that the manufacturer is liable and entitled as undisclosed principal? It has been suggested above that the undisclosed principal situation is to some extent the common law's analysis of the position of the independent intermediary not authorised to create privity of contract between his principal and a third party. If so, the common law might in a case like ***Romalpa*** hold the principal liable, for example for breach of warranty of quality. Roskill L.J. did not think this would be so. "I see no difficulty" he said[64] "in the contractual concept that, as between the defendants and their sub-purchasers, the defendants sold as principals, but that, as between themselves and the plaintiffs, those goods which they were selling as principals within their implied authority from the plaintiffs were the plaintiffs' goods which they were selling as agents for the plaintiffs to whom they remained fully accountable. . .The fact that they so sold them as principals does not, as I think, affect their relationship with the plaintiffs: nor (as at present advised) do I think. . .that the subpurchasers could on this analysis have sued the plaintiffs upon the subcontracts as undisclosed principals for, say, breach of warranty of quality." Certainly the Dutch sellers would be surprised to be held so liable, yet if the English company are agents, are not the Dutch sellers undisclosed principals? Perhaps it was considerations of this sort that made Blackburn J. wonder "whether it was originally right so to hold", that the undisclosed principal was liable and entitled.[65]

All of these are questions to which attention needs directing. My suggestion is that the common law doctrine too readily assumes that the agent drops out, and too readily ignores his position; and that writers devote all their energy towards the problem of the principal's position. In commerce generally it may be that this approach contains unsatisfactory assumptions. "In no branch of international trade", says Professor Schmitthoff, "is the cleavage between theory and reality greater than in the law of agency".[66] The proposition need not, perhaps, be confined to international trade. One of the cures for the problem is to look more closely at the agent.

64. At p.690.
65. *Armstrong v Stokes* (1872) L.R. 7 Q.B. 598, 604.
66. "Agency in International Trade": 1970 I Hague *Recueil des Cours* p.116.