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Delivery to Imposters May be Effective: Apparent Authority of Estoppel? - Regal Shop Co. v. Legum Co.

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Delivery To Imposters May Be Effective: Apparent Authority Or Estoppel?

Regal Shop Co. v. Legum Co.[1]

Legum, a wholesale appliances dealer, directed Regal to return for credit six television sets to the Legum warehouse. Brown, Regal's truck-driver, transferred the merchandise to two men standing on the platform of Legum's warehouse and accepted an initialed receipt. Legum had no record or recollection of the delivery being completed and sent a bill for the price of the sets. Regal denied that debt, and claimed a valid delivery. It seems that the two men were imposters who had converted the sets to their use.

The trial court in holding for Legum, stated that the "burden of proof was on Regal to show that the goods were delivered back to Legum in accordance with the agreement". The court was not satisfied that the uncorroborated testimony of Brown established the fact of delivery by the preponderance of evidence required to meet this burden of proof, since Brown could neither describe the men nor produce a signed receipt. However, the court indicated that it did not disbelieve Brown, and found as a fact that the merchandise was left by Brown at the warehouse.

The Court of Appeals reversed the decision. It maintained that the issue was whether or not the delivery to the men inside the Legum warehouse, to which Brown was directed, constituted delivery to Legum. Accepting the trial court's finding that Brown did transfer the merchandise at the warehouse to two unknown men the court applied the rule declared in the English case of *Galbraith & Grant v. Block*:[2]

> "A vendor who is told to deliver goods at the purchaser's premises discharges his obligation if he delivers them there without negligence to a person apparently having authority to receive them. . . . If the purchaser has been unfortunate enough to have had access to his premises obtained by some apparently respectable person who takes the goods and signs for them in his absence, the loss must fall on him, and not on the innocent carrier or vendor."

The place of delivery was Legum's warehouse and the mode of delivery was assented to by Legum in directing Brown

[1] 206 Md. 267, 111 A. 2d 613 (1955).
[2] 2 K. B. 155, 157 (1922).

to the place. Hence, the delivery to the imposters was delivery to Legum.

The Court of Appeals in the instant case and the English Court in the *Galbraith* case reasoned in terms of apparent authority, a doctrine which holds a principal liable to third persons for the acts of a purported agent where the principal through his manifestations to the third person has led that third person to believe that he is authorized to so act. Apparent authority has often been treated as being synonymous with a similar doctrine of agency by estoppel. The latest tentative draft of the Restatement of Agency[3] sets forth the elements of agency by estoppel as follows:

> (a) intentional or negligent conduct by the principal which creates a situation where,
>
> (b) a third person believes there is an agency and,
>
> (c) relying on such belief he changes his position to his detriment.

The principal must have breached a duty he owes to a third person and such breach is effected either by positive representations or by an omission of a duty to prevent detriment to the third person. The situation created by the principal's actions or omissions are the only reasons for estoppel. The Maryland Court has declared:

> " 'When . . . the authority . . . is one sought to be deduced from special circumstances of recognition, acquiescence, or holding out, the principle of estoppel or something akin to it at least, must be invoked.' "[4]

Whether apparent authority and estoppel in agency are two different doctrines or two different names for the same doctrine has been the cause of much discussion.[5] The latest tentative draft of the Restatement of Agency takes the stand that these are two different distinct doctrines; estoppel being the broader rule covering those situations where there is not sufficient manifestation by the principal to be classified under apparent authority. Estoppel, however, is in one respect more limited than apparent authority in that it requires a change of position while apparent authority

[3] RESTATEMENT SECOND, AGENCY, Tentative Draft No. 3, Sec. 8A, April, 1955.

[4] Abuc Trading Etc. Corp. v. Jennings, 151 Md. 392, 411, 135 A. 166 (1926).

[5] MECHEM, OUTLINES OF AGENCY (4th ed., 1952), Secs. 85-90. Also for further discussions see: Cook, *Agency by Estoppel*, 5 Col. L. Rev. 36 (1905); Ewart, *Agency by Estoppel*, 5 Col. L. Rev. 354 (1905).

does not. The latest tentative draft indicates that in a case such as the *Regal* case, where it is artificial to speak of manifestation by the principal, apparent authority cannot apply. Thus, if an agency question at all, it must be considered under the doctrine of agency by estoppel.

Cases such as the *Regal* case where the apparent agent is not an agent at all are relatively rare.[6] In *Miltenberger v. Hulett,*[7] an imposter had access to the defendant's transfer office and fraudulently received plaintiff's trunk key and check thereby stealing the trunk's contents. The court said:

> "The law is that if a proprietor of a place of business by negligence permits one who is not his agent to be in apparent charge, and who assumes to transact the proprietor's business with a patron, the appearances being such as would lead a man of ordinary care to believe the imposter was really his agent, he will not be permitted to take advantage of the imposter's lack of authority."

In an Ohio case,[8] the defendant was estopped from denying authority to an imposter who impersonated his hotel clerk and stole plaintiff's property. The defendant breached his duty to have someone in authority in the lobby to register the patrons.

A distinction can be made between cases like those mentioned above and one in the category of *Livingston v. Fuhrman.*[9] In that case the principal knew of the purported agent's activities and the situation created by the purported agent conducting his own business within the principal's shop. So, also in the Maryland case of *Metropolitan Club v. Hopper, McGraw,*[10] the principal was estopped to deny that one who contracted with the plaintiff as his agent was in fact his agent. The principal's book-keeper had notice of the possible fraud and her failure to inform her employer was sufficient negligence for estoppel to apply. The court declared:

> "Whenever the circumstances are such that a party learns, or *is charged with knowledge,* that he has been placed by the wrongful act of a third party in such a relation with a second party that a reasonable person would perceive that, if he did not use ordinary care and

[6] MECHEM, *ibid,* Sec. 91.
[7] 188 Mo. App. 273, 175 S. W. 111, 112 (1915).
[8] Kanelles v. Locke, 12 Ohio App. 210 (1919).
[9] 37 A. 2d 747 (D. C. Mun. App., 1944).
[10] 153 Md. 666, 139 A. 554 (1927).

> caution in his own conduct with reference to these circumstances, he would as a natural consequence . . . cause danger of injury to the property of the second party, *it becomes the duty of the first party* to act so as to avoid such danger."[11]

In the latter two cases estoppel can be easily applied because the negligence of the defendant was definitely established. First, the defendant had knowledge that the deceptive situation existed, which created a duty to take reasonable action to protect third persons in the position of the plaintiff in those cases. Second, he failed to act discharging that duty. At least in the *Metropolitan* case, a simple communciation to the plaintiff would have informed him of the true situation which was all that was necessary.

In the instant case, however, whether classified under apparent authority or estoppel, liability on the part of Legum, the receiver, must depend on some fault on his part; that is, some negligence on the part of the receiver of the goods is a necessary element under both doctrines. Yet in the *Regal* case, and in the *Galbraith* case upon which the Court of Appeals in *Regal* substantially relied, the question of the receiver's negligence was not considered. In *Regal*, Legum, the receiver did not know of the deceptive situation. At most, it can be said, perhaps, that he "should" have known that persons "might" be deceived "if" imposters occupied his receiving platform. Communication of this danger to third persons who might be affected was not feasible or reasonable.

It is submitted, therefore, that the true ground upon which the question was decided in both cases was not apparent authority or agency by estoppel, but instead the rationale rests upon a matter of public policy, where a fiction of agency by estoppel is created to complete the delivery between two innocent parties. A presumption of negligence here seems to be placed upon the receiver when thieves intervene and steal merchandise from the deliverer. This presumption should hold, however, only if the deliverer can prove a non-negligent delivery. It must be borne in mind that such a case as this can often involve two innocent parties, but liability must be placed somewhere. Hence, since the receiver is in complete control of the situs upon which the theft was committed, the presumption of negligence is properly placed upon the receiver because he would be in a better position to rebut the pre-

[11] *Ibid*, 673. Italics supplied.

sumption of negligence than the deliverer would be to establish the receiver's negligent management of his place of business. Also, considerable weight should attach to his direction that delivery be made at his place of business.

There may be an alternative to basing the case on a presumption of negligence on the receiver's part. An outcome favorable to the deliverer could also be achieved by holding that possession and risk of loss shifted to the receiver at the *moment* the goods were deposited on the premises of the receiver, the action of the imposters being an interference with the receiver's possession after the deliverer had completed the act of delivery. Such an approach would render the question of the receiver's negligence immaterial.[12]

Regardless of what the doctrinal basis for the case is, the deliverer should be compelled to prove a non-negligent delivery. The Court in the *Galbraith* case recognized this, and sent the controversy back for a trial on one point:

> "His (carrier) duty is to deliver the goods at the proper place, and, of course, to take all proper care to see that no unauthorized person receives them."[13]

Brown was found free of negligence and there was no obligation to specifically inquire as to the authority of the two imposters. However, since he had previously been to the Legum warehouse, his care would include knowledge of any business procedure adopted by Legum. The honesty of Brown was not questioned, but in the future a driver may steal the goods himself and present the same testimony as Brown and if he is believed, crime would pay. A literal interpretation of this decision may be an impetus for fraud or carelessness on the part of a deliverer whose word seems to be final. The trial court wanted evidence of delivery extrinsic to Brown's testimony. Did anyone see the truck at the warehouse? Why should not the testimony of Legum's clerks, who denied delivery, be believed?

Because of his view of the law as to what facts in this situation were sufficient to establish delivery by Regal, the trial judge was able to give judgment for Legum and still say that he did not disbelieve any of the witnesses. If the trial judge was confronted with the proposition that if he believed Brown, he had to find for Regal, he might have brought himself to choose between the two directly conflicting stories, and have given judgment for Legum on the basis that Brown's story was less believable than that of

[12] Note, 36 Harv. L. Rev. 1036 (1923).
[13] 2 K. B. 155, 157 (1922). Parenthetical material supplied.

Legum's witnesses. Thus, perhaps, the case should have been sent back to the trial court for it to reassess the question of Brown's due care and his credibility in the light of the correct principles of law.

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