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The Power of an Agent to Delegate His Authority

Henry Irving Gordon
Cornell Law School

T H E S I S

For the Degree of Bachelor of Laws.

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Barkersdale v. Brown ---------- 9 Am. Dec. 720.

Laussatt v. Lippincott ---------- 6 S. & R. 386.

Darling v. Slanwood ---------- 14 Allen 504.

In the study of the law of agency, of the many subjects discussed, an important and very interesting one, is that which I have taken as the basis of this article, and which is expressed by the maxim, "potestas delegata non potest delegare."

To state the general rule relating to this subject, one has merely to repeat the maxim just given. No difficulties arise when there is an attempt to express this rule; but its application to the numerous cases which have arisen, has been a matter of discussion throughout the country. And where the rule has been applied various reasons are given for its application.

There is no doubt arising from the well known principle that, "one acting under delegated authority, cannot himself delegate that authority to another." An agent may have the most ample power to bind his principal by his acts and determinations, respecting the subject of the agency, but this of itself gives him no authority to delegate those powers to another.

The authority to delegate the power with which an agent is intrusted,ought not, in the absence of words

conferring express authority, or from which such an authority may be inferred, to be presumed. Upon this subject the principles of the early writers are identical in substance, with the principles of the writers of the present day; and may be traced to the same general principle, that "an authority to delegate a delegated authority will not be presumed. In the absence of express authority the presumption is that the agent has no such power.

The appointment of an agent in a particular case is, as a rule, made because of some fitness which his principal believes him to possess, and by reason of which he is better qualified to carry out the purposes for which he is appointed. When the performance of the agency requires the exercise of special skill, judgment or discretion, on the part of the agent, the general rule, previously stated, is particularly applicable, for the reason that the authority is purely personal, the principal placing more than ordinary confidence in the skill and judgment of the person whom he appoints as his agent, and are not capable of delegation.

The rule, potestas delegata non potest delegare, is, however, subject to certain exceptions which grow out of

the circumstances of each case, and create an implied authority to employ a subagent. These exceptions will come up for consideration after the general rule has been discussed and applied.

The general rule has not been comfined to that class of persons who, strictly speaking, are known as agents, but from an early period of our law has been laid down, as to powers, to sell land, make leases,etc., given by will or deed to executors, trustees and attorneys. The courts of the present time have extended the principle to the less formal appointments of factors, brokers, and other commercial agents, and to corporations, both municiple and private.

In treating the rule as applied in this broader sense, I have thought it best to take each class and deal with it separately.

Before entering upon this, it is well to understand the distinction between acts and duties which are ministerial and those which are judicial. Ministerial acts and duties are those which are definitely fixed and ascertained. Acts and duties are judicial when they require the exercise of judgment and discretion.

Chase's Blackstone, note, p. 102.

As to those persons who are known strictly as agents little need be said as the general rule and previous discussion apply with particular force to that class.

An interesting question, however, came up in the case of Lyons v. Jerome 26 Wend. 485, as to how far the reason and policy of the rule applied to the delegation of power by the State to its high public officers, made by legislative act. A statute gave to canal commissioners power to take property for the construction and repair of the canals. The defendant was Chief Engineer of improvements of a lock, on the Oswego Canal; and in that capacity, entered a quarry belonging to the plaintiffs and took therefrom a quantity of stone to use in the repairing of the lock. The opinion written by Senator Verplank, was the opinion of the majority. The Senator says:

"The statute as well as the nature of the trust itself, shows that this is an authority confided to the judgment and discretion of the commissioners themselves, for the impartial discharge of which they are responsible to the State. The person thus entrusted may have occasion to depend on scientific and professional advice for the guidance of his own judgment; he may even, in matters

not out of the scope of his own information, rely upon the authority of his own advisors; yet he is still bound to form a judgment for himself, and to resume its responsibilities. In this case there was no exercise of judgment or discretion whatever by the commissioners; there was merely such a reliance on the supervision and judgment of the engineer, as might amount to an implied delegation of authority, had the commissioners been authorized to make such a delegation. I have only to add that it is the greatest public importance to establish the general rule of agency that "delegated authority cannot be delegated again without special power to do so", as governing the officials, powers, acts and contracts of our state officers." This case was followed in 58 N.Y. 461.

A general agent cannot submit a cause to arbitration unless he has special authority to do so. If, however, the agent is appointed to institute legal proceedings, he may bind his principal by a submission to arbitration. The reason for allowing the agent to thus bind his principal is, that an authority to prosecute or defend a suit implies a power to refer the subject, by rule of court, that being a mode of compromising suits.

As a rule, the services of an attorney are procured because of his personal skill and learning, and when he is employed to argue and conduct a cause, there comes into existence a personal trust; he cannot, therefore, without the consent of his principal, entrust the performance of this duty to another; or let the case out on shares. Clerks and assistants may, nevertheless, be employed to perform the merely ministerial and mechanical duties.

The right of an attorney to submit his clients cause to arbitration is a question over which there has been a difference of opinion.

The attorney's authority and duty in the conduct of a cause clothe him with all the powers necessary for the proper discharge of that duty, according to the forms and usages of the court in which the cause is pending. And it is well settled by numerous decisions, composing the weight of authority, that an attorney may, in the absence of express restriction, submit his clients cause to arbitration. Arbitration being a recognized mode of settling suits, these decisions are in accordance with the correct view of an attorney's office.

When arbitrators are chosen by the parties, special

confidence is placed in their discretion and ability, and to allow them to delegate their responsibilities and duties to others, would work manifest injustice. The rule of delegatus potestas non potest delegare, applies with special force to this class of persons. Arbitrators may, however, obtain advice and information from a disinterested person, whenever it becomes necessary to enable them in properly deciding a technical question which has been submitted to their judgment.

A short space may properly be devoted to a consideration of the general rule, as applied to factors, brokers, executors, trustees and corporations.

A factor or broker has not the power to delegate his authority to a clerk or subagent without the assent of his principal.

The reason for the rule in these merchantile agencies is, that there is a trust and confidence placed in the personal skill and integrity of the person authorized to act; the principal employs the broker or factor for th the simple reason of this skill. There is, however, a relaxation of the rule, in the case of merchantile persons, that a consignee or agent to whom goods are sent for the purpose of sale, may employ a broker to sell the

goods.

The principles which underlie the general rule, are of frequent application to the case of executors, trustees, and other persons standing in a fiduciary relation.

The powers and duties of a trustee will not permit him to give a general authority to another, unless express authority for that purpose is given in the instrument creating the trust.

Perry on Trusts, 227.

A general power to an agent to sell and convey lands belonging to the estate, or to contract absolutely for the sale of such lands, cannot therefore be given by trustees. But trustees may intrust an agent with an authority to make conditional sales of land lying at a distance from the place of residence of the trustees; and subject to be ratified by them.

By the statute of New York, a power given to two or more persons must be exercised by them all.

8 Ed. R. S. p

The criterion by which to determine whether a power contained in a devise or other instrument can or cannot be executed by attorney is, "if a personal trust or confidence is reposed in the donee of the power, requiring

the exercise of his judgment, he cannot delegate the execution of such power; if otherwise, it may be delegated.

Wherever a power is given whether over real estate, or personal property, and whether the execution of it will confer a legal or only an equitable right on the appointee, the test will apply.

In the case of Pearson v. Jameson, 1 McLean 197, it was held that notwithstanding the power was coupled with an interest, it could not be delegated. The power in question was given to an executor in the following manner, "I hereby give to him a full and complete power and authority to dispose of the real property in the best mode he may find convenient or may judge proper, etc."

One can see at a glance that this power conferred upon the executor required the exercise of his judgment as to what was the "best mode", and by an application of the test, incapable of delegation.

One of the leading cases on this subject is that of Berger and Icard v. Duff, 4 John. Chan. 369. Berger and Icard, executors of the estate of one J. Icard, were authorized to sell two lots of land, if the imperious circumstances of the times should in their best judgment demand. The plaintiff Icard left the country and soon

after executed his power of attorney, authorizing Berger as co-executor to sell the land. The court said: "The executor cannot sell by attorney; the power given to Berger and Icard was a trust and confidence reposed in them, to be exercised jointly, according to their best judgment, under circumstances contemplated in the will. One of the executors in this case cannot commit his judgment to the other, any more than to a stranger, for, delegatus non potest delegare."

The cases establishing this point are so numerous that I have only given two of those which are the foundations of our later decisions.

Municiple and private corporations are also subject to the rule of "potestas delegata non potest delegare".

As to public or municiple corporations, there has been much discussion, and cases may be found in favor of and cases against, including them within the rule.

Legislative powers of a municiple corporation are in the nature of a trust conferred upon the legislative body of the corporation; if discretion and judgment are to be exercised, either as to time or manner, the body or officer entrusted with the duty must exercise it.

In Budsall v. Clark 73 N.Y. 73, the charter of

Binghampton provided that the building and maintaining of sidewalks shall be done at the expense of the adjoining premises. That when, after proper notice, the work was not done within the time limited, The Council should cause the same to be performed by contract or otherwise. The Council directed that in all such cases the Superintendent of Streets should cause the work to be done. J. Church, in writing the opinion uses the following language: "The charter conferred the power upon the Council to cause the work to be done by contract or otherwise. This requires the exercise of judgment and discretion as to the manner in which the work should be done. Whose judgment and discretion was to be exercised? The legislature has said that it was the judgment and discretion of the common council. x x x As to one work it might be judicious and economical to direct that it be done by contract and to let to the lowest bidder; in another, entirely by days work, and even other terms and directions might be appropriate."

This decision seems to be in accordance with the weight of authority.

Where power is conferred upon a municiple corporation to regulate, by license or otherwise, any calling

or business, they are powerless to delegate a discretionary authority to others.

East St. Louis v. Wehring, 50 Ill. 28.

In creating such bodies it is designed to aid the government in the preservation of good order, and to protect persons in the particular community from injury and annoyance, that cannot be so readily guarded against by the general government of the state . In conferring the power upon the corporate body, it is intended that the power shall be exercised by the body created, and in the mode prescribed; and any departure from such authority, or any attempt of the body to transfer their power to others is unwarranted.

A city, authorized by its charter to errect, repair and regulate public wharves, and to fix the rate of wharfage thereat, cannot lease its wharves and farm out its revenues, or empower another to fix the rate of wharfage.

Matthews v. City of Alexandria
68 Mo. 115.

Lord v. City of Aconto, 47 Wis. 386.

The legislature has, by virtue of the right of eminent domain,or inherent sovereignty, the authority to take private property for public purposes. When the

legislature delegates this power to a corporation, its exercise is subject to the rule that the power must be strictly pursued.

State v. Jersey City, 25 N.J.L.

The principle that municiple power cannot be delegated, does not prevent a corporation from appointing agents and committees and investing them with duties of a ministerial and mechanical character.

The general management and control of the affairs of private corporations are entrusted to the board of directors.

The directors have, as will be seen under the cases of implied authority, the right to employ the necessary assistants to carry on the business of the company. But those powers which it is intended should be exercised by them personally can in no case be delegated.

It is upon the personal care and attention of the directors that the shareholders depend for the success of their enterprise; and by reason of this, there exists the exercise of such a judgment and discretion as will make the rule of "potestas delegata non potest delegare" apply.

Having to some extent considered the general rule, the remainder of this article may properly be given to an

examination of the exceptions of this rule.

There are certain cases in which an agent may lawfully appoint a subagent; these are divided into four classes; in each one of which the agent has prima facie authority to appoint a deputy.

1. When it becomes necessary to employ a subagent in order to carry out the agency.

2. When the act to be performed is purely ministerial.

3. Whenever the agent is allowed by a lawful usage or custom of trade to appoint a deputy.

4. When it is understood by the parties to be the method by which the object and purpose of the agency would or might be attained.

Proceeding to the examination of these exceptions in the order given:

First. Where it becomes necessary to employ a subagent in order to carry out the agency.

This exception manifestly arises from the ordinary interpretation of the contract of agency. The authority of an agent is always construed to include all the necessary and usual means of executing it properly.

It is clear that there are many cases where, from

the very nature of the duty, or from the circumstances under which it is to be performed, the employment of a deputy or subagent is of the greatest importance to prevent injury to the principal's interests.

Having previously seen that the management and control of a private corporation is left to the board of directors, and that such of their duties as require the exercise of judgment and discretion cannot be delegated, one must not confuse these duties with those which, although requiring the exercise of skill and discretion, cannot be personally performed by the directors.

A frequent case of this kind is that of a railroad corporation where it is necessary for the purpose of carrying on the business, to employ engineers, brakemen, etc.,who have qualifications not usually possessed by the directors.

Agents of a town appointed to institute legal proceedings have the power of delegation, so far as to employ attorneys to conduct the proceedings. One can plainly see that in such cases it is necessary for the best interests of the town, that the assistance of a person acquainted with the ways of the courts, should be procured.

Buckland v. Conway, 16 Mass. 296.

Whenever a note sent to a bank for collection, must, for the protection of the principal, be protested, the bank has implied authority to employ the proper officer. In case a note or check is delivered to a bank to be collected at a distant point, the authority of the bank to employ a subagent at that point and to send the note or check to him, is implied.

The liability of the bank receiving the note has been a matter of discussion; and involves a rule of general application. A rule affecting trade between different and distant places; and which in the absence of statutory regulations, special contract or usage of trade, is not to be determined according to the interests of any particular persons, or class of persons, but according to those principles which will best promote the general weifare of the commercial community. In performing the duty of collection, as in all other acts, a bank having no capacity to act for itself must depend upon the instrumentalities of agents. This proposition is the basis of the Massachusetts doctrine, established by the case of Dorchester Bank v. New England Bank, 1 Cush. 177. The court held that the liability of the bank receiving

the note extends merely to the exercise of due care in the selection of a competent agent and to transmit the note to such agent. This case has been followed in Connecticut, Maryland, Illinois, Wisconsin and Mississippi.

The authorities in these states rest on the ground of necessity; and that the risk is on the person empolying the bank for the reason that he impliedly authorizes the appointment of a subagent.

The contrary, that a bank receiving a draft for collection, from a drawer residing in another state, is, in the absence of any express or implied contract, liable for a neglect occuring in its collection, whether arising from default of its own officers, of its correspondent in the other state, or of an agent empolyed by such correspondent.

Allen v. Merchants Bank, 26 Wend. 485, established this doctrine in New York, and notwithstanding the sharp criticism which it received in Dorchester Bank v. Bank of New England, has been adopted by the United Stats States court. Exchange Nat. Bank v. Third Nat. Bank, 112 U.S. 278., and by the courts of Pa., N.J., Ohio and Indiana.

The second exception is expressed as follows: "When the act to be performed is purely ministerial."

Certain powers arise by inference as incident to others, and are essential to their exercise. In the performance of a general or special agency, many acts are to be performed, of an indifferent nature, which may be done by one person as well as by another, and which the agent might find inconvenient to do personally. The maxim witholding the power of subdelegation, only applies where the end or object to be gained might suffer injury by such substitution. The agent having first determined the propriety of the act may direct another to perform the mechanical part.

Although the governing body of a municiple corporation cannot delegate the powers requiring the exercise of discretion, it may appoint agents and committees to discharge duties which are merely ministerial or mechanical.

Edwards v. City of Watertown
61 How. Pr. 488.

This applies with equal force to the directors of private corporations, who have power to employ various inferior agents to take care of the details of the company's business.

Where a power to sell lands is given to an executor, he has implied authority to employ a real estate dealer to procure a purchaser.

In Norwich University v. Denny, 47 Vt. 9, it was held that one having authority to sign the name of another to a subscription paper, might procure a third person to do so in his presence.

Also in Commercial Bank v. Norton, 1 Hill 501, a general agent, having decided to accept two bills of exchange, directed a bookkeeper to do the mechanical part of the act; the court held that there was no delegation of authority to the book-keeper.

A question which remained for a time in dispute, was in regards to the power of an insurance agent to authorize his clerks to contract for risks, etc. The leading case of Bodine v. Insurance Co. 51 N.Y. 123, held that agents had such power, and said: "Because as is well known they could not transact their business if required to attend to all the details in person." The court seemed to incline towards necessity instead of the rule under discussion. The cases which I have given will serve to show the manner in which the rule has been applied.

Third Exception, permits an agent to appoint a depu-

ty whenever there is a known and established custom or usage of trade by which such an appointment is justified. Parties contracting in relation to a subject matter, concerning which there exists such a usage, may well be presumed to have it in contemplation. But a usage to be good, must be reasonable, and for the benefit of trade generally, and not for a particular class of individuals; the usage must also be legal and consistent with the terms of the contract.

Hence when a factor, being instructed to sell for cash, allowed a purchaser to take the goods away without paying for them, he is liable for the goods and cannot defend on the ground of a usage existing among factors, which allowed purchasers a week to make their payments.

Bakersdale v. Brown, 9 Am. Dec. 720.

This case may be upheld on the further ground that an agent cannot justify his acts in contravention to express instructions which he has received, on the ground of usage or custom.

Where, however, goods were entrusted to a merchandise broker to sell, not below a fixed price, and to deliver them and receive payment, and he deposited them in accordance with a usage with a commission merchant,

taking his notes therefor; some of the goods were afterwards sold below the given price. It was held that the deposot bound the principal.

Laussatt v. Lippincott, 6 S.&.R. 386.

The liability of a bank receiving a note for collection has also been released on the ground of usage and custom.

A good authority upon this exception is the case of Darling v. Slanwood, 14 Allen 504.

The fourth and last exception to the general rule of delegata potestas non potest delegare, exists where the principal is aware that the agent will appoint a deputy. If at the time of the creation of the agents authority the appointment of a subagent was contemplated by the parties, or it was expected that a subagent might or would be employed, the authority to make such an appointment will be implied.

As to the liability of the agent and subagent, it may be said in general terms that, if an agent employs a subagent, having authority, express or implied, to do so, the latter is responsible directly to the principal for his acts; but if damage results from these acts, the agent is liable, only in case he has not exercised due

care in the selection of his subagent. But if the agent merely to assist him in what he has undertaken to do, employs a subagent, he does so at his own hazard, and no privity of contract exists between the principal and subagent. The agent is, therefore, responsible for the manner in which the business is done, whether by himself or by his servant, his agent.