2001

Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-day Saints : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BANK OF SALT LAKE, a Utah corporation,
Plaintiff-Respondent,

vs.

CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation sole,
Defendant-Appellant.

Case No. 13704

BRIEF OF APPELLANT

An Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, State of Utah
Judge Stewart M. Hanson, Presiding

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff-respondent seeks money damages against defendant-appellant arising out of the failure of the latter to pay the former pursuant to certain alleged collateral assignments in its favor.

DISPOSITION IN THE LOWER COURT

Plaintiff-respondent was awarded judgment in the amount of $59,205.80, interest and costs, pursuant to its complaint as amended at trial over objections of defendant-appellant.

RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks a complete reversal of the trial court's judgment against it and prays that this Court grant judgment in its favor, no cause of action as to all claims of plaintiff-respondent; in the event this Court does not grant a reversal, defendant-appellant seeks appropriate modification of the Judgment in accordance with the Argument infra.

STATEMENT OF FACTS

This action arises out of certain transactions and surrounding circumstances, which occurred during 1968 and 1969 by and among the plaintiff, Bank of Salt Lake (sometimes "Bank"), Kerry-Aldon, Inc., and Leland Ronald Bruderer ("Bruderer"), at that time a low-level employee in the office of the department of Seminars and Institutes of the Church Schools, a division of The Church of Jesus Christ of Latter-day Saints, an unincorporated association (Church). (R. 100-105, 109, 110, 111, 113, 114, 197). During the latter part of 1968 and early 1969, the Church was purchasing various manufacturers' lines of school furniture and fixtures from, among others, Kerry-Aldon, Inc. The plaintiff was, at least in part, financing the operation of Kerry-Aldon, Inc., as it had the operation of Kerry-Aldon Associates, the partnership through which Kerry Rapp and Aldon Cook had done business prior to the incorporation of Kerry-Aldon, Inc. in June, 1968. Among the receivables assigned as security for some of the promissory notes by Kerry-Aldon, Inc., and one or more of the officers of said corporation, to Bank were payments due on

certain invoices representing items of school furniture and fixtures sold to various departments of the Church.

In connection with each of the subject transactions form letters were prepared by plaintiff addressed to Mr. Leland Bruderer, Seminaries and Institutes, LDS Church, Union Pacific Building, Salt Lake City, Utah 84111. (R. 46-49) Bruderer was selected as the addressee of these letters by the plaintiff solely on the advice of Mr. Aldon Cook, a principal in Kerry-Aldon, Inc., who, at the request of Plaintiff, hand delivered these letters to Mr. Bruderer, one letter having been brought to him at his home on a Sunday. (R. 46-49; 171). One of these letters, which was signed by an Assistant Vice President of the Bank, contained, inter alia, the following language below the Bank officer's signature:

> Seminaries and Institutes, LDS Church, hereby acknowledges the indebtedness described above and agrees to the assignment consenting to make all disbursements on the above invoices payable to the Bank of Salt Lake and Kerry-Aldon Associates, jointly, and to mail such disbursements to the Bank of Salt Lake, 3081 South State, Salt Lake City, Utah.
>
> Seminaries and Institutes, LDS Church
> By: /s/ Leland R. Bruderer
> Title
> Budget and Records Offices
>
> (Exhibit 5-P-C-)

This language was representative of that portion of all letters below the Bank's signature, except that the first acknowledgement did not indicate Bruderer's title. (Exhibit 2-P-C; see Exhibits 2-P-C through 5-P-C).

The body of each of these letters misrepresented that credit had ben extended to Kerry-Aldon *Associates* by the Bank of Salt Lake and that in consideration therefor Kerry-Aldon Associates had assigned the proceeds of certain invoices. (R. 158-159)

As directed by plaintiff, Mr. Cook personally delivered each of these letters to Mr. Bruderer, obtained his signature on the acknowledgment, and returned each letter to the plaintiff. (R. 46-49; 171).

Bruderer indicated that he signed the acknowlegments with the understanding that Cook would send through the "assigned" invoices to the appropriate Church department with the names of Kerry-Aldon Inc. and the Bank on them. Bruderer indicated to Cook at the time he signed them that he (Bruderer) had no authority to sign the acknowledgments and Cook, according to Bruderer, well knew at that time that he had no authority to sign the acknowledgments. (R. 104, 105) Cook further stated that the invoices when presented would have the name of the Bank on them for payment. (R. 104, 105). At no time did anyone on behalf of the Bank, except Cook, contact Bruderer or anyone else who worked for the Church nor did anyone ever contact any representative of Corporation of the President of The Church of Jesus Christ of Latter-day Saints, a Utah corporation sole, the defendant in this action (Corporation of the President). (R. 105, 108, 168)

At the time of these "acknowledgments" Bruderer was a low-level employee of the Seminaries and Institutes Department of the Church Educational System. The only

employees working under him then were a full-time secretary and, later, a part-time secretary. (R. 100) There were numerous men above him in the hierarchy of the Seminaries and Institutes Department, and additional persons in the Church Educational System. (R. 113, 114, 195, 196) His duties were largely clerical. He obtained basic factual payroll information from seminary and institute teachers. He also filled out requisition forms from requests by seminaries or institutes, some types of which requests were initially reviewed by his immediate superior and assigned to Bruderer. The requisition forms, when filled out, went to Bruderer's immediate superior, a Mr. Gardner, for his review, approval and signature. Bruderer's sole non-clerical function was recommending various types or brands of school furniture and fixtures for and estimating the aggregate cost of furnishing any given room in a specific seminary or institute. He had no control over pricing, returning defective merchandise, paying or receiving merchandise he recommended. Requisitions filled in by Mr. Bruderer, when approved and signed by Mr. Gardner, went either directly to the Church Purchasing Department or first to the Church Building Department, depending upon whether the requested items were to go to a seminary or institute already built or one under construction. After Purchasing Department and/or Building Department approval, the Purchasing Department would prepare a purchase order from the requisition. Only the Building and/or Purchasing and the Financial Departments were involved in the transaction from the time the requisition left Mr. Gardner's office. (R. 41-43, 60-64, 100-105, 109-114, 211) Bruderer had no authority to sign any instru-

ments, papers or documents during this period nor did he have any authority in financial matters. (R. 44, 60, 101-104)

During the period of time relevant to this action, Bruderer officed in various buildings in Salt Lake City. He (in common with thousands of Church employees) could be reached by telephone through an extension of the L.D.S. Church central switchboard. (R. 40, 99, 100) The suite in which Bruderer's office was located was identified as housing some offices of the Seminaries and Institutes Department of the Church Education System. He was paid during this period of time by Corporation of the President as were some 6,000 persons, including employees of several separately incorporated entities such as hospital, welfare, and social service corporations. He was actually hired by the Church Board of Education. (R. 195 et seq.)

The first of the four (4) promissory notes executed by Kerry-Aldon, Inc. in favor of the Bank and secured by collateral assignments of invoices including some of those ~~of~~ to the Church's Purchasing Department, in the amount of $14,280.00, was dated on or about August 14, 1968, and was allegedly secured by unspecified "Invoices to LDS Church Department of Seminaries and Institutes totaling $18,978.36". This note was satisfied 2 months after it became *overdue* by an involuntary offset against the bank account of Kerry-Aldon, Inc. (not Kerry-Aldon Associates) on or about January 13, 1969. (R. 171) Various amounts were paid on the other three promissory notes from different sources and at various and sundry times.

One of the Church's invoices purportedly assigned to the Bank was allegedly No. 1171 in the amount of some $34,966.00. This invoice did not exist at the time of its alleged assignment. (R. 54-59) It was at that time a blank invoice form in the office of Mr. Cook. It was later used but the total amount thereof was $85.00. (Exhibit 22-D) The so-called assignment of invoice No. 1171 was by Aldon Cook, individually, and not Kerry-Aldon, Inc. (Exhibit 4-P-E)

Mr. Cook failed to make good on his promise to see that the Bank's name was included on all of the Church's invoices. None of the Seminaries and Institutes or Building Department invoices were made payable to the Bank and Kerry-Aldon, Inc., jointly. Bruderer did not notify anyone anent the purported assignments. (R. 108-109)

None of the assignments, invoices, acknowledgments or other documents, letters, papers or instruments involved in the transactions hereinabove described purport to relate to Corporation of the President, the defendant herein, nor was there any consideration given Corporation of the President or the Church for any of the "acknowledgments".

In October 1969, the President of the Bank, Mr. Norton Parker, sent a letter to Mr. Bruderer calling to his attention that the Bank had received no jointly payable checks pursuant to the "assignments" and requesting that that situation be corrected. (Exhibit 10-P) Some time later the Bank also obtained a general assignment of all Kerry-Aldon, Inc.'s accounts receivable and filed a financing statement covering the same in the office of the

Utah Secretary of State but apparently made no attempt to give either the Church or Corporation of the President notice thereof. (Exhibit 6-P)

All checks issued by Corporation of the President relative to Kerry-Aldon, Inc.'s invoices purportedly assigned to Bank of Salt Lake were deposited to the account of Kerry-Aldon, Inc. at Bank of Salt Lake, and, during the relevant time period, there were funds in said account sufficient to cover the aforementioned promissory notes as they became due. (Exhibits 16-D, 18-D)

ARGUMENT

POINT I

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN ITS JUDGMENT BECAUSE DEFENDANT WAS NOT A PARTY TO ANY OF THE TRANSACTIONS AT ISSUE.

It is elementary that one who is not a party to an agreement cannot be bound by the terms thereof. Thus, according to 17 Am Jur 2d, Contracts §§294-295:

> As a general thing obligation of contracts is limited to the parties making them, and ordinarily, only those who are parties to contracts are liable for their breach. Parties to a contract cannot thereby impose any liability and in any event, in order to bind a third person contractually, an expression of assent by such person is necessary.

It is also elementary that a debtor who has not been notified of an assignment cannot be bound by its terms.

Section 70A-9-318, Utah Code Annotated, 1953, as amended, provides in part:

> The account debtor is authorized to pay the assignor until the account debtor receives notification that the account has been assigned and that payment is to be made by the assignee. A notification which does not reasonably identify the rights assigned is ineffective.

While the plaintiff dealt with and named various persons and entities in the instruments, papers, and documents comprising the subject transactions, nowhere is the defendant named as a party thereto. Where in any of the transactions of which plaintiff makes isue does the name of the defendant appear? Where in any of the instruments documents, or papers upon which plaintiff relies is the name of the defendant set forth? Where is any notice upon which plaintiff relies directed to the defendant? If plaintiff claims the defendant entered into a agreement, where is the agreement to which the defendant is a party? If the plaintiff intended to deal with and give notice to defendant, why didn't it address its various letters and documents to defendant?

All of the aforementioned questions must be answered in favor of the defendant. Whatever parties the plaintiff chose to identify as being involved in the subject transactions, it did not identify the defendant. The failure of plaintiff in this respect leads to the inescapable conclusion that plaintiff did not consider nor intend defendant to be a part of or involved in any manner in the subject transactions. Naming of the defendant in this action is an afterthought, an attempt of plaintiff to escape the effects of its

own negligence in failing to make necessary inquiry, failing to draft its own documents and instruments with a sufficient degree of intelligent precision, and failing to avoid the consequences of its acts and omissions when such avoidance was within its power.

As to the defendant, all the papers, documents and instruments offered by the plaintiff were irrelevant and incompetent, especially the letters from the Bank to Bruderer. 29 Am Jur 2d, Evidence § 836. These letters also come within the general rule that correspondence of third persons, where offered as proof of the facts therein stated, fall within the purview of, and thus may be subject to exclusion under, the hearsay evidence rule. 29 Am Jur 2d, Evidence § 881.

POINT II

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT SUCH AGENCY RELATIONSHIP EXISTED BETWEEN DEFENDANT AND BRUDERER SO AS TO CHARGE DEFENDANT AS ADJUDGED.

The defendant is a Utah corporation sole. (Exhibit 12-D) The creation of the relation of principal and agent by such corporation is governed by Section 16-7-8, Utah Code Annotated, 1953, which provides:

> All deeds and other instruments of writing *shall* be made in the name of the corporation, signed by the person representing the corporation in the official capacity designated in the articles of incorporation, or *by a duly authorized agent or agents*

> *designated and named in a certificate filed by such corporation in the office of the secretary of state,* and sealed with the seal of the corporation; an impression of which seal shall be filed in the office of the secretary of state. The authority of any agent or agents designated as herein provided shall continue until revoked. A corporation sole designating an agent or agents to sign deeds and instruments of writing by certificates may revoke such authority by filing a notice of revocation of authority in the office of the secretary of state. (Emphasis added)

The evidence before the Court indicates that Leland R. Bruderer was not a duly authorized agent designated and named in any certificate referred to in Section 16-7-8, supra (Exhibit 12-D); therefore, the defendant cannot be bound by any acts of the said Bruderer. Plaintiff is charged with knowledge and had constructive notice of this statute, the absence of such certificate and hence the lack of authority of Bruderer.

Assuming, nevertheless, for purposes of argument that the aforementioned law does not limit the creation of an agency by the corporation sole to the method provided in such statute, it is submitted that no actual or apparent agency existed between defendant and Bruderer. The evidence fails to establish any contract or appointment of Bruderer to represent defendant in contractual or business relations with third persons, it being fundamental that agency always connotes commercial or contractual dealings between two parties by and through the medium of another. 3 Am Jur 2d, Agency § 2.

The lower court committed prejudicial error in finding that the "* * * defendant clothed its employee and

agent, Leland Bruderer, with apparent authority to perform the acts which he performed including acknowledgment of plaintiff's assignment, that plaintiff was entitled to and did rely upon Mr. Bruderer's acknowledgments and the loss complained of by plaintiff resulted." (Finding of Fact No. 8, R. 322) The finding is not only vague, general, and begs the ultimate question; it is unsupported by the evidence and contrary to law.

It is well settled that apparent authority is not to be determined from the acts or statements of an agent, but only from the acts or statements of a principal. This Court, in the case of *Leavitt v. Courturier* (Utah) 23 P.2d 1101, quoted with approval the following:

> The apparent power of an agent is to be determined by the acts of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct has created the apparent authority.

See also *Torrence National Bank v. Enesco Federal Credit Union* (Cal.) 285 P.2d 737; *Christian et al v. Rice Growers Association of California* (Cal.) 123 P.2d 534; *Start v. Shell Oil Co.* (Oregon) 260 P.2d 468; *Cignetti v. American Trust Company* (Cal.) 294 P.2d 490; *Perkins v. Willacy* (Alaska) 431 P.2d 141; 2A C.J.S. Agency § 161.

Again in *Malin et al v. Giles et al* 100 Utah 502, 114 P.2d 208, this Court stated:

> The extent of an agent's apparent authority is not measured by the extent of power exercised

> by the agent; but by the principal's conduct with reference to the power exercised by the agent. Either by action or by inaction where there is a duty to act, the principal may create a situation the reasonable interpretation of which, by a third party with whom the agent is about to deal, is such as to lead that third party to believe that the agent has authority to deal with him as contemplated. Under such circumstances the law will hold the principal responsible to that third party for the results of that deal with the agent. But the conduct of the principal must be such as occurs prior to the deal, and not subsequent thereto. The latter conduct may have evidentiary value as a recognition by the principal of his former conduct, or may evidence a waiver of his right to object to lack of authority in his agent; but to be the inducement for the third party to enter into an agreement with the agent, the conduct must occur prior to the agreement. 2 C.J.S. Agency § 96.

In furtherance of the foregoing principle, it has been stated that there are three prerequisites to the establishment of apparent authority:

> In order to establish that an agent had the apparent authority to do the act in question, it must be established (1) that the principal has manifested his consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

3 Am Jur 2d, Agency § 75; See also 2A C.J.S. Agency §§ 161-163.

Proof of each of the foregoing requisites of apparent authority is lacking in this case. There is no evidence upon which a finding could be made that the defendant consented to the acts of Bruderer in accepting the Bank letters (Exhibits 2-P-C, 3-P-C, 4-P-C, 5-P-C) and his executing the same, or that defendant knowingly permitted Bruderer to assume the exercise of such authority. Nor does it appear in the record that Bruderer had ever been authorized in the past to acknowledge corporate indebtedness, agree to and accept notice of assignments of corporate debt, or draw and mail corporate checks on behalf of defendant.

It would seem elementary that a course of conduct of a particular character does not exist where there is a total absence of any conduct whatsoever of the character claimed. In this case there is no evidence of any prior dealing whatsoever between the plaintiff and defendant; and there is no act whatsoever on the part of defendant which would constitute ratification of the conduct of Bruderer in his receipt and execution of the Bank letters.

Assuming further for purposes of argument, and despite the record, that some course of prior dealing had occurred, it is submitted that a finding of apparent authority based upon earlier dealings requires that the prior dealings must be of the same character as the act under which it is claimed the principal is bound, and a required degree of repetitiveness.

Thus, in the case of *Bennett v. Royal Union Mutual Life Insurance Co.* (Mo.) 112 S.W.2d 134, the Court stated:

> Where previous acts done by the agent with the acquiescence of his principal are relied upon to establish apparent authority of the agent to do the act in question, the prior acts shown in evidence must be of the same kind and character as the act with which it is sought to charge the principal.* * * (Citing cases and treatise)

In *Jennings et al v. Pittsburgh Mercantile Company* (Pa.) 202 A.2d 51, the principle was stated as follows:

> Focusing on the first of these factors, in order for a reasonable inference of the existence of apparent authority to be drawn from prior dealings, these dealings must have (1) a measure of similarity to the act for which the principal is sought to be bound, and, granting this similarity, (2) a degree of repetitiveness. * * * (Citing cases)

Wewerka et al v. Lanton (Texas) 174 S.W.2d 630, quotes with approval the following:

> In 2 C.J.S., Agency, P. 1214, § 96, on the question of apparent authority, we find this language: " Of course, no apparent authority grounded upon a course of conduct is assertable in the absence of even a single precedent act or transaction to manifest the existence of the power claimed; a course of conduct of a particular character does not exist where there is an utter absence of any conduct whatsoever of the character supposed."

In this connection it has been said: "* * * The appearance of authority in one respect does not extend to

other acts which are not of a like nature.* * *" *Continental - St. Louis Corporation v. Ray Scharf Vending Company, Inc.* (Mo.) 400 S.W.2d 467.

And further: "* * * In any event a course of dealings is necessary to establish apparent authority. Isolated or occasional transactions are not enough.* * *" *Bogue Electric Manufacturing Company v. Coconut Grove Bank* 269 F.2d 1. See also *Ziv Television Programs, Inc. v. Associated Grocers Inc., of South Carolina* (S.C.) 114 S.E. 2d 826.

The attention of the Court is invited to the foregoing cases of *Bennett, Jennings, Wewerka, Continental - St. Louis, Bogue* and *Ziv,* for not only the rules quoted, but also for the reasoning which resulted in the rejection of claims comparable to those here pressed by the plaintiff Bank.

The record shows that Bruderer had certain duties with the Seminaries and Institutes of the Church Educational System, relating and limited to the collection of basic payroll information, the estimation of the cost of furnishing seminary and institute rooms and the preparation of requisitions and the evaluation of specifications of merchandise for use in the Seminary and Institute system. The record does not show that Bruderer had any authority to accept and agree to assignments, execute acknowledgment of corporate debt, or agree to the payment of that debt.

The duty to prepare but not sign requisitions, obtain and prepare payroll information of Seminary and Institute personnel, and evaluate cost and other specifications

of merchandise, are hardly sufficient to reasonably warrant that Bruderer was one upon whom notice of assignments could be given, one who could execute acknowledgement of corporate debt, or who could agree to the method of payment of that debt. There is no evidence to indicate that Bruderer had any authority to manage or direct the affairs of defendant generally or to handle defendant's financial matters. Bruderer's duties were limited in nature and confined geographically to his office; he was a subordinate in a long-line of persons in a hierarchy of the Seminaries and Institutes Department, a part of the Church Educational System, in turn one of many departments of the Church.

To equate Bruderer's sole management responsibilities—supervising a full and part time secretary in one limited functional area of Seminaries and Institutes of the aforementioned hierarchy—with those of one having general management and fiscal responsibilities for all of an organization's activities within a given geographical area, as plaintiff has attempted to do, is absurd.

No inference that Bruderer had the authority plaintiff claims for him arose from his position with Seminaries and Institutes. Bruderer had, by virtue of said position, only the authority to do things which persons in analogous positions in his locality, trade, or occupation and time customarily did. Restatement, Second, Agency, p. 106, § 49 Comment c. The Bank, as Cook's principal in dealing with Bruderer, had imputed notice of the latter's lack of actual and apparent authority. Except for imputed knowledge from its agent Cook, the Bank had absolutely no

knowledge of Bruderer or his position with Seminaries and Institutes. As to the defendant, Bruderer had no position from which Cook or the Bank could infer agency of any nature whatsoever.

As noted heretofore, among the requisites in establishing apparent authority, it must be shown that the third person knew of the facts, and acting in good faith, had reason to believe, and did actually believe, that agent possessed such authority; and that the third person has relied upon such appearance, and changed his position. 3 Am Jur 2d, Agency § 75.

No evidence indicates that plaintiff knew of any act of the defendant, nor did it rely upon any act of defendant, in its dealings in question. The record shows that it relied upon Cook alone for any information relating to the question of agency. Indeed, the Findings of Fact as entered in this case are devoid of any finding that plaintiff relied upon any conduct of the defendant whatsoever in entering into the subject transaction. (R. 321-323) The reason for the absence of such an essential finding is clear: Plaintiff knew of no facts which would give appearance of authority, because there were none, and of course could not have relied upon some non-existant conduct, and did not.

The evidence indicates that plaintiff did not even know the nature of Bruderer's position at the time the subject transactions took place. In fact as late as October 13, 1969, at which time plaintiff sent a letter to Bruderer, plaintiff was under the erroneous assumption that payment of accounts payable originated from Bruderer's office,

(Exhibit 10-P), further indicating the negligent manner in which plaintiff had entered into the subject transactions.

Not only is there an absence of a prior course of conduct of defendant which might mislead plaintiff to the extent of authority, if any, of Bruderer, but in fact the acts of defendant negative such authority, and placed plaintiff on a duty of inquiry.

It is fundamental that a third person cannot assert an apparent authority effective as against a principal where there is a failure to discover the true state of the agent's powers. 2A C.J.S. Agency § 162.

According to the case of *Dohrmann Hotel Supply Co. v. Beau Brummel, Inc.* 99 Utah 188, 103 P.2d 650:

> * * * One dealing with a supposed agent is under the duty to ascertain just what his capacity is.* * *

The treatise 2A C.J.S. Agency § 168 states:

> The fact of dealing with one who claims or is known to be acting as agent is in itself a signal of danger, calling for the exercise of caution; and a person so dealing assumes the risk which may be involved, despite the difficulty of ascertainment in some cases as to the extent of the power. Such a person is chargeable with notice of the authority and powers of the agent. The law holds him bound to know or discover them, and deems him, in the absence of such investigation or information, as dealing at his peril, on the question of whether his dealings come within the authority. Ignorance of the extent of authority affords no excuse to one who deals with the agent outside of its limits.

> In applying this rule, it has been held that no one is bound to deal with an agent, and, that where anyone does so as to matters beyond the actual authority conferred, any trust and confidence as to such matters is reposed by him and not by the principal, so that where one of two innocent parties must suffer from the wrongful acts of a third person, that one must bear the loss who by a confidence reposed in the person acting wrongfully has made it possible.

Litchfield v. Green (Ariz.) 33 P.2d 290; *Ernst et ux v. Searle* (Cal.) 22 P.2d 715; *Brutinel v. Nygren* (Ariz.) 154 P. 1042.

In the instant case the plaintiff Bank made no inquiry whatsoever of defendant regarding the authority, if any, of Bruderer. The only contact was with Aldon Cook — hardly discharging the duty incumbent upon plaintiff to inquire of defendant to ascertain the extent and character of the authority of any claimed agent. While inquiry of an alleged agent will not discharge the duty of inquiry, in this case the plaintiff did not even inquire of Burderer! See C.J.S. Agency § 169. It is submitted that the Bank, a sophisticated lender, has no excuse for not meeting a standard of inquiry equal to the ordinary business prudence test, especially in view of the fact that the transactions involved an initial dealing with Bruderer.

Plaintiff's negligence is further indicated by its relying upon Cook for purposes of determining to whom the so-called acknowledgement letters should be directed, and having Cook deliver the same to Bruderer, and secure his signature. It is submitted that such action by the plain-

tiff constituted Cook its agent for such purposes and charges plaintiff with knowledge of Bruderer's statement that he did not have authority to sign the letters, and that his act in so doing was adverse to the interests of a principal, if any.

The duty of plaintiff to inquire of defendant continued with subsequent transactions. The initial act of Bruderer in the subject chain of events occurred on August 1, 1968, when he signed the first of the four so-called acknowledgement letters. (Exhibit 2-P-C). More than five months later, the plaintiff with full knowledge it had not received checks drawn to joint payees pursuant to the August 13, 1968 letter, and with further notice that during the same five month period 35 checks drawn by defendant in favor of Kerry-Aldon, Inc., in the total sum of approximately $12,185.00 had been deposited to the latter's account with plaintiff (Exhibit 26-D), nevertheless, on January 15, 1969, entered into a further transaction with Kerry-Aldon, Inc. following the same procedural pattern, and without ascertaining of defendant or the Church what Bruderer's capacity, if any, was.

More than seven months after the August 13, 1968 transaction, the plaintiff with full knowledge it had not received checks drawn to joint payees pursuant to the August 13, 1968 and January 15, 1969 letters, and with equal knowledge that certain invoices enumerated in the latter letter bore dates of October 10, 1968, and with further notice that during the same seven month period over 62 checks drawn by defendant in favor of Kerry-Aldon, Inc., the total thereof exceeding $21,522.00, had

been deposited to the latter's account with plaintiff (Exhibit 26-D), nevertheless, on March 17 and March 26, 1969, entered into further transactions with Kerry-Aldon, Inc. following the same procedural pattern, and without ascertaining of either the Church or defendant the extent of Bruderer's authority, if any.

When plaintiff directed Cook to take the so-called acknowledgement letters to Bruderer, plaintiff did not attach loan documents or invoices to allow for vertification of the information represented in the letters. The debt represented in the letters and "acknowledged" by Bruderer exceeded the amount of the invoices; furthermore, the plaintiff had Bruderer "acknowledge" a debt twice, although represented by a single invoice, and also acknowledge a debt due by a vendor which had no relation to the Church. (Exhibit 5-P-P) Plaintiff also had Bruderer "acknowledge" an assignment of an invoice and indebtedness thereon in the amount of $34,966.00 which invoice was non-existent. (No. 1171) (Exhibit 4-P-C)

As a general rule, the knowledge of an agent may be imputed to the principal only in matters relevant to the agency. This rule is explained by one treatise as follows:

> . . . Knowledge acquired or notice received by an agent which does not pertain to the duties of the agent which does not relate to the subject matter of the employment, or which affects matters outside the subject matter of the employment, or which affects matters outside the scope of his agency is not chargeable to the principal unless actually communicated to him. In other words the knowledge or *notice must come to an agent who has*

authority to deal in reference to those matters which the knowledge or notice affects.

(3 Am Jur 2d, Agency § 276)

Also, in order for the knowledge of one person to be imputed to another under the law of agency, the knowledge must be of a person who is executing some agency, and not that of one acting merely in some ministerial capacity, such as servant or clerk.

In the transactions out of which the instant case arose, Bruderer clearly had no authority to deal in reference to those matters which the notice affected. The notice also quite obviously did not concern matters related to the subject matter of his employment or the scope of his agency, if any.

The notices to Bruderer could not, therefore, be imputed to the defendant.

Furthermore, the rule that notice to an agent is notice to the principal does not apply where the circumstances are such as to raise a presumption that the agent will not transmit his knowledge to his principal.

One treatise has elaborated upon this exception to the rule as follows:

> Accordingly, the *principal is not charged with such knowledge* where the *agent's personal interests* would *be effected if facts known to him* were *known to his principal;* and the same result follows where the agent is more intent in furthering the interests of the opposite party than that of his principal, or the agent acquires information that it

> would be to his advantage to conceal from his principal. Even if *there is apparent authority to receive notice on behalf of the principal, it is ineffective where the person relying on it has knowledge, or should have knowledge, that an adverse interest exists.* (Emphasis added)
>
> (3 C.J.S. Agency, § 440, See also 3 Am Jur 206, Agency §83)

In the instant case plaintiff's agent, Cook, not only was aware of circumstances that would have created a presumption that Bruderer would not transmit his information to the Church, let alone to the defendant, but he had assured Bruderer that he (Cook) would himself act so as to make such communication unnecessary (R. 104). Obviously, it would not have been to Bruderer's advantage or in his interest to inform the Church or the defendant that he had exceeded his authority by acknowledging corporate debt, especially non-existent or prospective debt, accepting notice of assignments, or agreeing to have checks issued to joint payees.

It is equally clear that it would not have been to Cook's advantage or in his interest to convey Bruderer's lack of actual authority or the facts from which his lack of apparent authority could be determined to the plaintiff. But plaintiff rather than the Church or defendant should bear the loss because plaintiff selected Cook as its agent for the specific purpose of having the "acknowledgments" executed and the "notice" delivered. Plaintiff accepted Cook's representation that Bruderer was the proper addressee and signatory on behalf of the Church.

As noted, plaintiff through its agent Cook had knowledge that the acts of Bruderer in signing the so-called acknowledgements were adverse to the interests of a principal, if any; and that certainly no act of defendant clothed Bruderer with any authority to acknowledge an indebtedness and assignment based upon a non-existent, if not fraudulent, invoice and certain other indebtedness unsupported in fact.

Plaintiff's position is that defendant is bound by an agreement arising from the acts of Bruderer in signing the so-called acknowledgement letters. It is fundamental that consideration is an essential element of the validity of a contract. 17 Am Jur 2d, Contracts § 86. No consideration supports the claimed agreement, and the same must be unenforceable against the defendant.

Furthermore, the indebtedness which Bruderer is claimed to have acknowledged in the subject transactions was prospective. The evidence fails to indicate that there was any contract or purchase order of the vendees to purchase the merchandise enumerated on the various invoices at the time of the so-called acknowledgments; further, the exhibits and testimony which relate to the transaction of March 26, 1969 (Exhibits 4-P-C, D, E) involving the non-existent invoice No. 1171, indicate no such contract or purchase order was entered into, even subsequently. It is submitted that no person has the authority to acknowledge prospective corporate indebtedness in behalf of another, or to accept assignments thereof, and agree to pay that indebtedness.

It is submitted that Bruderer was not the actual, apparent, nor agent by estoppel of defendant; and that in any event the acts of Bruderer upon which plaintiff relies fall outside the scope of any possible duties which Bruderer may have performed in connection with his position with Seminaries and Institutes of the Church Educational System.

POINT III

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN ADJUDGING DEFENDANT LIABLE FOR AMOUNTS IN EXCESS OF THE BALANCE UNDER THE SECURED NOTES.

The lower court committed additional prejudicial error in adjudging defendant liable for amounts in excess of the balance due under the three notes secured by the assignments. The assignments were given as collateral, and the balance including interest under the notes thus secured is $49,558.31. (See Exhibits 1-P; 3-P-D; 4-P-D; 5-P-D) The lower court held the defendant liable for the aggregate amount of the assignments, $59,205.80, apparently under the theory that any assigned sums in excess of the balance due under the three secured notes should be available to discharge other indebtedness in favor of the Bank which had been incurred subsequently by Kerry-Aldon, Inc. An analysis of this other indebtedness indicates it was incurred over a year after the 1969 transactions involving the assignments (Exhibits 7-P-B; 8-P-C; 9-P-B), and in one instance involved indebtedness of individuals and not the assignor, Kerry-Aldon, Inc. (Exhibit 8-P-C).

Section 70A-9-504 (2), Utah Code Annotated, provides:

> (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency.

The complaint of plaintiff sought recovery of $43,486.00, attorney fees, and costs, based upon the balance due under the three notes executed in 1969 (R. 214-215). Over objection of the defendant, the lower court allowed plaintiff to amend its complaint, pursue the issues of additional indebtedness, and advance an additional theory of recovery. (R. 80)

It is submitted that, assuming the validity of the assignments in question and any liability of the defendant thereunder, the liability should not exceed the balance under the three notes. (Exhibits 3-P-D; 4-P-D; 5-P-D).

POINT IV

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN HOLDING DEFENDANT LIABLE WHEN PLAINTIFF HAD A RIGHT OF OFFSET AGAINST KERRY-ALDON, INC.

It is a legal maxim that in the case where one of two innocent persons must suffer injury or damage, the party whose acts or omissions caused or permitted the injury or damage to occur should bear the burden thereof. In the instant case the Bank is far from an innocent party but even if it were it still should not prevail. The Bank and Aldon Cook, whom it sent to Bruderer, sought mutual

economic advantage in entering into the transactions which are the basis of this case. Defendant had nothing whatsoever to gain from the transactions. The Bank and Cook initiated the transactions and prepared all the documents. For this reason the Bank should bear the loss.

As the loans to Cook were supervised by an Assistant Vice President of the Bank, it should have been aware of the financial condition of its debtor. The Bank could have avoided loss resulting from its debtor's insolvency had it exercised its right of offet when the notes became due, as there were at those times ample funds to cover the notes. (Exhibit 16-D). *Farmers & Merchants Bank v. Universal C.I.T. Cr. Corp.* 6 Utah 2d 413, 315 P.2d 653; 10 Am Jur 2d, Banks §666. It could have avoided extending the credit evidenced by the later notes at all had it properly supervised the Kerry-Aldon, Inc. account. The Bank would have been required to have exercised this right to protect a surety or indorser if it knew that Kerry-Aldon, Inc. was insolvent, and it certainly was aware that Kerry-Aldon, Inc. wasn't paying its debts as they matured — one test of insolvency. Surely an account debtor should be similarly protected. 10 Am Jur 2d, Banks § 680.

The failure of the Bank to exercise its right of off-set in order to collect the notes as they became overdue was a direct proximate cause of the plaintiff's losses. The doctrine of avoidable consequences precludes plaintiff's recovery for these loans.

The law does not shift to a defendant a requirement to pay damages for all of the consequences which flow from his wrongful act or omission. Failure of a plaintiff

to take reasonable action to limit damages will result in the disallowance of damages for those consequences which the plaintiff could have reasonably avoided. This doctrine applies in contractual matters as well as in tort cases. Acts which have been construed by the courts as "reasonable" in the context of the ~~avoidance~~ avoidable doctrine of consequences include entering into subsequent contracts and the expenditure of reasonable sums of money to avoid larger losses. In the instant case, plaintiff could have avoided all the losses of which it complains merely by properly monitoring all its loans and collecting all of them by offset as it did the loan made by it in August 1968—merely by acting in a commercially reasonable manner. (22 Am Jur 2d, Damages §§ 30-37; 25 C.J.S. Damages §§ 33, 34)

POINT V

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN HOLDING DEFENDANT LIABLE IN VIEW OF DEFICIENCIES IN THE DOCUMENTS UPON WHICH PLAINTIFF RELIES.

There were numerous flaws and discrepancies in the collateral assignments and other documents prepared by the Bank and which should thus be construed strictly against the Bank. Some of these flaws and discrepancies which will now be noted go to the validity of the documents.

In the January 15, 1969, transaction, (Exhibit 3-P) the purported assignment fails to designate the defendant as the account debtor. The designation of the signatory

of this assignment as Kerry-Aldon, Inc. had been added in pen, perhaps after the instrument was executed. The letter from the Bank to Bruderer refers to the assignor as Kerry-Aldon *Associates* rather than Kerry-Aldon, *Inc.* and is directed to Seminaries and Institutes, LDS Church. Bruderer's title under his signature was supplied after Bruderer had signed the "acknowledgment", by an unknown person. (R. 106, 107) The Bank's practice in these matters was to secure notes by the collateral assignment of accounts with face value of approximately 133% of the note amount (R. 95) It is apparent, therefore, that other invoices must have been assigned to secure this January 15, 1969, promissory note. The balance currently due on this note is $6,030.79. Only 13 of the 19 invoices covered by the January 15, 1969 assignment were entered into evidence by the Bank. (Exhibit 3-P-F through 3-P-R) These 13 were all sold to the LDS Church Building Department rather than Seminaries and Institute Division of the Church Educational Department.

This note was taken only 2 days after the August 13, 1968 note had been satisfied by involuntary offset against Kerry-Aldon, Inc.'s checking account at the Bank. (Exhibit 16-D, R. 171) The 1968 note was apparently 60 days overdue and none of the $18,978.36 worth of invoices of "LDS Church Department of Seminaries and Institutes" securing the note had been paid jointly but had in all probability been paid to Kerry-Aldon, Inc. None of these January transaction documents refer to or concern the defendant.

In the March 17, 1969 transaction, the Bank's letter to Bruderer recited the assignment by Kerry-Aldon *Associ-*

ates of certain numbered invoices totaling $10,192.04. (Exhibit 5-P-C) The note face amount was $14,000, again indicating that there was other security therefor. Despite this there is no evidence that any other security was ever realized on this note. The "acknowledgment" is dated March 15th, the note March 17th, and the "assignment" is undated. The Statement executed by Bruderer is dated March 16, 1969, before the loan was ever made. Of the 18 invoices listed by number in the Bank's letter, the Bank has furnished only 14, one of which was sold to Sevier School and Office Supply, a purchaser not related to defendant at all. The other invoices furnished indicate various vendees such as LDS School Division; LDS Church Building Department; Church Building Department; Church of Jesus Christ of Latter-day Saints, School Division; San Bernardino District Seminaries; Church of Jesus Christ of Latter-day Saints, School Purchasing Division; none of them Seminaries and Institutes, LDS Church. The defendant is not mentioned in any of the documents involved with the first March transaction.

In regard to the March 26, 1969 transaction the Bank's letter to Bruderer also refers to Kerry-Aldon *Associates* as assignor. (Exhibit 4-P-C) Bruderer affixed his title as "Records and Budget". Someone else later printed below those words, "Records and Budget Officer". (R. 107) The assignment form used in the transaction did not identify specifically the invoice supposedly assigned — "invoice from Seminaries and Institutes, of L.D.S. Church" (Exhibit 4-P-C). Furthermore, the invoice allegedly assigned was a non-existent invoice No. 1171

in the imaginery amount of $34,966.00. Of course, no invoice was furnished with this set of documents. Defendant is nowhere named or alluded to in these documents.

The property right supposedly the subject of transfer is not sufficiently identified under the assignment aforementioned, and is therefore ineffective. Section 70A-9-318, U.C.A. 1953. It is also elementary that one cannot assign a non-existent right. It is even "generally held that an assignment of a right expected to arise uder a contract not yet formed, or employment not yet existing, is ineffective to transfer such a prospective 'right'." 3 Williston on Contracts, § 413, p. 56.

Further analysis indicates that the foregoing assignment form was signed by Aldon Cook, individually, and not by Kerry-Aldon, Inc., the content of the assignment being here set forth:

> KNOW ALL MEN BY THESE PRESENTS:
>
> That the undersigned, for a valuable consideration, receipt whereof is hereby acknowledged, hereby bargains, sells, assigns, transfers and sets over unto Bank of Salt Lake of Salt Lake City all the right, title and interest of the undersigned in and to the following to wit: Invoices from Seminaries & Institutes, of L.D.S. Church, hereby constituting the said assignee as the true and lawful attorney in fact for the undersigned irrevocably to adopt and pursue all lawful ways and means to collect and enforce and recover and reduce to possession and ownership the property and rights hereby transferred.
>
> Dated this 26 day of March 1969.
>
> /s/ Aldon Cook
> (Exhibit 4-P-E)

It is obvious that a non-existent invoice in the imaginary amount of $34,966.00 cannot be assigned, and certainly was not assigned by Kerry-Aldon, Inc., the only signature thereon being that of Aldon Cook individually.

In the absence of such valid assignment the defendant should not be charged in said amount of $34,966.00; nor should defendant be charged in the additional amounts of the other "assignments" for the reasons here advanced.

By letter dated April 22, 1969, Kerry-Aldon, Inc.'s main supplier, Artco Bell Corporation, informed him that it would require that the LDS Church make payment directly to it or no further merchandise would be shipped to the Church. (Exhibit 17-D). Kerry-Aldon, Inc. was required therein to give Artco Bell an assignment of all future invoices and a Power of Attorney. No one could be liable to the Bank for materials not specifically and validly assigned but especially could no one be liable on invoices which Artco Bell had a superior assignment.

Bruderer obviously had no authority, actual, apparent or otherwise, to acknowledge indebtedness on invoices which had already been paid at the time of their purported assignment. Nor could such invoices be effectively assigned by any Kerry-Aldon entity. Given the week's lead time required by the Church to process requests for payment (R. 203), many of the invoices purportedly assigned by a Kerry-Aldon entity had been paid prior to the assignment. For example, note invoices number 1026, 1031, 1040, 1041, 1043, 1089, (Exhibits 3-P-E and 24-D). It also appears that some invoices were assigned before they were

actually created. See invoices numbers 1115 and 1047 (Exhibits 3-P-E and 24-D).

An examination of Exhibits 5-P-C, 5-P-E and 25-D indicates that invoices numbers 1036, 1148, 1151 and 1154, at least, were paid prior to their alleged assignment. Comparing Exhibits 5-P-C and 3-P-E reveals that invoice number 1036 was assigned and "acknowledged" twice. Because the August, 1968, assignment did not list invoices by number and the March 21, 1969, acknowledgment relating to the March 26, 1969 assignment listed the fictitious invoice number 1171 (Exhibits 4-P-C and 4-P-E), no further positive identification of invoices paid before their assignment or assigned more than once is possible.

To add insult to injury the lower court did not only hold defendant liable for the full amount of the assignments acknowledged by Bruderer and refused to grant defendant credit for amounts paid by others upon the promissory notes, despite the fact that the acknowledged amount included (1) invoices for materials purchased by entities not related to the Church or defendant and (2) duplicates of invoices to Church-related purchasers, (R. 83, 84); but in a final touch of irony the lower court awarded the plaintiff attorney's fees according to the terms of the notes. (R. 373, R. 310)

CONCLUSION

The judgment of the lower court should be reversed for the following reasons:

1. The defendant was not named a party in any of the documents upon which plaintiff relies for its recovery in this case. It's suing the defendant is an afterthought.

2. Plaintiff could not rely upon the acts of Bruderer as an agent of defendant inofar as the acknowledgments, receipts of notice, and the agreements as to the method of payment were concerned because it had constructive notice of the requirements of Section 16-7-8 U.C.A. 1953, as amended, relative to the appointment of agents of corporations sole with the power to execute deeds and other written instruments.

3. Leland R. Bruderer had neither the actual, apparent nor estoppel authority to bind defendant by his acknowledgment and agreement as to how certain indebtedness would be paid. Bruderer's notice and knowledge of the assignments, being outside the scope of his employment, should not be imputed to the defendant.

4. The Banks' recovery against anyone but Cook, Rapp and the Kerry-Aldon entities is barred by its contributory negligence in failing to inquire of the Secretary of State's office so as to properly determine how to deal with the defendant or to investigate the extent of Bruderer's authority, if any; in appointing Cook its agent for purposes of securing the acknowledgments and giving

notice of the assignment; in accepting the assignment of duplicate, stray, prepaid and imaginary invoices, in failing to properly supervise the loans to Kerry-Aldon entities so that it could collect them by offset when overdue, or at least make due inquiry why no monies had been received from the assignments.

5. No liability could be charged to the defendant on the general assignment of accounts receivable filed by plaintiff with the Secretary of State's office, long after the due date of the last of the notes secured by invoices of any Church organization or entity, but of which the defendant was not given notice.

6. No knowledge can be imputed to defendant by virtue of the acknowledgments relied upon by plaintiff because they are not addressed to defendant and thus could not have been reasonably calculated to give it notice of the assignments.

7. Even if Bruderer had been the agent of defendant with the authority to do the acts upon which plaintiff relies and even if defendant had been named as a party in the documents relied upon by plaintiff, plaintiff should not be allowed to prevail because the doctrine of avoidable consequences applies to its failure to collect the subsequent loans by offset as it had the August, 1968, assignment.

8. In any event plaintiff's recovery should be limited to the amounts actually due on the promisory notes as the assignments were collateral assignments only.

9. In no event should defendant be liable in the "phoney" invoice No. 1171 in the imaginary amount of $34,966.00.

Respectfully submitted,

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