Louisiana Law Review

Volume 5 | Number 2
May 1943

What is the Effect of a Ratification of an Agent's Unauthorized Contract?

Wallace A. Hunter

Repository Citation

Wallace A. Hunter, *What is the Effect of a Ratification of an Agent's Unauthorized Contract?*, 5 La. L. Rev. (1943)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol5/iss2/5

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

logical suggestion on this point seems to be that the courts should look to the intentions of the parties in an effort to see whether they regarded the goods as fungible.[79]

Although risks are usually governed by the intentions of the parties at common law, in the absence of an express or clearly implied agreement to the contrary, the courts will presume that risks pass at the same time title passes.[80] The result is that the rule *res perit domino* is usually applicable. Naturally, however, if the party in possession is at fault, the risk of loss would be on him.[81] However, in many cases, the parties may find it convenient for the seller to assume the risk until the buyer has actually received the goods or in conditional sales until the price is paid.[82]

RUSSELL B. LONG

WHAT IS THE EFFECT OF A RATIFICATION OF AN AGENT'S UNAUTHORIZED CONTRACT?

A wide diversity of opinion exists among the various American jurisdictions as to the effect of the ratification of an agent's unauthorized contract. In order to present the questions involved, the following hypothetical case is presented. On the first day of the month, *A*, agent acting on behalf of *P*, purchased five hundred bales of cotton from *T* at seventeen cents a pound. On the second *P* discovered that *A* had made this purchase. On the fourteenth, the day before delivery was to be made, *P* wired a ratification of the purchase to *T*. During the period between the original purchase and ratification the price of cotton had risen to twenty cents a pound. When *T* received the wire of ratification he immediately wired *P* that since *A* did not have authority

---

fungible goods as those "of which any unit is from its nature or mercantile usage treated as the equivalent of any other unit."

Query: Should the "fungible goods" qualification be implied in sales of goods by weight, count, or measure at civil law? The point would not be important in regard to passage of title and risks, since they pass only after the weighing, counting, or measuring. However, the point could have some effect as to the necessity of a contradictory weighing, counting, or measuring.

79. Vold, op. cit. supra note 72, at 186-187.

80. Uniform Sales Act, § 22; Williston, op. cit. supra note 55, at 693-694, § 301.

81. Compare Section 22(b) of the Uniform Sales Act with Article 1915 of the Louisiana Civil Code of 1870. The risk of loss will be upon the party in default.

82. Williston, op. cit. supra note 55, at 694 et seq., §§ 302 et seq.

he did not consider himself bound and would not make delivery. Is *T* liable for breach of contract? The necessary companion to this question is what would be the effect had there been a falling instead of a rising market, inducing *P* on the fourteenth to repudiate rather than ratify. Since the issue rarely arises when the market has remained constant, the question resolves itself into the query: Who should be given the advantage of a change in market price?

An answer to this suppositious case depends upon which of three rules is applied in regard to the ratification of an agent's unauthorized contract. The last sentence of Article 1840 of the Louisiana Civil Code would seem to settle the matter in this jurisdiction: "Contracts, however, made in the name of another, under void powers, will be valid, if ratified by the principal before the other contracting party has signified his dissent to the agreement."[1] Yet, an examination of the Louisiana jurisprudence reveals the surprising fact that Article 1840 has never been mentioned in approximately the twenty cases on this subject.[2] The majority rule of the United States Supreme Court is expressed in *Clews v. Jamieson*[3] where the court held that a ratification by a principal of an unauthorized contract of his agent is binding on the third party unless the third party withdraws previous to ratification. Another view followed in a large number of states is that adopted by the Restatement of Agency: "At the election of the third person, an affirmance of the transaction with him is not effective as ratification if it occurs after the situation has so materially changed that it would be inequitable to subject him to

1. Art. 1840, La. Civil Code of 1870: "Contracts, which could only be made by persons possessing certain powers, either delegated by contract, given by virtue of any private or public office, or vested by operation of law, or also void, where there is error as to character, quality or office under color of which such contract was made. Contracts entered into under forged or void powers or assignments, or with persons without authority, assuming to act as public or private officers, are governed by this rule. Contracts, however, made in the name of another, under void powers, will be valid, if ratified by the principal before the other contracting party has signified his dissent to the agreement."

2. This lack of discussion is probably due to the failure of attorneys to mention the article in their briefs, for if it were called to the court's attention some comment on it would have undoubtedly resulted.

3. 182 U.S. 461, 21 S.Ct. 845, 45 L.Ed. 1183 (1901). Plaintiff, on July 16, authorized his agent to sell 700 shares of stock at $229. Agent instead, without authority, sold at $223. When, at the end of July, the exchange was balanced defendant was substituted as buyer. On September 9, plaintiff authorized the act of his agent by letter to the defendant stating that he would bring an action to enforce the contract. By this time the market had dropped nearly 100 points. Plaintiff sold stock on the market for $130. Suit was for the difference between the contract price and the market price when the stock was sold.

liability thereon."[4] Under this view ratification to be effective must be made within a reasonable time. A third view, followed in Wisconsin and a few other states and known as the "Wisconsin rule," was adopted in the case of *Dodge v. Hopkins*.[5] There the court held that a ratification was not effective unless the third party assented to it, no matter when the ratification was made.

A study of the Louisiana decisions in point reveals a now and then approval of all three views. The court, in *Grove v. Harvey*,[6] recognized the majority rule that ratification of an agent's act was retroactive and was equivalent to prior authority. Judge Simon quoted the Latin maxim *Omnis ratihabito retrotrabitur et mandato priori aequiparatur*[7] as generally applying, but refused to follow it since the case at bar came within a well recognized exception.[8] Under this rule ratification at any time before withdrawal will be effective and will bind the third party. The ratification acts retrospectively, and nowhere is this more unhesitatingly expressed than in the Roman law.[9] This ratification may be made by bringing suit for the purchase price of goods sold by an agent without authority,[10] or an effective tacit ratification may be inferred from the silence of the principal once he is aware of his agent's unauthorized act.[11] The rule recognized by the Restatement of Agency was taken cognizance of in *Cockerham v. Perot*[12] when the court held that the ratification by the principal would have to be made unequivocally and within a reasonable time.

4. American Law Institute, Restatement of the Law of Agency (1933) § 89. (Comment C of this section clarifies the meaning of inequitable as used. "A lapse of time with such a change in the condition that the promise of the principal is entirely disproportionate in value to that of the third person may make it inequitable to enforce the transaction against a third person.")

5. 14 Wis. 686 (1860).

6. 12 Rob. 221, 224 (La. 1845).

7. Every ratification relates back and is equivalent to prior authority. Black, Law Dictionary (1933) 1290.

8. The intervening rights of innocent third parties will prevent an effective ratification. Williston, Contracts (1936) § 278a.

9. Wharton, Agency, § 76.

10. Zino v. Verdelle, 9 La. 51, 53 (1836). In this case the court said, "He sues for the price of certain merchandise sold by his agent and thereby necessarily adopts and ratifies the sale, and it becomes quite immaterial whether the agent had any authority originally or not."

11. Beaumont Bldg. Material Co. v. Barbe, 13 La. App. 335, 127 So. 484 (1930). See also Clews v. Jamieson, 182 U.S. 461, 21 S.Ct. 845, 45 L.Ed. 1183 (1901). "He must disavow the act of his agent within a reasonable time after the fact has come to his knowledge or he will be deemed to have ratified it."

12. 48 La. Ann. 109, 19 So. 122 (1896). This case can possibly be distinguished on its facts, as the contract was not made in the plaintiff's name, and the evidence was in conflict as to whether or not the third party, defendant, had withdrawn before the ratification. The dicta was emphatic, however, to the effect that the ratification must be made timely. This cannot be explained as not being inconsistent with the holdings in Zino v. Verdelle, 9

Again, in *Flower v. Down*[13] the court pointed out that the principal must ratify or reject the act within a reasonable time. Approval of the "Wisconsin rule" was voiced in *Union Garment Company v. Newburger*[14] where the court stated that even after ratification the third party was not bound and could refuse performance of the contract.

Without apparently recognizing any inconsistency, the various Louisiana decisions have purported to adopt all three of the conflicting rules as to ratification of unauthorized contracts. It will be the purpose of this comment to critically examine and evaluate the three views and endeavor to ascertain which rule should be followed as the law of this state.

The majority doctrine of ratification makes the contract voidable at the option of the principal. The Louisiana Civil Code provides that the attorney, meaning agent as used in the Code, cannot go beyond the limits of his procuration; whatever he does which exceeds his powers is null and void, with regard to the principal unless ratified by the latter.[15] The basis for this rule is that if the principal elects to ratify, the third party gets exactly what he bargained for. If the act in question is repudiated by the principal then the third party's failure to have a contract can be attributed to nothing more than his failure to ascertain the authority of the agent with whom he dealt. A person dealing with another in a fiduciary capacity must investigate the latter's powers, otherwise he acts at his peril.[16] This is a universally recognized principle. In the hypothetical case stated, *P's* ratification on the fourteenth came before *T* was to make delivery on the fifteenth, therefore *T* got exactly what he bargained for. Had *P* repudiated, however, then *T* could attribute his loss to nothing except his own negligence in failing to ascertain the authority of *A*.

On the other hand, let us consider the companion case where the market falls, but *P* has waited until the fourteenth to signify his repudiation of the unauthorized contract. Would this attempted repudiation have been effective? The tardy attempted

La. 51 (1836) and Grove v. Harvey, 12 Rob. 221 (La. 1845), where the court said ratification at any time before withdrawal would be effective.

13. 6 La. Ann. 538 (1851).

14. 124 La. 820, 50 So. 740 (1909). The unauthorized act was the purchase of property at an auction sale. This must be classed as dicta, however, for the third party was seeking to enforce performance against the principal rather than objecting to it.

15. Art. 3010, La. Civil Code of 1870.

16. Hebert v. Langhoff, 185 La. 105, 168 So. 508 (1936).

repudiation would have had no effect and the contract would have become binding, because the rule is well settled that ratification may be inferred from the silence of the principal if he be apprised of the act of his agent done beyond or without authority, and does not within a reasonable time express his dissent to the act.[17] *P* would have been estopped to deny the authority of *A* by his failure to repudiate within a reasonable time and would consequently bear the loss. It is because the Louisiana courts, as well as those of other jurisdictions, do not consider the interrelation of the "failure to repudiate" rule and the general "ratification" principles, that such inconsistency appears in the decisions.

The Restatement and the courts which adhere to its rule recognize that a ratification may be inferred by a failure to repudiate the unauthorized transaction.[18] Yet when considering cases involving an express ratification, these courts completely lose sight of this rule and hold that ratification is precluded by an unreasonably long period of silence. It appears to this writer that any delay which would make it inequitable to permit an express ratification and enforce the contract under the rule of the Restatement would be the lapse of a reasonable time to repudiate, which amounts to a tacit ratification. Since a ratification will be inferred by the lapse of a reasonable time to repudiate, how can courts recognizing the tacit ratification doctrine consistently hold an express ratification impossible.[19] It seems that the measure of a reasonable time to ratify or to repudiate should and would be the same. Obviously this rule would be subject to the same exceptions prevailing today in states recognizing the majority rule in that no unauthorized act can be made valid retroactively to the prejudice of third persons without their consent,[20] and in cases

17. Beaumont Bldg. Material Co. v. Barbe, 13 La. App. 335, 127 So. 484 (1930).

18. American Law Institute, Restatement of the Law of Agency (1933) § 94. The Michigan courts which follow the "Wisconsin rule" as to ratification as well as the Wisconsin courts have taken cognizance of this rule. In Saveland v. Green, 40 Wis. 431 (1876), the court said, "Where a person assumes in good faith to act as agent for another in any given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must within a reasonable time disaffirm such act, at least in cases where his silence would operate to the prejudice of third parties, or he will be held to have ratified such unauthorized act." In Heyn v. O'Hagen, 60 Mich. 157 (1886) this was cited with approval.

19. This question pertains naturally to those cases in which a tacit ratification can be made, and is not directed to cases where the ratification has to be under seal or in writing.

20. Title Insurance and Trust Co. v. California Development Co., 168 Cal. 397, 143 Pac. 723 (1914).

where the subject matter of the contract is destroyed to the principal's knowledge so that there is in essence nothing to ratify.[21]

The "Wisconsin rule" holding that the ratification is not effective unless the third party assents to the ratification is based on the fact that the contract lacks mutuality,[22] for one party should not be in a position where he can compel performance of the other party if advantageous to him, and at the same time be at liberty to avoid the contract on his part if disadvantageous.[23] Under this view the contract formed by the agent is completely null and void, and a subsequent ratification has the practical effect of an offer made by the principal to the third party. In favor of this view Professor Edward Manson argues: "To hold him [the third party] bound with perhaps the market rising, while the principal is free to ratify or reject, is to place him [the third party] at an undeserved disadvantage."[24]

It is submitted that the reason offered to sustain this position is erroneously based upon a consideration of the English rule expressed in *Bolton Partners v. Lambert*,[25] that the ratification is effective even though the third party withdraws previous to it. But the right of the principal to ratify after the third party's withdrawal is not allowed under the majority American rule[26] or that expressed in the Civil Code of Louisiana.[27] Therefore there is mutuality as the third party is not bound before ratification and may withdraw thereby preventing an effective ratification.[28] Of course this rule is open to the objection that the third party usually thinks he has a binding contract, and would gladly express his dissent to the contract were he aware of the agent's lack of authority. Still, who is to blame for this lack of knowledge? Certainly this lack can be attributed to nothing other than the third party's carelessness in not ascertaining the power of the agent with whom he dealt. Under the majority rule which allows an effective ratification at any time before withdrawal, the third party gets exactly what he bargained for. In the hypothetical case given, *T* desired a contract with *P* for five hundred

21. Kline Bros. and Co. v. Royal Insurance Co., 19 N.Y. 401, 192 Fed. 378 (1911).
22. Dodge v. Hopkins, 14 Wis. 686 (1860).
23. Athe v. Bartholemew, 69 Wis. 43, 33 N.W. 110, 5 Am. St. Rep. 103 (1887).
24. Note (1889) 5 L.Q. Rev. 441.
25. Bolton Partners v. Lamber, 41 Ch. Div. 295 (1888).
26. Meechem, Agency (2 ed. 1914) § 522.
27. Art. 1840, La. Civil Code of 1870.
28. Baldwin v. Schiappacasse, 109 Mich. 170 (1896).

bales of cotton at seventeen cents a pound. This is exactly what he got. Now that the price of cotton has risen he desires to get out of a contract where he would get everything which he bargained for. The basis of the Wisconsin decisions refusing to allow a ratification is not so much that *T* is injured but that *P* gets a windfall, in that he can watch the market before ratification or repudiation. But as long as *T* gets what he bargained for and is not injured, why not allow *P* this advantage? It seems better that *P* be given the advantage than that *T* be allowed to evade a contract where he gets what he bargained for, when he was negligent in not ascertaining *A's* authority. One of the two must be given the advantage of the change in the market price. And in this light it must be remembered that had there been a falling instead of a rising market during *P's* delay, *P* would have been forced to bear the loss because of his failure to repudiate within a reasonable time. Since *P* carries the loss if the market falls, it seems just that he be given the advantage if the market rises.

It should also be noted that with a recognition of the "failure to repudiate" rule, the main argument advanced against the majority that the principal can watch the market and ratify or reject according to his interest, is destroyed, inasmuch as his failure to repudiate within a reasonable time would be deemed a ratification by silence. Construing the "failure to repudiate" doctrine and the majority ratification rule together it appears that the only option given to the principal is the right to repudiate within a reasonable time. It seems better that he be given this option than to allow negligent *T* to get out of a contract where he would get what he bargained for, when the market turns to his disadvantage. Construing the two rules together, *T* will get exactly what he contracted for, unless *P* repudiates within a reasonable time. This right to repudiate within a reasonable time must be granted to *P,* or an agent without authority would be given absolute power to bind a principal.

Followers of the Restatement and "Wisconsin" rules may argue that the above reasoning is unsound because a tacit ratification cannot be made against the wishes of the third party. It will be urged that the "failure to repudiate" doctrine is for the protection of the third party and is used by the third party who seeks to hold the principal to the contract, and should not be used by the principal to claim a binding contract against the wishes of the third party. After the lapse of a reasonable time to make an express ratification, the principal should not be allowed

to claim that he ratified by his failure to repudiate. To a certain extent these arguments are logical and bear weight. But is the "failure to repudiate" doctrine for the sole benefit of the third party? Is it for the protection of the third party to the extent that he is allowed to evade a contract where he gets what he bargained for by not allowing the principal to claim a tacit ratification, or is it only for his protection to the extent that he is enabled to get what he bargained for? It is the contention of this writer that the "failure to repudiate" doctrine is for the protection of the third party only to the extent that he gets what he bargained for and to prevent the principal from watching the fluctuations of the market for over a reasonable time. Therefore, after the lapse of a reasonable time to make an express ratification the principal also can claim a ratification by silence. In other words, as soon as there is the lapse of a reasonable time to repudiate the contract, it becomes binding on both parties and either can enforce performance.

In conclusion it is submitted that the rule based upon the soundest reasoning and subject to the fewest objections is the one that permits ratification by the principal of his agent's unauthorized contracts at any time before withdrawal by the third party. Possibly the conflicting Louisiana decisions may provide a flexible rule which will permit equitable decisions in "hard cases." Since this is a civil law jurisdiction and the common law doctrine of stare decisis is of lesser significance it is possible for the courts to continue handing down somewhat inconsistent decisions without being intellectually dishonest. However, the general policy of the law should be to make for security of commercial transactions. Under the inconsistent rulings of the court in regard to ratification this is impossible. It is therefore submitted that since the Code is specific in laying down the rule to govern such contracts, and since this rule seems to yield the most consistent and equitable results, the courts of this state should follow the express mandate of the last sentence of Article 1840 of the Civil Code, and that a ratification by a principal of his agent's unauthorized contract, at any time before withdrawal by the third party, forms a binding contract.

WALLACE A. HUNTER