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## Civil Code and Related Subjects: Agency

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## AGENCY

Robert A. Pascal\*

The deficiency of our written law in matters of undisclosed agency became evident once again in *Sentell v. Richardson*.<sup>1</sup> Sentell asked Richardson to buy stock for him, without revealing he was acting for anyone else, and then to transfer the stock to Sentell. Richardson agreed, negotiated for the stock and notified Sentell, who gave him a check for the price before the stock certificate was endorsed over to Richardson. On the same day Richardson notified Sentell of his withdrawal from the contract and of his intention to buy the stock for himself. Richardson paid for the stock with his own funds, obtained the stock certificate, and then sold the stock to Martin. Sentell sued Richardson and Martin.<sup>2</sup> Sentell claimed Richardson was his "agent" when he completed negotiations for the stock and hence that Sentell at that time became owner of the stock and Richardson powerless to sell it. Richardson pleaded alternative defenses. Either his contract with Sentell was not a "mandate or procuration" (which is gratuitous)<sup>3</sup> and therefore invalid for lack of "consideration"; or, if mandate, he was privileged to renounce it under Article 3031 of the Civil Code.<sup>4</sup>

The opinion of the court is no less interesting than the contentions of the defendant. Chief Justice O'Niell declared the contract a *mandate*, denying that representation, or action in the name of another, is essential to mandate, Article 2985 notwithstanding. This view is the subject of a note to be published in the review<sup>5</sup> and will not be discussed here at length. Suffice it here to say that neither the Civil Code nor any other legislation provides for non-representative or undisclosed agency and that only three courses of action would have been open to the court. It might have treated acts of

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1. 211 La. 288, 29 So. (2d) 852 (1947).

2. Martin claimed he was owner of the stock under the Uniform Stock Transfer Act, La. Act 180 of 1910 [Dart's Stats. §§ 1180-1205], having purchased same in good faith from an indorsee of the stock certificate. The supreme court found the evidence did not support his allegation of good faith.

3. Art. 2991, La. Civil Code of 1870:

"The procuration is gratuitous unless there has been a contrary agreement."

4. Art. 3031, La. Civil Code of 1870:

"The attorney may renounce his power of attorney by notifying to the principal his renunciation.

"Nevertheless, if this renunciation be prejudicial to the principal, he ought to be indemnified by the agent, unless the latter should be so situated that he can not continue the agency without considerable injury."

5. (1948) Volume VIII, No. 3.

undisclosed agency as involving two separate contracts, one between principal and agent and another between agent and third party contracting with the agent. This analysis would result in legal relations between principal and agent and between agent and third party, but never between principal and third party. This was the solution reached by French jurisprudence, there being no French legislation sanctioning non-representative or undisclosed agency in civil, as distinguished from commercial, matters.<sup>6</sup> Or, the court might have followed the same procedure employed in previous cases, that of following the common law. This method is non-civilian, but we have operated under it, and common law does allow recovery between principal and third party in undisclosed agency.<sup>7</sup> Or, the court could, as it did, deny the essential difference between mandate and undisclosed agency. This approach is little less than outright judicial reform of the law, but it has the practical advantage of giving an appearance of legislative or textual basis to our law of non-representative agency.<sup>8</sup>

The absence of legislation on undisclosed or non-representative agency is possibly more than a mere oversight. The civil law never developed the trust theory which, if not the basis of action between principal and third party in such cases at common law, is similar in character. The common law alone developed the idea that principal—third party relations flow from non-representative agency. The civil law tradition found difficulty admitting legal relations between principal and third party even in representative agency or mandate<sup>9</sup> and does so here only on the theory of *privity* between these parties.

The second contention of the defendant, that an agent may effectively renounce his agency at any time, involves another

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6. *Ibid.*

7. *Ibid.*

8. Having once found the contract between Sentell and Richardson to be one of mandate, the contention of the defendant that the contract was void for lack of "consideration" became unimportant. The opinion, however, nevertheless undertakes to find a "consideration." It is unfortunate that both the bar and bench of our state continue to speak of consideration, a purely common law concept and requirement without any basis whatsoever in our law of contracts. Our law does not require mutuality of obligation in contracts in general. Art. 1765, La. Civil Code of 1870. And even where there are mutual obligations, these obligations need not be in the nature of exchanged values. Arts. 1767-1770, La. Civil Code of 1870. Only in contracts which have as their essence the exchange of values must there be the equivalent of a "consideration"—a price in money or other values, whether material or in terms of promises of action or non-action. See, for example, Arts. 1860, 2439, 2660, 2669, 2779, 2793, 2801, and 3071, and contrast with Arts. 2893 and 2894, 2910, 2926, 3035, and 3133.

9. Buckland and McNair, *Roman Law and Common Law* (1936) 164, 167-171.

phase of agency law sadly neglected in our legislation. The fiduciary character of agency is treated in Articles 3003-3005 of the Civil Code and the agent is clearly responsible for "unfaithfulness," "fault," and "neglect"; he must account for his management and must even deliver to the principal whatever he has received "by virtue of his procuration, even should he have received it unduly." But it is clear that he is obligated only so long as he is agent,<sup>10</sup> that he may renounce the agency at any time,<sup>11</sup> and that he is liable only in damages for a renunciation prejudicial to the principal<sup>12</sup> or for non-performance or fault or neglect in the performance of his duty.<sup>13</sup> No text seems to provide the principal with the protection afforded by the constructive trust against the agent who attempts to renounce his agency so as to act for himself contrary to the interests of the principal.

In its opinion the court at first avoided the question whether the agent could renounce the agency and then act for himself. By applying Article 2456<sup>14</sup> of the Civil Code, the court found Richardson had effectively "bought" the stock as soon as the agreement as to the price had been reached with the seller, a time at which he had not as yet renounced the agency. On this basis, apparently, Sentell was considered owner of the stock from the moment Richardson and the seller had agreed on the price—a conclusion which premises immediate transfer of interests to the principal in acts of non-representative agency<sup>15</sup>—and, Martin's claim to the stock being denied,<sup>16</sup> Sentell was recognized as owner thereof. On application for rehearing the defendants apparently contended that under the Uniform Stock Transfer Act<sup>17</sup> an effective transfer could not have been accomplished until delivery of the stock certificate. Though this contention is very questionable,<sup>18</sup> as if to meet the argument the

10. Art. 3002, La. Civil Code of 1870.

11. Art. 3031, La. Civil Code of 1870, *supra* note 4.

12. *Ibid.*

13. Arts. 3002-3003, La. Civil Code of 1870.

14. Art. 2456, La. Civil Code of 1870: "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid."

15. A conclusion which renders the distinction between representative and non-representative agency unimportant, as explained in the principal text, above.

16. See *supra* note 2.

17. La. Act 180 of 1910 [Dart's Stats. (1939) §§ 1180-1205].

18. See the Uniform Stock Transfer Act, cited in note 17, above, § 4 [Dart's Stats. (1939) § 1183], which implies the possibility of stock transfers other than by delivery of the stock certificate except to the prejudice of third persons purchasing and obtaining prior delivery of the certificate in good faith and without notice.

per curiam opinion denying a rehearing declares the court's decision had been based on Richardson's inability "to purchase the stock for his own benefit without having given his principal *reasonable notice* of his intention to renounce the mandate," and on his acquisition of the stock "as trustee for the account of his principal, who became the rightful owner thereof."

Thus the supreme court resorted to the constructive trust in a case in which it considered the agent to have acted in violation of his fiduciary duty. The result is eminently fair and just, but the theory of the case demonstrates the inadequacy of our legislation in such situations. Perhaps a simpler solution would have been to deny that a denunciation with the intention of acting contrary to the interests of the principal can be effective and then to refuse to consider any act of the agent as being in violation of his obligations. In this way the constructive trust, with its non-civilian implications of separation of legal and equitable title and of formalism as opposed to substantivism in transactions, could be avoided.

#### CONVENTIONAL OBLIGATIONS

*J. Denson Smith\**

Although not many cases falling within this classification were decided during the 1946-1947 session of the supreme court, there were a few of more than passing interest.

A very interesting situation developed in the case of *Mallet v. Thibault*.<sup>1</sup> An owner of two lots sold one to a Mrs. Rainey from whom the plaintiff inherited. It was agreed that Mrs. Rainey should have a servitude across the other lot for perpetual use as a driveway to her garage. However, this agreement was not written into the act of sale. Nevertheless, Mrs. Rainey and her tenant made use of the servitude as intended. Subsequently, the owner entered into a written agreement to sell the other lot to the defendant. This writing contained a recitation that the property was sold and purchased subject to "vendor's previous agreement to allow owner and tenant of house directly in rear use of driveway for entering and leaving their garage." But again when the act of sale was accomplished, this provision was not included therein. When plaintiff was thereafter notified to discontinue using the driveway, she filed this suit against the purchaser and the original owner seeking judicial recog-

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1. 81 So. (2d) 601 (La. 1947).