CORPORATIONS
SUPPLEMENTARY READINGS

PART ONE

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INTRODUCTORY MATERIALS

In order to understand the first cases it is useful to have some background information on the basic structure of corporations and on agency law. For some of you this will be new material; for others it is review. I have tried to keep this very short. Those of you who need more information should consult Klein and Coffee.

PRINCIPAL/AGENT: CONTRACTUAL SETTING

The central players in principal/agent relationship are the principal (P), the agent (A) (or alleged agent) and the third party (T).

Most of the cases we will focus on involve contractual liability of principals for acts of agents. We spend very little time on tort. Generally, A has entered into a contract with T, some problem has arisen and the question is who is liable on the contract: (i) is A liable? (ii) is P liable?, and/or (iii) is T bound. The answer to these questions depends on whether A actually was an agent of the principal and if so, what type of agent.

The basic rule is that an agent is someone who by mutual assent acts on behalf of the other and subject to the other's control.

The study of agency law focuses in part on how do we know when there has been such assent. Is it when the principal actually gives it; when the agent believes P. has established this relationship; when a third party so believes; or in some other situation?

Agency law has developed five categories of agency which address many of these different possibilities: actual authority (express or implied); apparent authority; ratification; and inherent agency power.

Actual agency is the most straightforward. The test is simple: did the A. reasonably believe, based on the P's conduct/manifestations, that the A. was acting on P's behalf and subject to his control. This manifestation by P. may be express or implied. It is express if P. expressly directs A. to enter into a particular contract on P's behalf. It can be implied in a number of situations. The most common is where P. hires A. to perform a job -- for example, to be President of the firm -- and an inherent part of that job is the power to hire and fire employees. If A. has actual authority, P. is bound on the contract to the third party. Moreover, P. cannot seek indemnification from A.

Apparent Authority: A. has apparent authority if, based on P's conduct, a reasonable person in the third party's position would belief that A. is P's agent: that A. is acting on P's behalf and subject to P's control. P's conduct may be nothing more than
giving A. a job title that normally carries with it the authority to enter into the contract in question and not informing the third party that in fact A. has no such authority. If A. has apparent authority, P is liable to the third party but can get indemnification from A (unless of course A also had actual authority).

Ratification: If initially A. entered into a contract purportedly on P's behalf, but without actual or apparent authority, and P. subsequently decides to adopt the contract, then P. is bound, as is the third party.

Inherent Agency Power: This is very messy. This theory encompasses respondeat superior (the doctrine that holds P's liable for A's torts even if the A's negligence was against express instructions). It also holds P's responsible for some acts of agents which, while unauthorized, are nonetheless quite close to (or incidental to) that which they are authorized to do.

CORPORATIONS
Because our early cases involve corporations, it is important to understand some basic facts about corporations. A corporation is a business organization which is owned by shareholders (also called equity holders) but managed by professional managers (who also may own shares).

The ultimate locus of managerial power is the Board of Directors, which makes the big decisions governing the firm. Day-to-day management is in the hands of the officers, such as the Chief Executive Officer, the President, and the Chief Financial Officer. Officers may also sit on the board. Shareholders determine who shall be on the Board at each annual meeting; the general rule is voting for the board is based on how many shares you have (one share/one vote). Generally, the Board selects the officers.

Corporations are treated as legal persons. A corporation can enter into a contract and sue and be sued. A corporations also can held to be a "principal," liable for the acts of its agents.
A. GAY JENSON FARMS CO v. CARGILL, INCORPORATED
Supreme Court of Minnesota.

No. 50744.


Heard, considered, and decided by the court en banc.

OPINION

PETERSON, Justice.

Plaintiffs, 86 individual, partnership or corporate farmers, brought this action against defendant Cargill, Inc. (Cargill) and defendant Warren Grain & Seed Co. (Warren) to recover losses sustained when Warren defaulted on the contracts made with plaintiffs for the sale of grain. After a trial by jury, judgment was entered in favor of plaintiffs, and Cargill brought this appeal. We affirm.

This case arose out of the financial collapse of defendant Warren Seed & Grain Co., and its failure to satisfy its indebtedness to plaintiffs. Warren, which was located in Warren, Minnesota, was operated by Lloyd Hill and his son, Gary Hill. Warren operated a grain elevator and as a result was involved in the purchase of cash or market grain from local farmers. The cash grain would be resold through the Minneapolis Grain Exchange or to the terminal grain companies directly. Warren also stored grain for farmers and sold chemicals, fertilizer and steel storage bins. In addition, it operated a seed business which involved buying seed grain from farmers, processing it and reselling it for seed to farmers and local elevators.

Lloyd Hill decided in 1964 to apply for financing from Cargill.2 Cargill's officials from the Moorhead regional office investigated Warren's operations and recommended that Cargill finance Warren.

Warren and Cargill thereafter entered into a security agreement which provided that Cargill would loan money for working capital to Warren on "open account"

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2 Prior to this time, Atwood Larson had provided working capital for Warren, and Warren had used Atwood Larson as its commission agent for the sale of market grain on the grain exchange.
financing up to a stated limit, which was originally set as $175,000. Under this contract, Warren would receive funds and pay its expenses by issuing drafts drawn on Cargill through Minneapolis banks. The drafts were imprinted with both Warren's and Cargill's names. Proceeds from Warren's sales would be deposited with Cargill and credited to its account. In return for this financing, Warren appointed Cargill as its grain agent for transaction with the Commodity Credit Corporation. Cargill was also given a right of first refusal to purchase market grain sold by Warren to the terminal market.

A new contract was negotiated in 1967, extending Warren's credit line to $300,000 and incorporating the provisions of the original contract. It was also stated in the contract that Warren would provide Cargill with annual financial statements and that either Cargill would keep the books for Warren or an audit would be conducted by an independent firm. Cargill was given the right of access to Warren's books for inspection.

In addition, the agreement provided that Warren was not to make capital improvements or repairs in excess of $5,000 without Cargill's prior consent. Further, it was not to become liable as guarantor on another's indebtedness, or encumber its assets except with Cargill's permission. Consent by Cargill was required before Warren would be allowed to declare a dividend or sell and purchase stock.

Officials from Cargill's regional office made a brief visit to Warren shortly after the agreement was executed. They examined the annual statement and the accounts receivable, expenses, inventory, seed, machinery and other financial matters. Warren was informed that it would be reminded periodically to make the improvements recommended by Cargill. At approximately this time, a memo was given to the Cargill official in charge of the Warren account, Erhart Becker, which stated in part: "This organization (Warren) needs very strong paternal guidance."

In 1970, Cargill contracted with Warren and other elevators to act as its agent to seek growers for a new type of wheat called Bounty 208. Warren, as Cargill's agent for this project, entered into contracts for the growing of the wheat seed, with Cargill named as the contracting party. Farmers were paid directly by Cargill for the seed and

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3 Loans were secured by a second mortgage on Warren's real estate and a first chattel mortgage on its inventories of grain and merchandise in the sum of $175,000 with 7% interest. Warren was to use the $175,000 to pay off the debt that it owed to Atwood Larson.

4 Cargill headquarters suggested that the regional office check Warren monthly. Also, it was requested that Warren be given an explanation for the relatively large withdrawals from undistributed earnings made by the Hills, since Cargill hoped that Warren's profits would be used to decrease its debt balance. Cargill asked for written requests for withdrawals from undistributed earnings in the future.
all contracts were performed in full. In 1971, pursuant to an agency contract, Warren contracted on Cargill's behalf with various farmers for the growing of sunflower seeds for Cargill. The arrangements were similar to those made in the Bounty 208 contracts, and all those contracts were also completed. Both these agreements were unrelated to the open account financing contract. In addition, Warren, as Cargill's agent in the sunflower seed business, cleaned and packaged the seed in Cargill bags.

During this period, Cargill continued to review Warren's operations and expenses and recommend that certain actions should be taken. Warren purchased from Cargill various business forms printed by Cargill and received sample forms from Cargill which Warren used to develop its own business forms.

Cargill wrote to its regional office in 1970 expressing its concern that the pattern of increased use of funds allowed to develop at Warren was similar to that involved in two other cases in which Cargill experienced severe losses. Cargill did not refuse to honor drafts or call the loan, however. A new security agreement which increased the credit line to $750,000 was executed in 1972, and a subsequent agreement which raised the limit to $1,250,000 was entered into in 1976.

Warren was at that time shipping Cargill 90% of its cash grain. When Cargill's facilities were full, Warren shipped its grain to other companies. Approximately 25% of Warren's total sales was seed grain which was sold directly by Warren to its customers.

As Warren's indebtedness continued to be in excess of its credit line, Cargill began to contact Warren daily regarding its financial affairs. Cargill headquarters informed its regional office in 1973 that, since Cargill money was being used, Warren should realize that Cargill had the right to make some critical decisions regarding the use of the funds. Cargill headquarters also told Warren that a regional manager would be working with Warren on a day-to-day basis as well as in monthly planning meetings. In 1975, Cargill's regional office began to keep a daily debit position on Warren. A bank account was opened in Warren’s name on which Warren could draw checks in 1976. The account was to be funded by drafts drawn on Cargill by the local bank.

In early 1977, it became evident that Warren had serious financial problems.

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5 Between 1967 and 1973, Cargill suggested that Warren take a number of steps, including: (1) a reduction of seed grain and cash grain inventories; (2) improved collection of accounts receivable; (3) reduction or elimination of its wholesale seed business and its specialty grain operation; (4) marketing fertilizer and steel bins on consignment; (5) a reduction in withdrawals made by officers; (6) a suggestion that Warren's bookkeeper not issue her own salary checks; and (7) cooperation with Cargill in implementing the recommendations. These ideas were apparently never implemented, however.
Several farmers, who had heard that Warren's checks were not being paid, inquired or had their agents inquire at Cargill regarding Warren's status and were initially told that there would be no problem with payment. In April 1977, an audit of Warren revealed that Warren was $4 million in debt. After Cargill was informed that Warren's financial statements had been deliberately falsified, Warren's request for additional financing was refused. In the final days of Warren's operation, Cargill sent an official to supervise the elevator, including disbursement of funds and income generated by the elevator.

After Warren ceased operations, it was found to be indebted to Cargill in the amount of $3.6 million. Warren was also determined to be indebted to plaintiffs in the amount of $2 million, and plaintiffs brought this action in 1977 to seek recovery of that sum. Plaintiffs alleged that Cargill was jointly liable for Warren’s indebtedness as it had acted as principal for the grain elevator.

[This appeal is an appeal solely by Cargill on a jury verdict finding that Cargill's conduct between 1973 and 1977 had made it Warren's principal.]\(^6\) Warren was found to be the agent of Cargill with regard to contracts for:

1. The purchase and sale of grain for market.
2. The purchase and sale of seed grain.
3. The storage of grain.

The court determined that Cargill was the disclosed principal of Warren. It was concluded that Cargill was jointly liable with Warren for plaintiffs' losses, and judgment was entered for plaintiffs.

The major issue in this case is whether Cargill, by its course of dealing with Warren, became liable as a principal on contracts made by Warren with plaintiffs. Cargill contends that no agency relationship was established with Warren, notwithstanding its financing of Warren's operation and its purchase of the majority of Warren's grain. However, we conclude that Cargill, by its control and influence over Warren, became a principal with liability for the transactions entered into by its agent Warren.

\(^6\) At trial, plaintiffs sought to establish actual agency by Cargill's course of dealing between 1973 and 1977 rather than "apparent" agency or agency by estoppel, so that the only issue in this case is one of actual agency.
Agency is the fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Restatement (Second) of Agency s 1 (1958). In order to create an agency there must be an agreement, but not necessarily a contract between the parties. Restatement (Second) of Agency s 1, comment b (1958). An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the legal consequences of the relation to follow. Id. The existence of the agency may be proved by circumstantial evidence which shows a course of dealing between the two parties. When an agency relationship is to be proven by circumstantial evidence, the principal must be shown to have consented to the agency since one cannot be the agent of another except by consent of the latter.

Cargill contends that the prerequisites of an agency relationship did not exist because Cargill never consented to the agency, Warren did not act on behalf of Cargill, and Cargill did not exercise control over Warren. We hold that all three elements of agency could be found in the particular circumstances of this case. By directing Warren to implement its recommendations, Cargill manifested its consent that Warren would be its agent. Warren acted on Cargill's behalf in procuring grain for Cargill as the part of its normal operations which were totally financed by Cargill. Further, an agency relationship was established by Cargill's interference with the internal affairs of Warren, which constituted de facto control of the elevator.

A creditor who assumes control of his debtor's business may become liable as principal for the acts of the debtor in connection with the business. Restatement (Second) of Agency s 14 O (1958). It is noted in comment a to section 14 O that:

A security holder who merely exercises a veto power over the business acts of his debtor by preventing purchases or sales above specified amounts does not thereby become a principal. However, if he takes over the management of the debtor's business either in person or through an agent, and directs what contracts may or may not be made, he becomes a principal, liable as a principal for the obligations incurred thereafter in the normal course of business by the debtor who has now become his general agent. The point at which the creditor becomes a principal is that at which he assumes de facto control over the conduct of his debtor, whatever the terms of the formal contract with his debtor may be.

A number of factors indicate Cargill's control over Warren, including the

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7 Although the contracts with the farmers were executed by Warren, Warren paid for the grain with drafts drawn on Cargill. While this is not in itself significant it is one factor to be taken into account in analyzing the relationship between Warren and Cargill.
following:

(1) Cargill's constant recommendations to Warren by telephone;

(2) Cargill's right of first refusal on grain;

(3) Warren's inability to enter into mortgages, to purchase stock or to pay dividends without Cargill's approval;

(4) Cargill's right of entry onto Warren's premises to carry on periodic checks and audits;

(5) Cargill's correspondence and criticism regarding Warren's finances, officers salaries and inventory;

(6) Cargill's determination that Warren needed "strong paternal guidance";

(7) Provision of drafts and forms to Warren upon which Cargill's name was imprinted;

(8) Financing of all Warren's purchases of grain and operating expenses; and

(9) Cargill's power to discontinue the financing of Warren's operations.

We recognize that some of these elements, as Cargill contends, are found in an ordinary debtor-creditor relationship. However, these factors cannot be considered in isolation, but, rather, they must be viewed in light of all the circumstances surrounding Cargill's aggressive financing of Warren.

It is also Cargill's position that the relationship between Cargill and Warren was that of buyer-supplier rather than principal-agent. Restatement (Second) of Agency s 14K (1958) compares an agent with a supplier as follows:

One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself.

Factors indicating that one is a supplier, rather than an agent, are: (1) That he is to receive a fixed price for the property irrespective of price paid by him. This is the most important. (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying
and selling similar property. Restatement (Second) of Agency s 14K, Comment a (1958).

Under the Restatement approach, it must be shown that the supplier has an independent business before it can be concluded that he is not an agent. The record establishes that all portions of Warren's operation were financed by Cargill and that Warren sold almost all of its market grain to Cargill. Thus, the relationship which existed between the parties was not merely that of buyer and supplier.

A case analogous to the present one is Butler v. Bunge Corporation, 329 F.Supp. 47 (N.D.Miss.1971). In Butler, the plaintiff brought an action to recover the price of a soybean crop sold to an elevator that was operated by Bayles, a purported agent of the defendant Bunge Corporation. Bayles had agreed to operate a former Bunge elevator pursuant to an agreement in which Bayles was designated as manager. Although Bunge contended that Bayles was an independent contractor, the court determined that the elevator was an agent of Bunge.8

In this case, as in Butler, Cargill furnished substantially all funds received by the elevator. Cargill did have a right of entry on Warren's premises, and it, like Bunge, required maintenance of insurance against hazards of operation. Warren's activities, like Bayles' operations, formed a substantial part of Cargill's business that was developed in that area. In addition, Cargill did not think of Warren as an operator who was free to become Cargill's competitor, but rather conceded that it believed that

8 In Butler v. Bunge Corporation, 329 F.Supp. 47 (N.D.Miss.1971), the evidence revealed the following indicia of agency:

(1) Bunge furnished all or practically all of the means and appliances for the work; (2) Bunge furnished substantially all funds received by Bayles; (3) Bunge controlled the destination of all grain handled by Bayles; (4) Bunge controlled the price, weights and grades of all grain handled by Bayles; (5) Bunge, on certain occasions, permitted Bayles to sell a limited quantity of grain to other buyers; (6) Bunge not only had the right to direct details important to grain buying but gave actual direction to Bayles through constant contact, quoting its price to him and consulting with him regarding prices for the farmers; (7) Bunge had a significant degree of control over the operation of the grain elevator at Roundaway in such areas as training Bayles' personnel, inspecting the premises and requiring maintenance of insurance against hazards of operation; (8) Bayles' grain transaction with farmers was the identical type of business activity that was regularly carried on by Bunge, and Bayles' transactions formed a substantial part of Bunge's business that was developed from the area in which Coahoma Grain Elevator operated; and finally (9) although the agreement formally specified a fixed term, the relationship between the parties had no viability apart from grain dealings that were wholly subject to Bunge's will. These findings make clear that Bunge did not consider Bayles an independent operator who was free to become Bunge's competitor in buying grain from the farmers in the region, but rather that he was effectually given authority to buy grain from Bunge. Id. at 61.
Warren owed a duty of loyalty to Cargill. The decisions made by Warren were not independent of Cargill's interest or its control.

The amici curiae assert that, if the jury verdict is upheld, firms and banks which have provided business loans to county elevators will decline to make further loans. The decision in this case should give no cause for such concern. We deal here with a business enterprise markedly different from an ordinary bank financing, since Cargill was an active participant in Warren's operations rather than simply a financier. Cargill's course of dealing with Warren was, by its own admission, a paternalistic relationship in which Cargill made the key economic decisions and kept Warren in existence.

Although considerable interest was paid by Warren on the loan, the reason for Cargill's financing of Warren was not to make money as a lender but, rather, to establish a source of market grain for its business. As one Cargill manager noted, "We were staying in there because we wanted the grain." For this reason, Cargill was willing to extend the credit line far beyond the amount originally allocated to Warren. It is noteworthy that Cargill was receiving significant amounts of grain and that, notwithstanding the risk that was recognized by Cargill, the operation was considered profitable.

On the whole, there was a unique fabric in the relationship between Cargill and Warren which varies from that found in normal debtor-creditor situations. We conclude that, on the facts of this case, there was sufficient evidence from which the jury could find that Cargill was the principal of Warren within the definitions of agency set forth in Restatement (Second) of Agency §§ 1 and 140.

Affirmed.

**QUESTIONS ON CARGILL**

1. What is the basis of the farmers' claims that Cargill is liable to them for the contracts executed by Warren? On appeal is the farmer's claim predicated on a showing of actual authority or apparent authority? What is the difference?

2. The court says that in order for an agency relationship to arise the principal must consent? Did Cargill want to create agency relationship with Warren? If so, why did Cargill structure the arrangement as two separate arrangements: a financing agreement plus a right of first refusal on the grain? If not, then how can Cargill be liable if it did not want to be a principal? To what must it consent?
3. What is the holding of the court?

   At what point in time did the agency relationship arise?

   What factors did the court consider? Are they really all relevant?

   What type of control is at issue? Did Cargill exert day-to-day control over Warren? What facts suggest it did or didn't. What facts suggest Cargill may have had more control than it might at first appear?

4. What relationship did Cargill say the two parties had? Examine the court's reasoning for rejecting this argument. Is the court right? In examining the buyer-seller issue, what price did Warren sell grain to Cargill at? Why might this matter? Reexamine the definition of an agency relationship. Is there a weakness in the court's analysis?

5. Why did Cargill keep Warren alive? Why do we care?

6. Given this holding, who can recover from Cargill? Are only farmers who reasonably thought Cargill was the principal entitled to recover or can all farmers who sold grain to Warren during this period recover?

7. Given the holding as to the nature of the agency relationship, can Cargill recover from Warren? Do you think the outcome of this issue is right?

   Is Warren liable to all the farmers? Why or why not? Does this seem right? If not, does this make you reassess the court's holding.
This is a diversity case. Lind, the plaintiff-appellant, sued Park & Tilford Distiller's Corp.,1 the defendant-appellee, for compensation that he asserts is due him by virtue of a contract expressed by a written memorandum supplemented by oral conversations as set out hereinafter. Lind also sued for certain expenses he incurred when moving from New Jersey to New York when his position as New Jersey State Manager of Park & Tilford terminated on January 31, 1957. The evidence, including Lind's own testimony, taking the inferences most favorable to Lind, shows the following. Lind had been employed for some years by Park & Tilford. In July 1950, Lind was informed by Herrfeldt, then Park & Tilford's vice-president and general sales-manager, that he would be appointed assistant to Kaufman, Park & Tilford's sales-manager for metropolitan New York. Herrfeldt told Lind to see Kaufman to ascertain what his new duties and his salary would be. Lind embarked on his new duties with Kaufman and was informed in October 1950, that some 'raises' had come through and that Lind should get official word from his 'boss', Kaufman. Subsequently, Lind received a communication, dated April 19, 1951, signed by Kaufman, informing Lind that he would assume the title of 'District Manager'. The letter went on to state: 'I wish to inform you of the fact that you have as much responsibility as a State Manager and that you should consider yourself to be of the same status.' The latter concluded with the statement: 'An incentive plan is being worked out so that you will not only be responsible for increased sales in your district, but will benefit substantially in monetary way.' The other two district managers under Kaufman received similar memoranda.***

In July 1951, Kaufman informed Lind that he was to 1% commission on the gross sales of the men under him. This was an oral communication and was completely corroborated by Mrs. Kennan, Kaufman's former secretary, who was present. On subsequent occasions Lind was assured by Kaufman that he would get his money. Lind was also informed by Herrfeldt in the autumn of 1952 that he would get a 1% Commission of the sales of the men under him. Early in 1955, Lind

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1 Park & Tilford Distiller's Corp. was merged into Schenley Industries, Inc., a Delaware corporation, before the commencement of this action, with Schenley assuming all of Park & Tilford's obligations. Schenley was substituted in this action on March 31, 1958, by order of Judge Wortendyke.
negotiated with Brown, then president of Park & Tilford, for the sale of Park & Tilford's New Jersey Wholesale House, and Brown agreed to apply the money owed to Lind by reason of the 1% Commission against the value of the goodwill of the Wholesale House. The proposed sale of the New Jersey Wholesale House was not consummated.

Notice to produce various records of Lind's employment was served on Park & Tilford but one slip dealing with Lind's appointment as district manager was not produced and is presumed to have been lost. The evidence was conflicting as to the character of the 'incentive compensation' to be offered Lind in connection with his services as a district manager. Herrfeldt designated the incentive an 'added incentive plan with a percentage arrangement'. Kaufman characterized the plan as 'bonuses and contests'. Weiner, Park & Tilford's Secretary, said that the incentive was a 'pension plan.' Kaufman testified, however, that the pension plan had nothing to do with the bonus incentive he referred to.

The record also shows that Lind commenced his employment with Park & Tilford in 1941, that from 1942 to 1950 he worked on a commission basis, that on August 31, 1950, he became an assistant sales manager for the New York metropolitan area at $125 a week, which was raised to $150 a week on October 1, 1950, plus certain allowances. After Lind became district manager on April 19, 1951, he continued to receive the same salary of $150 a week but this was increased to $175 in January 1952. On February 1, 1952, Lind was transferred from New York to New Jersey to become state manager of Park & Tilford's business in New Jersey. He retained that position until January 31, 1957, when he was transferred back to New York.

Park & Tilford moved for but was denied a directed verdict at the close of all the evidence ***. However, the court below *** submitted the case to the jury subject to a later determination of the legal questions raised by Park & Tilford's motion to dismiss. The court then requested the jury to answer *** five questions***

The answers provided by the jury amounted to a determination that Kaufman did offer Lind a 1% Commission on the gross sales of the men under him; that the agreement commenced April 19, 1951; that the agreement terminated February 15, 1952, the date of Lind's transfer to New Jersey; that Park & Tilford did cause Lind to believe that Kaufman had authority to offer him the one percent commission; and that Lind was justified in assuming that Kaufman had the authority to make the offer.
[The jury found for Lind but the trial court entered a judgment notwithstanding the verdict and, granted a new trial in the event that the judgment in favor of the defendant was subsequently reversed.]

The decision to reverse the verdict for Lind with respect to the 1% Commission was based on two alternative grounds. First, the court found that Lind had failed to prove a case of apparent authority in that the evidence did not disclose that Park & Tilford acted in such a manner as to induce Lind to believe that Kaufman had been authorized to offer him the 1% Commission. Also the court concluded that the issues of 'actual' and 'implied' authority had somehow been eliminated from the case. Second, the court reasoned, that even if the jury could find apparent authority, the alleged contract was not sufficiently definite nor specific to be enforceable against Park & Tilford. The trial judge rejected a contention by Park & Tilford that a document signed by Lind on January 31, 1957, upon receiving his last pay check as New Jersey State Manager, should be construed as a release of his claims for commissions.

A federal court sitting in a diversity case must apply the same law as would a court of the state in which the district court is located. [Operation of New Jersey’s conflicts law requires that the court apply New York law governing the substantive law of contracts and agency].

The problems of 'authority' are probably the most difficult in that segment of law loosely termed, 'Agency'. Two main classifications of authority are generally recognized, 'actual authority', and 'apparent authority'. The term 'implied authority' is often seen but most authorities consider 'implied authority' to be merely a sub-group of 'actual' authority. An additional kind of authority has been designated by the Restatement, Agency 2d, §§ 8A and 161(b) as 'inherent agency'. Actually this new term is employed to designate a meaning frequently ascribed to 'implied authority'.

'Actual authority' means, as the words connote, authority that the principal, expressly or implicitly, gave the agent. 'Apparent authority' arises when a principal acts in such a manner as to convey the impression to a third party that an agent has certain powers which he may or may not actually possess. 'Implied authority' has been variously defined. It has been held to be actual authority given implicitly by a principal to his agent. Another definition of 'implied authority' is that it is a kind of authority arising solely from the designation by the principal of a kind of agent who ordinarily possesses certain powers. It is this concept that is called 'inherent authority' by the Restatement. In many cases the same facts will support a finding of 'inherent' or 'apparent agency'. Usually it is not necessary for a third
party attempting to hold a principal to specify which type of authority he relies upon, general proof of agency being sufficient. ***

In the case at bar Lind attempted to prove all three kinds of agency: actual, apparent, and inherent, although most of his evidence was directed to proof of 'inherent' or 'apparent' authority. From the evidence it is clear that Park & Tilford can be held accountable for Kaufman's action on the principle of 'inherent authority'. Kaufman was Lind's direct superior, and was the man to transfer communications from the upper executives to the lower. Moreover, there was testimony tending to prove that Herrfeldt, the vice-president in charge of sales, had told Lind to see Kaufman for information about his salary any that Herrfeldt himself had confirmed the 1% Commission arrangement. Thus Kaufman, so far as Lind was concerned, was the spokesman for the company.

It is not necessary to determine the status of the New York law in respect to 'inherent agency' for substantially the same testimony that would establish 'inherent' agency under the circumstances at bar proves conventional 'apparent' agency. The Restatement, Agency 2d 8, defines 'apparent agency' as 'the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.' There is some uncertainty as to whether or not the third person must change his position in reliance upon these manifestations of authority, but this is of no consequence in the case at bar since Lind clearly changed his position when he accepted the job of district manager with its admittedly increased responsibilities. There is no doubt that New York accepts the 'apparent authority' doctrine if change of position is shown. ***

The opinion of the court below and the argument of the appellee here rely heavily on Gumpert v. Bon Ami Corporation, 2 Cir., 1958, 251 F.2d 735, a diversity case decided under New York law, upholding the lower court's reversal of a jury verdict for the plaintiff. The facts in that case showed that Gumpert had been hired by Rosenberg, a director and member of the executive board of the Bon Ami company for a salary of $25,000 in cash plus $25,000 worth of the company's common stock. The Court of Appeals found that the jury could not properly find that the Bon Ami company had clothed Rosenberg with apparent authority to offer Gumpert $25,000 in common stock. This decision is inapposite for here we deal with an offer made by an employee's immediate superior, the man who represented the company to those under him, not a contract offered by one not an officer of a corporation to prospective employee. Furthermore a salary of $25,000 in cash and $25,000 in common stock might well be deemed unusual enough to put the prospective employee on notice as to a possible lack of authority in the director to
make the offer but the same may not be said of an offer of a commission to a salesman who had been habitually working on that basis, in a corporation that confined itself to selling others' products. It should be borne in mind also that a director, even if he be a member of the executive board, does not ordinarily hire employees. Moreover in the case at bar there was evidence by an employee of Schenley that at least some state managers received 1% Commissions.

Testimony was adduced by Schenley tending to prove that Kaufman had no authority to set salaries, that power being exercisable solely by the president of the corporation, and that the president had not authorized Kaufman to offer Lind a commission of the kind under consideration here. However, this testimony, even if fully accepted, would only prove lack of actual or implied authority in Kaufman but is irrelevant to the issue of apparent authority.

The opinion below seems to agree with the conception of the New York agency law as set out above but the court reversed the jury's verdict and the judgment based on it on the conclusion, as a matter of law, that Lind could not reasonably have believed that Kaufman was authorized to offer him a commission that would, in the trial judge's words 'have almost quadrupled Lind's then salary'. But Lind testified that before he had become Kaufman's assistant in September 1950, the latter position named being that which he had held before being 'promoted' to district manager in April 1951, he had earned $9,000 for the period from January 1, 1950 to August 31, 1950, that figure allegedly representing half of his expected earnings for the year. Lind testified that a liquor salesman can expect to make 50% of his salary in the last four months of the year owing to holiday sales. Thus Lind's salary two years before his appointment as district manager could have been estimated by the jury at $18,000 per year, and his alleged earnings, as district manager, a position of greater responsibility, do not appear disproportionate. On the basis of the foregoing it appears that there was sufficient evidence to authorize a jury finding that Park & Tilford had given Kaufman apparent authority to offer Lind 1% Commission of gross sales of the salesmen under him and that Lind reasonably had relied upon Kaufman's offer.

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[The court this discusses the standard to apply to reversing the trial court's grant of a new trial if defendant loses on appeal. The appellate court concludes that a trial court cannot order a new trial on grounds that the jury verdict is against the weight of the evidence unless it was, for otherwise the trial judge in negating the jury's verdict would have substituted his judgment of the facts and the credibility of the witnesses for that of the jury]. Such an action effects a denigration of the jury
system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than in the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices. An example of subject matter unfamiliar to a layman would be a case requiring a jury to pass upon the nature of an alleged newly discovered organic compound in an infringement action. See 3 Walker on Patents, Deller's ed., Section 697. A prime example of subject matter lying well within the comprehension of jurors is presented by the circumstances at bar.

The subject matter of the litigation before us is simple and easily comprehended by any intelligent layman. The jury's main function was to determine the veracity of the witnesses: i.e. what testimony should be believed. If Lind's testimony and that of Mrs. Kennan, Kaufman's secretary, was deemed credible, Lind presented a convincing, indeed an overwhelming case. We must conclude that the jury did believe this testimony and that the court below substituted its judgment for that of the jury on this issue and thereby abused its legal discretion.

The judgment of the court below will be reversed and the case will be remanded with the direction to the court below to reinstate the verdict and judgment in favor of Lind.

HASTIE, Circuit Judge, with whom KALODNER, Circuit Judge, joins (dissenting).

I agree that the order granting judgment for the defendant notwithstanding the verdict for the plaintiff, must be set aside. However, I think the majority make a serious mistake when they take the extraordinary additional step of reversing the alternative order of the trial judge, granting a new trial because he considered the verdict against the weight of the evidence.
The present record discloses a sharp conflict of testimony whether Kaufman, the metropolitan sales manager, ever promised plaintiff, his subordinate district manager, a 1% Commission on all gross sales of agents working under plaintiff. There are several remarkable aspects of this alleged promise which could reasonably have influenced the trial judge on this decisive issue. This commission would have more than quadrupled plaintiff’s salary of $150 per week, making him much higher paid than his immediate superior, Kaufman, or any other company executive, except the president. No other sales manager or supervisor received any such commission at all. Moreover, after the alleged promise was made, month after month elapsed with no payment of the 1% Commission or indication of any step to fulfill such an obligation. Yet plaintiff himself admits that he made no formal demand for or inquiry about the large obligation for several years, and said nothing even informally about it to anyone for many months save for an occasional passing verbal inquiry said to have been addressed to Kaufman. The trial court may have reasoned that the amount said to have been promised was so abnormally large and plaintiff’s concern about nonpayment so unnaturally small as to make it incredible that the promise ever was made. In addition, the very vagueness of the alleged promise and the absence of any mention of time in it may have increased the incredulity of the judge who heard the evidence.

In such circumstances it was neither arbitrary nor an abuse of discretion for the trial judge to grant a new trial. Whether in the same circumstances some other trial judge or any member of this court would have let the verdict stand is beside the point.

The majority think the trial judge usurped the function of the jury. I think it is we who are impinging upon the function and discretion of the trial judge in a way that is serious, regrettable and without precedent in this court.

**QUESTIONS ON LIND**

1. What type of authority is the plaintiff relying on in this case? Why not simply argue that Herrfeldt had actual authority?

2. What was the scope of Kaufman's authority? What must plaintiff show to prevail on his claim that the commission at issue what within the scope of that authority?
3. What are the defendant's two arguments that there was no authority? In particular, assuming plaintiff reasonably believed that Kaufman could set salaries, what argument does defendant have that Kaufman did not have authority to obligate it to pay this particular salary?

4. If plaintiff had lost the claim that Kaufman had authority to make the initial deal, could he possibly make another claim as to why the firm should be liable?
QUESTIONS ON HUMBLE/HOOVER

1. What is the basis of the plaintiff's claim that either oil company should be liable for a tort that occurred at a service station the oil company did not own.

2. Can a plaintiff win simply by showing that there was a principal/agent relationship, or must plaintiff show that there was some special P/A relationship? What type?

3. What is the critical legal issue determining whether P. is liable?

4. What did each court hold?

5. Can you distinguish the cases and argue that both courts were right?
PROBLEM ONE
(Partnership and review of Agency Law)
(UPA 9, 10, 13-18, 25, 27, 40)

Assume that Sam Spade, Sherlock Holmes and Columbo had a detective agency partnership which they have been operating together for 6 years. Sam and Sherlock each contributed 10% of the initial capital to form the partnership. Columbo put in the remaining 80%. They do not have a written agreement.

Last year, Columbo decided to hire an additional employee, Ace Ventura, paying him a $15,000 salary. Ace was the premier pet detective in the area (investigating pet kidnappings) and Columbo wanted to attract some of this lucrative business. Columbo never mentioned it to the others but had no reason to think they would object. Columbo hired him. Upon learning of the decision that Ace had been hired, the other did object. At the end of the year when profits were divided, Holmes & Spade claimed that the $15,000 salary should not be treated as a cost of the partnership.

(1) Is the partnership liable for Ace's salary? What is Holmes' & Spades’ best argument that it is not?

What UPA Sections govern your answer? What result under this section/s?

How relevant is Columbo's superior capital contribution? Why does the UPA take this approach? Should the same result apply to public corporations?

(2) Would your answer to (1) be different if Spade and Holmes were passive partners who never went into the office and only Columbo participated in managing the business? What is Columbo’s best argument that the partnership is liable?

(3) Assume that Columbo hired Ace, Spade & Holmes learned of his plans to do so and objected on a number of grounds, including that the agency was a people-oriented detective agency; they refused to agree to hiring Ace. Is the partnership liable for Ace's salary? What is Holmes' & Spades’ best argument that it is not?

What UPA Sections govern your answer? What result under this section/s?

How relevant is Columbo’s superior capital contribution? Why does the UPA take this approach? Should the same result apply to public corporations?
(4) Assume the partnership is liable and becomes insolvent, could Ace sue Spade and Holmes personally for the $15,000 owed him by the partnership? If Holmes & Spade are liable, can they get contribution or indemnification from Columbo (if so, which?).

(5) What result if it is a two person detective agency (with Columbo and Holmes as partners) and Columbo hires Spade over Holmes’ objection? If Holmes claims the partnership is not liable who wins? Does the result depend on whether we are in a National Biscuit jurisdiction or not?
QUESTIONS ON MEINHARD

(1) What was the agreement between Meinhard and Salmon? In particular, what was the agreement as to the duration of the relationship? Does it matter?

(2) Imagine that Cardozo is supplying a standard term in a joint venture agreement between the Salmons and the Meinhards of the world.

(a) What does the term he has supplied say? Specifically, what must an active co-venturer like Salmon share and what must he keep to himself? Did the court conclude that Salmon was obligated to share the new deal with Meinhard or only the opportunity or information? Why?

(b) Do you think that Salmon and Meinhard would have adopted the term included by Cardozo if they had negotiated explicitly terms governing renewal and extension of the agreement? Why or why not?

(3) What if Salmon had read in the newspaper about Gerry's interest in developing his property and had approached Gerry with a proposal to participate in the development? Would he have had any obligation to notify Meinhard or let him in on the deal?
The duty of loyalty is treated at length in RUPA. It is described in § 404(a) as one of two fiduciary duties, and then is limited in (b) to the following three rules: a partner must account for profits derived from the business without the consent of the other partners; must refrain from dealing on behalf of an adverse party without consent; and refrain from competing with the partnership without consent. Section 103(b)(3) of RUPA states that the duty of loyalty may not be eliminated by the partnership agreement, but "the partners by agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable." Would the Singer case likely come out the same in a RUPA jurisdiction?

In addition, in § 404(e) RUPA provides that, "A partner does not violate a duty or obligation under this Act or under the partnership agreement merely because the partner's conduct furthers the partner's own interest." Comment 1 to § 404 states that, "Arguably, the term 'fiduciary' is inappropriate when used to describe the duties of a partner because a partner may legitimately pursue self-interest and not solely the interest of the partnership and the other partners, as must a true trustee. Nevertheless, partners have long been characterized as fiduciaries." This idea is developed in Comment 5, which states, "That admonition [in § 404(e)] has particular application to the duty of loyalty and the obligation of good faith and fair dealing. It underscores the partner's rights as owner and principal in the enterprise, which must always be balanced against his duties and obligations as an agent and fiduciary."

This approach of RUPA has drawn fire from two different perspectives. One perspective is represented by Allan W. Vestal, Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992, 73 Boston U. L. Rev. 523, 535 (1993) ("The Revised Act turns the world upside down with respect to the fiduciary relations of partners inter se. The Engine of this error is the drafters' rejection of the fiduciary essence of the partnership relationship in favor of the contractarian premise. . . . This shift is breathtaking. In one stroke of the pen [referring to § 404(e)] the drafters have made the partners adversaries, whereas before they were bound by `the duty of the finest loyalty'. . . ."). See also Claire Moore Dickerson, Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act, 64 U. Colo. L. Rev. 111, 155-56 (1993) ("Once the partnership form has been chosen, there would be no purpose in wasting time -- and transaction costs -- on negotiating the terms of a fiduciary duty. I do not agree with contractarian commentators who maintain that the traditional fiduciary duties are so vague and aspirational as to be
meaningless. . . . Far from being naively aspirational, those duties serve to guide the parties to a standard of behavior that reduces the need to monitor.

The other perspective is represented by Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 Bus. Law. 45, 52-54 (1993), stating in part as follows: "Fiduciary duty is a type of contractual terms courts supply because the parties themselves would have contracted for the duties if it were not so costly to contract in detail. . . . Because fiduciary duties are contractual `gap-fillers,' the precise nature of the duties that exist in any particular contractual relationship depends on the express and implied terms of the relevant contract. . . . The UPA prohibition on unilateral benefit without co-partners' consent [§ 21] gives courts the flexibility to fill gaps in partnership contracts by determining who owns what and the partners' duties regarding partnership property. Because the extensive case law under the UPA's simple language recognizes a full range of fiduciary duties, there was no need for further detail. Yet RUPA perversely attempts to spell out a set of duties that exists in all partnerships under all circumstances. . . . While partners may have a duty to act unselfishly in partnership affairs, RUPA errs in making this duty part of every partnership contract. Partners often do not contract to be strict fiduciaries in the typical agency or trust sense of one who controls the property of another. In other words, partners are not necessarily comparable to directors or executives of publicly-held corporations. Instead, partners may be self-seeking co-venturers who are constrained from the worst kinds of misconduct by their contingent compensation, personal liability for debts, and their co-partners' close monitoring and power to withdraw at any time."

QUESTIONS ON DISSOLUTION
Read cases and UPA 29-38, 40-42

1. What is the legal effect of dissolution? Winding up? Termination?

2. What happens if a partner to a partnership at will announces that he wants to
dissolve it and the other partners do not? Can he insist on a winding up? If he insists,
is he liable for damages? Can the others elect to continue the business? Can they
purchase the business if it is liquidated?

3. What happens if a partner wants to dissolve a partnership for a term before the term
is over? Can he do so unilaterally or must he ask the court's permission? If he does so
unilaterally, can he insist on a winding up? Is he liable for damages? Can the others
elect to continue the business? If they do, does he necessarily get his money out
immediately? Will he ever get it out?

4. If there is a partnership for a term, can a partner get the partnership dissolved by
decree of the court? On what grounds? What if he petitions for a dissolution and loses?
Is he now liable for damages for wrongful dissolution? What if he wins, are the other
partners treated as wrongful. Does it depend on why the partnership was dissolved?
QUESTIONS ON PAGE v. PAGE

(1) Why was the court unwilling to conclude that this is a partnership for a term? How is this situation distinguishable for those presented in Owen v. Cohen, where one partner loaned the partnership money at the beginning of the partnership to be paid back out of profits. There the court found a partnership for a term reasonably required to repay the loan.

(2) Judge Traynor in Page had several options available to him. He could have concluded that the partnership was implicitly a partnership for a term. He could have announced the rule he did announce. Or he could have ruled, as many commentators have suggested is the proper approach, that partners may dissolve at-will partnerships for any reason they choose. What are the pros and cons of these various approaches?

(3) What precisely is the holding announced in Page regarding a partners right to dissolve? How does this holding compare with the holding of Meinhard?

(4) Assume that the defendant brother is able to show that the plaintiff (the would-be dissolving brother) is dissolving in bad faith. What is the appropriate remedy in this situation? Can he prevent his brother from liquidating the partnership? What would the dissolving brother receive? Would his recovery include anything for the increased partnership profits associated with the Vandenberg Air force Base? Would his recovery include anything for the new Air force base if the dissolution were viewed as a "rightful" dissolution?