

NOTES

LIABILITY OF PRINCIPAL FOR THE UNAUTHORIZED FRAUD OF HIS AGENT.—It is universally acknowledged that no liability will attach to a principal for the unauthorized fraud of his agent, unless such fraud is committed within the scope of the agent's authority.¹ However, where the fraud is committed within the scope of authority,² there is diversity

1. **STORY ON AGENCY**, secs. 452, 456. *Lloyd v. Grace, Smith Co.*, App. Cas. (1912) 716 House of Lords; *Crescent Ring Co. v. Travelers Indemnity Company*, 102 N.J.L. 85, 132 Atl. 106 (E. & A. 1926); *Decker v. Fredericks*, 47 N.J.L. 469, 1 Atl. 470 (Sup. Ct. 1885); *People v. Straus Co. (Feltham v. Schultze)*, 282 N.Y.S. 972 (1935); *Janecko v. Manheimer*, 77 Fed. (2d) 205 (1935); *Kennedy v. McKay*, 43 N.J.L. 288 (Sup. Ct. 1881); *CORPUS JURIS SECUNDUM*, Vol. 3, par. 256.

2. "Scope of Authority" and "Unauthorized" Acts Distinguished:

Unless the act is one expressly, impliedly or apparently authorized by the principal, it is an unauthorized act (*Decker v. Fredericks*, 47 N.J.L. 469, 1 Atl. 470 (Sup. Ct. 1885); *Cooley v. Perrine*, 41 N.J.L. 322 (Sup. Ct. 1879); *Frankowski v. Lawrence Motor Car Co.*, 114 N.J.L. 326 (E. & A. 1935)). But even though the act is unauthorized, it will be within the scope of authority, if it belongs to that class of act authorized by the principal. *Lloyd v. Grace, Smith Co.*, App. Cas. (1912) 716 House of Lords; *Barwick v. Eng. Joint Stock Bank*, L.R. 2 Exch. 259 (1867).

As to Express and Implied Authority see: *Decker v. Fredericks*, 47 N.J.L. 469, 1 Atl. 470 (Sup. Ct. 1885). Also, cases collected in POLLITT, PROBLEMS IN AGENCY.

As to agent's apparent authority: "The question in every such case is whether the principal has by his voluntary act, placed the agent in such a situation that a person of ordinary prudence, conversant with business usage and the nature of the business, is justified in presuming that such agent has authority to perform the particular act in question." Wells, J., in *Frankowski v. Lawrence Motor Car Co.*, 114 N.J.L. 326, 176 Atl. 397 (E. & A. 1935), quoting Justice Trenchard in *Wiss & Sons Co. v. H. G. Vogel Co.*, 86 N.J.L. 618, 94 Atl. 308 [E. & A. 1914].

Accordingly: Where an agent, with general powers to sell goods for his principal, who was a silk merchant, represented the goods to be of a quality and kind superior to those sold, it was held that the agent acted within the scope of his authority in making such representations, even though the principal had not authorized the making of the representation (*Earl of Halsbury in Lloyd v. Grace, Smith Co. reviewing Hern v. Nichols*). To the same effect, where one employed as managing clerk of a firm of solicitors, with power to advise clients as to the best legal means of transferring property and the necessary documents to execute, fraudulently induced a client to execute papers transferring property to

of opinion as to the extent and nature of the principal's liability. It appears to have been settled in Lord Holt's time that where the fraud was committed within the scope of the agent's authority, the principal's lia-

himself personally, it was held that the agent acted within the scope of his authority in causing such documents to be executed, even though principal had not authorized the giving of advice for such a transfer. (*Lloyd v. Grace, Smith Co.*, App. Cas. (1912) 716 House of Lords). Where one caused Corporate Stocks to be purchased and registered in another's name, without that person's consent or knowledge, and subsequently, without such person's knowledge, sold the stock to a third person, inducing the purchase by fraudulent representations: *Held*, the vendor did not act within the scope of any authority given by the named owner of the stock. (*Kennedy v. McKay*, 43 N.J.L. 288, Sup. Ct. 1881). A Hostess-Tenant, with authority to negotiate rental of apartments to prospective tenants, was held to be acting within the scope of her authority in representing the apartments to be free from vermin, although no specific authority to make such representation was given by principal. (*Sewell v. Metropolitan Life Insurance Co.*, 118 N.J.L. 308, 192 Atl. 575 [Sup. Ct. 1937]). Likewise, where agent, entrusted with entire responsibility of dealing with insurance companies in collecting insurance after a loss, made fraudulent statements in proof of loss required by insurance contract, even though principal did not authorize the making of such false statements or know of their falsity. (*Mick v. Royal Exchange Assur.*, 87 N.J.L. 607, 91 Atl. 102 [E. & A. 1914]). To the same effect, where one employed by an automobile dealer as an automobile salesman, falsely represented an automobile to be "New". (*Frankowski v. Lawrence Motor Car Co.*, 114 N.J.L. 326, 176 Atl. 397 [E. & A. 1935]).

But see, *Crescent Ring Company v. Travelers Indemnity Company*, 102 N.J.L. 85, 132 Atl. 106 (E. & A. 1926), where an insurance agent, with power to solicit proposals for insurance, was held to have acted beyond the scope of his authority in representing a policy to be the same as a Jeweler's Block Policy, when in fact it was not, and the principal had no authority under its charter to issue such a policy.

But General and Special Agents must be distinguished: See, *MECHEM ON AGENCY*, paragraphs 1, 283; *EVANS ON AGENCY* (Ewell's Ed.) 2,101,102; *STORY ON AGENCY* (8th Ed.) paragraph 17; *Scherer v. Post Office Bldg. & Loan Assn.*, 91 N.J.Eq. 666, 103 Atl. 202 (E. & A. 1918); *Butler v. Maples*, 19 L. Ed. 822 (1869); *Bodine v. Berg*, 82 N.J.L. 662, 82 Atl. 901 (E. & A. 1912); *Sloss-Scheffield Steel & Iron Co. v. Aetna Life Insurance Company*, 74 N.J.Eq. 635, 70 Atl. 380 (Ch. 1908); *Cooley v. Perrine*, 41 N.J.L. 322 (Sup. Ct. 1879).

Accordingly, where one is specifically empowered to sell a specific horse to a particular individual, at a definitely fixed price, he will be deemed to act beyond the scope of his authority in making representations as to the soundness of the horse or its fitness for the vendee's purpose. (*Cooley v. Perrine*, 41 N.J.L. 322 [Sup. Ct. 1879]; *Decker v. Fredericks*, 47 N.J.L. 469, 1 Atl. 470 [Sup. Ct. 1885]

bility extended to all civil actions, but not to actions criminal in nature.⁸ Today, however, the question of the extent of such liability is considered one of the vexed questions of the law;⁴ for, since Lord Holt's time, various doctrines have been employed limiting the extent of this liability.

It was once considered to be the law in England that even though the fraud of the agent be committed within the scope of his authority, the liability of the principal would not extend to actions in tort for deceit, unless the fraud was perpetrated for the benefit of the principal;⁵ and some maintained that the principal was not liable in such actions, even though the fraud was committed for his benefit.⁶ These doctrines were subsequently repudiated, however, and today the English Courts, adhering to the view of Lord Holt's era, hold the principal liable in all

Ratification of Unauthorized Acts: "Subsequent ratification of an act done by another, assuming to act in the capacity of an agent, though without any precedent authority, creates the relation of principal and agent; and after such ratification, with full knowledge of all the material facts and circumstances, the principal is bound by the act to the same extent, as if it had been done by his previous authority." (Justice Trenchard in *Looschen Piano Case Company v. Steinberg*, 76 N.J.L. 130, 68 Atl. 1072 [Sup. Ct. 1908]).

As to when Retention of Benefits may amount to Ratification, see: *Looschen Piano Case Co. v. Steinberg*, 76 N.J.L. 130, 68 Atl. 1072 (Sup. Ct. 1908); *Morris & Essex Railroad Co. v. Green*, 15 N.J.Eq. 469 (E. & A. 1862); *Gulick & Holmes v. Grover*, 33 N.J.L. 463 (E. & A. 1868); *Bodine v. Berg*, 82 N.J.L. 662, 82 Atl. 901 (E. & A. 1912); *Phoenix Pottery Co. v. Perkins Co.*, 79 N.J.L. 78, 74 Atl. 258 (Sup. Ct. 1909).

As to when Silence of Principal may amount to ratification see: *Chetwood v. Berrian*, 39 N.J.Eq. 203 (Ch. 1884); *Dugan v. Lyman*, 23 Atl. 657 (Ch. 1892).

For further consideration as to what constitutes ratification, see cases collected on that subject in POLLITT, *PROBLEMS IN AGENCY*; also, *Dempsey v. Chambers*, 154 Mass. 330, 28 N.E. 279 (1891).

3. *Barwick v. English Joint Stock Bank*, L.R. 2 Exch. 259 (1867); *Lloyd v. Grace, Smith Co.*, App. Cas. (1912) 716 House of Lords; *Hern v. Nichols* (named and reviewed in the *Barwick and Grace, Smith Co.* cases, but no citation given).

4. *Mick v. Royal Exchange Assur.*, 87 N.J.L. 607, 91 Atl. 102 (E. & A. 1914).

5. *Barwick v. English Joint Stock Bank* (1867); *Lloyd v. Grace, Smith Company* (1912).

6. *Udell v. Atherton*, 7 H. & N. 172 (dissenting opinions); *Western Bank of Scotland v. Addie*, L.R. 1 Sc. App. 146.

civil actions for the unauthorized fraud of his agent, committed within the scope of the agent's authority.⁷

The case law in New Jersey seems well established to the contrary, however. In this State, the Courts limit the liability of the principal in such cases to civil actions on the contract, either in rescission and recoupment,⁸ or for breach of warranty,⁹ and refuse to extend this liability to actions in tort for deceit.¹⁰ The denial of the defrauded party's right to proceed against the principal in tort and the recognition of his right so to proceed in contract actions is made indiscriminately, without regard to questions as to the principal's benefit from or knowledge of the fraud.¹¹

It is impossible to reconcile the New Jersey view with that of the

7. *Lloyd v. Grace, Smith Co.* This is also the Federal View; *Nat'l Bank of Birmingham v. Dun* (1892) 51 Fed. 160. But see *Janeczko v. Manheimer* 77 Fed. (2d) 205 (1935), which suggests a contrary view. *CORPUS JURIS SECUNDUM*, vol. 3, par. 256. As for New York, see 63 N.Y. 653 (1876), but also 282 N.Y.S. 972 (1935), which indicates the contrary view as followed in N. J.

8. *Kennedy v. McKay*, 43 N.J.L. 288 (Sup. Ct. 1881); *Reitman v. Fiorillo*, 76 N.J.L. 815, 72 Atl. 74 (E. & A. 1909); *White v. N.Y.S. & W. R. Co.*, 68 N.J.L. 123, 52 Atl. 216 (Sup. Ct. 1902). The fraud need not be in the inception or inducement of the contract, but may be in the performance of an obligation under the contract. *Mick v. Royal Exchange Assur.*, 87 N.J.L. 607, 91 Atl. 102 (E. & A. 1914)

9. *Frankowski v. Lawrence Motor Car Company*, 114 N.J.L. 326, 176 Atl. 387 (E. & A. 1935). See *Sales Act*, 4 COMP. STAT., pp. 4663, 4650, par. 12.

10. *Kennedy v. McKay*, 43 N.J.L. 288 (Sup. Ct. 1881); *Crescent Ring Co. v. Travelers Indemnity Co.*, 102 N.J.L. 85, 132 Atl. 106 (E. & A. 1926); *Mick v. Royal Exchange Assur.*, *supra*; *White v. N. Y. S. & W. R. Co.*, 68 N.J.L. 123 (Sup. Ct. 1902).

11. *Decker v. Fredericks*, 47 N.J.L. 469, 1 Atl. 470 (Sup. Ct. 1885); *Gordon v. Schellhorn*, 95 N.J.Eq. 563, 123 Atl. 549 (Ch. 1924); *Sewell v. Metropolitan Life Insurance Company*, 118 N.J.L. 308, 192 Atl. 575 (Sup. Ct. 1937). In refusing to hold the principal liable, the Courts sometimes make mention of the fact that the fraud was without principal's knowledge. The question of knowledge, however, appears to bear more on the question of scope of authority, than on the question of liability after the question of scope of authority has been determined. Knowledge is to be considered in determining whether or not there has been ratification of an otherwise unauthorized act, thus bringing it within the authorized class. (*Looschen Piano Case Company v. Steinberg*, 76 N.J.L. 130, 68 Atl. 1072 [Sup. Ct. 1908]). Likewise, the retention of benefit may operate in ratification (see previous note).

English Courts, although the Federal Courts¹² have sought to make a distinction on the theory that the New Jersey Courts, in the cases denying principal's liability in tort for deceit, were not really limiting the extent or nature of the liability once attached, but were merely adhering to the English doctrine and refusing to recognize any liability as attaching to the principal, unless the fraud was committed within the scope of the agent's authority. This attempt at reconciliation, however, was based primarily upon *Kennedy v. McKay*¹³ which, although it is the authority upon which the New Jersey Courts base their decisions in such cases,¹⁴ is generally acknowledged, even by the Courts using it as authority, to be authority only by dictum;¹⁵ and what was done in the Federal Case was merely to distinguish *Kennedy v. McKay* on its facts, and not to reconcile its dictum with or distinguish it from the English doctrine. In *Kennedy v. McKay* the Court was concerned with a situation in which the president of an insurance company had purchased certain shares of the company's stock with the company's money, and, having caused the stock to be transferred upon the books of the company in McKay's name, without his knowledge or consent, succeeded in fraudulently inducing Kennedy to purchase the stock. Kennedy then sought to sue McKay in tort for deceit, and Chief Justice Beasley, after holding that no agency relationship existed between the fraud-doer and McKay, and after denying plaintiff's right to maintain the suit on this ground, proceeded to state the law to be that even had the fraud-doer been an agent of McKay acting within the scope of his authority as agent, Kennedy could not have prevailed in his action; for his remedy would be limited to (1) Rescission of the contract and reclamation of the money paid, and (2) a suit in tort against the agent, founded on deceit; but that a suit in tort for deceit could not be maintained in such a case against the principal. It is evident, therefore, that while, strictly speak-

12. *Nat'l Bank of Birmingham v. Dun*, 51 Fed. 160 (1892) Cir. Ct. S.D.N.Y.

13. *Ibid*

14. *Sewell v. Metropolitan Life Insurance Company*, 118 N.J.L. 308, 192 Atl. 575 (Sup. Ct. 1937); *Crescent Ring Co. v. Travelers Indemnity Co.*, 102 N.J.L. 85, 132 Atl. 106 (E. & A. 1926); *White v. N. Y. S. & W. R. Co.*, 68 N.J.L. 123 (Sup. Ct. 1902).

15. *Crescent Ring Co. v. Travelers Indemnity Co.*, 102 N.J.L. 85, 132 Atl. 106 (E. & A. 1926)

ing, the *Kennedy* Case was decided on the question of scope of authority, the dictum, upon which our present law is founded, did not proceed upon any such theory. In fact, all the Federal Courts have done in their attempt to reconcile the two doctrines has been to say what everyone acknowledges, namely, that the remarks of Chief Justice Beasley in *Kennedy v. McKay* were merely remarks by way of dictum on the liability of a principal for the unauthorized fraud of his agent.

While any attempt to reconcile Chief Justice Beasley's dictum with the English rule on the ground of scope of authority must fail, since in his dictum he presumes an unauthorized fraud within the scope of authority, yet, certain subsequent cases, often cited as following Beasley's dictum, may be distinguished on this ground. In *Decker v. Fredericks*,¹⁶ plaintiff sought to recover from principal in an action in tort predicated on the agent's misrepresentation as to the soundness of a horse purchased by plaintiff from the defendant through the defendant's agent. Plaintiff was denied recovery on the finding of the Court that the agent acted outside the scope of his authority in making the representations. The Court thus avoided the question of the principal's liability for his agent's fraud within the scope of authority.¹⁷ In *Crescent Ring Company v. Travelers Indemnity Company*,¹⁸ however, the Court, while taking considerable pains to declare the agent's fraud beyond the scope of his authority, also made it clear that the dictum in the *Kennedy* case was law in New Jersey and, therefore, controlling. Thus, it would seem that this case, like the dictum upon which it is based, cannot be properly distinguished on the ground of scope of authority; yet, one can hardly deny that it is not entirely free from such a distinguishing element. The most modern and most complete adherence to the doctrine of the *Kennedy* case by our Supreme Court leaves no room, however, for such distinction. In this case, *Sewell v. Metropolitan Life Insurance Company*,¹⁹ a hostess-tenant, with authority to negotiate in the renting of apartments

16. 47 N.J.L. 469, 1 Atl. 470 (Sup. Ct. 1885).

17. The syllabus of this case contains the statement that: "An innocent vendor is not liable in an action for deceit brought for the fraudulent representations of his agent." Examination of the opinion, however, reveals that the Court did not base its opinion on this doctrine, although it cited it with approval.

18. 102 N.J.L. 85, 132 Atl. 106 (E. & A. 1926).

19. 118 N.J.L. 308, 192 Atl. 575 (Sup. Ct. 1937).

to prospective tenants, represented to such a prospective tenant that the premises were free from vermin. Though it did not appear that such representation was authorized by the principal, the representation was held to be within the scope of the agent's authority; but the plaintiff's action in tort for deceit was denied on the ground that the liability of a principal for the unauthorized fraud of his agent, committed within the scope of the agent's authority, does not extend to actions in tort for deceit.

The frequency with which the Courts in this State have approvingly stated this doctrine, either voluntarily or decisively, is emphasized by their failure to make any serious attempt to justify it in reason. The nearest approach to such an attempt is found in *Kennedy v. McKay*, where Chief Justice Beasley quotes Lord Chelmsford as follows: "Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent representations of the directors, and suit is brought in the name of the company to seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the grounds of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, *because the company cannot retain any benefit which they have obtained through the fraud of their agents*. But, if the person who has been induced to purchase the shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action of deceit, such an action cannot be sustained against the company, but only against the directors personally.²⁰ While this may justify holding the principal liable in contract, since in this respect Lord Chelmsford's statement is consonant with the general rule of agency respecting principal's liability, it cannot be seriously considered to justify exempting him from such liability in tort, unless we are prepared to construe Lord Chelmsford's statement to mean that a principal is never liable for the fraud of his agent, but that he will not be allowed to retain any benefit from such fraud. If we assume this construction, however, we immediately get into difficulty, for then the principal would not even be liable in contract, unless the effect of denying such relief would enable him to retain a benefit obtained through the fraud. It is true that in most

20. 43 N.J.L. 288 (Sup. Ct. 1881).

cases a refusal to allow the defrauded party to proceed or defend against the principal in contract actions on the ground of such fraud would result in allowing the principal to retain benefits of the fraud, but this is because most frauds perpetrated by agents acting within the scope of their authority result in contracts benefitting the principal. Suppose, however, the agent's fraud did not inure to the principal's benefit. Would the defrauded party be denied relief in contract? Our courts have indicated to the contrary.²¹ It becomes apparent, then, that, in following Lord Chelmsford's opinion, our courts have not interpreted his words in this manner.

But, for the purpose of justifying the rule, it matters not which interpretation we place upon Lord Chelmsford's words, for in either event he is stating a principle as applicable to cases of fraud which is opposed to the principle applicable to other wrongs, without advancing any reason for making such distinction. That there is no sensible distinction to be drawn between a principal's liability for the fraud of his agent and his liability for other wrongs committed by his agent, within the scope of his authority, admits of no doubt. The lack of such distinction has been repeatedly recognized in England,²² and has been admitted by our own Court of Errors and Appeals.²³ Our courts allow recovery in tort against the principal for the unauthorized acts of his agent, within the scope of the agent's authority, when such acts amount to Negligence,²⁴ Assault,²⁵ Libel,²⁶ and other wrongs.²⁷ It is wholly incon-

21. In *Crescent Ring Co. v. Travelers Indem. Co.*, 102 N.J.L. 85, 132 Atl. 106 (E. & A. 1926), the court dismissed plaintiff's argument that defendant was liable in tort because he benefited by the fraud, by saying that in New Jersey the question of benefit was immaterial in tort actions. The court then went on to remark that, even if the benefit doctrine did prevail in New Jersey, the plaintiff would not prevail, because the fraud in question did not inure to the defendant's benefit, but to his detriment; and subsequently, the court says that plaintiff's remedy, if any, is in contract, not in tort.

22. *Barwick v. English Joint Stock Bank*, L.R. 2 Exch. 265 (1867); *Lloyd v. Grace, Smith Co.*, App. Cas. (1912) 716 House of Lords.

23. *Corona Kid Co. v. Lichtman*, 84 N.J.L. 363, 86 Atl. 371 (E. & A. 1913).

24. *Haines v. Atlantic R.R. Co.*, 65 N.J.L. 27, 46 Atl. 595 (Sup. Ct. 1900); *Spelde v. Galtieri*, 130 Atl. 526 (E. & A. 1925).

25. *O'Carroll v. Stark*, 85 N.J.L. 438, 89 Atl. 989 (Sup. Ct. 1914); *Dierkes v. Hauxhurst Land Co.*, 80 N.J.L. 364, 79 Atl. 361 (E. & A. 1911); *Brokaw v.*

sistent, unsound in principle, and,—as evidenced by the silence of the courts on the question of reason,—unwarranted, therefore, that recovery in tort against such a principal for his agent's fraud should be denied.

While the views expressed by our courts on the question of this liability cannot be reconciled with the English view, and while the New Jersey attitude has no sound foundation in reason, yet, the history of the development of the law on this subject suggests an explanation of the error into which our courts have fallen.

When Chief Justice Beasley, in deciding *Kennedy v. McKay*,²⁸ adopted the remarks of Lord Chelmsford in *Western Bank of Scotland v. Addie*,²⁹ the unsoundness of the doctrine had not been seriously considered. The *Barwick Case*³⁰ was still construed by many to hold that a principal was not liable, unless he benefitted from the fraud, and the *Udell Case*³¹ had been decided, in which certain dissenting opinions had held the view that in no event was the principal liable in a tort action for deceit. Lord Chelmsford's views, therefore, while not entirely new, were comparatively so. Like many unsound doctrines, these views probably fascinated many as being "Progressive," because "New," and, though serious reflection subsequently caused the English Courts to re-establish the general rule as the sounder one,³² Chief Justice Beasley was called upon to decide the *Kennedy* case, before such reflection had manifested itself in the English decisions. It might have been more to the credit of our eminent jurist, if, before writing the dictum in this case, he had tested the doctrine's validity in reason, but, not being called upon to employ the doctrine in order to decide the case, he seems to have

N. J. R.R. & Transportation Co., 32 N.J.L. 328 (Sup. Ct. 1867); *Welsh v. West Jersey & S. R.R. Co.*, 62 N.J.L. 655, 42 Atl. 736 (E. & A. 1899).

26. *Hoboken Printing & Publishing Co. v. Kahn*, 59 N.J.L. 218, 35 Atl. 1053 (E. & A. 1896).

27. *Gibbons v. Morse*, 7 N.J.L. 253 (E. & A. 1821).

28. 43 N.J.L. 288 (Sup. Ct. 1881).

29. L.R. 1 Sc. App. 146.

30. L.R. 2 Exch. 265.

31. *Udell v. Atherton*, 7 H. & N. 172.

32. *Lloyd v. Grace, Smith Co.*, App. Cas. (1912) 716 House of Lords; 26

been content to cite the doctrine voluntarily, without any apparent attempt to test the reasoning behind it.³³

In 1913, shortly after the doctrine was disapproved in England, Justice Kalisch, speaking for the New Jersey Court of Errors and Appeals, disapproved the dictum in the *Kennedy* case on the ground that it was not founded in reason;³⁴ but this disapproval was also in the nature of dictum.³⁵

Then followed cases in contract in which the views of Chief Justice Beasley were approved, apparently in *toto*, but actually only as to that portion of the dictum applicable to actions in contract.³⁶

In 1925, the *Crescent Ring Company* case was decided.³⁷ It will be recalled that this case gave decisive effect to the dictum in the *Kennedy* case in so far as that dictum denied relief in tort. It is evident from the opinion, however, that the basis of the decision was the esteem in which the Court held Chief Justice Beasley and the numerous *dicta* approving his dictum; for the Court refuses to consider the remarks of Justice Kalisch in the *Corona Kid Company* case on the ground those remarks were merely in the nature of dictum.³⁸

In view of this development, culminated as it is by the *Sewell* case³⁹ adopting arbitrarily the dictum in the *Kennedy* case, it is evident that

33. Following the *Kennedy* case, *White v. N. Y. S. & W. R. Co.*, 68 N.J.L. 123 (Sup. Ct. 1902), was decided, giving decisive effect to Beasley's dictum. Thereafter, in 1909, *Reitman v. Fiorillo* was decided, wherein though a suit in contract, the Court of Errors and Appeals approved the *White* case as decisive of the rule respecting actions in tort.

34. *Corona Kid Co. v. Lichtman*, 84 N.J.L. 363 at pp. 369, 370.

35. *Crescent Ring Co. v. Travelers Indem. Co.*, 102 N.J.L. 85 at pp. 89, 90 (E. & A. 1926).

36. *Mick v. Royal Exchange Assur.*, 87 N.J.L. 607 (E. & A. 1914); *Gordon v. Schellhorn*, 95 N.J.L. 563 (Ch. 1924).

37. 102 N.J.L. 85, 132 Atl. 106 (E. & A. 1926). This was a 7-8 decision. Justice Kalisch voted to affirm decision of lower court which rendered judgment for plaintiff. In 1929 the Court of Errors and Appeals in *Chapin v. Kreps*, 106 N.J.L. 424, which was an action to recover money paid on a contract rescinded for fraud, approved the doctrine denying relief against the principal in tort. In this case, however, the approval was given by way of dictum in the opinion written by Mr. Justice Parker.

38. 102 N.J.L. 85, at pp. 89, 90 (E. & A. 1926).

39. 118 N.J.L. 308, 192 Atl. 575 (Sup. Ct. 1937).

the doctrine in this state is a combined result of the judicial influence of Chief Justice Beasley coupled with the tendency of courts voluntarily to make and judicially to follow ill-considered statements of the law.

The subject is one which clearly exemplifies the difference between the law, as a body of rules developed by courts on the basis of reason, and the law, as a collection of attitudes indulged in by our courts arbitrarily. When the law conflicts in these respects, we must, for practical purposes, adhere to the latter, although we may theoretically adhere to the former. It is with this attitude that the law in New Jersey should be acknowledged to be that a principal is liable for the unauthorized fraud of his agent, committed within the scope of the agent's authority, in contract actions, but not in tort for deceit.

This rule is so firmly, even though unsoundly, established in this State that the possibility of correcting the error is not immediately apparent. In the Federal Courts, however, the law has prevailed that the principal in such cases is liable in tort as well as contract,⁴⁰ but a recent case decided by the Federal Court of Appeals, 7th district,⁴¹ suggests a change in attitude favoring the view prevalent in New Jersey. This recent case is no more convincing than our New Jersey cases, and it is to be hoped that the Federal Courts will not allow themselves to fall into the error prevalent in this and other states.⁴²

STATUTE OF FRAUDS—PERFORMANCE WITHIN A YEAR—PERFORMANCE WITHIN A YEAR BY ONE PARTY.—At the Common Law, a contract in writing was classed with parol contracts and had no added validity.¹ A writing was not necessary to give the agreement force.

40. CORPUS JURIS SECUNDUM, vol. 3, par. 257; 51 Fed. 160.

41. *Janecko v. Manheimer*, 77 Fed. (2d) 205, decided April 29, 1935; CORPUS JURIS SECUNDUM, vol. 3, par. 257.

42. *Fultham v. Schultze*, 282 N.Y.S. 972 (Sup. Ct. 1935).

1. 1 WILLISTON ON CONTRACTS, 1920 Ed., sec. 448: "It was suggested in several cases in the latter part of the eighteenth century that the requirement of consideration was for the sake of evidence only, and therefore written contracts needed no consideration. This notion, however, was promptly overthrown by the