The Legal Foundations of Apparent Authority

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ABSTRACT

This article traces the coming of apparent authority in the 18th and 19th centuries. Some confusion exists about the origins of this rule. It is often suggested that the doctrine has theoretical and historical roots in estoppel as an extension of actual authority. This article provides strong evidence that the apparent authority was—and should be thought of as—a true form of authority that grew out of developments in contract law rather than the rules of equity. This analysis contributes to the intellectual understanding of the history of commercial law and the law of agents.

I. INTRODUCTION

Agents pay a crucial role in coordinating transactions and connecting producer to consumer in today's markets. A significant development in Anglo-American law of agency came with the establishment of apparent authority in the 19th century. In his 1891 article on agency, Oliver Wendell Holmes, Jr. explained that "the obvious consequence of the principal's own conduct in employing an agent is that the public understand him to have given the agent certain powers."[1] In this statement, Holmes explained the function of the doctrine of apparent authority. An agent acts with apparent authority when he or she transacts without the express authority of the principal, but the third party has a reasonable basis for assuming the agent has authority. Although this doctrine is well-documented, its intellectual and legal foundations have long been disputed.[2] One strand of thinking links the origins of apparent authority to estoppel: as stated by Webb and Bianco, "if the principal, by words or conduct, represents or holds his agent out as having certain authority, he will be estopped" from denying that the agent had actual authority.[3] A second view sees

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1. Oliver Wendell Holmes, Jr., *Agency, II*, 5 HARV. L. REV. 1, 1 (1891).
2. HOWARD BENNETT, PRINCIPLES OF THE LAW OF AGENCY 50–51 (2013).
3. GARN H. WEBB & THOMAS C. BIANCO, AGENCY AND PARTNERSHIP: ANALYSIS AND EXPLANATION 22 (1970); Hoddeson v. Koos Bros., 135 A.2d. 702, 706 (N.J. Super. Ct. App. Div. 1957) (defining the requirements

apparent authority as an independent class of authority. It ties apparent authority to the objective approach in modern contract law where the courts adopt the position of a reasonable person in order to interpret how others would have seen the intention of the parties.[4] This article provides new insights into this debate as it traces the emergence of apparent authority back to its legal foundations.

The Anglo-American law of agents was forged in the 18th and 19th centuries by English judges and legal commentators; it was then adopted and revised by their American counterparts.[5] We argue apparent authority has little or no historical roots in equity as a form of estoppel. Rather, the doctrine began as an independent form of authority as part of the movement from subjective to objective reasoning. The emergence of the objective approach occurred first in agency law, much earlier than has traditionally been thought, and arrived later in contract law. This article begins by providing some background and context on early agency law with a discussion of commercial and mercantile custom as independent from the rules of private law. We then consider the sources of an agent's power and how the courts construed authority. Finally, this article explains how the law of agency—as a distinct body of commercial rules—gathered pace and became accepted in the Anglo-American legal world.

II. BACKGROUND: THE BASIS OF AGENCY LAW

The late 18th and early 19th centuries were a richly formative era in the history of Anglo-American law. International commercial trade had expanded,[6] despite formidable logistical inhibitors. For merchants and traders, neither the telegraph nor the railway had yet arrived, and poor communication meant information asymmetries were rife.[7] Factors and brokers had become essential in order to coordinate between spatially separated markets and to act as conduits between producer and consumer.[8] As the business of intermediaries flourished, the modern legal rules of agency law began to appear. The doctrine of apparent authority, first articulated in the early 19th century, remains an important part of agency.

It is not surprising that developments in agency law first took place in Great Britain. With its far-flung colonial Empire and its network of merchants,[9] Britain served as the fulcrum of international commerce and the epicenter for new concepts that were passed on

for apparent authority); *see also* Rama Corp. v. Proved Tin & Gen. Inv. Ltd. [1952] 2 QB 147, 149–50 (Eng.).

4. Michael Conant, *Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership*, 47 NEB. L. REV. 678, 703–04 (1968); Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911); Smith v. Hughes (1871) 6 QB 597, 597 (Eng.).

5. G. H. L. FRIDMAN, THE LAW OF AGENCY 5 (2d ed. 1966); CLIVE M. SCHMITTHOFF, CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 316 (Chia-Jui Cheng ed., 1988).

6. For more on the nature of British export and regional trade during the industrial revolution, see T. S. ASHTON, AN ECONOMIC HISTORY OF ENGLAND: THE 18TH CENTURY 130–67 (1972).

7. These conditions inhibited the formation of a mass market in the United Kingdom and United States. For analysis of American law when a mass market did emerge, see generally Sally H. Clarke, *Unmanageable Risks:* MacPherson v. Buick *and the Emergence of a Mass Consumer Market*, 23 LAW HIST. REV. 1 (2005).

8. Naomi R. Lamoreaux & Daniel M. G. Raff, *Introduction: History and Theory in Search of One Another*, *in* COORDINATION AND INFORMATION: HISTORICAL PERSPECTIVES ON THE ORGANIZATION OF ENTERPRISE 2–8 (Naomi R. Lamoreaux & Daniel M. G. Raff eds., 2007).

9. *See* P. J. CAIN & ANTHONY G. HOPKINS, BRITISH IMPERIALISM: INNOVATION AND EXPANSION, 1688-1914 (1993) (describing British imperialism throughout the past four centuries).

to its colonies and so became embedded within American legal thought. The issue of the scope of an agent's authority frequently arose in the English common law courts at *nisi prius*, predominantly before the judges of the Court of the King's Bench. Lords Mansfield, Kenyon, and Ellenborough served successively as Chief Justice for over half a century, from 1756 to 1818. The Court of the King's Bench, together with the two other common law courts (Common Pleas and Exchequer) collectively conducted thousands of jury trials annually, many of which dealt with issues of contract, tort, and commercial law.[10]

The so-called foundational agency law cases, such as *Ireland v. Livingston* and *Watteau v. Fenwick*, date from late in the second half of the 19th century.[11] Yet, the rules that appeared in these cases would have been understood by the common lawyers much earlier. In the 18th and early 19th centuries, agency relationships, though regulated by law, were rarely studied by lawyers or understood in isolation from the rules of contract. As William Paley wrote in the first English treatise on the law of principal and agent in 1812, it "appears at first view to be founded upon principles so few and simple, and in general so easy of application, that a treatise upon such a subject may seem altogether superfluous."[12] Principles of agency were fundamental in many cases within contract and commercial law. Authors such as Ross and Pothier, who wrote about obligations and the sale of goods, found agency to be an indispensable component.[13]

Traditionally, some have posited that commercial law, as such, did not exist in the early modern period, and that the mercantile community developed its own separate system of customary rules and regulations that came to be known as the *lex mercatoria*.[14] This view has not persisted without challenge. Kadens, for example, argues that early legal developments were important and a key driver in informing or regulating commercial practices.[15] During Lord Mansfield's 32 years as Chief Justice in the King's Bench (1756–88) the understanding of commercial law changed substantially.[16] Commercial rules and practices, once thought to be external to English law and understood by merchants only, became firmly embedded within the common law tradition.[17] English commercial law thus

10. James Oldham, *Law-Making at* Nisi Prius *in the Early 1800s*, 25 J. LEGAL HIST. 221, 223–27 (2004).

11. Ireland v. Livingston (1872) 5 HL 395 (Eng.); Watteau v. Fenwick [1893] 1 QB 346 (Eng.).

12. WILLIAM PALEY, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT: CHIEFLY WITH REFERENCE TO MERCANTILE TRANSACTIONS v (London, 1812).

13. *See* GEORGE ROSS, A TREATISE ON THE LAW OF VENDORS AND PURCHASERS OF PERSONAL PROPERTY: CONSIDERED CHIEFLY WITH A VIEW TO MERCANTILE TRANSACTIONS 115–31 (1811); 1 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS 45–50 (William David Evans trans., 1st ed. 1806) (discussing the centrality of principles of agency to commercial law).

14. *See* Celia Wasserstein Fassberg, *Lex Mercatoria—Hoist with Its Own Petard?*, 5 CHIC. J. INT'L L. 67 (2004); J. H. Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 BERKELEY J. INT'L L. 129 (2006); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOB. LEGAL STUD. 447 (2007) (for more on its historical and modern equivalents).

15. *See* Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1153 (2011) (arguing that the most widespread aspects of commercial law stem from early contract law and statute rather than the *lex mercatoria* or custom).

16. Mansfield endeavored to reform areas of English commercial law that lagged behind other nations, most notably the laws of negotiable instruments, trade, and copyright. *See* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 152–64, 177–89, 190–205 (Thomas A. Green et al. eds., 2005) (chapters 6, 8, 9).

17. Indeed, much scholarly attention has been paid to Mansfield's judgments and this formative phase in the development of modern English commercial law. In Livermore's treatise, he gave a fitting tribute to Lord

became more aligned with the customs of international commerce. As Lord Mansfield claimed soon after becoming Chief Justice, mercantile law was "the same all over the World."[18]

Lord Mansfield was instrumental in this evolution because of his understanding of the commercial world (as, for example, an active investor in real estate mortgages) and his longevity in office.[19] Even so, in the process of internalizing and importing commercial practices, few judges in the common law courts, after Lord Mansfield, had significant business acumen. Lord Ellenborough was an exception but most judges felt the need for expert guidance when it came to commercial rules and custom. The use of arbitrators in lieu of judges is perhaps the best-known example, which shows how judges outsourced this problem. Arbitrators were often called upon to resolve disputes because of their experience in directly relevant trades or occupations.[20] Some contracts even specified that decisions would be taken to a particular arbitrator rather than a court of law. This was especially evident in disputes between or among partners.[21] Some judges pushed back and asked investors to manage their own conflicts without recourse to the law.[22] Moreover, when in the courtroom, judges drew upon the expertise of merchants as special jurors in order to understand the rules arising out of commercial honor, trade, and custom.[23]

III. WHO COULD BECOME AN AGENT

The fusion of legal rules and commercial practices did not preclude discrepancies between the two worlds. Some differences in terminology remained, as with the concept of agency. For example, it has long been accepted within managerial and economic theory literature that the term "agent" could include both those working for the business as independent contractors, and persons who were part of the firm—and this remains true

Mansfield, who, he said, "laid the foundation of that fabrick of commercial jurisprudence, which his own subsequent labours, and those of succeeding judges treading in his paths, have since raised to such an amazing height. Lord Mansfield has been truly called the founder of the commercial law of *England*, which before his time could scarcely be said to form a part of the common law; as it existed only in the memory of merchants and depended more upon usage than upon principle." SAMUEL LIVERMORE, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT; AND OF SALES BY AUCTION, AUCTIONEERS, AND BROKERS vi (1st ed. 1811).

18. Pelly v. Royal Exch. Assurance Co. (1757) 97 Eng. Rep. 342, 346; 1 Burr. 341, 347.

19. *See* James Oldham, *Murray, William, First Earl of Mansfield*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Oct. 4, 2008), http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-19655.

20. Henry Horwitz & James Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century*, 36 HIST. J. 137 (1993). For a tabulation of over 25 examples of late 18th century cases sent by the Court of the King's Bench to arbitrators to take advantage of their expertise, see James Oldham, *The Historically Shifting Sands of Reasons to Arbitrate*, 2016 J. DISP. RESOL. 41 (2016).

21. WILLIAM WATSON, A TREATISE OF THE LAW OF PARTNERSHIP 402 (1st ed. 1794). *See also* Christian R. Burset, *Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire*, 34 LAW & HIST. REV. 615, 622 n.43 (2016) (mentioning "[c]ommon law courts also struggled with suits between partners").

22. Victoria Barnes & James Oldham, Carlen v Drury *(1812): The Origins of the Internal Management Debate in Corporate Law*, 38 J. LEGAL HIST. 1 (2017); Victoria Barnes, *Judicial Intervention in Early Corporate Governance Disputes: Vice-Chancellor Shadwell's Lost Judgment in* Mozley v Alston *(1847)*, 58 AM. J. LEGAL HIST. 394 (2018).

23. OLDHAM, *supra* note 16, at 20–27.

today.[24] For most lawyers, however, this term has a much narrower definition—generally an agent held an external role and operated outside of the business. Munday provides a recent critical discussion of the overbreadth of the word "agent" in commerce.[25] He shows that agents from within the firm who act on behalf of the principal to engage third parties, such as an employee or even a manager, would fall under the remit of employment law, or the law of master and servant, as it was known up until the 20th century.[26]

Before the mid-19th century, limited liability in Great Britain was only available to those companies possessing a government-issued charter.[27] Thus, the question of who bore personal responsibility for unpaid debts was of great interest and particular consequence to merchants—especially as business failure was a typical experience.[28] Gerard Malynes, the "first English author to treat the Law Merchant as an entity in itself,"[29] wrote that an agent "is bound to answer the loss which happeneth by overpassing or exceeding his Commission: whereas a Servant is not, but may incurre his Master's displeasure."[30] So, while an employee's mistake would be akin to his master's mistake, agents, Malynes said, "beareath the hazard of their actions" and were themselves liable for unauthorized transactions.[31] If not an employee, then, the other common "internal" position was that of a partner or owner, and would ordinarily be regulated by the laws of partnership, and later corporate law, rather than that of agency.[32]

Nevertheless, while these relationships were governed by different branches of law, it was accepted that an agent, a servant, and a partner carried out similar functions, so the three areas of law overlapped. This point was evident in Paley's treatise when he explained the rules by using a number of cases involving masters and servants as opposed to agents and principals.[33] The obvious parallel that existed between the law of partnerships and the law of agency was that partners, like agents, factors and brokers, could bind others, and

24. For examples of the way agency relationships have been conceived in economics, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

25. RODERICK MUNDAY, AGENCY: LAW AND PRINCIPLES 1–5 (2010).

26. *Id.*; *see also* SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT, AND LEGAL EVOLUTION (1st ed. 2005) (discussing agents in terms of employment law).

27. *See* Michael Lobban, *Corporate Identity and Limited Liability in France and England 1825–67*, 25 ANGLO-AM. L. REV. 397, 400 (1996) (discussing England's history with corporate legal identities).

28. *See* JULIAN HOPPIT, RISK AND FAILURE IN ENGLISH BUSINESS 1700–1800 (2002) (discussing the Industrial Revolution and bankruptcy).

29. BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 349 (A. W. Brian Simpson ed., 1984).

30. 1 GERARD MALYNES, CONSUETUDO, VEL, LEX MERCATORIA: OR, THE ANCIENT LAW-MERCHANT, IN THREE PARTS, ACCORDING TO THE ESSENTIALS OF TRAFFICK NECESSARY FOR STATESMEN, JUDGES, MAGISTRATES, TEMPORAL AND CIVIL LAWYERS, MINT-MEN, MERCHANTS, MARINERS, AND ALL OTHERS NEGOTIATING IN ANY PARTS OF THE WORLD 81–82 (1685).

31. *Id.*

32. This is not to say a partner could not also hold a role as an agent or an intermediary. He or she could, for example, own another business and transact on behalf of both. While this might result in a conflict of interest, such examples were prevalent in the small commercial communities of the 19th century. *See* Lucy Newton, *Regional Bank-Industry Relations During the Mid-Nineteenth Century: Links Between Bankers and Manufacturing in Sheffield, c.1850 to c.1885*, 38 BUS. HIST. 64 (1996).

33. The contrast was most apparent in Paley's discussion of instances where the servant had absconded with his master's money. PALEY, *supra* note 12, at 118–21.

would also be personally subject to unlimited liability.[34]

Even within the concentrated definition of agents as intermediaries who transacted business between principals and third parties, further distinctions applied. In law, agents could be either brokers or factors.[35] A share broker was a good example of the former, as he would not carry stock personally but would merely link A to B.[36] A cotton factor, on the other hand, would not only provide a supply of goods but also would ordinarily arrange transportation and would carry out other responsibilities in bailment and warehousing or storing the goods. The chief difference was that brokers would complete the transaction as liaisons between seller and buyer, whereas factors had a larger role in the sense that they often had ongoing or additional contractual obligations.[37] In this environment, where the custom and rules of merchants and traders were highly influential and determined the legal rules, it is difficult to see a clear conceptualization of apparent authority as an application of purely legal doctrine that was governed by equitable estoppel.

IV. SOURCES OF AN AGENT'S POWER AND AUTHORITY

While merchants devised their own terms to govern and regulate practices, the courts did so as well. An agent's authority could be either express or implied. Express authority was both written and oral, whereas implied authority arose through conduct or custom. One approach used by the courts to draw the line between implied and express agency was to differentiate general agents from special agents. The difference between a special and general agent was addressed in *Fenn v. Harrison* in 1790 by Justice Buller's succinct definition. There, he commented:

> [T]here is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent, constituted so for a particular purpose and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority; for that would be to say that one man may bind another against his consent.[38]

The powers of a general agent were, therefore, quite broad and could bind the principal even beyond express instructions. The division between the two types of express and implied authority came not from what the third party or any reasonable person expected but, rather, what the principal had consented to (or not). The express intentions and

34. For descriptions, see BENNETT, *supra* note 2; *See generally* STEPHEN M. BAINBRIDGE, AGENCY, PARTNERSHIPS & LLCS 134–35 (2d ed. 2014) (explaining how "every partner is an agent").

35. Stockjobbers, on the other hand, held a slightly different role from share brokers. As Gisborne said, they "have a capital in the funds, which they retail to purchasers as opportunities offer' and 'watch the turn of the market that they may re-invest the money to advantage." THOMAS GISBORNE, AN ENQUIRY INTO THE DUTIES OF MEN IN THE HIGHER AND MIDDLE CLASSES OF SOCIETY IN GREAT BRITAIN: RESULTING FROM THEIR RESPECTIVE STATIONS, PROFESSIONS, AND EMPLOYMENTS 373 (London, 1800).

36. The number of share brokers grew rapidly in England in the first half of the 19th century. *See* WILLIAM A. THOMAS, PROVINCIAL STOCK EXCHANGE 80–81 (1973) (explaining the role of contracts in each transaction); R. C. MICHIE, MONEY, MANIA AND MARKETS: INVESTMENT, COMPANY FORMATION AND THE STOCK EXCHANGE IN NINETEENTH-CENTURY SCOTLAND (1981).

37. For a description of further distinctions, see JOHN A. RUSSELL, A TREATISE ON THE LAWS RELATING TO FACTORS AND BROKERS 15–18 (1844).

38. Fenn v. Harrison (1790) 100 Eng. Rep. 842; 3 T.R. 757.

evidence of instructions were paramount in proving authority.

Justice Buller's definition, while clear, was not always followed. For instance, he thought a principal who resided abroad should always have a general agent, but this advice was largely ignored.[39] According to Foss, Buller "was not a popular judge," but "was considered arrogant in his assumption of superiority."[40] Despite Mansfield's support, Buller was passed over for promotion, and Sir Lloyd Kenyon became Chief Justice in 1788. Buller nevertheless gave strong patronage to Edward Law, who became Kenyon's successor as Chief Justice in 1802, ennobled as Lord Ellenborough. As is later shown, Lord Ellenborough also departed from Buller's thinking and would play an instrumental part in establishing the apparent authority doctrine.

Judges naturally looked to the instructions given by the principal as the best evidence of the principal's intentions. In *Caldwell v. Ball*, Thomas Pepper Thompson produced sugar on a plantation in Jamaica, which was then sold by his agent, Fairbrother, in Liverpool.[41] While Fairbrother had been Thompson's general agent, the court found that this arrangement ceased when Dorothy Thompson (Thomas Pepper Thompson's sister) and Thomas Bromfield (their attorney) assumed power of attorney over Thomas Pepper Thompson's affairs. Dorothy Thompson and Bromfield gave instructions through letters, which were produced in court. These were found to limit Fairbrother's ability to dispose of the goods, thereby rendering him a special agent.[42]

Thus, the intentions of the parties, as reflected in written or express instructions, could set clear limits on authority by establishing restrictions, and this was tantamount to the appointment of a special agent. A good example, almost a primer on agency law, is the 1794 case of *East India Company v. Hensley*. This case was included in the reports written by Espinasse—reports that were not known for their accuracy. Lord Denman, in *Small v. Nairne*, explained that Espinasse's description of cases "were never quoted without doubt and hesitation; and a special reason was often given as an apology for citing that particular case."[43] The detail that Espinasse gave in his account of *East India Company v. Hensley* was scant, but it was clear enough to reveal a general set of legal principles. In the case, the principal gave an express instruction that his agent should buy Bengal raw silk.[44] The instruction created a special agency with expressly limited power, according to Lord Kenyon. As the agent had purchased silk that was not of the quality or type specified, Kenyon ruled the principal was not bound by the contract formed with the third party.[45]

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39. *See* Caldwell v. Ball (1786) 99 Eng. Rep. 1053, 1059; 1 T.R. 205, 215; E. India Co. v. Hensley (1794) 170 Eng. Rep. 296, 296–97; 1 Esp. 112, 112 (rejecting this view).

40. EDWARD FOSS, 8 THE JUDGES OF ENGLAND; WITH SKETCHES OF THEIR LIVES, AND MISCELLANEOUS NOTICES CONNECTED WITH THE COURTS AT WESTMINSTER, FROM THE PRESENT TIME 254–55 (1864).

41. *Caldwell*, 99 Eng. Rep. at 1055; 1 T.R. at 211; Thomas Pepper Thompson's great granddaughter was the poet and essayist Alice Meynell. The biography for Meynell at Oxford Dictionary of National Biography noted Thomas Pepper Thompson's business in Jamaica was highly profitable as his family gained considerable wealth from his sugar plantations. *See* June Badeni, *Meynell [née Thompson], Alice Christiana Gertrude (1847–1922)*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2d ed. 2004), http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-35008.

42. *Caldwell*, 99 Eng. Rep. at 1055; 1 T.R. at 212.

43. Small v. Nairne (1849) 116 Eng. Rep. 1484, 1486; 13 QB 840, 844.

44. This was one of the staple exports from the region since a century or so earlier. OMAR PRAKASH CHOUHAN, THE DUTCH EAST INDIA COMPANY AND THE ECONOMY OF BENGAL, 1630-1720 26–28 (1985).

45. E. India Co. v. Hensley (1794) 170 Eng. Rep. 296, 296–97; 1 Esp. 112, 112.

Aside from written correspondence, testimony about custom was also used by the courts to establish the nature of authority. In 1802, in *Hicks v. Hankin*, George Hankin, the father and principal, asked his son Joseph Hankin, the agent, to purchase malt on his behalf, and he wrote to him with a price.[46] This would ordinarily result in an agent with limited powers, but when questioned, the son was reported by Justice Heath to have said he "did not consider himself as bound by the direction . . . of his father; he considered himself at liberty to exceed that authority."[47] The son's belief was enough to give him—as the agent—the power to bind his father as the principal, even beyond the scope of his express instructions. Indeed, Justice Heath in his deliberations made a point to note the son's understanding of the agreement and of his powers. In looking to the parties themselves, Heath engaged with their thinking in a subjective way. Thus, the judges had not yet taken up the perspective of a third party or begun to use the objective reasonable person test. Custom was a way of understanding the nature of authority. It was also used in the case of *Egerton v. Teasdale*, heard in 1794, when experts from the mercantile world were called to establish ordinary commercial behavior.[48] The litigation was reported only in the newspaper, *The Times*.[49] Law reporting in England at the time was unofficial and intermittent, with long delays and some gaps that were never filled.[50] Legal treatises provided some supplementary case reports, and in addition to the printed cases, manuscript case notes were frequently compiled and copied.[51] The newspapers, however, filled many of the gaps for barristers eager for daily information about judicial decisions.[52]

The *Egerton* case, according to *The Times*, revolved around the question of whether Teasdale, a factor at the Royal Exchange, actually had the authority to sell to a third party several bags of Smyrna cotton that belonged to Egerton, the principal and a merchant in Turkey.[53] Egerton believed the agent had sold the cotton for "a very inadequate and unfair price."[54] His counsel argued that the agent needed to confirm the price with the principal in order to be granted authority.[55] Egerton supposed that the reason for the low price was that the agent sold the cotton to himself or a friend and sought to reclaim its true market value.[56]

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46. Despite this misunderstanding between father and son, the son eventually took over the father's trade and the family was well-known in the brewing industry. *See* PETER MATHIAS, THE BREWING INDUSTRY IN ENGLAND, 1700-1830 444 (1959).

47. Hicks v. Hankin (1802) 170 Eng. Rep. 660, 661; 4 Esp. 114, 117.

48. Egerton v. Matthews (1805) 102 Eng. Rep. 1304; 6 East 307.

49. THE TIMES, Jan. 3, 1794.

50. For a full discussion of case reporting practices in England, see 128 SELDEN SOCIETY, CASE NOTES OF SIR SOULDEN LAWRENCE, 1787-1800 xiv–xxxix (James Oldman ed., 2013).

51. *Id.*

52. *See* James Oldham, *The Law of Negligence as Reported in The Times, 1785–1820*, 36 LAW HIST. REV. 383, 383–419 (2018).

53. Egerton was litigious and he initiated other law suits which related to transactions in his cotton business. *See, e.g.*, Egerton v. Matthews (1805) 102 Eng. Rep. 1304; 6 East 307. This case revolved around a question about the writing of the contract and the application of the Statute of Frauds.

54. THE TIMES, *supra* note 49.

55. *Id.*

56. During the trial, various merchants explained the low price was a result of a downturn in the market. Within the cotton market, Smyrna cotton was one of the inferior types. One Glasgow merchant said it was quite "pleasing [to] the eye" but it was not strong enough to be processed by a machine as had become custom in some manufacturing firms. *See* GIORGIO RIELLO, COTTON: THE FABRIC THAT MADE THE MODERN WORLD 260 (2013)

The trial was heard by Lord Kenyon and a special jury of merchants, who supplied advice about commercial practice between agent and principal, the transaction between the agent and a third party, and prices in the market. The first witness was Thomas Allingham,[57] a cotton broker, who would, he said, "never [have] sold any cottons without applying to his principal for his consent, unless there was a special contract to sell within a certain time."[58] According to the rest of Allingham's testimony, Teasdale was free to negotiate without needing consent from his principal. Allingham confirmed his method was not "universal custom in the trade" and that he knew of none that existed, but the special jury of merchants nevertheless found in Teasdale's favor.[59] Lord Kenyon applauded this decision as "a very proper verdict."[60] Written correspondence and express instruction were key to understanding the intentions of the principal and the limits of an agent's power up until around 1802. When the courts did not have written instructions or an understanding of what the parties themselves intended, custom could show whether an agent had actual authority.

V. IMPLIED AUTHORITY

When Ellenborough became Chief Justice in 1802, he began to favor a third-party perspective—to examine how actions would be understood in their ordinary commercial context. In doctrinal terms, he emphasized the notion of implied authority and put less value on express authority. Ellenborough saw a "distinction between a particular and a general authority," explaining that the latter "does not import an unqualified authority, but that which is derived from a multitude of instances; whereas the former is confined to an individual instance."[61]

Despite the close relationship between Buller and Ellenborough, this shift in emphasis was a clear move away from the views given several decades earlier by Buller and his peer group. Buller and others supposed the principal's intentions and the nature of the instructions were of critical importance—whether with circumscribed or unlimited power. Ellenborough, however, thought the manner in which rules were applied should be based upon a contextualized understanding of the course of dealing between the two parties. He began to place himself in the shoes of a third party in order to interpret how the conduct and intention of the principal and agent would have been understood. Indeed, by *Pickering v. Busk*, in 1812,[62] Ellenborough had become increasingly ready to find implied authority,

(alteration in original); ALFRED P. WADSWORTH & JULIA DE LACY MANN, THE COTTON TRADE AND INDUSTRIAL LANCASHIRE, 1600-1780 191 (1931).

57. Although *The Times* recorded his name as "Alingham," those within the local cotton market wrote his name as "Allingham." THE TIMES, *supra* note 49. We have adopted this spelling as the more common version of his name. See the records of the Strutts, cotton buyers, as discussed in R. S. FITTON & ALFRED P. WADSWORTH, THE STRUTTS AND THE ARKWRIGHTS, 1758-1830: A STUDY OF THE EARLY FACTORY SYSTEM 272 (1958). The records suggested that Allingham was seldom used as a factor and not one of the most prolific of traders in the region.

58. THE TIMES, *supra* note 49.

59. *Id.*

60. *Id.* The report gave no information on the reasons behind the jury's decision.

61. Whitehead v. Tuckett (1812) 104 Eng. Rep. 896, 899; 15 East 400, 408.

62. This case was also reported in *The Times* although very few differences existed between the two reports. THE TIMES, Nov. 12, 1811 and Jan. 29, 1812.

and he lowered the threshold needed to establish it. He stated that "[i]f the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale."[63] Following Ellenborough's term in office, written correspondence between principal and agent ceased to be the preferred method to define the agent's authority. Discerning the intentions of the parties was no longer the central task.

A practical reality for factors, brokers, and principals was the national or international scale of trade. This made it difficult to achieve clear or concise communication about a contract or commodity. International correspondence arrived slowly and this would not change until new methods of communication were established in the late 19th century.[64] There were, nevertheless, protective steps that could be taken to reasonably secure the principal's position. In 1773, Beawes advised:

> a Trader should not be drawn in to employ a Factor, with whose Character he is unacquainted . . . . His first Case, therefore, should be the Choice of such a Correspondent as he can depend on, whose Integrity will naturally lead him assiduously to solicit and promote the Interest of his Principal, unbiassed [sic] by any sinister Views of his own.[65]

Beawes considered that expenses associated with careful vetting were a far better investment than legal fees, lengthy contracts, and litigation. He suggested information gathering and due diligence were needed to establish who would be a trustworthy agent. Some merchants controlled and reduced transaction costs by working only with agents who were also trusted family members or those within kinship groups.[66] Others, however, did not have the advantage of such a family network or international family tree.

While Ellenborough emphasized the importance of examining the commercial context, he was still prepared to interpret the correspondence and written terms of the contract, but he exercised considerable caution in doing so. In *Whitehead v. Tuckett*, in 1812, he concluded written instructions were valueless in terms of giving an agent power or creating a binding agreement. He said Sill and Co., the Liverpool brokerage company, "were general agents," because "they bought and sold [sugar] in a multitude of instances in their own names, paid and received the money in their own names, and blended their accounts of receipts and payments, without carrying each order to a separate account with the defendant."[67] There was considerable correspondence between Sill and Co. and Tuckett, the principal and defendant, a wholesale grocer in Bristol, but:

> If these expressions are to be construed into so many restrictions of the power of the brokers, it will follow that they were not only limited as to price, but also as

63. Pickering v. Busk (1812) 104 Eng. Rep. 758, 760; 15 East 38, 43.

64. For more on the developments within the postal services (including the use of the telegraph) and its impact on business communication, see WILLIAM ASHWORTH, AN ECONOMIC HISTORY OF ENGLAND, 1870-1939 109–38 (1960).

65. WYNDHAM BEAWES, LEX MERCATORIA REDIVIVA: OR, THE MERCHANT'S DIRECTORY 27 (Dublin, Printed for James Williams, 6th ed. 1773). *See infra* note 75 and accompanying text.

66. *See generally* Naomi R. Lamoreaux, *Banks, Kinship, and Economic Development: The New England Case*, 46 J. ECON. HIST. 647 (1986); Lucy Newton, *The Birth of Joint-Stock Banking: England and New England Compared*, 84 BUS. HIST. REV. 27 (2010); Janette Rutterford et al., *Individual Investors and Local Bias in the UK, 1870–1935*, 70 ECON. HIST. REV. 1291 (2017).

67. Whitehead v. Tuckett (1812) 104 Eng. Rep. 896, 899; 15 East 400, 408.

> to the terms of sale, which according to the latter were to be the best, and as to the purchasers who were to be safe men: and if in either of these respects the contract made by them should fail, their principal would have a right to reject it.[68]

The contract was, therefore, binding and the principal was liable for the cost of the goods despite the express instructions from the principal, which, if interpreted strictly, would mean the agent did not have the authority to make a binding agreement. Express instructions, thus, had less power in establishing types of agents and their authority. The decision clearly took its toll, as Tuckett's family firm was dissolved only a year later.[69]

Why did Ellenborough move away from a strict and literal interpretation of letters? Ellenborough explained that such communications "must not be taken as limitations of their power"; otherwise, "in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principal."[70] Ellenborough preferred to look at the case objectively from the vantage point of a bystander in order to place the third party in a more secure position. As a result, the subject matter and substance of the agreement between principal and agent became less important, and the agent's conduct and context of the transaction became central in the undertaking of judicial analysis. This meant an agent's authority could be established more easily as the concept became looser.

In light of this change in the fiber of the common law, new instructions were given to merchants, agents, and those likely to engage factors or brokers. The *Cyclopædia of Commerce* was an early 19th century legal encyclopedia that compared existing mercantile guides and exposed the law of principal and agent.[71] Samuel Clarke provided the business expertise, and John Williams, a barrister, gave the legal viewpoint.[72] Williams had also written a reference book for merchants a few years earlier.[73] Large portions of this text appeared in the encyclopedia written with Clarke. Together, Clarke and Williams offered a blended view of the customs and legal rules that regulated the commercial world. The description of agency provided that agency agreements could be created in several ways. It said the rival and perhaps better-known mercantile publication, Wyndham Beawes's *Lex Mercatoria*,[74] claimed such agreements must be made by deed.[75] Clarke and Williams, in

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68. *Id.* at 899, 408–09.

69. LONDON GAZETTE, Feb. 2, 1813, at 255, http://www.thegazette.co.uk/London/issue/16700/page/255/data.htm.

70. Whitehead, 104 Eng. Rep. at 899; 15 East at 409.

71. SAMUEL CLARKE & JOHN WILLIAMS, THE CYCLOPÆDIA OF COMMERCE; COMPRISING A CODE OF COMMERCIAL LAW, PRACTICE, CUSTOMS, & INFORMATION (1819).

72. *Id.* at i.

73. *See* JOHN WILLIAMS, THE LAWS OF TRADE AND COMMERCE, DESIGNED AS A BOOK OF REFERENCE, IN MERCANTILE TRANSACTIONS (1812).

74. This publication was not a directory in the traditional sense of the term; it did not provide a list of those involved in trade or commerce. It served more as an encyclopedia and explained terms or customs.

75. CLARKE & WILLIAMS, *supra* note 71, at cccxlviii. Beawes gave a slightly different and nuanced set of instructions, as he stated "[a]n authority may in some cases be implied and inferred from prior conduct of the principal; and therefore, if a person has upon a former occasion, in the principal's absence usually accepted bills for him, and the latter on his return approved thereof, he would be bound in a similar situation on a second absence from home." 1 WYNDHAM BEAWES & JOSEPH CHITTY, LEX MERCATORIA: OR A COMPLETE CODE OF COMMERCIAL LAW, BEING A GENERAL GUIDE TO ALL MEN IN BUSINESS, WHETHER AS TRADERS, REMITTERS,

their encyclopedia, rejected this advice and Beawes's assertion that a deed was necessary and reminded their readers this was "by no means the case."[76] The conflicting guidance, and debate between Beawes, on one hand, and Clarke and Williams, on the other, was settled easily. Others, like Paley and Chitty, sided with Clarke and Williams and confirmed their observations that authority did not have to be given expressly.[77]

With the emphasis on conduct over written instructions, agency law took on a new force of its own. In order to determine the nature of an agency relationship, the extent of an agent's power, and his authority to bind his principal, judges did not need to insist upon reading reams of correspondence or interpreting a written contract between principal and agent literally. Instead, the rules looked toward the agent's behavior with third parties and what might be implied thereby.

VI. RECOGNITION OF APPARENT AUTHORITY

The movement towards a more contextualized understanding of authority removed the barriers that had previously limited an agent's power. It significantly altered the existing approach in contract law, where strict interpretation of correspondence persisted as the dominant style of judicial examination.[78] Lord Ellenborough's role in this transition gained momentum as he offered a forceful explanation for his new rules. In *Pickering v. Busk*, a merchant, who was based in Hull, purchased a parcel of hemp and had it transferred into Swallow's name—the agent and wharfinger. The goods were held in one of Swallow's warehouses in London. The transfer of title into Swallow's name (rather than that of the principal) was deemed sufficient to give the agent authority to sell the goods.[79] Ellenborough, in his leading judgment, explained:

> It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not.[80]

OWNERS, FREIGHTERS, CAPTAINS, INSURERS, BROKERS, FACTORS, SUPERCARGOES, OR AGENTS 51–52 (6th ed. 1813).

76. CLARKE & WILLIAMS, *supra* note 71, at cccxlviii.

77. PALEY, *supra* note 12, at 118; JOSEPH CHITTY, A PRACTICAL TREATISE ON BILLS OF EXCHANGE, CHECKS ON BANKERS, PROMISSORY NOTES, BANKERS' CASH NOTES, AND BANK NOTES 31 (5th ed. 1818).

78. *See* Cutter v. Powell (1795) 101 Eng. Rep. 573; 6 T.R. 320.

79. Pickering v. Busk (1812) 104 Eng. Rep. 758, 759; 15 East 38, 40. The action arose as Swallow then sold it to Hayward and Co., another agent working on behalf of another principal, Blackburn and Co. Hayward and Co., the third party, later became bankrupt. *Id.* at 758–59, 38. Pickering, the original purchaser, on learning of these circumstances then requested the shipment be returned and when it was not, he sued for trover. *Id.*

80. *Id.* at 760, 43.

Ellenborough thus gave voice to the term "apparent authority." He saw its value in protecting the third party who lacked knowledge of the agreement between principal and agent to sell or buy. This view ensured that the transaction was valid and binding. Ellenborough did not speak as an interested party, a consumer, or a businessman, but rather, as a respected judge who had spent a career in law and politics. Even before his appointment as Chief Justice, Ellenborough had gained a reputation at the bar as a formidable mercantile lawyer.[81] His reputation made these cases more significant. Ellenborough recognized that possession of the property was not enough to give authority but that when the agent was "exhibited to the world as the owner," as in *Pickering v. Busk*, the contract with the third party would be binding.[82]

Ellenborough's judgments were also the first that were thought to link clearly the idea of the objective bystander—the third party—to the scope of authority. He pushed the expression "apparent authority" and differentiated it from what he considered to be "real" or "actual" authority.[83] It was not until decades later that treatise writers looked back to Ellenborough's words and recognized their significance. In Joseph Story's 1839 treatise on the law of agency, *Pickering v. Busk* was the first case referenced to illustrate the difference between "real" and "apparent" authority.[84] Joseph Story, an American jurist and Supreme Court Justice, was a guiding academic light at Harvard Law School. His aim was, according to Newmyer, "to devise rules of business that were technically sufficient, organized systematically, administered uniformly and fairly, and known to businessmen."[85] In later editions of his *Commentaries on the Law of Agency*, Story included Ellenborough's judgments in their entirety to add clarity to his text.[86]

Ellenborough was by no means a pioneer in looking beyond the intentions of the parties. This view had been building within the judiciary, albeit as a minority position. Past judges, such as William Ashhurst, a judge on the Court of the King's Bench during Mansfield's and Kenyon's time, invoked the idea of public protection.[87] Moreover, agency issues had begun to be perceived as somewhat different from ordinary cases in contract law because they involved three parties, not two. Ashhurst emphasized the third party as an ordinary member of the public. He was thought to have been one of the more equitable judges in the common law courts, favoring a closer union between the rules of equity and

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81. *See* Michael Lobban, *Law*, *Edward, First Baron Ellenborough*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Sept. 23, 2004), http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-16142?mediaType=Article.

82. Pickering, 104 Eng. Rep. at 760; 15 East at 41.

83. *Id.*

84. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY: AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW 85 (1st ed. 1839).

85. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 120 (1985); *see generally* GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1971).

86. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW 89–91 n.3 (2d ed. 1844).

87. *See infra* note 89 and 90.

common law.[88] In *Fenn v. Harrison*, Ashhurst was reported to have said:

> [W]here I take the distinction to be, that, if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant.[89]

With Ashhurst's insistence that the "public" were at risk, he looked toward those in society at large—not experienced merchants or those with information or knowledge of the parties.[90] He aimed to safeguard those individuals with reasonable or natural expectations who might be disadvantaged by their external position, instead of those inside the network. Ashhurst shared Ellenborough's desire to protect "strangers," as unknown or distant parties beyond the periphery of the group. Both justices endorsed doctrines and rules to assist the ordinary citizen, who could not be thought of as a mercantile insider, or as having specialist knowledge of the commercial relationship between principal and agent.

Ashhurst's words were also well reported in the English versions of Pothier's *Treatise on the Laws of Obligations*.[91] Pothier's work became a leading text and had a significant impact on the shape and form of offer, acceptance, frustration, and damages in contract law.[92] In his analysis, Pothier explained that transactions must be upheld when the third party "contracted conformably to his apparent authority; otherwise no one could be safe in contracting with the agent of an absent person."[93] Pothier's treatise, in particular this section, was heavily used in Anglo-American works—most notably in Livermore's description of apparent authority.[94] Although Lord Ellenborough's views were not a dramatic departure from previous judicial thinking, it was Ellenborough's words, not Ashhurst's or even Pothier's, that were quoted by Joseph Story to explain the doctrines of real and apparent authority. Story's 1839 treatise on the law of agency, supported by his reputation as an educator and author, gave Ellenborough's apparent authority doctrine a firm purchase in American common law.

In England, Ellenborough's idea had already taken root after William Paley wrote the first English treatise on agency. Paley's first American edition was published in 1822 and updated by Niel Gow, an English barrister, well-known for his works on the law of partnership and his case reports.[95] Although listed as the second American edition, this was

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88. DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 131 (2002). Not all shared this view. Bentham was especially critical of Ashhurst in a manuscript published posthumously. JEREMY BENTHAM, TRUTH VERSUS ASHHURST; OR, LAW AS IT IS, CONTRASTED WITH WHAT IT IS SAID TO BE (1823).

89. Fenn v. Harrison (1791) 100 Eng. Rep. 842, 844–45; 3 T.R. 757, 760–61. Lord Kenyon and Justices Buller and Grose agreed, in separate opinions.

90. It is also difficult to see Ashhurst's example as a transaction within the mercantile community. His example discusses the sale of a single horse which has been kept in a livery stable, and the horse was likely to be ridden for pleasure rather than used in agriculture.

91. POTHIER, *supra* note 13.

92. Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267, 267 (2004); J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 352–53 (4th ed. 2002).

93. POTHIER, *supra* note 13, at 148.

94. LIVERMORE, *supra* note 17, at 35–43.

95. *See* WILLIAM PALEY & NIEL GOW, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT CHIEFLY WITH

the first edition to be published with American authorities and with an American market in mind.[96] Paley's treatise appeared to have an impact across the Atlantic on Story's thinking in particular. Before its publication, Story did not seem to think about agency as an independent or separate body of law. In the manuscript digest Story wrote between 1801 and 1815, he listed a number of legal concepts alphabetically and provided for each an explanation and case notes. No entry existed for either the term "agent" or the term "factor."[97] The rules of agency did not appear in the section on "merchants"; rather, the points he would later consider to be questions of agency were fitted under the heading "master and servant" and employment law more generally.[98] Paley's work, therefore, revolutionized Story's thinking. One advertisement for Paley's treatise recommended it simply due to its influence on Story. The advertisement pointed out that "Mr. Justice Story constantly refers to it in his Commentaries."[99] As Story saw the laws of England and America, respectively, as the "admirable parent and the advancing child,"[100] he was adept at following in the footsteps of English lawyers.

Paley derived his ideas from the cases of the day and paid close attention to Lord Ellenborough's opinions. He dedicated the first edition to Lord Ellenborough, as he did in other editions that followed immediately after.[101] Ellenborough's decisions were featured significantly in Paley's work, not only on their merits but also because the two men were close personal friends. Paley, a clergyman as well as a respected author and legal authority, enjoyed a strong relationship with Edmund Law, Bishop of Carlisle.[102] This friendship extended from Bishop Edmund Law to his son, Edward Law, who later became Lord Ellenborough.[103] Ellenborough even possessed a copy of Paley's portrait.[104] Given this personal connection between Paley and Edmund Law, it is natural to expect Paley would follow the career and the cases of a good friend's son so intently.

Ellenborough's prominence in Paley's prestigious text had the effect of promoting Ellenborough's decisions within Anglo-American legal thought. As Paley's and Story's texts soon became compulsory reading and part of the curriculum in American law schools, their explanations of complex doctrinal theory were passed down to succeeding generations

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REFERENCE TO MERCANTILE TRANSACTIONS (2d Am. ed. 1822).

96. *See* Alfred Conard, *What's Wrong with Agency?*, 1 J. LEGAL EDUC. 540 (1949).

97. *See generally* 1 JOSEPH STORY, DIGEST OF VARIOUS LAW WORKS (1801) (unpublished manuscript), https://iiif.lib.harvard.edu/manifests/view/drs:42906252$1i (on file with Harvard Law Library).

98. These were when a servant was personally answerable, the rights and duties of a servant and the authority and duties of a master. *See generally* 2 DIGEST OF VARIOUS LAW WORKS (Joseph Story ed., 1801).

99. The advertisement added that Paley's treatise was "universally recognized as the leading authority among all the text books on that subject, since its first appearance in 1811." THOMAS W. WATERMAN, A DIGEST OF THE REPORTED DECISIONS OF THE SUPERIOR COURT, AND OF THE SUPREME COURT OF ERRORS, OF THE STATE OF CONNECTICUT, FROM THE ORGANIZATION OF SAID COURTS TO THE PRESENT TIME 14 (1858).

100. Letter from Joseph Story to Justice Coleridge (May 30, 1840), *in* 2 LIFE AND LETTERS OF JOSEPH STORY: ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY 335 (William W. Story ed., 1851).

101. PALEY, *supra* note 12; PALEY & GOW, *supra* note 95.

102. *See* James E. Crimmins, *Paley, William, First Earl of Mansfield*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Sept. 23, 2004), https://doi.org/10.1093/ref:odnb/21155.

103. WILLIAM PALEY, THE WORKS OF WILLIAM PALEY . . . A NEW EDITION, WITH ILLUSTRATIVE NOTES AND A LIFE OF THE AUTHOR 8, 475 n.* (1838).

104. GEORGE WILSON MEADLEY, MEMOIRS OF WILLIAM PALEY, D. D. 225 n.* (2d ed. 1810).

of lawyers.[105] Ellenborough forged a new test based on objective reasoning that lowered the necessary evidentiary burden to show the agent acted with authority. While his aim was by no means new or out of step with others who sat on the bench, legal commentators, and the law students that followed them, credited the words of Ellenborough as those that first captured the doctrine of apparent authority.

VII. CONCLUSION

This article has argued that apparent authority should be understood as a doctrine that was first established as an independent and true form of authority. The transformation, which led to the emergence of apparent authority as we know it today, took place at the turn of the 19th century. Before this watershed moment, judicial focus was placed on the principal's intention, usually evidenced through written instruction and analyzed with subjective reasoning.

Minimal thought was given to how the agent's representations might be perceived by third parties or to how those who knew little of the relationship between agent and principal would have interpreted the agent's authority. Jurists, such as Ellenborough and Ashhurst, changed this when they pushed away from the subjective approach in favor of implementing a new method. Both judges looked to ascertain what any reasonable person or third party might know about the agent's authority from the agent's and principal's conduct. In doing so, they forged a reasonable person test and utilized objective reasoning before it appeared more generally in contract law. Ellenborough's words gave life to the principle of apparent authority, but its popularization is owed much to Joseph Story, his treatise on agency, and his great influence in the legal profession on both sides of the Atlantic.

105. Conard, *supra* note 96, at 540.