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Signatures by Procuration and Section 51 of the Bills of Exchange Act

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Signatures by Procuration and Section 51 of The Bills of Exchange Act[1]

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Modern commercial practices, reflecting an ever-increasing political, social, and economic tendency towards the delegation of duties, often occasion one person to sign a negotiable instrument on behalf of another. The authority to sign may or may not be given by written instructions or by formal power of attorney. Where the person signing indicates by the form of the signature that he is signing in pursuance of authority given him by a principal, the signature may be called a signature by procuration.

Section 51 of the Bills of Exchange Act provides that:

> A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority.

This section would appear to exclude the principle of ostensible or apparent authority, which is based on estoppel—namely, if a third party acts and changes his position as a result of relying on the appearance of the agent's authority created or permitted by the principal, the principal is estopped from denying the agent's authority.[2] Thus, where an agent signs for a principal there are two principles to be considered with regard to documents within the scope of the Bills of Exchange Act: 1. the principle of ostensible authority based on estoppel and not dependant on the actual delegated authority; 2. the principle contained in section 51 to the effect that the signature by procuration operates as notice to the third person, and the principal is bound only if the agent is within "the actual limits of the authority".

Let us examine the most common forms of signatures whereby an agent signs a negotiable instrument for a principal to see which types of signature come within section 51.

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1 R.S.C., 1952, c. 15.

2 For a discussion of the relation between apparent authority and estoppel and of the possibility that the two principles are to be distinguished, see Powell, *The Law of Agency*, (London, Pitman, 1952), at pp. 50-62; Wright, 1 Toronto L.J. 17, at p. 42; A.R.L.A., §159e.

When an agent (A) signs a document within the scope of the Bills of Exchange Act for a principal (P), the following represent the most common forms used:

(a) "P by procuration A"
(b) "P per pro A"
(c) "P by his attorney A"
(d) "P by his agent A"
(e) "A on behalf of P"
(f) "P per A"
(g) "P p.p. A"
(h) "P p. A"

Some of these eight forms might in practice be interchanged by a commercial agent, as, for example, (b) and (f). This might be done because the agent was signing very hastily, or simply because it would not ordinarily occur to an agent that different consequences might flow from the form of wording used. However, it was held in *Kreditbank Cassel v. Schenkers*[3] that the cases in which a third party is put on inquiry are cases:

> where the form of signature shows a special and limited authority, as 'per procuration' or under power of attorney, and excludes cases of a general authority, as 'A for B'.

A case suggesting that the law may be otherwise is *Smith v. M'Guire.*[4] In that case the defendant, when he went to live in London, left his brother M. in charge of his business at Limerick. The defendant's name remained over the door of the business establishment. For three years M. chartered ships and purchased quantities of oats on account of the defendant. In 1858 M. chartered a ship to carry a cargo, and he signed the charter-party "per procuration". The defendant lost an action brought against him for not loading a cargo pursuant to the charter-party. In an application for a new trial it was held that it was properly left to the jury at the trial to say whether the defendant had allowed M. to act as his general agent, and if so, the defendant was liable even though M. might have exceeded his authority. Pollock C.B., in the course of giving his decision, denied that there was a distinction between the two types of signatures; he said at page 560:

> I think it makes no difference whatever whether the agent acts as if he were the principal, or professes to act as agent, as by signing 'A.B., agent for C.D.' The expression 'per procuration' does not always necessarily mean that the act is done under procuration. All that it in reality means is this, 'I am an agent not having any authority of my own'.

It is rather difficult to accept this part of the judgment, which seems to indicate that the form of signature is not important. Dean Falconbridge in his book *Banking and Bills of Exchange*[5] suggests that

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[3] [1926] 2 K.B. 450 at p. 461 per Wright J.

[4] (1858), 3 H. and N. 554, 157 E.R. 589.

[5] 6th ed. (Toronto, Canada Law Book Company, 1956), at pp. 572-3.

the *Smith* case was decided on the basis of holding out, and therefore the portion of the judgment destroying the distinction between the two types of signature was unnecessary to the decision.

Another case dealing with the suggested distinction in types of signatures is *O'Reilly v. Richardson*[6] where Pigot C.B. said at page 80:

> Although it was argued strenuously before us that the acceptance by 'Thomas Popple, for Richardson and Son,' imported the same thing as an acceptance by 'procuration of Richardson and Son,' and must abide the same rule, yet no authority was cited in support of this alleged analogy; and the reason of the rule, as expounded in the authorities in which it has been applied, appears to me very plainly to negative any such analogy. The words 'by procuration' are construed as importing a reference to a special and limited authority. The words 'for Richardson and Son' refer to no special or limited authority; . . .

Counsel did refer to *Stagg v. Elliott*[7] which discusses the *Smith* case. In the argument in the *Stagg* case, Erle C.J. at page 377 offered little help by saying:

> *Smith v. M'Guire* is a very peculiar case.

The court in the *Stagg* case gave judgment against the third party because the signature was one by procuration. Keating J. specifically said he did not feel that *Smith v. M'Guire* was incorrectly decided.

Ulster Bank v. Synnott[8] is often cited when the two types of signatures are discussed. The question in that case involved a bill of lading endorsed by the agent "p. Black and Naschitz". Counsel argued that this form of endorsement was not the regular "per pro" endorsement, and was so irregular as to render the endorsement inoperative. The court suggested that a simple "p", "pro", or "for" expressed an authority generally, and "per pro" or "p.p." expressed an authority created by procuration or power of attorney. However, the real basis for the decision was that the endorsement was quite proper, and the bank had only the duty to see that the documents professed to answer the description contained in the instructions given to the bank; the bank need not inquire into the agent's authority. It had been contended that the bank was authorized to accept bills on receipt of bills of lading, and this meant that the bills of lading must be endorsed to the bank. If the bills of lading were endorsed by an agent, it was argued that the bank must inquire if he has authority. The question was whether there could be an endorsement by an agent, and it was unnecessary to discuss different types of endorsements by agents.

The case law would generally appear to indicate that the form of the signature is important, and different legal consequences can attach to different wordings. It might be argued that there is no basis for distinguishing between the treatment of different types of signatures, and that any of the eight examples mentioned earlier

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6 (1865), Ir. C.L.R. 74.
7 12 Com. B., N.S. 373.
8 (1871), 5 Ir. R. Eq. 595.

should be governed by the ordinary principles of ostensible authority. But the wording of section 51 appears to favour, from the principal's standpoint, certain types of signatures. This is the present state of the authorities on this problem. What is to be regretted is that nowhere is there a clear indication of exactly which forms of signatures come within section 51. The cases, at most, deal with two or three examples, and many of the common forms have never been commented on judicially. In order to remedy this situation, section 51 should be expanded to include a list of exactly which signatures are within it. Further, inasmuch as the question as to whether the authority has to be written in order to be within the section does not appear to have been dealt with, the new section 51 should specify the form of authority that will place a signature, signed in pursuance of that authority, within section 51. Naturally it would be impossible for the section to cover every eventuality, but the courts would at least have more to help them than is available now, and commercial agents and third parties dealing with agents would be able to use the section as a guide in their business transactions. This would result in the clarification of what is at present an unsettled field of commercial law.