POWERS OF POSITION IN THE SWEDISH LAW OF AGENCY

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INTRODUCTION

In civil-law countries there is a body of well-established rules concerning the authority of an agent and his power to bind a principal by his acts. These rules have developed without any influence from the corresponding rules of the common law. Only during the last decades have civil-law scholars begun to study the Anglo-American law of agency and to compare it with their own rules. They have found, on the one hand, a legal technique quite different from that to which they are accustomed, but, on the other hand, solutions that often resemble quite closely those of their own legal systems. We have here a fertile ground for studies in comparative law. The similarity in results is great enough to make the studies practically important, while the difference in method is sufficient to shed new light on old problems.

This paper does not aim at undertaking a complete comparison between the law of agency of the common law and the corresponding branch of law in Sweden, which for the present purpose may be considered a civil-law country.[1] The intention is more modest —to select from the vast field one small topic which has not yet been thoroughly discussed on a comparative basis.

In a modern American casebook on agency one can find, under the heading "Powers of Position", the following statement:

> "In the great flow of cases involving one person's power to bind another, there are few sharp lines between groups. Yet there are distinct distinguishable currents of thought. One of these currents is

[1] There are already a number of treatises of such a general kind. Important is the one by Müller-Freienfels, *Die Vertretung beim Rechtsgeschäft,* Tübingen 1955. This book is supplemented by several papers by the same author, viz. "Die 'Anomalie' der verdeckten Stellvertretung", *Zeitschrift für ausländisches und internationales Privatrecht* 17 (1952), pp. 578 ff., 18 (1953), pp. 12 ff.; "The undisclosed principal", *Modern Law Review* 16 (1953), pp. 299 ff.; "Comparative aspect of undisclosed agency", *ibid.* 18 (1955), pp. 33 ff.; "Law of agency", *The American Journal of Comparative Law* 6 (1957), pp. 165 ff. Among other important studies may here be mentioned Lévy-Ullman, "La contribution essentielle du droit anglais à la théorie générale de la représentation dans les actes juridiques", *Acta Academiae Universalis Iurisprudentiae Comparativae,* Vol. 1, Berlin, London & Paris 1928, and Würdinger, *Die Geschichte der Stellvertretung (agency) in England,* Marburg 1933.

> the idea that a person has certain powers because he or she is a wife, a partner, a president, or a boss—the idea that in such cases one need no longer to ask what was the reasonable appearance to outsiders. In some of the cases where this current appears, the analysis of the job is merely an analysis of business usage under another name. A man who is told to be a foreman is in effect instructed to do what a foreman generally does in that kind of business."[2]

This technique of uniting all situations where certain powers are conferred on a person because of his position is not in line with common-law tradition.[3] On the contrary, the custom there is to distinguish between several kinds of power which all may be due to holding such a position, viz. real authority (implied or incidental), apparent authority, authority by estoppel, and agency powers.[4] In civil-law countries, however, the institution "powers of position" is quite well known. Sec. 56 of the German Commercial Code deals with the powers of shop assistants, which include all acts usually required by a business of the kind in question. According to sec. 54 of the Code a similar power is conferred on a person who has a commercial authority as the head of a business without having a so-called *procura.*

The Uniform Scandinavian Contracts Act, of which the Swedish version was enacted in 1915, includes, in sec. 10, subsec. 2, an even more general provision on powers of position. It reads as follows:

> If a person, by virtue of being employed by another or otherwise by virtue of a contract with the other, holds a position from which, according to the law or usages, there follows an authority to act for the other, he shall be considered to have power to perform all acts falling within the scope of such authority.

This type of power was by no means unknown before the codification in 1915.[5] What was new was the idea of forming an ex-

[2] Conard, *Cases and Materials on the Law of Business Organization,* 2nd ed. Brooklyn 1957, p. 359.

[3] Some examples may be found, however, e.g. Hirschl, *Business Law,* Chicago 1911. The reason why this author was systematically untraditional may be that his book was meant as a guide for practitioners.

[4] As a fifth ground ratification is often mentioned, though this ground constitutes subsequent consent only, not prior consent. De Villiers & Macintosh, *The Law of Agency in South Africa,* Cape Town, Wynberg & Johannesburg 1956, pp. 213 and 219 ff., mention unjust enrichment as a further ground. The explanation of this standpoint, which might seem somewhat unfamiliar from a common-law point of view, is the Roman-Dutch influence on South African law.

[5] See, e. g., Trygger, *Om fullmakt såsom civilrättsligt institut,* Uppsala 1884, p. 150, the note from the previous page.

press provision on the matter, phrased in such a general and all-embracing way. The Scandinavian Contracts Act is said to have served as a model for the corresponding provisions in the draft Act on agency, made by the Rome Institute for the Unification of Private Law (UNIDROIT):[6]

> *Article 4.—Implied Authorization.* The authority of a person to act in the name of another may arise from some position which that person occupies with the consent of the other, and from which the power to act in the name of that other arises according to the law and usages applicable.
>
> *Article 8.—Scope of Authorization Implied from a Position.* In the case of authorization implied from a position, the agent shall be authorized to perform in the name of his principal all those acts normally implied by his position.
>
> If a person shall be entrusted by another with the management of a business, then by that fact he shall be authorized to perform all acts required by the normal running of the business.

The existence of such sweeping provisions on powers of position gives rise to various questions, some of which appear to the courts when they try to deepen the principle involved and adapt it to practical life. Will the courts get any guidance from such a provision? Will all situations of practical importance be covered? We may further ask: What is the legal character of powers of position as compared to other types of agency? Will the result differ very much from those obtained in a legal system of the common-law type, where no general doctrine on powers of position is recognized but the cases are divided into several groups, each one depending on the individual ground of authorization? It may be of interest to review some experiences of the Swedish provision just cited in order to present some informative facts about these problems. This is the task of the following lines.

I. THE BACKGROUND OF THE SWEDISH STATUTORY RULE CONCERNING POWERS OF POSITION

Before going into details it seems desirable to sketch briefly the background of the Swedish statutory rule concerning powers of position as compared to common-law rules on the same subject.

[6] *Avant-Projet—Preliminary Draft* (Unidroit. Et/XIX, Doc. 36), Rome 1955, p. 35.

The wide concept of agency in Anglo-American law has in fact no counterpart in Continental legal traditions.[7] Following these, Swedish law uses a narrow concept of authorization, meaning cases where the agent is acting "in the name of another" (Fr. *réprésentation,* Germ. *Vollmacht,* Sw. *fullmakt*). The cases where the agent "acts in his own name", without disclosing his principal, either in his own interest—as a business secret—or because the question who is really the contracting party is of no concern to the third party (Fr. *commission,* Germ. *Kommission,* Sw. *kommission*) or in the interest of his principal (Fr. *prête-nom,* Germ. *Strohmannschaft,* Sw. *bulvanskap*), fall outside the framework of this concept. All such civil-law phenomena are included in the common-law concept of agency, and this basic difference has been described as "one of the most important contrasts between the two legal systems that to the present time exist in the sphere of private law".[8]

In Swedish law, if the principal is undisclosed in the interest of the agent (Sw. *kommission*), the third party will never be entitled to sue the principal directly. In certain circumstances, however, the principal can sue the third party direct, according to the provisions in the Swedish Mercantile Agents Act, 1914, secs. 57 ff. Thus, the Swedish legal technique in such a case is to treat third-party relations as part of the special contractual situation (the *kommission*), a method which is certainly familiar to common-law lawyers. But if the agent acts "in the name of his principal", the whole situation is suddenly placed on quite another level. All third-party relations will then be governed by a special body of rules concerning authorization, and these rules are in principle meant to be independent of the contract between principal and agent (the mandate).

The typical or "classical" case of authorization in Swedish law is as follows. The principal has announced his intention to authorize by making out an instrument of authority, designed to be presented to third parties when forming contracts. The instrument then functions as a manifestation of the principal's intention to authorize the agent. The principal wants to be bound by the acts of the agent and has made a declaration to that effect beforehand. At the same time he has, in the text of the instrument, fixed the

[7] However, efforts have sometimes been made to copy the Anglo-American pattern. See for one example the French scholar Stark in *Le contrat de commission,* Paris 1949, pp. 154 ff. Cf. Hamel, *ibid.,* pp. 15 f.

[8] Müller-Freienfels in his previously (*supra,* not 1) cited paper in *The American Journal of Comparative Law* 6 (1957), pp. 165 ff., at p. 178.

limits of his willingness to be bound. Starting from this general position one can easily qualify as mere consequences of the contractual principle of private autonomy the effects that the principal is bound by the acts of the agent and that he is so bound only within the limits laid down in his declaration of intention as manifested by the document. Thus, with the aid of this declaration he has also the possibility of controlling the scope of authority.

As far as the scope of authority is concerned, the Swedish law of agency, as enacted in the Contracts Act, recognizes two main types of authority.

(1) The first is the type where the power of the agent is created by a manifestation of the principal's intention direct to third parties. The authority is then said to have an existence independently of the legal relations between principal and agent, "independent authority" (Sw. *självständig fullmakt*). The most typical example is where—as in the case just mentioned—the authority is created by a written instrument, such as a power of attorney, intended to be presented to third parties. The latter are allowed to rely on the outward appearance of the whole situation,[9] and instructions from the principal to the agent limiting his power will not diminish the agent's power in relation to a third party who is *bona fide* unaware of this secret instruction (is "in good faith").

(2) The second main type is the authorization directed to the agent only. The agent is supposed to inform third parties that he has been authorized by his principal. For all practical purposes such a kind of authorization is the other side of a mandate (*mandatum*) and can be called "mandate authority" (Sw. *uppdragsfullmakt*). Here the principle of appearance is no longer followed. The third party has to trust the words of the agent and is not protected in cases of "good faith" concerning the mandate.[1]

These are the only two types of authorization that, properly speaking, are recognized by the drafters of the Contracts Act. Consequently, the question is how powers of position are to be class-

[9] The principle of appearance will be further studied *infra*, III.

[1] The writer is quite aware that a fundamental difference like the one just described is unfamiliar to the English and American law of agency. The Swedish terminology *behörighet* (referring to Type No. 1) and *befogenhet* (referring to Type No. 2) as describing the limits of the agent's powers also lack equivalents. But the writer remembers hearing the distinguished American expert on agency, Professor Warren A. Seavey, in his course at the Harvard Law School in 1954 use the terms privileged and unprivileged power in a very similar sense as the Swedish *behörighet* and *befogenhet*.

ified. The answer can easily be found. Sec. 10, subsec. 2, was obviously intended by its drafters as a provision concerning "independent authority". The rule emanates from the idea that a third party "in the interest of business convenience" will be able to rely on the "mere appearance of the situation", the agent's holding of a position which "according to a widespread opinion gives power to make contracts or to undertake legal transactions of the kind in question".[2] The contracting party can thus be confident that the normal effects of authority will arise. The prerequisites have therefore been mainly constructed in such a manner that they shall be apparent to the third party. Owing to this the production of evidence by the latter for a possible lawsuit is also facilitated.[3] On the other hand it may not be necessary that the contracting party, when making the contract, shall actually know or observe the apparent position of the agent.[4] The determining factor, at least in principle, seems only to be the apparentness of the position, i.e. the contracting party must be able to see the position. A fact that may be compared to this is that a declaration of intention according to the Contracts Act is considered to have reached its addressee as soon as the latter is in a position immediately to acquaint himself with the declaration; it is not required that the party concerned shall also in fact have been acquainted with it.[5]

These facts may be sufficient as a background for the following investigation of the Swedish statutory rule on powers of position. We shall now study in detail the three prerequisites of this rule that are characteristic of it as compared with other cases of power in Swedish law, viz. "position", "by virtue of a contract", and "usages" (II–IV). After that, we shall try to grasp the general character of powers of position in Swedish law by comparing such power with similar means of binding a principal (V). Finally, the results of this investigation will be summarized.

[2] *Förslag till lag om avtal* etc., Stockholm 1914, pp. 73 f. This source is in what follows referred to as *Committee's Report*. Cf. Kallenberg, *Svensk civilprocessrätt*, Vol. 3, Lund 1922, pp. 67 f., and Hult, *Om kommissionärsavtalet*, Vol. 1, Stockholm 1936, pp. 66 f.

[3] This is a main argument used as to German law by Schlossmann, *Die Lehre von der Stellvertretung*, Vol. 2, Leipzig 1902, pp. 457 ff., 515 ff.

[4] Cf. Ussing, *Aftaler paa formuerettens omraade*, 3rd ed. Copenhagen 1950, p. 298.

[5] Cf. *Committee's Report*, p. 41.

II. THE "POSITION" PREREQUISITE AND ITS INTERPRETATION

Powers of position as a special type of power are in Swedish law mainly characterized by the fact that the authority is coupled with the occupation of a position. What exactly is meant by the term "position" in the text of the statute?

Undoubtedly, the starting point is that the holding of a position shall play the same role of an instrument of authority as has been described in the previous chapter. In the same way as the holding of such an instrument, the holding of a position appears as the outward and visible sign of an authority to act for the principal.

This is clearly shown by certain cases used as object lessons, namely that of a shop assistant standing behind the counter in a shop and that of a cashier sitting at the cashier's desk. The position is then quite apparent to onlookers and has a symbolic meaning, a signification which is easily apprehended by everyone. It is characteristic that such authorized persons typically perform their work in surroundings which suggest their authority to act for the principal.

The matter is less clear when an office manager or a workshop manager of a company is chosen as an example of an authorized agent. The intention is that their power of position is to be executed while they are fulfilling their respective functions. But a person who sells stationery to the company upon an order signed by the office manager as an agent for the buyer normally has no opportunity of seeing the office manager sitting in his room in the same way as the customer in a shop sees the shop assistant standing behind the counter. Here, the decisive fact is the position, not in the same sense as in the previous example but in a transferred sense, viz. the position which the agent holds in the organization, the managerial status to which he has been assigned by the principal—and as a symbol for it the professional title which he uses with the consent of his principal while performing the duties of his appointment.[6]

It might be said that one is still further removed from a case of position which is easily apprehended by people around when one

[6] The title is often mentioned as an indicator of the position held by the agent in question. See for instance *E. Lundin* v. *Aktiebolaget Kristallverken*, 1929 N. J. A. 244, and *Ingenjörsfirman Sandblom och Stohne* v. *Hermelins handelsaktiebolag*, 1954 N. J. A. note C 478.

deals with the example of a maidservant buying provisions for the household. Here one cannot even speak of a position as a link in an organization. The decisive fact will probably be "the position" in the meaning of "the employment". This position can—at least when the servant wears no uniform—be apparent to a third party only through the general behaviour of the servant and her employer.

However, there is no doubt that all the employees mentioned above satify the requirements as to a position within the meaning of the Uniform Scandinavian Contracts Act. It is more doubtful, however, how one should consider the following situation. An office employee, who is neither a member of the board of the employer's company nor an authorized signatory of the firm, has the task of receiving telephone calls and of negotiating with customers over the phone. The fact apprehensible by third parties, which would here primarily imply the position creating authority, is the position of the person in question as a telephone negotiator in the organization of the company, viz. the person to whom telephone customers are directed. However, it seems to be uncertain whether such a position will in itself be sufficient to satisfy the prerequisite of "position" within the meaning of the Contracts Act.

As far as is known there is no decisive case on this matter to be found among reported Swedish cases. The Stockholm Chamber of Commerce, however, made the following response to an inquiry concerning the authority of an assistant manager in the paper trade: "It has been stated in the case in question that X had, among other things, the task of receiving and handling incoming telephone business calls. In view of this fact it must be held that according to existing usages of the trade X was authorized to act for the Stockholm corporation in regard to telephone transactions falling within the scope of the normal business activities of that corporation."[7] It is quite obvious from the heading of this statement that it in fact refers to the legal institution powers of position. It might be that strong practical considerations of efficiency in the trade in question argue in favour of such a point of view, and no doubt a corresponding standpoint may be taken in regard to various other trades. However, against the solution it may be argued that the position of the person receiving telephone calls has little resemblance to the power created by an instrument of

[7] Statement of Feb. 9, 1950, published in *Handelsbruk*, Vol. 5, pp. 46 f.

authority, i. e. the situation which obviously the drafters have had in mind. To accept such a "diluted" concept of position, therefore, it may perhaps be necessary to require that the "dilution" be at least to some extent neutralized by some other circumstances in the concrete situation or type of situation in a way that will be more exactly described below. It is possible, particularly with regard to negotiations by telegraph, teleprinter or telephone, that special weight should be attached to the fact that the principal has good possibilities of controlling the actions of his employees, whereas the third party has little opportunity of ascertaining the authority of a person acting with the aid of telegraph, teleprinter or telephone (an investigation which would require a visit to the place where the principal is located). In these situations, therefore, the risk of the servants not being properly authorized might very well be the principal's.

Apart from positions with a clearly symbolic character (the shop assistant behind the counter) in the examples mentioned hitherto, the acting person's relationship to the organization of a company or his employment has been considered as creating a position within the true meaning of the Contracts Act. It may be asked whether it is possible also to accept as creating a position other facts indicating the agent's status. Suggestions in this direction can be found in legal literature. It has been stated by a Finnish writer, dealing with the applicability of sec. 10, subsec. 2, of the Contracts Act to (certain kinds of) insurance agents, that the policy holder is within certain limits entitled to rely on "the apparent position of the agent, as this position is revealed by office signs, printed texts on letters, information in telephone directories and lists of addresses, etc."[8] Thus it would be possible for the agent himself (of course only with the consent of the principal—otherwise it could not be said, within the wording of the rule, that the position is held "by virtue of a contract with the principal") to create a position by using expedients which are simple and easily accessible to everybody. In this case outward appearance, as it can be observed by people in general, is more independent of the principal's own actions than in the typical instances mentioned above. The decisive fact is hardly the agent's position as a cog in a sales machine but rather his "position in the community" as a salesman of insurance. In so far as the opinion above can be accepted—it seems, however,

[8] Vihma, »Om försäkringsagentens rättsliga ställning med särskilt beaktande av i vilken grad hans uttalanden förplikta försäkringsgivaren», *Nordisk försäkringstidskrift* 1954, pp. 133 ff., at p. 136.

rather debatable—the concept of "position" has obviously been even more "diluted" than in the situations discussed earlier. The "dilution" in some cases goes even further, particularly where a person's relation to another person's property is apprehended as a position within the meaning of this word in sec. 10, subsec. 2, of the Contracts Act.[9] In that case the term "position" will hardly do more than denote the fact that the effects of the authority will arise on the foundation created by the rule on "powers of position" in the Contracts Act.[1]

Summarizing what has been stated above, it may be said that the requirement of the agent holding a position will cause some trouble as to the applicability of sec. 10, subsec. 2, owing to the vagueness which in everyday language surrounds the term "position" used by the statute. It is uncertain how far one can deviate from the visible positions with symbolic character without disregarding the substance of the "position" prerequisite. No juridical linguistic usage has been developed in this respect. Some examples of a rather far-reaching "dilution" of the concept have been given above. In order to avoid misunderstanding, however, it should be stressed that the prerequisite of "position" cannot, any more than other existing prerequisites of the rule in question, be looked upon as isolated. On the contrary, to be rightly understood it has to be seen in combination with other prerequisites.

It has been already stated in the opening remarks of this paper that power is created only by positions which are usually connected with authority to act on behalf of the employer. This means a substantial limitation of the number of positions in question. Also, the courts are likely to accept a "diluted" position as a basis for power only where there exists a firm general opinion that such a position confers authority. Some examples may throw light upon this matter.

The position of a maidservant was previously described as having a less apparent symbolic character than that of a shop assistant. Nevertheless there is no doubt that a maidservant has been a standard example of a holder of "powers of position". There is,

[9] See for example Hult in his previously cited work *Kommissionärsavtalet*, p. 84. Cf. von Eyben, *Formuerettigheder*, Copenhagen 1958, p. 232, and the provision in the Mercantile Agents Act, 1914, sec. 88, subsec. 2.

[1] Bergendal has used the term position for describing "circumstances which according to the law applicable produce legal consequences that do not completely depend on the intention of the parties". See Bergendal, "Om avtalsbrott såsom förbrytelse mot tredje man", *Skrifter tillägnade Johan C. W. Thyrén* etc., Lund 1926, pp. 170 ff., at p. 214.

or at least there was at the time of the origin of the Contracts Act, a firm and widespread opinion that a maidservant has some power of representation in relation to her principal. In spite of the less marked symbolic character, the position *per se* may thus be said to give rise to authority.

In other cases the position itself can no longer be considered alone to create authority.[2] This situation does not necessarily mean that the position in combination with certain other additional circumstances cannot make applicable the rule in sec. 10, subsec. 2, of the Contracts Act. This seems to be true as regards, e. g., forwarding agents[3] and mercantile agents,[4] who in spite of their loose connections with their employers are generally considered to have power to act for them.

Such cases, however, create characteristic difficulties, since the basis of the rule—i. e. that the position shall correspond to an instrument of authority—has in fact been abandoned. One such difficulty concerns the revocation of the authority. The rule of revocation of authority is founded on the principle that the authority is to be revoked in the same way as it has been given. To tear up an instrument of authority or to announce to a certain third party in writing or orally (or possibly to announce to the public by advertisement or some other kind of public notice) that a given authority is revoked, hardly causes any complicated practical problems. On the other hand, it may sometimes undoubtedly be difficult to take similar steps with regard to authority founded on powers of position. According to sec. 15 of the Contracts Act such authority is revoked through the principal's effective removal of the agent from the position creating authority. As soon as this position has not the same character as, for instance, that of the shop assistant, a removal in a "physical" sense may be more or less impossible.[5] And apparently it is a removal of this kind that the drafters of the rule of revocation have been aiming at, e. g. a removal that is so apparent that it may be compared to the destroying of an instrument of authority. This situation leads one

[2] *Ester Thorelid* v. *C. M. Streiffert*, 1953 N. J. A. note A 6 (the position as a member of the Bar), offers one example.

[3] Cf. *Handelsbolaget Delong & Hagberg* v. *Importaktiebolaget Knaust & Larsson*, 1918 N. J. A. 75. See further Brækhus, *Meglerens rettslige stilling*, Oslo 1946, pp. 173 f., 197 f.

[4] Cf. *Haase & Solger* v. *S. Marcus*, 1903 N. J. A. 195. See Sjöman, "Om handelsagentens rättsställning", *Festskrift för Svenska handelsagenters förening* etc., Stockholm 1944, pp. 57 f., 59.

[5] Cf. Arnholm, *Sammensatte avtaler*, Oslo 1952, p. 78.

to consider whether there could not be set forth, as a rule of interpretation, the proposition that a "position" within the meaning of the Contracts Act is to be considered to exist only where the agent in fact can be removed from it in a way as effective from the onlookers' angle as that aimed at in sec. 15. In other words, the rule of revocation should be ascribed some importance when establishing the minimum requirement of a position creating authority within the meaning of the statute.

Connected with the role of the typical position as a counterpart of the instrument of authority and thus with its visibility to outsiders is the fact that the position, in order to create authority effectively, has to be actually held by the agent at the time of his acting. This requirement, which may be considered to be implied in the words of the provision (viz. that the authority follows from a person's holding of a position), is founded on the idea that the actual holding of a position generally indicates that the agent is going to act in the name of his principal.[6] If, on the other hand, the agent does not from the customer's point of view appear to occupy the position which gives rise to the authority, there is no longer the same reason to allow the normal effects of authority to arise.

III. THE PREREQUISITE "BY VIRTUE OF A CONTRACT" AND THE PRINCIPLE OF APPEARANCE

In the text of the statute it is stated that the agent shall hold his position "by virtue of being employed by another or otherwise by virtue of a contract with the other".

This prerequisite contains two elements. First, the position has to be held or—having regard to the fact that the rule of revocation in sec. 15 previously mentioned requires, besides dismissal, an effective removal from the position—shall at least before the dismissal have been held by virtue of a contract. Secondly, the contract has to be binding between the principal and the agent.

This limitation, which possibly can be traced to Swedish case law previous to the adoption of the Contracts Act,[7] is, according

[6] Cf. Schlossman, *op. cit.*, pp. 89 f. The previously mentioned rule on revocation in sec. 15 of the Contracts Act may be considered as a consequence of this fundamental idea.

[7] *T. Sundeman* v. *V. Andersson,* 1912 N. J. A. note A 563.

to statements in the report of the committee formulating the draft statute, "motivated by the fact that * * * only such representatives whose authority to act for the principal is based on the principal's own intention are to be classified as agents".[8]

Behind this statement there may be hidden the idea that a principal should never be considered to be bound by the acts of another person unless that person has been put there as agent by a valid declaration of intention on the part of the principal. The explanation why the principal is bound then lies in his own intention to accept this legal consequence. In legal literature there are also several statements to the effect that the placing of an agent in a certain position owing to contract with the principal is regarded as a declaration of the intention to authorize, or to be more exact as a tacit declaration to that effect (implied authority).[9]

The wording of the statute, however, hardly reflects such a view. Sec. 10, subsec. 2, of the Contracts Act does not propose any requirement for an express or tacit declaration from the principal. On the contrary, when reading the text one gets the impression that the power has been attached directly to the prerequisites actually mentioned, an impression that seems to be underlined by the words "he shall be considered to have power" (quasi-authority).[1] Some scholars have therefore held the view that it would be superfluous and misleading to operate with a requirement for an actual declaration of the principal's intention to authorize or to apprehend the prerequisites given in the statute as reflecting such a requirement.[2]

The question whether or not powers of position may suitably be considered to include a declaration of intention will be further discussed later on (*infra*, V). In this connection only the following

[8] *Committee's Report*, p. 74, cf. pp. 66 f.

[9] See, for examples, Stjernstedt, *Våra avtalslagar i deras praktiska tillämpning*, Stockholm 1926, pp. 84 and 90; Wrede, *Lagen om rättshandlingar*, etc., Helsinki 1931, p. 51; and Bugge, *Avtaleloven med motiver og henvisninger*, 3rd ed. Oslo 1949, p. 43.

[1] Cf. Ussing, "Fuldmagt og Bemyndigelse", *T. f. R.* 1930, pp. 1 ff., at p. 32, note 85.

[2] So Ussing in his previously mentioned book *Aftaler* pp. 293 and 331, as well as in the previously cited paper by the same author in *T. f. R.* 1930, at pp. 21 f.; R. Beckman, *Om fartygsbefälhavarens rättsliga ställning*, Vol. 1, Åbo 1936, pp. 120 ff. (cf. Cederberg's review in *F. J. F. T.* 1936, pp. 336 ff.); Taxell, *Aktiebolagsstyrelsens kompetens att rättshandla*, Helsinki 1946, p. 71, Arnholm, *op. cit.*, p. 96; Vuorio, *Työsuhteen ehtojen määrääminen*, Borgå & Helsinki 1955, pp. 108 f., as well as the paper by the same author in *Sv. J. T.* 1957, pp. 249 ff., at p. 254. Cf. a statement in Ljungman's review of the above-mentioned book by Arnholm, *Sv. J. T.* 1953, p. 581.

will be said. If the latter of the two opinions mentioned is adopted, the prerequisite "by virtue of a contract with the principal" can no longer be intended to fulfil the function of forming an element of a declaration of the principal's intention to authorize.

Is there, then, any other purpose that the prerequisite in question may be assumed to fulfil?

It is pointed out in the *travaux préparatoires* to the Contracts Act that an agent who can refer to other "legal foundations" as a proof of his authority than "the intention of the principal", e.g. the position of parent or guardian or a position due to appointment by a public authority, is sometimes said to be an authorized agent (Sw. *fullmäktig*). The use of that term, however, is not (it is further stated) in conformity with conventional linguistic usage or with prevailing legal opinion in Sweden.[3] It is also stated that in many respects other rules have to be applied to a case of representation which "is founded on the intention of the principal" than those appropriate to a case of representation which has "some other foundation".[4] It is thus suggested that the different situations require rules of at least partly different content. Such is certainly the case, since the decisive purposes are rather different. To take but one example, a minor may as a matter of principle act only through his guardian, an arrangement which is one element of the far-reaching protection of persons lacking legal capacity. A principal, on the other hand, has according to sec. 10, subsec. 2, of the Contracts Act the possibility in principle[5] of intervening himself. The representation is not arranged for his protection but in order to make possible the use of assistants and to meet the needs of creating business organizations.

The prerequisite "by virtue of a contract with the principal" thus has the important and necessary function of distinguishing this particular case of representation from other cases where the rules of authority contained in the Contracts Act should be replaced by other rules which are more suitable or, in case of application, applied with certain modifications. There are several different types of representatives which are thus excepted from the

[3] *Committee's Report*, p. 66.

[4] *Ibid.* Cf. Trygger, *op. cit.*, p. 16.

[5] See, as to exceptions to this rule in Swedish law, Benckert, "Om testamentsexekutorer enligt svensk rätt", *T. f.R.* 1926, pp. 163 ff., at pp. 170 f., and Björling, "Oåterkallelig fullmakt", *Festskrift för Berndt Julius Grotenfelt*, Helsinki 1929, pp. 5 ff. Cf. Nial, *Aktiebolagsrättsliga studier*, Stockholm 1935, pp. 24 f.; Olsson, "Den oåterkalleliga fullmakten", *F. J. F. T.* 1952, pp. 236 ff.; and Gunvor Wallin, *Om avtal mellan makar*, Lund 1958, p. 52.

(direct) scope of the provision. Guardians have already been mentioned. Other types of so-called legal representatives also fall outside the range of applicability. Similarly, the prerequisite mentioned, together with the fundamental limitation of the Contract Act to the realm of property law,[6] sets aside government officials and other persons having a public position of authority; such persons can hardly be said to occupy their positions on the basis of a contract with a principal within the same meaning as in private law—the meaning which the legislators had in mind.[7] But of course there are in some situations sufficient grounds for drawing an analogy from the private-law rules on representation.[8]

The limitation to situations in which the agent occupies his position by virtue of a contract with the principal has the effect of setting apart representatives of the kind just mentioned. Moreover, some situations are exempted which present elements of criminal conduct by the person who claims to be an agent. To take only one example, the person acting as a shop assistant might turn out to be a customer who, having entered the shop when it happened to be empty, has attempted to play the role of a shop assistant.[9] The legislative material does not give any account of the reasons for such an exception. It seems, however, to be in line with the general construction of the rule to deem it to have the purpose of guaranteeing the principal a certain minimum protection.[1] However this may be, the practical result of the passage in the statute will in any case be the creation of such a protection. This main principle, which can be traced even in non-Scandinavian legal systems, may be briefly described as follows.

As has previously been shown,[2] sec. 10, subsec. 2, was meant as a provision concerning "independent authority" and is thus built on the principle of appearance. The prerequisite here discussed is in fact an exception from this principle. The question whether, in the concrete situation, there really is a contract between the

[6] See the statement in the *Committee's Report,* p. 66.

[7] Cf. Wetter, *Om trolöshet mot huvudman,* Uppsala 1907, pp. 82 ff.; Jägerskiöld, *Svensk tjänstemannrätt,* Vol. 1, Uppsala 1956, pp. 48 ff.; and Geijer in Geijer & Schmidt, *Arbetsgivare och fackföreningsledare i domarsäte,* Lund 1958, p. 223.

[8] This was at least done by the plurality in the decision *B. Hallmén* v. *Handelsbolaget Gust. Pettersson,* 1956 N. J. A. 217. Two Justices of five dissented.

[9] Cf. Arnholm, *op. cit.,* p. 33.

[1] A different opinion is stated by von Eyben, "Fuldmagtsproblemer", *T. f. R.* 1952, pp. 496 ff., at p. 498.

[2] See *supra,* I.

principal and the agent is not an apparent fact that can be apprehended by the third party. Nevertheless the risk that the prerequisite will not be fulfilled rests on the third party. Owing to this, the principal can be sure of not being bound if he has not made a contract with the agent as just mentioned.[3] At least in this respect the authority may be said to "have its ground in the principal's own conduct".[4] The principal must have taken some measures. This is fully in accordance with the fundamental principle in Swedish law that, as a rule, it is not possible to draw an outsider into a contractual situation against his intention.[5] The risk run by the party dealing with the supposed agent seems to be slight, considering the rarity of the cases where the principal will escape from being bound. Also, he may be fully or partly compensated by tort liability not only for the false agent *(falsus procurator)*—a liability that in such cases will as a rule become effective to the extent that the agent is solvent[6]—but also for the "principal". In the shop case just mentioned, it is conceivable that the shopkeeper will be considered liable in tort to the defrauded contracting party, i.e. if he negligently left the shop without supervision, thus making it possible for the customer to assume the role of shop assistant. It has even been suggested that the principal might be considered bound by the contract by abandoning the prerequisite "by virtue of a contract with the principal" in cases where the agent has taken his position owing to negligence by the principal.[7]

The nature of the contract with the principal, by virtue of which the agent holds his position creating authority, is exemplified in the text of the statute by the words "by virtue of being employed by another". Normally it might also be a contract of employment that lies behind the authority. The principal then is employer and the agent is his employee. But the agent does not have to be an employee in the true (civil-law) meaning of the term; he can also hold the position of a contractor, thus having a more independent position in relation to the principal.[8]

[3] Cf. the similar treatment of forged negotiable instruments in the Swedish Promissory Notes Act, 1936, sec. 17.

[4] Taxell in his previously cited book *Aktiebolagsstyrelsens kompetens,* p. 72.

[5] See further, on this principle in Swedish law and the exceptions from it, Grönfors, *Ställningsfullmakt och bulvanskap,* Stockholm 1961, pp. 9 ff.

[6] See sec. 25 of the Swedish Contracts Act and the remarks concerning the effect of this provision by Grönfors, *op. cit.,* pp. 128 ff.

[7] Nial, "Omyndighetsskydd och godtrosskydd", *Festskrift tillägnad Nils Stjernberg,* Stockholm 1940, pp. 216 ff., at p. 226.

[8] See, as to the concepts employer and contractor in Swedish law, Adlercreutz in Schmidt, *The Law of Labour Relations in Sweden,* Stockholm 1962, pp. 54 ff.

Nor does the law preclude the authority's being based only on an ordinary mandate, although such a contract is perhaps rather seldom combined with a position creating authority.[9] The wording of the text ("or otherwise by virtue of a contract") is actually so wide that any type of contract whatever—e.g. agreement concerning partnership without joint and several liability for debts ("simple partnership", Sw. *enkelt bolag,* cf. the Swiss *Einfache Gesellschaft*)[1] —may be the foundation of an authority, even though in practice types of contract other than those now mentioned are hardly to be contemplated.

The argument shows that powers of position are usually only a by-product, an accessory to an employment or commission contract, and that their scope—unlike that of other types of authority —has therefore been given scarcely any attention by the principal at the time of the origin of the authority.[2]

The mere fact that the contract through which the agent has attained the position which created his authority, has been made through fraud, etc., by the agent, ought not to be of any concern to the third party. According to the aim of powers of position, viz. to create "confidence in business", such objections ought to be rejected if directed against a *bona fide* third party.[3] This is also in accordance with the general effect of fraud, etc., within contract law. If there are, on the other hand, "strong objections to the validity" (compulsion by open robbery, minority, disturbed mental state), a position by virtue of a contract with the principal should not, according to the general principles for such objections and notwithstanding the interest of business convenience, be considered to exist even if a *bona fide* third party be concerned.[4]

We have now followed the pattern of the Swedish legal institution powers of position, as laid down in the Contracts Act. The only exception from the principle of appearance is offered by the prerequisite "by virtue of a contract". It may be asked whether the Swedish courts have followed this legal pattern closely or have deviated from it to some extent. The answer is that, though most decisions are compatible with the principle of appearance, at least

[9] In the *Committee's Report,* p. 73, the landlord's agent is mentioned as an example.

[1] Cf. Nial, *Om handelsbolag och enkla bolag,* Stockholm 1955, pp. 409 f.

[2] Cf. Stang, *Innledning til formueretten,* 3rd ed. Oslo 1935, p. 375.

[3] So also Ussing in *T. f. R.* 1930, p. 26. Cf. Hult, *Kommissionärsavtalet,* p. 278, and the same author's *Lärobok i värdepappersrätt,* 3rd ed. by Hessler, Stockholm 1961, p. 71.

[4] Cf. Ussing in *T. f. R.* 1930, p. 25, and Stang, *op. cit.,* p. 370.

one important exception can be found. In the case in question, the principal's interest not to be bound was qualified as more important than the contracting party's interest to be able to rely on apparent facts.

> *United States Rubber Company aktiebolag* v. *Axpe aktiebolag,* 1953 N. J. A. 566. The head of a branch office of the Swedish Rubber Corporation purchased some goods in the name of the Corporation but sold them for his own account. The seller sued the Corporation for payment. However, the Corporation denied being bound by the acts of the agent.
>
> The Court of Appeal found that the head of the branch office could not, taking into account that this office was mainly an office for selling and not for buying goods, be deemed to have a position from which there followed, according to usages, a power to buy goods and thus bind the principal.
>
> This decision was affirmed by the Supreme Court, but two Justices dissented.

The agreements on *purchasing* goods were here found to fall outside the authority created by the position, as the branch office was mainly an office for *selling* goods. As pointed out by the dissenting Justices, this quality of the branch office was not apparent to presumptive contracting parties or other onlookers. The legal relation between principal and agent, though it is certainly not apparent, has been allowed to decide the question of the powers of the agent.

As mentioned before,[5] the Contracts Act recognizes only two types of authorization, as far as the scope of authority is concerned. Type No. 1 is the "independent authority". In spite of the fact that powers of position were framed by the legislator to fit into Type No. 1, the "independent authority", and are thus based on the principle of appearance, the Supreme Court in the Rubber Case permitted one fact, referring only to the non-ostensible legal relations between principal and agent, to limit the scope of the powers. But it does not mean that the powers of position were in this case simply classified under Type No. 2 instead. For in other respects the principle of appearance was upheld as usual, e.g. the holding out of the agent in his position was ostensible. The Court has in effect created a new type of authority, a third type lying between the two mentioned.[5a] This is something that was never anticipated by the legislator.

[5] *Supra,* I.

[5a] Dissenting as to the implications of this judgment Karlgren, "Ställningsfullmakt och bulvanskap", *Sv. J. T.* 1962, pp. 257 ff., at p. 259.

IV. THE "USAGES" PREREQUISITE AND SWEDISH CASE LAW

It is typical of the kind of authorization here dealt with that the authority following from the position is the one that follows from it "according to the law or usages".

The meaning of the reference to "the law"—including statutory law—is not completely clear. But it is usually supposed to be aimed at existing special provisions in different statutes, e.g. some in the Maritime Code concerning the powers of a ship's master.[6] The reason why this legal technique was chosen seems to have been the desire to create a truly general, all-embracing provision on powers of position.[7] The practical importance of the reference seems to be small.

On the other hand, the conjoined reference to usages is of the utmost importance for the function of the provision. The "usages" prerequisite sets the limits for the authority coupled with the position. The factual patterns of social behaviour thus govern the scope of authority. Obviously, only acts of a standardized kind are so frequently made that they can reasonably result in a certain pattern of behaviour and in this way create powers of position. This type of authorization is therefore especially adapted to the type of acts just mentioned, where an express authorization would be considered as an unneccessary and burdensome complication. If an act is not of such a character that is likely to be repeated several times but is more individualized—perhaps because it concerns a large sum of money—and thus requires more attention, there are good reasons to state the question of powers in specific terms and not to use such a short cut as powers of position.

As the fact of what people have generally done plays such an important role as to the scope of authority, the main item in many lawsuits in this field is proof of the existence of certain patterns of social behaviour, e. g. in commercial life.[8] In some cases, however, this part of the problem does not seem to have been extensively dealt with; at least the courts have not openly declared that they

[6] See, for some examples concerning such special provisions on powers of position in Swedish law, Grönfors, *op. cit.*, pp. 212 ff.

[7] Cf. *Committe's Report*, p. 73.

[8] See, e.g., the cases *Bostadsrättsföreningen S:t Olof* v. *G. Lundberg*, 1943 N. J. A. 316; *United States Rubber Company aktiebolag* v. *Axpe aktiebolag*, 1953 N. J. A. 566; and *F. Fransson* v. *Trafikförsäkringsföreningen*, 1956 N. J. A. 36.

have founded their decisions on the existing patterns of behaviour. Now and then the courts have quite evidently gone further than a mere registration of what people generally do. They have then introduced a new trend in the Swedish law on powers of position.

> *M. Carlberg* v. *Aktiebolaget Stockholms centralgarage,* 1956 N. J. A. 656. This case answers the question whether a control guard at a garage held such a position that he was authorized on behalf of the company to take charge of a camera whose owner had temporarily deposited his car in the garage. The camera was lost, and the owner therefore claimed damages from the garage company.
>
> The Supreme Court in a unanimous decision stated that a car owner who puts his car in a big garage with special, constantly available garage hands, has good reason to believe that it will be a spontaneous service of the company—unless it notifies the customer that movables are not kept on deposit on the company's responsibility —to allow the car owner to deposit for this purpose some small article which for some reason he does not want to take with him. By the statements of the company itself and its staff, made in the case, it was proved that the control guards, in spite of the instructions not to accept movables on deposit at all which according to the defendant company had been issued to the staff, nevertheless had done this rather often, at times once or twice a day. The fact that such things had happened could hardly be explained in any other way than that it had been considered natural to comply with the request of the customer for this specific service of taking occasional small articles on deposit.
>
> Having regard to this—the Supreme Court continued—and since it had been the duty of the control guard to accept cars for garaging, on behalf of the company, he must be considered as authorized to take charge of the camera, also on behalf of the company. The owner of the camera would thus, unless there were special circumstances to the contrary, have good reason to presume that the control guard had been acting within the scope of his employment at the time when he accepted the camera. The fact that no special receipt had been given for the camera was deemed to be of no importance.

It may be asked what meaning was attached by the Court to the prerequisite of "usages" as an element in the rule on powers of position of the Contracts Act. There is no indication in the opinion or in the report of the case that an investigation had taken place in order to find out whether some usage in one direction or another could be established. Does this imply that the requirement of usages was disregarded by the Court?

The main argument behind the opinion of the Supreme Court

seems to be that the authority of the control guard to accept cars for garaging, an authority which must be founded on powers of position within the framework of the Contracts Act, in itself includes an authority also to accept small valuables on deposit in order to make the type of contract as suitable as possible for practical use. In other words it has been presumed that the authority covers as much as is necessary or at least desirable, having regard to the type of contract and its function in daily life. The procedure recalls that which is applied when interpreting authority in Anglo-American law (incidental authority, included powers, etc.) as well as bringing to mind the Swedish rule of interpretation that the authority of the agent is to be considered to cover everything that is necessary for satisfying the purpose of creating the authority.[9] But in this case the Court has gone further by saying that it has taken into account not only what was necessary for the realization of the purpose of the authority but also what has been considered reasonable and suitable with regard to the type of contract in question (accepting cars for garaging).

The result is that powers of position, founded on the Contracts Act, will also cover authority to act outside the scope of the main object. The problem is no longer whether such acts are typically undertaken by persons in a corresponding position and thus generally regarded as binding for the principal. The court does not hold the inactive role of registering the habits of people in daily life and founding its decision on this. Instead it engages itself actively to direct habits into a direction which seem to it to be suitable and therefore also socially desirable. The matter may also be put in the following way. With regard to the scope of the authority it has been considered that the most expedient acts for the type of contract concerned are also treated, or at least ought to be treated, as if they were the customary acts for that type of contract and thus binding on the principal.

In other respects, also, the judge-made law has developed without being bound by the prerequisite of "usages" *stricto sensu*. It is clear that this term was not intended by the legislator to include mercantile usages only.[1] It is a wider concept, covering also other habits that are socially common without being recognized as mercantile usages. In the *travaux préparatoires* to the Contracts Act

[9] See, on this principle of interpretation in Swedish law, Grönfors, *op. cit.*, pp. 92 ff.

[1] As to mercantile usages in Swedish law, see Karlgren, "Usage and Statute Law", *Scandinavian Studies in Law* 1961, pp. 39 ff.

expressions such as *"general* habits" and *"prevalent* opinions" (author's italics) are used as synonymous.[2] A "usage" within the meaning of sec. 10, subsec. 2, has obviously to be fairly widely spread—which, incidentally, is not necessary as far as mercantile customs are concerned, local customs of the port offering one example. What is a habitual mode of action between two persons who often enter into agreements with each other, cannot constitute such usages as those recognized by the statute as creating authority. In spite of this, powers of position have been deemed to exist by Swedish courts in cases where only such repeated acts between two parties could be found, not a more widespread pattern of behaviour among people or at least special groups of people.

Bostadsrättsföreningen S:t Olof v. *G. Lundberg,* 1943 N. J. A. 316. An association with the purpose of providing flats for its members had received from a person a loan amounting to Swedish kronor 35,000. Instalments and agreed interest were to be paid every half-year. As security the lender had obtained some mortgage deeds relating to real estate belonging to the association. According to a clause in the agreement the lender was to return the mortgage deeds in so far as payments were received. In conformity with this clause the lender returned one deed when the cashier made a payment on behalf of the association. However, the cashier obtained a loan on this deed for his own purposes and embezzled the money. Hence the question arose whether the cashier had authority to receive the deed on behalf of the association.

The Court of Appeal answered this question in the affirmative, and the Supreme Court confirmed this judgment. Many arguments were put forward in the grounds for the decision. The cashier had collected rents from the building belonging to the association and made current disbursements. Furthermore, he had regularly made the payments to the lender and these payments had amounted to considerable sums. According to the above-mentioned clause the lender was obliged to return the mortgage deeds as soon as the association, by virtue of the payment schedule, was entitled to regain them. In this particular case, the deed was not returned until the association really was entitled to it. During the whole time the cashier had held his position as cashier and a member of the board of the association, however, without being able alone to bind his association as a signatory.

From the evidence presented in this case it was clear that according to usages a cashier in an association of the *bostadsrättsförening* type has no authority to bind his association in such a

[2] *Committee's Report,* pp. 72 f.

situation. Here the cashier was nevertheless held to be authorized because he had regularly made the payments to the lender on behalf of the association. The main point is thus the repeated acts by the "agent", the implied principle being that this repeated action had been tolerated without the "principal" having interfered. This fact—the usual conduct of "principal" and "agent"—was held to form a substitute for the missing prerequisite of "usages". A tendency in the same direction can be traced in a number of Swedish decisions.[3] Such a kind of authorization comes very close to the German *Duldungsvollmacht* (perhaps to be rendered in English by the expression "authorization by tolerating").[4] It might be added that other prerequisites for powers of position are still valid, for example the requirement that the agent must hold a position within the meaning just dealt with.

The last case shows that Swedish courts are prepared to go very far. The acts repeated by the agent were not identical with the final act considered to bind the principal. The cashier had repeatedly made payments to the lender on behalf of the association, but the final act binding the principal was his receipt of the mortgage deed. But even if the types of acts were not the same, there was a close connection between them. All payments concerned the very loan for which the deed was the security. The purpose of the payments was to regain the deed, and the payments were linked by the clause in the agreement with the lender's duty to return the mortgage deed to the association. This solution—no identity but a close connection—may be traced to a few cases of an earlier date.[5]

The doctrine of authorization by repeated conduct of the "agent" tolerated by the "principal", means that the law requires a principal who wants to deprive the agent of his power to interfere actively in order to remove the impression of authorization that onlookers may otherwise obtain. Or the principal will be bound *as if* he had authorized the agent to represent him. The reason for his being so bound is that he *should* have interfered in order to clarify the situation. Here there probably lies a kind of blame, when the principal fails to act, but negligence in the usual legal meaning does not seem to be included in the rule as a prerequisite.

[3] See further Grönfors, *op. cit.*, pp. 245 ff.

[4] See, e.g., Enneccerus, Kipp & Wolff, *Allgemeiner Teil des Bürgerlichen Rechts*, Vol. 1: 2, ed. by Nipperdey, Tübingen 1960, p. 1131.

[5] *Handelsbolaget Bröderna Hedbergs beklädnadsaffär* v. *Aktiebolaget Thånell & Gråberg*, 1922 N. J. A. 131, and *Kristina Alexandersson et als.* v. *Aktiebolaget Tegefors verk*, 1929 N. J. A. 124.

There is another group of reported Swedish cases in which powers of position have been recognized, though the "usages" prerequisite does not seem to be fulfilled. The circumstance offsetting the lack of a "usage" has been not repeated conduct but other circumstances in certain combinations, as the following example may show.[6]

Aktiebolaget amerikanska motorimporten v. *Anny Ahlquist,* 1950 N. J. A. 86. A had purchased a motor car for B's account. The agreement was made by A, signing a standard agreement for car purchase. The seller, a car-dealing corporation, was represented by a salesman on duty. He and the buyer made a deal and signed the document in the showroom of the corporation. The salesman asked for a advance payment amounting to 3000 Swedish kronor. A, who found nothing surprising in this, gave the money in cash to the salesman, and the latter signed a receipt for the sum on the document mentioned. Later on it became clear that the salesman had spent the money himself instead of accounting for the money to the corporation. The corporation declared that it was not willing to consider itself bound by the purchase or to pay back the deposit. Therefore B sued the corporation, demanding that it should pay him 3000 kronor as well as accrued interest. As a ground B stated that the salesman, even if he had no mandate to collect the money, had the power to receive the deposit, as he appeared to the customers in the premises of the corporation in the position of a salesman on duty.

It was quite clear that there does not exist any usage to the effect that a salesman in a corporation for selling cars has power to bind his principal when receiving advance payment. In spite of this the Supreme Court found the salesman authorized in this case.

The grounds advanced in the decision were as follows. The contract form contained a provision according to which the agreement should not be valid until it was confirmed in writing by the corporation. This provision indicated, if considered alone without regard to further circumstances, that the salesman was not authorized to collect, on behalf of the corporation, the sum of money under dispute. However, the printed text of the standard document used included, just after the place where the price was to be filled in, the following words: "whereof . . . in cash when this agreement is signed". It was not mentioned whether this payment was meant to be received by the salesman concluding the particular contract or had to be performed directly to the corporation, at the cashier's office situated in the showroom or in some other way. The circumstances in this case gave support to the buyer's view that the salesman on duty in the premises was authorized to collect the money. In any case the

[6] See further Grönfors, *op. cit.,* pp. 259 ff.

> consequences of the obscurity attached to the standard document used must act to the disadvantage of the corporation, which had drawn it up. For these reasons the buyer was entitled to make the advance payment to the salesman and thus bind the corporation as principal. As the corporation did not want to perform the sale of the car, the buyer was entitled to get the money back.

In this case the combination of the following three facts has been considered to create powers of position. The first is the existence of the clause according to which part of the price should be paid in advance when signing the agreement. The second was the appearance of power created by the salesman's position in the premises as a salesman on duty. It is doubtful whether these two facts alone were considered sufficient to create authority. But, to cite the opinion of the Supreme Court: "*In any case* (author's italics) the consequences of the obscurity attached to the standard document used must act to the disadvantage of the corporation, which had drawn it up." Thus, to the two existing grounds the court added a third. It applied a principle of interpretation now and then used in the Swedish law of contract and closely corresponding to the English *contra proferentem* rule.[7] If the two grounds first mentioned were further supported by this third one, it was in the Court's opinion beyond doubt that the salesman was authorized to receive the advance payment on behalf of the corporation.

This means that a principal in such cases, also, has to interfere in order to clarify the situation, or otherwise he will be bound. In other words, he has to be active. The legal technique of founding the decision on a combination of various facts, none of which in isolation is sufficient to reach the solution, is by no means unique; it can be found in other fields of the law, e. g. the Swedish case law on torts.[8]

The last two types of powers of position, illustrated by the *Lundberg* case and the *Ahlquist* case, can be found not only in the decisions of ordinary courts, as here has been shown, but also—at least to some extent—in decisions of the Swedish Labour Court.[9]

[7] Cf., for example, Grönfors, "Mandatory and Contractual Regulation of Sea Transport", *Journal of Business Law* 1961, pp. 46 ff., at p. 51.

[8] Cf. Karlgren, *Skadeståndsrätt,* 2nd ed. Stockholm 1958, p. 188; Bolding, *Skiljeförfarande och rättegång,* Stockholm 1956, p. 145; Hellner, "Några huvudlinjer i diskussionen om skadeståndsansvaret under 1900-talet", *Minnesskrift utgiven av Juridiska fakulteten i Stockholm vid dess femtioårsjubileum 1957,* Stockholm 1957, pp. 117 ff., at pp. 142 f.; and Bengtsson, *Om ansvarsförsäkring i kontraktsförhållanden,* Stockholm 1960, pp. 178 f.

[9] Grönfors, *Ställningsfullmakt och bulvanskap,* pp. 268 ff.

V. THE GENERAL CHARACTER OF POWERS OF POSITION IN SWEDISH LAW

We have now studied in detail the three prerequisites that make the statutory rule on powers of position distinctive as compared with other cases of power in Swedish law. Thus we have caught some characteristic features of the legal institution here being examined. In order to complete the picture it seems necessary to fit the concept into its context: it is only one of several means of binding a principal.[1]

We have already found that the typical or "classical" case of authorization in Swedish law is the issuing of an instrument of authority, designed to be presented to third parties when forming contracts.[2] By this manifestation of his intention the principal has at the same time expressed his consent to be bound by the acts of the agent and fixed the limits of the scope of authority, which he can thus control. This type of authorization is obviously founded on the contractual principle of private autonomy.

From our point of view it seems of little interest to compare this case with situations where the principal is undisclosed in the interest of the agent (Sw. *kommission*), as according to Swedish law the third party is not entitled to sue the principal directly. But if the principal is undisclosed in his own interest (Sw. *bulvanskap*), the situation is just the opposite. Here the facts differ entirely from the typical case of authorization. The principal has never made a declaration of his intention to be bound by the acts of the agent. In fact, he has chosen this way of contracting because he does not want to be bound. If the third party should find out that there is in fact a principal hidden behind the "party", who is therefore only an agent, he must get the impression that the principal does not want to be bound and therefore seeks to remain undisclosed. And if the existence of the principal remains unknown to the third party, he must be convinced that the agent and no one else is the real party to the contract. Although the arrangement of the whole situation from this point of view indicates the principal's intention not to be bound, he is nevertheless in some cases considered by Swedish courts as the contractual party. Such cases are very rare,[3] but when they do arise the effect as to the

[1] The subject covered by this chapter is more extensively dealt with by Grönfors, *op. cit.*, pp. 325 ff.

[2] See *supra*, I.

[3] See further Grönfors, *op. cit.*, pp. 306 ff.

third party's right to sue the principal directly is the same as under the Anglo-American doctrine of responsibility for an undisclosed principal.[4] As there is no declaration of intention, the principal further has not the same possibility of controlling the scope of the agent's power as in cases of authorization within the narrow sense of this concept. He is able to exercise control only through the pressure he can put on the agent because the agent owes him money or is his employee, or because of some similar legal or factual circumstances. This disadvantage is the price the principal has to pay if, in his own interest, he chooses to act through an agent without appearing himself as principal, thus hiding behind the agent's back.[5]

When a principal is bound in cases of this kind, this effect is founded on some idea other than that of contractual freedom and private autonomy. He is in fact bound *in spite of* his opposite intention. The reason for this lies in considerations in favour of the third party. From his point of view the solution that the undisclosed principal becomes bound by the acts of the agent signifies that the third party has not a position inferior to that which he would have had if the principal had contracted himself openly. Here the liability of the principal has, in other words, the character of a sanction with the aim of opposing certain transactions that are undesirable in the eyes of the law. In other words, the liability for the undisclosed principal is in Swedish law not a regular method for making contracts, not a legal instrument offered to the members of society on the same level as the declaration of intention to authorize.

We have now met two entirely different patterns for binding a person to a contract. Where does the legal institution powers of position fit in? What is the legal pattern of this institution?

When dealing with the prerequisite "by virtue of a contract" we have already found that Scandinavian writers have expressed two different opinions.[6] Some have taken the view that the principal's mere placing of an agent in a certain position should be considered as a tacit declaration of his intention to authorize. Others have found it superfluous and misleading to operate with a requirement for an actual declaration of the principal's intention. This

[4] But in other respects there may be various differences, for example as to the position of the agent or the third party's right of election. See further *ibid.*, pp. 314 ff.

[5] Cf. Gautschi, *Berner Kommentar. Obligationenrecht, 2. Abt. 13. Tit., Der Auftrag*, Berne 1959, p. 271.

[6] See *supra*, III.

divergence of opinions necessitates a closer study of the problems involved. The premise for such an examination must be the principle that one can reasonably talk about a declaration of intention in cases of powers of position, only where this declaration can be said to fulfil the same function as it does in typical cases of authorization.

We have previously found that in the situations that have the greatest practical impact powers of position emerge as a by-product, an accessory to an employment.[7] The question concerning the scope of the agent's power has therefore usually not attracted the attention of the principal. The legal technique of founding, in spite of this fact, the scope of authority on a declaration of intention by the principal (considering his act of employing the agent, etc., as a manifestation of such an intention) cannot be more than using a fictitious intention of the party, especially when the problem is to draw a line of demarcation in detail. For usually the principal has not had any intention at all as to such details. This is certainly an argument against founding powers of position on the notion of a declaration of intention.

Another argument on the same line might be that this conception is mostly used to include some extreme cases where an express declaration has not been made but the facts are nevertheless analogous. In typical cases of powers of position such a kernel of express declaration is lacking, thus weakening the reason for using this construction. The mere act of placing a person in a position can never attain such a detailed sharpness that it can offer clear-cut boundaries of the agent's power in the same way as an instrument of authority, a document manifesting the principal's intention to authorize. The scope of authority in cases of powers of position can only be decided by analysing the question which authority is usually considered to be connected with the alleged position. For this reason the holding of the position plays, as has been previously pointed out, a role closely corresponding to that of an instrument of authority.[8] The power is, in other words, directly attached to the status of the agent, to his position. The addition, for dogmatic or similar reasons, of the concept of declaration of intention would imply the use of one postulate more than is necessary for the adequate handling of powers of position. It is better to get rid of such superfluous postulates by using Occam's Razor.

[7] *Ibid.*
[8] See *supra*, II.

The arguments now advanced all point to the conclusion that there remains in fact no space for private autonomy and thus no space for a declaration of intention by the principal. Such a conclusion, however, would be too hasty. For if we examine the typical situation still more closely we shall find a few strictly limited remnants of private autonomy.

The power attached to the position is created only by an act of the principal, viz. his placing of the agent in the position in question ("by virtue of a contract"). In order to extinguish the power the principal has to remove the agent from his position. These acts represent a minimum space for private autonomy and thus, as has been previously emphasized,[9] a minimum standard of protection for the principal against being bound contrary to his own intention. Furthermore, the principal can give the agent instructions restricting his power in relation to the power attached to his position, and such instructions will be valid against third parties, as soon as these are aware of the instructions and in this sense do not act *bona fide*. The principal may, e.g., include such instructions in standard documents used by the agent when concluding agreements on behalf of the principal. From a practical point of view, however, the principal, in cases of powers of position, seems to have greater difficulties in informing the vague and large group of presumptive third parties about such instructions than in the typical case of authorization through an instrument which normally is not shown to many persons. Instructions restricting the agent's authority are in practice rather rare, another reason why it might be difficult to enforce them effectively against third parties. The principal can also enlarge the scope of the agent's authority by giving instructions authorizing him to act on the principal's behalf even in cases that are not covered by the power attached to the position. Such a declaration of intention to authorize outside the power following from the position appears to be more detached than a corresponding declaration in relation to an authorization manifested in an instrument of authority—it seems natural to consider the principal as having given a special "mandate authority" with a wider scope than the power following from the agent's position.[1]

Obviously there remains a definite space for private autonomy. But this space is much more restricted than in the typical case of

[9] *Supra*, III.

[1] Cf. the mode of expression used by Hellner, *Försäkringsrätt*, Stockholm 1959, p. 246.

authorization. In order to protect himself from being bound outside the limits he wants to be observed, the principal has to rely on other means of controlling the agent's power than giving a declaration of intention to authorize and he must thus individually adapt the scope of the agent's power according to his own intention. The principal is forced to supervise the agent meticulously and, in the last resort, remove him from his position. But, on the other hand, the element of private autonomy is greater than in cases where the principal is undisclosed in his own interest (Sw. *bulvanskap*)—a situation where, as has just been mentioned, we also meet with a status relationship that in some cases in Swedish law gives rise to an obligation between principal and third party. Here the principal has no possibility at all of influencing the agent's power through instructions (without turning the whole situation into a case of authorization within the narrow civil-law sense of this term). When the principal is bound, he is bound because of reasons other than contractual considerations, viz. the idea of creating a sanction against what are, in principle, undesirable patterns of social behaviour.

It therefore seems meaningless to use the conception of declaration of intention to authorize both in the typical case of authorization and in case of powers of position. There can be no such declaration in both situations, if by this concept we refer to one and the same phenomenon. Powers of position must be qualified as something lying between the case of typical authorization and the case of responsibility for a principal who is undisclosed in his own interest, as powers of position obviously contain characteristic features of both these legal institutions.[2]

This is also true of the special types of powers of position previously examined.[3] If a principal has tolerated repeated acts by the agent, there is in fact even more space left for private autonomy than in cases directly covered by the provision in the Contracts Act. For by his individual behaviour—the free choice between tolerating the acts of the agent or preventing further acts by him—

[2] What has now been said may resemble, but is not similar to, the main idea in Stoljar's recently published book *The Law of Agency*, London 1961. This author considers that, in English law, the relationship between principal and third party is not, and does not have to be, contractual in the sense of being consensually formed, though it certainly is contractual in its material incidents. By this theory he intends to resolve the "difficulties" attached to the question of the true basis of agency (contract, tort or something else?) as well as those connected with the doctrine of undisclosed agency. See Stoljar, *op. cit.*, esp. pp. 41, 232 f.

[3] *Supra*, IV *in fine*.

he can influence the scope of the agent's power, although this type of authorization is mainly founded on the position of the agent as creating the power. However, this possibility could not regularly be used by principals as a means of controlling the scope of the agent's authority; the contractual bond has more the character of a sanction than of an instrument for exercising private autonomy within the framework of contractual freedom.[4] The principal is charged with the duty to be active. If he wants to escape being bound himself, he must remove the appearance of power. The same duty to be active is the real foundation for responsibility in situations where other visible circumstances than the agent's repeated acts (as tolerated by the principal) in certain combinations give rise to authority. Both these special types of powers of position can thus be said to be more closely related to the typical case of authorization than to the case directly covered by the provision in the Contracts Act concerning powers of position. But at the same time they contain elements of the other extreme, the *bulvanskap*.

CONCLUSIONS

In the introduction to this paper certain questions were raised concerning powers of position in Swedish law as compared with similar phenomena in the common law. Against the background of the inquiry that has now been accomplished it seems possible to give the answers.

The Swedish legislative technique of drawing up a sweeping general clause on the subject must be considered the exact opposite of the Anglo-American legal technique. In spite of this profound difference as to the tools used, however, the results obtained in concrete situations often seem rather similar.[5] The prerequisite of "position" is so vague as to cover the majority of both Swedish and Anglo-American cases of the types here discussed and does not give very much guidance. The prerequisite of "usages" has all the elasticity of the concept of "negligence" as used in the law of torts; it appears to give the court ample scope to create new types of powers of position if desirable, e.g. in cases of repeated conduct

[4] Cf. Flume, "Rechtsgeschäft und Privatautonomie", *Hundert Jahre deutsches Rechtsleben*, Vol. 1, Karlsruhe 1960, pp. 136 ff., at pp. 163 f., 180, 181 *in fine*.

[5] Cf. Müller-Freienfels in his previously (*supra*, the first note 1) cited paper in *Modern Law Review* 16 (1953), pp. 229 ff., at p. 317.

between two parties only. In this way more detailed rules are worked out in case law, rules that often closely resemble those of the Anglo-American law of agency.

It might be said that this result of our investigation is not very surprising. "It is a well-known truism in comparative law that different legal systems, even in the countless instances in which they arrive at identical results, usually proceed along divergent conceptual routes."[6] But it is an equally well-known truism that only too often the student of comparative law is satisfied with comparing a codified, short and sweeping foreign rule of the kind here discussed with his own system of law without examining in detail the practical functions of the rule. Consequently he finds the differences so important that he writes off the foreign rule as an exotic phenomenon of no interest for his purpose. Results like those obtained in this paper illustrate the necessity of placing comparative law studies on a concrete foundation, comparing the practical solutions reached in situations of the same kind.

But the resemblances here pointed out must not conceal the important difference between, on the one hand, the wide common-law concept of agency and, on the other, the narrow civil-law concept. In Swedish law it is looked upon as something irregular that a principal who is undisclosed in his own interest might be bound by acts of his agent. Such a responsibility, bearing the stamp of a sanction, is definitely not placed on the same level as ordinary agency responsibility. This is why powers of position in the Swedish legal system appear as being "something in between"—at the same time an instrument for executing private autonomy and a sanction aiming at the creation of a duty for principals to interfere actively in order to clarify situations where third parties may reasonably receive a false impression that the "agent" has power. This is in fact the key to a true understanding of the whole Swedish law of agency.

[6] Schlesinger, "The Common Core of Legal Systems as Emerging Subject of Comparative Study", *XXth Century Comparative and Conflicts Law* (Legal Essays in honour of Hessel E. Yntema), Leyden 1961, pp. 65 ff., at p. 73.