Robert **HODDESON** and Joan Hoddeson, Plaintiffs-Respondents,

v.

KOOS BROS., a New Jersey corporation, Defendant-Appellant.

Superior Court of New Jersey, Appellate Division
Decided Oct. 30, 1957.

The plaintiff Mrs. Hoddeson was acquainted with the spacious furniture store conducted by the defendant, Koos Bros., a corporation, at No. 1859 St. George Avenue in the City of Rahway. On a previous observational visit, her eyes had fallen upon certain articles of bedroom furniture which she ardently desired to acquire for her home. It has been said that 'the sea hath bounds but deep desire hath none.' Her sympathetic mother liberated her from the grasp of despair and bestowed upon her a gift of $165 with which to consummate the purchase.

It was in the forenoon of August 22, 1956 that Mrs. Hoddeson, accompanied by her aunt and four children, happily journeyed from her home in South River to the defendant's store to attain her objective. Upon entering, she was greeted by a tall man with dark hair frosted at the temples and clad in a light gray suit. He inquired if he could be of assistance, and she informed him specifically of her mission. Whereupon he immediately guided her, her aunt, and the flock to the mirror then on display and priced at $29 which Mrs. Hoddeson identified, and next to the location of the designated bedroom furniture which she had described.

Upon confirming her selections the man withdrew from his pocket a small pad or paper upon which he presumably recorded her order and calculated the total purchase price to be $168.50. Mrs. Hoddeson handed to him the $168.50 in cash. He informed her the articles other than those on display were not in stock, and that reproductions would upon notice be delivered to her in September. Alas, she omitted to request from him a receipt for her cash disbursement. The transaction consumed in time a period from 30 to 40 minutes.

Mrs. Hoddeson impatiently awaited the delivery of the articles of furniture, but a span of time beyond the assured date of delivery elapsed, which motivated her to inquire of the defendant the cause of the unexpected delay. Sorrowful, indeed, was she to learn from the defendant that its records failed to disclose any such sale to her and any such monetary credit in payment.

Such were the essentialities of the narrative imparted to the judge and jury in the Union County District Court, where Mrs. Hoddeson and her husband obtained a final judgment against the defendant in reimbursement of her cash expenditure. The testimony of her aunt was corroborative of that of Mrs. Hoddeson.

Although the amount of money involved is relatively inconsiderable, the defendant has resolved to incur the expense of this appeal. . . . Obviously, the endeavor of the defendant is to elicit from us a precedential opinion concerning a merchant's liability in the exceptional circumstances disclosed by the evidence . . . .

It eventuated that Mrs. Hoddeson and her aunt were subsequently unable positively to recognize among the defendant's regularly employed salesmen the individual with whom Mrs. Hoddeson had arranged for the purchase, although when she and her aunt were afforded the opportunities to gaze intently at one of the five salesmen assigned to that department of the store, both indicated a resemblance of one of them to the purported salesman, but frankly acknowledged the incertitude of their identification. The defendant's records revealed that the salesman bearing the alleged resemblance was on vacation and hence presumably absent from the store during the week of August 22, 1956.

As you will at this point surmise, the insistence of the defendant at the trial was that the person who served Mrs. Hoddeson was an impostor deceitfully impersonating a salesman of the defendant without the latter's knowledge.

It was additionally disclosed by the testimony that a relatively large number of salesmen were employed at the defendant's store, and that since they were remunerated in part on a sales commission basis, there existed considerable rivalry among them to serve incoming customers; hence the improbability of the unnoticed intrusion of an impersonator.

* * *

The ground now asserted on behalf of the defendant for a reversal of the judgment is that there was a deficit of evidence to support the conclusion that a relationship of [principal and agent] existed between the man who served and received the money from Mrs. Hoddeson and the defendant company.

* * *

[W]e pause to examine the probative range of the circumstantial evidence. True, in the present case there was evidence that the person whose identity is undisclosed approached Mrs. Hoddeson and her aunt in the store, publicly exhibiting the mannerisms of a salesman; inquired if he could be of service; upon being informed of the type of the articles in which Mrs. Hoddeson was interested, he was not only sufficiently acquainted with their description, but also where in the department they were respectively on display, guiding them without hesitation to the location of the mirror and then to that of the indicated bedroom furniture; he represented that those articles were not then available in stock, which significantly the store records disclosed to be true; his prophetic representation concerning their prospective arrival in stock proved to be prescient, unless he gleaned that

information from the price tag; he accurately calculated their true sales prices and openly received the cash. Those activities precisely characteristic of the common experiences and practices in the trade were conspicuously pursued in market overt during a period of 30 to 40 minutes.

* * *

In the study of the circumstantial evidence, its perceptible legal deficiency and inadequacy inhere in the limitations of its disclosures. Obviously it confines its information solely to the activities of the supposed salesman. It does not embrace or, indeed, touch any manifestations whatever emanating from the defendant tending to indicate its conference of authority, actual or apparent, upon the alleged salesman.

Where a party seeks to impose liability upon an alleged principal on a contract made by an alleged agent, as here, the party must assume the obligation of proving the agency relationship. It is not the burden of the alleged principal to disprove it.

Concisely stated, the liability of a principal to third parties for the acts of an agent may be shown by proof disclosing (1) express or real authority which has been definitely granted; (2) implied authority, that is, to do all that is proper, customarily incidental and reasonably appropriate to the exercise of the authority granted; and (3) apparent authority, such as where the principal by words, conduct, or other indicative manifestations has 'held out' the person to be his agent.

Obviously the plaintiffs' evidence in the present action does not substantiate the existence of any basic express authority or project any question implicating implied authority. The point here debated is whether or not the evidence circumstantiates the presence of apparent authority, and it is at this very point we come face to face with the general rule of law that the apparency and appearance of authority must be shown to have been created by the manifestations of the alleged principal, and not alone and solely by proof of those of the supposed agent. Assuredly the law cannot permit apparent authority to be established by the mere proof that a mountebank in fact exercised it.

. . . The inadequacy of the evidence to prove the alleged essential element of agency obliges us to reverse the judgment.

[Nonetheless,] the proprietor's duty of care and precaution for the safety and security of the customer encompasses more than the diligent observance and removal of banana peels from the aisles. Broadly stated, the duty of the proprietor also encircles the exercise of reasonable care and vigilance to protect the customer from loss occasioned by the deceptions of an apparent salesman. The rule that those who bargain without inquiry with an apparent agent do so at the risk and peril of

an absence of the agent's authority has a patently impracticable application to the customers who patronize our modern department stores. Vide, 2 C.J.S. Agency s 93, p. 1193.

Our concept of the modern law is that where a proprietor of a place of business by his dereliction of duty enables one who is not his agent conspicuously to act as such and ostensibly to transact the proprietor's business with a patron in the establishment, the appearances being of such a character as to lead a person of ordinary prudence and circumspection to believe that the impostor was in truth the proprietor's agent, in such circumstances the law will not permit the proprietor defensively to avail himself of the impostor's lack of authority and thus escape liability for the consequential loss thereby sustained by the customer.

The reported decisions implicating precisely such uncommon occurrences are not numerous. Of them, the following will suffice to illustrate the import of our comments. *Kanelles v. Locke*, 12 Ohio App. 210 (Ct.App.1919), where an impostor acting as the hotel clerk received at the desk for safe-keeping money and jewelry from a guest; *Miltenberger v. Hulett*, 188 Mo.App. 273, 175 S.W. 111 (K.C.Ct.App.1915), where an incoming railroad passenger delivered his trunk check to an impostor acting in the office of the transfer agency; *Luken v. Buckeye Parking Corporation*, 77 Ohio App. 451, 68 N.E.2d 217 (Ct.App.1945), where a motorist entrusted her vehicle to an impostor acting as the attendant at a parking lot. [other cites omitted.]

* * *

Let it not be inferred from our remarks that we have derived from the record before us a conviction that the defendant in the present case was heedless of its duty, that Mrs. Hoddeson acted with ordinary prudence, or that the factual circumstances were as represented at the trial.

In reversing the judgment under review, the interests of justice seem to us to recommend the allowance of a new trial with the privilege accorded the plaintiffs to reconstruct the architecture of their complaint appropriately to project for determination the justiciable issue to which, in view of the inquisitive object of the present appeal, we have alluded. . . .

Reversed and new trial allowed.