

Operation of law

[15.102] An agency can also arise, in rare circumstances, by operation of law. That is, in the absence of agreement or intention, an agency can be created. This occurs in two situations, arising out of:

- (a) necessity; and
- (b) cohabitation.

Agency of necessity

[15.104] The common law recognises that an emergency situation may occur which allows one person to bind another *without the authority of the other*. In such a case, an agency of necessity arises, not through agreement, but from the relationship of the parties in the particular circumstances. However, because of the potential consequences of an agent binding a principal in the absence of agreement, the following four criteria must be met:

1. A person must have been entrusted with another's property.
2. There must be some commercial necessity for the action or expense.
3. It must be impossible/extraordinarily difficult to contact the owner.
4. The agent must act bona fide in the interest of the principal.

Great Northern Railway Co v Swaffield

[15.106] *Great Northern Railway Co v Swaffield* (1874) LR 9 Exch 132. The plaintiff company agreed to deliver the defendant's horse to a particular railway station. However, on arrival, there was no one to take possession of the horse on his behalf. Accordingly, the plaintiff's stationmaster sent the horse to a nearby stable. Subsequently, the plaintiff paid the stableman his charges. It was held that the plaintiff (acting as an agent) had satisfied the four criteria and was therefore entitled to recover from the defendant (principal) its expenses.

Agency arising by cohabitation

[15.108] Reflecting a very different time, the common law presumed that, when a husband and wife were living together, the wife had the authority to pledge her husband's credit for all necessities suitable to their particular station in life. In New South Wales, South Australia, the Australian Capital Territory and the Northern Territory, the common law doctrine enabling a wife to pledge her husband's credit has been abolished.¹

¹ *Married Persons (Equality of Status) Act 1996* (NSW), s 7; *Law of Property Act 1936* (SA), s 104; *Married Persons Property Act 1986* (ACT), s 5; *Married Persons (Equality of Status) Act 1989* (NT), s 5.