

## DISTINCTION BETWEEN SERVANTS AND AGENTS.

A person's jural relations may be varied by his own acts or through the agency of another acting for him. His representative is sometimes called an "agent" and sometimes a "servant". In either case the liability of the constituent for acts done in his behalf is well established, and the crucial question is usually whether the representative has acted within his "authority" or "employment" as the case may be.

While agency in its broad sense includes the relation of master and servant as well as that of principal and agent, these relations are discussed separately by theoretical writers, and the rules relating to the liability of the constituent to third persons in each situation have been worked out in an independent line of cases. The scope of a servant's employment is tested by more or less crystallized rules very different from those employed when the inquiry is whether the agent acted within his authority.<sup>1</sup> The distinction so uniformly assumed between these relations has been misunderstood in two ways: first, as to which element of the relationship indicates its character, and second, as to the line of distinction.

The elements of either relationship are a constituent, a representative, and the act or acts to be done. Assuming the persons involved to be normal, the only real distinction between agency relationships must arise out of the character of the thing to be done by the representative. The usual treatment which shifts the emphasis away from the acts to be performed to the persons involved, is circuitous, and, moreover, is confusing in cases where one representative is to perform different kinds of

<sup>1</sup> While parties dealing with an agent are bound at their peril to notice the limitations to his authority and cannot hold the principal unless the agent was within that authority, yet a servant may be deemed within the scope of his employment and his master held even though the act he committed be done in willful disobedience. Mechem on Agency, 2d Ed., Pars. 707, 1874, *et seq.* Phila. & Reading Ry. Co. v. Derby, 14 How. 468. "In tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden." "A man is not bound by his servants' contracts unless they are made in his behalf and by his authority." Justice Holmes, 4 Harvard Law Review 348, 5 Harvard Law Review 1.

acts. Some acts, owing to their nature, will bind the constituent only in case he authorizes the representative who performs them; while other acts subject the constituent to their legal consequences if they were within the scope of the representative's employment. No classification and naming of representatives is necessary to determine the constituent's liability. Convenience no doubt justifies the practice of calling representatives agents or servants, according to the kind of acts they are to perform; and these names are likely to continue. But this practice gives a false guide so far as it gives the impression that once a representative has been branded agent or servant, his character is fixed for every kind of act. It is helpful to recall that the simple and direct proposition underlying is this: the character of the act for which it is sought to hold a constituent responsible, is the criterion as to whether we should test for "authority" or for "employment".

A more difficult problem is to trace the line of distinction between acts and to indicate what acts must be authorized in order to bind the constituent and what acts render him liable if only they are within the scope of the representative's employment. The ability to effect certain jural charges generally called authority, is with more propriety called legal power.<sup>2</sup> This term better indicates such ability as a conception apart from the authorization or facts which give rise to it. There seems to be no analogous term to indicate the ability of a servant to impose obligation on his master. A conception, however, of such ability, apart from the facts which give rise to it, is helpful.

Since legal power is an institution broader than agency and since the ability of a servant to impose obligations on his master is but a branch of the master's broader liability, it may be helpful to recall a few fundamental ideas with reference to jural changes in general. Some recent discussions<sup>3</sup> have well

<sup>2</sup> 23 Yale Law Journal 46.

<sup>3</sup> Professor Hohfeld in 23 Yale Law Journal 26, 44; Professor Pound, in 26 International Journal of Ethics, 92, 95.

indicated the character of legal power and incidentally have indicated the cases where such power is appropriate and essential to effective action.

It has come to be recognized that the paramount object of law is to protect the interests of individuals and society.<sup>4</sup> These interests the law recognizes and protects by throwing about them the legal institutions known as rights, powers, privileges, and immunities.<sup>5</sup> The extent to which an individual's interests are recognized, and the fortifying rights, powers, privileges, and immunities which he possesses are continually being shifted and altered. These changes are made in one of two ways: either the consent of the parties to the change is recognized as effective to accomplish the change or the sovereignty regardless of the parties' consent imposes the change.<sup>6</sup> By the former method contractual duties are incurred, property is transferred, and privileges and powers are granted. By the latter method the obligations to make reparation for torts are imposed, property is condemned for public benefit, and other changes accomplished. Most of the state-made changes are imposed as the jural consequences of acts committed. It should be noted that while the state may either enlarge or diminish the rights of an individual, the consent of that individual can alter his rights<sup>7</sup> only by way of diminishing them. To enlarge his rights requires either state action or the consent of some other individual. Of course the consent of an individual to the curtailment of some right may be the inducement which indirectly procures for him a new and enlarged right. He may, for example, acquire property or personal interests because he consents to pay for them, but the only direct effect of his consent is to surrender right and become obliged to pay.

<sup>4</sup> Beale, *The Conflict of Laws*, p. 155.

<sup>5</sup> See Professor Pound, 26 *International Journal of Ethics* 92. Professor Hohfeld, 23 *Yale Law Journal* 16.

The word "rights" is sometimes used in a broad sense to include this entire group of legal institutions.

<sup>6</sup> III *Select Essays in Anglo-American Legal History* 583.

<sup>7</sup> The word "rights" is frequently used herein in the broad sense indicated in note 5.

Rights, powers, privileges, and immunities, and the shifting thereof, imply the existence of legal persons, having more or less capacity. While capacity as an attribute of legal personality has in one aspect to do with ability to acquire and hold rights, we are more concerned at present with the ability to part with rights and incur duties. The law imposes duties and takes away rights, usually, because of some act or acts committed. In doing this the law needs to recognize not only a legal person with ability to owe but also needs to recognize in the actor ability to bind that legal person. In the simplest case, of course, the person bound and the actor are identical but this, as will appear later, is not always the case. As noted above, the diminution of rights or increase of duties may come about either as the result of an act indicating consent or by will of the state exerted regardless of the individual's consent. To effect a consensual change requires capacity different in degree, if not in kind, from a capacity sufficient to subject one to state-imposed changes.

The diminution of one's rights by consent, requires a high degree of capacity called "power" Legal power has been variously defined. According to Professor Pound the word power is used to indicate the "capacity of creating, divesting, or altering rights".<sup>8</sup> According to Professor Hohfeld a person whose political control is paramount in effecting change in a given legal relation is said to have legal power.<sup>9</sup> According to Hon. John W. Salmond a power may be defined as "ability conferred upon a person by the law to determine, by his own will directed to that end, the rights, duties, liabilities, or other legal relations either of himself or of other persons".<sup>10</sup> While the idea does not very clearly appear in some definitions of legal power, it should be observed that the acts which a power render effective are those which manifest consent to a change in jural relations, such acts being apparently directed to that end. They are what

<sup>8</sup> 26 *International Journal of Ethics*, p. 95.

<sup>9</sup> 23 *Yale Law Journal*, 16.

<sup>10</sup> *Salmond on Jurisprudence*, par. 76.

Professor Holland would call "juristic acts".<sup>11</sup> The making of contracts, the alienation of property, and the granting of privileges, and all consensual changes are brought about by acts apparently intended to have those results.<sup>12</sup> Contrasted with these are acts such as striking another or trespassing upon his property, which acts produce a change of jural relations regardless of the doer's consent or intention as to the jural effects of the acts. The jural result in such cases is generally imposed by way of redressing an injury done to some social or individual interest. The state itself makes the change in jural relation. No legal power is needed. Power should not be used to explain the origin of duties which the state imposes directly, regardless of the individual's consent.

Since consent is an "internal act" which the law cannot take cognizance of directly, it is generally conceived that the law acts on the manifestation, that is, on the external act indicative of consent. The essence of legal power then is the ability to curtail or divest rights of a person subject to the power by manifestation of consent to the change.

Acts, other than those above called juristic, are generally not expected to have any legal effect; at any rate they are not intended to work directly any detrimental change in jural relations. Occasionally, however, they do work that result. Any legal person is subject to duties. These duties may be violated by acts. When a violative act occurs the law imposes a penalty, generally in the form of a sanctioning duty. Such change follows the act without regard to the consent of the actor. This process differs in two particulars from the exercise of legal power. The character of the act differs in that it is not directed to the result; and the character of the change differs in that it is

<sup>11</sup> Holland on Jurisprudence, 8th Ed., p. 102.

<sup>12</sup> Contracts for an undisclosed principal may seem to be an exception, but the doctrine which permits an undisclosed principal to sue and be used on contracts is an anomaly. Dean James B. Ames in 18 Yale Law Journal 443.

"The plain truth ought never to be forgotten that the whole law as to the rights and liabilities of an undisclosed principal is inconsistent with the elementary doctrines of the law of contracts." 3 Law Quarterly Review, p. 359.

usually a sanctioning or secondary duty that is produced. Owing to these differences such changes may be wrought by one who has not legal power. The state will impose its sanctions, for acts committed, so long as the actor has even a small degree of capacity. The act of the infant or insane person will call down the sanction just as surely as the act of an adult. While ability to bring about the above jural changes differs from legal power it is still a phase of capacity. This smaller degree of capacity in an actor, which will satisfy the law as a prerequisite to visiting the usual consequences of non-juristic acts, does not seem to have a name, but a conception of it, as distinguished from legal power, seems important.

It is impossible for an act to have a double aspect. First, it may be viewed as an act to which the law attaches consequences irrespective of the parties' consent; and, second, it may be viewed as an act manifesting consent and so dependent for its efficacy on the existence of power. Such an act is the infant's fraudulent pretense of binding himself to a contract. The infant has such capacity that the law imposes on him a duty to make reparation for his fraud. The contract fails for lack of legal power.

Some jural results have been attributed to powers which must find other explanation if the operation of a power depends on the result achieved being that intended or apparently intended. The ability of a person to "break a contract and substitute a duty of paying damages for the pre-existing duty of performing" has been cited as an illustration of a power.<sup>13</sup> In such cases of course the result of the breach is the same whether intended or not. But, it is submitted, such a case does not involve legal power. The breach of a contractual duty, indeed the breach of any duty, does not require legal power. Nor does the substitution of a duty to pay damages require a legal power.<sup>14</sup> The state imposes that duty.<sup>15</sup>

<sup>13</sup> *26 International Journal of Ethics*, p. 95.

<sup>14</sup> "An insane person is liable for a breach committed during insanity, of a contract made while sane." Page on Contracts, par. 897.

<sup>15</sup> Beale, *Conflict of Laws*, p. 186.

The existence of power or the existence of lesser capacity does not necessarily indicate any jural relation. Capacity, in any degree, may be but an attribute of legal personality conferred by law, the person of inherence and the person of incidence being the same. But it is a common situation that one person has legal power to bind another or has capacity, by the performance of non-juristic acts, to render another amenable. The person of inherence and the person of incidence are now related but are no longer the same. Such a situation constitutes an agency relation. If the representative has power to bind his constituent by juristic acts, he is called an agent; if he has only a capacity to make his constituent amenable for non-juristic acts, he is called a servant.<sup>16</sup>

The conception of power as such, apart from the facts which give rise to it, remains essentially the same whether it be noted as the power one has to alter his own relations or the power an agent has to alter the relations of his principal. A corresponding identity exists in the conception of that capacity less than power, which we see on one hand enabling a person by non-juristic acts to alter his own relations and on the other hand enabling a servant, by non-juristic acts, to alter those of his master. Unfortunately this latter sort of capacity has no distinctive name.

The existence of power or lesser capacity is a question of fact. As noted above the power or capacity to affect one's own jural situation is conferred by law and usually depends on such circumstances as age, personal ability, and domestic status. In a few cases the law may confer power or capacity to alter the jural situation of another. The usual method of creating an agency relation, however, is for the constituent to confer the power or capacity, as the case may be. The power is conferred and the correlative liability is assumed directly by real or apparent consent. The sort of juristic acts which the agent may perform in the constituent's behalf are pointed out. In

<sup>16</sup>The master is under a liability analogous to that of the principal and the correlative ability of the servant should be recognized.

consenting to have such acts performed in his behalf, it is fairly clear that the constituent contemplates third parties and consents to subject himself to the result of those acts. Of course he does not necessarily consent to the particular acts. He may not even know of them. But the potentiality—the power itself—he does consent to.

The lesser capacity which a servant has and to which the master bears a correlative liability,<sup>17</sup> is not consented to, except indirectly, by the master. The constituent employs a servant to perform certain, or various, acts; the law then imposes the liability. The employment is consented to but the liability is not. The employer may not even contemplate relationship with third persons. Neither employment nor scope of employment is the analogue of delegated power but employment is the premise upon which the law supplies the analogue of delegated power, viz., the servant's capacity or ability, by his acts, to provoke the imposition of obligations on his master. Just as making a contract gives rise to a consensual duty while absolute duties are imposed; so the delegation of a power gives rise to a consensual liability<sup>17</sup> while imposed liability<sup>17</sup> exists whenever one is employed to act for another. Consent of the constituent is thus at the basis of investiture of another person with either power or lesser capacity but in one case it operates directly and in the other indirectly.

In view of the multifarious and equivocal dealings of men it is frequently a vexed question of fact whether the requisite consent has been given. Such consent as exists is generally evidenced by communications from the constituent to the representative, but it should be observed that the power or other capacity conferred is a thing quite distinct from any contract for service that may exist between them.

The criteria as to the existence of power, on one hand, or mere capacity on the other, differ in kind because the operative facts to be established differ; these criteria differ also in degree

<sup>17</sup> Liability is here used in the sense of Prof. Hohfeld's definition, 23 Yale Law Journal, p. 44.

owing to considerations of policy. For instance, the distinction between deviation and departure by a servant, and the rule that deviation does not take him outside his employment could have, at most, only a figurative application in dealing with the establishment of power. Again the cases which have held a servant to be still within the scope of his employment in spite of his willful disobedience, cannot with safety be applied in testing for power. The establishment of capacity or power is not usually an end in itself but is sought as a means of holding the alleged constituent. This leads to considerations of policy. In cases where it is a question whether the act has been committed by a servant acting within his employment, the right of a third person usually has already been invaded and a loss sustained by him. On the other hand the existence of a power usually comes into question when no right of the third person has been invaded; the only thing at stake is a benefit he hopes to derive from a bargain. Owing to these and other considerations, not only a different sort but also a weaker array of evidential facts seems sufficient to establish mere capacity than would suffice to establish power.

There is nothing to be gained by comparing the criteria as to the existence of power and capacity, respectively, any further than is necessary to indicate that they are different. The point to be emphasized is that in considering whether one person is subject to or liable for acts committed by another, the first step is to determine whether the jural consequences alleged depend on the representative having power or mere capacity. The next step is to apply the appropriate tests to determine whether that power of capacity exists.

In one class of acts, particularly, a failure to note the above distinction has caused confusion. Courts have frequently assumed that words alleged to have been spoken in behalf of a constituent were not chargeable to him unless the representative had power to make those words bind his constituent to a consensual obligation.<sup>18</sup> Obviously a representation is an act which may

<sup>18</sup> Grant v. Norway, 10 C. B. 865; Udell v. Atherton, 7 H. & N. 172.

violate existing rights of others and be attended by legal consequences regardless of the maker's consent. It would seem to follow that power as distinguished from capacity is not requisite to such consequences. In the case of fraudulent<sup>19</sup> or libelous<sup>20</sup> statements the courts have no hesitation in predicating liability even where the author of the statement is without legal power to bind by such a statement. An infant or insane person is bound to make restitution for damages thus occasioned. A servant may subject his master to a similar duty. There was for a time some confusion in the fraud cases. We find Baron Bramwell in the case of *Udell v. Atherton*,<sup>21</sup> saying: "It certainly would be a most singular thing that the defendant should be liable for this fraud of Youngman's though not liable on Youngman's warranty, which he is not, although the same reasoning would apply." It is now recognized that a statement which would be inoperative as a consensual warranty because the maker lacked power<sup>22</sup> may be operative as a fraudulent representation.<sup>23</sup> Such a statement as a juristic act has no consequence; but viewed in another aspect it is such an act that the law imposes a jural result regardless of whether the maker has power.

It is in cases where the statement is of such character as would work an estoppel that most confusion has arisen. Even in these cases it may be said that statements appropriate to work an estoppel are generally given that effect though the author was without power to bind by such a statement. By the better doctrine, infants may estop themselves.<sup>24</sup> Servants may estop their masters by most kinds of representations if made within the scope of their employment.<sup>25</sup> This is true in cases where the representative clearly had no power. For example, where the servant of a municipal corporation in charge of its files exhibited

<sup>19</sup> 5 B. R. C. 526.

<sup>20</sup> 8 L. N. S. 1023.

<sup>21</sup> 7 H. & N. 172.

<sup>22</sup> *Dunham v. Salmon*, 130 Wis. 164.

<sup>23</sup> *Haskell v. Starbird*, 152 Mass. 117.

<sup>24</sup> Bigelow on Estoppel, 6th Ed., p. 628.

<sup>25</sup> Bigelow on Estoppel, 6th Ed., p. 618.

to a prospective bidder what purported to be a copy of plans and specifications for work to be done, the corporation was estopped as against this bidder from denying that the plans and specifications exhibited were the true ones.<sup>26</sup> The holding in these cases seems obviously correct. Estoppel does not create a consensual situation. It is one imposed as a consequence of words or other acts. The law creates it, and no legal power on the part of the actor is essential to its existence. As to one class of statements, however, the courts have hesitated and often refused to give them effect as an estoppel of the constituent even where made by one pretty clearly within his employment. The statements referred to are those which indicate the extent of an agent's power or which relate to facts upon which power is conditioned.

In dealing with this class of representations it has been supposed that we encounter the proposition that an agent cannot enlarge his authority by his own representations. The difficulty has come from a failure to observe what is meant by "his own representations". Clearly representations made by an agent in his own behalf should not operate to enlarge his delegated power, the extent of which is generally measured by the real or apparent consent of his constituent. But where one is employed by and does make representations in behalf of his constituent these representations may operate to enlarge his power or to establish facts upon which his power is conditioned. Suppose a bank cashier were authorized to purchase a certain article when the bank deposits reached \$100,000, and suppose further that this same cashier were directed to publish financial statements monthly. If he were to publish a monthly statement indicating deposits in excess of \$100,000 and a third person relying on the truth of such statement were to sell the article to this cashier acting in behalf of the bank, would anyone doubt the liability of the bank? Here the statement is one which does not operate to enlarge the agent's power but does operate to place beyond dispute facts upon which his power depends. With the facts thus established, the power as it admittedly exists is suffi-

<sup>26</sup> *City of Chicago v. Sexton*, 2 N. E., 263, 266.

cient. A case which illustrates that a statement made by an agent may operate even to enlarge his power is found in *Holden v. Phelps*.<sup>27</sup> The facts in that case were that a board of directors passed a resolution authorizing the "treasurer" of the company to "discharge and release mortgages". One man held the position of secretary-treasurer. As secretary he recorded the resolution and made it read as authorizing him to "discharge, release, and assign mortgages". He showed the resolution thus recorded to the plaintiff, who became assignee for value of a mortgage which this treasurer assigned to him in the name of the bank. The purchase money paid by the plaintiff to the treasurer was misappropriated by the latter. It was held that the bank was bound by the assignment. The representation which this agent made as to the extent of his power, it was within his employment to make, and so was effective to enlarge the bounds of his power.

The application of the above principles to cases where a station agent has issued a bill of lading without receiving the goods, would seem obvious; but in such cases the decisions are in great conflict as to whether one who has innocently advanced money on the security of such a bill of lading may hold the carrier company.<sup>28</sup> The bill of lading is first of all a written representation that the goods have been received and one which by its terms purports to be made in behalf of the company. This representation is not made to the shipper alone but to all whom the bill of lading may reach in due course. Representations need not be made directly. In speaking of the representation of authority which an agent impliedly makes when he executes a negotiable instrument, it is said in *Polhill v. Walter*,<sup>29</sup> "The representation is made to all to whom the bill may be offered in course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of those."

<sup>27</sup> 141 Mass. 456.

<sup>28</sup> *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111; *Grant v. Norway*, 10 C. B. 665; *Friedlander v. Railroad Co.*, 130 U. S. 416. See also article by H. S. Ross in 15 Michigan Law Review, 38, where a large number of cases involving this point are reviewed.

<sup>29</sup> 3 B. & Ad. 114.

Quite distinct from the question as to what representation has been made, is the question whether that statement is chargeable to the company. To be sure, the station agent is empowered to make a bill of lading contract only on condition that he receive the goods. He has not even apparent power to make a bill of lading contract except upon that condition. But he is employed to state in written bills of lading what goods have been received, and, by silence or otherwise to negative the receipt of other goods. This he does in behalf of the company. The station agent is no doubt instructed to make such a representation only when he has received the goods. The truth of the situation may be the motive which should, and which is expected, to induce his statements, but violation of orders or improper motives do not of themselves remove an act from the scope of a servant's employment. Moreover, a master may be estopped to deny the employment of a servant whose statements have misled another. Ordinarily, employment and consequent capacity of a servant can not thus be shown, because the person injured has not been misled by any apparent relationship between the about from the person having been misled, such an apparent relation may have contributed to induce the injurious action. Therefore, estoppel can and often does operate to establish a master and servant relation in favor of one who has been injured by false statements of an apparent servant. One of the clearest cases against a constituent is that where the constituent has referred third persons to a representative for information, and the third person has been misled by the false or fraudulent statements of that representative.<sup>30</sup> The carrying company is such a constituent. It has put a man in the position of station agent to whom as is well known third persons turn for statements issued in behalf of the company as to what goods have been received.

For the above reasons the statement of the servant in behalf of his company that the goods have been received, would seem to put the fact of their receipt beyond question in favor of one

<sup>30</sup> *Philps v. Mallory Commission Co.*, 105 Mo. App. 67, 78 S. W. 1097.

who has advanced money on the bill of lading. With this fact established, the power of the agent to contract for the carriage of the goods is complete, and the company would seem to be contractually bound by the bill of lading. Moreover, it would seem that one in whose favor the fact of the goods having been received is established, should be able to hold the carrier on its common law liability which exists apart from contract.

While many courts have insisted that sound reason exonerated the carrier in the above type of cases, it has been long recognized that convenience and policy required that the carrier should be held. Statutes have been passed by Congress and a large number of state legislatures providing that the carrier is liable in such cases.<sup>31</sup> It is submitted that the common law would have supplied a clear and expedient rule had the fundamental principles of agency been kept in mind.

It may be well to add a word by way of summarizing the foregoing discussion. Changes in one's jural relations are usually the result of acts. Juristic acts, owing to their character and the result to be produced, are operative when performed by a man in his own behalf, only in case he has legal power. His other acts, so far as they have legal significance, are not dependent on legal power. The same distinction exists between acts to be performed by a representative. Juristic acts require power; other acts do not. A representative whose function requires power may well be called an agent and a representative whose function requires no power may well be called a servant. It frequently happens that one representative has both functions to perform and if so the particular act in question indicates whether power or a lesser capacity is required. The existence of either power or a lesser capacity is a question of fact but the criteria as to its existence differ in the two cases. By way of illustrating the necessity for observing this distinction the cases are referred to where it is endeavored to hold a carrying company on a bill of lading issued by its station agent who did so

<sup>31</sup> 39 U. S. Stat., p. 542. The Uniform Bills of Lading Act which contains such a provision has been adopted in 19 States. <sup>2</sup> American Bar Association Journal 710, <sup>3</sup> American Bar Association Journal 524.

without receiving the goods. If the representation in such bill of lading, that the goods have been received, is chargeable to the company, it should by well known principles be estopped to deny the truth of the statement. Many courts have assumed that power on the part of the station agent to make such statements binding as consensual obligations, is a prerequisite to holding the company; and failing to find that power have exonerated the carrier. Obviously the company has not consented to give their agent power to bind them under such circumstances. But the statement need not be viewed as a manifestation of consent and in its other aspect it is chargeable to the company. It is made in their behalf by a man whom they have employed to make just such statements, necessarily leaving to his discretion when and what specific statements to make. The company's liability<sup>32</sup> correlative to their station agent's capacity follows regardless of their consent to it.

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<sup>32</sup> See note 17, *supra*.