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ACTS

The concept, 'act,' is a fundamental one in legal science. Every legal relation of whatever sort, whether of private law or of public law, necessarily involves for its existence an act. The act involved, moreover, gives to a legal relation its jural character. An act therefore is said to be the 'content' of a legal relation.¹ The persons (*personæ*) of a legal relation are static elements; but the act involved in a legal relation is a dynamic element.² When the involved act is performed (evolved) the persons of the legal relation remain the same persons (under changed jural conditions brought about by the evolution of the act), but the act itself, after evolution, has become an historical fact.³

Thus, if a debtor fails to pay his debt, the act of non-performance accomplishes two legal results: (a) it destroys the sanctional claim to the payment of the money; (b) it creates a new sanctioning duty to pay damages for the breach of the earlier duty.⁴ A legal relation therefore has been destroyed and

¹ Salmond, *Jurisprudence*, (3d ed. 1910) Sec. 73: "The Elements of a Legal Right."

² Kocourek, *Natura e specie dei rapporti giuridici*, *Riv. Int. D. Fil. Del. Diritto*, I, 21 (24) (1921).

³ The terms, 'involved' and 'evolved' (or involution and evolution) are used in a precise technical juristic sense. These and other related terms are fully explained elsewhere: Kocourek, *Nomic and Anomic Relations*, 7 *CORNELL LAW QUARTERLY* II, 19, n. 23 (1921).

⁴ This results from the juristic fact that the duty to pay is, and necessarily

a new legal relation has been created. The evolved act, however, is no longer an element of any jural relation. It has become an evidentiary historical fact, important only to furnish proof of the jural sequence. If, on the other hand, the debtor pays his debt, then payment is the evolution of the mesonomic (power) relation resulting in its destruction without the sequence of a new 'polarized' relation between the same persons.⁵ And, here again, the evolved act has become a thing of the past, having a present value only for evidentiary purposes to show what the present situation is between the creditor and the debtor.

It is the object of this discussion to state, and, if possible to prove two theses concerning the important concept, 'act.' The first thesis is that an act has no duration and that, to use a mathematical figure, it is a point and not a line. The second thesis is that an act is an objective situation attributed by the law to the precedent existence or absence of a human reflex. Since these propositions are closely interconnected we shall discuss them together.

I

The prevailing analysis of 'act' is singularly complex. That of Holland is typical.⁶ According to Holland, the essential elements of an act are: (1) an exertion of the will; (2) an accompanying state of consciousness; (3) a manifestation of the will.

1. Borrowing from Zitelman, Holland paraphrases the first element as "the psychical cause by which the motor nerves are immediately stimulated."⁷

must be, accompanied by the power (in the debtor) *not* to pay. The duty to pay is the content of a zynomic relation; and the power *not* to pay is the content of a mesonomic relation. In this example, the mesonomic relation is evolved. Cf. "Nomic and Anomic Relations" *loc. cit.*, note 3 *supra*.

⁵A 'polarized' legal relation is a so-called '*in personam*' legal relation. Since all legal relations are *in personam*; since, in other words, there are legal relations only of persons and to persons, it is desirable to indicate the juristic distinction between '*in personam*' and '*in rem*' by other terms. The terms employed here to indicate the distinction are 'polarized' and 'unpolarized.' See Kocourek, Rights in Rem 68 U. OF PA. L. REV. 322 (1920); Polarized and Unpolarized Legal Relations, 9 KENTUCKY L. JOUR. 131 (1921).

⁶Holland, Jurisprudence, (13th ed. 1924) p. 108: "Analysis of a Right"; Mill, A System of Logic, I, 59.

⁷Zitelmann "Irrthum und Rechtsgeschäft," (1879) p. 36.

It is apparent that we have here the effort of the jurist to assimilate, for legal purposes, the findings of the psychologists; but the learned author then proceeds to say that a 'juristic' person is incapable of willing, "unless by a representative, or by a majority of its members."⁸ On this, it may be remarked that the law is a practical science and that it need not concern itself with motor nerves. The law, of course, must accept the findings of psychologists, but only for evidentiary ends; for example, to determine responsibility for a criminal act; but it is beyond the province of the law to enter into the details of mental science or to build up theories based on such details.

Again, it may be remarked, that we can see no need of any qualification for 'juristic' persons. A 'juristic' person can not act in any sense either mentally or physically. Juristic persons can only be made accountable by imputation for the acts of those who can at all.⁹ Only human beings can act in a juristic sense.¹⁰ It is a fiction to say that any act can be imputed;¹¹ but it is not a fiction to hold responsible one person for the act of another.

2. The second element in the prevailing analysis of acts is 'consciousness.' As Holland puts it, "The moral phenomena of an exertion of will are necessarily accompanied by intellectual phenomena."¹² It seems a broad statement to assert the necessary coincidence of will and consciousness, but, since we believe that legal science cannot be concerned with that question, it is

⁸ Holland *op. cit.*, p. 109.

⁹ "Von Handlungen kann bei einer juristischen Person da sie kein Mensch ist, an und für sich nicht die Rede sein"; Windscheid, Lehrbuch des Pandektenrechts, 9th ed., (Kipp Ed. 1906) I, sec. 59.

¹⁰ In the view which cannot be elaborated here that there are only 'juristic' persons in the law, it follows that responsibility for acts of human beings must always be imputed. Responsibility for the act of Titius, a human being, may be imputed to the *persona* called Titius. When the human being and the *persona* coincide as they do for most practical purposes the distinction may be disregarded in practice, but it exists nevertheless, and rarely it becomes of great technical importance as where the legal *persona* antedates or survives the physical person. See Part III of this paper.

¹¹ Terry, *Leading Principles of Anglo-American Law*, (1884) sec. 88, p. 70: "It is an absurd fiction."

¹² Holland, *op. cit.*, p. 109.

unnecessary to attempt to survey the opinions of psychologists. It is true, nevertheless, in the field of legal wrongs, that important categories of liability have been constructed on the basis not only of a coincidence of will and consciousness but even of particular kinds of consciousness. For the purposes of civil liability, one of the most important of these categories is that of intentional and unintentional acts. Intentional acts may be actually malicious; they may be of a kind where malice is presumed; and, lastly, they may be simply intentional without malice. Of the latter sort, an intentional act may be 'directly' intentional, as where the consequence of acting determines the will to that end; or an intentional act may be 'obliquely' intentional as where the consequence is in contemplation but does not determine the will to that end.¹³

Non-intentional acts are commonly divided into acts of 'slight,' 'ordinary,' and 'gross' negligence; into '*culpa in concreto*' and '*culpa in abstracto*'; into '*culpa levis*' and '*culpa lata*'; into advertant and inadvertant negligence;¹⁴ and in various European codes in other ways.¹⁵

In criminal law, a similar attempt is seen to classify states of mind, especially in the legislation dealing with homicides. In American states, various degrees of murder are commonly recognized, and manslaughter also is often classified into two or more degrees.

These attempts to make arbitrary divisions of the functions of the mind, we believe, are bottomed on an unworkable plan. We do not doubt the reality of differences in the mind so far as they are followed by external consequences, but precisely what these differences are and how they are to be grouped and evaluated are problems as to which there is no settled view among

¹³ Bentham, *Principles of Morals and Legislation*, (1789) cap. viii. The difficulty for the law in making application of Bentham's "logic of the will" (*Principles*, Preface p. xiii) is well illustrated by the case put (chap. VIII) of the shooting of William II by Sir Walter Tyrrel.

¹⁴ Austin, (*Lectures on Jurisprudence*, 4th ed. 1873, Lect. xx, p. 438) says that Negligence is the inadvertent breach by omission of a positive duty; Heedlessness is inadvertent breach of a positive duty; Rashness is the breach of a positive duty by insufficient advertence.

¹⁵ Cf. Holland op. cit. pp. 113 seq.

psychologists. What the psychologist can not do in his own field, the jurist can not do for him in making application of psychical concepts. We speak of intentional and unintentional acts in the law with the false assurance that we know just what these terms mean; while the fact is that they represent ideas of very great complexity.¹⁶

It is almost universally accepted among lawyers that the distinction between intentional and unintentional acts is a necessary one in legal analysis. Thus, Holland says that "the state of mind of the doer of an act is often the subject of legal inquiry with a view to ascertaining whether it exhibits the phenomena of intention."¹⁷ He gives as instances, intention to cancel a will, malice in libel, and *animus furandi*.

The opinions of judges and the commentaries are a unit in the view that the concept, 'intention,' is a simple one, readily understood, and free from ambiguity, and that the law cannot dispense with it. To say that the idea is a highly nebulous one is equivalent to saying that the law neither does nor can deal accurately with it even in the field of criminal law. There is, no doubt, an idea of 'intention' in the sense of 'willing' or 'desire' or of 'purpose' which serves in current speech where most of the terms employed lack clearness of definition; and there is

¹⁶ Austin, (*op. cit.*, Lect. xxi, p. 449) in describing intention says: "The party wishes or wills certain of the bodily movements which immediately follow our desires of them; he expects or believes, at the moment of the volition, that the bodily movements which he wills, will certainly and immediately follow it; and he also expects or believes, at the moment of the volition, that some given event or events will certainly or probably follow those bodily movements." It is sufficient to point out that by this analysis a surgeon who operates skilfully and with some hope to cure his patient, but with the belief that the operation will result fatally, has intended the death of his patient.

The definition of Mr. Justice Holmes avoids the difficulty of Austin's analysis but it introduces other problems. He says (*The Common Law*, [1881] p. 53) ". . . intent . . . will be found to resolve itself into two things: foresight that certain consequences will follow from an act; and the wish for those consequences working as a motive which induces the act." Taking again the surgeon illustration, suppose that the surgeon believes that it will be better that the patient die under an operation which has some margin of possible success than live without an operation. He operates skilfully believing that the chances of death probably outweigh the chances of recovery. If the operation results fatally, has not the surgeon intended the death?

¹⁷ Holland, *op. cit.*, p. 113.

no doubt, either, that the idea in the great bulk of instances in the law does a rough service in the administration of practical justice; but the fact remains that if it is an idea the exact nature of which can not be stated, it can not function in a practical art except under the illusion of certainty. In the law, the illusion is not only that of certainty in the meaning of 'intention' but the greater illusion that the term functions at all. This has been shown in a learned and convincing manner by Mr. Justice Holmes. "All law," says Mr. Justice Holmes, "is directed to conditions of things manifest to the senses."¹⁸

All terms such as '*mens rea*' and the large array of words that attempt to describe states of mind must in a scientific analysis of legal ideas be replaced by functional ideas which state behavioristic attitudes. For our present purpose it is sufficient to repeat, that the effort of the jurist to analyze consciousness is futile and unnecessary.¹⁹

3. The next element in the prevailing analysis of 'act' is the outward expression. But according to Austin "the bodily movements which immediately follow our desires of them, are the only human *acts* strictly and properly so called."²⁰ Mr. Justice Holmes puts it in still a more striking way. He says "an act is always a voluntary muscular contraction and nothing else."²¹ He then proceeds to say that "the chain of physical sequences which it sets in motion . . . is no part of it

¹⁸ Holmes, *The Common Law* (1881), p. 49. Cf. Levitt, (Origin of the Doctrine of Mens Rea, 17 *ILL. L. REV.* 117 [1922]) who ascribes the origin of *mens rea* in the common law to the penitential books of the ninth century. See, also, the important article of G. H. T. Malan, Behavioristic Basis of Science of Law, 8 *A. B. A. JOUR.* 737 *seq.*

¹⁹ It is interesting to note that Holland who argues for the juristic necessity of operating with the concept of 'intention' in criminal law and for 'juristic acts' abandons that idea for contracts. He says (*op. cit.*, p. 263) ". . . when the question is once raised, it is hard to see how it can be supposed that the *consensus* of the parties is within the province of law which must needs regard not the will itself but the will as expressed . . ." Cf. Leonhard, *Der Irrthum bei nichtigen Verträgen*; Windscheid, *Lehrbuch des Pandektenrechts* (9th ed., Kipp Ed. 1906) I, sec. 69 n. 1a.; Williston, *Mutual Assent in the Formation of Contracts*, (1919) in Wigmore, *Celebration Legal Essays*, p. 525.

²⁰ Austin, *op. cit.* I, 432: Lecture xix.

²¹ Holmes, *The Common Law* (1881), p. 91.

. . .”²² In another place, Austin has said that “acts (properly so called) are not injuries or wrongs, independently of their consequences.”²³ It is perfectly clear that when a liability is incurred for a wrongful harm, the liability is not for the act as above defined by Austin and by Holmes. It is also perfectly clear, on the contrary, that liability is imposed for having been in a definite objective relation to a harm. The basis of the application of this liability is the probability of harm flowing from the muscular movements, or the lack of them, of some person. No doubt the standard is an ideal one varying from case to case and dependent on the education, character, and prejudice of those who apply the standard.²⁴ The standard in all cases is and must be an objective one even where in the chain of physical motions there is a psychical gap, as where a master orders his servant to do an unlawful act or where the owner of a dog incites the animal by words to attack another.

If we examine the contents of any specific code we will at once encounter definitions of this sort:

Murder is the unlawful killing of a human being with malice aforethought.

Manslaughter is the unlawful killing of a human being without malice.

Larceny is the felonious stealing, taking and carrying, leading, riding or driving away of the personal goods of another.

Robbery is the felonious and violent taking of money, goods, or other valuable things from the person of another by force or intimidation.

The crime of murder is not the crooking of a finger, even though that finger was attached to the trigger of a loaded pistol which was discharged resulting in the death of a human being. The crime is the killing. Liability is imposed because of the objective relation of some person who brought it about. If

²² *Ibid.*

²³ Austin, *op. cit.* I, 440: Lecture xx.

²⁴ Cf. Holmes, *op. cit.* p. 51.

criminal punishment is inflicted for acts, then it is clear beyond any doubt that the act is the killing and is not the muscular movement which preceded it. To accept the Austinian view of the nature of an act would require a cumbersome rephrasing of every criminal code.²⁵

The Austinian analysis confuses two distinct ideas: (1) acts, the results of muscular movements; and (2) culpability for these results. The act is the same whether it was willed or not willed, whether harm or not harm, whether *injuria* or not *injuria*.²⁶ The act is the *prius*; the question of culpability is a *posterius*. The act, the factual result, is a datum of the physical world; liability is a datum of juristic thought. It is an inconvenient inversion of the order of things, to attempt to isolate an intermediate act and to connect it to a state of mind on one side and to certain consequences on the other.²⁷ It is not only inconvenient to proceed in this way but it is also analytically confusing to attempt it. The more natural line of inquiry is: (1) Was there a harmful result?; (2) Is any one accountable for that harmful result? The first question is answered by evidence. The second question is answered in part by evidence showing the objective relation of the actor to the event, and in part by application of a standard to measure this objective relation.

In the ordinary case of liability the ultimate questions are generally so obvious that it is of little practical importance

²⁵ Markby (*Elements of Law*, 6th ed., [1905] sec. 215, p. 118), confessedly follows the Austinian analysis. See, also Cook, W. W., *Act, Intention, and Motive*, 26 *YALE LAW JOURNAL* 645 (1917).

²⁶ Cf. Beale, *Recovery for Consequences of an Act*, 9 *HARV. L. REV.* 82 *seq.* (1896), cited by Prof. Cook (*vide n. 25 ante*).

²⁷ Austin's definition of 'act' is limited to "the bodily movements which immediately follow our desires of them." Whether Austin means to include *all* of the bodily movements supervening between the mental state and the external result, or only the latest stage of bodily movements preceding the consequence, is not clear and perhaps also is not important. In other words, it is not certain whether Austin's definition is a state or a connected series of states; or to put it yet in still other words, whether an act is a point or a line. As to this inquiry, it is relevant to notice Salmond's analysis of act which like Holland's adopts a linear view. According to Salmond, *Jurisprudence*, (3d ed. 1910, sec. 128) an act is constituted of three elements: (1) origin (mind or body); (2) circumstances; (3) consequences.

whether we think of liability imposed for *consequences* of acts or whether we think of it as imposed for *doing* acts. The intuition of courts and legislatures on this point has been sounder than the prevailing reasoning of jurists. Courts and legislatures impose liability primarily for what is done and only secondarily for what is caused. It may also be noticed that the question, What is a crime or tort? is not the same question, now under discussion, What is an act? The concept, 'crime,' involves all the objective elements leading up to a harm, but the harm alone is the 'act' in the proper sense.

If the position above taken is correct, it follows that an act is simply a certain kind of event. It is a situation of fact which theoretically may be fully described. Therefore, it has no duration. It is the last element for purposes of description in a complex chain of other events. Each of these other events also may be described as an act. They are infinite in number but the law generally deals only with those that are practically significant, such as a bodily wound, economic loss, deprivation of possession, putting in bodily fear, acceptance of an offer, abandonment of an object, death, etc. The law does not usually regard the series of events leading up to these final events except for the purpose, and then only in penal law, of determining the objective direction of preliminary acts of an evidentiary nature.

II

From the foregoing statement it appears that there are, or may be, three main types of theory of the nature of an act: (1) the theory that an act is a muscular contraction (or a connected series of such contractions); (2) the theory that an act consists of muscular contractions, the surrounding circumstances, and the consequences; (3) the theory that an act is the result either of a bodily movement or is a result attributable to its absence. The last theory is the one which the present discussion seeks to support. There are, or may be, subordinate theories under each of these three main groups which predicate an accompanying state of mind. There is still another classification of these theories into two types: (1) the linear type; and (2) the

point type. This paper adopts the latter (the point type) as the correct one.

While it is true that in the ordinary case the practical needs of justice are realized without attempting a thoroughgoing analysis of the juristic foundations of liability, and while it is also true in such cases that the courts need not concern themselves with the various types of theory above sketched, yet there are instances where there is no escape from theory even though it be inarticulate and even though it finds a surrogate in the sound intuition of the judge.

We believe it has already been sufficiently shown that the law does not impose liability for an act that consists solely of a contraction of the muscles. If liability is imposed, it is because the contraction of muscular tissue has been followed by a harmful result to some person. The act for purposes of liability is that harmful result and nothing else. The reason for imposing liability is that some other person is accountable for that harmful act because of his preceding acts:

If a gate-tender falls asleep at his post and a railroad fatality occurs because of the failure to lower the gates at the proper time, the fatality is the (negative) act of the gate-tender. It is a result for which he is responsible and liability is imposed because of two other facts: (1) that he acted in assuming the duties of his employment; and (2) that after so acting he later failed to act when he ought to have acted.

Positive and Negative Acts. (1) In a narrow sense there are only positive acts, or, as Austin has put it, simply acts.²⁸ If there are no bodily movements then there is no act. This view proceeds from Austin's theory of the nature of an act

²⁸ According to Austin (*op. cit.* I, pp. 376, 438), there are: (1) *acts* ("the bodily movements which immediately follow our desires of them"); (2) *forbearances* ("the not doing a given act with the intention of not doing it"); *omissions* ("the not doing a given act, without adverting [at the time] to the act which is not done"). This classification is logically complete but it offers three objections: (1) there is no generic name for these three instances of acting; (2) it relies on a mental factor which cannot be applied with objective certainty; (3) it does not correctly or logically describe the 'act' even if taken in the sense of a bodily movement since the emphasis is wholly on a state of mind which precedes the bodily movement.

which disregards in the definition the consequences of acting. It is a view logically consistent with that theory.

(2) There is another view widely accepted that acts are positive or negative; they are acts of commission and acts of omission. "A wrongdoer either does that which he ought not to do, or leaves undone that which he ought to do."²⁹ This terminology is an improvement over Austin's in that it gives to the term 'act' a generic meaning. It suffers however, from a serious defect of its own in that it makes the nature of an act depend upon an extraneous jural fact, *i. e.*, the existence of a duty and the method of its violation. An attempt to apply this idea, however, presents difficulties. This may be seen in the following illustration.

Primus has a claim to corporal integrity. Every other person owes a duty not to infringe the corporal integrity of Primus. But the corporal integrity of Primus may be infringed by bodily movements of Secundus which have a direct physical connection with Primus; or the corporal integrity of Primus may be infringed by the absence of bodily movements of Tertius which lead to the same harmful result. It is clear enough that the act of Secundus was one of commission; it is also clear that the act (if there can be said to be an act) of Tertius was an act of omission. In other words, the act of Secundus was a positive act; he did what he ought not to do. The act of Tertius was a negative act; he left undone what he ought to do. So far, there seems to be no difficulty.

But, now, suppose that Sextus infringes the corporal integrity of Primus by striking him with an automobile. Did Sextus do what he ought not to do; or did Sextus leave undone what he ought to do; or, perchance, did Sextus do what he ought not and also leave undone what he ought to do? We believe the only escape from this and similar difficulties lies in another approach.³⁰

²⁹ Salmond, *op. cit.* sec. 128; *cf.* Bentham, *Principles of Morals and Legislation*, (1789) cap. vii.

³⁰ Salmond, (*op. cit.* sec. 128) seems to limit the application of positive and negative acts (at least his discussion of the terms is so limited) to acts

(3) An act can best be defined by considering it objectively and stripping it of all subjective or jural elements. The same observation holds for the effort to classify acts. Proceeding objectively, an act is a result which is carried back for purposes of legal reasoning to a human being. If the result is one which is directly connected in a physical chain of sequences with the bodily movements of a person, then the result is the positive act of that person. If the result is not so connected then the result is, as to that person, a negative act. Whether the person is held accountable for the result, whether as to him positive or negative, is not here the question. The point is to find a criterion which has universal objective validity and logical coherence.

Applying this criterion to the example last considered, there appears to be no difficulty in saying that if Sextus strikes Primus while Sextus is driving his automobile, the act is a positive act although the duty was a negative one, *i. e.*, not to infringe the corporal integrity of Primus.

Negative acts require to be further classified. They may be omissive or commissive. If a landowner neglects to warn an invitee of a hidden danger not created by the landowner, the harm results from negative omission. If a master orders his servant to commit a tort, as to the servant the act is positive; as to the master, the act is a negative act of commission. Negative acts of commission may be direct or indirect. When the master orders the servant to commit a tort, the act as to the master is a negative act of direct commission. Where the master is responsible for a tort of the servant committed within the scope of his employment, the act as to the master is a negative act of indirect commission.

Since several ideas are involved in this analysis it may be useful, so far as it has any importance, to show the classification by means of the following diagram.

of wrongdoing; but such a view is inadmissible. The ideas are universal and apply to all the various kinds of acts in every legal relation. Thus an act of performance may be either positive or negative. The payment of a debt is a positive act; the refraining from a trespass is a negative act.

ACTS { POSITIVE—direct physical connection of force of an actor with an objective fact (and exceptionally a subjective fact).
 NEGATIVE { Omissive { Direct } Involving the intermediation
 Commissive { Indirect } of an intelligent force.

Negative commissive acts are positive actings by physical connections of force of intelligent forces (*e. g.*, of men and of the lower animals, but not of the forces of inanimate nature), the results of which are imputable for purposes of responsibility to another. Acts may be negative and omissive by the intermediation of an intelligent intermediary force (*e. g.*, the negligence of a servant), but in this case there is no need of further subdivision since such omission can be neither direct nor indirect. A crucial illustration of the application of this analysis may be put as follows: A stretches wire across a public highway, holding one end of the wire and B, while passing along the highway, comes into contact with the wire as a result of his own motions. What is the objective character of the act? It would seem to be a negative act of direct commission.

Internal and External Acts. There are three views on this matter: (1) That there is no distinction between internal and external acts³¹—that there is only one species of act which involves (a) a psychic content and (b) a physical element;³² (2) that there are internal acts, or acts of the mind, and also external acts, the latter of which are constituted of psychic and material elements;³³ (3) that there are internal acts

³¹ Del Vecchio, *The Formal Bases of Law*, (Boston 1914) sec. 90, p. 128; Austin (*op. cit.*) I, 433.

³² The argument of Schopenhauer, (*Die Welt als Wille und Vorstellung*, sec. 18, cited by Del Vecchio, *op. cit.*) may be noted: "Acts of will and physical acts are not two distinct things joined in a causal chain; they do not stand in a relation of cause and effect but are one and the same." As Del Vecchio puts it, "to hold the relation of the will to its acts as causal is equivalent to saying that will acts upon its acts which is arguing in a circle": Del Vecchio, *op. cit.* sec. 89, p. 127, n. 7.

³³ Salmond (*op. cit.* sec. 128): "Every external act involves an internal act which is related to it; but the converse is not true, for there are many acts of the mind which never realize themselves in acts of the body." Cf. Bentham, *Principles of Morals and Legislation*, (1789) cap. vii. It may be noted here, although the detail of the matter must be passed over, that Bent-

and external acts, but that these acts are independent data for legal purposes. The view of the present writer gives adhesion to the last view.

If the law for any purpose takes account of reflexes³⁴ stopping short of physical expression, then internal acts accordingly must be noticed as one of the fields of law. There are many instances where this appears to be the fact. Some typical instances are estoppel from silence, admissions from silence, tacit ratification, negligence by omission.

If a man perceiving the mistake of another who is about to build on the former's land, stands by, is the act of the landowner an internal act? If there is a determination of the will to remain silent, that determination of the will certainly is an act. But does the law act upon that factor? It would seem not to do so, but rather to operate upon the effect produced on the builder. It is a case of misrepresentation by passive assistance.³⁵ The act of the builder was clearly a positive external act. It is also the landowner's act by contribution to the result. As to the landowner therefore, it is also an external act.³⁶ Other instances will submit of a similar analysis with the result that we find that the law actually deals only with such acts as are represented by physical situations or by mental states flowing from physical situations.³⁷ But while this statement is true of the law as it is,

ham (cap. vii) classifies acts into the following groups: (1) Positive and Negative (substantially in the same sense as shown above); (2) Internal and External (acts of discourse being a mixture of the two); (3) Transitive and Intransitive; (4) Transitory and Continuing; (5) Divisible and Indivisible.

³⁴ We use the term in a broad sense to include voluntary or involuntary movements of mind or matter. In this sense a lunatic, a hypnotic subject, or one under duress may act. Responsibility in these cases is another question.

³⁵ Ewart, *Principles of Estoppel*, (Toronto 1900) p. 88.

³⁶ It may be worth observing that while the act is external, it is, as to the landowner, a negative act. It is a negative act of direct commission.

³⁷ Cf. Del Vecchio, *op. cit.* sec. 95, p. 139. As in the case of mental harms (if and when actionable). An interesting example of this kind is mental suffering due to failure to deliver a telegram. Here the act is the mental harm; as to the telegraph carrier it is a negative act; it is also an internal act (or event) as to the person who suffers mentally.

it is not a necessary result, since conceivably the law might deal with internal acts if it thought it practicable to attempt it.³⁸

The doctrinal theory, indeed, is that the law does deal with internal acts. This is seen in all those instances where a state of mind is premised as a ground of responsibility. Thus for criminal liability it is generally believed that an 'intent' is necessary. Now this intent can be nothing other than a mental act. Where knowledge of a fact is assumed to be the foundation of responsibility whether civil or criminal such knowledge itself must often be considered as an internal act.³⁹

For example, where there is a non-disclosure of an essential fact known to one and unknown to another, this non-disclosure may be due not to an exercise of the will choosing to remain silent where good faith requires speech, but, on the other hand, it may be due to indifference, or indecision, or forgetfulness. This illustration, too, may serve to show how difficult it necessarily is to base any sort of responsibility on a particular state of mind.⁴⁰

Acts are the results of human reflexes or the absence of them. Since animals other than man have the faculty of acting,⁴¹ why do we not include the reflexes of the lower animals in the juristic category of 'acts'? It is true that a dangerous dog may bite and it is also true that the owner may be responsible for the harm done by the dog in the same way that he is held responsible if his servant in the course of his employment harms another. If what the servant does is an 'act,' why is not what the dog does also an 'act'?

³⁸ Cf. Del Vecchio, *op. cit.* sec. 95, p. 139.

³⁹ Austin's editor, Mr. Robert Campbell, (*Jurisprudence*, 1873, 4th ed. I 427, n. 71) asserts that in spite of Austin's rejection of internal acts, he recognized 'meditation' as an act. Mr. Campbell then says: "And it is difficult to see why 'cogito' should not be classed with acts just as much as 'curro' or 'haurio.'"

⁴⁰ Del Vecchio, (*op. cit.* pp. 130 *seq.*) shows that ancient psychology treated will as subordinate to intellect while modern psychology makes will the basic fact, and this apart from the metaphysical theory of voluntarism. According to Del Vecchio "will and act are essentially correlative" and will is the primary and irreducible principle of subjective being."

⁴¹ *I. e.*, of performing acts.

In a wide sense, the term 'act' may include the reflexes and the result of them of any living organism,⁴² but if the technical meaning is extended beyond the reflexes of human beings there will be difficulty in drawing the line between animate and inanimate matter. The result of a stroke of lightning or of a windstorm, if we disregard the mental element, is as much an act as a result produced by the muscles of a man. In order, therefore, to find a sharp line of logical separation we may include as 'acts' in the strict sense (a) the results of human reflexes; (b) the results legally attributable⁴³ to the absence of a human reflex. In the strictest sense only the results of human reflexes are 'acts.' All other results, no matter whether flowing from a living organism or not, may be called 'events.' Both 'acts' and 'events' may be grouped under the term 'facts.'⁴⁴

Our question, however, yet remains unanswered,—why the actions of the lower animals are not acts in the jural sense. The proper answer, we believe, is that since legal relations can subsist only between persons, no act in a legal sense can be required of an animal nor can a jural act be projected against an animal. While the muscular movements of animals could be called acts in a juristic sense, it would be neither convenient nor desirable since such movements can never be the content of legal relations.⁴⁵

⁴² The usage in the application of the terms 'act,' 'acting,' and 'action' is not settled, and although it has been suggested that an effort to confine these terms to special functions will be confusing (Salmond, *op. cit.* sec. 128), yet we believe that is one of the risks that legal science must take. We therefore use these terms here in the following way: (1) *Act* (as already defined having three senses (: (a) *lato sensu*, being all attributable results of the reflexes of living organisms; (b) strict sense, all attributable results of the reflexes of human beings; (c) strictest sense, the positive acts of human beings. (2) *Acting*, the series of concrete movements leading from a defined center whether animate or inanimate to a given result. (3) *Action*, the same series of phenomena or any one of them considered in an abstract sense. Cf. Jevons "Elements of logic" (Hill's ed. New York, 1883) sec. 6: "Concrete and Abstract Terms"; cf. Bentham (Principles of Morals and Legislation, [1789] chap. VIII), who employs the term 'action' to include both the 'act' and the consequence.

⁴³ We make no effort here to consider causation and we have avoided use of the term in speaking of 'acts.'

⁴⁴ Holland, Jurisprudence, (13th ed. 1924) p. 93.

⁴⁵ Salmond, Jurisprudence, (3d ed. 1910 sec. 109: "The Legal Status of the Lower Animals."

III

While analysis of the concept 'act' is rarely considered by the courts, and, in general, is unnecessary, there are two classes of instances where such analysis is of major importance. The first is where the series of facts leading from a human reflex and ending in a given result or results extends over two or more territorial jurisdictions. The second is where the legal condition of the actor undergoes a change before the result is reached. The first involves a problem of space; the second involves a problem of time. Some of these problems may now briefly be considered.

If A in state X puts in motion a force which strikes B in state Y and which has a further result (*e. g.*, death) in state Z, where was the act done? The prevailing common law answer is that the act is done where the physical contact between the person harmed and the outside force takes place.⁴⁶ According to the view taken here, the act is localized at the place where the result for which liability attaches, occurs. The difficulty has been in not perceiving that in such cases there are plural acts instead only of one act. If a bullet is fired in state X, that is an act and there is no theoretical reason why that act should not subject the actor to liability in state X (if the territorial theory of liability is to be strictly adhered to)⁴⁷ upon a condition subsequent of a given harmful consequence in state Y. or state Z.⁴⁸

⁴⁶ *Cf.*, Beale, Recovery for Consequences of an Act, 9 HARV. L. REV. 82 (1896); Goodrich, Tort Liability and the Conflict of Laws, 73 U. OF PA. L. REV. 21, n. 8, cases (1924); Salmond, (*op. cit.*) sec. 131: The Place and Time of An Act.

⁴⁷ It is strictly adhered to in criminal liability upon the view that no state will inflict punishment for an act done elsewhere. The theory is also adhered to in civil liability by a singular confusion of thought. In civil law, in American jurisdictions, if there is tort liability at the *locus commissi*, it is also a tort at the foreign forum if the defendant carries it there: *Cf.* Slater v. Mexican Nat. R. Co., 194 U. S. 120, 24 Sup. Ct. 581 (1904). In a word, in criminal liability in all jurisdictions, acts and responsibility are local, but in civil liability in American jurisdictions the act is local but responsibility is a floating one. The English rule, at least as between English subjects is logically more consistent. By that rule, the act is local but responsibility is not localized with the act. There may be tort liability in England for an act which is not locally a tort: Phillips v. Eyre, L. R. 6 Q. B. 1; Machado v. Fontes, 2 Q. B. 231; Scott v. Seymour, 1 H. & C. 219.

⁴⁸ In effect, this reasoning is applied in dealing with criminal attempts ex-

Upon the same basis, if the bullet strikes B in state Y there is no theoretical reason why state Y should not impose criminal liability upon A for that act in state Y, and again, state Y might upon the same ground impose another more extensive liability for the act in state Y annexed to a condition subsequent of a further harm elsewhere. And, finally, if death occurs in state Z, that state might impose criminal liability for that act. The present rules probably work out with reasonable satisfaction, since instances which raise these problems do not commonly occur.

Another difficulty has been presented by the effort to connect a state of mind with one or more of the series or consequences flowing from a reflex. The judicial results at this point exhibit much confusion and show the need of a logically sound theory of the nature of 'acts.'⁴⁹ An act is an objective fact; it is a datum of nature to which the law may or may not attach legal consequences. It seems to us quite impossible to say that if an act is willed it is localized at one place, while if the act is unwilled it is localized at another place. The act must have the same situs in all cases without respect to the causes physical or mental that produced it. The question of responsibility can in no manner change the nature of the act.

(2) If A puts in motion a force which produces a result after A's change in legal condition, what is the legal effect, if any, of the act? The question may arise in contract law, in tort law, and in crimes. If an infant makes an offer by post which is received after the infant attains his majority, and is then accepted, is there an enforceable contract? If A excavates on his land causing a subsidence on the adjoining land of B, but after A's death, was there an act? and if so, was it A's act? and if so, who is responsible?⁵⁰ If A at B's request provides B with poison which B voluntarily takes and B dies, is A guilty of any criminal act, and if so, what is it?

cept that there is not and can not be a condition subsequent in attempts. Cf. Beale, *Criminal Attempts*, 16 HARV. L. REV. 492 (1903).

⁴⁹ Cf. *Reg. v. Keyn*, 2 Ex. D. 63; Salmond, (*op. cit.*) sec. 131; Terry, *Leading Principles of Anglo-American Law*, (Tokyo 1884) p. 598.

⁵⁰ See Salmond (*op. cit.*) sec. 131, n. 5.

If, for these problems, we make an effort to apply the theory of 'acts' advanced in this paper, we will arrive at the following results:

(i) If the offer is received after the infant attains his majority, the act of offer is then complete; it may therefore be seized upon to constitute an enforceable contract. An acceptance mailed while the offeror was still an infant but received after his majority would not be a contract binding the infant. If, within the period of reasonable time to accept an offer the infant attains his majority and thereafter the offer is accepted, there should be a contract. If at the moment of accepting an offer the offeror is dead, there can be no contract even though there may be some other form of responsibility.⁵¹

(ii) When an adjoining owner's land subsides after the death of the person who made the excavation, the act or event, is the subsidence. It is necessary that there be a legal person if there is an act. There is an act or event (*i. e.*, the subsidence) by hypothesis, but is there a legal person? It is not sufficient that there was a legal person. 'Act' and 'person' must be coincident.

There seem to be two possible solutions of the problem:

(a) We may hold the actor liable for the excavation upon a condition subsequent of harm by the subsidence. That view is not tenable. It meets the need of having a coincidence of "act" (*i. e.*, the excavation) and "person"; but it fails in that it imposes a liability for an act (*i. e.*, the excavation) which is not in itself harmful or unlawful. Annexing a condition subsequent does not alter the intrinsic nature and quality of the act.

(b) Since neither executors of the actor nor successors in title can be held liable upon any sound theory, there remains only to extend the sphere of the actor's person⁵² to embrace in point of time the culpable act (*i. e.*, the subsidence). That view pro-

⁵¹ So far as authority may be found on these propositions, it appears to be highly conflicting, showing contradictions in the theoretical foundations upon which answers must depend. *Cf.* Holland, *Jurisprudence*, (13th ed. 1924) p. 270 *seq.*

⁵² An effort will be made in another paper to justify this solution. For the present we may say that it involves no more of fiction to extend a legal *persona* to a dead man than to attribute a legal *persona* to a live one.

duces a just result holding the actor's estate liable for the harm and it avoids the inelegant disruption of act and person.

(iii) Where A at B's request and without inducement on A's part provides B with the means for accomplishing B's suicide and A not being present, there is no crime either by A or by B in the absence of a statute specifically dealing with such a case as put. The act (*i. e.*, the death) is not the act of B.⁵³ On the facts stated the act is not that of A.⁵⁴ On different facts (*e. g.*, of inducement) A might be held as a principal, but A could not be held as an accessory where the rule prevails that the principal must be triable. At common law, suicide was a crime punished by indignities to the dead body and forfeiture of goods.⁵⁵ Since death is the act and since the act and a person must be coincident, it necessarily follows that where suicide is a crime the legal person must survive, if only for a moment, the fact of death.

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⁵³ Terry, *Leading Principles of Anglo-American Law*, sec. 78, p. 63: "A person's birth or death is not his act even though the death be by suicide."

⁵⁴ *Contra*, *People v. Roberts*, 211 Mich. 187, 178 N. W. 690 (1920); see a valuable unsigned comment criticizing this case: 30 *YALE L. JOUR.* 408.

⁵⁵ Bl., *Com. IV*, 189.