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Merton Ferson

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RIGHTS AND POWERS: WHAT ARE THEY?

MERTON FERSON*

INTRODUCTION

One thing that distinguishes a lawyer from other educated persons is his facility in the use of legal concepts. And yet there is a current notion that the study of legal concepts, as such, is academic and impractical. Professor F. H. Lawson, delivering the Cooley Lectures at the University of Michigan in 1953, notes that it is fashionable among both civil and common lawyers to disparage the use of concepts. He then goes on to say:[1] "This is of course nonsense. The very persons who inveigh against the use of concepts have been so thoroughly educated in a system built on concepts that they do not realize how much they are always using them."

The legal profession has developed concepts that are different from the ordinary concepts that are in general use. These peculiar legal concepts, although entirely ethereal like other concepts, are different in that they have come to be *things*. Rights and powers, for instance, have no physical existence and yet they are treated by lawyers as things. The words "right" and "power" are not merely class words. A specific right or power, even though it has no physical existence, is thingified. Like tangible things, it can exist and endure. A right can be bought, sold, inherited and taxed. Of what stuff is this thing made? How does it come to exist? And what is its function?

Legal concepts, although treated as things, are not naturally phenomena. They are artificial and intangible things invented by lawyers in order to sum up and prolong the result of operative facts and, if need be, to transmute those facts into judgments or decrees.

There was society for thousands of years and there were crude systems of law for a long time before legal concepts came into use. They appear dimly in the common law about the fifteenth century. Since that time, they have gradually come into clear view and their use has served mightily to simplify and systematize the common law.

* Dean Emeritus, University of Cincinnati College of Law; Professor of Law, University of California Hastings College of Law.

1. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 67 (1955).

NOTABLE STUDIES OF CONCEPTS

There have been a few notable studies of legal concepts. They are all wholesome in at least one respect. They all make for more accurate legal analysis. Dean Pound[2] dwells on the use and misuse of the word "right." He points out that the word "right" is sometimes used when the concept intended is "power" or "privilege." It is common, for instance, to say that the owner of a chattel has a "right" to sell it, the so-called "right" in such a case being a power. Again, it is common to say that an owner has a "right" to use his chattel, the so-called "right" being really a *privilege*.

Professor Hohfeld's treatment of the subject[3] is intensive and technical. Along with his thorough discussion he sets up the following tables of legal concepts:

Jural Opposites	*Jural Correlatives*
right	right
no-right	duty
privilege	privilege
duty	no-right
power	power
disability	liability
immunity	immunity
liability	disability

Professor Goble, in his study,[4] makes three points that are indispensable to an understanding of legal concepts.

First, he notes that a legal relation itself is a single thing. It has, however, two aspects—one from the point of view of the dominant party and one from the point of view of the servient party. A "power-liability," for instance, describes a single relationship. But it is between two persons. The dominant person has a power. The servient person has a liability. The power and the liability are concepts.

Second, Professor Goble points to the existence and the value of some concepts that are negative in the sense that they stand for a lack of something but still have meanings and are useful. Says he:

> It has been contended that such negative terms as *disability*, meaning absence of power, and *immunity*, means absence of liability, are non-legal-content relations; that, as negative terms simply, they mean nothing except the absence of something, and therefore may mean *anything* other than the one specific thing negatived. But it is believed that such a position is untenable. Our language has many such terms which are useful in conveying meaning, and reveal very definite conceptions, *e.g.*,

2. Pound, *Legal Rights*, 26 INT. J. ETHICS 92 (1915).
3. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).
4. Goble, *A Redefinition of Basic Legal Terms*, 35 COLUM. L. REV. 535 (1935).

> *cold* means simply absence of heat or no-heat. *Dark* means absence of light, or no-light. Although each of these is a negative term in the sense that it negates a certain condition, the *conception* expressed by the term is as positive as any other conception.[5]

Third, Professor Goble's study comes to a focus on the few concepts that are actually used in legal thought. He passes by a relatively large number of possible concepts that are not in use. He puts forward only the concepts that inhere in the two relations, power-liability and right-duty.

Adopting the ideas of Professor Goble, the useful and correlative legal concepts can be arranged as follows:

Positive Concepts	*Negative Concepts*
Right	No-right
Duty	Privilege
Power	Disability
Liability	Immunity

Legal Concepts As Assets and Liabilities

The legal status of a person is something like a balance sheet. On one side are assets—legal advantages. On the other side are liabilities—legal disadvantages. Let us regard the status of a person in terms of fundamental legal concepts. Each person has positive and negative conceptual relations with every other person. But, to make for simplicity, let us regard the relations of only two persons, Mr. *A* and Mr. *B*. And for still greater simplicity, let us focus on the legal status of Mr. *A*—the strength and the weakness of his position.

On the credit (strength) side of Mr. *A*'s account with Mr. *B* we set down *A*'s rights and powers. These are positive concepts. They bespeak relations with *B*, and *A* has the dominant ends of the relations. *A* might have the dominant end of more than one relationship even with regard to a single subject matter. He might for instance have *power* to sell *B*'s horse and have also a *right* that *B* should pay him for making the sale.

On the credit side of *A*'s account, we set down also his privileges and immunities. These are negative concepts. They stand for the lack of right or power in *B*, and a corresponding lack of servience on the part of *A*. *A*'s ownership of a chattel, for instance, includes *A's privileges* to use it. *B*. has no right to prevent him. His ownership includes also his *immunity*. That is, *B* has no power to divest him. *A*'s privileges and immunities are negative concepts in the sense pointed out by Professor Goble, but even so they have value. One who has a privilege can demand a price for giving it up—as when one gives up his privilege to use tobacco. And one who has an immunity

5. *Id.* at 537-38.

can demand a price for giving it up, as when one grants an option and thus subjects himself to a power in the optionee. Thus, the asset side of *A*'s balance sheet consists of positive concepts (rights and powers) and negative concepts (privileges and immunities).

On the debit side of *A*'s account, we must set down his duties and liabilities—positive concepts, together with his no-rights and disabilities—negative concepts. *A* might, for instance, be under a duty to pay *B* $100. Or he mght be liable in the sense that *B* has a power to divest *A* of property. Such duty and liability are positive concepts and *A* is the servient party. On the debit side of *A*'s account we should set down also his no-rights and his disabilities. These are negative concepts that weigh against the legal position of *A*. If, for example, he desires a right that *B* shall saw his wood, it will cost him something to get such a right. And if he desires an option to buy *B*'s horse, it will cost him something to get it.

LEGAL CONCEPTS LACKING IN PRIMITIVE SOCIETY

A documented and detailed account of how legal concepts got into legal thinking and into the law itself would be difficult to make. A broad view of the cases, however, reveals three periods in the history of concepts. These periods are as follows: (1) The period in primitive society when legal concepts were unknown. (2) The period when lawyers and laymen alike came to need a device that would procure a given person to render a specified performance in the future. In this period contract rights grew out of the social need. The beginning of this period in the common law can be roughly set at about the fifteenth century. (3) Finally, there is the present period when our whole commercial structure is built of concepts.

In the first period referred to, when there were no concepts, the judicial mind moved directly from the act of the defendant to his liability, or lack of liability. We read, for instance, from the laws of Ine, King of Wessex in the eighth century, "If any one fights in a monastery, he shall pay 120 shillings compensation."[6] There was no intermediate logical step between the act and its legal consequence. In case *A* hit *B* with a club, or made defamatory statements about *B* or carelessly injured *B*, he was perhaps required to make compensation. But the physical act of *A* led to physical retribution without any intervening concept. The act of *A* may have been given a name—such as trespass, slander or negligence. But such names did not and do not stand for concepts that endure or become objects of trade.

NECESSITY, THE MOTHER OF INVENTION

It was during the second period that the idea of legal obligation was

6. ATTENBOROUGH, THE LAWS OF THE EARLIEST KINGS 39 (1922).

born and came into use. This was a crucial period in legal history. It is also the period during which it is most difficult to trace and document the successive steps by which concepts came to be things. This difficulty is not strange when we remember we are concerned with mental phenomena that cannot be seen or perceived by any special sense. They can be known only by observing how they are used.

Early opinions say nothing about right or duty. This was so even after courts came to give redress for broken promises. "Anglo-Saxon society barely knew what credit was. . . . In any case the Germanic races, not only of the Karolingian period, but down to a much later time, had no general notion whatever of promise or agreement as a source of civil obligation."[7] It was the job of a plaintiff in the early days to marshal facts that would fit into a form of action. He was not concerned to make out his "right." There was no such thing. The "idea of obligation" came later.[8]

The idea of property and the reciprocal grants of things that exist, *i.e.*, exchanges, were common among primitive people[9] but the ideas of obligation and how obligations are created were slow to develop. They call for minds that are advanced in thinking technique.

Let us take illustrations. Suppose that, in an early day, Sayler had given his horse to Buyer in exchange for Buyer's cow or for a sum of money. The whole deal was closed. Sayler had the cow or the money. Buyer had the horse. There was nothing pending. But suppose the bargain had been this: Sayler sold and delivered the horse and Buyer undertook to pay Sayler $200 on the coming January first. Now by agreement of the parties, a period of time is to intervene the performance by Sayler and *a hoped for* performance by Buyer. *What is the situation during that interval?* That was a hard problem in minds that knew of no things except physical things. A groping for the solution appears in two forms of action.

The action of Debt provided a way to reach the desired result by deeming that the original transaction was a complete exchange. That is, Sayler transferred his horse to Buyer and Buyer transferred $200 to Sayler (fiction of course). By that theory, when Buyer later omitted to pay he was detaining $200 that already belonged to Sayler and Buyer should hand it over.[10]

The action of Trespass on the Case on the Promises reached the desired result by branding Buyer as a tortfeasor (also a fiction). This

7. 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 184-85 (2d ed. 1923).
8. *Id.* at 207.
9. See note 23 *infra.*
10. Ames, *Parol Contracts Prior to Assumpsit,* 8 HARV. L. REV. 252, 260 (1894) in ASS'N OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON THE LAW OF CONTRACTS 23, 29 (1931); MARTIN, CIVIL PROCEDURE AT COMMON LAW § 40 (1905).

theory took no account of the interval between the promise and the time for its performance. Buyer's promise, however honestly made, was linked immediately with Buyer's omission to perform. Thus the deceit was made out.[11]

The specious reasoning had to give way by which such a case as Sayler had against Buyer was brought within the purview of Debt or Case.[12] And the actions themselves fell into disuse in most jurisdictions.

There was at this period urgent need for a device that would embody the bargain and span the interval between the bargain and the time for its performance. A bargain itself consists of physical acts. Parties to a bargain speak words of promise, shake hands, mail letters, nod their heads or otherwise enact their respective assents. But such physical facts are quickly gone. No physical trace remains. Even if the parties make a written memorial of their bargain that writing is only evidence—mere history. What *thing* does Sayler get in exchange for the horse he sold to Buyer? Has he an asset that he can sell, give away or pass by his will? Verily he gets no physical thing. But, thanks to the ingenuity of lawyers, he nowadays gets an intangible thing—viz., a *right*. His right is artificial in the sense that it has no physical existence. But it is real in the sense that it is an article of commerce and a powerful goad against the obligor (Buyer in the illustration).

The fact that in legal theory a right is a *thing* calls for some emphasis although we use it as such in our daily thought. Its use is so common that it is hard to pause, note its ethereal character and realize that a right is a thing—a queer *thing*.

The origin of simple contracts has been explained in terms of procedure.[13] But that account does not tell the whole story. It does not take account of a new mental technique that was formed in the period between primitive law and mature law. The forms of action were on the surface of a legal system. They were obvious. But, under the surface, a notion of obligation was germinating and pushing toward the light. There was urgent need for a device that would procure certain

11. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888), in ASS'N OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON THE LAW OF CONTRACTS 33 (1931); 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 428-54 (3d ed. 1923).

12. "The ancient distinction between the judgments in debt and assumpsit when money was recovered was expressly abolished by the Common Law Procedure Act of 1852. Thus it may be said that debt, as finally settled, is in substance an action to obtain redress for the breach of a personal obligation to pay a certain sum of money." MARTIN, CIVIL PROCEDURE AT COMMON LAW § 41, at 37 (1905).

13. "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms." MAINE, EARLY LAW AND CUSTOM 389 (1901).

persons to render specified performances in the future. We can see now that contract obligation is the device that was needed. The period of which we speak must be credited with a two-fold achievement: first, invention of the idea of obligation itself, and second, invention of simple contracts whereby obligations are created.

Nature of Right-Duty

Coming now to the period of mature law, what is the nature of a contract obligation (right-duty) and how is it made?

Permit a simple illustration. Suppose *A* says to *B* on May first, "If you will saw my pile of wood, I will pay you ten dollars come June first." Suppose further that *B* promptly saws the wood. Result? A contract obligation is born. From what these parties have said and done—facts entirely physical—there came to be a thing that is entirely metaphysical—viz., an obligation. *A* has come under a duty to pay *B* ten dollars on June first. *B*'s right is treated as a thing. It endures as a thing and has value. This metaphysical thing, itself the product of physical acts, operates later to produce physical action. In most instances the obligor follows the dictates of his obligation and performs without being forced to do so by legal procedure. The performance is physical. In exceptional cases where the obligor omits to perform according to his promise, his duties can be transmuted into physical operation of courts. The courts may find judgment against the defaulting obligor and take his land or chattels in execution. That action is physical. So in either event the metaphysical thing bridges a time gap and then is transmuted back into physical action. The legal concept (right-duty) may be compared to a storage battery where mechanical action, after being converted into electricity, is held available for reconversion into mechanical action.

The transmutation of physical facts into metaphysical things clothed with reality is peculiar to legal thinking. Concepts are common. But they remain subjective in other fields of thought. The uniqueness of legal concepts appears when we note that they are treated as objects. Such a concept as a right-duty is inherently only a mental image. And yet a lawyer treats it as a tangible thing. He uses the right as an object of property and commerce. It has value. It can be bought, sold, taxed and inherited.

The creation of contract rights is a simple and familiar process. Suppose *A* goes to a bank and gives his promissory note in exchange for $100. The act of *A* and the act of the bank are alike in character. The bank by a suitable act of assent passes title to the $100. *A*, by a suitable act of assent, creates and assumes a duty to pay on a future day. The freedom of a normal adult owner to divest himself of what he has and his freedom to obligate himself is basic in the common

law. The genesis and nature of contract obligations has remained the same ever since such obligations were invented. Their volume has come to be enormous. A wilderness of contract rights, intangible but objective, evidenced by promissory notes, insurance policies, certificates of shares of stock and other forms are the main assets of financial institutions.

A RIGHT AS A SUBJECT OF PROPERTY

In a popular sense a chair, a horse or other tangible thing is property. A right is likewise property in the popular sense. By modern analysis, however, neither the tangible thing nor the right is defined as property. Either one or the other is an object with reference to which property exists. It is the rights, privileges, powers and immunities pertinent to the thing that constitute property.[14] The aggregation of these concepts amounts to ownership. Can there be property in a right—a contract right? Does one, having a right against a specific obligor, have also rights, privileges, powers and immunities with reference to his primary right? A few cases and a bit of reflection will indicate that a contract right is not only property in the popular sense but may also be a subject of property according to modern analysis. There cannot, of course, be physical trespass against a right, as there can against physical things. But there are ways that a third person can destroy the value of an owner's primary right against a specific person. And the owner of the primary right is fortified against such injury. He has property rights against third persons that they shall not commit such injury.

Let us look at a right as a subject of property, particularly as a subject with reference to which an owner has rights in addition to his primary right against the specific obligor. The case of *Lumley* v. *Gye*[15] will serve as an illustration. In that case Lumley had a contract with Miss Wagner whereby Lumley got a right that Miss Wagner should sing in Lumley's theatre. Gye maliciously induced Miss Wagner to break her contract. Lumley brought suit and was given judgment against Gye. Be it noted that the right of Lumley against Gye was not a contract right. It was a property right to the effect that Gye should not impair Lumley's primary right against Miss Wagner. And in a Massachusetts case[16] it was held that one who by malevolent advice or falsehood persuaded an employer to break his contract with an employee was liable to the employee. Said Holmes, C. J.: "We

14. RESTATEMENT, PROPERTY §§ 1-4 (1936). See also Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710 (1917).

15. 2 Ell. & Bl. 216, 118 Eng. Rep. 749 (Q. B. 1853).

16. Moran v. Dunphy, 177 Mass. 485, 59 N.E. 125 (1901), 52 L.R.A. 115. See also Berry v. Donovan, 188 Mass. 353, 74 N.E. 603 (1905), 5 L.R.A. (N.S.) 899 (1907); Klauder v. Cregar, 327 Pa. 1, 192 Atl. 667 (1937).

apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor."[17] The action against one who wrongfully persuades an obligor to break his contract is not on the contract. It is rather a tort action for injury done to the plaintiff.

As to the *privileges* of one who owns a contract right, it would seem that no citation of authority is necessary to indicate that the owner has the privilege to let his right become outlawed, to give it away or do anything he pleases with his right. As to the *power* of one who owns a right, the whole body of learning about the assignment of contracts shows his power to dispose of his contract rights. As to the owner's *immunity,* that appears in the extreme case where the owner is a third party beneficiary. Even the parties who created the right cannot take it away.[18] A fortiori the owner of a contract right is immune in the normal case where he procured the contract right himself. It thus appears that a contract right is a species of property when the word property is used in its popular sense. It is also treated as a subject of property when the word, property, is used in its technical sense. The incidents of property—rights, privileges, powers and immunities—attend the ownership of a contract right just as they attend the ownership of a physical thing.

The discussion so far has had to do with the origin and nature of rights that spring from contracts. But rights and other concepts come to exist in other ways. For example, the ownership of property, as now defined, consists of rights, privileges, powers and immunities.

Nature of Power-Liability

Let us turn to the power-liability relation. It, like the "right-duty" relation, is a single relation with two aspects. Looked at from the point of view of the dominant person the relation is called "power." Looked at from the point of view of the servient person, *i.e.,* the person whose relations can be changed by the power holder, the relation is called "liability." The word "liability" is not much used to describe the situation of the servient person, perhaps because the word, liability, has other meanings. Another reason for not saying that the servient person has a "liability" is that specific names for him are generally proper, such as principal, offeror, pledgor and vendor. These are persons whose legal relations can be affected by a power holder, and so their "liability" is implied in the specific names.

The definition of power is not so well settled as the definition of

17. Moran v. Dunphy, 177 Mass. 485, 59 N.E. 125, 126 (1901).
18. Restatement, Contracts §§ 142, 143 (1932).

right. In a broad sense the term power seems to mean the ability of one person to alter legal relations of another by his volitional control.[19] The following illustrations are taken from Professor Hohfeld's stimulating article:

> (a) An owner of a tangible object has power to abandon it and simultaneously to create in others power to appropriate it.
> (b) An owner of property has power to transfer his property to another.
> (c) A normal adult has power to incur contractual obligations.
> (d) A principal can grant power to an agent and thus enable the agent to alter the legal relations of the principal.
> (e) The owner of property can establish powers of appointment.
> (f) Some public officers have power—*e.g.*, to sell property under execution.
> (g) A donor, having made a gift causa mortis, has power to divest the title of the donee.
> (h) A pledgee has power to sell the object pledged if the pledgor defaults.
> (i) A vendee under a conditional sale arrangement has power to make final payment and so divest the title of the vendor.
> (j) The grantee in an escrow transaction has power to perform the conditions and thus divest the title of the grantor.
> (k) A vendor has power, by entry, to regain title if land has been conveyed subject to a condition subsequent and the condition has come to pass.
> (l) Members of the public have powers, by making applications for services, to create duties on the part of innkeepers and carriers to give the services.
> (m) An offeree has power to render acceptance and thus bind the offerer.

In one aspect a right-duty relationship can be viewed as a power. In case the duty shall be broken the obligee has power to get a judgment or decree against the obligor. This fills the description of a power, *i.e.*, the obligee has ability, by volitional act to alter the legal relations of the obligor. Professor Goble points out that, in the last analysis, a right-duty is really a sequence of powers. But he also points out that the use of the right-duty idea is a convenient way to jump across the numerous intervening powers and proceed directly from the operative facts to a judgment or decree. The right-duty is commonly treated as something different from a power-liability.

POWER-LIABILITY BROADER THAN AGENCY

The ability of one person who holds a power to alter the relations of another person who is liable to have his relations changed connotes agency. But power, in the broad sense, does not necessarily mean that agency exists. An operative act of a power holder may be done in his own behalf and, so, not as an agent or servant of the person who is subject to the power. For example, suppose *A* offers to become

19. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 44 (1913).

bound to pay ten dollars to *B* if *B* will saw a pile of wood, or perhaps *A*'s offer is to be bound to pay if *B* will promise to saw the wood. It is often said—and it is a convenient way to put it—that *B*, the offeree, has a power. But *B*'s power is not to do any act in behalf of *A*. *B* acts in his own behalf when he saws the wood or makes the promise. *B* simply meets a condition imposed by the offeror and by meeting the condition he fixes an obligation on *A*. An offeree has power to fix an obligation on the offeror, but the offeree is not an agent of the offeror. And in a good many of the other illustrations cited above the power is an ability of the power holder to act in his own behalf and thus alter the legal position of the person who is subject to the power. It is so with regard to the power of any one to appropriate abandoned objects, the power of a donor causa mortis to revoke the gift, the power of a conditional vendee to make final payment and thus divest the conditional vendor of his title, the power of a grantee in an escrow transaction to meet the conditions and thus become entitled to the property, the power of entry when property has been conveyed subject to a condition subsequent and the condition has come to pass, and the power of a member of the public to fix a duty on a carrier or innkeeper by applying for services. The power to act in such cases is not agency in the sense that the power holder can act in behalf of the person subject to the power. The power holder simply meets a condition by doing an act for himself.

Power-Liability in Agency

Although the existence of a power-liability relation does not necessarily mean that there is an agency relation between the parties, the most familiar example of power-liability is found where an agency relation exists. That is where the power holder is an agent or servant of his constituent (master or principal). The law of agency (using the term agency in its broad sense) is arranged in two compartments. One of these compartments is labeled master and servant. The other is labeled principal and agent. Digests, encyclopedias and textbooks commonly follow this arrangement.

The manner of creating power-liability is essentially different in the cases that fall under the master and servant heading from what it is in cases that fall under the principal and agent heading, and the character of "liability" differs in the two groups of cases. But what determines whether a given act done by an employee falls in one compartment or the other? One test used by high authority is this: If the person employed is subject to the employer's right to control he is called a servant[20] and the case falls in the master and servant compartment. Otherwise the case falls in the principal and agent compartment.

20. Restatement (Second), Agency § 220 (1) (1958).

This test is not altogether satisfactory since an employer generally has a right to control his employee whether the employee is called servant or agent.

Another test approved by high authority is this: An agent has to do with the business affairs of his constituent while the work of a servant is manual service.[21]

The test noted last above seems to sense the significant difference between a "servant" and an "agent" but is not sufficiently specific. A business transaction consists of several acts. Selling a washing machine, for example, is a business transaction. But consider the acts it includes. The salesman travels one way or another and seeks out a prospective buyer. Then he talks about the machine, demonstrates how it works and persuades the buyer to give up his money or obligation in exchange for the machine. Then the salesman puts across ownership of the machine to the buyer or he undertakes that his company will do so. The several acts done by the salesman and his customer add up to make a business transaction but the several acts of the salesman differ in character one from another.

Suppose the salesman carelessly drove over someone while en route to the customer, or he made fraudulent statements about the machine, or he took an old machine in payment for the new one, or he promised that his company would accept a return of the new machine any time within a year. Can we charge the act of the salesman to the company? Was there power-liability as to the particular act? The answer depends on an analysis that goes deeper than to question whether we can lump the whole story as a business transaction. The analysis, too, must go deeper than naming the salesman "agent" or "servant," and thus fixing his status in every act he does for the employer.

TWO KINDS OF ACTS

A rational explanation of the separation of the general subject of agency into the two compartments requires that we take note of the two kinds of acts that a person may do, or have someone else do in his behalf. The manner of creating power-liability—*i.e.*, enabling someone else to act for the power-giver—differs, depending on which kind of act is in question. The kind of legal result, also, is different, depending on which kind of act was operative. The present emphasis is on the thesis that the distinctness in character between the two kinds of *acts* is basic to the separation of the general subject of agency into its two compartments. The respective headings, "master and servant" and "principal and agent" do not describe the basic difference between the two parts.

21. For citations to numerous authors who approve this test, see FERSON, PRINCIPLES OF AGENCY 23, n.45 (1954).

NON-JURISTIC ACTS

It is now in order to discuss and distinguish the two kinds of acts that underlie the separation of agency into two compartments. The bulk of human acts, infinite in number and variety, are done for their mechanical value or personal satisfaction and rarely affect the legal position of anyone. A farmer, for instance, hauls his wood, cultivates his crop and feeds his animals. Such an act incurs no liability unless perchance it invades the right or privilege of another person. In instances that are relatively rare the act is a tort. It may be a crime. It may work an estoppel and so on. A person may drive a truck without due care or he may assault someone, or he may utter defamatory or fraudulent statements, or he may make a false statement that misleads someone. When a person does such an act himself or is done by another in his service the law may impose a change in his legal relations. He may suffer a penalty, or be adjudged to pay damages or be estopped although the act was not done to accomplish that result.

Power-liability with regard to this kind of act is established the moment one person accepts the services of another. The doctrine of *respondeat superior* operates at once to charge the employer. No request for the services needs to be shown.[22] And the liability goes on even though the servant violates his master's instructions with regard to the manner of serving. The master gets the benefit of the services and must bear the risk that the servant may harm other persons, so long as the servant is within the scope of his employment. No amount of protesting against his being liable will spare him. Since this large part of human activity is composed of acts that are not done in order to accomplish legal results and since such acts do not in most instances have legal results they may be called "non-juristic" and that term has been used by several writers.[23]

Does one who is employed to do only non-juristic acts really have agency power? In a broad sense he does. He does not have power to alter the primary rights and duties of his master. He cannot, by virtue of such employment, divest his employer of property or bind his employer in contract. Indeed, it is not common to speak of his ability as a power. We do not for instance speak of a servant's "power" (legal concept) to drive a truck or to saw wood. He can, however, alter

22. Hill v. Morey, 26 Vt. 178 (1854); Moore v. El Paso Chamber of Commerce, 220 S.W.2d 327 (Tex. Civ. App. 1949).

23. Juristic acts have been set apart from other acts by several authors, HOLLAND, THE ELEMENTS OF JURISPRUDENCE 117 (13th ed. 1924); MARKBY, ELEMENTS OF LAW, 125 (6th ed. 1905); SALMOND, JURISPRUDENCE 481 (9th ed. 1937); STAIR, INSTITUTIONS OF THE LAW OF SCOTLAND, 94 (Moore's ed. 1832); Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L. J. 621, 646 (1919). These writers do not use a uniform terminology. Professor Salmond, for instance, makes the distinction between an "act of the party" and an "act of the law." Dean Wigmore uses the term "jural act" for what is here being called "juristic act."

the legal relations of his employer. When he does a non-juristic act in the scope of his employment the rule of *respondeat superior* applies. In case a servant wrongfully drives a truck he is employed to drive, against another or in case a servant slanders, libels or defrauds a third person, in the scope of the servant's employment, the master must make compensation. One employed to do a non-juristic act may in this way alter the legal relations of his master, and so in a broad sense he has power. The servant's act is volitional but the legal consequence is usually not volitional. The legal consequence is imposed regardless of the master's or the servant's assent to be liable. When a servant subjects his master to liability it is generally because the servant's act was wrongful. This is unlike the act of an agent who makes grants or assumes obligations for his principal by acts that are entirely proper.

JURISTIC ACTS

Let us introduce juristic acts by illustrations. Suppose that *A* and *B* make a contract or they exchange property. How do they do it? It was long said that the contract or exchange was based on a "meeting of the minds" of *A* and *B*. More recently the phrase used has been "mutual assent." Either form of expression puts so much emphasis on the mental element that it obscures the fact that every contract and every exchange is made by the several acts of more than one person. Take, for example, the well known case of *Adams v. Lindsell*.[24] Mr. Lindsell mailed a letter at St. Ives on September second to Mr. Adams proposing to sell wool at a price. That mailing was an offer—a juristic act. Mr. Adams on September fifth mailed a letter at Bromsgrove saying he would buy the wool and pay the price. That mailing was an acceptance—a juristic act. The result of these two mailings was a contract. But note, it was accomplished by the several acts of different persons which acts were performed at different times and in different places. And the contract thus made consisted, not of one, but of two obligations, each one deriving from a several juristic act of the obligor. The several acts of the parties are summed up nowadays and called "mutual assent." It should be noted, however, that "mutual assent" is plural in the sense that it stands for two or more several acts. It should be noted too that each obligation derives from an act of assent by the obligor, and each grant rests on an act of assent by the grantor. The acts are of like character and that is true even though one is an offer and the other is an acceptance.

Every juristic act is not only voluntary, it is also calculated to subtract from the legal position of the person who does it or in whose behalf it is done. Suppose the act is a grant of property or an under-

24. 1 Barn. & Ald. 681, 106 Eng. Rep. 250 (K. B. 1818).

taking to be bound in an obligation. Either one is a worsening of the legal position of the person for whom the act is done. It divests him of property or subtracts from his freedom. It is true that one who does a juristic act usually exacts something in exchange for what he gives and so the entire transaction may be profitable. But when a man sells a horse for $100 he must give up the horse. When he borrows money at a bank he must undertake to repay the amount. The emphasis just now is on the fact that each party to a bargain gives up something and that he does so by juristic act. The fact that the bargain as a whole may give him a net gain is beside the point. The isolated juristic act derogates from the legal position of the person for whom it is done. Ever since the dawn of history it has been possible for a normal person to divest himself of property by making gift thereof or by exchanging it for other property. In either case the basic operative fact is an act of assent on the part of the owner.[25] And since the invention of contract obligations it has been possible for a normal adult person to subject himself to obligation by his wilful undertaking.

Power-liability with regard to a juristic act requires authorization by the power giver. Employment is not sufficient. What is the difference between authorization and employment? Authorizing is something more than employing. It is not only permission that the power holder may serve. It is an act of assent that, within certain limits, he can bind the power giver by doing juristic acts. An authorization is like an offer in several respects. Each one is created and limited by the power giver, and each one calls for meticulous conformity with its terms in order to bind the power giver.[26]

Two Compartments of Law of Agency

An analytical study of the law of agency reveals that there are two compartments. These parts can be summed up and compared like this:

	First Compartment	*Second Compartment*
Kinds of acts	Non-Juristic (a) Mechanical (b) Representations, Threats, etc.	Juristic (a) Grants & Promises (b) Other acts of assent that derogate

25. "Nevertheless trade, *i.e.*, a regular series of acts of exchange, is a distinct feature in the life of primitive peoples, even the lowest, who live by hunting and collecting forest products. The principle of reciprocal transfer of goods, of giving and taking, seems in fact to be deep-rooted in human nature." 22 Encyclopedia Britannica, *Primitive Trade* 347 (1954).

26. Barrett v. McHattie, 102 Mont. 473, 59 P.2d 794 (1936); Harrigan v. Dodge, 216 Mass. 461, 103 N.E. 919 (1914); "If the principal will describe the particular condition on which a bill is accepted, however idle, even to the writing of it with a steel pen, it must be fulfilled." Attwood v. Munnings, 7 Barn. & Cress. 278, 108 Eng. Rep. 727 (K.B. 1827).

Illustrations	(a) Driving truck (b) Sawing wood (c) Making representation	(a) Offer or Acceptance (b) Grant of property (c) Authorization or ratification of agency
Why power giver is charged with the act	Respondeat Superior	Authority of actor
How power liability is created	Acceptance of services by power giver (a) Really (b) Apparently	Authorization by power giver (a) Real (b) Apparent
Ambit of actor	Scope of employment	Limits of power
How power giver is affected by the act	(a) He gets the benefits (b) He is "liable" for the torts (c) He may be estopped by representation[27]	(a) He is "bound by" the act (b) It invariably subtracts from his rights or privileges
What actor is called	Servant (of master)	Agent (of Principal)[28]

The distinction that has just been made between juristic and non-juristic acts is not dwelt upon and is seldom noted in the literature of agency. It may seem, therefore, that the making of that distinction is nothing more than an academic pastime. But a study of judicial decisions (not the dicta in the opinions) reveals that power-liability differs in origin and legal effect according to which kind of act is in question. Such a study reveals that the distinction between these two kinds of acts is basic to the distinction that is commonly made under the heading "master and servant" and "principal and agent."

The distinction is justified—indeed imperative—when the question is whether to charge an employer with an act that is alleged to have been done in his behalf. In case the act is non-juristic, the doctrine of *respondeat superior* applies. In case the act was juristic, the doctrine of *respondeat superior* does not apply. It is, in the latter case, a question of whether the act was authorized. When, for example, a worker has carelessly or willfully driven a truck against the plaintiff, the act was non-juristic and the employer can be charged if he merely accepted the service that was being rendered. The doctrine of *respondeat superior* applies. But if the act was an assenting that the employer should be bound in a contract, it was a juristic act and the em-

27. "Liable for" may not be an apt phrase in cases where a representation made by a servant estops his master. At any rate, the master is charged in such cases with the statement regardless of his assent to be so charged.

28. Since the whole subject is called agency and then is broken down into principal and agent, and master and servant, it seems implicit that the word "agent" is sometimes used in a broad sense that includes servants and sometimes in a narrow sense that excludes servants.

ployer is not bound unless he authorized the act. The doctrine of *respondeat superior* does not apply. One worker may do both kinds of acts for his employer, and hence some confusion and disagreement exists among the decisions.

A large area where confusion has come from failure to distinguish juristic from non-juristic acts has to do with representations. Slight reflection is convincing that the making of a representation is a non-juristic act. It is common for an employer to engage a worker who shall (a) persuade customers to buy this or that by making representations (non-juristic) and (b) grant, or contract to grant, property to the customer (juristic). Such a worker is often called an agent. The word "agent" suggests that the worker must be authorized to make the representations he assumes to make as well as the contract or grant he assumes to make. A good many cases have held employers not liable for misrepresentations made by agents in the scope of their employment because the misrepresentations were not authorized. A majority of the decisions, however, charge the employer in such cases. The majority rule seems correct when it is remembered that a representation need not be authorized in order to hold the employer. A representation (true or false) is a non-juristic act and the doctrine of *respondeat superior* applies.

A Legal Concept is Not an End in Itself

Care should be taken to avoid the notion that a legal concept is an end in itself or that it is indispensable in the solution of a given problem. In many cases it is a useful device for tracing facts to their legal consequence. But in some cases an insistence on finding a legal concept makes a simple problem seem complicated. This is illustrated by the state of the law and theory with regard to ratification. Suppose that *A*, without authority from *P*, assumes to bargain with *T* that *P* shall sell his horse, Pompey, to *T* for $200. And suppose further that *A* later reports to *P* the deal he has assumed to make and *P* ratifies the deal that has been set up. At that moment, and not before, a contract is made. The courts so hold. But note the complicated reasoning they use to reach that result. It is first assumed that the agent must have had power *when he assumed to deal* with the third party. That power is then supplied by an anachronism. It is said that *P*'s ratification, when it comes, reaches back and establishes a power at the earlier time when *A* assumed to make the bargain.[29] How much simpler it is to skip the power idea and go directly to the basic fact that each party as-

29. "The ratification relates back to the time of the inception of the transaction and has a complete retroactive efficacy." Story, Commentaries on the Law of Agency § 244 (9th ed. 1882). "The ratification goes to the relation, and establishes it *ab initio*." Holmes, in Dempsey v. Chambers, 154 Mass. 330, 28 N.E. 279, 281, 13 L.R.A. 219, 221-22 (1891).

sented to be bound and should be held accordingly! The fact that *P*'s act of assent to be bound came later than *T*'s act of assent is not important.

SUMMARY

By way of summary the following can be said: A legal concept has no tangible existence. The most common illustrations of legal concepts are rights and powers. Rights, particularly, are deemed to be things that endure. They have commercial value. They are bought, sold, inherited and taxed. The thingifying and commercializing of concepts is a peculiar technique. Rights and ways to create them began to appear in the common law in about the fifteenth century. A two fold innovation was implicit when legal concepts came into use. First, the idea of a right or power itself was new, and second the manner of creating such things was new. The use of legal concepts is now so extensive that the wealth of each person is, in the final analysis, a lot of concepts.

Powers vary one from another in important respects. Generally speaking, power means the ability of one person to alter the legal relations of another by volitional acts. Power does not necessarily signify agency. The particular power may be one where the power holder can effect the change by an act done in his own behalf, as where an offeree accepts an offer and so binds the offeror. On the other hand, the power may be one where an agent must act in behalf of his principal, as where an agent has power to grant his principal's property.

Agency powers—*i.e.*, powers to act in behalf of the person subject to the power—are of two kinds. One kind is the power of a servant to do non-juristic acts for his master. The other kind is the power of an agent to do juristic acts for his principal. A servant's power is created when his services are accepted. The doctrine of *respondeat superior* then applies. The power of an agent, in the narrow sense, is created by the principal's assent to be bound. Since a servant can change the legal relations of his master, as he does when he commits a tort within the scope of his employment, his ability is a power according to the general definition of a power. But a servant's ability is not commonly called a power.

Commerce could go on and justice be administered without the use of "rights" and "powers." But these concepts have been built into the common law and are among its most permanent features. Specific rules of law change frequently, but the technique of the common law remains the same through centuries.