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BASES FOR MASTER'S LIABILITY AND FOR PRINCIPAL'S LIABILITY TO THIRD PERSONS *

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INTRODUCTION

Farmer Cornwall had accumulated enough eggs to fill a crate. He directed his hired man, Sambo, to pack the eggs into a crate and then to take them to Middletown and sell them at the market. It was understood that Sambo should make the trip in the farm truck. Cornwall also told Sambo to go to the hardware store in Middletown and to order an Ajax corn sheller if the dealer would allow six months credit. Sambo was cautioned to drive carefully, not faster than twenty miles per hour, and always to stay on the right hand side of the road.

Sambo went about his mission. While proceeding toward Middletown, Sambo saw his enemy, Bulfinch, coming from the opposite direction. Sambo speeded up the truck to forty miles per hour, in violation of Cornwall's command, and in violation of the speed limit fixed by law; he veered slightly to the left, past the center of the road, in order to hit Bulfinch. He succeeded and Bulfinch was injured.

Sambo proceeded on his way. A boy, Peter, attempted to hitch his little wagon to the back of the truck Sambo was driving and thus to get free towing. Sambo, in order to get rid of Peter, threw an iron bar at him. The bar missed Peter and hit Jerry, another boy who happened to be near by.

Sambo went on to Middletown and did his errands. At the hardware store he signed and delivered an order for an Ajax corn sheller. This order contained a promise that Cornwall would pay for the corn sheller in sixty days. The hardware man later procured the corn sheller and tendered it to Cornwall who refused to take it.

Sambo, on his way home, picked up his friend, Charley, who was reputed to be a good driver and asked Charley to drive. Charley carelessly drove against Thomas and injured him.

Now let us consider how Cornwall would be affected by the incidents of Sambo's trip. First, would Cornwall be liable to Sambo's enemy, Bulfinch, who was injured when Sambo willfully swerved to the left and ran against

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*The central idea in agency is the ability of one person to act for another and thus to bind or make liable the person for whom the act was done. Little attention is paid in this essay to other parts of the law of agency such as the rights of principals and agents, or masters and servants, between themselves and the duties of agents or servants to third persons.

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him? There are cases holding on similar facts that the masters were liable.[1] Second, is Cornwall liable to Jerry, the boy who was struck by the iron bar thrown by Sambo in his effort to keep another boy from hitching onto the truck? It was held on similar facts that the master was liable.[2]

Third, is Cornwall bound to receive the corn sheller and to pay for it in sixty days? There is good authority to the effect that Cornwall is not so bound.[3] Cornwall's consent to become bound was only on condition that the credit should be for six months. Fourth, is Cornwall bound to Thomas who was injured by Charley, the driver Sambo picked up on the way home? Decisions on similar facts hold that Cornwall is not so liable.[4] He was not bound by Sambo's consent that Charley might drive for Cornwall and so Cornwall was not liable for Charley's improper driving.

Why would Cornwall be held liable in the first two of the above suppositions, where Sambo went widely beyond what he was told to do and did injuries that were willful, unlawful and forbidden by Cornwall?[5] Why, in contrast, would Cornwall not be liable in the last two suppositions? In one of them, Sambo varied only a little the terms of the contract that Cornwall authorized him to make; he promised that Cornwall would pay in sixty days whereas Cornwall had said "six months." In the other supposition, Sambo did something closely related to his work; he asked Charley to drive. Can we account for the striking difference that Cornwall is held liable for the injuries Sambo did to Bulfinch and Jerry but is not held bound by Sambo's promise that Cornwall would pay for the corn sheller or by Sambo's acceptance of Charley's services? The explanation lies in this. There were two distinct

1. Wibye v. United States, 87 F. Supp. 830 (N.D. Cal. 1949); Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684 (1947); Francis v. Barbazon, 16 La. App. 509, 134 So. 789 (1931); Howe v. Newmarch, 94 Mass. (12 Allen) 49 (1866); Linam v. Murphy, 232 S.W.2d 937 (Mo. 1950); Wright v. Wilcox, 19 Wend. 343 (N.Y. 1838); Kohlman v. Hyland, 54 N.D. 710, 210 N.W. 643 (1926); Texas Power & Light Co. v. Evans, 225 S.W.2d 879 (Tex. Civ. App. 1949); Limpus v. London General Omnibus Co., 1 H. & C. 526, 158 Eng. Rep. 993 (Ex. 1862).

2. Doscher v. Superior Fireproof D. & S. Co., 221 App. Div. 63, 222 N.Y. Supp. 629 (1st Dep't 1927).

3. Batty v. Carswell, 2 Johns. 48 (N.Y. 1806); Baines v. Ewing, L.R. 1 Ex. 320 (1866). "If the principal will describe the particular condition on which a bill shall be accepted, however idle, even to the writing of it with a steel pen, it must be fulfilled." Cowen, J., in North River Bank v. Aymar, 3 Hill 262, 271 (N.Y. 1842).

4. Burkhalter v. Birmingham Electric Co., 242 Ala. 388, 6 So.2d 864 (1942); White v. Levi & Co., 137 Ga. 269, 73 S.E. 376 (1911); Copp v. Paradis, 130 Me. 464, 157 Atl. 228 (1931); Weatherman v. Handy, 198 S.W. 459 (Mo. App. 1917); Clough v. Rockingham County L. & P. Co., 75 N.H. 84, 71 Atl. 223 (1908); Kosick v. Standard Properties, Inc., 13 N.J. Misc. 219, 177 Atl. 428 (Sup. Ct. 1935) ("The selection of one's servants is the right of the master, and the delegation of authority to select another or substitute must be either expressly or impliedly conferred on the servant"); White v. Consumers Finance Service, 339 Pa. 417, 15 A.2d 142 (1940); Corbin v. George, 308 Pa. 201, 162 Atl. 459, 460 (1932). ("The relation of master and servant cannot be imposed upon a person without his consent, express or implied"); Board of Trade Bldg. Corp. v. Cralle, 109 Va. 246, 63 S.E. 995 (1909).

5. The two illustrations that have been put are extreme. They were put to illustrate how broad, how elastic and how loosely bounded is the scope of a servant's employment and thus to illustrate how extensive is a master's liability.

relations between Cornwall and Sambo. These same two persons were master and servant; and they were also principal and agent. When Sambo drove against Bulfinch and when he hit Jerry with the iron bar, he was acting as a servant and Cornwall would be liable for those injuries, according to the doctrine of *respondeat superior*. But when Sambo came to ordering a corn sheller and to accepting the services of Charley, he was presuming to act as agent. The doctrine of *respondeat superior* does not apply. Cornwall is not bound unless he gave Sambo power to do those things.

Either one of the two relations referred to above would enable Sambo to affect the legal position of Cornwall. But the two relations differ in the way they are created, in the kind of acts Sambo would do in one capacity or in the other and in the character of change he would cause to Cornwall's legal position when he acts as servant and when he acts as agent. The two relations differ also in their history and rationale. These differences will be amplified in the following pages.

The law with regard to principal and agent grew up as part and parcel of the law of contracts.[6] The law with regard to master and servant grew up as part and parcel of the law of torts. Each one takes its origin far back in the history of the common law.[7]

Agents were used in an early day to effect livery of seisin,[8] to create covenants,[9] and to carry on commercial transactions.[10] The terms "principal"

6. The word "contracts" is used at the moment in a broad sense that includes deeds, livery of seisin and other legal transactions. It was so used in the early common law. Says St. Germains, "It is not much argued in England what diversity is between a contract, a concord, a promise, a gift, a loan, or a pledge, a bargain, a covenant, or such other," DOCTOR AND STUDENT, Dialogue II, c. 24 (1518).

7. "Gradually the common law came to recognize a law of agency. . . . We begin to see the rise of agents for the purpose of contract at an early date. . . . [I]n the early thirteenth century the appointment of agents for this purpose was not common. . . . However, it was not long before it gained recognition; and the fact that the practice spread somewhat readily in the course of the thirteenth century, is due to the two allied influences of mercantile necessity and the canon law. . . . Thus, in the course of the mediaeval period, the ideas that it is possible to make a contract through an agent, and that it is possible for a man to ratify a contract made on his behalf through an agent, were fully recognized by the common law." 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 222-23 (1926).

8. "'*Attorney*' is an ancient *English* word, and signifieth one that is set in the turn, stead, or place of another. . . . [T]he authority to deliver seisin . . . must be by deed. . . . [And] in all cases the attorney [agent] must pursue the warrant in substance and effect that he hath to deliver seisin." Co. LITT. *51b, *52b. See also Combes' Case, 9 Co. Rep. 75a, 77 Eng. Rep. 843 (K.B. 1613).

9. "A seventh requisite to a good deed is, that it be *delivered* by the party himself *or his certain attorney* [agent] . . . ." (italics added) 2 BL. COMM. *306. "That power of acting which one man has, being transferred to another, is called an authority, and this the law allows of; for as a contract is no more than the consent of a man's mind to a thing, if such consent or concurrence appears, it would be very unreasonable to oblige him to be present at the execution of every contract, since it may be as well performed by any other person delegated for that purpose." 1 BACON, ABRIDGEMENT 518 (Bouvier Am. ed. 1868). See also 5 *id.* at 571.

10. "From an early date the records of the fair courts show that some sort of commercial agency must perforce be recognized; and, during the fourteenth and fifteenth centuries, the development of trading companies, which must necessarily act through

and "agent" may be of modern origin. But the power of one person to bind another in legal transactions was familiar in the days of the Year Books.[11] The agent was able, by his act of consent, to transfer his principal's property, to obligate his principal, and otherwise to bind him in legal transactions.[12] In order that an agent's acts should be effective, it was necessary that the agent should have authority.[13]

The doctrine that a master is liable for the acts of his servant has a different history and a different meaning. It grew up with the law of torts.[14] Dean Wigmore traces the development of the master's liability for the torts of his servant from about 1300 to 1850.[15] He points out that, in the early days, the master was held liable in cases where he had commanded his servant to do the wrong. Later, the master's command was implied if the servant did the wrong while he was about the master's business. In the final stage the master came to be held liable for the servant's acts regardless of any actual or implied command. It came to be simply a question of whether the servant was acting in the scope of his employment and in the execution of his service. About the year 1800 the doctrine became established that a master who was in no wise remiss and who had not commanded the wrongful act was nevertheless responsible for it.[16]

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agents, helped its further development." 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 223 (1926).

11. Professor Street cites Sir Robert Brooke's abridgement of the Year Book for the proposition that "if a man sends his servant to buy certain goods, or his factor or attorney to buy merchandise for him, and he buys, the master shall be charged though the goods never came to his hands and though the master has no notice of it, and the master cannot countermand it without giving notice to the servant, attorney, or factor." 2 STREET, FOUNDATIONS OF LEGAL LIABILITY 447 (1906).

12. Speaking of the thirteenth century, Pollock and Maitland have this to say: "The whole law of agency is yet in its infancy. The King, indeed, ever since John's day has been issuing letters of credit empowering his agents to borrow money and to promise repayment in his name. A great prelate will sometimes do the like. It is by this time admitted that a man by his deed can appoint another to do many acts in his name. . . . Attorneys were appointed to deliver and receive seisin." It should be observed that agents had to do with transferring property and creating obligations. Their acts constituted no wrong; they did not contribute directly to any cause of action. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 228 (2d ed. 1923).

13. *Supra* notes 8 and 9.

14. Mr. Justice Holmes in two learned articles traced the doctrine of *respondeat superior* back to ancient slavery and the *patria potestas*. Holmes, *Agency*, 4 HARV. L. REV. 346, 5 *id.* 1 (1891). But say Pollock and Maitland in their History of English Law, "Any theory therefore that would connect our employers' liability with slavery has before it a difficult task. Between the modern employer and the slave owner stand some centuries of villeinage, and the medieval lord was not liable for the acts of his villein." P. 530 (2d ed. 1923). And further say these same authors, "it would seem that our present doctrine about the liability of a master for a tort committed by a servant who was 'acting within the scope of his employment' can hardly be traced in any definite shape beyond the Revolution of 1688. Before that date, there lie several centuries comprising the age of the Year Books and the days of the Tudors and Stuarts, during which exceedingly few hints are given to us of any responsibility of a master for acts that he has not commanded." *Id.* at 528.

15. Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 HARV. L. REV. 383 (1894).

16. *Id.* at 399 *et seq.*

It thus appears that the doctrine of *respondeat superior* is of more recent origin than is the doctrine that a person can be bound by the authorized act of his agent. The point being emphasized at present is that the two doctrines grew up separately and that they pertain to different situations. The doctrine of *respondeat superior* pertains to torts; the doctrine that a principal is bound by the authorized act of his agent pertains to contracts.

Professor Conard has traced the steps whereby Agency came to be a title in the law "knitting together the whole subject of the employment of one man by another." [17] He points out that "by 1928-29, there was probably no prominent law school in which Agency was not a separate course, and there were very few in which it did not include the tort liability aspects of 'master and servant.' " [18] This brings together under one comprehensive label two doctrines that are naturally and historically distinct—*viz.*, the doctrine of *respondeat superior* and the doctrine that a principal is bound by the authorized juristic acts of his agent.

Agency, as a title in the law, includes more than the law pertaining to the power of agents and the liability of employers. A principal and his agent commonly have rights and duties between themselves; and so do a master and servant. Such rights and duties are determined mainly by the law of contracts and to some extent, by the law of trusts.[19] It is convenient to discuss such rights and duties under the general head of agency, without bothering to note whether the parties are principal and agent or master and servant. The representative also has duties to third persons, and these do not depend on whether he is an agent or servant. Add to these considerations the fact that agents and servants alike do acts in behalf of their constituents. These points of similarity may justify a combination under the head of agency that takes in all phases of the employment of one man by another. But the two basic relations are strange bedfellows. The liability of a master under the doctrine of *respondeat superior* and the subjection of a principal to the power of his agents are utterly different. Lumping them under one title, treating them as things alike and speaking of them in interchangeable terms [20] cannot wipe out their historic and inherent differences. They will not homogenize. There is a wide difference between contracts and torts, and there is a corresponding difference between the liability of an employer as such and the subjection of a principal to the power of his agent.

17. Conard, *What's Wrong With Agency?* 1 J. LEGAL ED. 540, 548 (1949).

18. *Id.* at 542. The liability of an employer for what his independent contractor does to third persons is also commonly treated under the general head of agency. It should be noted that such liability rests on a basis that is distinct from the doctrine of respondeat superior and equally distinct from the "liability" of a principal who is exposed to the power of his agent. See Ferson, *Liability of Employers for Misrepresentations Made by "Independent Contractors,"* 3 VAND. L. REV. 1 (1949).

19. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 226 (2d ed. 1923).

20. See *infra* note 52.

The legal doctrine with regard to employer's liability on one hand, and the subjection of a principal to the power of his agent on the other, can be contrasted in the following respects: (1) the manner of incurring employer's liability and the manner of creating the power of an agent; (2) the kind of acts that are done by servants and by agents, respectively; and (3) the character of the changes that are wrought by servants and agents respectively on the legal positions of their constituents.

Manner of Incurring Master's "Liability" and Principal's "Liability"

First, how does one come under a master's liability? In the illustration used, Sambo was Cornwall's hired man. That fact has various incidents such as Cornwall's contract duty to pay Sambo and to give him a safe place to work. But our concern here is about the liability of Cornwall to third persons for the misdeeds of Sambo. That liability is established by the mere fact that Cornwall availed himself of Sambo's services and assumed the right to control Sambo. Cornwall's liability would be the same if Sambo had been an obliging neighbor who volunteered, with Cornwall's permission, to make the trip. One who procures, or even accepts, the services of another person and the right to control that person while he renders the services, is put under a master's responsibility. The employer must pay the damages if his servant in the execution of his service violates the existing rights of a third person—in other words, commits a tort. And that is so whether or not the employer consented to be thus liable. A recent illustrative case is *Moore v. El Paso Chamber of Commerce*.[21] In this case it appeared that a chamber of commerce was advertising a rodeo. As a publicity stunt they admonished the citizens of the town to wear western regalia, and, to bring about compliance with that request, they were roping persons who did not comply. "One good fellow after another would just go ahead and take a hand at it." A cowboy volunteered to assist in the enterprise. He went forth, with the acquiescence of the chamber of commerce, armed with a lasso. In his attempt to lasso a young woman, he brought about her injury. The chamber of commerce was held liable to the young woman for her injury.

The doctrine that one who accepts the services of another is put under a master's responsibility is well established in the common law and is known as the doctrine of *respondeat superior*. If one does a tort by his own hand, his consent to be liable for it is no part of making out a case against him, and the master's consent to become liable is equally beside the point when the tort has been done for him by the hand of another. It would be vain for an employer to say to a third person, "I shall not be liable to you if I

21. 220 S.W.2d 327 (Tex. Civ. App. 1949). See also Hill v. Morey, 26 Vt. 178 (1854).

hurt you in this operation." And it would be equally vain if, availing himself of the services of another, he should say, "I shall not be liable if my servant hurts you in this operation." The master's liability is a vicarious one visited on him without his fault and without his having consented to be so liable. The only sense in which he has consented is that he may (or may not) know that he is accepting services at his peril.

Now let us turn to Sambo's attempt to obligate Cornwall to pay for the corn sheller in sixty days, and to Sambo's further attempt to accept the services of Charley. These attempts would not bind Cornwall if they were not authorized by him.[22] They were attempts to put Cornwall under new duties to third persons. If Sambo's attempts had been effective, the hardware dealer would have a right to get paid by Cornwall; and all persons would have rights against Cornwall not to be injured by the poor driving of Charley. Such subtractions from Cornwall's legal position can be made by Cornwall's direct or indirect consent, but he is not bound unless, in one way or another, he consents to be so bound.[23] The doctrine of *respondeat superior,* which would make Cornwall liable for Sambo's torts, does not enable Sambo to bind Cornwall in a contract or to the acceptance of Charley's services. The conferring of power on Sambo to bind Cornwall must itself be a legal transaction. The granting of power to an agent is like the granting of property to another, or to the voluntary assumption of an obligation. The grantor of property consents that he shall be deprived of property. The contractor consents to come under a new duty, and a principal consents that he shall be subject to a defined power. Each one of these transactions is an exercise of the will, and each one is a subtraction from the legal position of the person who consents to be bound. The act of conferring a power is substantially like the act of making an offer. Professor Corbin, in his careful analysis of legal relations,[24] puts offers into the category with other powers. This analysis emphasizes the similarity—the virtual identity in character—between an offer and the authorization of an agent. The gist of a simple offer to make a bargain (exchange or contract) is this: The offeror consents to be bound, to a transfer or obligation, when the offeree meets specified conditions. The conditions the offeree is to perform are called the "acceptance." [25] The author-

22. "The general rule, that when an attorney does any act beyond the scope of his power, it is void even as between the appointee and the principal, has always prevailed, and is indeed elementary in the doctrine of powers." North River Bank v. Aymar, 3 Hill 262, 266 (N.Y. 1842).

23. "An agency is created—authority is actually conferred—very much as a contract is made, i.e. by an agreement between the principal and agent that such a relation shall exist." Taft, J., in Central Trust Co. v. Bridges, 57 Fed. 753, 764 (6th Cir. 1893).

24. Corbin, *Legal Analysis and Terminology,* 29 YALE L.J. 163 (1919) "An *offer* is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract. An *acceptance* is the exercise of the power conferred by the offer, by the performance of some other act or acts." 1 CORBIN, CONTRACTS 21, n.18 (1950).

25. It should be remembered that the word "acceptance" has a different meaning when we speak of the acceptance of an offer than the word has when it is used in its

izing of an agent is likewise a consent to be bound on specified conditions—*viz.*, that the agent and third person shall make a particular bargain. A simple offer can be accepted by the offeree acting alone. The authorizing of an agent to make a bargain calls for the cooperation of the agent and third party in order to meet the conditions, *i.e.*, to make what amounts to an "acceptance" of the principal's offer. A power, like a simple offer, can be made with any condition or limitation that the one who makes it may choose to insert. Suppose, for instance, that Cornwall, without the intervention of an agent, had sent an offer to the hardware man to buy a corn sheller on six months credit. And suppose further that the hardware man had replied, "I accept your offer, but the term of credit will be only sixty days." Cornwall would not be bound. His consent to be bound was on a condition that has not been met. And when Cornwall authorized Sambo to buy the corn sheller on six months credit, the same condition was imposed. It was not met when Sambo attempted to bind Cornwall to pay in sixty days.[26]

A bargain made by means of an agent commonly includes three acts of consent. First, the principal consents that the agent shall have certain power. The agent may be given much or little discretion. But the gist of the principal's consent is that he shall be bound if and when the agent acts within his prescribed limits. Second, the agent consents that his principal shall be bound. In case the agent is bargaining for his principal with a third party, the agent's consent may be in the form of an offer or an acceptance. Third, the third person consents to assume whatever duty or give up whatever rights are required of him by the terms of the bargain. Thus, there are three separate consents—each one perhaps at a different time and place from the others. The process is simple and realistic unless the phrase "meeting of the minds" gets into the calculation. That phrase seems to mean that the minds must get together and act in unison. But there is no such requirement for the making of a bargain, whether it is made by a simple offer and acceptance or is made through the intervention of an agent. The simple requirement is that each party shall consent to the subtraction that the bargain would make from his

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popular sense. It means, when used in this technical sense, the thing that must be given or done by the offeree in order to complete the proposed transaction. See FERSON, BASIS OF CONTRACTS, c. 4 (1949).

26. Barrett v. McHattie, 102 Mont. 473, 59 P.2d 794 (1936). Batty v. Carswell, 2 Johns. 48 (N.Y. 1806). "The master has found that the defendants placed the real estate in question in the hands of a real estate agent for sale, but with the limitation upon his authority that no sale should be made except to a purchaser agreeable to Mrs. Dodge. . . . The agent clearly exceeded his authority in the case at bar, for he failed to comply with the condition precedent, that the proposed purchaser should be a person satisfactory as a neighbor to Mrs. Dodge." Harrigan v. Dodge, 216 Mass. 461, 103 N.E. 919, 920 (1914). "If the principal will describe the particular condition on which a bill shall be accepted, however idle, even to the writing of it with a steel pen, it must be fulfilled." Cowen, J., in North River Bank v. Aymar, 3 Hill 262, 271 (N.Y. 1842). "This power of attorney, which is in the nature of a letter of credit, is precise and limited in amount. . . ." Shaw, C.J., in Mussey v. Beecher, 57 Mass. (3 Cush.) 511, 516 (1849).

own legal position, or—in the case of an agent's consent—from the legal position of his principal.

The word, consent, as here used, does not mean or necessarily include, what goes on in the mind of a person who binds himself in a legal transaction. There is sometimes a discrepancy between what a person thinks and his expression of what is in his mind. This possible discrepancy presents a problem. Suppose that a question arises as to whether a person has bound himself in a legal transaction. Should the law, in solving the question, take heed of what was in the person's mind? Or should it take heed of his acts? The problem has been much discussed. Some scholars say the law should regard only the "will" [27] of the parties. This is known as the "subjective" test. Other scholars hold that the law should regard only the acts [28] of the parties. This is known as the "objective" test. Dean Wigmore observes that "It would be useless to prescribe either that the internal will alone or that the external expression alone shall invariably be decisive. Probably no developed system of law has ever practically enforced either the one or the other standard exclusively." [29] The subjective test and the objective test are sometimes discussed as though they were antitheses.[30] A broad view of legal literature indicates that they are not antithetical. On the contrary they complement each other. The objective test affords the rule, the subjective test affords the reason.

Let us notice the subjective test and its rationale. Farmer Cornwall, for example, has his eggs and other farm products. Their value derives largely from Cornwall's ability to exchange them for other things he would rather have. It is also to his ultimate advantage if he can obligate himself in exchange for what he wants and if he can authorize an agent to bargain for him. The idea pervades legal transactions that a normal person should, by the exercise of his will, be able to subtract from his legal position. It is his care to see that he gets what he wants in exchange. And so the law gives a considerable degree of autonomy. That is the basis of contracts, exchanges, gifts, the conferring of powers and other legal transactions. "Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy." [31] The "subjective" test, recognizing the policy of the law to allow a large degree of autonomy inquires: Did the person really consent?

27. ANSON, CONTRACTS 8 (5th Am. ed., Corbin, 1930). The Roman Lawyers held a similar view. HOLLAND, ELEMENTS OF JURISPRUDENCE 120 (13th ed. 1924).

28. Williston, *Mutual Assent in the Formation of Contracts,* 14 ILL. L. REV. 85 (1919). "Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words." Holmes, J., in O'Donnell v. Town of Clinton, 145 Mass. 461, 14 N.E. 747, 751 (1888).

29. 9 WIGMORE, EVIDENCE § 2404 (3d ed. 1940).

30. Note, 23 N.Y.U.L.Q. REV. 143 (1948); Frank, J., in a concurring opinion, Ricketts v. Pennsylvania R.R., 153 F.2d 757, 760 (2d Cir. 1946).

31. Fuller, *Consideration and Form,* 41 COL. L. REV. 799, 806 (1941). RESTATEMENT, CONTRACTS § 20 (1932).

But how can a judge or jury trying the facts of a case know the will of a man? How can they tell whether he consented to enter this transaction? There is no practical way to determine this fact except to infer it from the man's behavior.[32] And so we come to the rule as it is laid down by the American Law Institute.[33] "Not mutual assent but a manifestation indicating such assent is what the law requires." That is the "objective" test. It thus appears that the subjective test by itself is unworkable and the objective test by itself would be devoid of reason. Together they give us a workable rule on a rational basis.

Closely related to the idea that the law takes account of acts, rather than of what is in the mind of the actor, are requirements with regard to the form of the act or to the form of the evidence of the transaction. Livery of seisin, for example, had to be carried out by the delivery of a twig or a piece of sod.[34] In the making of some kinds of contracts and transfers there is need that a writing shall be signed and delivered.[35] Insurance contracts [36] and bills of lading [37] must be issued in forms that are specified by law. The authorization of an agent must for some purposes be in writing; and, when sealed instruments were in vogue, the agent's power of attorney needed to be sealed if he were being authorized to execute sealed instruments.[38] The great volume and speed of modern commerce call for forms of legal transactions that are short and simple. Consent to be bound in an ordinary transaction may consist in the mailing of a letter,[39] it may be included in the delivery or shipping of a chattel,[40] it may be a nod or a wink. It "may be gathered from acts or signs, words or silence, in multitudinous variety of circumstance." [41] The authorization of an agent may be implied from a course of dealing.[42] Where form has not been prescribed, the act of consent may take any form that is suitable according to business usage.

Briefly, the comparison between what it takes to create a master's "liability" and what it take to create "power" in an agent comes to this: One who procures or accepts the services of another and the right to control the worker has a master's "liability" thrust upon him. The risk the master takes

32. The word "consent" may be used in more than one sense. But the meaning given to it here is "to indicate or express a willingness" (Webster's New International Dictionary). The actor's brain process and his external behavior are necessarily deemed a unit. The enactment of a will to be bound is accordingly taken to be "consent."

33. RESTATEMENT, CONTRACTS § 20 (1932).

34. 2 BL. COMM. *315.

35. *Id.* at *297.

36. 29 AM. JUR., *Insurance* § 28 (1940).

37. UNIFORM BILLS OF LADING ACT §§ 2, 3; Federal Bills of Lading Act, 39 STAT. 538 (1916), 49 U.S.C.A. §§ 81 *et seq.* (1929).

38. 1 MECHEM, AGENCY § 212 (2d ed. 1914).

39. Adams v. Lindsell, 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).

40. Port Huron Machinery Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1928).

41. Bogie v. Bogie, 35 Wis. 659, 667 (1874); see also, Hallock v. The Commercial Ins. Co., 26 N.J.L. 268, 281 (1857).

42. Wheatley v. McRoberts, 157 S.W.2d 805 (Mo. App. 1942).

is imposed upon him regardless of his consent to bear it. But in order to create power in an agent to bind his principal, it is necessary to have the consent of the principal. The principal can impose such conditions and limitations as he may choose in creating the agent's power, just as an offeror can impose such conditions and limitations as he may choose in creating the power of his offeree to accept.

DIFFERENCE BETWEEN KINDS OF ACTS DONE BY SERVANTS AND AGENTS RESPECTIVELY

What is the important difference in kind between acts that are done by servants and acts that are done by agents? It is easy to imagine that Sambo, as a servant, plowed the field, fed the hogs, milked the cows and did innumerable chores. These acts are mechanical, but so are all acts. That feature does not distinguish the acts that are done by servants. The acts mentioned create value. But that is not a safe criterion of the difference. When Sambo reports to Cornwall that "two heifers are missing from the back pasture," he has not created value, he has merely spoken some words and yet it was an act in his service. Can the kind of acts done by a servant be distinguished because they do not affect third parties? That also is an inadequate test. Acts done by a servant do, in many instances, affect third parties. Employees of carriers and hotels address their efforts to third persons. And then we have the large group of cases where a servant's efforts go amiss and injure a third person. Can the acts of a servant be set apart as different in kind because they are done by a man of small training and humble station like Sambo? Not so. Such acts can be done by a locomotive engineer who is a person with great skill and high responsibility. They can be done by the highest officer in a great bank or industrial concern.

It seems impossible to mark the acts of servants by any feature which, always present, sets them apart. It is easy, however, to take account of a feature which, always *absent,* sets them apart. The acts of servants take their distinct character from what they are *not.* They are not acts of consent to be bound in a legal transaction such as a grant or a contract. And, conversely, the acts of agents are acts of consent that his principal shall be bound.

The distinction between servants and agents is elliptical. The real distinction is between the two kinds of acts just noted. Calling a person a "servant" is a short way to say that he does the one kind of acts (nonjuristic) and needs only to be employed in order to make his master liable. Calling a person an "agent" is a short way to say that he does the other kind of acts (juristic) and needs authorization in order to bind his principal.[43] Acts are

43. The terms "juristic" and "nonjuristic" mark the distinction that is here being made. HOLLAND, ELEMENTS OF JURISPRUDENCE 117 (13th ed. 1924). But these terms are not much used in this essay because they smack more of jurisprudence than they do of every day law.

not classified according to whether they are done by servants or by agents. The reasoning process is just the reverse. We name the person who acts for another "servant" or "agent" according to the kind of act he does. And this is the key to the difference between servants and agents.

Representations are the kind of acts that servants do and so the master is charged when his servant makes a representation in the scope of his employment. That is clear when for instance, the watchman at the crossing says "the tracks are clear"; or a trainman announces a station. But in some instances representations have been mistaken for the kind of acts that agents do, and inquiry has been made as to whether the one who made the representation had been authorized to make it for his principal.[44] Since authorization—*i.e.,* consent to be bound—is more difficult to establish than the fact of employment, it is important to place representations, as well as other acts, in the appropriate category. Suppose that Sambo, when he packed the eggs, kept out a few dozen and left empty spaces in the center of the crate where that would not be noticed. And suppose further that he sold the partly filled crate as a full crate of eggs and appropriated the eggs he had kept out to his own use. Would Cornwall be liable to the buyer for the fraud? Sambo has virtually represented to the buyer that the crate was full and thus has persuaded the buyer to pay for a full crate. If the buyer, in order to recover from Cornwall, must prove that Cornwall consented, or even seemed to consent, to such a trick the buyer would fail. But the representation was not a juristic act—*i.e.,* not a consent to be bound. It did not have to be authorized in order to make Cornwall liable. The question would be whether the representation as made by Sambo fell within the scope of his employment. It would be relatively easy to establish that it did fall within his employment. He was to pack the eggs and make suitable representations leading up to the sale. Similar cases hold the employer.[45] The marked tendency is to hold the master liable for misrepresentations made by his servant.[46]

The right of an employer to control an employee is frequently taken to be the criterion as to whether the relationship of master and servant exists between the parties. The test is helpful, but two observations should be made about it. First, it has no particular application in distinguishing servants from agents. The principal may have a right to control his agent just as a master has to control his servant. The control test marks the difference between a

44. Friedlander v. Texas and Pac. Ry., 130 U.S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991 (1889); Pollard v. Vinton, 105 U.S. 7, 26 L. Ed. 998 (1882); Ellison v. Stockton, 185 Iowa 979, 170 N.W. 435, 437 (1919); Udell v. Atherton, 7 H. & N. 172, 158 Eng. Rep. 437 (Ex. 1861).

45. Yoars v. New Orleans Linen Supply Co., 185 So. 525 (La. App. 1939); Brooks v. Gray-Von Allmen Sanitary Milk Co., 211 Ky. 462, 277 S.W. 816 (1925); Grigsby v. Hagler, 25 Cal. App. 2d 714, 78 P.2d 444 (1938); Ripon Knitting Works v. Railway Express Agency, 207 Wis. 452, 240 N.W. 840 (1932).

46. See Ferson, *Agency to Make Representations,* 2 VAND. L. REV. 1 (1948).

servant and a nonservant and it has peculiar application in making the distinction between servants and independent contractors. The right of the employer to control the worker indicates that the employer has hired services and not bought the result of services as he does when he hires an independent contractor. The control test is useful also in determining who is liable as master for a particular act that has been done by a "borrowed servant." Second, the right to control may tend to prove but it does not create the relation of master and servant. It is, rather, an inevitable incident of that relation. The right to control is imputed to the master and he cannot get rid of it by renouncing it. Let us note, for instance, the case of *Hill v. Morey*.[47] The defendant was repairing his brush fence. His neighbor, Sturdivant, who happened to come by, volunteered to help the defendant with his work. Sturdivant, while helping the defendant, committed a trespass on the plaintiff's adjacent land. The defendant was held liable for the trespass. He had accepted the services of Sturdivant. Is it conceivable that the result would have been any different if the defendant had said to Sturdivant, "I disclaim any right to control you"? Or if he had posted a sign saying, "I have no right to control Sturdivant who is serving me"? It was the acceptance of Sturdivant's services that made the defendant liable. His right to control Sturdivant was an inevitable incident. Just as smoke proves but does not create fire; so the right to control a worker proves but does not create a master and servant relation.

CHARACTER OF CHANGES WROUGHT BY SERVANTS AND AGENTS RESPECTIVELY ON THE LEGAL POSITIONS OF THEIR CONSTITUENTS

We may now note the character of change that an agent can work on his principal's legal position and compare that with the character of change that a servant can work on his master's legal position. Take Cornwall and Sambo, for instance. They were principal and agent and also master and servant.[48] Sambo, the agent, can sell and transfer Cornwall's eggs to another. Cornwall is bound, in the sense that the eggs no longer belong to him. They belong to the vendee. Cornwall gave Sambo also power to buy a corn sheller. Sambo can, if he acts within the limits of his power, obligate Cornwall to pay a certain amount for the corn sheller. It will be observed that, while these transactions bind Cornwall, they do not give anyone a right of action

47. 26 Vt. 178 (1854).

48. A multiplicity of relations between the same parties is not strange. Consider the situation when a fruit grower sends his fruit to a packer who is to pack the fruit and forward it to a commission merchant for sale. The packer becomes a bailee (to possess the fruit), an independent contractor (to pack and handle the fruit) and an agent (to contract with the carrier and with the commission merchant and to authorize the latter to sell the fruit). At later stages in the operation the packer becomes a trustee of the rights against the commission merchant, and then, perhaps, a debtor to the grower for the amount.

against Cornwall. Neither transaction is a wrong to anyone. The sale of the eggs divested Cornwall of property rights he theretofore had. The promise to pay for the corn sheller would put Cornwall under a new duty. Each transaction subtracts from Cornwall's legal position but does not make him liable in the sense that he can now be sued. That is characteristic of what happens to a principal when his agent exercises his power. There is a divestment of primary rights or a creation of primary duties. But there is no invasion of the existing rights of other persons and so no incurring of liability to suit.

Now, for sake of contrast, note what can happen under Cornwall's liability as a master. Sambo wrongfully drove against Bulfinch. That was an invasion of Bulfinch's existing primary rights. And by the doctrine of *respondeat superior* Cornwall is liable to a suit right now. A wrong has been done. Bulfinch can have redress. When Sambo threw the iron bar and hit Jerry, Cornwall could be sued at once; and when Sambo cheated the vendee of the eggs by misrepresenting to him the number of eggs in the crate, the vendee could sue Cornwall at once.[49] These acts, unlike Sambo's acts as agent under his power, had nothing to do with the shifting or creating of primary rights. They had to do with violations of the primary rights of third persons. Such an invasion gives a right of action sometimes called a secondary[50] right. This is characteristic of what can happen under a master's liability.

It is not meant to be said here that a suit for damages is the exclusive remedy when a right has been violated. The law may visit some other unpleasant consequence on one who does wrong, or who has employed another who, in the employment, does wrong. The law would, for instance, permit the vendee of the eggs to rescind the transaction by reason of Sambo's fraud. But that is just another remedy that is allowed against one whose servant perpetrates a fraud in inducing the transaction. And in other situations the representations of a servant will operate to estop the master.[51] Whether the injured party can sue for damages, avoid his bargain, or estop Cornwall, they are all alike remedial. They are consequences visited on Cornwall by law because his servant violated the rights of third persons.

Recapitulating what has been said, the liability of a master and the subjection of a principal to his agent's power are different one from the other in their historical origins; in the ways they are created; in the kind of acts that are done by servants and agents respectively; and in the character of legal change they bring to the master and principal respectively. These are differences that cannot be wiped out by putting both relations together under

49. See note 45 *supra.*

50. HOLLAND, ELEMENTS OF JURISPRUDENCE 147 (13th ed. 1924).

51. Holden v. Phelps, 141 Mass. 456, 5 N.E. 815 (1886); Penas v. Chicago, M. & St. P. Ry., 112 Minn. 203, 127 N.W. 926 (1910).

the general head of agency. And the two relations will stubbornly remain distinct even if we, to some extent, try to discuss them in interchangeable terms.[52]

DISTINCTION BETWEEN "REAL" AND "APPARENT" AUTHORITY

It was pointed out above that the power of an agent is created by the consent of his principal. Now, what is it that marks the distinction between "real" and "apparent" authority? It is simply this: Did the principal notify the agent or did he notify the third party of the principal's consent? If he notified the agent, the authority is "real";[53] if he notified the third party the authority is "apparent."[54] Let us illustrate: Suppose that Cornwall, away from home, writes and mails a letter to Sambo in which he tells Sambo that he can buy a hay rake and charge it to Cornwall. Sambo, on receipt of the letter, has "real" authority.[55] The fact that an implement dealer who sold Sambo the rake was not aware of Sambo's power will not relieve Cornwall from the binding effect of Sambo's act within his real authority.[56] Next suppose that Cornwall sent no letter or word of any kind to Sambo, but that he did send a letter to the implement dealer in which he said that Sambo could buy a hay rake and charge it to Cornwall. When the implement dealer receives that letter, Sambo has "apparent" authority.[57] It is implicit in these two illustrations that if Cornwall had sent letters to both Sambo and the dealer, notifying them of his consent to the purchase, Sambo would have both "real" and "apparent" authority. And in a vast majority of the cases the agent does have both. The principal's consent that the agent shall have power is usually made manifest to both the agent and the third party. A clerk in a store, for instance, would commonly have both real and apparent authority. The principal would naturally tell the clerk that he could sell articles in the store (real authorization); and, by putting the clerk in the

52. The terms "principal" and "master" are generally used as terms that do not mean the same thing—that is, they are not used interchangeably and that is true of the corresponding terms "agent" and "servant." But when it comes to "authorization" and "employment" they seem to be used at times as though they meant the same thing and so it is with "scope of employment" and "limits of authority." And so it is with "bound by" and "liable for." We commonly say that a master is "liable for" the acts of his servant. But, unfortunately we do not have a comparable term to sum up and express the idea that a principal is exposed to the power of his agent. The words "liable for" are therefore pressed into double use and so we speak of the liability of a principal. Says Kensworthy, J., in Zidek v. West Penn Power Co., 145 Pa. Super. 103, 20 A.2d 810, 812 (1941), "A principal is always liable for the act of an agent if the act is within the scope of his authority." This double use of the term tends to blur two distinct ideas.

53. RESTATEMENT, AGENCY § 7 (1932).

54. *Id.*, § 8.

55. RESTATEMENT, AGENCY § 7 (1932).

56. North Alabama Grocery Co. v. J. C. Lysle Milling Co., 205 Ala. 484, 88 So. 590 (1921); Fidelity & Casualty Co. v. Continental Ill. Nat. Bank & Trust Co., 303 Ill. App. 595, 25 N.E.2d 550 (1940); Stanfill v. Bell, 44 N.M. 576, 106 P.2d 540 (1940); Zidek v. West Penn Power Co., 145 Pa. Super. 103, 20 A.2d 810 (1941).

57. RESTATEMENT, AGENCY § 8 (1932).

store, the principal would represent to third persons that the clerk could sell the goods (apparent authorization).

The terms used to mark this distinction—"real" and "apparent"—are inapt and misleading. They divert attention from the true distinction. These terms make it seem that contrast is being drawn between what is real in the sense of actual or genuine, and what is illusory. But the agent's authority (power) is equally effective whether it is "real" or "apparent," and the foundation for that power—viz., the principal's consent—may be as real in one case as it is in the other.[58] It was so in the two illustrations used above, in one of which Cornwall sent his letter to Sambo, and in the other Cornwall sent his letter to the dealer. The distinction does not have to do with whether the power is effective, and it does not have to do with whether the principal really consented to the power. It has to do with whether news of the principal's consent has been communicated to the agent or to the third person.

The word "authority" is sometimes used as synonymous with power—*i.e.*, the relation whereby an agent can bind his principal. At other times "authority" is used as synonymous with authorization—*i.e.*, the acts whereby a power is created.[59] Authority in the sense of power—*i.e.*, what the agent has—is of the same character and potency however the agent got it. It is a relation whereby the agent can bind the principal. The distinction between "real" and "apparent" authority, therefore, is a distinction with regard to how the power is created. Was it created by "real" authorization or "apparent" authorization?

It appears from the foregoing discussion that the creation of an agency is like any other legal transaction in that it derives from the consent of the person to be bound—in this case the principal; that the consent of a party is one thing and communication of the news that he has consented is another thing; and, that we call the agent's authority "real" when the principal's consent has been communicated to the agent, but we call it "apparent" when the principal's consent has been communicated to the third party. That is the simple pattern. But there are problems about details such as: What, if any, requirements are there with regard to the form of the principal's consent and communication? Can the principal be estopped by his communication and

58. See SEAVEY, STUDIES IN AGENCY 184 (1949). It seems that in the rare situations where a principal has suitably consented to the power but news of that event has not reached either the agent or the third party the principal's consent is effective and the power exists notwithstanding the lack of communication. In Ruggles v. American Cent. Ins. Co., 114 N.Y. 415, 21 N.E. 1000 (1889), negotiations were under way for the appointment of an insurance agent. On Oct. 13, a letter was mailed making the appointment. This letter did not reach the agent until the 20th. On Oct. 16, the agent made a contract of insurance and on the 19th the property was burned. It was held that the agent's authority dated from the mailing of the letter.

59. Corbin, Note, 34 YALE L.J. 788 (1925). Professor Seavey uses "authority" to mean "a power which can be rightfully exercised, or a power which can be exercised without going beyond the privilege given to A by P." SEAVEY, STUDIES IN AGENCY 68 (1949).

thus held even though he gave no consent? What happens when both "real" and "apparent" authority are present but they are not coextensive? And do limitations placed on an agent's "real" authority affect his "apparent" authority—or vice versa? It will be necessary, too, that we shall distinguish limitations on the agent's power from instructions given to him by the principal.

REAL AUTHORITY

"Real" authority is created by the principal's consent communicated to the agent. What are some of the ways in which the communication can be made? The simplest and clearest manner of creating real authority is for the principal to give the agent a written power of attorney stating definitely what the agent can do.[60] Authority to execute a sealed instrument must be written and under seal.[61] But in most cases oral communication to the agent that he shall have the power is sufficient. And the principal's acquiescence in a course of conduct of the agent may indicate to the agent that the principal gives him certain power.[62] Power thus established does not depend on estoppel.[63] It rests rather on the principal's consent as it appears in his acts. It is not necessary in making out real authority, whether it is expressly given or inferred from the principal's acts, to show that the third person knew about the agent's authority.[64]

It was noted above that consent does not mean or necessarily include what is in the mind of the person who consents. Consent means an act that, in the circumstances, seems to register the actor's will to be bound. Bearing that in mind, there is seldom any need for estoppel in proving "real" authorization. The principal's conduct would or would not signify consent and there is no need for estoppel in either case. But in some rare cases estoppel may be necessary. Such a case was *Telgraph Company v. Griswold*.[65] The facts were these: An agent telegraphed to his principal asking for authority to buy flax

60. Fidelity & Casualty Co. v. Continental Ill. Nat. Bank & Trust Co., 303 Ill. App. 595, 25 N.E.2d 550 (1940); Zidek v. West Penn Power Co., 145 Pa. Super. 103, 20 A.2d 810 (1941).

61. 1 MECHEM, AGENCY § 212 (2d ed. 1914), citing Co. LITT. *48b; Combes' Case, 9 Co. Rep. 75a, 77, 77 Eng. Rep. 843 (K.B. 1613). A principal can be held on a sealed instrument even though the agent's authorization was not sealed if the seal on the instrument executed was not required. Vigdor v. Nelson, 322 Mass. 670, 79 N.E.2d 288 (1948).

62. Kansas Educational Ass'n v. McMahan, 76 F.2d 957 (10th Cir. 1935); Thurber & Co. v. Anderson, 88 Ill. 167 (1878); Ragatz v. Diener, 218 Iowa 703, 253 N.W. 824 (1934); Haluptzok v. Great Northern Ry., 55 Minn. 446, 57 N.W. 144 (1893); Wheatley v. McRoberts, 157 S.W.2d 805 (Mo. App. 1942); Farm & Home Savings & Loan Ass'n v. Stubbs, 231 Mo. App. 87, 98 S.W.2d 320 (1936); Brock v. Real Estate-Land Title & Trust Co., 318 Pa. 49, 178 Atl. 146 (1935); McDorman v. Goodell, 69 S.W.2d 428 (Tex. Civ. App. 1934).

63. See note 62 *supra*.

64. North Alabama Grocery Co. v. J. C. Lysle Milling Co., 205 Ala. 484, 88 So. 590 (1921); Ragatz v. Diener, 218 Iowa 703, 253 N.W. 824 (1934); Wheatley v. McRoberts, 157 S.W.2d 805 (Mo. App. 1942); Stanfill v. Bell, 44 N.M. 576, 106 P.2d 540 (1940); Zidek v. West Penn Power Co., 145 Pa. Super. 103, 20 A.2d 810 (1941); McDorman v. Goodell, 69 S.W.2d 428 (Tex. Civ. App. 1934).

65. 37 Ohio St. 301 (1881).

seed at "one-fifty" per bushel. The Telegraph Company made a mistake in transmitting the message and, as delivered, it asked for authority to buy at "one-five." The principal telegraphed his approval and the agent bought the flax seed at $1.45 per bushel. In an action by the plaintiff against the Telegraph Company, it was assumed without argument that the principal was bound according to the telegraphic messages. Thus, although the principal never consented to authorize the purchase at one-fifty he was estopped by the communication that was made to the agent.[66] He was estopped from denying "real" authorization. Although estoppel is rarely invoked in making out real authority, we shall find that it is frequently invoked in making out apparent authority.

It is well settled that an undisclosed principal is bound by the acts of his agent acting within his authority. Such authority is necessarily "real." It cannot be "apparent" to a third person when the principal's very existence is not known to the third person. It seems rational that the undisclosed principal should be held. He has consented to the agent's power; he has manifested that consent to the agent. Why should there be any doubt or hesitation about holding the principal? The theoretical basis of the rule has, however, been assailed, and by scholars of such eminence that their criticisms should be noted with respect. Professor Huffcut says:[67] "The strict application of the common law rule would lead to the conclusion . . . that the principal could neither sue nor be sued upon the contract." "Yet," he adds, "just the opposite conclusion prevails . . . the rule is probably the outcome of a kind of common law equity powerfully aided and extended by the fiction of the identity of principal and agent and the doctrine of reciprocity or mutuality of contract obligations."

Sir Frederick Pollock refers to the doctrine as an "anomaly" [68] and says: "The plain truth ought never to be forgotten that the whole law as to the rights and liabilities of an undisclosed principal is inconsistent with the elementary doctrines of the law of contract." Dean Ames also refers to the doctrine as an "anomaly" and asks "Why . . . did the English and American courts sanction a doctrine, logically indefensible, and not recognized in other countries?"[69] Now why do these scholars so strongly disapprove of the doctrine? It will be remembered that the principal has consented to be bound and has manifested that consent to the agent. The objection to holding the principal seems to be mainly on the ground that the third person has not

66. Some courts would not charge the sender with errors that were made by the telegraph company. See Ferson, *Liability of Employers for Misrepresentations Made By "Independent Contractors,"* 3 VAND. L. REV. 1, 9 (1949).

67. HUFFCUT, AGENCY 161 (2d ed. 1901).

68. Note, 3 L.Q. REV. 358, 359 (1887).

69. Ames, *Undisclosed Principal—His Rights and Liabilities,* 18 YALE L.J. 443, 445, 447 (1909).

received news of the principal's consent.[70] Should that fact preclude the third person? Other kinds of transactions can be made in favor of persons who are not aware of the benefits they are receiving. The owner of property, for example, can consent in suitable form that his property shall pass to another, and his consent is effective even before the transferee is aware of his acquisition.[71] A contractor can, by his consent, become bound to a third party who is not aware of the contract.[72] An offeree who accepts by mailing a letter [73] or shipping a chattel [74] is bound at once even though the offeror is not aware of the offeree's action. Trusts can be declared and become effective in favor of a cestui who has no news of the declaration.[75] And it seems both rational and expedient that a power can be created by "real" authorization even though the third party has not heard the news.

How did the idea get started that a transferee, obligee or third party in an agency transaction should have news of the event in order to hold one who has consented to be bound? In the first place, the act of consent is often one that is known at once to the transferee, obligee or other person who is receiving a legal advantage. It would be so, for example, in case of a promise spoken to the promisee. This common association of the act of consent with the communication thereof has given an impression that they are integral—*i.e.*, that the act of consent and the news thereof are one and inseparable. In the second place this need for communication is implicit in the form of action by which simple contracts were originally enforced. That form of action—trespass on the case—went on the theory that the promisor was a deceiver, his promise was a snare, and he should pay because he cheated the promisee.[76] Under that theory, communication is necessary. Else, how could the plaintiff have been cheated out of anything?

So long as simple contracts were enforced on the theory that the promisor had committed a tort and must suffer for the wrong he had done, the appointment of an agent would necessarily rest on the same basis. A more realistic explanation of simple contracts and agency was inevitable. The common sense of it is that simple contracts and the granting of power to an agent should not be assimilated with torts. They rest on the same basis as transfers of

70. "A person has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent." HUFFCUT, AGENCY 158 (2d ed. 1901). "The right of one person to sue another on a contract not really made with the person suing is unknown to every legal system except that of England and America." Pollock, Note, 3 L.Q. REV. 358, 359. "Logically . . . there is no direct relation between the undisclosed principal and the third person with whom the agent contracts." Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 YALE L.J. 443, 445 (1909).

71. Moore v. Trott, 162 Calif. 268, 122 Pac. 462 (1912).

72. RESTATEMENT CONTRACTS §§ 135, 136 (1932).

73. *Id.* at § 64.

74. Port Huron Machinery Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1928).

75. *Ex parte* Pye, 18 Ves. 140, 34 Eng. Rep. 271 (Ch. 1811).

76. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 53 (1888); HOLDSWORTH, HISTORY OF ENGLISH LAW 429 (3rd ed. 1923).

property and covenants—*i.e.*, the consent of the party to be bound. On this more rational theory the power of an agent does not depend on communication to the third person that the power has been granted.

Dean Ames is troubled by the situation where an agent buys property, particularly real property, for his undisclosed principal.[77] He makes the point that the title necessarily comes to the agent and that the agent is thus made a trustee for his principal Then says Dean Ames: "No one would maintain that a cestui qui trust may be sued, and at law, upon contracts between the trustee and third persons." True enough! But the principal would be sued as such, and not as a cestui qui trust. He was a principal in the purchase transaction and is a cestui qui trust of the property. Neither relation excludes the other.[78] One has to do with the principal's liability to the third party on a contract that was made at the time of the purchase; the other has to do with a property relation between the principal and his agent who now has title. The principal's obligation to pay the seller rests on the firm basis that he gave real authorization to his agent and the agent acted according to the power thus conferred.

An agent who contracts for an undisclosed principal necessarily does so in his own name. He is liable on a contract thus made. The result is that the third person can hold either the agent or the principal.[79] Is that bad? The result can be defended on grounds of both theory and justice. So far as theory is concerned, the agent is held because he in terms bound himself, and the third person relied on his credit. The principal is bound because he consented to the agent's power. Putting it another way, he consented to become bound on conditions that have come to pass. Now what about the justice of holding the principal as well as the agent? It should be remembered that the contract was made for the benefit of the principal. Whatever asset the agent acquires in the deal swells the estate of the principal. The agent must hold it in trust for the principal. A seller loses to that extent the credit he relied on. And so the third person's right against the undisclosed principal is not an unmitigated or undeserved windfall. It accords with justice, as well as with sound theory, to permit him to hold the person who got the beneficial ownership of his goods. And it clearly would be unjust if the third person were not allowed to recover against the agent, the person on whom the third person relied.

The principal, whether he is disclosed or undisclosed, can limit his "real" authorization as he may desire.[80] A few cases seem, at first blush, to be contrary to this proposition. But the result reached in those cases can and

77. Ames, *Undisclosed Principal—His Rights and Liabilities,* 18 YALE L.J. 443, 444 (1909).

78. Otoe County Nat. Bank v. Delany, 88 F.2d 238 (8th Cir. 1937).

79. An exception should be noted to the effect that on sealed or negotiable instruments no one can be held except the parties the instruments purpose to bind. 2 MECHEM, AGENCY §§ 2064, 2065 (2d ed. 1914).

80. See note 26 *supra.*

should be reached without reliance on the agent's power. The case of *Watteau v. Fenwick*,[81] particularly, is in point. The facts in that case were that one Humble managed a beer house for the defendant. The license was taken out in Humble's name and his name was painted over the door. The defendant's interest in the business did not appear. Humble "had no authority to buy any goods for the business except bottled ales and mineral waters." But Humble bought bovril and cigars and the action was brought to recover the price of these goods "for which it was admitted that the plaintiff gave credit to Humble only." The goods were delivered "over some years" and it can be inferred that Humble put these articles into stock and sold them. Judgment was given for the plaintiff. Professor Mechem disapproves the decision[82] and his disapproval of the decision is justified if the plaintiff's right to recover depends on Humble having either "real" or "apparent" authorization to bind the defendant. Humble had neither. But the result reached by the court is correct even if Humble had neither "real" nor "apparent" authority to pledge the defendant's credit in exchange for bovril and cigars. Let us recall an elementary rule from the law of contracts, and another from the law of master and servant. These two rules in combination lead inevitably to the liability of the defendant even if Humble had no authority to pledge the defendant's credit. It is elementary in the law of contracts that if one sends a chattel to another offering it at a price, as plaintiff sent the bovril and cigars, and the receiver exercises dominion over the thing sent, he is bound to pay the price.[83] That rule applies here. The bovril and cigars had been sent by the plaintiff to the defendant's store "over some years." And it is fair to assume they were accompanied by invoices indicating the price the defendant was expected to pay if he accepted the goods. Humble put them in stock. Let it be conceded that a promise made by Humble, in ordering the goods or otherwise, to pay for the goods would not be binding on the defendant. The fact remains that Humble was employed as "manager" of the beer house. "Manager" is not a word of art but Humble's duties as such no doubt included the mechanical work of putting goods in stock and offering them for sale. These acts, therefore, must be charged to the defendant. And those acts were an exercise of dominion. The defendant therefore accepted the plaintiff's offer of the goods and should be deemed bound in a contract to pay the invoice price. It may be urged that the defendant was not aware that Humble had, in the defendant's behalf, exercised dominion over these goods. But that

81. 1 Q.B.D. 346 (1875). Other illustrative cases are: Hubbard v. Tenbrook, 124 Pa. 291, 16 Atl. 817 (1889); McCracken v. Hamburger, 139 Pa. 326, 20 Atl. 1051 (1891); Kinahan v. Parry, [1910] 2 K.B. 389.

82. 2 MECHEM, AGENCY § 1767 (2d ed. 1914).

83. "Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. If circumstances indicate that the exercise of dominion is tortious the offeror may at his option treat it as an acceptance, though the offeree manifests an intention not to accept. RESTATEMENT, CONTRACTS § 72(2) (1932).

does not let the defendant out. In the first place, a master can be charged with a servant's act even if the master were not aware of the act at the time it was done. In the second place, a master is charged with information which his servant should have relayed to him.[84] Humble either relayed the information that he was putting these goods into the master's stock, or else Humble was remiss in the scope of his employment. The master is chargeable in either event.[85] Humble, like Sambo in the illustration used at the beginning of this article, was both an agent and a servant. That is, he did both juristic and non-juristic acts. He was an agent to do some acts and therefore needed authority to bind his principal by such acts. But it does not follow that he must have "authority" for everything he does. The fact of his employment is enough to charge the defendant for Humble's acts within the scope of his employment.

Can the undisclosed principal hold the third person on a contract the agent has made for the undisclosed principal? That question falls outside the subject of this essay. It may be noted, however, that the third person can be so held.[86] This is explained by a principle in the law of trusts. When an agent has procured a contract right by pledging his principal's credit or by giving up property that belonged to his principal, he must hold the right so procured for the benefit of his principal.[87] The agent is a fiduciary and what he procures as such belongs, in equity at least, to his principal.[88]

"Apparent" Authority

"Apparent" authorization is made out when a principal has manifested to a third party that the agent shall have certain power. The form of the

84. The Distilled Spirits, 78 U.S. 356, 20 L. Ed. 167 (1870); Prudential Ins. Co. v. Saxe, 134 F.2d 16 (D.C. Cir. 1943); *In re* Mifflin Chemical Corporation, 123 F.2d 311 (3rd Cir. 1941); Bowers v. City Bank Farmers Trust Co., 282 N.Y. 442, 26 N.E.2d 970 (1940); Goldstein v. Milmo Realty Corporation, 8 N.Y.S.2d 243 (N.Y. City Ct. 1938); Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545 (1943); RESTATEMENT, AGENCY § 274 (1933).

85. There can be omission as well as commission by a servant in the scope of his employment. Rice v. Marlar, 107 Colo. 57, 108 P.2d 868 (1940); Gladdish v. Southeastern Greyhound Lines, 293 Ky. 498, 169 S.W.2d 297 (1943); Cracker v. Chicago & Northwestern Ry., 36 Wis. 657 (1875). In Metropolitan Club v. Hopper, McGaw & Co., 153 Md. 666, 139 Atl. 554, 557 (1927), a bookkeeper omitted to notify her master that certain goods were being charged to it, and the court said: "The principal [master] cannot be excused because the agent [servant] failed in her duty to the principal [master]. Her default makes the principal chargeable to the same extent as if she had not been careless, but had communicated to her principal [master] the contents of the monthly statements, by making a delivery of them as she was charged to do by the duty of her employment."

The *Restatement of Agency* indicates that in such a case as *Watteau v. Fenwick*, the principal is held by reason of the appropriation of the goods to the principal's use rather than by reason of the promise the agent assumed to make. "If, although the agent does not intend to act for the principal, property secured by the contract later comes to the principal, or is used for his benefit, the principal may be liable." RESTATEMENT, AGENCY § 199 comment *b* (1933). This statement leaves open the question of whether the principal would be held on his implied in fact promise, as it is argued above that he should be, or on a promise implied in law by reason of the benefit he has received.

86. RESTATEMENT, AGENCY § 302 (1933).

87. RESTATEMENT, AGENCY § 423, comment *a* (1933).

88. 3 SCOTT, TRUSTS §§ 440.1, 499 (1939); Dixon v. Caldwell, 15 Ohio St. 412 (1864).

principal's manifestation can vary all the way from the filing of a written power of attorney with the third person [89] to a "holding out" of the alleged agent.[90] It should be noted that the "apparent authority for which the principal may be liable must be traceable to him . . . The principal is only liable for that appearance of authority caused by himself." [91]

The doctrine of estoppel frequently comes into play in making out apparent authority. This point calls for careful discrimination. Consent by the principal to the creation of a power is one thing; a representation by him that he has consented is another thing. Either one may be sufficient to bind the principal. Actual consent would be found in a case like this: Cornwall, away from home, writes to an implement dealer saying, "Sambo can buy a corn sheller and charge it to me." Sambo would have power. Cornwall's actual consent has been communicated to the dealer. There is no need to invoke the doctrine of estoppel. Now let us take an estoppel case, *Northwestern Mutual Life Ins. Co. v. Steckel.*[92] The plaintiff had threatened to foreclose a mortgage on defendant's land. The defendant went to the information desk in the plaintiff's office desiring to make a compromise settlement. The attendant at the desk referred the defendant to a Mr. Price, who in turn referred the defendant to a Mr. Swacker. Swacker agreed with the defendant to accept the land and a specified sum in settlement. It was held that the facts of the case gave Swacker power to make the settlement. Even if the plaintiff did not actually consent to give Swacker this power, the representations made by the plaintiff's employees, were chargeable to it. And, when those representations were acted on by the defendant, the plaintiff was estopped to deny that Swacker had power to bind the plaintiff in the alleged transaction.

Take another estoppel case, *Luken v. Buckeye Parking Corporation.*[93] Defendant had discontinued to operate a parking lot that it had operated for several years, but had left its sign at the entrance to the lot. Plaintiff, who had for two years past parked her car in this lot from time to time and who was not aware that the defendant had ceased to operate it, left her car with a man who was on the spot and who presumed to accept it for parking. He drove the car onto the street and it was wrecked. The defendant was held

89. Mussey v. Beecher, 57 Mass. 511 (1849); North River Bank v. Aymar, 3 Hill. 262 (N.Y. 1842).

90. Mason v. Rice, 47 Ga. App. 502, 170 S.E. 829 (1933); Shapleigh Hardware Co. v. McCoy & Son, 23 Ga. App. 265, 98 S.E. 102 (1919); Livingston v. Fuhrman, 37 A.2d 747 (D.C. Mun. Ct. 1944).

91. Hansche v. A. J. Conroy, Inc., 222 Wis. 553, 269 N.W. 309, 312 (1936). In this case Schulz, the alleged agent was introduced to the third person, plaintiff in the case, as "a man from Conroy's," and Schulz said "I am from Conroy's." But this evidence was not competent to prove that Schulz had apparent authority.

Where a credit coin or card is stolen or wrongfully appropriated and used by another without the knowledge of the holder, the latter, under ordinary circumstances, is not required to pay for the goods so obtained. Jones Store Co. v. Kelly, 225 Mo. App. 833, 36 S.W.2d 681 (1931); Lit Bros. v. Haines, 98 N.J. 658, 121 Atl. 131 (Sup. Ct. 1923); Gulf Ref. Co. v. Plotnick, 24 Pa. D. & C. 147 (1935).

92. 216 Iowa 1189, 250 N.W. 476 (1933).

93. 77 Ohio App. 451, 68 N.E.2d 217 (1945).

liable. The man who accepted the car was an impostor. The defendant had not consented that this person should have power to accept the bailment of cars on behalf of the defendant. But the defendant's earlier operation of the lot and its omission to remove its sign at the entrance to the lot created an appearance—made a virtual representation to the plaintiff—that the defendant still operated the lot and that the man on the spot was authorized to accept the bailment of cars for the defendant. The plaintiff was misled by this representation. She left her car with the man. And thus "apparent" authority was made out by estoppel.

One more case, *Livingston v. Fuhrman.*[94] The record showed that the plaintiff wanted to buy a diamond ring and was given the name and card of one Lassover. The card bore the telephone number and address of the defendant's jewelry store. The plaintiff called Lassover at defendant's store and made an appointment to see him there. She kept the appointment and he showed her some wrist watches. She bought one of the watches which proved to be defective and she sued defendant Livingston, to recover the purchase price. She testified that she thought Lassover was working for Livingston. The defendant testified, however, that Lassover was not his employee but was an independent jeweler who bought jewelry at wholesale from the defendant and sold it to Lassover's own customers; that the defendant permitted Lassover to use the store telephone number and to meet his customers at the store; but that the defendant had nothing to do with Lassover's sales or customers. First, let us look at the defendant's behavior in the light of the circumstances that were known to the court at the time of trial. In that light the defendant's behavior does not register his consent to be subject to Lassover's power. Even by the objective test these facts do not make out consent to be bound. But look at the defendant's behavior in the light of what the *plaintiff* knew when she bought the watch. In that light defendant seemed to say: "Lassover is my agent." Apparent authority is thus made out. Lassover had power.

The representation to third persons that an agent has certain power can be made in many ways. And in some situations, an effective representation can be made by the person whose power is thus being established. The general and elementary rule is that the authority of an agent cannot be proved by the agent's statement that he has it.[95] But there may be a power based upon statements which the principal-master has employed his agent-servant to make.[96] A carrier, for example, employs a servant-agent to issue bills of

94. 37 A.2d 747 (D.C. Mun. Ct. 1944); and see RESTATEMENT, AGENCY § 130 (1933); Will Doctor Meat Co. v. Hotel Kingsway, 232 S.W.2d 821 (Mo. App. 1850).

95. 1 MECHEM, AGENCY §§ 285, 743, 750, 757 (2d ed. 1914).

96. Planters Rice-Mill Co. v. Merchants' Nat. Bank of Savannah, 78 Ga. 574, 3 S.E. 327 (1887); Holden v. Phelps, 141 Mass. 456, 5 N.E. 815 (1886); Penas v. Chicago M. & St. P. Ry., 112 Minn. 203, 127 N.W. 926 (1910); Fifth Avenue Bank of N.Y. v. Forty-Second St. & G. St. Ferry, 137 N.Y. 231, 33 N.E. 478 (1893); New York & N.H.R.R. v. Schuyler, 34 N.Y. 30 (1865); 2 MECHEM, AGENCY §§ 1800, 1801 (2d ed. 1914).

lading when goods have been received. The carrier does not consent that the agent shall have power to issue a bill of lading for goods that have not been received. But issuing a bill of lading includes a statement by the servant-agent that the goods have been received by the carrier. That representation, being within the employment of the servant who made it, is charged to the carrier. When it is acted on by one who advances money or credit on the security of the bill of lading, we have the elements of estoppel. The carrier is held to an "apparent" authority that he did not consent to create.[97]

"LIMITATIONS" AND "INSTRUCTIONS"

An agent's power must be defined in one way or another. A "limitation" comes at the definition from the negative side. It is a fact that withholds or trims down the agent's power. Limitations have given rise to two problems. One has to do with the difficulty of distinguishing "limitations" from "instructions." The other problem has to do with situations where the agent's power has been established by both "real" and "apparent" authorization and the limitation in question cuts down his power as it was established by one, but not by the other form of his authorization.

First, let us notice the difference between limitations and instructions. There are commonly two relations between a principal and his agent. They are utterly different. One is the agent's power[98] to bind his principal in dealing with third persons. The other is a right-duty relation between the principal and agent. This latter relation springs from the contract made between the parties or, as some prefer to describe it, on a status[99] assumed by them. The separateness of these two relations leads to the distinction between "limitation of power" and "instructions" about how to use the power. It is consistent for an agent to have a certain power, but to be at the same time under an instruction, and thus under a duty to his principal, that he shall not use the power in a given way.[100] When a principal says to his agent "don't do this," there may be practical difficulty in determining whether

97. FERSON, BASIS OF CONTRACTS 267 (1949).

98. The concept, power, is discussed in Pound, *Legal Rights*, 26 INT. J. OF ETHICS 92, 95 (1915); Hohfeld, *Fundamental Legal Conceptions*, 23 YALE L.J. 16, 44 (1913); and Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 168 (1919).

99. Kidd v. Thomas A. Edison, 239 Fed. 405 (D.C.N.Y. 1917). Professor Seavey disapproves of the "status" description. SEAVEY, STUDIES IN AGENCY 69 (1949).

100. In Hatch v. Taylor, 10 N.H. 538, 542 (1840), the court said that "The instructions to the jury take a distinction between the authority given to an agent, which he is not only bound to pursue, in duty to his principal, but a deviation from which will render his act void . . . and the instructions or directions which he may receive from his principal, relative to the manner in which he is to execute his authority, which are matters between the principal and agent, so that a disregard of them by the latter, although it may make him liable to the principal, will not vitiate the act, if it be done within the scope of the authority itself.

"It is very apparent that such a distinction must exist in some cases of agency, the particular instructions from the principal, relative to the circumstances under which the agent is to act, being intended as directions for his guidance, but not operating as limitations upon the authority which is conferred."

he curtailed the agent's power, or, leaving the power intact, cautioned the agent about how he should use it. Should the principal be taken to mean, "you cannot" or to mean, "you ought not"? In some situations the principal's meaning is clear. When, for example, Cornwall told Sambo to order a corn sheller only on condition that the dealer would allow six months credit, Sambo's power was clearly limited. He could not bind Cornwall to pay in sixty days. But suppose that Cornwall had put Sambo in charge of a road side market and that he told Sambo not to sell the fresher eggs until the elderly ones had been disposed of. It would be pretty clear that Sambo retained his power to sell any of the eggs. If he sold the fresher eggs, the buyer would get title to them and Sambo must account to Cornwall for his disobedience. Actual cases can be cited where it was not so clear whether the principal's prohibition was a limitation or an instruction. In *Barrett v. McHattie,*[101] an agent was authorized to buy lambs. "The contracts were to provide for the weighing of the lambs at railroad scales and all lambs were to be delivered at the railroad." This provision with regard to the weighing and delivery was deemed a limitation. In *Harrigan v. Dodge,*[102] an agent was authorized to sell real estate but there was this restriction: "No sale should be made except to a purchaser agreeable to Mrs. Dodge." This was deemed a limitation. In *Butler v. Maples,*[103] the plaintiff sued to recover the purchase price of cotton alleged to have been sold to the defendant. The purchase had been made by one Shepherd who professed to act for the defendant. He bought the cotton "as it lay" and at forty cents per pound. The cotton burned before it could be taken away. As to Shepherd's authority to bind the defendant, there was evidence of an agreement between Shepherd and the defendant that Shepherd should buy cotton for the defendant but that he should not pay more than an average of thirty cents a pound and that he should not make any unpaid balance of the purchase price payable until the cotton should be put on the buyer's boat. The court deemed that the "guards and restrictions" on what Shepherd might do "were intended as regulations between the parties, but they were secret instructions rather than limitations." Judgment for the plaintiff was affirmed. The prohibitions put upon Shepherd were deemed to be only instructions. Thus, it appears that "limitations" cut down the agent's power—"instructions" do not. But it may be a difficult question of interpretation to tell whether a given prohibition constitutes one or the other.

It should be remembered that the existence and scope of an agent's power can be established by both "real" and "apparent" authorization; that his power as established by one form of authorization may be more extensive than it is as established by the other form; and, that a third person who has dealt with an agent can have the advantage of whichever authorization will the

101. 102 Mont. 473, 59 P.2d 794 (1936).
102. 216 Mass. 461, 103 N.E. 919 (1914).
103. 9 Wall. 766, 19 L. Ed. 227 (U.S. 1869).

better enable him to make out his case. Suppose, for example, that Cornwall, away from home, writes to Sambo saying, "I authorize you to buy a corn sheller but nothing else" ("real" authorization); and suppose further that Cornwall writes to the local dealer, saying "I authorize Sambo to buy a corn sheller and a hay rake" ("apparent" authorization). In that situation, the "apparent" authorization would be the more extensive. It would establish the power of Sambo to buy a hay rake, and the implement dealer could accordingly hold Cornwall.[104] Power established by apparent authorization can exist after a real authorization establishing the same power has been entirely wiped out. That happens when a principal communicates to his agent a revocation of the "real" authorization but neglects to terminate the agent's apparent power by giving suitable notice to third persons who have been dealing with the agent. In such a situation, the third person can have the advantage of the apparent authority that has been left outstanding.[105]

In the cases cited in the preceding paragraph, the apparent authorization was more extensive than the real authorization. But it sometimes happens that the real authorization is the more extensive. In *Zidek v. West Penn Power Co.*,[106] for instance, the agent, an attorney at law, did not have apparent authority to execute a release of his client's claim against the defendant. But he did have real authority to grant the release and so a release that he assumed to make was binding on his client. It follows from what has been said that when a principal has established an agent's power by both real and apparent authorization the principal's limitation or termination of one form of authorization does not necessarily affect the other.[107]

When, however, the third party knows of a limitation that has been put on an agent's authority or knows of an instruction the principal has given to the agent, the third party cannot hold the principal to a bargain the agent has purported to make beyond the limits of his authority or in violation of his instructions. The third party in such an event would be a participant in the agent's breach of duty to his principal. The agent is a fiduciary and there is a well settled doctrine applicable in both agency and trusts to the effect that one who participates in a breach of duty by a fiduciary cannot have the fruits of his bargain.[108]

104. Livingston v. Fuhrman, 37 A.2d 747 (D.C. Mun. Ct. 1944); Northwestern Mut. Life Ins. Co. v. Steckel, 216 Iowa 1189, 250 N.W. 476 (1933).

105. Shackelford v. Williams, 182 Ala. 87, 62 So. 54 (1913); Back Bay Nat. Bank v. Brickley, 254 Mass. 261, 150 N.E. 11 (1926); Anon v. Harrison, 12 No. 346 (1898); Daylight Burner v. Odlin, 51 N.H. 56 (1871); Lightbody v. North American Ins. Co., 23 Wend. 18 (N.Y. 1840); Dobie v. Southern Trading Co. of Tex., 193 S.W. 195 (Tex. Civ. App. 1917); Wilder v. Hinckley Fibre Co., 97 Vt. 45, 122 Atl. 428 (1923); Bentley v. Daggett, 51 Wis. 224, 8 N.W. 155 (1881); RESTATEMENT, AGENCY § 125, comment *a* (1933); STORY, AGENCY § 133 (8th ed. 1874).

106. 145 Pa. Super. 103, 20 A.2d 810 (1941).

107. See note 105 *supra*.

108. Galbraith's Adm'r v. Arlington Mut. Life Ins. Co., 75 Ky. 29 (1876); Dunning v. Gibbs, 213 Ky. 81, 280 S.W. 483 (1926); Scott, *Participation in a Breach of Trust*, 34 HARV. L. REV. 454 (1921).

SUMMARY

The aim in preparing this essay has been to simplify and rationalize some of the doctrines that are in the law of agency, and particularly to indicate the difference between the liability of a master under the doctrine of *respondeat superior* and the relation whereby a principal is subject to the power of his agent. The doctrine of *respondeat superior* originated far back in the history of the common law and grew up as an adjunct to the law of torts. The power of an agent to bind his principal was recognized even earlier. It was an adjunct to the law of contracts—using the term contracts to include transfers as it was used in early days.[109] The difference in the origins of these two relations is emphasized because it is sometimes lost sight of in the modern law of agency.

The two relations contrasted above are now treated together under the general head of Agency. The differences between the two relations are thus to some extent obscured. The differences are inherent, however, and they stubbornly persist.

First, there is a difference in the way these respective relations are created. One who accepts the services of another and has a right to control the worker in the rendition of those services is by those facts alone subject to the doctrine of *respondeat superior*. The master is so liable whether he consented to the liability or not. But a principal is not made subject to the power of another to bind him in legal transactions except by the principal's consent. The granting of such power is substantially the same as the making of an offer to become bound in a contract or exchange. The offeror consents to become bound when the offeree performs the condition called "acceptance." The person granting a power consents to become bound when the agent and the third person together perform the conditions indicated by the power. Consent, as the word is here used, does not mean what goes on in the mind of the principal. It is taken to be an act that seems to be an enactment of the will of the principal to become bound.

Second, there is a difference in the character of the acts that are done by a servant and the acts that are done by an agent. The act of an agent, as such, is an act of consent. He consents that his principal shall be bound in this or that legal transaction such as a grant or contract. Other acts, generally done for their mechanical value, and effective or not regardless of anyone's consent to be bound, are performed by servants. This distinction between consents to be bound, and all other acts is basic to the distinction between agents and servants.

Third, the two relations differ in the character of change the one and the other can produce in the master-principal's legal position. When a servant does something amiss it subjects the master to action for damages or to some

109. See note 6 *supra*.

other disagreeable consequence imposed by law. But when an agent acts, as by making a transfer of his principal's property or by binding his principal in a contract, no cause of action is created. There is a shift in the principal's primary rights or duties, but there is no breach of his existing duties.

These differences between the two relations are inherent. They cannot be wiped out by treating the two relations under the single head of Agency. Attempts to reason about the two relations with interchangeable terms leads to error.[110] In contrasting these two relations it is noted that both can exist between the same persons and at the same time. A multiplicity of relations between the same parties is common.[111]

The distinction between "real" and "apparent" authority has to do with the manner in which an agent's power is created, not with the power relation itself. When news of the principal's consent to be subject to the power is communicated to the agent he has "real" authorization. When the news is communicated to the third person, the agent has "apparent" authorization. The agent's power is as effective in one case as the other. And the principal's consent may be as genuine in one case as the other. The principal can be estopped from denying that he consented to certain power in an agent. But such estoppel comes into play mainly in the "apparent" authorization cases.

An agent commonly has both "real" and "apparent" authority, but they may not be coextensive. A third party, who had dealt with the agent, can have the advantage of whichever form of authority the better makes out his case. And a limitation put by the principal on one form of authority will not affect the other form as against a third person who had no notice of the limitation.

The undisclosed principal cases are cases of "real" authorization. Holding the principal bound in such cases has been called "anomalous," but the principal has consented to the agent's power. Why should he not be bound? The difficulty in seeing why he should be held may come from a fancied need to find a "meeting of the minds," "mutual assent," or "*consensus ad idem*"—phrases that have done much to sabotage clear thinking.

The soundness of this essay depends on two distinctions that are not usually stated by judges in explaining their decisions but which appear when the cases are viewed at large. One is a distinction between two kinds of acts—namely, enactments of consent to become bound in legal transactions, and all other acts. That difference is basic to the distinction between agents and servants. The other distinction that needs to be made is between the consent of a party to be bound and the giving of notice to another person that such consent has occurred. When that distinction is made the difference between "real" and "apparent" authorization is simple, and the law that an undisclosed principal is bound by the acts of his agent is rational.

110. See *supra* note 52 and corresponding text.
111. See note 48 *supra*.