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AGENCY TO MAKE REPRESENTATIONS

MERTON FERSON *

Representations, commands, threats and other utterances are a species of acts and may have legal consequences. An utterance may, for example, constitute fraud, negligence, slander or intimidation. The person who speaks is responsible and it may be that another person, in whose behalf the utterance was made, also is responsible. This discussion has to do with the question of what must be shown to establish the ability¹ of one person to speak in behalf of another, and thus to make the other liable for the legal consequences.

The problems with regard to the liability of a master-principal for what his servant-agent² says are commonly posed under such headings as these: The Master's Liability for Slander Uttered by His Servant; The Principal's Liability on Contracts Made by His Agent; and The Liability of a Principal for Fraud Committed by His Agent. This type of heading blurs two questions which are naturally clear and distinct into one which is hazy and slippery. The two questions involved are (1) whether the servant-agent has ability to speak for the alleged master-principal and (2) what is the legal effect of the utterance. The ability of one person to speak for another is a self-contained problem. The legal consequence of the utterance is a distinct problem. The character of the action and the question of one's agency to perform it remain the same whether the act constitutes fraud, slander or estoppel or is wholly innocuous.³ The first question is whether the speaker is vested with ability to speak for the master-principal. Lumping the two questions—which are naturally distinct—makes for confusion.

The present discussion is addressed to the agency question. At the risk

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1. There is a curious lack of terms. It is common to speak of the "power" or "authority" of an agent; but there is no corresponding word to describe the ability of a servant to act for, and so to make liable, his master. One does not, for instance, speak of the "power" or "authority" of a servant to drive a truck. What does the servant have? The word "ability" is used in the text, but with a full realization that it is inapt and means many other things. We need a brief term that would stand for the idea here being described—*viz.*, the ability of a servant to act for, and so to subject his master to liability. It would be helpful, too, if we had a term that would mean either (*i.e.*, indifferently) the power of an agent or the ability of a servant to act for his constituent. While deploring this dearth of terms an attempt is being made to follow common language.

2. The terms "master-principal" and "servant-agent" are here used with a meaning that would sometimes be expressed by the "and/or" device. The reason for using such a noncommittal term will appear later in this discussion.

3. A similar point is made and admirably developed in a note in 1 U. OF CHI. L. REV. 137 (1933).

of being tedious let us first approach the question by way of theory and then come to a consideration of the cases.

It is implicit in the literature of Agency that there are two kinds of acts.⁴ The "agent" does one kind of acts and must be "authorized" in order to bind his principal.⁵ The "servant" does the other kind of acts and does not need to be authorized in order to make his master liable; it is sufficient if his act falls within the "scope of the servant's employment."

It is familiar technique in legal reasoning to put the raw facts of life into one channel or another. When that has been done, certain corollaries attend and progress to a legal conclusion is, to an extent, automatic. This technique is illustrated in the law of Agency. Courts and writers put some cases into the channel marked "Principal and Agent"; they put other cases into the channel marked "Master and Servant." When a case is treated as one of "Principal and Agent" it is deemed necessary, in order to bind the principal, to find that he authorized the acts alleged to have been done in his behalf. But when the facts are channeled as a "Master and Servant" case, the master is held liable if it appears that the act was done by a servant in the course of his employment.

The liability imposed on a master for what his servant does is summed up by the phrase, *respondeat superior*.⁶ Extended apologetics have been written for the doctrine of *respondeat superior*,⁷ which is a variety of liability without fault. Whether that doctrine is rational or not, and whatever may be its true basis, it is an accepted fact of the common law.⁸ It is taken as one of the premises for this article.

"Authority" and "employment" alike depend on the will of the principal-master. But there is so much difference in what it takes to make out the one and the other that they are treated under separate headings in digests, encyclopedias and textbooks. One generalization can safely be made: "employment" is easier to establish than "authority"; limitations, prohibitions and conditions laid down by the principal-master are more respected when the fact

4. Digests and encyclopedias divide the material between "Master and Servant" and "Principal and Agent."

5. The word "agent" is sometimes used in a broad sense to include all persons who act in behalf of another, whether they are employed or authorized. At other times the word is used in a narrow sense to indicate one who makes contracts and other legal transactions, and who needs to be authorized.

6. The phrase "*respondeat superior*" is herein used to describe the doctrine whereby liability is imposed on a master for what his servant does and not to include the doctrine whereby a principal is bound by his agent's authorized juristic acts. This usage is justified by many judicial definitions. See 37 WORDS & PHRASES 423 *et. seq.* (perm. ed. 1940).

7. Holmes, *Agency*, 4 HARV. L. REV. 345, 5 *id.* 1 (1891); Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 105 (1917); Seavey, *Speculations as to "Respondeat Superior"* in HARV. LEGAL ESSAYS 433 (1934).

8. "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Gleason v. Seaboard Air Line Ry.*, 278 U. S. 349, 356, 49 Sup. Ct. 161, 73 L. Ed. 415 (1929).

of authority is in question than they are when the fact of employment is in question. An incredible number of decisions illustrate the meaning of "employment" and "authority" respectively. Our problem at the moment gets down to this: To which class of acts do representations naturally belong? Are they the kind of act that must be authorized or are they the kind that calls only for employment?⁹ When this question is answered we can turn to the appropriate case material and legal doctrine. It is abundant, but confusion is inevitable when we try to assimilate representations with the class of acts to which they do not belong.

Let us notice the two kinds of acts and the rational basis for the distinction between "servants" and "agents." It should be noted that servants and agents are not different kinds of persons.¹⁰ They are distinguished according to what they do. It is like the distinction between barbers and blacksmiths. They are not different kinds of persons; but there is a rational basis for distinguishing one from the other according to the kind of acts each one does.

The conventional classification into servants and agents gives a false emphasis. It seems to classify the persons, but the basic classification is not of persons but of acts. Calling the persons who act for others "servants" or "agents" is of secondary importance.¹¹ Let us study the two kinds of acts. What are their distinguishing features? And is it rational that one sort of acts calls for "authorization," while the other calls only for "employment," in order that the master-principal shall be affected?

Numerous writers in the field of agency recognize the two kinds of acts.¹²

9. "It is obvious that accurate and certain definition of these terms, 'authority,' 'implied authority,' 'scope of authority,' 'course of employment' and the like, is a sine qua non to correct reasoning. Such a definition is rarely, if ever, to be found. Identically the same charge is given the jury in different jurisdictions to describe entirely different and inconsistent criteria. Miscarriage of justice is inevitable. The correct definition, it will be found, must resolve itself into an enlarged formula of the standard of liability applicable to the particular case." Jaggard, J., in *Penas v. Chicago M. & St. P. Ry. Co.*, 112 Minn. 203, 127 N. W. 926, 934 (1910).

10. Neither are principals and masters different kinds of persons.

11. "Since it is the nature of the act to be performed that constitutes the essential difference between the two classes of representatives, it follows that the same representative may be both an agent and a servant, and herein lies the source of much of the confusion that prevails in the discussion of the law of representation." HUFFCUT, *AGENCY* 18 (2d ed. 1901).

12. Professor Floyd R. Mechem says: "With respect of the nature of the thing to be done, there may be marked differences. It may, perhaps, be mere physical labor, or work, more or less skilled, upon materials, or personal attendance or service; or it may be representing and taking the place of the employer in business negotiations with third persons, in the making of contracts or alliances, or in proceedings before boards, commissions or tribunals. There is a distinction possible between labor or service on the one hand, and business dealings or representation, on the other. The latter case involves or contemplates contractual dealings with third persons; the former does not." MECHEM, *OUTLINES OF AGENCY* 2 (3d ed. 1923). Professor Huffcut puts it this way: "An agent is a representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal, by making contracts with third persons, or by making promises or representations to third persons calculated to induce them to change their legal relations. . . . A servant is a representative vested with authority to perform operative acts for his master not cre-

But the comparisons of the two kinds of acts that have been made by these authors do not go far enough. We need something more specific and detailed. We need to know exactly how the two kinds of acts are essentially different from each other. It seems incredible that a vital classification based on the character of acts should be made without a critical study of acts. The scant attention that has been given to the difference between the two kinds may come from a tendency to shy away from anything that smacks of jurisprudence; the distinction may be deemed pedantic and impractical. But in this instance it is practical. The outcome of many a lawsuit depends on whether one who did a particular act needed to be "authorized" by the alleged master-principal; and that, in turn, depends on the kind of act it was.

The difference between the two kinds of acts has been discussed in detail by the present writer in another article,¹³ which serves as ground work for this discussion. The essential difference, pointed out in the earlier article, is this: A juristic act is an act manifesting consent to assume a contract obligation, to transfer a property right or to suffer some other diminution from one's legal position; non-juristic acts include all the remainder of human activities. The nature of a juristic act itself indicates why an agency to do such an act should be definitely circumscribed and contemplated by the master-principal—in short why it should be "authorized"—in order to bind the master-principal.

In the first place a juristic act is done for the very purpose of affecting the legal relations of the person for whom it is done.¹⁴ Why, for example, is the act of consenting to a contract obligation performed? It is for the very

ating new primary obligations, or bringing third persons into contractual relations with the master, or otherwise causing them to change their legal position." HUFFCUT, AGENCY 17 (2d ed. 1901). Wharton says: Agency "relates to business transactions" while the work of a servant "relates to manual services." WHARTON, AGENCY § § 19, 20 (1876). Professor Frank E. Horack says: "In general these acts may be divided into acts imposing contractual obligations on the principal and those subjecting him to tort liability." *Vicarious Liability for Fraud and Deceit in Iowa*, 16 IOWA L. REV. 361 (1931). And says Professor William R. Vance: "The difference between a servant and an agent is well settled and familiar. The test is the possession of authority to bring the constituent into contractual relations with third parties." *Liability for the Unauthorized Torts of Agents*, 4 MICH. L. REV. 199, 204-205 (1906). Jaggard, J., puts it this way: "The rule of master and servant concerns all acts of the representation which are non-contractual." *Penas v. Chicago M. & St. P. Ry. Co.*, 112 MINN. 203, 127 N. W. 926, 933 (1910).

13. Ferson, *The Nature of Legal Transactions and Juristic Acts: Analysis of Common Factors and Variations*, 31 CORN. L. Q. 105, 129-139 (1945). The two kinds of acts, so commonly assumed to exist, have also been discussed by several writers on jurisprudence and the differences between the two kinds of acts have been pointed out. HOLLAND, ELEMENTS OF JURISPRUDENCE 117 (13th ed. 1924); MARKBY, ELEMENTS OF LAW 125 (6th ed. 1905); SALMOND, JURISPRUDENCE 481 (9th ed. 1937); STAIR, INSTITUTIONS OF THE LAW OF SCOTLAND 94 (Moore's ed. 1832). These writers do not use a uniform terminology. Professor Salmond, for instance, makes the distinction between an "act of the party" and an "act of the law." And Professor Holland makes the distinction between "juristic act" and non-juristic act." The terms used by Professor Holland—"juristic" and "non-juristic"—are being used in this article. These terms may be high sounding ones, but their meaning is simple enough.

14. HOLLAND, ELEMENTS OF JURISPRUDENCE 118 (13th ed. 1924); MARKBY, ELEMENTS OF LAW 125 (6th ed. 1905); SALMOND, JURISPRUDENCE 192 (9th ed. 1937).

purpose of binding the person for whom the act is done. By way of contrast, non-juristic acts are not usually done for the purpose of altering legal relations. One does not drive a truck or employ a truck driver for the purpose of making himself liable to third persons. He has other reasons for wanting the truck driven. Creating liability is not an intended or essential part of the work. Note the contrast, then, between acts that are done for the very purpose of changing legal relations and acts that make up our workaday routine—acts that are not intended to have legal consequences. It is one thing for a constituent to engage a person who will deliberately tamper with the constituent's primary¹⁵ legal relations, and a different thing to engage a worker who might incidentally do something for which the law will impose a result.¹⁶

In the second place the juristic act always derogates directly from the position of the person for whom it is done.¹⁷ An agent vested with power to do this kind of acts can, by the mere fiat of his will, give or bargain away that which belongs to his principal. A principal will not lightly be presumed to confer such autocratic power. It is rational to require a clear showing that the principal contemplated the power he was creating and that the act of the agent falls within the limits fixed by the principal. Consider, on the other hand, non-juristic acts. A man wants his farm work done or his truck driven; a railroad company wants the fence along its right of way maintained and its crossing guarded. Such work usually redounds directly to the benefit of the employer. The reason for the employment is usually apparent. Now and then something within the employment goes amiss. "[I]t would seem difficult to contemplate business operation without including the mistakes, errors and deceptions of its agents as one of the incidents of that type of business."¹⁸ To deny the fact of employment in such instances is to negate the whole employment. The employer—within wide limits—must take the bitter with the sweet.¹⁹

The foregoing attempt to rationalize the requirement of authorization for juristic acts and the dispensing with such requirement in non-juristic acts

15. For definition of primary rights see HOLLAND, *ELEMENTS OF JURISPRUDENCE* 147 (13th ed. 1924).

16. "He [the employer] is merely held responsible in damages for reasons the law holds sufficient. His liability is 'imposed' or 'imputed.' His authority to the servant to do the act complained of is in strict logic as wholly irrelevant as the fact that he may have expressly forbidden the servant so to act. His authority does not exist in fact. If the language of authority be used, the authority is purely fictitious." Jaggard, J., in *Penas v. Chicago M. & St. P. Ry. Co.*, 112 Minn. 203, 127 N. W. 926, 929 (1910).

17. Ferson, *supra* note 13, at 138.

18. Horack, *Vicarious Liability for Fraud and Deceit in Iowa*, 16 *IOWA L. REV.* 361, 364 (1931).

19. "The responsibility of a master for the wrongful act of his servant does not depend merely on the question of authority, expressed or implied. He may be liable though the act be beyond any authority actually given by him. The expression 'scope of authority' in its relative sense may be wider than the limits of the 'authority' itself. . . . The master's responsibility may exist, notwithstanding he proves he has actually forbidden the act. . . . The master's responsibility may even exist where the law itself forbids the act as criminal." *Bugge v. Brown*, 26 C. L. R. 110, 9 Br. R. C. 631, 638 (Aust. 1919).

may be supererogation. The distinction has long been made in the law, but as pointed out above, it has been made under the guise of distinguishing agents from servants. It may be too late to rail against this circumlocution, but it has caused confusion in the type of cases we have set out to discuss—*viz.*, the agency-to-speak cases. How does it cause confusion? That will appear when we boil down some of the early fraud cases to a false syllogism that seems implicit in those cases. The syllogism runs like this:

One who sells is an agent.

The acts of an agent need to be authorized.

Therefore fraudulent statements of an agent who sells need to be authorized.²⁰

The syllogism is misleading: ambiguity lurks in two of its terms—the verb “sells” and the noun “agent.” The verb “sells” includes two distinct kinds of acts: (1) the mechanical or non-juristic act of persuading another person to buy²¹ and (2) the juristic act of manifesting consent to enter the contract or to make the transfer.²² To “sell,” in the sense of persuading another person, consists in exhibiting, demonstrating, extolling the article and perhaps making other statements that this or that is so. Such acts fall definitely in the non-juristic class. They are not manifestations of the will to come under obligation, transfer rights or give up any primary legal advantage. They come under the head of employment. On the other hand to “sell” in the sense of putting across title, or creating an obligation to do so, consists of such acts as signing and delivering a paper or otherwise manifesting consent to this or that surrender of primary right. Such manifestations of the will definitely are juristic acts. They call for authority. And so the verb “sells” in the above syllogism may mean acts of either or both kinds.

The noun “agent” is likewise ambiguous. It was pointed out above that one is denominated “agent” or “servant” according to the kind of acts he does for his constituent. This also leads to confusion when we note how com-

20. “The scope of the agent’s authority was to sell or to procure a purchaser for the land. Thusfar he bound his principal by his acts. He could not bind them by untruthful and unauthorized representations touching the character of the thing which he was authorized to sell.” *Ellison v. Stockton*, 185 Iowa 979, 170 N. W. 435, 437 (1919).

21. *Landskroener v. Henning*, 221 Mich. 558, 191 N. W. 943 (1923). “Certainly it would be the utopia of which all salesmen dream if purchasers could be found who made no inquiries—asked no questions—required no persuasion.” Horack, *Vicarious Liability for Fraud and Deceit in Iowa*, 16 IOWA L. REV. 361, 367 (1931).

22. “It has been uniformly held that the words ‘sell’ and ‘sale,’ as applied to the relation between the owner of land and a real estate broker working to secure a purchaser of the land, import no more than the act of bringing the owner and purchaser together on terms satisfactory to both, or procuring a purchaser able, ready, and willing to buy on the terms fixed by the seller; so that, for example, the broker cannot, without special authority, bind the owner by a contract of sale in his name.” *Resky v. Meyer*, 98 N. J. L. 168, 119 Atl. 97 (1922).

“Merchandise brokers making an offer may have authority to close a sale, and thus to represent the vendor for that purpose. Not so where,—as here,—they must report to the vendor any offer by the vendee, and the offer must, expressly or impliedly, be accepted by the vendor before there is any contract.” *Euclid Candy Co. v. Whitney-Central Trust & Savings Bank*, 48 F. 2d 757 (C. C. A. 6th 1931).

mon it is for a servant-agent to do both kinds of acts. By way of illustration consider the clerk in a small store who keeps stock in order (non-juristic acts) and transfers goods to buyers (juristic acts).²³ How confusing it is to say the servant-agent needs "authority" or not according to what we call him! He needs authorization or not, according to what particular act is in question.

And now what about representations? Must they be authorized in order to hold the master-principal for their legal consequence? The answer is, no. They are not juristic acts and they need only to come within the scope of a servant-agent's employment in order to hold the master-principal. The foregoing discussion of the theoretical aspect of our problem comes to this: There is a basic distinction between two kinds of acts—juristic and non-juristic. It is rational to require "authorization" for the juristic acts and only "employment" for the non-juristic acts, and the courts carry out that idea. Some confusion has come from putting an indirect and misleading step into the process of reasoning from the act in question to the fact of agency to perform the act. That extra step, as indicated, is to go from the act that has been done to a naming of the person who did it—calling him "agent" or "servant,"—and then derive from his name (servant or agent) a decision of whether he needs to have authority or merely employment. A simple and direct process is to note the character of the act: is it juristic or non-juristic? When this question is answered it is a one-step process to determine whether the act needed to be authorized or not. It is the kind of act that indicates the need for authorization, not the kind of person; and it should not be deemed important whether we call the actor servant or agent.

Our case law is grouped in the digests as though the question of agency varied according to whether statements constitute fraud, slander, estoppel or have some other legal effect. In deference to that arrangement, illustrative cases will be cited from the conventional groups. It will be seen, however, that in the long run the agency question is the same whether the representation brings this or that legal consequence.

REPRESENTATIONS WITH REGARD TO PERSONAL SAFETY

Let us start with a group of cases where the making of representations has been deemed employment and no contention has been made that the person who made the representation needed to be authorized in order to hold the employer liable. They are cases where servants were assigned jobs of making representations to third persons with regard to their safety. The watchman at a railroad crossing is a familiar example. His signal to an approaching driver to proceed across the tracks is essentially a representation. It amounts

²³. See for additional illustration, Vance, *Liability For the Unauthorized Torts of Agents*, 4 MICH. L. REV. 199, 205 (1906).

to a statement that no train is coming and that it is safe to cross. The signal—the representation—is sometimes made by beckoning with a flag;²⁴ in other instances a man stationed in a tower makes the representation by flashing different colored lights.²⁵ A representation thus made is sometimes false and the third person who relies on it is consequently injured. Employers in such cases have stubbornly denied their liability on various grounds, but it has hardly occurred to them to claim that the watchman was not authorized to give false information. It is taken for granted that it is not a question of authority. The only agency question is whether the watchman was acting in his employment.

Even in cases where the employee who made the false representation was called an "agent" the employer has been held without a showing that the agent was authorized. In such a case²⁶ there was testimony as follows: "The nigger asked Cornette [a station agent] if there was any trains coming and Cornette told him no, there was no trains coming." This was a false representation: it induced a boy to drive onto the track where he was killed by a coming train. The Railroad Company was held liable; the agent's representation was "in the line of his duty." In another case, a landlord was held for the willful misrepresentation of his agent.²⁷ In the language of the court, "the plaintiff directed the agent's attention to the decrepit and threatening condition of the ceiling in one of the rooms, expressing her apprehension of injury therefrom and her intention to vacate the rooms. She was assured by the agent that he had caused the ceiling to be examined and tested, and that it had been found to be secure. Later, during the same term, the ceiling fell upon the plaintiff, who, relying upon these assurances, had remained in the occupancy of the rooms, causing physical injuries to her. Upon the trial it appeared from sufficient proof that the ceiling had not been inspected or tested, and the agent's representations that it had were knowingly untrue as a matter of fact."²⁸ And, said the court, "the agent's representations having been made within the scope of his duties, the defendant's answerability therefore is not debatable."²⁹

MISREPRESENTATIONS WITH REGARD TO THE SAFETY OR WHEREABOUTS OF GOODS

These cases, like those in the preceding group, are cases where agents made false representations within the scope of their employment, and the courts without hesitation have charged them to the employers. In one case³⁰

24. *Peck v. Michigan Cent. R. R.*, 57 Mich. 3, 23 N. W. 466 (1885); *Buchanan v. Chicago M. & St. P. R. R.*, 75 Iowa 393, 39 N. W. 663 (1888).

25. *Seaboard Air Line Ry. v. Ebert*, 102 Fla. 641, 138 So. 4 (1931).

26. *Chicago & A. Ry. v. Cox*, 145 Fed. 157, 160 (C. C. A. 8th 1906).

27. *Williams v. Goldberg*, 58 Misc. 210, 109 N. Y. Supp. 15 (Sup. Ct. 1908).

28. 109 N. Y. Supp. at 16.

29. *Id.* at 17.

30. *Stevens v. Boston & M. R. R.*, 1 Gray 277 (Mass. 1854).

the plaintiff sent his teamster to the depot to get some bales of goods that were expected to arrive. The "agent" of the railroad company said "that the goods had already been delivered, and were not there." The goods were in fact at the depot and burned during the following night. The railroad company was held liable. The ability of the agent to speak for the company—even in making a misrepresentation—was not questioned.

The United States Supreme Court has held that even a willful misrepresentation by a station agent makes the employing company liable for the consequences.³¹ The defendant company employed an agent, McDonnell, in its Savannah, Georgia, office, "whose duty it was, and whose continuous practice it had been, to give notice to those engaged in the cotton trade, including petitioner, a cotton factor in Savannah, of the arrival of cotton at the Savannah terminal under 'order notify' bills of lading. There was evidence from which the jury could have found that on March 19, 1925, McDonnell, so acting, gave petitioner notice of arrival of a shipment of cotton under a designated order-notify bill of lading; that later, on the same day, a local bank presented to petitioner the described bill of lading, regular in form and properly endorsed, with an attached draft on petitioner for \$10,000, which petitioner paid in reliance upon the notice of arrival given by the agent and the apparent regularity of the documents. . . . The draft and the bill of lading, purporting to be issued by respondent at its Charleston office, eventually proved to have been forged and negotiated by McDonnell in Charleston, while temporarily absent from his duties in Savannah, and his entire course of conduct with respect to them, including his false notice to petitioner, was in the successful pursuance of a scheme to defraud petitioner of the amount paid by it on the draft." ³² Liability in this case was based on the false arrival notice—not on the false bill of lading. The liability of carriers on false bills of lading will be discussed later.

LIBEL AND SLANDER

Statements are sometimes made by an employee in the course of his employment that are libelous or slanderous. Such statements are not commonly authorized, and in a good many cases it appears that they were positively forbidden. Is the employer chargeable with such statements on a mere showing that they fell within the employment of the persons who made them? Some early cases exonerated the employer, particularly in the case of slander. One court explains the holding this way: "By reason of the fact that the offense of slander is the voluntary and tortious act of the speaker, and is more likely to be the expression of momentary passion or excitement of the agent, it is,

31. *Gleason v. Seaboard Air Line Ry.*, 278 U. S. 349, 49 Sup. Ct. 161, 73 L. Ed. 415 (1929).

32. 278 U. S. at 352, 353.

we think, rightly held that the utterance of slanderous words must be ascribed to the personal malice of the agent, rather than to an act performed in the course of his employment."³³ Other courts took the position that a corporation by reason of its nature could not commit slander and therefore could not be held liable for a slanderous statement made by its servant.³⁴

It would seem that the reasoning followed by these courts is unsound. The fact that there was malice on the part of a speaker who utters slander should not ipso facto take him out of the scope of his employment. It has become settled that other kinds of acts done by a servant with malice may still be in the scope of his employment.³⁵ What about holding a corporation for slander? To be sure "it has no tongue;" "it cannot talk;" but that is beside the point. A servant who utters slander does have a tongue; he can talk; and it is for his act that the corporation should be held. The specious reasoning of these early cases has given way. A large majority of the courts recognize that slander and libel are within the general rule that a master or principal is liable for the torts of a servant or agent when done within the scope of his employment.³⁶

It thus appears that statements, even though they are libelous or slanderous, fit into the simple proposition that is here being developed. Statements are a species of non-juristic acts and agency to make them does not depend on authorization. The fact that they were made by an employee within the scope of his employment is sufficient to charge the employer.

THREATS AND COMMANDS

Threats and commands are perhaps forms of representations. They are, at any rate, non-juristic acts and agency to make them would, according to

33. *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 43 So. 210 (1906).

34. In *Childs v. Bank of Missouri*, 17 Mo. 213 (1852) where suit had been brought against a bank for slander the court said: "The bank is a corporation—it cannot utter words—it has no tongue . . . no mind, heart or soul to be put into motion by malice." And in *Eichner v. Bowery Bank*, 24 App. Div. 63, 48 N. Y. Supp. 978, 980 (1st Dept. 1897), a New York court in disposing of slander suit said: "The corporation itself could not talk."

35. 2 MEACHEM, AGENCY § 1960 (2d ed. 1914).

36. *Gillis v. Great A. & P. Tea Co.*, 223 N. C. 470, 27 S. E. 2d 283, 150 A. L. R. 1338 (1943). In *Citizen's Life Assurance Co. v. Brown*, [1904] A. C. 423, decided by the Judicial Committee of the Privy Council, the syllabus reads as follows: "A corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment. Although the servant may have had no actual authority, express or implied, to write the libel complained of, containing statements against the plaintiff which he knew to be untrue, if he did so in the course of an employment which is authorized, the corporation is liable." The doctrine of this case is cited with approval in *Penas v. Chicago M. & St. P. Ry. Co.*, 112 Minn. 203, 127 N. W. 926 (1910). The case of *Hypes v. Southern Ry. Co.*, 82 S. C. 315, 64 S. E. 395, 396 (1909) holds that the "old doctrine that a corporation, having no mind, cannot be liable for acts of agents involving malice has been completely exploded in modern jurisprudence" and that a corporation is liable for slander spoken by its agent while acting within the scope of his employment. See also *Sawyer v. Railroad*, 142 N. C. 1, 54 S. E. 793 (1906).

sound theory, depend on employment—authorization being unnecessary. The decisions bear that out. In an English case,³⁷ the defendant operated a private detective agency. He sent an employee to obtain certain letters. The employee, in order to get possession of the letters, told a woman, the plaintiff in the action that followed, that he was a detective inspector from Scotland Yard, representing the military authorities, and that he wanted her because she had been corresponding with a German spy. The threat turned out to be injurious and the employer was held liable on the ground that the employee's action was in the scope of his employment.³⁸

Numerous cases have come before the National Labor Relations Board where a superintendent or a foreman has made anti-union statements to other employees. Is it necessary that the person who made the statement shall have been authorized to do so in order to charge the employer with unfair labor practice? The answer is, no. "The Board has adopted as a definite policy the doctrine of *respondeat superior*, by virtue of which the employer is held liable for the acts of the employee done within the scope of the employment.³⁹ This policy is sustained by the courts.⁴⁰

FALSE AND FRAUDULENT REPRESENTATIONS THAT INDUCE THE MAKING OF CONTRACTS OR OTHER TRANSACTIONS

In the cases here discussed the representations are frequently made by a person who is called an "agent," and who does both juristic and non-juristic acts for his employer. It may, for example, be the business of a sales agent: (1) to make representations about an article and thus persuade someone to buy it (non-juristic acts) and (2) to transfer or contract to transfer the subject of sale (a juristic act). We are here concerned with agency to make the representations, not with agency to make the contract obligation or the transfer.

A representation, whether true or false, is a species of non-juristic act. Fraud is a false representation made with intent to deceive.⁴¹ Its character as a non-juristic act should put fraud under the head of "Master

37. *Janvier v. Sweeney*, [1919] 2 K. B. 316.

38. *Bankes, L. J.*, in the course of his opinion in this case said: "The real contention was that this act of Barker [the employee] in threatening the plaintiff could not in law be held to be within the scope of his employment, because, first, he had no actual authority; and secondly, it is not to be supposed that a private inquiry agent would give his agent instructions to do such an act. The judge put this point rather more favorably to the defendants than he need have done. He asked them whether Barker was acting in the scope of his employment. The jury answered, yes, and they were quite justified in so answering." *Id.* at 325.

39. *TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING* § 292 (1940).

40. *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 61 Sup. Ct. 376, 85 L. Ed. 322 (1941); *International Assn. of Machinists v. National Labor Relations Board*, 311 U. S. 72, 61 Sup. Ct. 83, 85 L. Ed. 50 (1940); *National Labor Relations Board v. Frank Bros. Co.*, 137 F. 2d 989 (C. C. A. 1st 1943).

41. *Ferson, The Nature of Legal Transactions and Juristic Acts*, 31 *CORN. L. Q.* 105, 158 (1945).

and Servant" alongside of other non-juristic acts. Fraud has, however, become tangled with juristic acts and is commonly channeled under the head of "Principal and Agent." This gives the impression that the fraud of an agent—like the making of a contract by him—must be authorized in order to charge the principal. The fancied need for authorization has caused courts to exonerate the master-principal in a good many cases where a simple application of the doctrine of *respondeat superior* would have held the master-principal. In the case of *Elliston v. Stockton*,⁴² for instance, the owner of a farm employed an agent to procure a purchaser for his farm. The agent represented to the plaintiff, who later bought the farm, that the soil was "black sandy loam" and that the ground "never overflowed." These representations were false and the agent knew they were false. The plaintiff sued the seller for deceit. He was denied recovery, because the agent had not authority to make the false representations.⁴³

Let us notice a few additional illustrative cases. In an early English case,⁴⁴ one Youngman "was employed by the defendants to sell their timber." Youngman, in order to sell a log of defendants to the plaintiff, represented that the log was "perfectly sound," though he knew the log was defective and turned it over to conceal the defect. Action was brought against the defendant to recover for the fraud perpetrated by Youngman. It was "admitted that no such fraud has been committed by the defendant himself, nor authorized by him either by previous authority or by any ratification or adoption of it when he knew of it." There was a nonsuit in the trial court which was sustained on appeal. In the opinion of Bramwell, B., the plaintiff "ought to fail, for he shews neither the actual commission of fraud by the defendant, nor any authority for its commission, nor any ratification or adoption of it." ⁴⁵ Martin, B., concurred in sustaining the nonsuit and the nub of his argument appears in his rhetorical question and answer: "Was Youngman in fact authorized by the defendants to make the representation? He was not." ⁴⁶ These judges seem to be right in saying there was no authorization of Youngman to bind the defendant by false representation. But they mistook the character of representations. They are non-juristic, and do not have to be authorized, any more than the improper driving of a truck has to be authorized, in order to make the employer liable.⁴⁷

In *Janeczko v. Manheimer*,⁴⁸ the defendant listed city lots with a real

42. 185 Iowa 979, 170 N. W. 435 (1919).

43. Said Gaynor, J., "The representations to bind the principal must appear to be representations which the agent by his employment was authorized to make." 170 N. W. at 437.

44. *Udell v. Atherton*, 7 H. & N. 172, 158 Eng. Rep. 437 (Ex. 1861).

45. *Id.* at 189, 158 Eng. Rep. at 444.

46. *Id.* at 198, 158 Eng. Rep. at 447.

47. Youngman turned the log to conceal the defect. Is that the kind of act that must be authorized in order to hold the master-principal liable?

48. 77 F. 2d 205 (C. C. A. 7th 1935).

estate broker for sale. The broker told the plaintiff the location of the block and showed him the boundary lines. The plaintiff made a purchase and then discovered a year and a half later "that the land described in the deed was about a half mile east of the plot which was shown to the purchasers by the agent, and was of much less value." The plaintiff brought an action for damages and was denied recovery. Said the court: "A principal will not be held personally liable for his agent's deceit unless he has authorized the deceit or participated in it or has knowingly permitted the agent to commit it. . . . The doctrine of presumed, implied or apparent authority will not operate to hold an innocent principal for the tort of his agent. . . . The broker has no power to bind his principal beyond the express authority conferred upon him." 49

In *Sewell v. Metropolitan Life Ins. Co.*,⁵⁰ a hostess-tenant with authority to negotiate the rental of apartments to prospective tenants informed the plaintiff, in response to inquiries, that the apartment was "free from vermin." This statement was false, and the plaintiff was forced to move and to discard articles of furniture. He sought to recover against the landlord for deceit but the court directed a verdict for the defendant, which was sustained on appeal. Said the court: "It is not claimed that the defendant authorized the making of any such false representations or that it had knowledge of them. . . . [S]uch a principal is not liable in tort in an action for deceit for the unauthorized fraudulent representations of his agent." 51

The exoneration of the master-principal in each of the cases that have just been cited was the logical result of the assumption that representations—like the making of contracts—must be authorized in order to bind a master-principal. But there was instinctive revolt by most courts: the result reached in the cases cited was not desired. Said Willes, J., in *Barwick v. English Joint Stock Bank*:⁵² "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." And in *Briggs v. Life Ins. Co., of Va.*,⁵³ where the contention was made that the agent's fraudulent representations had not been authorized, Walker, J., said: "We can well answer this contention by stating what was said in regard to a similar one in *Peebles v. Guano Co.*, 77 N. C. 233, 24 Am. Rep. 447 [1877]: 'There is no reason that occurs to us why a different rule should be applicable to cases of deceit from what applies to other torts.'" 54

49. *Id.* at 207.

50. 118 N. J. L. 308, 192 Atl. 575 (1937).

51. 192 Atl. at 575. See also *Lawrence v. Wise*, 235 Ala. 54, 177 So. 175 (1937); *Baker v. Clark*, 14 Ala. App. 152, 68 So. 593 (1915).

52. L. R. 2 Ex. 259, 265 (1867).

53. 155 N. C. 73, 70 S. E. 1068 (1911).

54. 70 S. E. at 1069.

These last two quotations assimilate fraud with other torts. It would seem implicit that fraud should come under the settled doctrine of *respondeat superior*, which makes a master liable for torts committed by a servant in the scope of his employment. The court says as much in the *Barwick* case, in the following language: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."⁵⁵ Professor Philip Mechem commenting on the case wherein the foregoing rule was enunciated says, "This case, which retrospectively appears so inevitable in the light of the general law of principal and agent as scarcely to express more than a platitude, represents the settled law of England and that of the very great majority of American States."⁵⁶ And says Judge Learned Hand: "Although the law was at one time otherwise, at least in this country . . . , it is now settled both in the federal system . . . , and in England . . . , that an agent does not cease to be acting within the scope of his authority when he is engaged in a fraud upon a third person. That has probably always been the more generally accepted doctrine."⁵⁷

This doctrine has been applied in a wide variety of fact situations. A few illustrative cases will be noted. In a landmark case, already referred to,⁵⁸ there was evidence that the manager of a bank fraudulently represented to the plaintiff that a certain customer's account was good and thus persuaded the plaintiff to give credit to the customer. The customer's account was not good and the plaintiff lost the value of goods sold to the customer on credit. The plaintiff sued the bank for an alleged fraud. The trial judge directed a nonsuit. But it was held on appeal that the foregoing evidence should have been submitted to the jury and that if there was fraud committed by the manager it could be charged to the bank. In a Louisiana case⁵⁹ the defendants were engaged in the renting of linens to various customers. The plaintiff, an ice cream company, was one of the customers so supplied with linens. A route man named Leman delivered the linens and collected the rental. He devised a scheme to defraud the plaintiff by which he would deliver a number of gowns and towels to the supply room of the plaintiff and then make out a "fictitious C.O.D. slip" for a larger number and collect payment for the larger number. He would then account to the defendant, his employer, for the number actually delivered. In this way he defrauded the plaintiff of "approximately \$1300." The plaintiff was denied recovery because it was "grossly negligent" in not checking the number of articles delivered. But with regard to the agency question the court found "no difficulty in resolving that

55. L. R. 2 Ex. 259, 265.

56. MECHEM, *CASES ON AGENCY* 230 (3d ed. 1942).

57. *Ricketts v. Pennsylvania R. R.*, 153 F. 2d 757, 759 (C. C. A. 2d 1946).

58. *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259 (1867).

59. *Yoars v. New Orleans Linen Supply Co.*, 185 So. 525 (La. App. 1939).

Leman, as the agent of the New Orleans Linen Supply Company, was acting for and on behalf of his principal in all of his dealings with the plaintiff." Be it noted that the gist of Leman's wrong was a misrepresentation. He virtually said to plaintiff, "I have delivered to your supply room so many gowns and towels," whereas he had delivered a smaller number.⁶⁰

There are several cases⁶¹ where actions were brought against telegraph companies for damages sustained because agents of the companies transmitted or delivered forged telegrams. The companies are uniformly held liable for such defaults of their agents. "[T]he delivery of a telegram constitutes a representation that the message which came over its wires was genuine."⁶²

While the law is settled that a principal is liable for the false and fraudulent representations made by his agent in the scope of his employment the *ratio decidendi* is not always clear. Some writers are explicit in basing this settled law on the doctrine of *respondere superior*. Judge Story, for example, says: "He [the principal] is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them. In all such cases, the rule applied, *Respondere Superior* . . ." ⁶³ And Mr. Justice Stone in disposing of a false-representations case says: "Undoubtedly formal logic may find something to criticize in a rule which fastens on the principal liability for the acts of his agent, done without the principal's knowledge or consent and to which his own negligence has not contributed. But few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own."⁶⁴ Other judges and writers, however, give lip service to the idea that an "agent" must be "authorized" in order to make a false representation for his principal. Such is the tyranny of words.⁶⁵

60. The facts in *Ripon Knitting Works v. Railway Express Agency*, 207 Wis. 452, 240 N. W. 840 (1932), were similar. The delivery agent for an express company would first deliver goods to the receiving clerk of the plaintiff, who signed a receipt; then the express agent would go to the plaintiff's cashier and get the amount due, in the meantime adding fictitious items and charges to the delivery sheet. These excess amounts were kept by the agent. When the fraud was discovered the plaintiff sued the express company for the amount of the overpayment. Judgment for plaintiff was affirmed on appeal.

61. *Wise v. Western Union Tel. Co.*, 6 Harr. 155, 172 Atl. 757 (Del. 1934); *McCord v. Western Union Tel. Co.*, 39 Minn. 184, 39 N. W. 315 (1888); *Postal Tel. & Cable Co. v. Traders State Bank*, 150 S. W. 745 (Tex. Civ. App. 1912).

62. *Postal Tel. & Cable Co. v. Traders State Bank*, 150 S. W. 745, 747 (Tex. Civ. App. 1912).

63. STORY, AGENCY § 452 (5th ed. 1857).

64. *Gleason v. Seaboard Air Line Ry.*, 278 U. S. 349, 49 Sup. Ct. 161, 73 L. Ed. 415 (1929).

65. "It is a palpable misnomer to hold the master liable because of the authority to the servant to do the thing which the master has openly, in good faith, and expressly

Courts that take this tack reach the desired result, however, by giving the word "authorize" a meaning that is substantially the same as "employ." By one form of language or another, courts have brought fraudulent representations, made by an agent, within the purview of the doctrine of *respondeat superior*. "Water will find its level;" deceitful representations have found their level. Like other tortious acts, they are chargeable to an employer whether the person who made them is called "servant" or "agent"; and whether the court speaks of him as being "authorized" or as being "employed."⁶⁶

It should be borne in mind that there are two ingredients of fraud: (1) a misrepresentation and (2) an intent to deceive. The cases we have discussed were cases where agents had made representations intending to deceive. The agent in each instance furnished both of the ingredients of fraud—the false representation and the wicked thinking. We found that the principals have come to be uniformly held liable in such cases. And if a principal gives false information to his agent—or withholds information—and thus induces the agent to speak falsely, the principal may be held for his own fraud.

But suppose an agent has made a false representation believing that it was true, and if the agent had known what the principal knew the representation would be fraudulent. Has anyone committed fraud? Is the principal liable for fraud? These questions have come up from time to time and it seems to be settled law that in such a state of facts neither the agent nor the principal has committed fraud and neither is liable for fraud.

A case of this type came up early in England.⁶⁷ The owner of a house, plaintiff in the case, employed a man by the name of Clark to let the house for him. The defendant, who later contracted to take the house said to Clark, "Pray, Sir, is there anything objectionable about the house." To this Mr. Clark replied, "Nothing whatever." In truth the house adjoining to the plaintiff's house was a "brothel of the worst description." The owner was well aware of the situation but Clark was not. When the defendant was sued on his written agreement he set up the defense of fraud and thus set for himself the task of proving fraud. This he failed to do. Said Parke, B.: "Now the simple facts, that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute fraud: each person is innocent, because the plaintiff makes no false representation, and the agent, though he makes one, does not know it to be

forbidden the servant to do." Jaggard, J., in *Penas v. Chicago M. & St. P. Ry.*, 112 Minn. 203, 127 N. W. 926, 933 (1910).

66. "While the language of authority is often used to describe the liability of the master under such and similar circumstances, it is strained to meet the conclusion which the court has reached by independent reasoning." Jaggard, J., in *Penas v. Chicago M. & St. P. Ry.*, 112 Minn. 203, 127 N. W. 926, 931 (1910).

67. *Cornfoot v. Fowke*, 6, M. & W. 358, 151 Eng. Rep. 450 (Ex. 1840).

false; and it seems to me to be an untenable proposition, that if each be innocent, the act of either or both can be a fraud." 68

The better rule seems to be that, when proof of fraud is vital to the plaintiff's right to recover—or to the defendant's privilege to escape—such fraud cannot be made out by hitching the knowledge of the principal to the utterance of the agent. Says Patrick Delvin: "There is no way of combining an innocent principal and agent so as to produce dishonesty. You may add knowledge to knowledge or, as Slessor, L. J. put it, state of mind to state of mind. But you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind. You cannot add innocent knowledge to innocent knowledge and get guilty knowledge. . . . There is no possible way known to philosophy or psychology by which an intent can be divided; and no possible reason why the law should try to invent one. If you cannot find an intent in either the principal or the agent separately, you will not produce it by knocking their heads together." 69

REPRESENTATIONS THAT ESTOP

The circumstances under which a false statement is made may be such that the person for whom it was made can be estopped to deny its truth. How can agency to make such a representation for another be established? Specifically, must it be authorized? Or can the agency be established by a showing that the making of the representation came within the scope of the employment of the person who made it?

When that question has come up free from entanglements, courts have not hesitated to use what is virtually the scope-of-employment test although they have done so in terms of "agent" and "authority." In a Georgia case,⁷⁰ the defendants, operators, of a rice mill, employed a superintendent, who issued receipts acknowledging that an individual by the name of Schley had stored in the mill a quantity of rice. Schley had no rice in the mill, but he pledged the receipts which the superintendent had given him with the plaintiff and thus obtained a sum of money. Action was brought against the defendant on its failure to deliver rice in pursuance of the receipts. The court held that the defendant was estopped to deny that it had received the rice. Said the court: "Though in fact no goods had been received for storage, the recital in the special receipt being utterly false, nevertheless the recital will have the same effect in protecting such *bona fide* pledgee as if the goods had been received and stored." 71

68. *Id.* at 373, 151 Eng. Rep. at 456.

69. Delvin, *Fraudulent Misrepresentation: Division of Responsibility Between Principal and Agent*, 53 L. Q. REV. 344, 362, 363 (1937).

70. *Planters' Rice-Mill v. Merchants' Nat. Bank of Savannah*, 78 Ga. 574, 3 S. E. 327 (1887).

71. 3 S. E. at 329.

With regard to the agency of the superintendent who issued the receipt the court had this to say: "Thus far the cases have been considered as if there were no element of agency in them . . . but it [the corporation] acted through an agent, and the real defense is that the agent did not have authority to bind the corporation, his principal, where no rice was in fact stored. . . . The evidence leaves no question that the agent was authorized to issue receipts of this character. The receipts belonged to a class which the agent had power to issue. . . . An agent, to tell the truth, may bind his principal by telling a lie." ⁷²

The estoppel cases that have caused most difficulty are cases where an agent's authority to make a contract or transfer depended on some condition—*i.e.*, on some fact,—and the same agent was employed to make representations about the existence of that fact. A railroad company's shipping agent, for example, is commonly authorized to issue an "order" bill of lading on condition that the carrier has received goods for shipment. Such a bill of lading embodies a contract whereby the carrier is obligated to transport the goods and to deliver them to the order of the consignee. Such bills of lading are widely used as instruments of credit and fraudulent agents sometimes fabricate bills of lading and issue them when no goods have been shipped. Has the banker or other person who advances money on the faith of such a bill of lading recourse against the carrier? Judicial opinions on this question indicate a desire to hold the carrier. That result is deemed commercially expedient. And yet, says Professor Vance: "It is clear that the issue of bills of lading by the agent of a carrier without the receipt of the goods specified is not even apparently authorized." ⁷³ If the main thesis of this article is sound, the carrier should be held. The basic question is whether the carrier should be charged with the agent's representation that goods have been received. Since a representation is a non-juristic act, it is logical, as well as expedient, that the carrier should be so charged.

Two things have hindered the courts in coming to the desired result of holding the carrier: (1) an inadequate analysis of the character of bills of lading and (2) a superficial application of the rule that an agent cannot enlarge his own authority.

Let us scrutinize a typical bill of lading. What does it purport to be? First of all it is a recital that certain goods have been received by the carrier. "Received the property described below"—these are the first words in the standard form. It is purely a representation, as much so as though the words appeared on a separate piece of paper. Second, there appears on the form of a bill of lading the terms of a contract made by the carrier.

⁷². *Ibid.*

⁷³. Vance, *Liability for the Unauthorized Torts of Agents*, 4 MICH. L. REV. 199, 199-200 (1905).

"Said company agrees to carry to its usual place of delivery at said destination." The contract words of the bill of lading, recording its agreement, are analytically distinct from the representation of fact, that certain goods have been received.

Let us concede that the making of a contract must be authorized in order to bind the principal; but let us insist that the making of representations, like the doing of other non-juristic acts, does not need to be authorized. As to them the question is whether the person who made the representations did so within the scope of his employment.

In the bill-of-lading cases the representation that goods have been received happens to be one that would work an estoppel; it happens to be printed on the same sheet of paper with a contract; and it happens to be signed by a person who makes both contracts and representations for his company. But none of these circumstances takes away the character of the representation, and we have the simple question of whether the agent was employed to make such representations.

There can be no doubt that shipping agents are within their employment when they say that goods have been received. They are furnished with blank receipts, that is, with forms of bills of lading, and the first word on such forms is "Received." It is a part of the agent's job to make such representations. But does the agent make his representation to a remote purchaser of the bill of lading? He certainly does. The order bill of lading is designed to circulate as a symbol of the goods while they are in transit. The agent knows that. Says Finch, J., in a bill-of-lading case: "The bills were made for the precise purpose, so far as the agent and Williams were concerned, of deceiving the bank by their representations, and every bill issued not stamped was issued with the expectation of the principal that it would be transferred and used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances. Those thus trusting to it and affected by it, are not accidentally injured, but have done what they who issued the bill had every reason to expect. Considerations of this character provide the basis of an equitable estoppel, without reference to negotiability or directness of representation."⁷⁴

Now let us notice a second source of confusion in the bill-of-lading cases. It is elementary that a person cannot create or enlarge his own authority.⁷⁵ He cannot by the fiat of his will confer authority on himself and he cannot make himself an agent merely by saying that he is one. A superficial application of this elementary rule has sometimes been supposed to militate against the idea that an agent's representation can ever affect his authority.

74. *Bank of Batavia v. New York L. E. & W. R. R.*, 106 N. Y. 195, 201, 12 N. E. 433, 434-35 (1887).

75. 1 MECHEM, AGENCY § 285 (2d ed. 1914).

But authority to act is often given by a principal on a condition that some fact exists or shall come to pass. In such cases it may well be that the agent is employed to make representations about the existence of that fact. While he cannot willfully expand his authority he may be employed to make representations that estop his employer from denying certain authority.⁷⁶ And so when an agent represents, within the scope of his employment that certain goods have been received, he estops his company from denying that the agent had authority to issue a contract for their carriage. As pointed out above, representations have sometimes been mistaken for, or at least assimilated with, juristic acts, such as the making of contracts. The next step was to assume that, like juristic acts, they must be authorized by the principal in order to hold him. This idea has led courts in many estoppel cases to exonerate the principal when commercial expediency, sound doctrine and common sense would dictate that he should be held.

In an early English case⁷⁷ the captain of a ship had issued a bill of lading when no goods had been shipped. The plaintiff, having made advances on the faith of this bill of lading, sued the owner of the ship, in case, to recover the amount of his advances. Judgment was for the defendants. The court said: "The point presented by the several pleas is substantially one and the same, viz. whether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible. . . . It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped; nor can we discover any ground upon which a party taking a bill of lading by indorsement, would be justified in assuring that he had authority to sign such bills, whether the goods were on board or not."⁷⁸

A case in the Supreme Court of the United States⁷⁹ presented facts that were substantially similar. The same result was reached: the owner of the boat was exonerated. The court said that it is a question of pure agency and the agent's acts are not binding on the owner, if the facts on which his power depended did not exist—*i.e.* if the goods had not been received by the carrier. If the premise be accepted that the question is one of "pure agency" and that authority for the captain's representation must be found, it is difficult to escape from the reasoning of these courts. But a good many courts have found a way to reach a different result. The New York courts have consistently held carriers liable on false bills of lading issued by their agents.⁸⁰ This they have done on a theory that is substantially in

76. 2 *id.* §§ 1800-1801.

77. *Grant v. Norway*, 10 C. B. 665, 138 Eng. Rep. 263 (C. P. 1851).

78. *Id.* at 687, 688, 138 Eng. Rep. at 271, 272.

79. *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998 (1881).

80. *Armour v. Michigan Cent. R. R.*, 65 N. Y. 111 (1875); *Bank of Batavia v. New York L. E. & W. R. R.*, 106 N. Y. 195, 12 N. E. 433 (1887).

accord with the thesis of this article: the agent represents that the goods have been received, such representations are made in the scope of the agent's employment, they need not be authorized and they operate to estop the carrier. As Finch, J., explained, where a principal has clothed an agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact to the prejudice of a third person who has dealt with the agent in good faith in reliance upon the representation.⁸¹ And in a Wisconsin case it is said that "The exercise of the authority itself is, unambiguously, such a representation."⁸²

It may be added to what Judge Finch has said that in the bill-of-lading cases the representation is not only implied in the agent's "act of executing the power"; it is prominently and expressly made in the bill of lading. In some cases, however, the representation is made only by implication.⁸³ A good many state courts followed the Supreme Court of the United States in exonerating the carrier in the false bill-of-lading cases; and about the same number of state courts followed the New York decisions holding the carrier. The common law on the subject thus came to an unsatisfactory condition. Congress and most of the state legislatures took a hand. They passed statutes to the effect that if a bill of lading has been issued on behalf of a carrier by one of its station agents the carrier shall be liable to one who purchases such a bill of lading in good faith. This legislation has brought uniformity and no doubt serves the convenience of the commercial world. It is a reproach to the common law, however, that legislation was found to be necessary. A more careful analysis would have disclosed that representations are non-juristic acts and that the elementary law of master and servant is sufficient to hold the carrier.

There is another group of cases that present substantially the same question of agency as is presented in the false bill-of-lading cases. These are cases where an agent of a corporation, whose business it is to issue certificates of stock in the corporation when old ones have been turned in, presumes to issue such certificates when the old ones have not been turned in. The corporation is generally held liable to one who purchases such a false certificate and the reasons given are substantially the same as those given in the bill-of-lading cases.⁸⁴

81. *Bank of Batavia v. New York L. E. & W. R. R.*, 106 N. Y. 195, 12 N. E. 433 (1887).

82. *Arnold v. National Bank of Waupaca*, 126 Wis. 362, 105 N. W. 828, 831 (1905).

83. *North River Bank v. Aymar*, 3 Hill 262 (N. Y. 1842); *Arnold v. National Bank of Waupaca*, 126 Wis. 362, 105 N. W. 828 (1905).

84. In *Fifth Ave. Bank of N. Y. v. Forty-Second St. & G. St. Ferry*, 137 N. Y. 231, 33 N. E. 378, 380 (1893), the court said, "It is true that the secretary and transfer agent had no authority to issue a certificate of stock except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and

Another interesting illustration of a statement which virtually enlarged the agent's power is found in *Holden v. Phelps*,⁸⁵ where a board of directors passed a resolution authorizing the "treasurer" of the company to "discharge and release mortgages." One man held the position of secretary-treasurer. As secretary he recorded the resolution and made it read as authorizing him to "discharge, release and assign mortgages." He showed the resolution thus recorded to the plaintiff, who became assignee for value of a mortgage which the treasurer assigned to him in the name of the bank. The purchase money paid by the plaintiff to the treasurer was misappropriated by the latter. It was held that the bank was bound by the assignment. The representation which this agent made as to the extent of his power was within his employment and so estopped the company.

OMISSION TO MAKE REPRESENTATIONS

In the cases which we have considered up to this point, a servant-agent, having been given the task of making representations, spoke falsely. Let us now suppose that a servant-agent, who has been given the task to speak on occasion, omits altogether to speak when the occasion arises. Is the master-principal chargeable with the omission? It is true, with regard to other kinds of acts, that an omission to act may be in the scope of a servant's employment and when that occurs the master is charged with the consequences. A carrier of passengers, for example, is liable when a servant within the scope of his employment omits to protect a female passenger against indignities.⁸⁶ A carrier is liable also when its servants omit to prevent a drunken passenger from falling off a train.⁸⁷ It is likewise liable when its servants omit to stop a train from which a passenger has fallen and to return to care for the fallen passenger.⁸⁸ It was also held liable when one of its laborers took down a set of bars along the right of way to let his own team through and omitted to put the bars up again.⁸⁹

Naturally enough there is a like result when the servant-agent is

treasurer first obtained to the certificate to be issued; but these were facts necessarily and peculiarly within the knowledge of the secretary, and the issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his right to act depended." See also *New York & N. H. R. R. v. Schuyler*, 34 N. Y. 30 (1865). And *Jaggard, J.*, in *Penas v. Chicago M. & St. P. Ry.*, 112 Minn. 203, 127 N. W. 926, 931 (1910), says, "A secretary of a corporation, intrusted with the seal of a corporation and authorized to sign certificates of stock, issues unauthorized certificates and appropriates the proceeds. The agent, having no authority, could not have acted for his employer, but the corporation is held estopped from denying the validity of the fraudulent issue."

85. 141 Mass. 456, 5 N. E. 815 (1886).

86. *Croaker v. Chicago & N. W. Ry.*, 36 Wis. 657, 17 Am. Rep. 504 (1875).

87. *Wheeler v. Grand Trunk Ry.*, 70 N. H. 607, 50 Atl. 103 (1901).

88. *Cincinnati H. & D. Ry. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282 (1892).

89. *Chapman v. New York Central Ry.*, 33 N. Y. 369, 88 Am. Dec. 392 (1865). This happened after the worker's regular working hours, but he testified that "If I seen anything amiss after that, I had to do it."

charged with a duty to give warning or other notice and he omits entirely to speak. Let us first consider cases where an employee omits to notify a third person of impending danger when it was a part of his employment to give such notice. It has already been pointed out that flagmen at railroad crossings are persons who make representations. It is their assigned task to represent to persons who approach that the tracks whether they are clear and it is safe to cross them. In a leading case⁹⁰ brought for damages because defendant's switch engine had run down the plaintiff, evidence indicated that the flagman failed to perform his duty and was standing by the side of a stationary freight car with his flag under his arm in conversation with another person. The court declared that, "Although it is not negligent for a railroad company to omit to keep a flagman, yet if one is employed at a particular crossing, his neglect to perform the usual and ordinary functions of the place may be sufficient to charge the company."⁹¹ This holding has been approved and followed in later New York cases.⁹²

Let us next consider cases where a servant-agent should as a part of his employment relay information to his employer. The right or liability of an employer often depends on whether he has notice or information of certain facts. Is he chargeable with notice or knowledge that comes to his servant-agent? Professor Mechem says, "It is the general rule, settled by an unbroken current of authority, that notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal."⁹³ As an example, notice to the janitor of an apartment house with regard to a defective floor in the building is chargeable to the owner.⁹⁴ And so is notice to an agent in charge of a building.⁹⁵ Knowledge of a defendant's construction foreman that an uninsulated high voltage wire had been left dangerously close to the floor where plaintiff was working was chargeable to the defendant.⁹⁶

The fact that the knowledge of or notice to the agent was not actually communicated to his employer will not prevent the operation of the general

90. *Kissenger v. New York & H. R. R.*, 56 N. Y. 538 (1874).

91. *Id.* at 543.

92. *McGovern v. New York & H. R. R.*, 67 N. Y. 417 (1876); *Finklestein v. New York & H. R. R.*, 41 Hun 34 (N. Y. 1886).

93. 2 MECHEM, AGENCY § 1803 (2d ed. 1914). See also RESTATEMENT, AGENCY § 275 (1933).

94. *Bowers v. City Bank Farmers Trust Co.*, 282 N. Y. 442, 26 N. E. 2d 970 (1940).

95. *Goodstein v. Milmo Realty Corp.*, 8 N. Y. S. 2d 243 (N. Y. City Ct. 1938).

96. *Hill v. Carolina Power & Light Co.*, 204 S. C. 83, 28 S. E. 2d 545 (1943). See also *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990 (1894); *Duffy v. Bankers Life Ass'n*, 160 Iowa 19, 139 N. W. 1087 (1913); *Aultman & Taylor Co. v. Hefner*, 67 Tex. 54, 2 S. W. 861 (1886); *Buckeye Saw Mfg. Co. v. Rutherford*, 65 W. Va. 395, 64 S. E. 444 (1909).

rule that the master-principal is chargeable with such knowledge or notice.⁹⁷ What is the explanation of this dogmatic rule? Two distinct theories have been advanced. One is to the effect that there is "legal identity" of the principal and agent. The other is that the agent is conclusively presumed to have communicated his notice or knowledge to his principal. The first is obviously a fiction. The second does nothing more than restate the rule, and as Professor Seavey aptly says it, "is valuable only when opposed to the facts."⁹⁸

Is there a simple and rational explanation of the rule whereby knowledge of facts possessed by an agent is imputed to his principal? Yes, there is. Be it noted that the act we are concerned with is the giving of notice by an employee to his employer. That—like the making of any other representation—is a non-juristic act. The agency question is, therefore, not one of "authority" to do the act; it is rather a question of "employment" to do the act. Suppose the janitor of an apartment house knows about a dangerous hole in the floor. Must he have authority to report it to the owner? It would seem not, and that it is rather a question of his employment. But a janitor is called a "servant." Suppose the employee who gets the notice or information is called an "agent" and that, on occasion, he makes contracts or does other juristic acts for his principal? It should make no difference what we call him, and it should make no difference that he does both juristic and non-juristic acts. This act of giving notice is non-juristic and calls only for the fact of employment in order to charge the employer for the consequence of its omission.

It frequently is the duty of a servant-agent to make representation to his employer. Says Judge Bradley in the case of *The Distilled Spirits*, "The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation."⁹⁹ It is emphasized in a North Dakota case that the doctrine of imputed notice does not depend on the authority of the agent.¹⁰⁰

Theory and judicial utterance alike seem to indicate that the doctrine of imputed notice rests on the agent's employment to communicate certain facts

97. *Farnsworth v. Hazelett*, 197 Iowa 1367, 199 N. W. 410 (1924); *Westinghouse Electric & Mfg. Co. v. Hubert*, 175 Mich. 568, 141 N. W. 600 (1913).

98. Seavey, *Notice Through an Agent*, 65 U. OF PA. L. REV. 1, 12 (1916).

99. 11 Wall. 356, 367, 20 L. Ed. 167 (U. S. 1870). And Bean, J., in *Pennoyer v. Willis*, 26 Ore. 1, 36 Pac. 568, 569 (1894), makes the same point in these words: "This rule is generally said to be based upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of his agency and material to his principal's protection." This was quoted with approval in *Hill v. Carolina Power and Light Co.*, 204 S. C. 83, 28 S. E. 2d 545, 550 (1943).

100. *Leisen v. St. Paul F. & M. Ins. Co.*, 20 N. D. 316, 127 N. W. 837 (1910). Fisk, J., says: "The insurer is charged with the knowledge acquired by his agent in making or negotiating a contract of insurance, not because he has consented to be so charged, nor because he has authorized his agent so to bind him, but because, as a legal consequence of the relation he sustains to the agent, the latter's knowledge is imputed to him." 127 N. W. at 843.

to his employer. In other words the doctrine of imputed notice is an aspect of the doctrine of *respondeat superior*. Assuming that information has come to an employee whose business it is to relay it to his employer, the employee will either pass it on, in which event the employer will have the information; or else the employee will not pass it on, and so be remiss in the scope of his employment. In either case there is justice and reason in charging the employer with notice.

SUMMARY

The law of agency is found in digests, textbooks and encyclopedias under two headings—"Master and Servant" and "Principal and Agent." In both divisions of the law of agency we study cases where one person acts in behalf of another. But in the Master-and-Servant cases the word is "employment" and in the Principal-and-Agent cases the word is "authority." The difference is more than a difference of words. Either authority or employment creates agency in the broad sense but there is a vast difference in what it takes to establish the one or the other. Agency to perform non-juristic acts—found in the Master-and-Servant cases and generally called employment—is rationalized on the footing that a master should take the risk of his enterprise and so be liable for acts done by one in his employment. Agency to do juristic acts—found in the Principal-and-Agent cases—is rationalized on a footing that a principal should be bound only in accordance with his consent. His agent needs to be authorized.

Where do representations fit into this division of the law of agency? Should they be regimented under the head of "Master and Servant" or under the head of "Principal and Agent"? Considerable care has been taken in this article to indicate the nature of representations. They are non-juristic acts and agency to make representations would seem, therefore, to call for employment, not authorization. *Respondeat superior*.

When representations have been assigned to their place alongside of other non-juristic acts under the heading of "Master and Servant" our job would seem to be nearly done. The only thing remaining would be to apply the elementary, well-settled doctrine, that a master is liable for acts done by his servant in the scope of his employment. There have, however, been confusion of thought and uncertainty of result among the cases. This is, for the most part, due to inadequate analysis.

In the first place, representations have sometimes been mistaken for juristic acts. Their physical aspect—commonly a speaking or writing—is like that of juristic acts; the actor just "makes talk." This superficial resemblance has obscured the idea that juristic acts are manifestations of consent to be bound, whereas representations are not so. The legal consequence of a representation is imposed regardless of the speaker's consent.

In the second place, the law regarding agency to make representations has been distributed among such subjects as fraud, slander, estoppel and just plain representations like those made by a watchman at a crossing. To be sure these subjects are vastly different from each other. But they have a large common factor in that a representation is the basic act of every one of them; and agency to make representations for an employer is the same whether the particular representation leads to one or another legal consequence. Cases involving fraud, slander, estoppel and other topics have been examined in this essay in order to illustrate and check the idea that the agency question is the same in all of them. It may seem a far cry from the case of a watchman at a crossing, beckoning to a traveler that it is safe to cross the tracks, to the case of a shipping agent, who signs and issues a statement in a bill of lading that certain goods have been received. And yet both employees have done the same kind of an act—they have made a representation. The agency question is the same.

In the third place our terminology is misleading. We commonly divide persons who act for others into "servants" and "agents." These are handy terms, but they must be used with caution. When, for example, we call the person who did a given act "agent," and then say "agents must be authorized," we have made the word "agent" a term in our reasoning process. This may lead to error. It does lead to error when the act in question happens to be a representation—a non-juristic act.

In the fourth place, this form of classification ("Master and Servant" and "Principal and Agent") obscures the fact that one and the same employee may be engaged to do both kinds of acts. He may need authority for some of his acts and not for others.

These misconceptions have obscured a simple problem. They have produced doubt and confusion about what must be shown in order to establish the agency of one person to speak for another. The result, however, was inevitable. Representations are inherently and naturally non-juristic acts. That character has stubbornly asserted itself and a broad view of the cases reveals that the actual holdings have come to be in accord with sound theory. The reasoning in many cases is confusing and the language inept; but the net result is that agency to make representations exists, or not, according to the elementary doctrine that an employer is chargeable with what his employee does in the scope of his employment.