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OPERATIVE ACTS: JURISTIC AND NON-JURISTIC

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Acts galore. But most acts have no legal consequences.[1] A person eats his dinner, plays baseball, drives an automobile, shoots at a target or writes a book, and such acts usually produce no change in his legal relations. The relatively few acts that have legal effect operate according to one or the other of two basic principles. These two principles are so elementary and generally taken for granted that they are seldom stated in judicial opinions or other legal writings. But they appear clear and dominant when a broad view is taken of the decisions.

First Principle: Freedom Is Limited

One of the two principles referred to above is this: The large freedom accorded to every person by the common law is limited. An act beyond his limit has legal consequence regardless of his consent. The largest area where this principle bears down on the individual is in the field of torts. If one person does an unwarranted act that injures another he must make compensation to the injured person. When, for example, A hits B with a stick, or A slanders B, or A carelessly drives against B, A must compensate B for the injury that resulted from A's unwarranted act.

In fields besides torts an act may have legal consequence regardless of the actor's assent. In the large and growing field of warranties, for example, a seller is frequently held liable without any assent on his part to be bound.[2] And assent to be held is not essential to make out liability on a quasi contract,[3] or to establish an estoppel.[4]

Second Principle: A Normal Adult Can Give Up What He Has

The second basic and rational principle referred to in paragraph one is this: A normal adult can give up what he has by an act that seems to express his assent to give it up. He can by such an act grant his property to another, incur obligation or otherwise subtract from his legal position. In order to see the reign of this principle through the years let us notice some elementary phenomena that have turned up in our study of law and legal history.

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1 Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1923).

2 Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479 (1942). See also Silverman v. Imperial London Hotels, Ltd., 137 L.T. 57, 43 T.L.R. 260 (K.B. 1927).

3 WOODWARD, QUASI CONTRACTS § 4 (1913).

4 19 AM. JUR. *Equity* § 36 (1939).

Let us string together a number of familiar acts that vary greatly in form, but have in common a distinctive feature—viz. assents by the actors to subtractions from their respective legal positions. Even primitive men could give or barter away what they had. One practice was known as "silent barter." Each party would silently abandon the chattel he was willing to part with and the other party would pick it up.[5] The ancient Hebrews acted out their transactions like this: The grantor or obligor solemnized his act by delivering a sandal to the grantee or obligee.[6] Coming down to medieval times we see "livery of seizin." In this ceremony the grantor delivered a twig or a clod from the land being transferred.[7] We see also the use of sealed instruments. The grantor or obligor would sink his eye tooth into, or make some other impression on, soft wax attached to parchment.[8] Execution of the instrument was completed by a delivery thereof.

In modern times a man mails a letter in which he has set forth a promise to sell wool. Another man (the offeree) in a different place and at a different time mails a letter that embodies his promise to pay for wool. Each man is bound according to his undertaking.[9] A bidder at an auction sale nods his head and, by this token, undertakes to pay a certain amount for a chattel. The auctioneer hits the table with a mallet and thus passes ownership of the chattel to the bidder. Dealers on stock and produce exchanges buy and sell by finger signals. This string of symbolic acts, ancient and modern, formal and informal, illustrate the second one of the basic principles referred to above—viz. a normal adult can by an appropriate act subtract from his legal position. Throughout the history of the common law normal adult persons have been allowed that degree of autonomy. This principle comprehends the "objective theory"[10] of contracts and affords a like explanation of grants, exchanges and other legal transactions.

The converse of this principle also is firmly embedded in the common law. "No person shall . . . be deprived of life, liberty, or property without due process of law."[11]

Non-Juristic Acts Operate Under First Principle, Juristic Acts Operate Under Second Principle

Why has this extended statement been made of two principles that are so elementary? It was in order to build a firm approach to the distinction

[5] Firth, *Trade, Primative,* in 22 ENCYCLOPAEDIA BRITANNICA 347 (1956).

[6] *Ruth* 4:7.

[7] 2 BLACKSTONE, COMMENTARIES *315.

[8] 2 BLACKSTONE, COMMENTARIES *297 *et seq.*

[9] Adams v. Lindsell, 1 Barn & Ald. 681.

[10] "Assent, in the sense of the law, is a matter of overt acts." Holmes, in O'Donnell v. Clinton, 145 Mass. 461, 14 N.E. 747 (1888). "Not mutual assent but a manifestation indicating such assent is what the law requires." RESTATEMENT, CONTRACTS § 20 (1932).

[11] U.S. CONST. amend. V.

between two kinds of acts—a distinction too generally neglected. When these two principles are in mind it is clear that, in order to serve the first of the principles set forth, an act may utterly lack any assent that it shall have legal operation; while an act, in order to serve the second of the principles set forth, must contain an assent that the person by whom or for whom the act is done shall be bound. The distinction therefore is between acts that do, and acts that do not, contain assents to be bound. The acts that do contain such assents are here called juristic[12] and the acts that do not contain such assents are called non-juristic.

Non-Juristic Feature Common to Both Kinds of Acts

The two kinds of acts noted above are not mutually exclusive. Indeed every act has a non-juristic aspect. That is, it is mechanical. It may or may not have a juristic aspect. This calls for illustration. The act of mailing a letter has a non-juristic aspect and usually has no further significance. If, however, the mailing is done by way of making an offer or acceptance, the act of mailing is juristic. Another illustration: Hitting a table with a mallet is a non-juristic act and generally is only that, as when a chairman raps the table, meaning, "The meeting will come to order", or a bailiff raps the table and means "Stand, the judge is entering." But an auctioneer may do a like physical act. In this last case it is non-juristic and also juristic because, in the setting, it means "Sold. I hereby pass title to the chattel." A nod of the head may mean "Good morning" (non-juristic) or it may mean "I undertake to pay the price" (juristic). Injury, for which compensation must be made, might conceivably be inflicted by the physical component of a juristic act. A bizarre illustration: The firing of a pistol might be a specified way to accept an offer. Such an act is capable of doing harm. It might be so executed as to make the acceptor liable for a tort, as well as bound in a bargain.

Juristic Acts Always Derogate

It is characteristic of juristic acts that they subtract from, or make more perilous, the legal position of the person by whom or for whom they are done. For example, an act that grants property or incurs obligation is such a subtraction. And the assent of one person to let another person serve him puts the former in peril since he is answerable for what the servant does.

The autonomy[13] allowed to each person by the common law is the ability to give, not to grab. The overall result of a bargain may be profitable to

[12] Professor Holland has called this kind of act "juristic." THE ELEMENTS OF JURISPRUDENCE 117 (13th ed. 1924). Professor Lorenzen uses the same term. *Cause and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 646 (1919).

[13] "Among basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy." Fuller, *Consideration and Form* 41 COL. L. REV. 799, 806 (1941).

one or both of the parties, but the bargain consists of separate acts whereby each party gives up something. They are the operative acts. If A and B make an exchange of A's horse for B's cow, each party gives up the chattel he owned, and, if the bargain is to make such an exchange at a later time, each party gives up an amount of freedom—viz. the privilege to keep his chattel.

Importance of Distinguishing the Two Kinds of Acts

Pains have been taken to note that every person is answerable for his non-juristic act regardless of his assent, and that he is not bound by his juristic act unless it is essentially an act of assent. The importance of distinguishing the two kinds of acts and of noting how they respectively operate may not quickly appear. But the distinction is vital when we come to consider the instances where one person acts for another—i.e., when we come to agency.

Agency to Do Non-Juristic Acts for Another

The principle that one must answer for his non-juristic acts would come to naught if a person could dodge liability by the simple expedient of letting another act for him. And so it is rational that he should be charged with non-juristic acts that he lets another person do for him. At any rate he is liable for such acts when they are done within the scope of an accepted service. That is firmly established law. And "scope" of an accepted service is liberally construed. The employer may become liable for an act he has forbidden[14] or which is illegal[15] or done by mistake.[16] This rigorous liability is known as the doctrine of "respondeat superior."

Agency to Do Juristic Acts for Another

Since juristic acts invariably derogate from the legal positions of the persons for whom they are done, the agency of one person to do such an act for another person is not lightly established. A normal adult can authorize another to do a juristic act for him but the enabling act is strictly construed. When one acts through the intervention of an agent that assent is given by a two step process, consisting of the principal's act of assent complimented by the agent's act of assent. The agent's act must be in meticulous conformity with his authorization—just as an acceptance must conform with the terms of an offer. The limits of an agent's authority are rigid[17] in marked contrast with the large and elastic bounds of a servant's employment to do non-juristic acts.

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[14] Garretzen v. Duenckel, 50 Mo. 104 (1872); Philadelphia & Reading R. Co. v. Derby, 55 U.S. (14 How.) 468 (1852); RESTATEMENT, AGENCY § 230 (1933).

[15] Rich v. Dugan, 135 Neb. 63, 280 N.W. 225 (1938).

[16] Maier v. Randolph, 33 Kan. 340, 6 Pac. 399 (1885); May v. Bliss & Everett, 22 Vt. 477 (1850).

[17] Mussey v. Beecher, 57 Mass. (3 Cush.) 511 (1849); Barrett v. McHattie, 102 Mont. 473, 59 P.2d 794 (1936).

Classification of Persons vs. Classification of Acts

The general subject of agency is divided in digests and encyclopaedias into two parts—viz. Master and Servant and Principal and Agent. This seems to be a classification of *persons*. Each party to the agency is given a status and a name. A servant is taken to be different from an agent and a master is taken to be different from a principal. This classification of *persons* instead of classifying *acts* is confusing and in some cases has led to error. It is confusing in a case where the worker is expected to do both kinds of acts. Suppose for example, that a person is employed to manage a general store. He is expected to do juristic acts such as transfer title and contract to buy goods. He is also expected to do non-juristic acts such as manually to handle goods and make representations about them. Suppose further that an effort is being made to charge the employer with an act the manager has done. Shall we call him an "agent" and look for authorization or call him "servant" and look for employment? In truth it is the character of the particular act that should guide the inquiry. It is not possible to brand the worker with a name or a status that will be his in everything he does.

An area where a good many undesirable decisions have resulted from giving to a worker a name and a status is this: Suppose an "agent" has been employed to sell (*i.e.*, find a purchaser for) property. In his zeal he makes misrepresentations about the property. Should the employer be charged with those misrepresentations? Some courts have reasoned that the worker being an "agent" cannot charge his "principal" unless the misrepresentation was authorized.[18] Fortunately, a majority of the courts have come around to see that such misrepresentations should be charged to the employer. And the Restatement of Agency takes that view.[19] In short, the character of the act should guide the inquiry as to whether this or that was done for an alleged employer. The name of the worker ("agent" or "servant") is not important.

Agency to Do Juristic Acts May Depend on Employment to Do Non-Juristic Acts

Agency to do juristic acts depends in some rare situations on the employee's agency to do non-juristic acts. Take the shipping clerk of a carrier for instance. He is *authorized* to issue a bill of lading (juristic act) when he receives goods for carriage. He is not authorized to issue a bill of lading when he has not received goods. He is *employed* to represent as a fact (non-juristic act) whether he has received the goods. His representa-

[18] Loma Vista Development Co. v. Johnson, 142 Tex. 686, 180 S.W.2d 922 (1944); Ellison v. Stockton, 185 Ia. 979, 170 N.W. 435 (1919).

[19] Haskell v. Starbird, 152 Mass. 117, 142 N.E. 695 (1890); RESTATEMENT, AGENCY §§ 258, 259 (1933).

tion that he received the goods should therefore estop the company when claim is made against the carrier on the bill of lading by anyone who was misled to his injury by the misrepresentation. A good many courts, however, called the shipping clerk an "agent" and, reasoning from that *name,* assumed that his representation as well as his contract must be authorized in order to bind the company. The doctrine that an agent cannot enlarge his own authority was dogmatically applied without taking note that the agent was clearly within his employment when he represented that he had received the goods.[20] There was so much confusion and disagreement among the courts with reference to false bills of lading that resort was had to legislation. Carriers are now required by statutes to make good on false bills of lading.

The transfer agent of a corporation presents a situation like that of the shipping clerk. The transfer agent is authorized to issue a new certificate of stock (juristic act) when an old one is turned in. He is employed to represent (non-juristic act) whether the old one was turned in. Since the representation does not have to be authorized in order to charge the company, it is bound on a new certificate whether the old one was or was not turned in.[21]

Summary

In summary it can be said: Most acts are not operative at all to change legal relations. The ones that do operate fall under one or the other of two basic and rational principles that are as old as history. One of those principles is that some acts—*e.g.,* torts—should be, and are, fraught with legal consequences regardless of the actors' assents. The other principle is that a normal adult can give up what he has by a suitable act of assent. Acts that fall within the purview of the former principle are herein called non-juristic. Acts that fall within the purview of the latter principle are herein called juristic.

Either kind of acts can be done by one person for another. That is agency. In order that one person shall be charged with non-juristic acts done by another it is only necessary the former shall accept the services of the latter. But in order that one person shall be bound by juristic acts done by another, such acts must be authorized, and the act done must conform with the authorization, just as an acceptance must conform with an offer in order to make a bargain. It is the character of the act, and not the name of the actor ("agent" or "servant") that determines whether the act falls in one class or the other.

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[20] Grant v. Norway, 10 C.B. 665, 138 Eng. Rep. 263 (C.P. 1851); Pollard v. Vinton, 105 U.S. 7 (1881).

[21] Fifth Ave. Bank of N.Y. v. Forty-Second St. & Grand St. Ferry R. Co., 137 N.Y. 231, 242, 33 N.E. 378, 380 (1893); Penas v. Chicago M. & St. P. Ry. Co., 112 Minn. 203, 127 N.W. 926, 931 (1910). See also Holden v. Phelps, 141 Mass. 456, 5 N.E. 815 (1886); North River Bank v. Aymar, 3 Hill 262 (N.Y. 1842).