

also that this abolition of seals could be more efficiently handled by the legislature, on the ground, suggested in this connection, that "departure from the common law creates exceptions and exceptions breed confusion."<sup>32</sup> In view, however, of the criticism of *Briggs v. Partridge* and the almost unanimous approval with which the cases overruling it were received, it is hard to understand why the Court of Appeals, if it could not abolish the orthodox rule, should have attempted to justify it.<sup>33</sup> Two grounds were given—the first that "thousands of sealed instruments must have been executed in reliance upon *Briggs v. Partridge*," that "many times seals must have been used for the express purpose of relieving the undisclosed principal from liability"; and second, that different periods of limitations apply to sealed and unsealed contracts. As to the first, it can be no more than a guess that "thousands of instruments" were so made, and it would seem that the justification of the continued existence of the doctrine of *respondet superior*—distribution of economic losses—should require the same result as where the contract is not under seal. As to the second, it is evident that the same objection could be raised against the previously-discussed rule of partnership; but it is significant that no such cases seem ever to have arisen in New York; and should one arise the court could either call it a simple contract, governed by the six-year statute, or could follow the South Dakota court in saying that seals were unimportant save as determining which period of limitation applies.<sup>34</sup> Of the policy behind *Briggs v. Partridge* it seems more accurate to say that it "is an arbitrary, unreasonable rule, which never accomplishes any good and is used only to prevent the administration of justice."<sup>35</sup> And it is submitted that the Court of Appeals might at least have placed on it the stamp of their disapproval and called on the legislature directly to do what they did not feel justified in doing.<sup>36</sup>

#### THE "AUTHORITY" OF AN AGENT—DEFINITION

*Definition.* The "definition" of a term, whether technical or otherwise, is a matter to be determined by usage and convenience. It is not a matter that is determined for us, once and forever, by divinity or by nature or by some objective reality. The concept expressed by the word "stove" is at least as variable as are the objects which the word is used to denote. "Usage" is variable with people, place, and time; our notions of "convenience" are likewise variable and are likely to be quite ill-founded as well.

The American Law Institute has undertaken the tremendous task

<sup>32</sup> Crane, *op. cit. supra* note 4, at p. 36. Cf. also 1 Williston, *op. cit. sec.* 219; *Evans v. Wells* (1839, N. Y. Sup. Ct.) 22 Wend. 324, 339, 340.

<sup>33</sup> Cf. *Briggs v. Partridge*, *supra* note 1, at p. 363.

<sup>34</sup> *Gibson v. Allen* (1905) 19 S. D. 617, 104 N. W. 275.

<sup>35</sup> *Lagumis v. Gerard*, *supra* note 5, at p. 473.

<sup>36</sup> For the legislative attitude see Shephard, *Real Estate Dummies* (1925) 73 N. Y. L. JOUR. 298.

that is briefly, but somewhat erroneously, described as the Restatement of the Law. The performance of the task requires not only a knowledge of all the rules of law, variable and uncertain and conflicting as they are; it requires also a language in which to state them. This means large numbers of words, used so as to create in the minds of readers a concept somewhat like that in the mind of the draftsman. It means that each word must be defined, either in the "re-stating" document or elsewhere. It means that throughout the "re-statement" a term must be used uniformly in accordance with the selected definition.

To be successful with the legal profession and with the public, the selection of a definition must be made from among existing usages. Whenever such existing usage is wholly departed from, an entirely new term should be coined. This is done with great freedom in other sciences; but it should be done rarely, if ever, in any statement of the law. This limitation of the draftsman to existing terms and to existing usages does not make his task easier; it makes it much harder. The task of a maker of a "dictionary" is merely to record usages, all of them indicating their time and place and the number and character of the users. It is not his business to use a term so as to convey a specific concept; it is rather to explain all the possible concepts that other persons have used it to convey. The task of the American Law Institute, however, is to choose and to use a term so as to convey a particular and unmistakable concept. In one aspect this is a choice between different terms; in another it is a choice between different concepts now commonly expressed by a single term. From the usages collected in all the dictionaries it must choose *one*, even though several of these usages may be (as they frequently are) equally general and equally good as mere English language. By some formal definition it must indicate which usage it has adopted; and it should show definitely that it has excluded the other usages.

"Usage" provides the materials; the actual selection therefrom is to be determined by practical "convenience." This is a matter of opinion, and opinions are bound to differ. Compromise is necessary, and mistakes are inevitable; but the success of the Institute's work will depend largely upon the wisdom of the choices made. The choice of a particular usage should depend upon the extent of its distribution, particularly among those administering the law, its clearness and simplicity, the dearth of other available terms, the existence of other terms to fill other needs. It should not be left wholly to the feelings or the instinct of a particular draftsman. The decisive question ever to be borne in mind is: Will those who hereafter administer and explain the law understand the term and in fact use it as defined? If they will not, the choice of the Institute is a failure.

*Law.* A law is often defined as a rule of human action. The purpose of law is generally, but not always, to induce certain types of conduct on the part of human individuals and to discourage other types. This is merely one of the possible bases of definition. No

attempt will be made here to consider the various possible definitions of law, but a tentative choice will be indicated.

The question that the individual constantly puts to his lawyer is: What will be the action of the officers of society, judicial and administrative, on a given state of facts? This is true, whether the facts in question are in the past or in futuro. The client may put his question in the form "What shall I do"; or he may report "Here is what I have done." In either case he asks "What will society do about it?" Therefore it is suggested that

A statement of "the law" is a statement of the rules by which the action of organized society with respect to individuals can be predicted. A statement of what that action (affirmative or negative) will be, on specified facts now existing, in all, or in part, for one individual and against another, is a statement of the "legal relations" of those two individuals.

"Facts" may affect the action of society or they may not; if they do, they may be described as "operative," otherwise as "inoperative." The first step in the definition of a legal term should be to determine whether it is to be used to denote a "fact" or to denote some "legal relation" consequent upon facts.<sup>1</sup> If used to denote a "fact," the next step is to decide whether it is to denote a fact that is "operative" in some particular way, or to denote a fact wholly regardless of any possible legal operation. Thus, the term "promise" has been defined by some as a certain kind of expression by one person to another, wholly regardless of whether it is "binding" (whether society will do anything by way of enforcement). Others define it so as to require a "binding force," and call the non-binding expression a "pollicitation." Again, the term "contract" can be used so as to denote any expression of agreement by two persons; or it may be defined as any such expression of agreement that will be enforced by law. Again, the term "consideration" might be defined as any agreed equivalent exchanged in fact for a promise; or as any such equivalent that is operative to cause the enforcement of the return promise.

*Authority.* I. It is largely accidental that the word "authority" is here chosen for definition; but it affords excellent opportunity for demonstrating a method of definition. It is sometimes used to denote both facts and legal relations, both the acts (expressions) of the principal and the resulting effect of those acts upon the action of society as between principal and third persons and as between principal and agent. It seems desirable to avoid this double usage. The first suggestion to be made here, therefore, is to limit the denotation of the term to "facts" alone. Hence,

*Authority* denotes one or more facts.<sup>2</sup>

<sup>1</sup> For definitions of these terms see Corbin, *Legal Analysis and Terminology* (1919) 29 YALE LAW JOURNAL, 163.

<sup>2</sup> It will be considered below whether or not these facts must be "operative," although not every possible operative effect will be considered. Various specific

II. The next step is to classify facts and to determine which ones fall within the term "authority." Facts, whether operative or inoperative, may be:

1. Conduct of a person (acts and forbearances).
2. Other events (physical changes, excluding human conduct).
3. Other facts (neither conduct nor physical changes).

Basing the choice upon existing judicial usage, the term "authority" should be restricted to human conduct only, with one possible addition falling within class 3; viz., certain written documents. The definition, therefore, now becomes

*Authority* consists of human conduct or such conduct accompanied by certain written documents.

III. The next question is What conduct and Which documents. The choice here is not quite so easy. It must be made after a comparison of specific instances drawn from experience. We should consider both the *purpose* of the conduct and its juristic *result*. Now, the outstanding feature of Agency is the fact that an Agent can change the legal relations of his Principal with other persons. The short way of expressing this is to say that the Agent has "Power." Consider the following cases, with respect to the purpose of the conduct and also with respect to the resulting power to change the principal's legal relations with third persons.

(a) P tells A to sell a chattel. P's conduct here (his statement) is an expression of a purpose to put A in such a position that he can affect P's property interest. P may not have a definite concept of "power"; but in almost all cases he has a practical notion of property, of sale, and of representation by another. If P has such a purpose, it is clear that A has the power of an agent; and this is true even though A may not have known this. *P's statement is A's authority.* Therefore,

*Authority* may be human conduct intended to create legal power.

(b) P tells A to sell a chattel, accidentally omitting the word "not." A reasonably understands what was said, and sells the chattel to X. It was not P's purpose to create power in A; and yet he has done so. The sale is valid. Did A act within his "authority"? The answer should be *yes*. The authority was P's voluntary, intended conduct. It is not material whether X knows of this conduct. Hence we may say that

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instances will be given; but many additional useful instances will doubtless occur to every reader, further testing the "convenience" of the definition chosen herein. The chief question is believed to be whether the term should be so restricted as to denote "operative" facts only, to denote action by a principal that creates legal power in the agent. Must the agent be able to "bind" the principal in order that "authority" may be said to exist? If yes, then "authority" is a fact creating the legal relation of power-liability between agent and principal, power in the agent and liability (Hohfeld's term) in the principal. If "authority" be limited to denote such "operative" facts alone, then one or more legal relations will be included within its connotation and these relations would have to be worked out in complete detail.

*Authority* may be conduct reasonably understood by *A* as the expression of a purpose to create power.

(c) P puts A in charge of a store with definite oral instructions not to sell an article in the show case. A thereafter sells the article to an innocent purchaser. The sale is valid. A had legal power, and yet we say that A acted outside of his "authority." P's conduct was such that X, the buyer, was caused reasonably to believe that A had authority. Therefore, the law is that P's conduct created legal power. A's act was legally operative even though it was beyond his "authority." We say that he had "*apparent* authority." This means that there was no real or actual "authority." It is not A's *power* that was merely "apparent"; he had power as real as any *power* ever is. Therefore,

Conduct is not "authority" if it was not intended to be and A understood that it was not.

(d) P delivers to A a document that plainly says that A shall have certain power. P did not have the purpose of creating such power, however; he negligently failed to express himself accurately or to understand the written words. If A reasonably understood that P's purpose was to create the power, the case is like (b). We say that A had "authority." But if P had clearly expressed to A what his purpose really was, the case is like (c). A has power, but no "authority." Evidently we regard P's conduct objectively, his unexpressed purpose being immaterial. Not so as to A, however. His "authority" *depends upon his subjective understanding* of P's objective conduct. There is no "authority" unless we have both P's conduct, objectively considered, and the actual subjective understanding of A.

(e) P writes and mails a letter to A telling him to sell P's chattel on certain terms. Before A receives this letter, by mere coincidence A contracts in P's name to sell the chattel to X on the specified terms. A then receives the letter, and also a telegram from P cancelling it. In cases of this sort, it is reasonable to expect a holding that the contract does not bind P. If so held, A has no authority and also no power:—no "authority," because A did not suppose that there was any; no "power," because no conduct of P had caused X to suppose there was "authority."

(f) P writes to X: "My chattel is for sale to you on such terms as you and A may agree upon." X then writes to A, who knows nothing of P's letter: "I offer \$500 for P's chattel. Are you willing to accept this offer as P's agent?" A replies: "As P's agent, I accept." Here there is a contract. No ratification by P is necessary. A had legal power. It seems best, however, to say that he had no "authority" from P. The reason for giving A legal power in this case is the same as that existing in (c). It is that P has made representations to X leading him reasonably to believe that P intended A to have power. Of course, if X had communicated P's letter to A, it would have been an "authority" and A's action would have been within his authority. It is quite possible so to define "authority" as to include P's uncommunicated

letter to X. This would unnecessarily complicate the definition, however. The case would seldom happen and there is no presently established usage including such a case.

(g) At earlier common law a married woman could not create power in an agent. (Various persons may be so disabled under our present law.) Suppose such a person should tell A to sell her property for her. It would usually be said that A had her "authority" even though he had absolutely no power. If we adopt this usage, "authority" may consist of facts that are not operative. We could, perhaps without causing trouble, define it otherwise and deny that A had either "authority" or power. Probably this should not be done, however; consider the following illustrations: (1) P tells A orally to sell Blackacre. Suppose that a statute makes this oral statement inoperative. It would nevertheless be usual to say that A had oral "authority" from P, even though he had no legal power. (2) P, mistakenly thinking that he is an owner, gives A a "power of attorney" to convey. Here it would be said that P has *authorized* A to convey; and yet A has no power to convey. The definition below will be so worded as to be consistent with this.

(h) P, husband of A, deserts her without cause. A has legal power to bind P to pay for supplies. This is not like (a), because P expressed nothing. It is not like (b), for the additional reason that A did not suppose that P had authorized her to buy. It is not like (c), for the further reason that X, the grocer, did not suppose that P had authorized her. A certainly has power, and there certainly was no authority.

(i) A conveys Blackacre to P, and the latter fails to record the deed. A then fraudulently conveys to X, an innocent purchaser for value, who records his deed. P was at first the "owner," but now X is "owner." A had legal power; but he certainly had no authority. There was no conduct of P expressing such purpose, and neither A nor X supposed that there was.

Case (h) *supra* is generally treated under Agency. Case (i) generally is not. Whether or not they should be so treated depends upon the convenient definition of "Agency." We deal here only with what is "authority."

(j) A legislature passes a charter of incorporation. This creates certain powers in incorporators. The legislative action *is* their *authority*. A certified copy may often be called their authority, but it is not so; it is merely evidential. If the legislature did not act, such a certified copy would create no power. Doubtless the official legislative record books might be an "authority," like the document in (d) *supra*.

#### IV. Definition, and Comment.

Authority, in the law of Agency, denotes an oral or written communication from the principal to the agent, expressing an actual intention that the agent shall act on the principal's behalf in one or more transactions with third persons, or causing the agent reasonably to believe that such was the principal's intention.<sup>3</sup>

<sup>3</sup> One cannot state all the law of a subject in a single definition; nor is it possible

*Comment:* Authority differs from Power: Authority is a *fact*; Power is a legal relation. Authority is *conduct* of the principal, including either oral or written communication to the agent; Power is neither conduct nor a document. Authority may create Power, but not always; Power may be created by Authority, but may also be created by other operative facts. Authority denotes merely the factual transaction between Principal and Agent; Power expresses the concept of possible future changes in the legal relations of the Principal with third persons. Authority merely describes a historical event; Power predicts possible events in the future.

The test of Authority is objective, not subjective, as concerns the Principal. His conduct must be an expression of intent; the subjective intent need not actually exist. [Cases (b) and (d)].

The test is subjective, not objective, as concerns the Agent. If he in fact knows that the Principal did not intend him to have Power, there is no Authority, even though he *may* have legal Power as an agent. [Case (c)]. Further, if there has been no communication to A and he knows nothing of P's expressions of intention, there is no Authority, although here also there *may* be legal Power. [Cases (e) and (f)].

The term "apparent authority" means that there is in fact no authority, but that the conduct of the Principal leads the third person with whom the Agent deals to believe reasonably that there was authority. In such cases, the Agent by acting beyond his authority has legal power to bind the Principal.<sup>4</sup> [Case (c)].

Just as legal power may exist without any authority in fact, so also conversely may there be a factual authority without any legal power. [Cases put in (g)].

The voluntary "conduct" of the Principal may consist in the preparation and delivery of a written document. What is commonly called a "power of attorney" is such a document. Such written documents are frequently referred to as the authority of the Agent. X will say to A: "Show me your authority." Whereupon A produces his documentary paper. There is no harm in this usage. The document is not in itself "conduct"; but it is the permanent evidence of the conduct. It should be noted that such a document standing alone is totally inoperative. There must be voluntary conduct (writing, delivery, etc.) to make it operative. When such conduct takes place, the document is one of the facts (not the sole one, but perhaps the most important one) by which the conduct is to be interpreted.

A. L. C.

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to define one term without using other terms that themselves need definition. Such terms are "power," "communication," "intends," and "legal relations." For definition of "power," see *loc. cit. supra* note 1.

<sup>4</sup>The term "apparent authority," as it has been used, has been justly criticized. Very likely it should be abandoned, although one of the chief objections to it disappears when a clear distinction is made between "authority" and "power." If the term "authority" does not always connote "power," as in (g) *supra*, there may also be cases of "apparent authority" without any legal power.