

OUTLINES OF THE LAW OF AGENCY

MECHEM (3d Ed. 1923)

§120 Ratification in the law may be briefly defined as the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to be his agent.

§121 ...

Ratification operates as a subsequent act of approval.

...

§122 As a general rule, a person may ratify the previous unauthorized doing by another in his behalf, of any act which he might then and can still lawfully do himself, and which he might then and can still lawfully delegate to ~~each~~ ^{SUCH} other to be done.

§123 Ratification can not render valid acts which were void when done, or acts which were then so far illegal in themselves that they could not then be authorized; but a person may ~~incur~~ ^{INCUR} liability by the ratification of an act which another has done in his behalf and as his agent, and which proves to be or to include an act of trespass or other tort merely because, while that act might lawfully be done under some circumstances, it was not lawfully done in the case in question.

§127 As a general rule any person who is competent to do an act when it was done and who is still competent to do it, may ratify its unauthorized doing by another as his agent.

§130 An agent cannot ratify his own act... but one agent may ratify the act of another agent of the same principal, when the agent who ratifies has himself general authority over the act ratified.

§143 It is a general rule that the act of ratification must be of the same nature as that which would be required to confer authority to do the ratified act in the first instance.

§145 Ratification may be effected by subsequently conferring an authority ~~antidating~~ ^{ANTE-DATING} and sufficient to justify the act to be ratified, where that appears to have been the intention.

§146 Inasmuch as authority for the doing of most acts may be ^{CONFERRED BY} ~~parol~~, the ratification of most acts may be effected by parol.

§151 Another common method of ratifying (in addition to accepting benefits) is by bringing suit based upon, and for the enforcement of the act. This, when done with knowledge of the ~~effects~~ ^{FACTS}, ~~shows~~ ^{SHOWS} an intention to take the benefits of the act, and the burden must be taken with the benefits.

§154 The general effect of ratification under the conditions stated is...that the act becomes the act of the principal, with its benefits and burdens, from the beginning, as though he had previously authorized it to be done;....

§159 As between the principal and the party with whom the agent dealt, the effect of ratification is to ~~give~~^{GIVE} the other party the same rights against the principal which he would have had if the act had been previously authorized.

§160 The ratification of the act by the principal, being equivalent to prior authority, will operate to cut off any remedies which he might otherwise have had against the other party based upon want of authority, as, for example, the right to ~~recover~~^{RECOVER} property or money received by the other party from the agent.

§163 A person who assumes to deal as agent with third parties in matters concerning which he has no authority, incurs in many instances an individual liability to the person so dealt with. As between such other party and the agent of a disclosed principal, the effect of the ratification in contract cases is ordinarily and if effected while ^{THE} situation remains unchanged to release the agent from liability to the ~~action~~^{OTHER} party for having made the contract without authority; and it gives the agent the same rights against the other party which he would have had if the contract had been previously authorized.

§164 But in tort, the rule is different since agency usually is not a defense to a tort. The ratification by the principal makes him liable also for the tort to the third person but it does not release the agent from his liability to the third person for his participation in the tort. Both the principal and the agent are ^{HERE} ~~over~~ after liable. It is no defense to the agent when sued in tort that he acted as the authorized agent of another in committing it.*

* (1) Stephens v. Elwall (1815) 4 Marle and Sel 259, Mecham's Cas. 226; Delaney v. Rochereau ;(1882), 34 La. Ann. 1123, 44 Am. Rep 456, Mecham: Cos 514; Osborne v. Morgan (1881) 130 Mass 102, 39 Am Rep 437 Mecham Cas. 518; Miller v. Wilson (1896), 98 Ga 567, 25 S. E. 578, 58 Am. St. R. 319.

RESTATEMENT (SECOND) AGENCY (1958)

§
§2

MASTER, SERVANT, INDEPENDENT CONTRACTOR

- (1) A MASTER IS A PRINCIPAL WHO EMPLOYS AN AGENT TO PERFORM A SERVICE IN HIS AFFAIRS AND WHO CONTROLS OR HAS THE RIGHT TO CONTROL THE PHYSICAL CONDUCT OF THE OTHER IN THE PERFORMANCE OF THE SERVICE.
- (2) A SERVANT IS AN AGENT EMPLOYED BY A MASTER TO PERFORM SERVICE IN HIS AFFAIRS WHOSE PHYSICAL CONDUCT IN THE PERFORMANCE OF THE SERVICE IS CONTROLLED OR IS SUBJECT TO THE RIGHT TO CONTROL BY THE MASTER.
- (3) AN INDEPENDENT CONTRACTOR IS A PERSON WHO CONTRACTS WITH ANOTHER TO DO SOMETHING FOR HIM BUT WHO IS NOT CONTROLLED BY THE OTHER NOR SUBJECT TO THE OTHER'S RIGHT TO CONTROL WITH RESPECT TO HIS PHYSICAL CONDUCT IN THE PERFORMANCE OF THE UNDERTAKING. HE MAY OR MAY NOT BE AN AGENT.

COMMENT

a. Servants and non-servant agents. A master is a species of principal, and a servant is a species of agent. The words "master" and "servant" are herein used to indicate the relation from which arises both the liability of the employer for the physical harm caused to third persons by the tort of an employee (see §§219-249) and the special duties and immunities of an employer to the employee. See §§473-528. Although for brevity the definitions in these Sections refer only to the control or right to control the physical conduct of the servant, there are many factors which are considered by the courts in defining the relation. These factors

which distinguish a servant from an independent contractor are stated in Section 220. The distinction between servants and agents who are not servants is of importance for the purposes of the Sections referred to. Statements made in the Restatement of this Subject as applicable to principals or agents are, unless otherwise stated, applicable to masters and servants. The rules as to the liability of a principal for the torts of agents who are not servants are stated in Sections 250-267, and those with respect to his liability in tort to such agents in Sections 470-472. The duties of servants to masters and their liabilities to third persons are in general the same as those of agents who are not servants.

RESTATEMENT (SECOND) AGENCY (1958)

§217 WHERE THE PRINCIPAL OR AGENT HAS IMMUNITY OR PRIVILEGE

COMMENT

a. Privileges. "Privileges" denotes the fact that conduct which under ordinary circumstances subjects the actor to liability, under particular circumstances does not subject him thereto. See the Restatement of Torts, §10. A privilege may result from the consent of another, such as privilege to enter land or the privilege of an agent to act for the principal, or it may be created by the law, irrespective of consent for the protection of the rights of the individual or of the state, such as the privilege to act in self-defense, to arrest or abate a public nuisance or to enjoy the services of a public utility. Most of these privileges are delegable.

b. Immunities. Immunities is a word which denotes the absence of civil liabilities for what would be a tortious act but for the relation between the parties or the status or position of the actor. . . . Illustrations of immunities created by a position are the immunities of a legislator or judge in the prosecution of official business. In such situations although the conduct is wrongful and can be punished criminally, prevented by force

or punished by impeachment proceedings, the conduct is not the basis for a civil action. Immunities, unlike privileges, are not delegable and are available as a defense only to persons who have them. Thus, although a child may not have a civil action against his father for an excessive beating assuming under law of pertinent state child may not sue parent in tort/ he has one against a servant who administers such a beating at the command of the father. See §347.

RESTATEMENT (SECOND) AGENCY (1958)

§219 WHEN MASTER IS LIABLE FOR TORTS OF HIS SERVANT

- (1) A MASTER IS SUBJECT TO LIABILITY FOR TORTS OF HIS SERVANTS COMMITTED WHILE ACTING IN THE SCOPE OF THEIR EMPLOYMENT.
- (2) A MASTER IS NOT SUBJECT TO LIABILITY FOR THE TORTS OF HIS SERVANTS ACTING OUTSIDE THE SCOPE OF THEIR EMPLOYMENT, UNLESS:
 - (a) THE MASTER INTENDED THE CONDUCT OR THE CONSEQUENCES, OR
 - (b) THE MASTER WAS NEGLIGENT OR RECKLESS OR
 - (c) THE CONDUCT VIOLATED A NON-DELEGABLE DUTY OF THE MASTER, OR
 - (d) THE SERVANT PURPORTED TO ACT OR SPEAK ON BEHALF OF THE PRINCIPAL AND THERE WAS RELIANCE UPON APPARENT AUTHORITY, OR HE WAS AIDED IN ACCOMPLISHING THE TORT BY THE EXISTENCE OF THE AGENCY RELATION.

RESTATEMENT (SECOND) AGENCY (1958)

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SCOPE OF EMPLOYMENT - GENERAL

- (1) CONDUCT OF A SERVANT IS WITHIN THE SCOPE OF EMPLOYMENT IF BUT ONLY IF
 - (a) IT IS OF THE KIND HE IS EMPLOYED TO PERFORM
 - (b) IT OCCURS SUBSTANTIALLY WITHIN AUTHORIZED TIME AND SPACE LIMITS
 - (c) IT IS ACTUATED, AT LEAST IN PART, BY A PURPOSE TO SERVE THE MASTER, AND
 - (d) IF FORCE IS INTENTIONALLY USED BY THE SERVANT AGAINST ANOTHER, THE USE OF FORCE WAS NOT UN-EXPECTABLE BY THE MASTER.
- (2) CONDUCT OF A SERVANT IS NOT WITHIN THE SCOPE OF EMPLOYMENT IF IT IS DIFFERENT IN KIND FROM THAT AUTHORIZED FAR BEYOND THE AUTHORIZED TIME AND SPACE LIMITS, OR TOO LITTLE ACTUATED BY A PURPOSE TO SERVE THE MASTER.

RESTATEMENT (SECOND) AGENCY (1958)

§231

CRIMINAL OR TORTIOUS ACTS

AN ACT MAY BE WITHIN THE SCOPE OF EMPLOYMENT ALTHOUGH CONSCIOUSLY CRIMINAL OR TORTIOUS.

COMMENT

a. The fact that the servant intends a crime, especially if the ^{Crime} is of some magnitude is considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or ^{or} foreseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpected but in general are in nature different from what servants in a lawful occupation are expected to do.

.... A gardener using a small stick in an assault upon a trespassing child to exclude him from the premises may be found to be acting within the scope of the employment; if however the gardener were to shoot the child for the same purpose, it would be difficult to find the act within the scope of employment. So if a servant is directed to use any lawful means to overcome competition, the bribery of employees of the competitor, or the circulation of malicious stories, might be found to be within the scope of employment, while the murder of the competitor, although actuated solely by zeal for the master would not be.

RESTATEMENT (SECOND) AGENCY (1958)

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§247

DEFAMATION

A MASTER IS SUBJECT TO LIABILITY FOR DEFAMATORY STATEMENTS MADE BY A SERVANT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT, OR, AS TO THOSE HEARING OR READING THE STATEMENT, WITHIN HIS APPARENT AUTHORITY.

COMMENT

a. If the scope of employment of a servant includes the making of statements concerning others which he believes to be true and privileged, the master is subject to liability for untrue and unprivileged defamatory statements made by the servant concerning others, if the statements are otherwise within the scope of the servant's employment. . . .

RESTATEMENT (SECOND) AGENCY (1958)

§345

AGENT EXERCISING PRIVILEGES OF PRINCIPAL
AN AGENT IS PRIVILEGED TO DO WHAT OTHERWISE WOULD
CONSTITUTE A TORT IF HIS PRINCIPAL IS PRIVILEGED TO
HAVE AN AGENT DO IT AND HAS AUTHORIZED ~~AN~~ ^{THE} AGENT TO
DO IT.

COMMENT

a. One who is not privileged to ^{act on} ~~all~~ in his own behalf can exercise a privilege held by others if acting on their account and within the limits of their privilege. Thus, an agent who has no privilege of his own to enter a particular tract of land can properly do so upon his principal's business if his principal is privileged to have the agent so enter. A privilege may, by its character or by the terms upon which it is granted, be capable of exercise in person only, or it may be capable of exercise also through a servant or agent. The privilege of the principal may have been created by common law or by statute, or it may be the result of a private grant. In any case, the purpose for which the privilege exists is considered in determining whether or not it can be exercised by an agent and, if created by statute or private grant, the language used in creating it. Compare Section 217, a similar Section dealing with the liability of the principal where he or his agent has a privilege.

ILLUSTRATION

1. T, the owner of Blackacre, grants P a right of way over it, the grant stating that it is for horses and wagons. P's servant, A, drives across Blackacre on P's business. A is privileged to do so.

COMMENT

b. To be protected by the privilege, the agent must act for the purpose for which the privilege is given. See the Restatement of Torts §890. Thus, an agent who is authorized to eject trespassers is liable to one whom he ejects only because the intruder will not pay a bribe. See also §348, Comment d, which states that an agent selling his principal's property is not entitled to a seller's privileges of deception if the agent is selling for his own purposes.

ILLUSTRATION

2. P believes reasonably that T has committed a theft, and in a reply to a question by the prospective employer of T directs A to write a letter stating his belief. A has no knowledge or belief as to T's guilt. A is privileged to write the letter, signing P's name, or his own name as agent for P.

COMMENT

c. If an authorized agent would be privileged to act, one without authority and therefore without privilege is relieved from liability for

doing the act if subsequently thereto the one for whom he purported to act ratifies the act. See §360.

8 WIGMORE, EVIDENCE (McNAUGHTON ED.)

§2367(a) There is a doctrine of substantive law that the chief executive and subordinate executive officers are in some respects exempt from liability for torts of violence and defamation. (2368)

§2368(a) Tortious non-liability of the executive. The chief executive and subordinate executive and subordinate executive officers have unquestionably some exemptions from liability for harm done in the course of official duties. A sheriff for example is not liable for the death of a person hanged by him in pursuant to a lawful order of execution.

In general, two classes of officials are distinguished in applying this principle. A subordinate or ministerial official--i. e., one who acts under the orders of a superior official--is absolutely exempt from liability if the harm done by him is done solely in implicit obedience to an order lawful upon its face. Conversely, he is not exempt if he varies from the order although in good faith. A superior official--i. e., one who is given by law a discretionary authority and exercises his judgment independently and without looking higher for orders--is exempt from liability because the nature of his responsibility requires that he should exercise his judgment free from apprehension of the harassment of subsequent litigation.

Some courts exempt such an official only when he has acted in good faith. But sound policy requires an absolute exemption. This is not in order to protect the malicious official but in order that the upright official may be exempt from the burden of defending himself from a charge of malice:

Harlan J., in Barr v. Matteo, 360 U.S. 564, 571 (1959):

The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties--suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

RESTATEMENT (SECOND) AGENCY (1958)

§347 IMMUNITIES AND STANDARD OF CARE OF PRINCIPAL

(1) AN AGENT DOES NOT HAVE THE IMMUNITIES OF HIS PRINCIPAL
ALTHOUGH ACTING AT THE DIRECTION OF THE PRINCIPAL.

(2)

COMMENT ON SUBSECTION (1)

a. Immunities exist because of overriding public policy
which serves to protect an admitted wrongdoer from civil liability.
They are strictly personal to the individual and cannot be shared.

ILLUSTRATION

1. A, the driver of a municipal fire wagon, drives recklessly
to a fire, injuring T. Aside from statute, A is liable to T, although the
municipality is not.

RESTATEMENT (SECOND) AGENCY (1958)

§343

GENERAL RULE (TORTS)

AN AGENT WHO DOES AN ACT OTHERWISE A TORT IS NOT RELIEVED FROM LIABILITY BY THE FACT THAT HE ACTED AT THE COMMAND OF THE PRINCIPAL OR ON ACCOUNT OF THE PRINCIPAL, EXCEPT WHERE HE IS EXERCISING A PRIVILEGE OF THE PRINCIPAL, OR A PRIVILEGE HELD BY HIM FOR THE PROTECTION OF THE PRINCIPAL'S INTERESTS, OR WHERE THE PRINCIPAL OWES NO DUTY OR LESS THAN THE NORMAL DUTY OF CARE TO THE PERSON HARMED.

COMMENT

a.

b. An agent who enters the land of another, defames or arrests another, or does any similar act, is not excused by the mere fact that he is acting as agent. If, however, a reasonable belief in the existence of the fact causes the act to be privileged, and a command by the principal gives the agent reason to believe in the existence of such facts, such command gives him a privilege to act.

RESTATEMENT, TORTS

§10

PRIVILEGE

" " *THIS*
(1) THE WORD PRIVILEGE IS USED THROUGHOUT ~~THE~~ RESTATEMENT OF THE SUBJECT TO DENOTE THE FACT THAT CONDUCT WHICH, UNDER ORDINARY CIRCUMSTANCES, WOULD SUBJECT THE ACTOR TO LIABILITY, UNDER PARTICULAR CIRCUMSTANCES, DOES NOT SUBJECT HIM THERETO.

(2) A PRIVILEGE MAY BE BASED UPON

(a) THE CONSENT OF THE OTHER ~~A~~FFECTED BY THE ACTOR'S CONDUCT, OR

(b) IRRESPECTIVE OF THE OTHER'S CONSENT,

(i) THE FACT THAT ITS EXERCISE IS NECESSARY FOR THE PROTECTION OF SOME INTEREST OF THE ACTOR OR OF THE PUBLIC WHICH IS OF SUCH IMPORTANCE AS TO JUSTIFY THE HARM CAUSED OR THREATENED BY ITS EXERCISE, OR

(ii) THE FACT THAT THE ACTOR IS PERFORMING A FUNCTION FOR THE PROPER PERFORMANCE OF WHICH FREEDOM OF ACTION IS ESSENTIAL.

COMMENT:

a. The existence of a privilege whether consensual or irrespective of the other's consent prevents an act or omission which otherwise would be tortious from so being and, therefore, protects the actor from even being subject to liability. * * *

b. * * *

c. There is an important^t difference between ~~that~~^{those} privileges which are based on ~~the~~^{the} consent of the person affected by the actor's conduct and those which are created by law irrespective of the other's consent.

The latter type of privilege must always be pleaded and proved by him
who ~~pleads~~^{SEEMS} thereby to destroy the seeming tortious character of his conduct
and ~~to~~^{So} protect himself from being subject to liability. * * *