

THE LEGAL ASPECTS OF BUSINESS

by
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When Colonel Jordan asks me to speak for an hour on such a subject as the "Legal Aspects of Business" I know he does it with a very merry twinkle in his eye. He knows it can't be covered. So I take that twinkle as an indication that it is all right to cover just a part of the subject. I always have in mind the fact that some of you come here year after year in one capacity or another and therefore I can take some part of this great subject each year. I have for the last few years been following a line that gives unity to the aspects of the subject at least.

Several years ago I took up this general question "Is the Government a person?" That sounds like "Are parents people", but it is really a very serious question. We speak of the Government as a legal person and thereby avoid the necessity of doing a great deal of thinking. That makes the Government subject to the ordinary laws and means that the law of contracts applies to Government activities. The Government is just one person; one party to a contract. It means that you can go into the Law Digest and take any branch of law, the law of trusteeship, etc., and just substitute the Government for any person, and the Government can be a trustee or a beneficiary of a trust. It means that in the law of sales all you have to do is think of the Government as a person who buys or sells and you have a ready-made law for Government purchases and sales. It means that you can put the Government in the position of a stockholder in a corporation and apply what it says about people to the Government. That is quite convenient, it is so convenient

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that it is undesirable to destroy that picture by saying this fiction does not correspond to realities, and yet we have to stop somewhere. We cannot allow the fiction to run riot. We must make a distinction between the Government as a contracting party and a private citizen as a contracting party; between the Government as a buyer and the private citizen as a buyer.

That general theme is the theme to which I have devoted my talk for the last few years. One year I devoted the hour to the subject of contracts in general; another year I devoted my time to that particular phase of the subject of contracts that represents the Government as a purchaser, and today I should like to devote the time to a careful consideration of the extent to which the law of agency can apply to the Government; the extent to which an officer may be said to be an agent and the limit beyond which it is unsafe, undesirable, and perhaps even impossible to take the law of agency and say it is the law of officers.

What is an officer? That may seem so obvious to you as to cause you to smile, yet it is very difficult to answer. It is type of question that examiners for various types of licences like to use. The first question a man has to answer when he wants to be a barber in a country village is, "what is a barber?" It is difficult to answer. What is an officer technically in the eyes of the law? How do you distinguish an officer from a mere agent of the Government or from an employee or civil servant or independent contractor, or trustee, or any employee of a concern such as a building corporation controlled by the Government? It

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is necessary to make these distinctions for a great many reasons.

In the first place statutes are passed that apply to officers and a whole army of people claim either that they come within the term of this statute or that they do not.

For example, there is a law that exempts employees and officers of the state from Federal taxation and Federal officers from state taxation and the question arises as to whether the school teacher or teacher in a state college, or employees in the street cleaning department, or people who work only for the city, are employees or officers of the Government who are exempt from taxation by law. Or, there may be laws with reference to pensions or laws with reference to rights or duties or burdens of certain kinds of employees. For example, in most cases where the Government has limited hours of labor or imposed special duties on employees the question arises as to whether they come within a particular category or not.

There are other reasons why we have to make this distinction - find out who is an officer. Their powers are different. An agent has quite extensive powers to make contracts; a servant has no powers to make contracts for you but when he does your work he may involve you in liability for that work. Is an officer capable of binding his Government in the way that an agent can or does he bind it in a different way? Can an officer involve his Government in other kinds of liability than contractual liability? A Government can work through an agent but when it works through an officer I shall intimate to you the results are different. So it becomes necessary to know whether it is acting through you as an agent or an officer.

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- First let us look at the criteria by which the Courts have made the distinction. I find seven of them listed in different law books. Perhaps some of them overlap and perhaps some ought to be subdivided. This is not meant as a scientific classification. I shall reject a lot of them any way, but I should like to go over them with you.

The first criterion or test that has been put forward by the courts is the official designation. That sounds like common sense. If the statute says "the following officers shall be appointed" or the statute under the general head of officers authorizes the assignment or selection of certain persons and describes them as officers or gives them a name without using the word "officers" - calls them commissioners, it sounds reasonable that they are officers. If there is no such designation, if the powers under which the person is appointed simply allows the Government to act and then the Government selects its own tools or instruments or agents, we have not an officer. The only trouble is that when Congress or any other legislature draws its acts it is not thinking of this distinction and as a result is frequently careless. It gives designations to certain people and fails to give designations to others under conditions where it is quite obvious that its giving or failing to give them has nothing to do with the case. If, for example, one statute says that somebody shall be appointed with the following duties to inspect mines or examine candidates, and another statute with the same object in view says "there shall be appointed an inspector of mines" or "an examiner of such and such candidates", it is almost accidental that the wording

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gives one a designation and the other none. We do the best we can with this preliminary test but I am sure we cannot go very far with it. There is another reason why we can't rely on it. One man today may be acting as an agent and tomorrow may be acting as an officer, he may be assigned or detailed to a particular duty or service which is of the other nature.

The second test that has been put forward by the courts in these cases where they have to make a distinction, is the test of tenure, and that is a good test as far as it goes. If a man is called in for one particular job it does not look as if he were an officer - even if that particular job lasts quite a long time. If a man has an office that runs for life, or good behavior, or for a certain number of years, or through an administration, or the pleasure of the appointing officer, he begins to look like an officer. We can go back a hundred years to a case in which Chief Justice Marshall used this test and I shall read a quotation to show you that it is not merely useful but that it is vague. He says:

"If a duty be a continuing one which is confined by rules prescribed by the Government and not by contract but if it is a continuing duty

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That is good common sense when you are confronted with deciding whether A is an officer or not. Tenure is helpful, but it does not conclude the matter. There may be an agent of long employment; there may be an officer whose term is short and specific.

The third test that has been put forward is the mode of compensation. That is not a very good test at all; it suggests the late war-

time story of the man whose son was drafted into the Army and he was asked whether the boy had gotten a commission. He said "No, he gets a straight salary". I suppose you can get a straight salary or a commission and be an officer or not be an officer. It offers a little light on the distinction between the independent contractor and the officer. You may say that the functions of the independent contractor and the officer make that clear; they don't always. Many things that the Government in one war or period does through private contract it learns to do itself through its own officers at another period. There has been continual progress in that direction and in one of our previous discussions I raised the question as to where the line should be drawn. What can be best done by contract and what through officers? Without attempting to answer that question, can we take the mode of compensation as the absolute criterion and resort to it as a final indication of what a person is at a particular time - the presumption being that if he is paid in a lump sum and is permitted to make private profit out of it in accordance with his skill - that person does not look like an officer. The idea of office excludes the idea of private property.

The fourth test brings us a little nearer to realities. It is the mode of the creation of a position. If it is made by Constitution or legislation, and nowadays we have to add Executive Orders and Administrative Legislation, and the duties are prescribed and a man is appointed to do the particular job so described it looks as if he holds an office. If, in the determination of what his duties shall be, there is a two-sided arrangement in which he has something to say as to what

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his obligation shall be, and the other side has something to say so that the net result is a contract, it looks as if he is an officer. That was in Marshall's mind in the decision we read, where he said as to this continuing duty "it is defined by rules described by the Government and not by contract". I don't want you to feel, however, that this is an easy test to apply. It is not. In the first place you can make a contract even if the person who takes the job has very little to say as to its terms. You can define by your specifications of one kind or another precisely what is wanted. You offer the opportunity to a man to take this job and he accepts. It is still a contract even though there was no discussion of terms and no choice given to the man except to take it or leave it. Furthermore, contracts nowadays are apt not to be involved results of haggling. The standardized contract is present in every large business. It is present even in every small business if we analyze what takes place in our transactions, and it certainly is present in Government business. You have a standardized contract every time you buy or sell anything. The contract you make when you go into a shop and buy a hat is the entire sales code of the state, and that may be seventy-five pages of fine print - all the terms as to what is warranted, what is the right of the disappointed buyer, etc. They are there in spite of the fact that you have said little or nothing. The standardized contract is a very important thing in our lives. It is the one thing that makes it possible for us to do as much business as we do; the Government relies on standardized con-

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tracts to a great extent. There is a bill pending now (there always are some pending, and a few trickle through) dealing with Governmental contracts. You are familiar with that particular problem in the Army, especially as applied to emergency situations. The fact that your contract is standardized may make the situation look very much like an office; furthermore, there may be a statute that reads very much like the duties of an office. The statute defining the duties of one who paves the streets may read on and on for pages in the course of which the draftsmen were not thinking of the difference between having this done by an officer or employee of the Government or having it done by an outside contractor. The duties of ~~xxx~~ architects may only describe those employed casually by the Government so that by reading the statute and finding out how the duties were defined you cannot say that this particular architect in a Government job is or is not an officer.

In the case of the Army the matter is a little simpler. If a man is an officer to begin with and then is appointed to supervise a job as architect the probability is that he does not lose his status as an officer, and if they call in a man who is not in the service to do the same job the probability is he does not become an officer.

That leads me to the fifth test - the dignity and formality of the appointment; the giving of a commission in the Army; the administration of an oath of office; the requirements of bond, or some other formality; the listing of a man in certain official lists; the giving of certain rights and prerogatives; the uniform; and various other badges of office. These things help externally to make a sharp distinction

between the man vested with an office and the man who is not. In the Army there is a distinction between the civilian and military personnel which is understood. There is a certain formality and dignity accompanying the giving of status to office. It is a practical distinction yet it leads us into situations where it is hard to say whether we have or have not enough of the essential formality to make an office out of a position. Take the school teacher for example. is he an officer? Well, they are trying to make officers out of us by administering an oath. I wonder if that would mean we would be exempt from taxation, etc. , if we become officers. I doubt it very much. There are oaths administered for other types of persons who clearly are not officers of the state. Officers of corporations in many states take oaths - oaths authorized by law. No, this is not a perfect distinction. It is helpful and it is the distinction the man on the street thinks of first.

The sixth is rather a consequence from which we argue backwards rather than a means of making a distinction in the first place. It is known as liable for malfeasance or nonfeasance. If a man is an officer he is liable for certain things and if he is not, he has not that liability. A servant or agent is generally answerable for his conduct to his employer; he has no relations with a stranger. If I hire a man to take care of my sidewalk and he utterly fails to do anything and my sidewalk is in such shape that someone is hurt, certainly he cannot proceed against my hired man; he proceeds against me. On the other hand, a public officer may have a duty imposed on him and that duty is not limited so that he is answerable only to A or B or the state; it may be imposed so that he is

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answerable to everybody and therefore failure to perform that duty may make him liable. We have to decide first whether he is an officer and then it follows that he is liable to this one or that one.

To give you an illustration let us take a case I think I mentioned last time. It was a case decided by the State of New York. In it some public accountants had made up a report, including a balance sheet, for a department store. The account was inaccurate, it was admitted to be, but a bank relied on it and advanced money to the store. By reason of the inaccuracy the bank was misled and eventually was unable to collect its money. The bank sued the accountants. The question then was whether the accountant was a public officer with a duty to all comers and liable for his mistakes, or whether ^{the} accountant on the other hand, was to be looked upon as an employee of the store. When you determine that, the legal question is easy. If the accountant is nothing but a high class bookkeeper the stranger has no come-back against him. The stranger can fight with an employee as much as he wants. If the accountant, however, is not a bookkeeper, not an employee of the department store, but an officer on the outside, a certified public accountant, employed practically by the state and authorized to speak to whom it may concern, then the person concerned has a right to complain. It is argued that it is like a case that came up a hundred or two hundred years ago - the case of a public weighman. He got a fee from a person who brought coal or hay to the scale and had a certificate that the public weighman was appointed by the state and was to speak to all comers and anyone had the right to rely on it and expect the weighman to be responsible. That

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public weighman was sued and had to answer. He was an officer. But the Court of Appeals says that the Public Accountant is not an officer; he is public only in a sense that he serves any who employ him but when he is employed he is private. That was an unfortunate decision and we are hearing repercussions from it still. I think because of it certain lines were written into the Securities and Exchange Act - that any expert who gives out a statement with reference to these securities is responsible not merely to the person who paid him but responsible to all comers who thereafter rely on his statement. This Federal law has changed the decision to that extent in this one situation and I think we are likely to find other laws deliberately making some kind of ^{public} ~~an~~/officer out of an accountant. I think that this decision was a distinct setback in accountancy as a profession; I think it has made people less willing to rely on accountants' statements and it has led in many instances to new forms being used by banks who require accountants to address letters to them personally before they will rely on their statements. But the question behind this is whether he is a public officer. He certainly is on the evidence.

The seventh test seems to me to be the best; it is a study of the functions performed. Regardless of what a man is called, regardless of how long he holds office; regardless of whether he has dignity in connection with office, if he is doing the state's business he is an officer. If he is doing a different kind of thing, the kind of business which the state has only casually taken over but which is not a public



function in the ordinary sense, we had better keep him in the employees group. That is not an easy distinction to apply. In various generations people have thought it easy; this was a Government function and this was private. The question was raised two thousand years ago in the story of the coin used for the payment of taxation. The question was asked whose name was on the coin and the answer was "Caesar's". The solution of the problem was "Give to Caesar that which is Caesar's and to God that which is God's", and kept Church and State from flying at each other's throats. The only trouble was that there was warfare constantly over what was Caesar's and what was God's, and that borderline has been changing constantly. The whole history of law is one in which State and Church have fought. The whole field of marriage and divorce until 1857 was looked upon as a matter of the Church courts. In this country it was looked upon as a matter of the State much earlier. In most countries in Europe the whole field of inheritance was looked upon as a Church matter, the inheritance of personal property, at least, and we have inherited ecclesiastical procedure in this country for our probate courts. Libel and slander were looked upon not as crimes but as sins - matters for the Church. This line is shifting, but that is not all. The line between the functions of the state and the functions of private business - another one of the borders of the limits of state action - is shifting rapidly, materially, and dangerously today.

So when we speak of a particular function and say "this man

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is performing a state function" somebody may say "no"; the state may be making uniforms or manufacturing this or that but that does not make it a state function. The man who is actually serving in the canteen is performing a private function, and there is room for dispute. The matter reaches silly proportions which we distinguish between two types of functions of a city, as we do in many states. If a city inflicts an injury upon you in a Governmental capacity there is no redress except to go ~~to~~ to the legislature and beg. If it inflicts an injury in a private business capacity then you can sue. If you go to the City Hall to pay your taxes and a part of the ceiling falls on you, you have no redress. If you are paying your water rent, though, and the ceiling falls on you, you do have a perfect redress. If the patrol wagon knocks you down as you are crossing the street you have no redress, but if the garbage collection wagon knocks you down, you have.

There is no easy line drawn between the two functions yet that looks like the best and most hopeful basis for distinguishing between the man who acts for the Government as an officer and the man who is acting for the Government in some other capacity.

The English had a curious way of looking upon office. They looked upon the office that a man held not at all as a contractual relation of the state, and to that extent we follow them. It is something like a contract, yet it is not. The English look upon it as property; we don't look upon an office as property; we have no hereditary offices; none that

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can be sold. Office is too personal a matter to be looked upon as property; we don't look upon it as contract. So, the question is what is the relation between the man who has office and not mere employment, and the state. The consequence of saying it is not property and not a contract is obvious if you consider our Constitution for a minute. Under our Constitutions, State and Federal, states cannot pass laws confiscating property and impairing the obligation of contract. If an office is a contract then once a man has the office the state government has no power to put an end to it. The Federal Government, according to the fine spun theory of the Supreme Court, has no power to put an end to such a situation but you can't do anything about it if it sees fit to do so. In the state government you can go into the Federal courts and overrule their decisions.

As to officers the situation is different. The state can abolish any unnecessary office it cares to. If you are doing any particular thing in a state, making roads, or acting as architect, or selling pencils on the basis of a contract, you have certain constitutional protections. If you are doing the same things as a special agent of the Government you may find the legislature abolished your office. That is not the same question as to whether the President can terminate your tenure of office. It may be that Congress says the President can terminate it or that he cannot. That reminds us of a recent decision wherein it was found that the President did not have the power to terminate office. Congress itself can, however, abolish any office it sees fit that it has created. It is not a contract that you have then, when you receive an office; it is not property; what is it? The answer is that it is a special status given you,

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a special legal status; that does not make a new kind of thing out of it, that is making an old thing out of office. Most of our life today is controlled by the contract idea but most of life was controlled in the past by the status idea. That has been neatly stated by Sir Henry _____ and others in some such form as this: "The progress of our ^{law} ~~life~~ has been generally in the direction from status to contract". Officers represent one instance of keeping status alive. Let us say that in plain English: The most conservative part of law perhaps is family law. Family relations are in the main still controlled by states, your obligations to your wife and children and their obligations are not given to them because they contract to have them, and they cannot be modified very much by contract. The law says what are the duties and rights of a husband and the duties and rights of a wife. If you decide that you want to marry and have a different set of rights and duties and read them into the marriage contract I will tell you right now in advance that your arrangement is void. The marriage would probably stand. That law is a status law; you are free to enter it or not but once you enter it the particular rights and duties are dictated by law. That is not true in most other relations.

One hundred or two hundred years ago the relation between landlord and tenant was one of status; employer and employee in a domestic system of production was status; two hundred years ago it was a simple question to ask what are the duties of master and servant. You could look into a law book and find it. Today you can't. Two hundred years ago it was possible to argue who should repair the roof, the landlord or tenant, and the answer was there. Today it is not. The lawyer today must go back to what is in the contract; whether you have a lease or an oral under-

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standing; and the terms have to be dug out on the basis of past experience and relations of the landlord with other tenants, etc., representations made, conversations had, etc. What is the lawyer trying to find out? What is the contract.

So many of our relations have changed their status but contract to office has not. Agency has become pretty much a matter of contract but there is still something of status in the law of agency. It is still inaccurate to say that the relation between principal and agent is just exactly what the parties want to make it. To a great extent, yes; but I can prove to you very quickly that it is not merely the contract. There are some people who by law cannot make binding contracts. In some states married women cannot make binding contracts except with reference to certain things; children cannot make them; they are not binding. Certain other types cannot make them - maybe an alien enemy. But yet most of these who cannot make contracts can bind agents or can be agents. If you want to make a boy ten years old your agent he can tie you up in a contract if he is authorized to do so. The married woman who cannot make a contract for herself in some states can, if she is authorized to act as agent, make perfectly binding contracts for her husband; or she can bind an agent to make a contract for her. So when you appoint an agent it is not making a contract. There does not have to be consideration or these other formalities. If I simply say to you "I authorize you to act for me" and you act for me I am bound by your act because you were my agent, whether you were paid or not. If you were not paid you could throw up the job and decide you had changed your mind. I would ~~not~~ have no contract. But if you begin to act

and stop in the middle, that is another story. The agent has contracted for his principal that is not exactly what the principal wants. I may have told my agent "Don't do this particular thing." Sell my horse but don't warrant it." The agent disobeys me, and gives a warrant. Am I bound by his warrant? Yes, for that is within the apparent scope of most agents' authority. It has been held that the right to sell looked as if it carried with it the right to warrant. The stranger could assume that the agent had that power. He got that power by virtue of being an agent.

Servants can get you into a mess of trouble by being disobedient and there we come across one of those fine distinctions of the law that look all right on paper but lead to endless trouble when we apply them. He can bind you when he acts within the actual scope of his authority even though he does the thing he is doing in the wrong way. If he is doing the wrong thing, if he is off on a frolic of his own, and not attending to your business you might defend yourself and say you have nothing to do with it; but if he is doing your work and hurts somebody, even though he is doing it in the wrong manner, it is your work and you are liable. There are two cases I should like to cite. They both came up in the same state - in the same city. In one case a man was waiting for his ticket in a railroad station and he was one of those nervous fellows; he had only thirty minutes to catch his train and there was a long line ahead of him. He began to call out very uncomplimentary things about the railroad and the baggage master and finally about the baggage master's ancestry. The baggage master kept quiet as long as he could. Finally the excited citizen jumped over the counter

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and made a bee-line for his valise. There was an axe on the wall with the legend under it "To be used only in case of fire". The baggage man thought the time had come to use it and he hit the man on the head. This man sued the railroad company. His allegation was that the baggage man was doing the right thing in keeping the space around the baggage clear but he did it in the wrong way. He thought the railroad company ought to pay. The railroad company contended no such thing; the baggage man was not doing the railroad company's work - he was fighting a battle of his own. It was answered by an appeal and upheld by high authority.

Let us compare the other case. In the other case a business college was the defendant. The story was something like this: after school hours the janitor was sweeping the room. The students had left some chewing gum around and he was muttering to himself. In the middle of the room was a table on which was a ladder and an electrician had climbed up on it to change some bulbs. He started whistling and the janitor got furious and pushed his mop against the leg of the table and the ladder fell with the electrician. The electrician sued the owner of the college saying a man doing work for them had knocked him down. The college said "no, he was not working for us when he did it. He was fighting a battle of his own". The conditions are the same but in fact there was a difference. In one case the man did the right thing in the wrong way and in the other he did the wrong thing. How many of you think in the case first the railroad company should be held responsible and how many think, in the second case, that the business

College is responsible? You are about evenly divided; that is a delicate balance. Actually the business college was held liable and the railroad company escaped liability.

You see how hard it is to apply one of these legal formulae no matter how sensible it sounds. Just one other thing I want to say about this law of agency. I used the expression "actual scope of authority" in talking about a servant who is doing your work and in making contracts. I use "apparent scope of authority" in speaking of one who acts for you as the man who warrants your lame horse to be sound. We don't care about the apparent scope of authority of the man who is sweeping the floor. Why this difference? There is some sense in it and I shall try to make you see it by suggesting the case which came up of a driver of a laundry wagon who happened to be both crooked and careless. This driver was careless and ran over someone. Actually, he was not working for the laundry as an agent. He was an independent contractor; he owned the wagon. The name "White Star Laundry" was on the wagon and the laundry tried to make it appear they owned it. The bills were in the name of the White Star Laundry; actually this man was an independent contractor as laundry drivers frequently are, and made his profit and paid wholesale rates to the laundry for the work they did. They packed the things up and made the bills out for him. This man ran over somebody with his own wagon and he had also made some rash statements to his customers. They had lost some laundry and he told them the company would pay for it. Let us see whether the laundry company is liable for his contractual /promise to pay. Yes, he is within his apparent scope of authority and

he appears to be an agent. They cannot go into court and say he is not; they have induced you to believe that he was. Can it go into court, however, when it is sued by a person knocked down by the wagon and say it is not their wagon? You cannot say "If I had not seen your name on the wagon I would not have stepped in front of it". You can say that if you had not seen their name on it you would not have made the contract. So, as a result of this inherent distinction there grows up this fundamental rule of agency which is not the rule that the principal is held according to appearance in torts and wrongs that have nothing to do with the contract; the employer is held only within the actual scope of authority.

Our fundamental problem in Government is this: To what extent are these rules and laws applicable to the Government as a person? Some say not at all. Agency is based on a legal fiction which says that when a man acts through his agent he acts himself. That is fiction; it is not true. Fictions should be used only when they serve the purpose of justice. To say a state when acting through a man is acting itself would be against public policy. There is no principle which says a state cannot come in and deny it gave the man authority. The state does give authority by public laws; there is nothing private or secret about it, and you, in dealing with the state as a private citizen are supposed to know the authority of the man you are dealing with and not to trust to luck or appearances; therefore this whole law of apparent authority that applies to agents or individuals does not apply to officers because they are publicly known.

What about acting within the actual scope of authority? Is the state responsible? A phase of that which is most interesting to you is perhaps whether the individual is responsible; whether the state is responsible depends on whether the state gives its consent to being sued. You can't sue the state without its consent and it has not given its consent to be sued for private wrongs; but can the individual be sued? That is more important for you to know. If the agent of a private corporation makes a misrepresentation no one is going to bother him. If you make a mistake when you are buying for the Government and misrepresent what the Government will do they can sue the Government and will probably try to hold you on your bond. If in acting on behalf of the Government you inflict injury the same question is raised. Here is a law on the liability of military officers to seize property. Specific applications are very hard. "A military officer in time of war

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That has a little "if" in it.

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That is terribly unsatisfactory. Can the soldier from a practical point of view stop to determine whether the order given is legal or not? Can any man in the military service resist an order because he thinks it is illegal? Practically, of course, no. The result is that we come across

some very distressing cases. If it were not that I hate to leave a source of worry with you I would recite my "Flying Fish" case in which a military or naval officer was held responsible after the war for acts he performed in the course of the war because somebody was able to get into civilian court and prove a flaw in the orders under which he acted. That is not a common occurrence but there is enough of it still left to be a constant source of danger where orders are out of the ordinary or usual routine.

You are also interested to know, perhaps, whether you have liability on contracts you make. If you have ordered something and it turns out that your authority to order it was defective, here again the law is in an uncomfortable state. " A military officer is not liable

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In other words, the military officer may find himself personally liable for having misrepresented his authority and having made a contract that he had no authority to make. There is this comfort: in nine-tenths of the cases the party dealing with him is just as thoroughly bound by the limitations of his authority as he is himself and presumes to know whether such authority exists. Whether it exists in the abstract is possible and the only reason he does not have it is because it was definitely and distinctly withheld against him, but the individual may still proceed against that officer.

To sum up this rambling story I go back to my question: to what extent can we take this book on the law of agency and say the same applies to Government employees and particularly to Government officers?

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We began with the theory that it applies so far as possible, as I said when I began to discuss it some time ago. It is highly desirable to start out with the assumption that the Government is a person and as such the law as to persons applies. The Government cannot be held to have authorized something on the basis of appearances. If you want to rely on the authority of the man acting on behalf of the Government you had better find out what his authority is. Second, the Government cannot be looked upon as entering into a permanent relation with its officers. When we determine that a man is an officer by these difficult tests that man has a status and the details are to be looked for not in his commission, not in the private paper he holds but in the public law. Third, a certain amount of protection goes with that status; a certain amount of presumption of regularity goes with it. On the other hand, a certain amount of public duty goes with it which could not exist in the ordinary case of hiring a man as an agent. Fourth, a distinction must be shown somewhere among the different jobs we do for the Government. It won't do to say everybody who does anything for the Government is an officer. It is a distinct position - a special position. Most of the employees of the Government in the long run must remain more like employees of business than like special officers through whom the Government acts and as the Government's role in business increases more and more all those who work for it must be looked upon as private agents. In some of its recent undertakings the Government has something like a wartime situation in having the jobs done not through bureaus but through corporations it owns and controls. The employees of these corporations are ordinary servants.

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The Government could exempt them from liability but examination of the statutes reveals that in general the Government has not seen fit to exempt those corporations. In other words, if the corporation that sells stoves for the T.V.A. injures you the ordinary rules and regulations applying to private corporations apply.

All during my study of officers my respect for an office has increased and I feel it is proper in closing not only to mention to you the dignity of the office you hold but to congratulate you as well as to warn you on the distinction.

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Q - As an agent or officer of the Government I may send out proposals for some work for the Government such as the delivery of railroad ties. These come in and for some reason or other I fail to accept the lowest bid; I accept the next one. The case comes up to the Comptroller and he decides I should have accepted the lowest bid and decides that the contractor shall get no more than the lowest bid. What redress has that contractor?

A - None; he has no redress at all because he is supposed to know all the rights and duties of himself and of the Government - supposed to know that an officer is merely a mouthpiece and has no power to bind the Government. The case would be likely to drag on for months, but the easiest way to make it clear is to say that.

Q - With reference to your remarks concerning the White Star Laundry wagon: in Baltimore they have a taxicab concern, all of the cabs of which are individually owned. It is the Diamond Cab Company

and the company ~~has~~ an organization gives you public liability and to protect itself it has insurance. If you are injured by one of these cabs do you collect from the company or is the driver responsible?

A - You have two situations. One person is induced by this representation that they are responsible to get into the cab. That person certainly has redress against the cab company, but he can still sue the owner if he wants to. Then let us look at the situation of the man who is walking across the street and is hit by a cab owned by John Smith but which has the name of the Diamond Cab on it and the appearance of being owned by them. Following out the rule I laid down he has no redress against the Diamond Cab people. The representation or benefit of liability does not come to him, he has nothing to do with it. That situation has come up and the central concern which has acted as owner has prescribed the liability. If they go further than merely have a central office for receiving and transmitting telephone calls - if they really constitute some kind of business you might get at that in that way - as a corporation that is hiring cabs for its business. The burden would be to prove that the central office is like that and I would say the chances of recovering from the central office are slight. In Massachusetts they are not satisfied with insurance taken up by the central office - the independent taxicab owners must take out insurance individually.

Q - In the case of a contracting officer and disbursing officer who assessed against a contractor liquidating damages for failure to perform, we will assume that damages have been assessed and deducted from the payment to contractor, the contractor's first step would be to make

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claim to the General Accounting Office. We will assume that that has been turned down and he resorts to the courts. He enters suit against the disbursing officer; the courts decide in the favor of the plaintiff and hold the accounting officer liable. That is a case where money has been collected. In practise is the disbursing officer held responsible for the refund of those damages?

A - The Government is not held. When an officer is found liable the Government usually assumes the obligation and reimburses him. It may require in cities the act of the City Council. In the Government it may require some discretionary act on the part of some officer but the Government has no legal obligation. If this officer has misled the man or done some other wrong that causes this man to lose something on his contract there is no reason why he can't sue the officer. He has to prove that the officer has acted negligently or improperly.

Q - An officer was brought up before a Class B board. A was the officer before the Board and B testified orally to the effect that he considered A a crook. A was Class B'd and brought suit against B in Federal court for \$50,000. Is there any chance of B being stuck for that?

A - The great case on that will never be tried because of Huey Long's untimely death. There are some situations where a man's words are privileged - certainly in a legislative body and therefore perhaps in a legislative hearing - to some extent in a judicial hearing in court. If a man is asked to tell under oath what he thinks of someone he can say many things he would not print in a newspaper. It is not our duty to determine whether these words come within the privilege. There is a

question first of all as to how pertinent was it to know whether he was a crook. Is it a part of the real issue or was it dragged in by the heels? Certainly you can use your privilege to drag in things that don't belong there. There are many other instances where such things are allowed. If somebody writes to you about a former employee and you think he is a crook, you have a perfect right to answer it accordingly. I should guess the law of privilege is broad enough to let the man escape.

Q - I would like to ask, in connection with the New York case relative to the accountant - did he have to qualify under a state law to be a public accountant?

A - Yes; he could not use the letters C.P.A. under his name without passing a state examination and satisfying the state board as to his character, etc. That raises the question as to whether it made him a public officer. Public officers are sometimes forced upon you and still you may be responsible for what they do. I will give you one illustration. You can't come into a harbor without a licensed pilot and in many instances you have no control over the choice of a pilot. Sometimes you can pay the first one and take the second. It is not a very satisfactory arrangement, there have been times when people complained they had to take a licensed pilot washed on them by the state and then were liable for the pilot's negligence. In Illinois you cannot employ an engineer in your mine unless he is certified by the state. The unions have a great deal to do with it and an owner has little to say about the engineer. If he killed anyone the mine owner was liable. That happens sometimes. When the state helps you out by certifying a man that does not necessarily

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relieve the individual who employs them from liability. In that case the bankrupt was liable but he had nothing.

Colonel Jordan: I want to tell you something an officer had to do; he is now a member of the Planning Branch. He was on G-2 work in Siberia; he was captured by the soviets and they threatened to kill him unless he signed a treaty which they wanted. He thought it over and signed it. He reported it to his commanding general a little later and the general told him he had no authority to do that. The officer ^{was not authorized to sign it} thought the treaty should bind the U. S.

A - I think that would be a good case for the court. I don't think it had any validity; not because of the duress; and this brings up a nice point in the line of my discussion. In this process of drawing distinctions between private law and public law we sometimes say a treaty is a contract, and that leads to all kinds of fallacious conceptions. A treaty is not a contract. All that you have learned about contracts being without duress does not apply to treaties. The fact that Germany signed on the dotted line does not impair that treaty at all; duress has nothing to do with the situation. Furthermore, you don't need consideration in a treaty. On the other hand, another thing does not apply - the law of agency. A man who has no actual authority cannot bind his Government. Even the President could not bind his Government except in accordance with the laws of the Government, and Europe is still sore because they thought we should ratify the treaty signed by the President. Duress has nothing to do with it. If he signed it voluntarily it would not be any better. In the event a man without authority signs a treaty to escape from an Army, I think he should be dealt with rather leniently.