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Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer

H. P. F.

[Cumulative Supplement]

The reported cases for this annotation are [E.H. Emery & Co. v. American Refrigerator Transit Co.](#), 193 Iowa 93, 184 N.W. 750, 20 A.L.R. 86 (1921); and [Semonian v. Panoras](#), 44 R.I. 165, 116 A. 417, 20 A.L.R. 83 (1922).

This annotation is supplemented by [99 A.L.R. 408](#).

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[Gennaux v. Northwestern Imp. Co.](#), 72 Wash. 268, 130 P. 495 (1913) — [IVe1](#), [IVe2](#)

[Howe v. Northern Pac. Ry. Co.](#), 30 Wash. 569, 70 P. 1100 (1902) — [Vc1](#), [Vc2](#)

[Lough v. John Davis & Co.](#), 30 Wash. 204, 70 P. 491 (1902) — [Vc1](#), [Vc2](#)

[Morrison v. Northern Pac. Ry. Co.](#), 34 Wash. 70, 74 P. 1064 (1904) — [IVe1](#)

West Virginia

[Mann v. McVey](#), 3 W. Va. 232, 1869 WL 1909 (1869) — [IIIId](#)

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[Blizzard v. Brown](#), 152 Wis. 160, 139 N.W. 737 (1913) — [IIIj1](#), [IIIj2](#)

[Greenberg v. Whitcomb Lumber Co.](#), 90 Wis. 225, 63 N.W. 93 (1895) — [IVe1](#), [IVe3](#)

[Jensen v. Miller](#), 162 Wis. 546, 156 N.W. 1010 (1916) — [IIIj1](#), [IIIj2](#)

[Lawton v. Waite](#), 103 Wis. 244, 79 N.W. 321 (1899) — [IVe1](#)

[Morse v. Modern Woodmen of America](#), 166 Wis. 194, 164 N.W. 829 (1917) — [IIIe](#)

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Wyoming

[Bader v. Mills & B. Co.](#) (1921) — [Wyo.](#) —, 201 Pac. 1012 — [IIIb](#)

[Badger v. Mills & B. Co.](#) (1921) — [Wyo.](#) —, 201 Pac. 1012 — [IIIb](#)

I. Scope

This annotation will be confined strictly to the question of liability of the agent or servant of an individual or private corporation for injuries which occur to a third person through the performance or nonperformance of duties which he owes to his principal. There are several classes of cases which may, on their face, seem analogous to this question, and which, to some extent, may rest upon the general rules which govern the cases included in this note, but in which in fact other elements enter, and which are therefore excluded from consideration here. There are many cases in which the question has been whether or not the master and servant could be sued jointly for an injury caused by the act of the agent. If the joint liability is upheld, of course the court must assume that the servant is liable; but unless there is some discussion of the question of his liability, cases of that kind are not included.

So, cases are omitted which involve the question of the liability of an attorney at law for injuries to third persons. While such persons are, in a sense, agents, they are also officers of the court, and there may be considerations of public policy which would make a different rule applicable to them from that applicable to ordinary servants and agents. So, the general question of the liability of public officers will be omitted. Their liability depends so much upon the question of public policy that any ruling with regard to them might throw little or no light on the general question of liability of private servants or agents. This will apply also to soldiers, although it

may be suggested that a distinction has been made between officers and private soldiers, there being no liability on the latter for obeying orders, while there may be on the part of the former. Thus it has been held that a common soldier is not personally liable for committing a trespass under command of his officer. [Trammell v. Bassett \(1866\) 24 Ark. 499.](#)

But where an Army officer issued an order for seizure of property which was beyond his authority, the officer executing the order, by reason of which the property was lost to the owner, was held liable for the value thereof. The order given was an order to do an illegal act,—to commit a trespass upon the property of another,—and could afford no justification to the person by whom it was executed. "It can never be maintained that a military officer can justify himself for doing an unlawful act by producing an order of his superior." [Mitchell v. Harmony \(1851\) 13 How. \(U.S.\) 115, 14 L. ed. 75.](#)

Cases involving liability of the officers of corporations will also be omitted. Such officers representing, as they do, the corporation, and the corporation acting through them, a distinct ground of liability on their part may be found to exist which might not be the case with the mere agents and servants of such corporations or of individuals.

Cases involving the liability of contractors who have finished their contracts and turned the jobs over to the owners, who have accepted them, are omitted. These cases include servants who are employed upon work which afterwards causes injury, of which the following is an illustration:

"A contractor or hired man employed by and acting under direction of another person in digging a tunnel through an embankment, with which he has nothing further to do, is not liable for mere consequential injuries to third persons, as to whom he committed no direct trespass, where the injury results more than a year afterwards from water flowing through such tunnel, because it was the maintenance, and not the digging, of the tunnel, that caused the injury." [Chapel v. Smith \(1890\) 80 Mich. 100, 45 N.W. 69.](#)

So, also, are omitted cases involving the question of liability of subcontractors to the property owner. The question of liability of servants and agents for contempt of court in disobeying orders addressed to their employers is not considered.

The liability of agencies for collecting negotiable paper depending in part on the law merchant, and in part on general custom, are omitted. Moreover, there is a very numerous class of cases in which the courts have, on the facts, held the servant or agent not liable because no trespass, assault, conversion, or other wrong which was the basis of the action was established. The mere fact that no wrong was found to exist throws little light on the further question whether or not there would be a liability in case it did exist. Of this class reference is made to [Crandall v. Loomis \(1884\) 56 Vt. 664.](#)

The cases to be included are those for which the master is answerable because the act done was within the terms of his contract with the servant; and therefore, cases which have held the servant liable because he was acting outside the scope of his employment are not included.

As illustrative of this class, attention may be called to [Wright v. Intermountain Motor Car Co. \(1918\) 53 Utah, 176, 177 Pac. 237,](#) where it was held that one employed to demonstrate automobiles may be held personally liable if he takes a car after business hours, to accommodate a customer, and permits the customer to drive it, which results in the injury of a person on the highway.

So, a servant acts outside the scope of his employment where he takes his master's horse for his own purpose, and so insufficiently fastens it when leaving it that it breaks away, and causes the injury for which the suit is brought. [Way v. Powers \(1884\) 57 Vt. 135](#).

The excessive or ultra vires acts of the agent for which he, and not the master, is liable, are discussed by Brown and Comstock, JJ., in [Hibbard v. New York & E. R. Co. \(1857\) 15 N.Y. 455](#).

II. Introductory

a. General rule

An agent who violates a duty which he owes to a third person is answerable to such person for the consequences, whether it be an act of malfeasance, misfeasance, or nonfeasance. Stated in this form there is probably no case to be found to the contrary. But the doctrine laid down by some text-writers, founded on Lord Holt's dictum in [Lane v. Cotton \(1701\) 12 Mod. 488, 88 Eng. Reprint, 1466](#), has caused much confusion in the decisions over a fictitious distinction between acts of malfeasance and misfeasance and those of nonfeasance. As shown by Labatt on Master & Servant, page 7973, this error and the absence of any valid distinction in the classes of negligence were distinctly pointed out more than twenty-five years ago; but there are courts which still solemnly discuss the distinction every time a case involving the question comes before them, and settle the rights of the parties according as they think the case comes within or falls without the distinction. Many of the later cases have, however, abandoned it, as have also most of the recent text-writers.

If a servant owes a duty to a third person because of a contract with his master, there is no reason why he should not be liable for injury caused by its nonperformance. Of course, the circumstances in which the failure of the servant to perform a duty owing to his master will raise a liability in favor of a stranger must, of necessity, be few; but when they exist, the rule of liability should be applied the same as though it was an act of malfeasance or misfeasance. The error that such liability does not exist not only arose from a misreading of the case of [Lane v. Cotton](#), but also is an example of disconnected reasoning of which Judge Story, with whom the error seems to have originated, would hardly be imagined to be guilty. As will be seen in subdivision II. c, he laid down the formula that the servant or agent is liable to the third person for his mal- or mis-feasance, but not for his nonfeasance. A moment's consideration demonstrates that there are many mal- and mis-feasances of the servant towards his principal which give no right of action to third persons any more than do acts of nonfeasance. Thus, the servant may be guilty of malfeasance toward his principal by embezzling money intrusted to his care. He may be guilty of misfeasance by negligently wrecking an automobile which he is employed to operate. Neither of these will give a third person a right of action. Therefore, to give a third person a right of action the act must not be a malfeasance or misfeasance toward the master, but must, because of the act which he does, or attempts to do, be a malfeasance or misfeasance toward a stranger. The same rule applies with respect to nonfeasance. The servant's mere omission of duty towards his master will not give the person a right of action, but omitting to perform a duty which he and his master owe to a third person may give a right of action. When, therefore, the formula is read as stated by Judge Story, the delicts comprising mal- and mis-feasance are, of necessity, toward third persons, while those comprising nonfeasance are solely towards the master and the persons toward whom the duty is owing, and the liabilities said to exist or not to exist are not the same.

As thus analyzed, of course, the formula becomes meaningless as an aid to the decision of concrete cases. It has been suggested that the only value which the formula has is to indicate that a liability to a third person cannot be predicated upon mere omission of duty owing to the master; but since the same is true with respect to mal- or mis-performance of duty owing the master, it would seem that the sooner the formula passes into obli-

on, and the cases are judged solely upon the consideration whether or not the servant has breached any duty which he owed the complaining party, the better. Of course, in case of malfeasance or misfeasance, the relationship to the master may be entirely immaterial, because the liability may be predicated on the positive wrong done, while in case of nonfeasance, the duty to the complaining party must be worked out, if at all, through the duty which the servant had undertaken to perform for the master.

In volume 1, pp. 288, 289, of *Jaggard on Torts*, it is said: "The thinness and uncertainty of the distinction between the misfeasance, malfeasance, and nonfeasance leaves an exceedingly unstable basis on which to rest an important principle of liability. It would, indeed, seem to be a fair criticism on the subsequent reasoning that the courts have, in applying the distinction, engaged in a solemn game of logomachy. Thus, in *Bell v. Josselyn* (1855) 3 Gray (Mass.) 309, 63 Am. Dec. 741, it was said that failure of defendant to examine the state of the pipes in a house before causing the water to be let on, would be a nonfeasance, but, if he had not caused water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes, and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts were, the nonfeasance caused the act done to be a misfeasance. The plaintiff suffered from the act done, which was no less a misfeasance by the reason of its being preceded by a nonfeasance. ... The futility of such reasoning on the word "nonfeasance" appears fully from the lack of definitiveness of the meaning to be given the term. This solemn legal jugglery with words will probably disappear "if the nature of the duty incumbent upon the servant be considered." If the servant owe a duty to third persons, derived from an instrumentality likely to do harm or otherwise, and he violates that duty, he is responsible. His responsibility rests on his wrongdoing, not on the positive or negative character of his conduct. A wrongful omission is as actionable as a wrongful commission.' "

b. Lane v. Cotton

The celebrated case of *Lane v. Cotton* (1701) 11 Mod. 17, 12 Mod. 472, 88 Eng. Reprint, 855, 1458, Comyns, 107, 92 Eng. Reprint, 984, Holt, 583, 90 Eng. Reprint, 1222, 1 Salk. 17, 1 Ld. Raym. 655, 91 Eng. Reprint, 17, 1337, which seems to have been the cause of the misunderstanding upon this subject, was one to hold the Postmaster General liable for loss of exchequer bills from a letter after it had been deposited in the receiving office. It was held that he was not liable, but Chief Justice Holt, dissenting, argued in a long opinion that he should be held liable, and one branch of the argument was as follows: "It was objected at the bar, that they have this remedy against Breese (who was apparently the clerk from whose possession the loss occurred). I agree, if they could prove that he took out the bills, they might sue him for it; so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, quatenus such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrongdoer, or rescuer." It will be noticed that the question of the liability of the clerk was not involved, and the only ground upon which it becomes material at all is that it was suggested by the prevailing judges as one reason for the nonliability of the Postmaster General, that the receiving clerk was personally liable.

There are several reports of the case of *Lane v. Cotton*, and they do not strictly agree as to what the majority judges hold, or as to what Lord Holt himself held. All of the reports give more prominence to Holt's dissenting opinion than they do to the prevailing opinions. The question before the court being the liability of the Postmas-

ter General, the question of the liability of the clerk through whose negligence the letter was lost was in no way before the court. It was admitted in the case that he was not a party to the taking of the letter, but was simply negligent in caring for it, so that he was liable merely for nonfeasance, unless that term is limited to the sense in which it has been used by some of the later text-writers. See II. d.

Farresley's report, which goes under the name of Holt (Holt, 583, 90 Eng. Reprint, 1222), makes the other three judges hold the Postmaster General not liable because Breese was necessarily liable himself. And Salkeld's report makes all three judges agree that he is liable (1 Salk. 17, 91 Eng. Reprint, 17).

In the report in 1 Ld. Raym. 646, 91 Eng. Reprint, 1332, Powys, J., is made to say that an action would lie against Breese, and therefore plaintiff is not without remedy, and in this, Gould, J., seems to have concurred.

In the report in 11 Mod. 12, 88 Eng. Reprint, 853, however, Powys, J., is made to say in response to the objection that if the action does not lie against the Postmaster General there may be a wrong without any remedy,—that it is often so when no person can be found against whom to have a remedy. And the same response appears in the report of Comyns, 103, 92 Eng. Reprint, 982.

Not only were the arguments of the prevailing judges thus inadequately reported by the various reporters, but there is not an agreement among them as to Lord Holt's position in the matter.

In the report in 1 Ld. Raym. 655, 91 Eng. Reprint, 1337, Holt is made to say that Breese cannot be charged as an officer for negligence. For misfeasance of a deputy an action will lie against him, but that is not *qua* officer, but *qua* tort-feasor.

In 11 Mod. 17, 88 Eng. Reprint, 855, the statement is, if the deputy be guilty of misfeasance an action will lie against him; but for the nonfeasance or negligence of a deputy, the superior is punishable; and if, in this case, any misfeasance could be proved upon any particular deputy, as the taking out of the bills by him, he would be punishable.

In Comyns, 107, 92 Eng. Reprint, 984, Holt's statement is reduced to the following: "Another objection is that an action may be brought against the subagent, but for negligence the principal must answer for his inferior officer."

In Salkeld's Report 1 Salk. 17, 91 Eng. Reprint 17, Holt is made to say that though the master be liable, yet Breese is chargeable also, but he is not chargeable as an officer, but as a wrongdoer.

And in the report of the case by Thomas Farresley, which goes under the name of Holt (Holt, 583, 90 Eng. Reprint, 1222), Holt is made to say: "I am of opinion though the Postmaster General be liable, that Breese is chargeable also, not as an officer, but as a wrongdoer, for 'tis upon this reason that action of the case lies against the gaoler as well as against the sheriff upon a voluntary escape."

It will be noticed that the court was dealing with the question of the liability of a public official, and there has always been a distinction between the liability of their deputies and that of servants or private individuals. In the excerpt quoted above from 12 Mod., Holt's illustration is of a sheriff and his bailiff.

In *Cameron v. Reynolds* (1776) 1 Cowp. 406, 98 Eng. Reprint, 1155, Lord Mansfield said that the judges were all of opinion that an action for breach of duty in the office of sheriff must be brought against the sheriff himself, as for an act done by him, although it was in fact done by the undersheriff.

For authority for the statement set out above, from 12 Mod., Lord Holt cites 1 Leon. 146; 3 Cro. 175, 143; 41 Edw. III. 12; 1 Rolle, 78; and Salkeld adds Noy, 90.

The case in (1589) 1 Leon. 146, 74 **Eng.** Reprint, 135, is Marsh & Astrey's Case, in which Marsh brought action against Astrey, an undersheriff, for failure to return a summons for lands. It was argued on one side that the action should have been against the sheriff, but Snag, contra, said if the return be insufficient, the sheriff shall be amerced, but in the case of failure to return it is clear that the action lieth against the undersheriff if the person will, and such was the opinion of the judges. And judgment was given for the plaintiff. The case in 3 Cro. (Cro. Eliz.) 175, 78 **Eng.** Reprint, 432, seems to be the same case as that in Leonard, although it is attributed to a different year and term; but it is expressly stated that Coke moved in arrest of judgment that, the action being for nonfeasance, that is, for not returning the writ, the action lieth not against the undersheriff, but ought to be brought against the sheriff himself. But the argument did not prevail. There is no case in point on page 143, and so it must be an error in citation, but Salkeld locates the reference at page 743 (1599) 78 **Eng.** Reprint, 976. That was the case of Baldry v. Johnson, an action against the jailer of a prison for that the bailiffs of a vill had directed a warrant to the undersheriff to take a person in such manner that they have his body at the next court. The undersheriff made the arrest, and committed the prisoner to the custody of the jailer. After verdict for plaintiff, it was moved in arrest of judgment that the jailer was not liable because the undersheriffs had no authority to commit the prisoner to his custody, and that they alone were liable for the escape. And the conclusion seems to be that the judgment was arrested because the undersheriffs alone were liable.

The case of Laycock v. Undersheriff, Noy, 90, 74 **Eng.** Reprint, 1057, was an action against an undersheriff because of a false return non est inventus on a latitat. It was argued that for a falsity the action will lie against an undersheriff, but the report states that the court seemed to the contrary. For the undersheriff is not an officer to the court, but the sheriff himself shall be amerced for all defaults, negligence, and falsities of the undersheriff.

The case in (1614) 1 Rolle Rep. 78, 81 **Eng.** Reprint, 341, is Bell v. Catesby, in which Bell brought an action against Catesby, an undersheriff, for suppressing a warrant which had been put into his hands for service, the allegation being that he levied on the goods and afterwards concealed the writ and made no certificate of it. Exception was taken, after verdict, that the action will not lie against the undersheriff, but the judgment was given by the court for the plaintiff.

There is no case on page 12 of 41 Edw. III. having any bearing on the question under discussion. The case carried on to that page from the previous one was a writ of formedon to establish a remainder, and the case beginning on that page involved the right of infants against whom a right to real estate was sought to be established, to have the writ abated. It has been suggested that the reference was to pl. 12 of the Book of Assize of 41 Edw. III. But that was a prosecution for mayhem which involved a question of jurisdiction over persons not served. So that the citation seems to throw no light upon Lord Holt's meaning. Of the cases cited by Lord Holt, therefore, four seem to have been contrary to his claim, one in his favor, and one a miscitation.

But Lord Holt seems to have acted upon the opinion contended for by him in the next case which came before him.

In Savage v. Walthew (1708) 11 Mod. 135, 88 **Eng.** Reprint, 947, a carrier brought an action against his servant for loss of goods delivered to him for carriage, and it was objected that if the action lies, defendant will be twice charged by the master and by the owner. Holt, Ch. J., said it is not so unless there is an actual conversion, for the owner of the goods has an action against the servant only in case of a conversion.

A singular fact is that in at least two subsequent English cases, Lord Holt's opinion is referred to as the rule of the case. *Jones v. Hart* (1698) 2 Salk. 441, 91 Eng. Reprint, 382; *Bennett v. Bayes* (1860) 5 Hurlst. & N. 391, 157 Eng. Reprint, 1233, 29 L. J. Exch. N. S. 224, 8 Week. Rep. 320, 2 L. T. N. S. 156.

c. Judge Story's rule

Judge Story, in his work on the Law of Agency, published in 1839, founded the following statement on what he terms Lord Holt's celebrated judgment in *Lane v. Cotton*: "The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not, in general (for there are exceptions), liable to third persons for his own nonfeasances or omissions of duty, in the course of his employment. His liability, in these latter cases, is solely to his principal, there being no privity between him and such third persons, but the privity exists only between him and his principal. And hence the general maxim as to all such negligences and omissions of duty is, in cases of private agency, 'respondeat superior.' " § 308.

"The distinction, thus propounded, between misfeasance and nonfeasance, between acts of direct, positive wrong, and mere neglects by agents, as to their personal liability therefor, may seem nice and artificial, and partakes, perhaps, not a little of the subtlety and overrefinement of the old doctrines of the common law. It seems, however, to be founded upon this ground: that no authority whatsoever from a superior can furnish to any party a just defense for his own positive torts or trespasses, for no man can authorize another to do a positive wrong. But in respect to nonfeasances or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation, except those to whom he has become directly bound or amenable for his conduct." Story, *Agency*, 9th ed. § 309.

In making this statement, Judge Story seems to have overlooked the obligations which are imposed upon all living in a civilized community, in favor of their neighbors. Because of this obligation the law and public policy impose certain duties upon persons who have contracted with a master to do a certain thing which makes them liable to third persons for its nonperformance. Most acts of negligence are, in final analysis, acts of nonfeasance, but the books are full of cases in which servants and agents have been held liable for negligence. While, therefore, many cases have attempted to maintain the formula laid down by Judge Story, they have, in practice, either distinguished it so that little is left of it, or departed from it altogether. As will appear in the next succeeding section, certain text-writers have attempted to preserve the formula by giving it an interpretation so narrow that there is really little left of it.

d. Attempted explanation of rule

Clark & Skyles, in their work on the Law of Agency, make the following statement: "There is a distinction between nonfeasance and misfeasance or malfeasance; and this distinction is often of great importance in determining an agent's liability to third persons. By reason of some of the cases failing to clearly notice this distinction there has been some confusion in the decisions on this point. In this connection, nonfeasance means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do; misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons; and malfeasance is a doing of an act which he ought not to do at all. ... From these meanings, it will be seen that it is not every omission or failure to perform a duty that will constitute a nonfeasance, but only an omission to perform such distinct duties as he owes to his principal, as distinguished from those which he owes to third persons or to the public in general, as a member of society. Nonfeasance does not extend to the omission or failure to do some act whereby a third person is injured, after he has

once entered upon the performance of his contractual obligations. For example, if an agent undertakes to perform certain acts for another, and he refuses or fails to enter upon such performance, it is a nonfeasance; but if he once begins the performance of such acts, and in doing so fails or omits to do certain acts which he should have done, whereby a third person is injured, it is not a nonfeasance, but a misfeasance." Clark & S. Agency, p. 1299.

Mr. Mechem (Agency, § 572) also states that "some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing; as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do, under the circumstances,—does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed ... upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation."

It will thus be seen that these authors narrow the meaning of nonfeasance down to a mere failure to enter upon the performance of a duty which the contract imposes upon the servant. This meaning of the term is much narrower than that which was in the mind of Lord Holt or Judge Story, or than that which has been in the minds of many of the judges who have attempted to apply the formula in deciding cases. It may be seriously questioned whether, even in this narrow form, the formula is accurate. Is it entirely safe to say that when the question is determined solely by the duty of the servant to the person injured, the courts will not say that, in case an agreement is made with a protective agency for a watchman on a particular occasion, and the servant employed by the agency, without notice of the fact that he did not intend to meet his engagement, leaves the property unguarded when the owner is relying on him for protection, so that no other is provided, and the property is burglarized or destroyed, the servant will not be liable? Or, in case an agreement is made with a nurses' association for a nurse for a critical occasion, and she does not undertake the job, so that, because of inability to procure other assistance on account of want of timely notice of the nurse's default, the patient dies, the nurse will not be liable? Other cases of similar import readily come to mind and one cannot dogmatize upon them before the questions have been considered by the courts in their true light. This does not in any way interfere with the rule that a third person cannot maintain an action on a contract made for his benefit, because the contract between master and servant is not necessarily made for his benefit. It would not, however, be extending the doctrine that one having entered upon the performance of his duties who omits, to the injury of a third person, to perform some act which is part of his duties, is liable for the injury thereby caused to the third person, on the ground that it is misfeasance, to hold that it is also misfeasance to breach his agreement to perform an act, failure to perform which will injure a third person, after he has undertaken to do so, without giving any notice of his intended omission, on the ground that he will be deemed to have entered upon the performance of his agreement.

This narrowing of the definition of nonfeasance has, in some degree, presented a way out of the dilemma in which the old formula placed the courts, and some of the courts have followed it. Thus, in [Atkins v. Field \(1896\) 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375](#), the court said: "If the defendant had not undertaken to rig and set up the derrick, or in so doing had simply executed the will of a lawful superior as to details of mode and material, there might be said to be mere nonfeasance on his part. But he did undertake the work, and practically exercised his own discretion as to mode and material. He was then bound to act carefully in every respect, and his carelessness in any respect was a misfeasance."

So, in [Hagerty v. Montana Ore Purchasing Co. \(Hagerty v. Wilson\) 38 Mont. 69, 25 L.R.A.\(N.S.\) 356, 98 Pac. 643](#), the court said: "The courts and text-writers have not always been accurate in defining the terms 'nonfeasance' and 'misfeasance,' or in discriminating between them. As applied in cases of this character, we think the term 'nonfeasance' refers to the omission on the part of the agent to perform a duty which he owes to his principal by virtue of the relationship existing between them; but, whenever the omission on the part of the agent consists of his failure to perform a duty which he owes to third persons, then, as to such third persons, his omission amounts to 'misfeasance,' for which he is responsible. We think this conclusion is based upon reason and authority."

In [Orcutt v. Century Bldg. Co. \(1907\) 201 Mo. 424, 8 L.R.A.\(N.S.\) 929, 99 S.W. 1062](#), the court said: "When it [the defendant] undertook the management of this building from its principal, it undertook to do for the principal a particular work; and after it entered upon the performance of that work, any act which it did, whether by omission or commission, was misfeasance. After making this contract, had it stood aloof and refused to take the management of the building, and, in so doing, thereby failed to do something, which resulted in injury to a third person, it would not have been liable, because we would thus have mere nonfeasance. But, after it assumed its management, and thereby commenced to do the thing it contracted and agreed to do, then, as said before, acts of omission or commission constitute misfeasance, or a failure to properly do the things which it had, in the line of its duty, commenced to do."

In [Brower v. Northern P. R. Co. \(1910\) 109 Minn. 385, 25 L.R.A.\(N.S.\) 354, 124 N.W. 10](#), where an engineer, in repairing a water gauge, failed to replace the guard, the court said: "From the facts stated in the complaint it satisfactorily appears that appellant undertook the execution of the duty of replacing the gauge, and that he performed it negligently; hence his act was one of misfeasance, and not one of nonfeasance. ... Strictly speaking, the act of the engineer in failing to put on the guard was nonfeasance,—that is, in not doing an act which he was required to perform; but the distinction between misfeasance and nonfeasance is sometimes fanciful."

So, in [Southern R. Co. v. Grizzle \(1906\) 124 Ga. 735, 110 Am. St. Rep. 191, 53 S.E. 244](#), where it was held that the negligence of a railroad engineer in failing to blow his whistle where he was required by law to do so was a misfeasance, rendering him liable for injuries resulting therefrom, the court said: "Misfeasance may involve also, to some extent, the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution, or does not exercise that care, which a due regard to the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. ... The engineer having once undertaken, in behalf of the principal, to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of misfeasance."

In [Williams v. Dean \(1907\) 134 Iowa, 216, 11 L.R.A.\(N.S.\) 410, 111 N.W. 931](#), it is said, nonfeasance is nonperformance of some act which ought to be performed, and also is the performance of an act in an improper manner, whereby someone receives injury.

"Nonfeasance is the failure to do that which one, by reason of his undertaking, and not because imposed upon him as a legal duty, agrees to do for another; that which is imposed upon him merely by virtue of his relation to his principal. Misfeasance, on the contrary, may consist in failing to do that which is imposed as a duty,

or in doing for another, in an improper manner, that which the principal ought to have done. As of the latter class would be where an agent actually undertakes and enters upon the performance of a certain work for the principal, in the execution of which it is his duty to use reasonable care in the manner of executing it, so as not to cause injury to others, and he cannot, by failing to exercise such care, either while performing the work or by abandoning it in an uncompleted condition and leaving it unguarded or unsafe, exempt himself from liability to those who may suffer injury by reason of such negligence." [Dean v. Brock \(1894\) 11 Ind. App. 507, 38 N.E. 829.](#)

It will be noticed that one of the reasons given by Judge Story (*supra*, II. c) for holding the servant not liable is the maxim "respondeat superior;" and that has also been suggested as a reason in some of the cases. But the mere fact that the master is required to respond for the consequences of acts done on his behalf does not mean that there shall be no remedy against the one primarily liable for the injury, if he is a responsible person. The maxim "respondeat superior" was adopted to prevent a responsible principal from avoiding liability for injuries caused by the transaction of his business by employing impecunious servants, and there seems to be no reason why it should operate to relieve the negligent servant from personal responsibility.

e. Breach of servant's duty to person injured

The only rule which can be sustained on principle is that the servant or agent is liable for injury to third persons when, and only when, he breaches some duty which he owes to such third person. The cases are increasingly recognizing this test.

In [Morey v. Shenango Furnace Co. \(1910\) 112 Minn. 528, 127 N.W. 1134](#), it is said that if a servant owes a duty to a third person, and violates that duty, he is responsible because of his wrongdoing, and not because of the positive or negative character of his conduct.

In an action to hold one employed to operate a ferry for a county, liable for loss of property off the boat, the court said: "A servant or agent may be personally liable for the damnifying consequences of a tort committed by him in the master's service, and so whether the servant's or agent's dereliction, proximately causing the damage, is assignable to the categories of nonfeasance or of misfeasance. ... Personal liability attaches to the servant or agent when the servant or agent would be liable if there had been no relation of master and servant or principal and agent. Such liability is therefore dependent upon an act or omission, misfeasance, or nonfeasance, on the part of the servant or agent himself; and any dereliction of the master or principal, not effectively participated in by the servant or agent, will not, of course, afford the basis for the personal culpability of the servant or agent." [Hilburn v. McKinney \(1920\) 204 Ala. 158, 85 So. 496.](#)

An agent of a corporation is not to be held personally liable merely because he is such agent, but he must be so connected with the tortious act that he would be personally liable for his wilful act or negligent conduct without regard to the liability of the corporation. [Frorer v. Baker \(1907\) 137 Ill. App. 588.](#)

Where a certificate of title, prepared by an attorney for a property owner, was acted upon by a bank in lending money to the property owner, the court, without direct discussion of the question of liability of an agent for injury to third persons, in deciding against the liability, makes some observations which have a very material bearing upon the question. It says, the person occasioning the loss must owe a duty arising from contract or otherwise, to the person sustaining the loss. Also that building contractors are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employer. Where there is no fraud or collusion or privity of contract, the agent will not

be held liable to a stranger unless the act is one immediately dangerous to the lives of others, or is an act performed in pursuance of some legal duty. [National Sav. Bank v. Ward \(1880\) 100 U.S. 195, 25 L. ed. 621.](#)

One employed in a mill may be liable to a coemployee for negligence in directing the removal of a structure which had operated as a stop for a traveling crane, so that the pulley runs off the end of the rail, to the injury of the employee. The court says, a servant in charge of his master's property is liable to strangers in the management of it, not because he owes a duty in respect of it to the master, but because the possession and charge of property put him under an obligation of care in the use and management of it. The negligence must be negligence to strangers, and not to the master only. The violation of the master's orders, or the neglect or improper use of his property, not violating the duty which the servant owes to strangers, would not make him liable to them. [Osborne v. Morgan \(1884\) 137 Mass. 1.](#)

In [Haynes v. Cincinnati, N. O. & T. P. R. Co. \(1911\) 145 Ky. 209, 140 S.W. 176, Ann. Cas. 1913B, 719](#), the court said: "There is no reason for making a distinction between acts of commission and omission when each involves a breach of duty. The servant is not personally liable in either case because the breach of duty was committed by him while acting in the capacity of servant, but responsibility attaches to him as an individual wrongdoer without respect to the position in which he acts or the relation he bears to some other person. It is the fact that the servant is guilty of a wrongful or negligent act amounting to a breach of duty that he owes to the injured person that makes him liable. It is not at all material whether his wrongful or negligent act is committed in an affirmative or wilful manner, or results from mere nonattention to a duty that he owes to third persons, and that it is entirely within his power to perform or omit to perform."

III. Malfeasance

a. In general

The term "malfeasance" is employed to indicate acts which are forbidden or illegal, so that they are not justified under any circumstances.

In [Travis v. Claiborne \(1817\) 5 Munf. \(Va.\) 439](#), Roane, J., says if an agent does an act which the principal ought not to require nor he to obey him in, his character as agent ceases, and he himself becomes responsible for his acts.

Since authority from one who has no right to confer it is void, it is no legal excuse for an act which causes an injury to another that the person committing it acted under the direction or by the consent of a third person who himself had no right to grant such authority or permission, and hence the well-settled rule that if a principal is a wrongdoer the agent, however innocent his intention, who participates in his acts, is also a wrongdoer. It must, therefore, be true, as a general proposition, that if an injurious act be done without sufficient authority, it is no answer to the claim of the owner for redress that the immediate author of the mischief acted in good faith, by direction of one whom he supposed to be the owner. [Jones v. Fort \(1860\) 36 Ala. 462.](#)

An agent who commits an act prohibited by law is liable as a principal. [Swaggard v. Hancock \(1887\) 25 Mo. App. 596.](#)

One doing an illegal act under contract with another is personally liable for any damage that may proximately flow from it. [Moore v. Kopplin \(1911\) — Tex. Civ. App. —, 135 S.W. 1033.](#)

Servants of a railroad company who knowingly back a train in a manner prohibited by statute are personally

liable for injury thereby caused to a fellow servant. [Illinois C. R. Co. v. Archer \(1916\) 113 Miss. 158, 74 So. 135.](#)

Where the statute requires railroad rights of way to be kept clear from inflammable material, a section foreman will be liable in damages for injuries to adjoining lands by fire started on the right of way by his negligence in failing to keep it clear of such material. [Patry v. Northern P. R. Co. \(1911\) 114 Minn. 375, 34 L.R.A.\(N.S.\) 568, 131. N.W. 462.](#)

Where, by statute, railroad companies are required to maintain efficient spark arresters, engineers in charge of locomotives are liable for failure to see that the spark arresters on their engines are in good condition. *Ibid.*

An agent who receives usurious interest for his principal with notice that it is usurious, and that he will be held personally liable for it, cannot defeat an action on the ground that he acted merely as agent. [O'Connor v. Clopton \(1882\) 60 Miss. 349.](#)

In [Jenne v. Sutton \(1881\) 43 N.J.L. 257, 39 Am. Rep. 578](#), which involved the question of liability of the president of a political club for injury done by fireworks exploded in a public street by direction of the club, the court said that the act of exploding them in the public street being unlawful, there can be no question with respect to the legal liability of all persons concerned in the doing of such act.

b. Trespass

A servant who, in carrying out the terms of his employment, or who, by obeying the command of his master, commits a trespass, is personally liable therefor, and cannot plead in defense the fact that his act was that of his master. United States

[Mitchell v. Harmony \(1851\) 13 How. 115, 14 L. ed. 75](#)

[Lightner v. Brooks \(1864\) 2 Cliff. 287, Fed. Cas. No. 8,344](#)

California

[Brownell v. Fisher \(1880\) 57 Cal. 150](#)

Colorado

[Humphreys Tunnel & Min. Co. v. Frank \(1909\) 46 Colo. 524, 105 Pac. 1093](#)

Georgia

[Baker v. Davis \(1906\) 127 Ga. 649, 57 S.E. 62](#)

Illinois

[Gravett v. Mugge \(1878\) 89 Ill. 218](#)

[Sundmacher v. Block \(1891\) 39 Ill. App. 553](#)

Kentucky

[Waller v. Martin \(1856\) 17 B. Mon. 181](#)

Maine

[Hazen v. Wight \(1895\) 87 Me. 233, 32 Atl. 887](#)

Maryland

[Blaen Avon Coal Co. v. McCulloh \(1883\) 59 Md. 403, 43 Am. Rep. 560](#)

Massachusetts

[Hewett v. Swift \(1862\) 3 Allen, 420](#)

[Gilmore v. Driscoll \(1877\) 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37](#)

Missouri

[Peckham v. Lindell Glass Co. \(1881\) 9 Mo. App. 459](#)

[Martin v. Benoist \(1886\) 20 Mo. App. 262](#)

[Welsh v. Stewart \(1888\) 31 Mo. App. 376](#)

[McNichols v. Nelson \(1891\) 45 Mo. App. 446](#)

[Walters v. Hamilton \(1898\) 75 Mo. App. 237](#)

[Robinson v. Moark-Nemo Consol. Min. Co. \(1914\) 178 Mo. App. 531, 163 S.W. 885, affirmed in \(1917\) — Mo. —, 196 S.W. 1131](#)

[Reber v. Bell Teleph. Co. \(1916\) 196 Mo. App. 69, 190 S.W. 612](#)

New York

[Livingston v. Bishop \(1806\) 1 Johns. 290, 3 Am. Dec. 330](#)

[Hardrop v. Gallagher \(1854\) 2 E. D. Smith, 523](#)

[Page v. Dempsey \(1906\) 184 N.Y. 245, 77 N.E. 9, 22 Am. Neg. Rep. 135](#)

Pennsylvania

[Hindson v. Markle \(1895\) 171 Pa. 138, 33 Atl. 74](#)

Rhode Island

[Semonian v. Panorass \(reported herewith\) ante, 83](#)

Tennessee

[Nunnally v. Southern Iron Co. \(1895\) 94 Tenn. 397, 28 L.R.A. 421, 29 S.W. 361](#)

Texas

[Diamond & O. C. Sewerage Co. v. Smith \(1901\) 27 Tex. Civ. App. 558, 66 S.W. 141](#)

Vermont

[Brown v. Lent \(1848\) 20 Vt. 529](#)

Wyoming

[Badger v. Mills & B. Co. \(1921\) — Wyo. —, 201 Pac. 1012](#)

England

[1 Bl. Com. 430](#)

[Gauntlett v. King \(1857\) 3 C. B. N. S. 59, 140 Eng. Reprint, 660](#)

[Bennett v. Bayes \(1860\) 5 Hurlst. & N. 391, 157 Eng. Reprint, 1233, 29 L. J. Exch. N. S. 224, 2 L. T. N. S. 156, 8 Week. Rep. 320](#)

[Heugh v. Abergavenny \(1874\) 23 Week. Rep. 40](#)

[McManus v. Crickett \(1800\) 1 East, 106, 102 Eng. Reprint, 43, 5 Revised Rep. 518](#)

That a servant committed a trespass by the command or encouragement of his master, the master is liable, but the servant is not thereby excused, for he is only to obey his master in matters that are entirely lawful. 1 Bl. Com. 430.

An agent who commits a positive wrong, such as a trespass, cannot shield himself simply because he acts as agent for another. [Bader v. Mills & B. Co. \(1921\) — Wyo. —, 201 Pac. 1012.](#)

[Waller v. Martin \(1856\) 17 B. Mon. \(Ky.\) 181](#), was an action against the officers, engineers, and laborers of a railroad company for trespassing on plaintiff's land. Only the officers were served with process, but the court held that if the company had no authority to commit the act, they were individually liable.

In [Gilmore v. Driscoll \(1877\) 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37](#), which involved the right to lateral support, there is a dictum to the effect that even an agent of the owner of adjoining land will be liable for his own negligence or positive wrongs, for his principal could not confer upon him any authority to commit a tort upon the property or rights of another.

A servant who participates in the digging of a trench which casts water into another's cellar is liable for the resulting damage. The court says that for a misfeasance done by an agent in the line of his duty, he is liable. [Martin v. Benoist \(1886\) 20 Mo. App. 262.](#)

Agents of a corporation who enter upon private land and cut trees cannot defeat liability for the trespass on the theory that they were agents, if the corporation had no authority to do the act. [Brownell v. Fisher \(1880\) 57 Cal. 150.](#)

An agent who, under direction of his principal, unlawfully cuts timber of another, is liable for trespass. [Baker v. Davis \(1906\) 127 Ga. 649, 57 S.E. 62.](#)

An agent is liable in trespass for appropriating for his principal lumber belonging to another. [Gravett v. Mugge \(1878\) 89 Ill. 218.](#)

One cannot avoid liability for trespass in cutting and carrying away timber from another's land by the fact that he was acting merely as agent. [Hazen v. Wight \(1895\) 87 Me. 233, 32 Atl. 887.](#) The court says if the employer was a trespasser in ordering the removal of the timber, the servant was also a trespasser in carrying out the order, because a servant can never have greater authority than his employer.

In an action against a general contractor for injuries by a blast fired by one in charge of the blasting work, the court held that defendant could not be held liable for the act, but stated that the one responsible for the blast, and those under his control, by reason of their direct participation in the injurious act, might be liable. [Brown v. Lent \(1848\) 20 Vt. 529.](#)

Employees causing injury by blasting are personally liable therefor. [Hardrop v. Gallagher \(1854\) 2 E. D. Smith \(N.Y.\) 523.](#)

An employee responsible for the setting off of a blast which throws debris onto neighboring property is personally liable for the trespass. [Page v. Dempsey \(1906\) 184 N.Y. 245, 77 N.E. 9, 22 Am. Neg. Rep. 135.](#)

The active manager of a coal mine is personally liable for directing the deposit of culm where it is washed into a stream to the injury of lower riparian property. [Hindson v. Markle \(1895\) 171 Pa. 138, 33 Atl. 74.](#) The court says if the acts were wrongful and occasioned injury to plaintiff, they were acts of misfeasance for which, under all the authorities, he was liable. They were his own voluntary acts, not enjoined upon him by his employers.

An agent in charge of an ore mill cannot escape liability for injury done to lower riparian property by the casting of tailings into the stream so as to pollute the water, by the fact that he was a mere agent. [Humphreys Tunnel & Min. Co. v. Frank \(1909\) 46 Colo. 524, 105 Pac. 1093.](#)

In [Nunnely v. Southern Iron Co. \(1895\) 94 Tenn. 397, 28 L.R.A. 421, 29 S.W. 361](#), where a general manager of a mining corporation injured lower riparian property by casting débris into the stream, the court said: If the agent of a corporation or an individual commits a tort, the agent is clearly liable for the same, and it matters not what liability may attach to the principal, the agent must respond in damages if called upon to do so. "To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations. It would serve to stimulate the zeal of responsible and solvent agents of irresponsible and insolvent corporations in their efforts to repair the shattered fortunes of their failing principals upon the ruins of the rights of others."

An agent who, by direction of his employer, breaks the connection of a property owner with a sewer as a method of enforcing payment of charges for the right to use it, cannot defeat liability if the act was a wrongful trespass, on the ground that he acted merely as agent. [Diamond & O. C. Sewerage Co. v. Smith \(1901\) 27 Tex. Civ. App. 558, 66 S.W. 141.](#)

Where defendant demurred to a bill to enjoin him from entering upon plaintiff's land and destroying a weir, on the ground that he was a mere agent, the court said there was no agency between wrongdoers, and that want of interest was no defense because the tort was committed under direction of another. [Heugh v. Abergavenny \(1874\) 23 Week. Rep. \(Eng.\) 40.](#)

In [McManus v. Crickett \(1800\) 1 East, 106, 102 Eng. Reprint, 43, 5 Revised Rep. 518](#), where the question was as to the liability of the master for a wilful trespass of the servant, Lord Kenyon referred to cases in which the servant, through negligence, ran over a boy in the street, and another ran against and overturned a vehicle, by which its load was injured, and stated that there could be no doubt of the servants in these cases being liable as trespassers.

Servants of a telephone company, who enter upon private property and cut the branches off trees to facilitate the stringing of wires, are personally liable for the trespass. [Reber v. Bell Teleph. Co. \(1916\) 196 Mo. App. 69, 190 S.W. 612.](#)

A broker who, as the agent of a landlord, attempts to distrain for rent, will be liable jointly with the latter in case he seizes exempt property. [Gauntlett v. King \(1857\) 3 C. B. N. S. 59, 140 Eng. Reprint, 660.](#)

A servant who commits a trespass in running a mine over onto adjoining property will be individually liable therefor. [Blaen Avon Coal Co. v. McCulloh \(1883\) 59 Md. 403, 43 Am. Rep. 560.](#)

But if the agent acts under direction of his principal, an action of trespass will not lie against him unless it would lie against the principal. [Strong v. Colter \(1868\) 13 Minn. 82, Gil. 77.](#)

In [Paton v. Lancaster \(1874\) 38 Iowa, 494](#), which was an action to enjoin interference with plaintiff's possession of real estate, it appeared that defendant and his attorneys had committed actual trespasses on the property, and, although defendant was held liable, it was held that the attorneys, to the knowledge of plaintiff, were acting only as defendant's agents, and that, no fraud being charged, the action would not lie against them.

In *Buron v. Denman* (1848) 2 Exch. 167, 154 Eng. Reprint, 450, which involved the question of liability for acts done by an officer in suppression of the slave trade, it was held that the act being approved by the government, there was no personal liability; but Parke, Baron, said if an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured may sue either principal or agent.

c. Assault

An agent or servant cannot escape liability for an assault by showing that it was committed by command of the principal or master.

- United States
[Chamberlain v. Chandler](#) (1823) 3 Mason, 242, Fed. Cas. No. 2,575
District of Columbia
[Lisner v. Hughes](#) (1919) 49 App. D.C. 40, 258 Fed. 512
Illinois
[St. Louis, A. & C. R. Co. v. Dalby](#) (1857) 19 Ill. 353
Indiana
[Evansville & C. R. Co. v. Baum](#) (1866) 26 Ind. 70, 8 Am. Neg. Cas. 201
[Wright v. Compton](#) (1876) 53 Ind. 337, 2 Mor. Min. Rep. 189
Massachusetts
[Com. v. Rigney](#) (1862) 4 Allen, 316
Missouri
[Canfield v. Chicago, R. I. & P. R. Co.](#) (1894) 59 Mo. App. 354
New Jersey
[Brokaw v. New Jersey R. & Transp. Co.](#) (1867) 2 N.J.L. 333, 90 Am. Dec. 659
New York
[Brown v. Howard](#) (1817) 14 Johns. 119
[Phelps v. Wait](#) (1864) 30 N.Y. 78
[Montfort v. Hughes](#) (1854) 3 E. D. Smith, 591
[Priest v. Hudson River R. Co.](#) (1870) 40 How. Pr. 456
Ohio
[Bell v. Miller](#) (1831) 5 Ohio, 250
[Blakely v. Greer](#) (1905) 7 Ohio C. C. N. S. 169

If one person employs another to commit an assault and battery and the act is perpetrated, both are responsible in damages. *Bell v. Miller* (Ohio) *supra*.

The agent is personally liable for assault committed in discharging the duties imposed upon him by the master. *Brokaw v. New Jersey R. & Transp. Co.* (N.J.) *supra*.

The mate of a vessel cannot justify the commission of a wrongful assault upon a seaman by the fact that it was ordered to be done by the master. *Brown v. Howard* (N.Y.) *supra*.

Those in charge of a railroad train are personally liable for injuries caused by the use of excessive force in

removing a person from the train. *St. Louis, A. & C. R. Co. v. Dalby* (Ill.) *supra*.

In *Chamberlain v. Chandler* (Fed.) *supra*, which was an action to hold the master of a vessel liable in damages for illegal treatment of passengers upon his vessel, the court does not separately consider the question of his liability as agent of the owners, but says that, in exercising the rights of sovereign control while the ship is at sea, if he chooses to perform his duties or exert his office in a harsh, intemperate, or oppressive manner, he is responsible to the law; and the court states that it appears that if he is guilty of gross abuse and oppression, the courts will never be found slow in visiting him, in the shape of damages, with an appropriate punishment.

An employee of a railroad company is personally liable for assault and battery committed by him upon an intending passenger. *Priest v. Hudson River R. Co.* (N.Y.) *supra*.

In *Evansville & C. R. Co. v. Baum* (Ind.) *supra*, which was an action against the master, the court says the servant himself is liable if he makes an assault upon another to gratify his private hate or malignity, under color of discharging the duty he has undertaken for his master, though he is, in general, not so liable to strangers for the consequences of mere negligence in the course of his employment.

In *Lisner v. Hughes* (D.C.) *supra*, which was an action against a master and servant jointly for an assault committed by the servant, the question discussed was as to the form of action and sufficiency of proof; but it seems to have been assumed that the action would lie against the servant.

An agent in charge of an office who is furnished with a weapon for protection against robbers is personally liable in case, by mistake of judgment, he shoots one entering the office on lawful business. *Blakely v. Greer* (Ohio) *supra*.

Where a blast in a quarry injured a person passing on the highway, an action was brought against the servant performing the work, it was said to be well settled that the servant is liable for his own carelessness. *Wright v. Compton* (Ind.) *supra*.

In *Com. v. Rigney* (Mass.) *supra*, a servant, at the command of his master, ejected a third person from premises in possession of the master, and he was held liable for assault; but the question of the effect of the command of the master is not discussed, the case turning upon the question of the right to effect the ejection.

d. Fraud and extortion

An agent or servant is personally liable for injury inflicted upon third persons by his false representations, fraud, or extortion committed on behalf of his employer.

[Florida](#)
[Wheeler v. Baars](#) (1894) 33 Fla. 696, 15 So. 584

[Illinois](#)

[Reed v. Peterson](#) (1878) 91 Ill. 288

[Indiana](#)

[Moore v. Shields](#) (1889) 121 Ind. 267, 23 N.E. 89

[Kentucky](#)

[Campbell v. Hillman](#) (1854) 15 B. Mon. 508, 61 Am. Dec. 195

[Maryland](#)

[Lamm v. Port Deposit Homestead Asso.](#) (1878) 49 Md. 233, 33 Am. Rep. 246

[Massachusetts](#)

[Hedden v. Griffin](#) (1884) 136 Mass. 229, 49 Am. Rep. 25

Michigan

- [Starkweather v. Benjamin \(1875\) 32 Mich. 306](#)
- [Weber v. Weber \(1882\) 47 Mich. 569, 11 N.W. 389](#)
- [Hempfling v. Burr \(1886\) 59 Mich. 294, 26 N.W. 496](#)
- [McDonald v. McKinnon \(1892\) 92 Mich. 254, 52 N.W. 303](#)
- [Bartholomew v. Walsh \(1916\) 191 Mich. 252, 157 N.W. 575](#)

Minnesota

- [Clark v. Lovering \(1887\) 37 Minn. 120, 33 N.W. 776](#)

Missouri

- [Hamlin v. Abell \(1893\) 120 Mo. 188, 25 S.W. 516](#)

New Jersey

- [Bocchino v. Cook \(1902\) 67 N.J.L. 467, 51 Atl. 487](#)

New York

- [Hecker v. De Groot \(1857\) 15 How. Pr. 314](#)
- [Gutchess v. Whiting \(1866\) 46 Barb. 139](#)
- [Bruff v. Mali \(1867\) 36 N.Y. 200, 6 Mor. Min. Rep. 574](#)
- [Sprights v. Hawley \(1868\) 39 N.Y. 441, 7 N.Y. Trans. App. 14, 100 Am. Dec. 452](#)
- [Re Cushman \(1916\) 95 Misc. 9, 160 N.Y. Supp. 661](#)

Tennessee

- [Carpenter v. Lee \(1833\) 5 Yerg. 265](#)
- [Caulkins v. Memphis Gaslight Co. \(1887\) 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S.W. 287](#)
- [Brumley v. Chattanooga Speedway & Motordrome Co. \(1917\) 138 Tenn. 534, 198 S.W. 775](#)

Texas

- [Baker v. Wasson \(1880\) 53 Tex. 150](#)
- [Cameron v. First Nat. Bank \(1917\) — Tex. Civ. App. —, 194 S.W. 469](#)

West Virginia

- [Mann v. McVey \(1869\) 3 W. Va. 232](#)

Wisconsin

- [Wright v. Eaton \(1858\) 7 Wis. 595](#)

England

- [Southerne v. Howe \(1619\) 2 Rolle, Rep. 28, 81 Eng. Reprint, 637, citing \(1606\) 3 Jac. B. R. Lopez's Case](#)
- [Arnot v. Biscoe \(1743\) 1 Ves. Sr. 95, 27 Eng. Reprint, 914, 18 Eng. Rul. Cas. 156](#)
- [Cox v. Prentice \(1815\) 3 Maule & S. 345, 105 Eng. Reprint, 641, 16 Revised Rep. 288](#)

Swift v. Jewsbury (1846) L. R. 9 Q. B. 301, 43 L. J. Q. B. N. S. 56, 30 L. T. N. S. 31, 22 Week. Rep. 319

Cullen v. Thomson (1863) 4 Macq. H. L. Cas. 441, 9 Jur. N. S. 85, 6 L. T. N. S. 870

One who extorts money from another cannot avoid liability on the ground that he was acting for another person, to whom he has paid the money. *Bacchino v. Cook* (N.J.) *supra*.

An agent is personally liable for securing the surrender of bonds by their holder upon payments in Confederate currency by representing that such currency was legal tender, and that the creditor was compelled to receive it, whether the statement was fraudulently untrue, or constituted duress, by forcing the currency on the unwilling creditor. *Mann v. McVey* (W. Va.) *supra*.

For deceit and false representations made by an agent in the course of his employment, both the agent and his principal are civilly liable. *Wheeler v. Baars* (Fla.) *supra*.

In *Cameron v. First Nat. Bank* (Tex.) *supra*, which involved the question of liability of directors of a corporation, the court says an agent is as much responsible as his principal for fraud perpetrated by another, in which he participated.

In *Reed v. Peterson* (Ill.) *supra*, in which relief was sought from a fraudulent deprivation of a person of his property against a corporation and its cashier and agent, the court states the rule that, in an action at law for damages, the fact that defendant acted throughout in the capacity of agent, in a fraud perpetrated by him, will afford him no excuse.

An insurance agent is personally liable for false representations which induced the taking of a policy which would not otherwise have been taken. *Hedden v. Griffin* (Mass.) *supra*.

An agent is liable for false representations made in his master's business. [Weber v. Weber \(1882\) 47 Mich. 569, 11 N.W. 389](#). The court says a person cannot avoid responsibility merely because he gets no personal advantage from the fraud. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another.

The treasurer of a corporation, who has received, as custodian, stock to which another person will be entitled when he has performed certain services for the corporation, cannot avoid personal responsibility for his fraud in representing that it had been destroyed, and refusing to deliver it up when the condition was fulfilled, on the ground that the action should have been against the corporation. The court says that it is true that he, as agent of the corporation, could not be held liable for its acts, but he is charged with fraud and deceit, and for those acts he, and not the corporation, is the responsible party. *McDonald v. McKinnon* (1892) 92 Mich. 254, 52 N.W. 363.

A servant of a corporation is personally liable for fraudulently overissuing its stock. [Bruff v. Mali \(1867\) 36 N.Y. 200](#).

An agent who assists a trustee of corporate stock in selling it and securing a transfer of it on the books of the corporation is liable for its value to a cestui que trust. [Caulkins v. Memphis Gaslight Co. \(1887\) 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S.W. 287](#).

One who aids in procuring corporate stock to be illegally issued to him under circumstances which would make him, if acting in his own right, responsible to the true owner, cannot avoid liability because he was acting as agent for another. [Baker v. Wasson \(1880\) 53 Tex. 150.](#)

An agent of a bank, who makes a false statement upon inquiry by a third person as to the credit of a person named, is personally liable for the loss caused thereby to the one making the inquiry. That ruling, however, is put upon the ground that the inquiry was made of the manager individually, and that, therefore, the bank would not be liable for his act. [Swift v. Jewsbury \(1846\) L. R. 9 Q. B. \(Eng.\) 301, 43 L. J. Q. B. N. S. 56, 30 L. T. N. S. 31, 22 Week. Rep. 319.](#)

In [Hempfling v. Burr \(1886\) 59 Mich. 294, 26 N.W. 496](#), the court, in speaking of a claim that a cashier of a bank was not liable for a fraud committed by him in behalf of the bank, says this is a very singular result, and one which is too unreasonable to bear consideration.

Sales.

An agent is personally liable for false representations made in the sale of his principal's property. [Lamm v. Port Deposit Homestead Asso. \(1878\) 49 Md. 233, 33 Am. Rep. 246; Campbell v. Hillman \(1854\) 15 B. Mon. \(Ky.\) 508, 61 Am. Dec. 195; Gutchess v. Whiting \(1866\) 46 Barb. \(N.Y.\) 139.](#)

Agents who, by false representations, induce others to purchase invalid warrants, are personally liable in an action for money had and received, although they have turned the proceeds of the sale over to their principals. [Moore v. Shields \(1889\) 121 Ind. 267, 23 N.E. 89.](#)

In [Re Cushman \(1916\) 95 Misc. 9, 160 N.Y. Supp. 661](#), which was an action to hold the estate of a guardian liable for false representations as to title in the sale of the ward's real estate, the court recognizes the rule that a known agent is not responsible to a third person for acts done by him in performance of an authority rightfully conferred. He is not liable to third persons for omission or neglect of duty, though he may be liable for his own torts.

An agent fraudulently selling an unsound horse as sound is liable for the fraud. [Carpenter v. Lee \(1833\) 5 Yerg. \(Tenn.\) 265.](#)

An agent assisting in defrauding a customer into the purchase of worthless stock is personally liable. [Brumley v. Chattanooga Speedway & Motordrome Co. \(1917\) 138 Tenn. 534, 198 S.W. 775.](#) The court says: "If one acting as the agent or employee of another is guilty of fraud under circumstances which would make him responsible if acting for himself, he may not be relieved from liability by showing that he acted as agent for such another, even though no personal benefit accrues to him. ... Indeed, liability rests primarily upon the agent as the immediate actor at fault, and even his principal's liability is derivative from that primary source, and dependent on whether or not the agent acted for the principal. ... There can be no sound distinction between torts of negligence and torts growing out of fraud and deceit in this regard. The case for liability on the part of the agent rather would seem to be stronger in the latter case, since ordinarily he consciously and wittingly does the wrongful act that deceives and defrauds."

If one send his servant to sell a counterfeit Bezoar stone as genuine, and the servant, with knowledge of the deceit, follows his instructions, an action on the case lies against him. [Southerne v. Howe \(1619\) Rolle, Rep. 28, 81 Eng. Reprint, 637, citing \(1606\) 3 Jac. B. R. Lopez's Case.](#)

An agent who effects the sale of an encumbered leasehold without disclosing the fact of the encumbrance is personally liable for the down payment which has been made to him. *Arnot v. Biscoe* (1743) 1 Ves. Sr. 95, 27 Eng. Reprint, 914, 18 Eng. Rul. Cas. 156.

Where an agent having silver to sell for his principal sold it on a false assay for more than it was worth, and credited his principal's account with what he received, he was held to be personally liable to the purchaser for the deficiency, on the ground that he had not, by merely crediting his principal's account, changed his position. The agent was guilty of no wrong in the matter, however, because he employed a professional assay master to compute the amount. The decision was put upon the ground of mutual error. *Cox v. Prentice* (1815) 3 Maule & S. 345, 105 Eng. Reprint, 641, 16 Revised Rep. 288.

In *Cullen v. Thomson* (1863) 4 Macq. H. L. Cas. (Eng.) 441, 9 Jur. N. S. 85, 6 L. T. N. S. 870, which was an action to hold managers of a corporation liable for fraudulent sales of stock, the Lord Chancellor says all persons directly concerned in the commission of a fraud are to be treated as principals. No person can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another, and the reason is plain; for the contract of agency cannot impose an obligation on the agent or servant to commit, or assist in the committing of, a fraud.

Agents who aid in concealing property obtained by fraud will be equally liable therefor with the one guilty of the fraud. [Allen v. Hartfield \(1875\) 76 Ill. 358](#).

The same principle applies to an agent who aids in a breach of trust.

The agent of a trustee, who, with knowledge that a breach of trust is being committed, assists in that breach of trust, is personally answerable, although he may be employed as the agent of the person who directs him to commit the breach of trust. *Atty. Gen. v. Leicester* (1844) 7 Beav. 176, 49 Eng. Reprint, 1031.

There is one early case which, as reported, seems to be out of harmony with the law as afterwards established.

In *Anonymous* (1472) Y.B. (Eng.) Edw. IV. 6, pl. 10, an action of deceit was brought against a person for selling cloth warranted to be of a certain length, which was not so long as warranted. The defendant pleaded that he sold as servant for the owner, and the court said that plaintiff could look to the master, for the servant sold merely as servant.

As will be seen in the discussion of the question of conversion, III. j, there is a theory that if the servant or agent acts merely as a conduit through whose possession the goods pass, without any act on his part to affect the title, he is not liable. This rule has been applied in a few cases which appear to have involved liability for fraud.

Thus, a clerk is not personally liable for failure to credit a payment on the books which he has turned over to his master. *Cary v. Webster* (1721) 1 Strange, 480, 93 Eng. Reprint, 647. The court, however, says that if he had not paid it over, the plaintiff would have had his option to charge either servant or master.

In *Snowdon v. Davis* (1808) 1 Taunt. 359, 127 Eng. Reprint, 872, which was an action for money had and received against the bailiff of a sheriff, who had extorted more money than his warrant called for by threat of distress, and paid the money over to the sheriff, the question of liability was compared to that of an agent, and the distinction was made that if the money were paid to the agent to be paid to the principal, the agent would not

be liable, though he would be if it were not paid expressly for the benefit of the principal.

In 1 Rolle, Abr. 95, it is said that if a servant of a taverner sell wine which is bad, yet an action of deceit will not lie against the servant, for he did this as servant. But no authority is cited for the proposition, and the author concludes his sentence, "Contra, 9 Hen. VI. 533." The latter authority was a case against B and C for the sale of bad wine, and C defended on the ground that he sold as the servant of B, and Martin held that the defense was not good; so that Rolle's statement does not seem to be correct.

And in one case it was held that there was no liability for false representations in the sale of stock, if they were honestly made, the agent himself being deceived by the principal. [Eblin v. Sellars \(1894\) 15 Ky. L. Rep. 539](#).

That makes the question of knowledge or notice on the part of the agent an element in the liability of the agent, but it would seem that the same rule should apply to the agent as to the principal; that is, he should be liable not only for statements which he knows to be false, but also for those which he ought to have known to be so.

e. Libel

A servant or agent cannot avoid liability for libel published by him by the fact that he acted merely in the capacity of servant or agent. [Pollasky v. Minchener \(1890\) 81 Mich. 280, 9 L.R.A. 102, 21 Am. St. Rep. 516, 46 N.W. 5](#); [Morse v. Modern Woodmen \(1917\) 166 Wis. 194, 164 N.W. 829, Ann. Cas. 1918D, 480](#).

In [Breay v. Royal British Nurses Asso. \[1897\] 2 Ch. \(Eng.\) 272, 66 L. J. Ch. N. S. 587, 76 L. T. N. S. 735, 46 Week. Rep. 86](#), which involved the question of the liability of a benefit association for a libel published in a paper which it maintained, the court said that if the article was a libel, the secretary of the association, who ordered the publication to be made, would be personally liable for it.

In [Maloney v. Bartley \(1812\) 3 Campb. \(Eng.\) 210](#), which involved a question of admissibility of evidence, the court says that a person who has written a copy of a libel and delivered it to a third person is liable, and the fact that his master ordered him to do so is no justification.

Civil actions for libel seem to be rare; and therefore attention is called to the following cases in which prosecutions were upheld against servants as such: [Rex v. Clerk \(1728\) 1 Barnard. K. B. 304, 94 Eng. Reprint, 207](#); [Rex v. Knell \(1729\) 1 Barnard. K. B. 305, 94 Eng. Reprint, 207](#).

There is a tendency running through the decisions, however, to hold that if the agent or servant is a mere innocent conduit through which the wrong is committed, he will not be personally liable. Thus, a porter, who, in the course of his business, delivers parcels containing libelous handbills, is not liable in an action of libel if he can show that he was ignorant of the contents of the parcels. [Day v. Bream \(1837\) 2 Moody & R. \(Eng.\) 54](#).

f. Obstruction of ancient lights

A servant of a corporation is liable for obstructing ancient lights. [Thompson v. Gibson \(1841\) 7 Mees. & W. 456, 151 Eng. Reprint, 845, 9 Dowl. P. C. 717, 10 L. J. Exch. N. S. 330](#).

The managing clerk of a property owner under whose direction buildings are constructed which darken the ancient lights of a neighboring property owner is personally liable for the injury. [Wilson v. Peto \(1821\) 6 J. B. Moore \(Eng.\) 47](#).

g. Abuse of legal process

An agent or servant who uses legal process in an illegal manner incurs the same liability as he would had he employed it in his own behalf. Alabama

[Warfield v. Campbell \(1859\) 35 Ala. 349](#)

Illinois

[Sundmacher v. Block \(1890\) 39 Ill. App. 553](#)

Kentucky

[Wood v. Weir \(1845\) 5 B. Mon. 546](#)

Maine

[Richardson v. Kimball \(1848\) 28 Me. 463](#)

Michigan

[Josselyn v. McAllister \(1871\) 22 Mich. 300](#)

New York

[Gearity v. Strasbourger \(1909\) 133 App. Div. 701, 118 N.Y. Supp. 257](#)

Rhode Island

[McGarrahan v. Lavers \(1866\) 15 R. I. 302, 3 Atl. 592](#)

Texas

[Wallace v. Finberg \(1876\) 46 Tex. 35](#)

Wisconsin

[Wright v. Eaton \(1859\) 7 Wis. 595](#)

England

[Sands v. Child \(1693\) 3 Lev. 351, 83 Eng. Reprint, 725](#)

[Barker v. Braham \(1773\) 3 Wils. 377, 95 Eng. Reprint, 1109, 2 W. Bl. 866, 96 Eng. Reprint, 510](#)

[Stevens v. Midland Counties R. Co. \(1854\) 10 Exch. 352, 156 Eng. Reprint, 480, 2 C. L. R. 1300, 23 L. J. Exch. N. S. 328, 18 Jur. 932](#)

[Gauntlett v. King \(1857\) 3 C. B. N. S. 59, 140 Eng. Reprint, 660](#)

[Bennett v. Bayes \(1860\) 5 Hurlst. & N. 391, 157 Eng. Reprint, 1233, 29 L. J. Exch. N. S. 224, 8 Week. Rep. 320, 2 L. T. N. S. 156](#)

In *McGarrahan v. Lavers (R. I.) supra*, a clerk in a restaurant was held liable for directing the arrest of a customer, without any discussion as to whether or not the action should have been brought against his employer.

A manager of a store is personally liable for arresting, without warrant, a customer who is alleged to have been guilty of shoplifting, which did not occur in his presence. *Gearity v. Stresbrouger (N.Y.) supra*.

And the general rule is that the servant or agent is liable in all cases for false arrest. *Josselyn v. McAllister (Mich.) supra*.

A clerk and watchman of a hotel who took part in a wrongful arrest of a guest for alleged refusal to pay a bill are personally liable in damages therefor. *Sundmacher v. Block (Ill.) supra*.

An agent or servant is liable in damages for causing the arrest of a person maliciously and illegally, although he is acting for his principal. *Warfield v. Campbell (Ala.) supra*.

If A orders B to conduct a prosecution, and both know that the person charged is innocent, they are equally to blame. The fact of B obeying A's command is not enough to exonerate him. *Stevens v. Midland Counties R. Co.* (1854) 10 Exch. 352, 156 Eng. Reprint, 480, 2 C. L. R. 1300, 23 L. J. Exch. N. S. 328, 18 Jur. 932.

One who, as agent of another, collects money by execution, and, instead of applying it on the judgment and costs in the action, applies it to other claims of his principals, cannot avoid liability to the judgment debtor on the ground that he acted as agent. *Wright v. Eaton (Wis.) supra*. The court says the fact that the client obtained the money as agent, if wrongfully obtained, cannot absolve him from liability to the person from whom it was obtained, although he had paid it over to his principal.

In an action against agents for illegally bringing suit in the admiralty for a matter arising within the body of a county, it was held that the express command of the master would not avail because the warrant of no man, not even the King himself, can excuse the doing of an illegal act, for, although the commanders are trespassers, so are also the persons who do the act. *Sands v. Child* (1693) 3 Lev. 351, 83 Eng. Reprint, 725.

In *Wood v. Weir (Ky.) supra*, an attorney who maliciously procured a restraining order to deprive plaintiff of his property was held liable in damages; but there is no discussion of his position as agent of his client.

In *Barker v. Braham* (1773) 3 Wils. 377, 95 Eng. Reprint, 1109, 2 W. Bl. 866, 96 Eng. Reprint, 510, which involved the question of liability of an attorney for illegally suing out a *capias ad satisfaciendum*, he attempted to defend on the ground that he merely acted as agent for his principal; but the court said all the books say that all are principals in trespass.

An agent having the renting of property for the owner cannot defeat liability to an action for trespass in directing the leaving of a distress for rent after the rent had been tendered, on the ground that he was merely acting as agent. *Bennett v. Bayes* (1860) 5 Hurlst & N. 391, 157 Eng. Reprint, 1233, 29 L. J. Exch. N. S. 224, 8 Week. Rep. 320, 2 L. T. N. S. 156.

Agents of an officer who, after attaching a vessel, permit it to continue its accustomed course of business, and who receive the profits thereof, are liable to the attaching creditor, who establishes his title to the vessel, for the amounts so received, the court saying that an agent is liable for misfeasance to the owner of the property, whether he acted by direction of his principal or not. *Richardson v. Kimball (Me.) supra*.

A real estate broker employed by a property owner to make a distress for rent is personally liable for distraining goods not subject to distress. *Gauntlett v. King* (1857) 3 C. B. N. S. 59, 140 Eng. Reprint, 660.

An agent who acts maliciously in making the affidavit and bond necessary to secure an attachment is personally responsible for the injury done. *Wallace v. Finberg (Tex.) supra*.

h. Infringement of patent

Agents who participate in the infringement of a patent may be held personally liable for their acts.

And an injunction will lie against them to prevent infringement. [Goodyear v. Phelps](#) (1853) 3 Blatchf. 91, Fed. Cas. No. 5,581; [Poppenhausen v. Falke](#) (1861) 4 Blatchf. 493, Fed. Cas. No. 11,279; [Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co.](#) (1887) 30 Fed. 123; [Cahoone Barnet Mfg. Co. v. Rubber & C. Harness Co.](#) (1891) 45 Fed. 582.

An agent who actively participates in the infringement of a patent is liable in damages. [National Car-Brake](#)

[Shoe Co. v. Terre Haute Car & Mfg. Co. \(1884\) 19 Fed. 514.](#)

In an action against the chairman of the directors of a railroad company for contracting for certain work which involved the infringement of a patent, the court says undoubtedly all persons commanding, procuring, aiding, or assisting in the commission of a trespass are principals in the transaction, and stand responsible to answer in damages to the injured person. Both the master who commands the doing and the servant who does the acts of trespass may be made responsible as principals. [Lightner v. Brooks \(1864\) 2 Cliff. 287, Fed. Cas. No. 8,344.](#)

[Sickels v. Borden \(1857\) 4 Blatchf. 14, Fed. Cas. No. 12,833,](#) was a proceeding in attachment for violation of an injunction against infringement of a patent by the use of an engine to which the mechanism had been attached. But with respect to the liability of the engineer having no interest in, or control over, the engine, it was argued that it would not do to punish by attachment the mere servants of the owner of the boat, who were subject to the orders of the master and to punishment for disobedience if they refused to aid in the navigation of the boat. But the court held that both the master and engineer, as agents of the foreign corporation which owned the boat on which the infringing mechanism was placed, were proper parties to the suit, at least for the purpose of enjoining the engineer as the acting infringer. And neither his agency nor his relationship to the master or to the vessel affords an excuse for violation of the injunction.

But an action at law for damages cannot be maintained against servants who merely make or sell an article which infringes a patent. [United Nickel Co. v. Worthington \(1882\) 13 Fed. 392.](#)

So, customhouse agents of foreign manufacturers, who aid in passing through the customhouse articles manufactured abroad which infringe a domestic patent, cannot be held liable for the infringement. This was placed upon the ground that the act was neither making, using, exercising, nor vending the invention. [Nobel's Explosives Co. v. Jones \(1883\) L. R. 8 App. Cas. \(Eng.\) 5, 52 L. J. Ch. N. S. 339, 48 L. T. N. S. 490, 31 Week. Rep. 388,](#) affirming [\(1880\) L. R. 17 Ch. Div. 722, 50 L. J. Ch. N. S. 582, 44 L. T. N. S. 593, 30 Week. Rep. 494.](#)

The directors of a corporation which has been guilty of an infringement of a patent may be held personally liable so far as they co-operated in the infringement, and it is no justification for them to say that the corporation ordered them to do so. [Betts v. De Vitre \(1864\) 11 L. T. N. S. \(Eng.\) 535, 5 New. Rep. 165.](#)

i. Meddling with decedents' estates

An agent who assists his principal in meddling with the estate of a deceased person, with which the principal is not authorized to interfere, is personally liable therefor.

In [Lysley v. Clarke \(1851\) 14 Eng. L. & Eq. Rep. 510,](#) there is a dictum to the effect that one interfering with the estate of a deceased person, as agent for another, is a wrongdoer and liable as executor de son tort.

An agent of an executrix, who mismanages the estate and converts income to his own use, is liable to the executrix, but not to heirs and distributees. [Phinney v. Phinney \(1859\) 17 How. Pr. \(N.Y.\) 197.](#)

In [Pond v. Underwood \(1766\) 2 Ld. Raym. 1210, 92 Eng. Reprint, 299,](#) it was held that one who, as agent for an administrator appointed before finding the will, collects money due the intestate and turns it over to the administrator, is not liable in trover to the executor when appointed. The court held that though the administrator might be liable, yet it would be hard to make defendant liable, he having paid the money over before he knew of the will.

But in *Jacob v. Allen* (1703) 1 Salk. 27, 91 Eng. Reprint, 26, it was held that an agent of an administrator who collects money for the estate, and pays it over to the administrator before the will is found, is liable to the executor in *indebitatus assumpsit*, because the administration was void and could give him no authority to act.

The earlier case was decided by Trevor, Ch. J., and was *indebitatus assumpsit* for money had and received, and it was objected that defendant acting only as agent, it was a receipt by the administrator, and not by defendant, and that the action ought to be special *assumpsit*, and not general *indebitatus*, because, the money having been received by special authority, to the use of another, this express intent prevents the raising of an implied contract to a third person. *Sed non allocatur* for the administration was merely void and the administrator could give no authority, and then there is nothing to hinder the raising of an implied contract. The later case was the same form of action for money which was due the testator and collected by defendant before the will was found. The case came before Lord Holt, who, as has been seen, was inclined to favor a rule of nonliability in case of agents acting for their principals, and he directed a nonsuit. In *Sadler v. Evans* (1766) 4 Burr. 1984, 98 Eng. Reprint, 34, decided about the time of *Pond v. Underwood*, Lord Mansfield said that he favored the later case.

One who, at the instance of a widow, collects and pays over to her money due the estate when she has not taken letters of administration, is personally liable to the executor for the amount so collected. *Sharland v. Mildon* (1846) 5 Hare, 469, 67 Eng. Reprint, 997, 15 L. J. Ch. N. S. 434, 10 Jur. 771. The court says the authorities clearly show that the doctrine that the possession of the agent is the possession of the principal has no application to the case of a wrongdoer.

The husband of an administratrix, acting as her agent, may be directly liable to the cestuis que trust for any fraud or collusion in the management of the estate. [Lehmann v. Rothbarth \(1884\) 111 Ill. 185.](#)

Executors and trustees in charge of the property of a deceased are personally liable for permitting the property to become so out of order that a window falls from the building, to the injury of a passer-by. *Ferrier v. Trépannier* (1895) 24 Can. C. S. 86.

Where the treasurer of a savings bank paid out money of a deceased depositor in settlement of claims against him, and it was sought to make him liable for other debts as executor *de son tort*, he claims exemption as having acted merely as agent of the bank; but the court says the actual perpetrator of a positive and obvious wrong can never exonerate himself from personal liability by showing that he was acting as the agent or servant of another, or even by his superior command. [Bennett v. Ives \(1862\) 30 Conn. 329.](#)

In [Stephens v. Bacon \(1822\) 7 N.J.L. 1](#), it was held that an agent of an executrix who receives money held by testator in trust for a third person is not liable in *assumpsit* to the third person. The court says a mere agent, without suggestion of fraud, is answerable only to his principal.

If a person acting as agent for another takes possession of the personal property of a decedent and converts it into money, without administration, he will be liable to the lawful administrator for the value of the property so converted. [Stevenson v. Valentine \(1889\) 27 Neb. 338, 43 N.W. 107.](#) One employed to collect some debts belonging to a decedent's estate was sought to be held liable for paying them over to decedent's widow, and it was held that he will not be relieved from liability on the ground that he was acting as agent for the widow, since the law does not recognize the relation of principal and agent as existing amongst wrongdoers. *Sharland v. Mildon* (Eng.) *supra*.

j. Conversion

1. In general

An agent or servant who assists his principal or master in converting property of a third person to the use of the principal or master is personally liable to the true owner for the loss thereby inflicted upon him. United States

[Hills v. Ross \(1796\) 3 Dall. 184, 1 L. ed. 562](#)

Alabama

[Lee v. Mathews \(1846\) 10 Ala. 682, 44 Am. Dec. 177](#)

[Prince v. Puckett \(1848\) 12 Ala. 832](#)

[Perminter v. Kelly \(1851\) 18 Ala. 716, 54 Am. Dec. 177](#)

[Hudmon v. Du Bose \(1888\) 85 Ala. 446, 2 L.R.A. 475, 5 So. 162](#)

Arkansas

[Gaines v. Briggs \(1849\) 9 Ark. 46](#)

California

[Webb v. Winter \(1851\) 1 Cal. 417](#)

Dakota

[Nichols, S. & Co. v. Barnes \(1882\) 3 Dak. 148, 14 N.W. 110](#)

[Phillip Best Brewing Co. v. Pillsbury & H. Elevator Co. \(1888\) 5 Dak. 62, 37 N.W. 763](#)

Georgia

[Porter v. Thomas \(1857\) 23 Ga. 467](#)

[Miller v. Wilson \(1896\) 98 Ga. 567, 58 Am. St. Rep. 319, 25 S.E. 578](#)

[Flannery v. Harley \(1903\) 117 Ga. 483, 43 S.E. 765](#)

[McConnell v. Prince \(1912\) 12 Ga. App. 54, 76 S.E. 754](#)

Illinois

[Allen v. Hartfield \(1875\) 76 Ill. 358](#)

Indiana

[Berghoff v. McDonald \(1882\) 87 Ind. 549](#)

[Shearer v. Evans \(1883\) 89 Ind. 400](#)

Iowa

[Warder-Bushnell & G. Co. v. Harris \(1890\) 81 Iowa, 153, 46 N.W. 859](#)

Kansas

[Huffman v. Parsons \(1879\) 21 Kan. 467](#)

[Barnhart v. Ford \(1887\) 37 Kan. 520, 15 Pac. 542](#)

Kentucky

[Poole v. Adkisson \(1833\) 1 Dana, 110](#)

Maine

[Eveleth v. Blossom \(1867\) 54 Me. 447, 92 Am. Dec. 555](#)

[McPheters v. Page \(1891\) 83 Me. 234, 23 Am. St. Rep. 772, 22 Atl. 101](#)

[Wing v. Milliken \(1898\) 91 Me. 387, 64 Am. St. Rep. 238, 40 Atl. 138](#)

Massachusetts

[Higginson v. York \(1809\) 5 Mass. 341](#)
[McPartland v. Read \(1865\) 11 Allen, 231](#)
[Edgerly v. Whalan \(1871\) 106 Mass. 307](#)

Michigan

[Knowles v. Smith \(1916\) 190 Mich. 409, 157 N.W. 276](#)

Missouri

[Williams v. Wall \(1875\) 60 Mo. 318](#)
[Ess v. Griffith \(1894\) 128 Mo. 50, 30 S.W. 343](#)

Nebraska

[Peckinbaugh v. Quillin \(1882\) 12 Neb. 586, 12 N.W. 104](#)
[McCormick v. Stevenson \(1882\) 13 Neb. 70, 12 N.W. 828](#)
[Stevenson v. Valentine \(1889\) 27 Neb. 338, 43 N.W. 107](#)
[Cook v. Monroe \(1895\) 45 Neb. 349, 63 N.W. 800](#)
[D. M. Osborne Co. v. Plano Mfg. Co. \(1897\) 51 Neb. 502, 70 N.W. 1124](#)
[Hill v. Campbell Commission Co. \(1898\) 54 Neb. 59, 74 N.W. 388](#)

New Hampshire

[Doty v. Hawkins \(1833\) 6 N.H. 247, 25 Am. Dec. 459](#)
[Gage v. Whittier \(1845\) 17 N.H. 320](#)
[Arthur v. Balch \(1851\) 23 N.H. 157](#)
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[Sprights v. Hawley \(1868\) 39 N.Y. 441, 7 N.Y. Trans. App. 14, 100 Am. Dec. 452, affirming \(1863\) 40 Barb. 397](#)
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[Mayer v. Kilpatrick \(1894\) 7 Misc. 689, 28 N.Y. Supp. 145](#)
[Crane v. Onderdonk \(1873\) 67 Barb. 47](#)
[Mead v. Jack \(1883\) 12 Daly, 65](#)
[Farrar v. Chauffetete \(1848\) 5 Denio, 527](#)
[Hearsey v. Pruyn \(1810\) 7 Johns. 182](#)
[Thorp v. Burling \(1814\) 11 Johns. 285](#)

Pennsylvania

[Rice v. Yocum \(1893\) 155 Pa. 538, 26 Atl. 698](#)

[Barton v. Willey \(1875\) 2 W.N.C. 157](#)

[Thum v. Fish \(1882\) 12 W.N.C. 94](#)

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Rhode Island

[Singer Mfg. Co. v. King \(1884\) 14 R. I. 511](#)

South Carolina

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Tennessee

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Texas

[Shilling v. Shilling \(1896\) — Tex. Civ. App. —, 35 S.W. 420](#)

[Ellis v. Stine \(1900\) — Tex. Civ. App. —, 55 S.W. 758](#)

[Kauffman v. Beasley \(1881\) 54 Tex. 563](#)

Virginia

[Newsum v. Newsum \(1829\) 1 Leigh, 94, 19 Am. Dec. 739](#)

Wisconsin

[Wright v. Eaton \(1859\) 7 Wis. 595](#)

[Blizzard v. Brown \(1913\) 152 Wis. 160, 139 N.W. 737](#)

[Jensen v. Miller \(1916\) 162 Wis. 546, 156 N.W. 1010](#)

England

[\(1676\) 2 Rolle, Abr. 431](#)

[Parker v. Godin \(1728\) 2 Strange, 814, 93 Eng. Reprint, 866](#)

[Perkins v. Smith \(1752\) 1 Wils. 328, 95 Eng. Reprint, 644](#)

[Sadler v. Evans \(1766\) 4 Burr. 1984, 98 Eng. Reprint, 34](#)

[Buller v. Harrison \(1777\) Cowp. pt. 2, p. 566, 98 Eng. Reprint, 1243](#)

[Stephens v. Elwall \(1815\) 4 Maule & S. 259, 105 Eng. Reprint, 830](#)

[Featherstonhaugh v. Johnston \(1818\) 8 Taunt. 237, 129 Eng. Reprint, 374, 2 J. B. Moore, 181](#)

[Wilson v. Anderton \(1830\) 1 Barn & Ad. 450, 109 Eng. Reprint, 855, 9 L. J. K. B. 48](#)

[Howell v. Batt \(1833\) 2 Nev. & M. 381, 5 Barn & Ad. 504, 110 Eng. Reprint, 877, 3 L. J. K. B. N. S. 49](#)

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Pearson v. Graham (1837) 6 Ad. & El. 899, 112 Eng. Reprint, 344, 2 Nev. & P. 636, W. W. & D. 691, 7 L. J. Q. B. N. S. 247

Catterall v. Kenyon (1842) 3 Q. B. 310, 114 Eng. Reprint, 525, 6 Jur. 507, 2 Gale & D. 545, 11 L. J. Q. B. N. S. 260

Davies v. Vernon (1844) 6 Q. B. 443, 115 Eng. Reprint, 169, 14 L. J. Q. B. N. S. 30

Ewbank v. Nutting (1849) 7 C. B. 797, 137 Eng. Reprint, 316

Powell v. Hoyland (1851) 6 Exch. 67, 155 Eng. Reprint, 456, 20 L. J. Exch. N. S. 82

Lee v. Bayes (1856) 18 C. B. 609, 139 Eng. Reprint, 1508, 25 L. J. C. P. N. S. 249, 2 Jur. N. S. 1093

Schuster v. McKellar (1857) 7 El. & Bl. 704, 119 Eng. Reprint, 1407, 26 L. J. Q. B. N. S. 281, 3 Jur. N. S. 1320, 5 Week. Rep. 656

Sharland v. Mildon (1846) 5 Hare, 469, 67 Eng. Reprint, 997, 15 L. J. Ch. N. S. 434, 10 Jur. 771

Fine Art. Soc. v. Union Bank (1886) L. R. 17 Q. B. Div. 705, 56 L. J. Q. B. N. S. 70, 55 L. T. N. S. 536, 35 Week. Rep. 114, 51 J. P. 69

If A takes property by command of B, replevin may be brought against both. (1676) 2 Rolle, Abr. (**Eng.**) 431.

A person wrongfully taking property is liable in replevin although he acts as agent for another. [Thompson v. McLean \(1890\) 32 N.Y.S.R. 736, 10 N.Y. Supp. 411.](#)

In [Arthur v. Balch \(1851\) 23 N.H. 157](#), which was an action to hold the master liable for conversion by his servant, the court said that it was formerly held that where goods were converted by a servant at the command or by direction of the master, no action would lie against the servant, but that this doctrine is no longer held to be the law.

One who takes and converts property of another cannot escape liability to the owner by showing that he acted as agent. *Warder-Bushnell & G. Co. v. Harris (Iowa) supra*. The court says the capacity in which a tortfeasor acts does not protect him from liability for his acts.

Where one to whom stock has been sent for delivery upon payment of the amount for which it was held as collateral converted it to his own use, an action was brought against him by the true owner, and the court, after stating that he had transcended the power conferred upon him, and was guilty of misfeasance toward the one entitled to possession of the stock, says: "Although an agent, for nonfeasance and omissions of duty, is not liable, except to his principals, the rule is otherwise when the act complained of is misfeasance. In all such cases he is personally responsible, whether he did the wrong intentionally, or ignorantly by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or property of another." [Crane v. Onderdonk \(1873\) 67 Barb. \(N.Y.\) 47.](#)

One aiding in the conversion of property cannot escape liability in trover on the ground of his agency.

Shearer v. Evans (Ind.) supra.

In *Davies v. Vernon* (1844) 6 Q. B. 443, 115 Eng. Reprint, 169, 14 L. J. Q. B. N. S. 30, which was an action against an attorney, the court says the general rule is that an agent is liable in trover for a conversion to which he is a party, though it be for the benefit of his principal.

Replevin lies against an agent who aids in detaining property of another. *Berghoff v. McDonald* (Ind.) supra. The court says, in torts the rule of principal and agent does not exist. They are all wrongdoers.

An agent who, for and in behalf of his principal, takes the property of another without the latter's consent, is guilty of conversion. *McConnell v. Prince* (Ga.) supra.

It is no defense in trover that defendant acted under authority of another, who had no authority over the property. *Gaines v. Briggs* (1849) 9 Ark. 46.

An agent who takes for a principal plank to which the principal has no claim is personally liable in trover for the conversion. *Barton v. Willey* (1875) 2 W.N.C. (Pa.) 157.

One taking possession of another's animals, and carrying them off, cannot defeat liability on the ground that he was acting as agent. *Shilling v. Shilling* (1896) — Tex. Civ. App. —, 35 S.W. 420.

Persons who wrongfully drive a cropper off his land and appropriate his crop cannot defeat liability because they acted as agents. *Ellis v. Stine* (1900) — Tex. Civ. App. —, 55 S.W. 758.

In *Huffman v. Parsons* (1879) 21 Kan. 467, there is a dictum to the effect that if an agent, sued for the value of a wagon which he had taken from possession of plaintiff, committed a wrong in taking the wagon, he would be liable even though he acted as agent of another.

A cartman who assists in moving goods of a third person at the instance of his employer is liable in trover. *Thorp v. Burling* (1814) 11 Johns. (N.Y.) 285.

So, where cartmen assist the wrongdoer in reducing property to his possession by taking it from the place where the owner had deposited it, and carting it away, they will be liable for the conversion, although they did not know of the adverse title. The only ground on which the carrier cannot be held liable is that he has received and transported the goods after the trespasser has reduced them to his possession. *Mead v. Jack* (1883) 12 Daly (N.Y.) 65.

Agents sued in replevin for property taken by them for their principal cannot defeat the action by showing that they acted as agents. *Barnhart v. Ford* (1887) 37 Kan. 520, 15 Pac. 542.

Agents who aid their principal in concealing and retaining title to property fraudulently obtained are liable in trover. *Allen v. Hartfield* (1875) 76 Ill. 358.

An agent assisting in preventing the removal of trade fixtures from a building is personally liable in trover. *Farrar v. Chauffetete* (1848) 5 Denio, (N.Y.) 527.

The servant of a bankrupt, who, under his general authority, after his master has committed an act of bankruptcy and absconded, sells goods belonging to the bankrupt, is guilty of conversion. *Pearson v. Graham* (1837)

6 Ad. & El. 899, 112 Eng. Reprint, 344, 2 Nev. & P. 636, W. W. & D. 691, 7 L. J. Q. B. N. S. 247.

The master of a ship who negligently signs a bill of lading in favor of a third person, and then delivers according to the bill of lading, notwithstanding notice not to do so, is liable for conversion. *Schuster v. McKellar* (1857) 7 El. & Bl. 704, 119 Eng. Reprint, 1407, 26 L. J. Q. B. N. S. 281, 3 Jur. N. S. 1320, 5 Week. Rep. 656.

Where the master of a ship unnecessarily sells the cargo before reaching destination, he is guilty of conversion. *Ewbank v. Nutting* (1849) 7 C. B. 797, 137 Eng. Reprint, 316.

But an agent acting in the presence and under the direction of his master in taking possession of property claimed by another was held, in *Strong v. Colter* (1868) 13 Minn. 82, Gil. 77, not to be liable for the conversion unless his principal would also be liable.

And there is no liability for conversion for acts in which the agent does not participate. *McLennan v. Minneapolis & N. Elevator Co.* (1894) 57 Minn. 317, 59 N.W. 628.

And that doctrine was, in *Leuthold v. Fairchild* (1885) 35 Minn. 100, 27 N.W. 503, 28 N.W. 218, where an employee of a warehouse was sued for assisting in wrongfully disposing of property of a patron, carried to such an extent that the court said that the rule was that "an agent or servant who, acting solely for his master or principal, and by his direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property."

There is a rule acted upon by the courts more or less generally that an agent is not personally liable if he is a mere conduit through whose possession the property passes without any effect upon the title. Thus, a bailee or carrier may receive the property and return it to the principal or to his consignee without personal liability. This class of cases is not within the scope of this annotation because the cases turn upon the principle that there is no conversion in fact, without throwing any light upon the question now under consideration; namely, What is the liability of an agent who aids in a conversion?

Where a packer received, packed, and shipped goods to a third person which had been intrusted to his employers for sale, and by him pledged to such third persons for money lent, the court held that the packer was not liable for conversion, because he was exercising a public employment, and that he was a mere conduit in the ordinary course of trade, and could not be charged with a conversion. *Greenway v. Fisher* (1824) 1 Car. & P. (Eng.) 190.

But in *Fowler v. Hollins* (1872) L. R. 7 Q. B. 628, 2 Eng. Rul. Cas. 410, that case was doubted on the ground that a packer is not engaged in a public employment.

One Arkansas case failed to recognize this exception to the rule, and held broadly that in trover it is no defense that defendant acted under authority of another, who was himself a trespasser. *Gaines v. Briggs* (1848) 9 Ark. 46. In that case an instruction was disapproved which was to the effect that if defendant, in removing the property, acted as a mere carrier, at the instance and request of a third person, and with no intention of converting the property to his own use, or with the intent to exercise any right of ownership over said property, but in good faith, and at the time of the removal, the third person was in peaceable and quiet possession of the property, and defendant in no wise consented to, aided, or counseled the removal of the property, he would not be responsible.

2. Property turned over to principal

The fact that the property has been turned over to the principal is immaterial. The liability of the agent continues as though he still had the property in his possession. In fact, the act of turning it over may be the very act which completes the conversion.

An agent who, having become possessed of negotiable bills which had been taken from a bankrupt under circumstances such that they belonged to the one from whom he obtained them, may be personally liable in trover for turning them over to his principal after notice of the owner's claim. *Powell v. Hoyland* (1851) 6 Exch. 67, 155 Eng. Reprint, 456, 20 L. J. Exch. N. S. 82.

Where a clerk of a foreign merchant bought goods belonging to a bankrupt's estate and sent them to his employer, he was held personally liable for the conversion, although he was ignorant of the fact that the goods belonged to the estate. *Stephens v. Elwall* (1815) 4 Maule & S. 259, 105 Eng. Reprint, 830. Lord Ellenborough said the clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master, but nevertheless his acts may amount to a conversion, "for a person is guilty of a conversion who intermeddles with any property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it." And he says in answer to the plea of hard case, "What can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable not only jointly with his master, but, if the master cannot satisfy it, for every penny of the whole damage?"

An agent who trades a new machine in his hands for sale for an old one belonging to a third person is personally liable to the true owner, although he turns the old one and the money received in the trade over to his employer. *Rice v. Yocum* (1893) 155 Pa. 538, 26 Atl. 698.

An agent who has money to which his principal has no right is personally liable to one from whom it is wrongfully withheld. *Jensen v. Miller* (1916) 162 Wis. 546, 156 N.W. 1010.

In an action against an attorney for wrongfully collecting money and turning it over to his principal, the court says that the rule is that if an agent collects for his principal money which does not belong to him, and turns it over to the principal, he is personally liable therefor. *Blizzard v. Brown* (1913) 152 Wis. 160, 139 N.W. 737.

That one wrongfully obtaining money from another acts as agent for a third person does not absolve him from liability to the person from whom he secured it, although he has paid it over to his principal. *Wright v. Eaton* (1859) 7 Wis. 595.

Agents who assist their principal in appropriating the proceeds of a check which was alleged to be lost, after a duplicate had been issued in its place, with the understanding that the first one, if found, would be returned or destroyed, cannot avoid liability on the ground of their agency. *Mayer v. Kilpatrick* (1894) 7 Misc. 689, 28 N.Y. Supp. 145. The court says the principal cannot authorize or be deemed to have authorized the commission of any unlawful act by his agent, and defendants will not be permitted, therefore, to escape liability because, in the conversion of the check, they pretended to act for another.

In *Hearsey v. Pruyne* (1810) 7 Johns. (N.Y.) 182, it is said the law is well settled that an action may be sustained against an agent who has received money to which the principal has no right, if the agent has had notice not to pay it over.

One who bids in, as agent for another, at execution sale, property upon which he knows a third person has a lien, is guilty of conversion. [McCormick v. Stevenson](#) (1882) 13 Neb. 70, 12 N.W. 828; [Stevenson v. Valentine](#) (1889) 27 Neb. 338, 43 N.W. 107; [Cook v. Monroe](#) (1895) 45 Neb. 349, 63 N.W. 800; [D. M. Osborne Co. v. Plano Mfg. Co.](#) (1897) 51 Neb. 502, 70 N.W. 1124.

One who collects for another a draft received by indorsement in a gambling transaction, and turns the proceeds over to him, less his own commission for the service, is liable for the conversion. [Williams v. Wall](#) (1875) 60 Mo. 318.

Where an agent to collect a bill receives property from the debtor which belongs to a third person, and transmits it to his principal, he is liable in trover. The court said he was not relieved from liability by the fact that, in receiving the property from the debtor, he acted as the agent of the creditor, and without notice of the title of the true owner. Whoever meddles with another's property, whether as principal or agent, does so at his peril, and it makes no difference that, in doing so, he acted in good faith; nor, in case of an agent, that he delivers the property to his principal before receiving notice of the claim of the owner. If an agent takes the property of another without his consent and delivers it to the principal, it is a conversion, and trover will lie for recovery of the property, or for damages. [Miller v. Wilson](#) (1896) 98 Ga. 567, 58 Am. St. Rep. 319, 25 S.E. 578; [Flannery v. Harley](#) (1903) 117 Ga. 483, 43 S.E. 765.

Where an agent purchased slaves unlawfully sold at an auction, and immediately turned them over to his principal, but was sued for the conversion, the court says: "Our first impression was that the defendant, having acted merely as the agent of another person, and having parted with the possession before he received notice of the title of the plaintiff, was not responsible in this action, but that the suit must be brought against the principal. Subsequent reflection has satisfied us that we were mistaken, and that the principal upon which we relied does not govern such cases as this. The general rule of law, that agents properly authorized, acting for a known principal, without any personal undertaking, are not individually responsible, does not apply to torts, because no one can lawfully command another to commit a wrong. It is also clear that every unlawful intermeddling with the goods of another is a conversion; and it is no answer to the true owner, that the person so receiving the goods was ignorant of his title, or that he received them for the use or benefit of another. The taking or receiving of them, being a conversion, his subsequent disposition of them will not exonerate him from liability. ... Although, therefore, this may appear to be a hard case, it is perfectly clear the defendant, in receiving the slaves, was guilty of a conversion, although he was ignorant of the title of the plaintiff, and was acting merely as the agent of another, and consequently liable to be sued in this form of action." [Lee v. Mathews](#) (1846) 10 Ala. 682, 44 Am. Dec. 498.

But where one, as agent, purchases the share of the cotenant in a horse at execution sale, and delivers him to his principal, he is not liable for conversion of the share of the other cotenant unless his acts deprived such cotenant of the means of locating the animal. [Sheffler v. Mudd](#) (1897) 71 Mo. App. 78.

So, an agent of a surety company is not liable for conversion in placing money deposited with him by a customer as collateral for a bond executed in his favor in a bank account upon which checks for various purposes are drawn, after the agency has terminated and the fund has passed under control of the surety company. [Sagone v. Mackey](#) (1919) 225 N.Y. 594, 122 N.E. 621, reversing (1916) 172 App. Div. 192, 158 N.Y. Supp. 579, where the court says that the law is well settled that where an agent misapplies and misappropriates trust moneys, he, as well as the principal, is liable to the cestuis que trust therefor. When this defendant received these trust funds, it was not only the duty of his principal, but his own duty, to keep them separate and distinct, not only from the

funds of the company, but also from his individual funds. When he employed them in an account which contained a general fund of the company, and also an individual fund from which he drew for his personal use, he, as well as the principal, was liable for misfeasance and misappropriation. His wrongful act was a breach of duty owing to the cestuis que trust, for which he is personally liable.

Where a servant was sued in trover for conversion of a flute which he had obtained from plaintiff for his master's inspection, and which was not returned, it was held that the master was a competent witness to show that he authorized the obtaining of the flute, the chief justice saying that if he authorized the delivery of the message which was in fact delivered, the plaintiff could not recover from the servant. *Grylls v. Davies* (1831) 2 Barn. & Ad. 514, 109 Eng. Reprint, 1234. In that case trover had been brought against the servant, and after verdict in his favor, the only question was as to the competency of the principal as a witness, and that depended upon whether or not he was an interested party. The ground of the ruling of the chief justice is not stated. If the intent to convert the flute was not formed until after it had been delivered to the master, the servant may possibly not be liable because he did not participate in the conversion; but if the message was part of the scheme to get possession of and convert the instrument, it is not apparent why the servant should not be personally liable for aiding such a scheme.

Some New York cases, by an application of the principal of nonfeasance which obtained in that state, have reached the conclusion that an agent who purchases for a principal property claimed by another is not liable for the conversion. *Jackson v. Klinger* (1900) 33 Misc. 758, 67 N.Y. Supp. 850.

So, replevin will not lie against an agent who takes for his principal an article sold by the principal on conditional sale, and turns it over to the principal to hold for defaulted payments. *Iserman v. Conklin* (1897) 21 Misc. 194, 47 N.Y. Supp. 107. The court says the agent acted, with knowledge of the plaintiff, as the agent of the sellers, and not for himself.

In conflict with the above doctrine is the early English case of *Mires v. Solebay* (1677) 2 Mod. 242, 86 Eng. Reprint, 1050. In that case it appeared that, in consequence of a controversy over the title to some sheep, replevin was brought to recover their possession, and defendant, by command of the replevin suit, assisted the officers in driving the sheep to the plaintiff's pasture. Defendant was held not liable in trover, partly upon the ground that the sheep were in the custody of the law; but the court said the action will not lie against the servant, for apparent wrong; for if the master's command, though he had no title, yet he shall be excused. And this ruling would extend to all cases where the master's command was not to do an apparent wrong; for if the master's cause depend upon a title, be it true or false, it is enough to excuse the servant; for otherwise it would be a mischievous thing if a servant upon all occasions must be satisfied with his master's title and right before he will obey his commands. But the servant cannot plead the command of the master in bar of a trespass. The jury having failed to find a conversion, the court said it would not intend one, because, if the conversion was to the use of the master, there is no call for this action to be brought against defendant, but it ought to be brought against the master. It will be noted that in that case the jury refused to find a conversion, and that, together with the other elements in the case, makes the argument of the court of little weight. In the light of later decisions it would seem that had nothing appeared further than that, at his master's command, defendant assisted in taking sheep from their owner's pasture to his master's without authority of the owner, defendant could not shield himself from liability to suit.

In *Berry v. Vantries* (1824) 12 Serg. & R. (Pa.) 89, it is said the law is well laid down in *Mires v. Solebay* (Eng.) supra, that trover cannot be maintained against a servant who has acted by his master's command, unless

it were to do an apparent wrong. And that where the master's cause depends on a title, as where the command is given under the color of a writ, whether valid or not, a servant will be excused, for it would be unreasonable to require him to scrutinize the master's title, and thus make him act in all cases at his peril.

3. Sale and proceeds turned over

An agent who makes a sale of property to a third person at the command of his employer is liable in detinue, notwithstanding he acted merely as agent. [Poole v. Adkisson \(1833\) 1 Dana \(Ky.\) 110](#). The court says the principal cannot delegate authority to another to do an act which he himself has no legal authority to do. An agent or servant is responsible for his own tortious act even though it was done in submission to the command or authority of his employer or master. The general rule is that he whose voluntary act, whether for himself or another, operates injuriously to the rights of a third person, shall be responsible to the person who may be injured by the wrongful act.

A sale of property by an agent which deprives the true owner of it subjects the agent to liability for trover, although he has turned the proceeds over to his principal. [Gage v. Whittier \(1845\) 17 N.H. 320](#).

A servant who, in attempting to collect for his master a debt from a bankrupt, receives goods from the latter which he sells, and turns the money over to his principal, is personally liable in trover to the bankrupt's assignee. The court says that if the agent is a tort-feasor, no authority that he can derive from his master can excuse him from being liable in this action. [Perkins v. Smith \(1752\) 1 Wils. 328, 95 Eng. Reprint, 644](#).

In [Featherstonhaugh v. Johnston \(1818\) 8 Taunt. 237, 129 Eng. Reprint, 374, 2 J. B. Moore, 181](#), a consignee of goods, who sold them without notice of the claim of a third person, was held liable to him for the full value.

A bank which receives from a depositor money orders which he has embezzled, and cashes them, and places the proceeds to his credit, is liable for a conversion. [Fine Art Soc. v. Union Bank \(1886\) L. R. 17 Q. B. Div. \(Eng.\) 705, 56 L. J. Q. B. N. S. 70, 55 L. T. N. S. 536, 35 Week. Rep. 114, 51 J. P. 69](#).

One who merely aids the wife of a bankrupt in pawning some plate, and immediately delivers the proceeds to her, is personally liable in trover for the conversion. [Parker v. Godin \(1728\) 2 Strange, 814, 93 Eng. Reprint, 866](#).

An administrator who sells a chattel not owned by his intestate, and applies the proceeds to the payment of the debts of his intestate, is liable in trover to the true owner for its value. [Newsum v. Newsum \(1829\) 1 Leigh \(Va.\) 94, 19 Am. Dec. 739](#).

That one is acting as agent when he takes possession of property of one person to secure the debt of another, and has it sold, is no defense in an action of trover against him. [Kauffman v. Beasley \(1881\) 54 Tex. 563](#).

An agent who sells stolen property is liable to the true owner in trover if he refuses to disclose his principal. [Thum v. Fish \(1882\) 12 W.N.C. \(Pa.\) 94](#).

One who enters another's close at the instance of a third person, and takes away and sells wood, accounting to such third person for the proceeds, is liable in trespass to the true owner, although he was ignorant of the fact that his employer did not own the wood. [Higginson v. York \(1809\) 5 Mass. 341](#).

Where an agent of one cotenant sold the common property, the court said: "He must stand on the same

ground with his principal. The sale was equally a wrong by both. ... That the sale by the defendant below was such an assumption of authority over another's property as to amount to a conversion, there can be no doubt. If a party claim the property in the chattels as his own, or even assert the right of another over them, it is evidence of a conversion; and where a person's property is sold by one, whether for his own use or the use of another, it is a conversion, for it is a tortious act, and the gist of the action." [Perminter v. Kelly \(1851\) 18 Ala. 716, 54 Am. Dec. 177.](#)

Commercial agents of privateers were, in [Hills v. Ross \(1796\) 3 Dall. \(U.S.\) 331, 1 L. ed. 623](#), held liable to the owners of a prize which had been captured for the proceeds of sales which they, under direction of the privateers, had received and paid over to the privateers, with notice of the claim of the true owners.

4. Assisting conversion

Where consignees of a ship indorsed a bill of lading so as to permit goods to be taken by one not their true owner they were held liable in damages, the court saying that the fact that they were the agents of the owners of the ship would not relieve them from such liability. [Webb v. Winter \(1851\) 1 Cal. 417.](#)

A butcher who cuts up game for officers who have wrongfully seized it, and distributes it for consumption under their direction, is liable in trover. [McPheters v. Page \(1891\) 83 Me. 234, 23 Am. St. Rep. 772, 22 Atl. 101.](#)

An attorney at law who assists in the conversion of property by being present at an unlawful sale and bidding thereon cannot escape responsibility on the ground that he acted merely as agent. [Peckinbaugh v. Quillin \(1882\) 12 Neb. 586, 12 N.W. 104.](#)

But where the manager of a business, under direction of his employer, utilizes funds of the employer, under the latter's direction, to pay general debts of the business instead of a note, the holder of which claimed a special interest in the property, it was held that the agent was not personally liable. [Hodgson v. St. Paul Plow Co. \(1899\) 78 Minn. 172, 50 L.R.A. 644, 80 N.W. 956.](#) The court says, in contemplation of law such a servant has no possession of or title to his master's property. A servant may be a joint trespasser or joint tort-feasor in assisting the master in taking the goods wrongfully, but the servant is not liable for merely holding and refusing to deliver up goods received by him from his master, and held by him under the master's orders. The decision in that case, however, would seem to have been put upon a ground not applicable to the facts involved. The court says: "If, while the \$2,000 was still on deposit, and Power, as such servant, had the custody of the certificate of deposit, plaintiff had brought its action against him alone to have a trust declared in its favor upon such certificate, we are clearly of the opinion that the action could not be maintained. It would be useless to bring such an action. The plow company might discharge Power the next day after the action was commenced. Thereafter his relations to the certificate of deposit would be the same as those of any other stranger, and the action must necessarily be abortive. If plaintiff could not maintain such an action against Power while the alleged trust fund was so on deposit, it cannot maintain this action now, after the trust fund has been distributed in payment of the debts of the plow company." But the agent was not in mere passive possession. Conceding that no action would lie against him, if such was the fact, it by no means follows that he would not be liable where he had assisted in actually disbursing the funds.

The Minnesota decisions hold that an agent or servant, who, acting for his master or principal, and by his direction, and without knowing of any wrong, or being guilty of gross neglect in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property. [Leuthold v. Fairchild \(1886\) 35 Minn. 100, 27 N.W. 503, 28 N.W. 218;](#)

[McLennan v. Minneapolis & N. Elevator Co. \(1894\) 57 Minn. 317, 59 N.W. 628.](#)

5. Mortgaged property

That one assisting in wrongfully taking mortgaged property out of the possession of the mortgagor acted merely as agent for the mortgagee does not absolve him from liability in trover for the injury. [Hall v. Garvin \(1920\) 113 S.C. 182, 102 S.E. 1.](#)

An agent who sells mortgaged property for the mortgagor is liable to the mortgagee for the conversion. [Sprights v. Hawley \(1868\) 39 N.Y. 441, 7 N.Y. Trans. App. 14, 100 Am. Dec. 452,](#) affirming [Dudley v. Hawley \(1863\) 40 Barb. 397,](#) where the court said that the aiding in disposing of the property was an act of conversion in which defendant was a volunteer actor without excuse, and that the law holds him liable in such case, although he did not participate in the proceeds.

One aiding a mortgagor to secrete the mortgaged property so that the mortgage lien cannot be enforced is liable in trover. [Flanders v. Colby \(1853\) 28 N.H. 34.](#)

The owner of a grain elevator who receives mortgaged wheat from the mortgagor, mingles it with other wheat in its elevator, and ships it out of the country by orders of the mortgagor, is liable for conversion. [Phillip Best Brewing Co. v. Pillsbury & H. Elevator Co. \(1888\) 5 Dak. 62, 37 N.W. 763;](#) [Nichols S. & Co. v. Barnes \(1882\) 3 Dak. 148, 14 N.W. 110.](#)

The shipping by a warehouseman with whom mortgaged cotton is stored, of the property at the instance of the mortgagor, renders the warehouseman liable in trover. [Hudmon v. DuBose \(1888\) 85 Ala. 446, 2 L.R.A. 475, 5 So. 162.](#) The exception with respect to restoration of the property to the bailor does not include a restoration of the bailor's dominion by an act the essential nature of which is in defiance of the true owner's title, or the probable consequences of which will be to put the property beyond his reach.

But in [Travis v. Claiborne \(1817\) 5 Munf. \(Va.\) 435,](#) it was held that an agent who assists in disposing of a mortgaged slave without notice of the mortgage is not personally liable for the conversion after he has turned the proceeds over to his principal. The ruling was put upon the ground that the recording of the mortgage did not charge the agent with notice, but only made it good against creditors and purchasers. Cabell, J., says: "The command of the principal will not justify the agent in committing a trespass, nor even an apparent wrong; in such a case, both the principal and agent are liable to the party injured. But where the conduct of the agent is within the limits of the authority confided to him, is fair, and unattended by circumstances sufficient to apprise him that he is acting wrongfully in relation to others,—or, in other words, where he does not commit an apparent wrong,—the principal, and not the agent, is responsible for the act." And Roane, J., after stating that a verdict against the agent would not bind the principal, said it would be an enormity if the agent should be condemned and imprisoned on the ground of invading the property right of a third person in a subject which, in a future action between the proper parties, may be found to have been the property of his principal, and not of the stranger. A construction of this sort would destroy and put an end to agencies of every kind. No man would become an agent without, at the same time, becoming an insurer.

6. Refusal to deliver property in agent's possession

A mere bailee may be liable for conversion if he refuses to surrender the property to the true owner. [Wilson v. Anderton \(1830\) 1 Barn. & Ad. 450, 109 Eng. Reprint, 855, 9 L. J. K. B. 48.](#)

The general question of the liability of bailees in such cases is not within the scope of this annotation, and

only two cases will be included in which the servant was treated as a bailee, and the general principles applicable in case of servants applied.

Where one in whose custody property wrongfully seized under execution is placed, with an offer of indemnity, by the execution creditor, refuses to give it up, he is liable for conversion. *Catterall v. Kenyon* (1842) 3 Q. B. 310, 114 Eng. Reprint, 525, 6 Jur. 507, 2 Gale & D. 545.

A clerk in a business, who takes on an account due his master a bill which was left with the debtor merely for discount, and refuses to surrender it on demand, may be liable for conversion. *Cranch v. White* (1835) 1 Bing. N.C. 414, 131 Eng. Reprint, 1176, 6 Car. & P. 767, 1 Scott, 314, 4 L. J. C. P. N. S. 113, 1 Hodges, 61.

In *Lee v. Bayes* (1856) 18 C. B. 609, 139 Eng. Reprint, 1508, 25 L. J. C. P. N. S. 249, 2 Jur. N. S. 1093, where one in whose possession a stolen horse, purchased at public auction, had been placed for keeping, refused to deliver it to the owner upon demand, he was held to be guilty of conversion. The court says if the one who holds the goods chooses to set up the title of his bailor, and to rely on it, he is doing an act which is foreign to his employment or his duty. He asserts a title adverse to the real owner of the goods, and he is guilty of conversion.

A carrier's agent, who, by direction of his employer, refuses to deliver property to a consignee, is personally liable in trover. *Elmore v. Brooks* (1871) 6 Heisk. (Tenn.) 45. The court says if the agent elects to obey an order which was illegal, he cannot escape from the consequences by shifting the liability upon his principal.

An agent, who, having possession of a chattel belonging to a third person, by direction of his employer refuses to deliver it to the true owner, is liable in trover. *Singer Mfg. Co. v. King* (1884) 14 R. I. 511.

A manager of a factory who refuses to deliver a patented machine which had been set up in the factory, to the owner, was held personally liable in trover, the court saying that his possession, being an executive one, was different from that of an ordinary servant; that he is to judge of the propriety of every measure taken for the benefit of his employer, and that, as respects third persons, he acts at his peril. *Berry v. Vantries* (1824) 12 Serg. & R. (Pa.) 89.

An agent of one having no title to property cannot defeat an action for trover brought by the true owner, by setting up the claim of his principal. *Doty v. Hawkins* (1833) 6 N.H. 247, 25 Am. Dec. 459.

The agent of an express company, who has been instructed to hold goods transported by it until payment of certain charges thereon, cannot defeat an action of replevin on the ground of his agency, where the demand is too large and the proper charge is tendered, although he may be liable to the company in case he surrenders the property for less than the sum demanded by it. *Eveleth v. Blossom* (1867) 54 Me. 447, 92 Am. Dec. 555.

In *Prince v. Puckett* (1848) 12 Ala. 832, which was trespass against a warehouseman with whom a sheriff had stored goods seized under a writ against a nonowner, and who refused to deliver them to the true owner on request, the court said the remedy was trover or detinue.

An overseer may be liable in trover for slaves in his possession. *Porter v. Thomas* (1857) 23 Ga. 467. The court says a servant may be charged in trover though the conversion be done by him, however innocently, for the benefit of his master; and it is immaterial whether he had his master's authority or not.

To raise the question discussed in this annotation there must be an actual conversion or wrongful act on the

part of the servant; and therefore, a distinction must be kept in mind between cases of conversion and cases like *Alexander v. Southey* (1821) 5 Barn. & Ald. 247, 106 Eng. Reprint, 1183, 24 Revised Rep. 348, where the agent of an insurance company, who had salvaged goods in the company's warehouse, refused to deliver them without an order from the insurers, and it was held not to be a conversion.

The manager of a storage warehouse who merely refuses to select goods of a patron which are not covered by a chattel mortgage when the mortgagee directs those covered to be retained does not become liable for conversion, the court designating the act as being mere nonfeasance. *Economy Furniture Co. v. Chapman* (1894) 54 Ill. App. 122.

There are cases at variance with the rule laid down in this subdivision which cannot, on their facts, be harmonized with it.

Thus, where plaintiff bought goods in England through an agent of the seller in this country, and, upon the goods arriving here, the agent refused to deliver them, the court held that the remedy was solely against the principal, the merchant in England. *Bradford v. Eastburn* (1808) 2 Wash. C. C. 219, Fed. Cas. No. 1,767. It was difficult to support that ruling in principle. If the title had passed to the plaintiff, so that the property was in him, why could he not have had a remedy against the one who withheld the property from him, even though that person was acting as agent for another?

A servant is not liable in replevin merely because he refuses to deliver property which his master had placed in his custody, to a third person, without direction from the master. *Mount v. Derick* (1843) 5 Hill (N.Y.) 456; *Goodwin v. Wertheimer* (1885) 99 N.Y. 153, 1 N.E. 404.

Where personal property is left with an employer to assist in performance of a contract with the owner, the servant of the employer is not liable in replevin for refusal, at the employer's command, to surrender the property to the owner. *Hensey v. Howland* (1895) 10 Misc. 756, 31 N.Y. Supp. 823. The court says it is true that a wrongdoer may not plead agency for another in extenuation of his wrongdoing; yet, on the other hand, a servant is not to be made liable as for a conversion of chattels of which he has the custody at the hands of his employer, and which he refuses to surrender at the demand of a stranger, even though he may have good reason to believe that the stranger has good title to the property.

Replevin will not lie against a freight agent for refusal to deliver property until a claim for freight is paid. *McDougall v. Travis* (1881) 24 Hun (N.Y.) 590. The court says: "As it was not in the defendant's possession, it could not be rightfully taken by replevin against him. For instance, if one were in possession of furniture in one's own house, a person claiming it could not maintain replevin against the servant who should refuse to deliver it on demand. Replevin is to be brought against the person in possession, not against one who is the mere servant of the possessor. None of the cases cited by the plaintiff are in conflict with this rule. The plaintiff argues that whoever does the wrong is liable. He does the wrong who, being in possession wrongfully, refuses to surrender. He does not do the wrong who is not in possession. And it is not every exercise of physical power over the thing in question which constitutes possession."

Colvin v. Holbrook (1848) 2 N.Y. 126, was an action against a deputy sheriff for refusal to pay money over to plaintiff. Plaintiff insisted that he was a mere agent of the sheriff, and that his liability was to be considered from that point of view. The court said that this was less favorable to defendant, but proceeded to consider the case according to plaintiff's contention. It said: "The rule, it is believed, is universal, that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred upon him. The

very notion of an agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself; and the individuality of the agent so far is merged in that of the principal. It is also settled, if anything can be established by authority, that an agent is not liable to third persons for an omission or neglect of duty in the matter of his agency, but that the principal is alone responsible." The court, however, said that the plaintiff makes title, if he has any, through the official acts of the deputy, and is thus compelled to recognize the right of the sheriff to receive the deposit, and also the duty of the deputy to pay it over to him. It thus appears that the deputy was acting in the strict line of his duty, and was under no obligation to plaintiff, and therefore there was no wrong for which an action would lie against him.

7. Form of action

In most of the cases cited in the preceding subdivisions, the action in which relief was sought was trover or replevin. In some cases in which money alone was involved in the transaction, the form of the action was for money had and received. The liability of the agent for a conversion is, of course, founded on a wrongful act for which trover is the proper form of remedy. Cyc. (vol. 27, p. 849) says that an action for money had and received is an equitable one in which plaintiff waives all torts, trespasses, and damage. Under these circumstances, it is quite probable that if the money has been turned over to the principal, money had and received is not a proper form of action. But it has been held that an action for money had and received lies against an agent who has collected insurance money for his principal upon a loss for which the insurer was not liable, if he has merely credited it to the principal in his accounts, without having actually paid it over. The case was treated, however, as merely one of mistake, not of wrongdoing on the part of the agent. But the court asks, Is it conscionable that the agent should keep money which he has got by the misrepresentations of his principal? Buller v. Harrison (1777) Cowp. pt. 2, p. 566, 98 Eng. Reprint, 1243.

But an agent who collects for his principal rents, the liability for which is disputed, is not personally liable to the tenant for money had and received after he has turned it over to his principal. Sadler v. Evans (1766) 4 Burr. 1984, 98 Eng. Reprint, 34. The court thought that the principles upon which the action for money had and received was founded did not apply to the case. The defense in such action is an equity, which will rebut the action. The money was paid to a known agent. He was liable to his principal for it, and in such cases the action ought to be brought against the principal except in special cases, as under notice or mala fides.

So, the mere fact that an agent of one partner in a stagecoach sends to another partner less than his share of the profits does not render him liable to such partner in an action for money had and received, although the agent acknowledges that his employer had placed the full amount in his hands to be forwarded, where there is nothing to show that the employer may not have countermanded the payment before it was sent. Howell v. Batt (1833) 2 Nev. & M. 381, 5 Barn. & Ad. 504, 110 Eng. Reprint, 877, 3 L. J. K. B. N. S. 49.

8. Liability of broker or sales agent

a. In general

A broker or sales agent who sells property for one who is not the owner is liable to the true owner as for a conversion. Alabama

[Marks v. Robinson \(1886\) 82 Ala. 69, 2 So. 292](#)

Arkansas

[Merchants & P. Bank v. Meyer \(1892\) 56 Ark. 499, 20 S.W. 406](#)

California

[Cerkel v. Waterman \(1883\) 63 Cal. 34](#)

- [Swim v. Wilson \(1891\) 90 Cal. 126, 13 L.R.A. 605, 25 Am. St. Rep. 110, 27 Pac. 33](#)
- Georgia
[National Bank v. Piland \(1918\) 22 Ga. App. 471, 96 S.E. 341](#)
- Illinois
[Cassidy Bros. & Co. v. Elk Grove Land & Cattle Co. \(1894\) 58 Ill. App. 39](#)
- Indiana
[Alexander v. Swackhamer \(1885\) 105 Ind. 81, 55 Am. Rep. 180, 5 N.E. 908, 4 N.E. 433](#)
- [Fort v. Wells \(1895\) 14 Ind. App. 531, 56 Am. St. Rep. 316, 43 N.E. 155](#)
- Kansas
[Brown v. James H. Campbell Co. \(1890\) 44 Kan. 237, 21 Am. St. Rep. 274, 24 Pac. 492](#)
- Louisiana
[Ledoux v. Cooper \(1847\) 2 La. Ann. 586](#)
- [Ledoux v. Anderson \(1847\) 2 La. Ann. 558](#)
- Massachusetts
[Spooner v. Holmes \(1869\) 102 Mass. 503, 3 Am. Rep. 491](#)
- Maine
[Kimball v. Billings \(1867\) 55 Me. 147, 92 Am. Dec. 581](#)
- Missouri
[Koch v. Branch \(1869\) 44 Mo. 542, 100 Am. Dec. 324](#)
- [LaFayette County Bank v. Metcalf \(1890\) 40 Mo. App. 494](#)
- [Arkansas City Bank v. Cassidy \(1896\) 71 Mo. App. 186](#)
- [Laughlin v. Barnes \(1898\) 76 Mo. App. 258](#)
- [Thompson v. Irwin \(1891\) 76 Mo. App. 418](#)
- Nevada
[Bercich v. Marye \(1874\) 9 Nev. 312, 13 Mor. Min. Rep. 544](#)
- New York
[Everett v. Coffin \(1831\) 6 Wend. 603, 22 Am. Dec. 551](#)
- [Williams v. Merle \(1833\) 11 Wend. 80, 25 Am. Dec. 604](#)
- [Anderson v. Nicholas \(1859\) 5 Bosw. 121](#)
- Tennessee
[Taylor v. Pope \(1867\) 5 Coldw. 413](#)
- England
[Fowler v. Hollins \(1872\) L. R. 7 Q. B. 616, 41 L. J. Q. B. N. S. 277, 27 L. T. N. S. 168, 20 Week. Rep. 868](#)
- [Hollins v. Fowler \(1875\) L. R. 7 H. L. 757, 44 L. J. Q. B. N. S. 169, 33 L. T. N. S. 73](#)
- [Turner v. Hockey \(1887\) 56 L. J. Q. B. N. S. 301](#)

One selling stock for another, who has no title, is liable to the true owner for the conversion. *Anderson v.*

Nicholas (N.Y.) *supra*.

Agents who dispose of the cargo of a ship at the instance of the master, and turn the proceeds over to him without notice of the rights of third persons, are nevertheless liable to the true owner in trover. *Everett v. Coffin* (N.Y.) *supra*.

A factor who sells property of one person under authority from another cannot avoid liability in trover on the ground of his agency. *Arkansas City Bank v. Cassidy* (1896) 71 Mo. App. 186.

Brokers who sell cattle on the market for slaughter and consumption, and turn the proceeds over to their employer, are liable in trover to the true owner for their value. *LaFayette County Bank v. Metcalf* (1890) 40 Mo. App. 494.

Brokers to whom cotton is shipped for sale are liable to the true owner after receiving notice of his claim and demand for the proceeds of the sale, if they subsequently turn the proceeds over to their correspondent. *Ledoux v. Anderson and Ledoux v. Cooper* (La.) *supra*.

A bank which, as agent of a cotton buyer, sells cotton which the latter has not paid for, and turns the proceeds over to him, whereby the true owner loses the price, is liable for the conversion. *National Bank v. Piland* (1918) 22 Ga. App. 471, 96 S.E. 341.

In *Cerkel v. Waterman* (1883) 63 Cal. 34, the court, without discussion, held commission merchants liable for selling wheat as that of their principal, and turning the proceeds over to him, when the wheat in fact belonged to another.

But where a dairyman sent a cow to a cattle market, and directed the cattle salesman into whose pen it was put, to sell it, the mere fact that the salesman received an offer for it which, when communicated to the dairyman, was accepted by him, and paid the proceeds through his bank account to the dairyman, does not render the salesman liable for a conversion. *Turner v. Hockey* (Eng.) *supra*. The court applied the rule of the conduit pipe, saying that where the salesman merely acts as a conduit by which title is passed from seller to buyer without himself interfering with it, he is not personally liable.

The assumption and exercise of dominion over a chattel inconsistent with the title and general dominion which the true owner has in and over it is a conversion, and it is immaterial whether the act done be for the use of defendant himself, or of a third person. And therefore it was held, by a divided court, in *Fowler v. Hollins* (1872) L. R. 7 Q. B. (Eng.) 628, 41 L. J. Q. B. N. S. 277, 27 L. T. N. S. 168, 20 Week. Rep. 868, affirming a judgment of the Queen's bench, that a broker who sells cotton the title to which was fraudulently obtained by his employer is personally liable for the conversion in case he sells it to a stranger. The case was, however, affirmed by the House of Lords in (1875) L. R. 7 H. L. 757, 44 L. J. Q. B. N. S. 169, 33 L. T. N. S. 73, but it seemed to be the opinion of some of the judges, at least, that since brokers act merely as conduits to pass the title from seller to buyer without themselves interfering with the goods, there would be no liability.

So, commission merchants selling mortgaged property are liable in trover to the mortgagee. *Brown v. James H. Campbell Co.* (1890) 44 Kan. 237, 21 Am. St. Rep. 274, 24 Pac. 492.

A commission merchant who sells mortgaged property for the mortgagor when the mortgage is on record is liable in trover, although he immediately turns over the proceeds to his employer. *Marks v. Robinson* (1886) 82

[Ala. 69, 2 So. 292.](#)

A factor who sells cotton with notice of a lien upon it, thereby aiding in the destruction of the lien, is liable for conversion. [Merchants & P. Bank v. Meyer \(1892\) 56 Ark. 499, 20 S.W. 406.](#)

In an early Tennessee case it was held that factors who sell property for an agent in possession, and turn the money over to him, are liable in trover to the true owner. [Taylor v. Pope \(1867\) 5 Coldw. \(Tenn.\) 413.](#)

But that case was overruled in [Roach v. Turk \(1872\) 9 Heisk. \(Tenn.\) 708, 24 Am. Rep. 360](#), where it was held that commission merchants are not liable to the true owner for selling property for one wrongfully claiming it, and turning the proceeds over to him, without notice of the rights of the owner. The court says: "If the plaintiffs recover in this case, it must be for a conversion of the cotton by parties who had no knowledge of their title or claim, and who never for a moment claimed adversely to their rights. It is equally clear that we must force upon the defendants the position of antagonism to the rights of the plaintiffs, contrary to the facts of the case, and assume that they are guilty of a tortious conversion when it is evident that, had they known of the plaintiffs' title, they would most readily have yielded to it. Can such a liability be based on sound principle? We think not. ... It is clear, beyond question, that there can be no conversion in a case like this without an adverse holding or claim as against the title of the true owner (which necessarily involves a knowledge of such title); and until such knowledge is fixed on the party in possession, or who has been in the possession, of the property, he cannot, in the language of Mr. Greenleaf, be said to 'exercise dominion over it in exclusion or in defiance of the plaintiff's right, or to withhold the possession from the plaintiff under a claim of title inconsistent with the title of the true owner.' ... In order to make the factor liable, a demand must be made while the property or its proceeds are in his hands; or notice of the owner's title, or the want of title on the part of the party placing it in his hands, must be brought home to him, and thus fix upon him a wrongful assertion of dominion and control over another's property, and in defiance of his right."

b. Stolen property

A broker selling stolen property is liable in trover to the true owner. [Bercich v. Marye \(1874\) 9 Nev. 312, 13 Mor. Min. Rep. 544; Thompson v. Allen \(1898\) 76 Mo. App. 418; Laughlin v. Barnes \(1898\) 76 Mo. App. 258; Fort v. Wells \(1895\) 14 Ind. App. 531, 56 Am. St. Rep. 316, 43 N.E. 155.](#)

An agent who sells stolen bonds for his principal, and delivers to him the proceeds, is liable in trover for their conversion. [Kimball v. Billings \(1867\) 55 Me. 147, 92 Am. Dec. 581.](#) The court says the principal could not secure to the agent immunity for an act which the principal could not do himself.

A factor who sells stolen property for the thief, and refuses information to enable the true owner to trace the property, is liable in trover. [Cassidy Bros. & Co. v. Elk Grove Land & Cattle Co. \(1894\) 58 Ill. App. 39.](#) The court says that, as against the view of liability, it is argued: "That such a rule imperils great commercial interests, and that those great agencies by which property is necessarily transferred from seller to buyer should not be required to investigate title to the property handled at the peril of liability for its value. There is much force in this contention, which has been exhaustively discussed in the cases referred to, and yet, in principle, it is difficult to see why, if the innocent purchaser of stolen property is liable, the agent, who should know better than he the title, and who induced the purchase, should not also be equally liable. If the purchaser is guilty of a tort, the one who suggests it and aids in its commission, according to the fundamental rules of law, is equally guilty. There are no agencies in torts."

A broker who sells stolen securities and turns the proceeds over to the thief is liable to the true owner for

their value. [Swim v. Wilson \(1891\) 90 Cal. 126, 13 L.R.A. 605, 25 Am. St. Rep. 110, 27 Pac. 33](#). The court says it is clear that the thief did not acquire a right to the stock, and it is equally clear that defendant, acting for him as his agent, did not have a greater right, and his act was, therefore, wholly unauthorized, and, in law, a conversion of the property. "To hold the defendant liable, under the circumstances disclosed here, may seem, upon first impression, to be a hardship upon him. But it is a matter of everyday experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who, it now appears, was a thief; and, relying on his representations, aided his principal to convert the plaintiff's property into money; and it is no greater hardship to require him to pay to the plaintiff its value than it would be to take the same away from the innocent vendee, who purchased and paid for it."

If one with whom a horse has been placed for sale refuses to deliver it to another, claiming that it had been stolen from him, he may be held liable for conversion. [Lee v. Robinson \(1856\) 18 C. B. 599, 139 Eng. Reprint, 1504, 2 Jur. N. S. 1093, 25 L. J. C. P. N. S. 249](#).

In [Alexander v. Swackhamer \(1885\) 105 Ind. 81, 55 Am. Rep. 180, 4 N.E. 433, 5 N.E. 908](#), which involved the liability of the ultimate purchaser of stolen property to the true owner, the court, in the course of the opinion, says that when the brokerage firm sold the property, received the money, and turned it over to the thief, this amounted to a conversion of the property for which the brokers were liable.

One who merely collects for a thief a government voucher, and turns the proceeds over to him, is liable for conversion to the true owner. [Koch v. Branch \(1869\) 44 Mo. 542, 100 Am. Dec. 324](#). The court says public policy as well as private rights demand that the settled rule that no title shall pass through a thief shall not be relaxed, and those who buy it of him shall be compelled to give up the property unless they have converted it, when they shall be held for its value. Factors and agents also should be held to the same accountability. It is their duty to know for whom they act, and whether they can be saved harmless if their actions shall amount to a conversion of another's property.

But one who, as agent, sells coupons from stolen bonds and turns the proceeds over to his employer, is not liable in trover for conversion of the coupons. [Spooner v. Holmes \(1869\) 102 Mass. 503, 3 Am. Rep. 491](#). The court held that the coupons were negotiable and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer. The court concluded that neither taking the coupons by delivery, transferring them by delivery, nor paying over the proceeds to the employer, constitutes a conversion for which the broker could be held liable in an action of tort in the nature of trover.

The agent must, however, have received the coupons, and sold them without notice of the infirmity of his employer's title, and have acted in good faith, without gross negligence, as agent only, without receiving any benefit from the transaction.

9. Auctioneers

a. In general

This article has been superseded by the following article(s):

Subdiv III j 9a superseded [96 A.L.R.2d 208](#).

b. Stolen and mortgaged property

This article has been superseded by the following article(s):

Subdiv III j 9b superseded [96 A.L.R.2d 208](#).

k. Forcible entry and detainer

One cannot defeat an action for forcible entry and detainer on the ground that he was acting as agent. [Luling v. Sheppard \(1896\) 112 Ala. 588, 21 So. 352](#). The court says the act is a tort, and no principle of law is more general and better settled than that one guilty of a tort cannot justify on the ground that he was acting in the capacity of an agent, and not on his personal responsibility. It has never been questioned that an agent is liable for his actual torts.

IV. Misfeasance

a. In general

As has been seen from the foregoing subdivisions of this annotation, there is very little difficulty in determining what is an act of malfeasance, and the liability of the servant or agent for committing it; but when it comes to distinguishing between misfeasance and nonfeasance, and laying down any rule which will be of practical value, very great difficulty is encountered. As a general proposition for classification purposes, the acts of misfeasance are merely acts of negligence, i. e., the misperformance of acts which there is a perfect right to perform in a proper way. Very slight consideration will show that the true distinction between misfeasance and nonfeasance is not merely between performance and omission to perform. For example, a motorman in charge of a street car injures a pedestrian at a highway crossing. It cannot be true that he would be liable if the injury were caused by driving the car too fast, but would not be liable if it were caused by his failure to stop the car in time to avoid the injury. Application of the formula that the servant was liable for misfeasance, but not for nonfeasance, would render the conductor of a train liable in case he injured a drunken passenger by negligently removing him from the car, but not liable for injury by the drunken person to a fellow passenger, resulting from the conductor's failure to remove or restrain him. In many of the cases where the courts have attempted to apply the formula they have held acts of omission to be misfeasance. These cases will be considered in subdivision V. of this annotation. It may be stated as a general rule, however, that the servant or agent is liable for any injuries caused to third persons by active, as distinguished from passive, negligence on his part. This does not mean that there may not be liability for passive negligence, but that question will be considered in later subdivisions. United States

[Standard Oil Co. v. Anderson \(1909\) 212 U.S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252](#)

California

[Zibbell v. Southern P. Co. \(1911\) 160 Cal. 237, 116 Pac. 513](#)

Colorado

[Miller v. Staples \(1893\) 3 Colo. App. 93, 32 Pac. 81](#)

Georgia

[Southern R. Co. v. Grizzle \(1906\) 124 Ga. 734, 110 Am. St. Rep. 191, 53 S.E. 244](#)

[Southern R. Co. v. Reynolds \(1906\) 126 Ga. 657, 55 S.E. 1039](#)

[Louisville & N. R. Co. v. Peebles \(1911\) 136 Ga. 448, 71 S.E. 805](#)

[Wadley v. Dooly \(1912\) 138 Ga. 275, 75 S.E. 153](#)

Illinois

[Johnson v. Barber \(1849\) 10 Ill. 425, 50 Am. Dec. 416](#)

- Tuller v. Voght (1851) 13 Ill. 277
- Illinois C. R. Co. v. Foulks (1901) 191 Ill. 57, 60 N.E. 890
- Chicago & E. R. Co. v. Neilson (1905) 118 Ill. App. 343
- Indiana
- Block v. Haseltine (1891) 3 Ind. App. 491, 29 N.E. 937
- Blue v. Briggs (1894) 12 Ind. App. 105, 39 N.E. 885
- Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co. (1904) — Ind. App. —, 72 N.E. 183
- Iowa
- Hough v. Illinois C. R. Co. (1914) 169 Iowa, 224, 149 N.W. 885
- E. H. Emery & Co. v. American Refrigerator Transit Co. (reported herewith) ante, 86
- Kentucky
- Chesapeake & O. R. Co. v. Dixon (1898) 104 Ky. 608, 47 S.W. 615
- Illinois C. R. Co. v. Coley (1905) 121 Ky. 385, 1 L.R.A. (N.S.) 370, 89 S.W. 234
- Chesapeake & O. R. Co. v. Banks (1911) 144 Ky. 137, 137 S.W. 1066, affirmed in (1914) 232 U.S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278
- Louisiana
- Le Blanc v. Sweet (1902) 107 La. 355, 90 Am. St. Rep. 303, 31 So. 766
- Englert v. New Orleans R. & Light Co. (1911) 128 La. 473, 54 So. 963
- Burke v. Werlein (1918) 143 La. 788, 79 So. 405
- Massachusetts
- Bell v. Josselyn (1855) 3 Gray, 309, 63 Am. Dec. 741
- Hawkesworth v. Thompson (1867) 98 Mass. 77, 93 Am. Dec. 137
- Mulchey v. Methodist Religious Soc. (1878) 125 Mass. 487
- Bickford v. Richards (1891) 154 Mass. 163, 26 Am. St. Rep. 224, 27 N.E. 1014
- Corliss v. Keown (1910) 207 Mass. 149, 93 N.E. 143
- Banfield v. Whipple (1865) 10 Allen, 30, 87 Am. Dec. 618
- Parsons v. Winchell (1850) 5 Cush. 592, 52 Am. Dec. 745
- Missouri
- Harriman v. Stowe (1874) 57 Mo. 93
- Buis v. Cook (1875) 60 Mo. 391
- New Jersey
- Whalen v. Pennsylvania R. Co. (1906) 73 N.J.L. 192, 63 Atl. 993
- New York

[Suydam v. Moore \(1850\) 8 Barb. 358](#)

[Wright v. Wilcox \(1838\) 19 Wend. 343, 32 Am. Dec. 507](#)

North Dakota

[Schlosser v. Great Northern R. Co. \(1910\) 20 N.D. 406, 127 N.W. 502](#)

[Edwards v. Great Northern R. Co. \(1919\) 42 N.D. 154, 171 N.W. 873](#)

South Carolina

[Ellis v. Southern R. Co. \(1905\) 72 S.C. 465, 2 L.R.A. \(N.S.\) 378, 52 S.E. 228, 19 Am. Neg. Rep. 541](#)

[Able v. Southern R. Co. \(1906\) 73 S.C. 173, 52 S.E. 962, 19 Am. Neg. Rep. 549](#)

[Carter v. Atlantic Coast Line R. Co. \(1910\) 84 S.C. 546, 66 S.E. 997](#)

Tennessee

[Nashville, C. & St. L. R. Co. v. Price \(1911\) 125 Tenn. 646, 148 S.W. 219](#)

Texas

[Eastin v. Texas & P. R. Co. \(1906\) 99 Tex. 654, 92 S.W. 838](#)

Washington

[Cronkhite v. Whalen \(1920\) 111 Wash. 31, 189 Pac. 94](#)

England

[Morse v. Slue \(1673\) 1 Ventr. 238, 1 Mod. 85, 86 Eng. Reprint, 159, 752, T. Raym. 220, 83 Eng. Reprint, 453, 5 Eng. Rul. Cas. 244](#)

[Michael v. Alestree \(1676\) 2 Lev. 172, 83 Eng. Reprint, 504, 3 Keble, 650, 84 Eng. Reprint, 932](#)

[Stone v. Cartwright \(1795\) 6 T. R. 411, 101 Eng. Reprint, 622, 9 Mor. Min. Rep. 672](#)

[Williams v. Cranston \(1816\) 2 Starkie, 82](#)

[Whitmore v. Waterhouse \(1830\) 4 Car. & P. 382](#)

[Quarman v. Burnett \(1840\) 6 Mees. & W. 499, per Parke, B., p. 509, 151 Eng. Reprint, 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969](#)

[Woodman v. Joiner \(1864\) 10 Jur. N. S. 852](#)

One employed to make excavations for the foundation of a building may be personally liable for so negligently performing the work that an adjoining building is undermined and caused to fall. [Block v. Haseltine \(1891\) 3 Ind. App. 491, 29 N.E. 937.](#)

Where one employed to build a trapdoor does so so negligently that another falls into it and is injured, the servant will be personally liable therefor. [Harriman v. Stowe \(1874\) 57 Mo. 93.](#) The court, after setting out, with apparent approval, Judge Story's theory of nonliability for nonfeasance, says the agent undertook and proceeded to build the trapdoor, but did it so negligently as to cause the injury. Under such circumstances, the action would be maintained against the agent.

Where the employee of a corporation which had undertaken to shoot an oil well for plaintiff so negligently performed the work that the well was destroyed, the court said the fault charged upon the employee was not an

omission to perform a duty of his master toward the injured third person, or mere negligence, but was negligent conduct in the doing of his own duty as an employee, for the negligent and unskilful doing of which both the employer and employee are liable. [Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co. \(1904\) — Ind. App. —, 72 N.E. 183.](#)

An agent who constructs an improperly covered excavation in a public street is personally liable for injury to a pedestrian who falls into it. [Burke v. Werlein \(1918\) 143 La. 788, 79 So. 405.](#)

An agent of a railroad, who, in changing the course of a highway, constructs a wire fence across the abandoned road, without marks, is personally liable for injury to one colliding with it in the dark, in attempting to use the highway. [Blue v. Briggs \(1894\) 12 Ind. App. 105, 39 N.E. 885.](#) The court says he who commits an unlawful act or act of misfeasance and positive and aggressive wrong to another cannot escape liability therefor, upon the ground of his being an agent for another.

One who superintends the making of a connection with a sewer which is done so carelessly as to cause the water from the sewer to flow into and injure the property of a stranger is personally liable for the injury. [Hawkesworth v. Thompson \(1867\) 98 Mass. 77, 93 Am. Dec. 137.](#)

Where the managing agent of a block of tenements ordered the water turned on when a faucet in one of the rooms was open and the waste pipe clogged, so that the water overflowed, to the injury of occupants of a lower room, he was held to be personally liable. [Bell v. Josselyn \(1855\) 3 Gray \(Mass.\) 309, 63 Am. Dec. 741.](#) The court says the injury was caused not by his nonfeasance but by his misfeasance. His omission to examine the pipes in the house before the water was turned on was nonfeasance; but if he had not caused the water to be turned on, that nonfeasance would have caused no injury. As the facts are, the nonfeasance caused the acts done to be a misfeasance. There was no less a misfeasance by reason of it being preceded by a nonfeasance.

A committee of a religious society, authorized to secure the painting of the interior of the church, will be personally liable in case they furnish to the painters a staging which is insufficient, and causes their injury. [Mulchey v. Methodist Religious Soc. \(1878\) 125 Mass. 487.](#)

Employees of one who has contracted to move a building are liable to the owner for their negligence, which injures the building. [Bickford v. Richards \(1891\) 154 Mass. 163, 26 Am. St. Rep. 224, 27 N.E. 1014.](#) The right of action depends upon the fact that they have wrongfully or negligently done something to the property which has injured it. The gist of the action is the breach by defendants of the duty which they owed to the owner not to injure his property by any wrongful or negligent act of theirs.

A servant of the lessee of a horse, who drives it so immoderately that it dies, is personally liable to the owner for its value. [Banfield v. Whipple \(1865\) 10 Allen \(Mass.\) 30, 87 Am. Dec. 618.](#)

The abuse and injury of a team by overdriving and heating by the agent to whom it was committed by one who had hired it is a positive damage, and not a mere omission of duty, and the agent is therefore liable for the injury done. [Buis v. Cook \(1875\) 60 Mo. 391.](#)

An agent who kills a mare in negligently roping her for the purpose of breaking her, which his employer has been engaged to do, cannot escape liability on the ground that he was merely an agent. [Miller v. Staples \(1893\) 3 Colo. App. 93, 32 Pac. 81.](#) The court says: "The frequent attempts of agents to escape responsibility for their negligent acts by shielding themselves behind the principal whose business they may be transacting when the in-

jury is done has led to many discussions as to the proper limits of the defenses based on the employment. The rule is pretty well settled that while both principal and agent are liable for the injuries which may come to a third person from the agent's misfeasance or malfeasance, the injured party may elect to sue one or the other, or both, at his pleasure. Doubtless the primary responsibility rests on the principal as to the agent's misfeasance, and he should be called upon to answer for the damages resulting from the negligent performance of his agent; yet the servant or agent may likewise be sued, and he cannot escape by asserting that what he did was done while working for his master."

An agent for the sale of threshing machines, who takes control of the testing of a new machine which has been sold and has undertaken a job, is personally liable for negligent operation of the engine, so that it sets fire to the grain stacks. [Cronkhite v. Whalen \(1920\) 111 Wash. 31, 189 Pac. 94.](#)

A servant in charge of his master's team is liable for wilfulness or negligence in causing injury to a person who attempts to board the wagon for a ride. [Wright v. Wilcox \(1838\) 19 Wend. \(N.Y.\) 343, 32 Am. Dec. 507.](#)

A section boss of a railroad is personally liable for injuries to a horse which he negligently drives over a stock gap. [Louisville & N. R. Co. v. Peebles \(1911\) 136 Ga. 448, 71 S.E. 805.](#)

In [Parsons v. Winchell \(1850\) 5 Cush. \(Mass.\) 592, 52 Am. Dec. 745,](#) where the question was whether or not a joint action would lie against master and servant for injuries done by the negligent driving of the master's horses, the court says that the servant is answerable to the person injured by his acts done as servant.

In holding that no action lay against an intermediate servant for the negligence of those under him, the court said the action must either be brought against the servant committing the injury, or against the master. [Stone v. Cartwright \(1795\) 6 T. R. 411, 101 Eng. Reprint, 622, 9 Mor. Min. Rep. 672.](#)

In [Standard Oil Co. v. Anderson \(1909\) 212 U.S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252,](#) which was an action to recover for personal injuries caused by the negligent operation of a winch by a servant in charge of it, and the question in the case was who was the master at the time of the injury, within the rule that the master was liable for the negligent act of his servant, the court observed, by way of dictum, that the servant himself is, of course, liable for the consequences of his own carelessness.

In 1 Bl. Com. 431, where the author is considering the liability of the master for negligence of his servant, he states that if a smith's servant lames a horse while shoeing him, an action lies against the master, and not against the servant. No authority is cited for this proposition, and it is questioned in the notes in Lewis's edition of that work.

b. Driving car or team against traveler

A railroad engineer is personally liable for injury to one at a highway crossing by his failure to give the required signals when approaching it with his engine. [Southern R. Co. v. Grizzle \(1906\) 124 Ga. 735, 110 Am. St. Rep. 191, 53 S.E. 244.](#) The court says: "An agent is not ordinarily liable to third persons for mere nonfeasance. ... An agent is, however, liable to third persons for misfeasance. Nonfeasance is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Where an agent fails to use reasonable care or diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in

such cases is not based upon the ground of his agency, but upon the ground that he is a wrongdoer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and, in doing so, omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. ... Misfeasance may involve also to some extent the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. ... In the present case the failure of the engineer to comply with the requirements of the Blow-post Law was not doing, but the running of the train over the crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad company owed to travelers upon the highway. The engineer having once undertaken, in behalf of the principal, to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of misfeasance."

Those in charge of a locomotive are personally liable for their own negligence in injuring a traveler at a highway crossing. [Illinois C. R. Co. v. Coley \(1905\) 121 Ky. 385, 1 L.R.A. \(N.S.\) 370, 89 S.W. 234](#); [Zibbell v. Southern P. Co. \(1911\) 160 Cal. 237, 116 Pac. 513](#); [Edwards v. Great Northern R. Co. \(1919\) 42 N.D. 154, 171 N.W. 873](#); [Able v. Southern R. Co. \(1906\) 73 S.C. 173, 52 S.E. 962, 19 Am. Neg. Rep. 549](#).

Or for killing him. [Chesapeake & O. R. Co. v. Dixon \(1898\) 104 Ky. 608, 47 S.W. 615](#).

The engineer of a train which kills a person at a highway crossing cannot defeat an action for damages on the theory that he was merely agent for the railroad company. [Hough v. Illinois C. R. Co. \(1914\) 169 Iowa, 224, 149 N.W. 885](#).

Where plaintiff was injured by the negligence of a railroad engineer in running his engine over a highway crossing, the court said his liability is made to appear when the evidence shows that he failed to use reasonable care and diligence in the performance of his duty, and such misfeasance resulted in injury to a third person. When an agent once enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby third persons are injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. [Southern R. Co. v. Reynolds \(1906\) 126 Ga. 657, 55 S.E. 1039](#).

In [Ellis v. Southern R. Co. \(1905\) 72 S.C. 465, 2 L.R.A.\(N.S.\) 378, 52 S.E. 228, 19 Am. Neg. Rep. 541](#), one attempting to flag a train at night was killed by the negligence of the engineer in running the train at high speed past the stopping place after signaling that the train would stop. The court says the question is whether or not an agent is personally liable to a third person for nonfeasance causing injury. And after reviewing authorities, the court concludes that the true rule is that the servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of nonfeasance or misfeasance.

A fireman on a locomotive is personally liable for the death of a pedestrian attempting to cross the track at a much-used crossing near the railroad station, where he failed to keep a lookout as the train started up to leave

the station after discharging passengers. [Chesapeake & O. R. Co. v. Banks \(1911\) 144 Ky. 137, 137 S.W. 1066](#), affirmed in [\(1914\) 232 U.S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278](#).

Where a cow was killed by a train, and the action was against the engineer and fireman, the court held that if the railroad company would be liable, defendants were liable. [Suydam v. Moore \(1850\) 8 Barb. \(N.Y.\) 358](#). The inclination of the court seems to be to hold the defendants liable for the negligence of their employer because the cow was upon the track on account of absence of fences and cattle guards which the company was under obligation to erect. The court says defendants were not bound to remain in the employ of the company after it had neglected to erect the fences. Such act greatly increased their responsibility. If they continued to remain at their respective posts they had no just cause for complaining if the public held them accountable for the consequences resulting from this omission of their employers.

Under the Georgia Code, an agent is personally liable for his own torts; and therefore an agent in charge of an automobile, who negligently runs down a pedestrian on the highway, cannot avoid liability merely on the theory that he is an agent. [Wadley v. Dooly \(1912\) 138 Ga. 275, 75 S.E. 153](#).

Where a servant, by command of his master, takes ungovernable horses to a place much frequented by people, to break them, he will be personally liable for injury done by their running down a stranger. [Michael v. Alestree \(1676\) 2 Lev. 172, 83 Eng. Reprint, 504, 3 Keble, 650, 84 Eng. Reprint, 932](#).

In [Quarman v. Burnett \(1840\) 6 Mees & W. 499, 151 Eng. Reprint, 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969](#), where the question was whether the owner of a team, a driver, or a hirer was liable for the driver's negligence in leaving the team unattended, so that it ran away, to the injury of plaintiff, the court said the question is whether anyone but the coachman is liable to the person injured; for the coachman certainly is.

In an action for injury caused by the driving of a team along a highway against the horse on which plaintiff was riding, the question involved was whether trespass was the proper form of action. The court said that unless the master expressly commanded the servant to commit the trespass, the servant alone is liable in this form of action. [Tuller v. Voght \(1851\) 13 Ill. 277](#).

An agent of the owner of a horse which is dangerous to be used on the public streets is liable for injuries to a traveler by the running away of the horse while it is being used in such place under his direction. [Corliss v. Keown \(1910\) 207 Mass. 149, 93 N.E. 143](#).

In [Phelps v. Wait \(1864\) 30 N.Y. 78](#), where the agent in charge of a team drove over plaintiff, to his injury, the question was whether a joint action would lie against him and the owner of the team; and there seems to be no question that the driver was liable to the person injured.

And the principle of that case was followed in [Montfort v. Hughes \(1854\) 3 E. D. Smith \(N.Y.\) 591](#).

c. Agents of carriers

A servant in charge of a steamboat is personally liable for injury to a passenger through negligent operation of the boat. [Whalen v. Pennsylvania R. Co. \(1906\) 73 N.J.L. 192, 63 Atl. 993](#).

In [Le Blanc v. Sweet \(1902\) 107 La. 355, 90 Am. St. Rep. 303, 31 So. 766](#), where a passenger on a boat was drowned through the negligence of the captain in handling the boat, while she was attempting to disembark, the headnote says that since the master was acting in a representative capacity, the owner alone was liable, and the

opinion simply states that, under the circumstances, no reason was found for holding the captain liable.

In *Whitmore v. Waterhouse* (1830) 4 Car. & P. (Eng.) 382, which was an action against the proprietors of a coach and the servant in charge of it, for injury to a passenger by the latter's negligence, a verdict went for defendants for lack of proof; but the court was of opinion that the servant would be personally liable to the passenger for the injury.

In *Williams v. Cranston* (1816) 2 Starkie (Eng.) 82, a watch which had been given to the driver of a stage-coach for delivery to the owner was lost and suit was brought against the driver. The court said there was nothing to indicate that he received the parcel otherwise than in the character of servant, and that the loss appears to have resulted from the negligence of the master through the medium of his servants, so that there could be no recovery against the servant.

A railroad company which, as agent for a sleeping car company, sells an intending passenger a sleeping car ticket for a car which does not follow the route called for by the transportation ticket, cannot avoid liability for expulsion of the passenger from the car on the theory that it is a mere agent. *Nashville, C. & St. L. R. Co. v. Price* (1911) 125 Tenn. 646, 148 S.W. 219. The court says the acts were those of misfeasance and negligence for which the agent is liable.

So *E. H. Emery & Co. v. American Refrigerator Transit Co.* (reported herewith) ante, 86, holds that a refrigerating company which contracts with a railroad company to ice fruit cars is liable to a shipper for injury to his fruit by the negligent manner in which it performs its agreement.

The negligence of a railroad company in misbilling freight so that it is delayed on the road is an act of misfeasance, and not of nonfeasance, and therefore, it is liable notwithstanding it was acting merely as agent for another road. *Illinois C. R. Co. v. Foulks* (1901) 191 Ill. 57, 60 N.E. 890.

A station agent of a railroad company who refuses to route cattle over the shorter route to destination, and sends them over a longer route, is personally liable for an injury thereby caused to them. *Eastin v. Texas & P. R. Co.* (1906) 99 Tex. 654, 92 S.W. 838. The court says that where an agent is empowered to perform a duty for his principal and neglects to perform it, and damage accrues from the failure, the agent is not responsible. But where the agent, acting for his principal, does a wrongful act and damage results to a third person, he is responsible. The same ruling was made on second appeal (1907) 100 Tex. 556, 102 S. W. 105, which was affirmed by the Supreme Court of the United States in (1909) 214 U.S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564.

Where goods were delivered to a ship for transportation, and lost before the ship left port, an action was brought against the master, and it was objected that he was but a servant to the owners, but Lord Hale held that the law takes notice of him that he is more than a servant. He is rather an officer than a servant, and is chargeable for the loss. *Morse v. Slue* (1673) 1 Ventr. 238, 1 Mod. 85, 86 Eng. Reprint, 159, 752, 5 Eng. Rul. Cas. 244, T. Raym. 220, 83 Eng. Reprint, 453.

In *Schlosser v. Great Northern R. Co.* (1910) 20 N.D. 406, 127 N.W. 502, which involved the question of liability of a carrier to the owner for injuries to horses which had been shipped to him by a bailee, the court says that the rule is that an agent is liable to third persons for negligence resulting in injury to them in the discharge of his agency. An agent, like other persons, in discharging his duties to his principal, is bound to recognize and respect the rights and privileges of others. He must take care that he does not by his own act unnecessarily injure another. If he fails to do so, either negligently or intentionally, and thereby causes an injury to another, he is li-

able in damages to the person injured. The fact that he was acting as agent at the time will not relieve him from liability. Everyone, whether he is principal or agent, is responsible directly to persons injured by his negligence in fulfilling obligations resting upon him in his individual character, and which the law imposes upon him independently of contract. Where an agent is guilty of misfeasance, that is, where he has actually entered upon the performance of his duties to his principal, and in doing so fails to respect the rights of others, by doing some wrong, as where he fails or neglects to use reasonable care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by reason of his misfeasance. An agent's liability in such cases is not based upon the ground of his agency, but on the ground that he is a wrongdoer, and as such is responsible for any injury he may cause.

One employed to unload shells from a boat for use of a railroad company may be liable for injury to a passenger caused by his piling them so close to the track that they slid onto it and derailed a car. [Englert v. New Orleans R. & Light Co. \(1911\) 128 La. 473, 54 So. 963.](#)

d. Negligent fires

A section foreman is personally liable for permitting the right of way to become covered with inflammable material, so that it ignites and causes injury to neighboring property. [Carter v. Atlantic Coast Line R. Co. \(1910\) 84 S.C. 546, 66 S.E. 997.](#)

A servant employed to construct a sign in a shed let to the employer for the purpose is personally liable for destruction of the shed by fire caused by his negligence in lighting his pipe. [Woodman v. Joiner \(1864\) 10 Jur. N. S. \(Eng.\) 852.](#)

Those in charge of a locomotive, the sparks from which set fire to private property, are personally liable for the injury thereby caused. [Chicago & E. R. Co. v. Neilson \(1905\) 118 Ill. App. 343.](#)

In an action for damages for wrongfully setting fire to a prairie, to the injury of plaintiff's property, it appeared that the fire was set by one defendant as agent of the other, and defendant requested an instruction that plaintiff could not recover against both defendants, for if one acted under the instructions and directions of the other, then the latter alone would be liable. The court said, the instruction is clearly wrong; if the act complained of was illegal, the fact that one of the defendants committed it under direction of the other did not relieve him from responsibility. All concerned in the commission of a wrongful act are responsible for the consequences. Admit the principle asserted in this instruction, and every person charged with the commission of an act prohibited by law would excuse himself by showing that he acted in obedience to the command or under the direction of another. And such a doctrine would be subversive of private rights and detrimental to the public interests. [Johnson v. Barber \(1849\) 10 Ill. 425, 50 Am. Dec. 416.](#)

e. Injury to fellow servants

1. In general

Except in cases where the courts have become confused by the suggested distinction between cases of misfeasance and nonfeasance, the general rule is that the servant is liable for injuries which he inflicts upon a fellow servant, either through his negligence or unskilful management of the business intrusted to him, or through omissions to perform duties committed to him. United States

[Warax v. Cincinnati, N. O. & T. P. R. Co. \(1896\) 72 Fed. 637](#)

[Hukill v. Maysville & B. S. R. Co. \(1896\) 72 Fed. 745](#)

- Charman v. Lake Erie & W. R. Co. (1900) 105 Fed. 449
- Chiarello Bros. Co. v. Pedersen (1917) 155 C. C. A. 258, 242 Fed. 482
- Alabama
Wright v. McCord (1920) 205 Ala. 122, 88 So. 150
- California
Daves v. Southern P. Co. (1893) 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708, 13 Am. Neg. Cas. 367
- Georgia
Southern R. Co. v. Miller (1907) 1 Ga. App. 616, 57 S.E. 1090, approved in (1907) 3 Ga. App. 410, 59 S.E. 1115, which is affirmed in (1910) 217 U.S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450
- Illinois
Republic Iron & Steel Co. v. Lee (1907) 227 Ill. 246, 81 N.E. 411
- Indiana
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Tennessee

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Washington

[Morrison v. Northern P. R. Co. \(1904\) 34 Wash. 70, 74 Pac. 1064](#)

[Gennaux v. Northwestern Improv. Co. \(1913\) 72 Wash. 268, 130 Pac. 495](#)

Wisconsin

[Greenberg v. Whitcomb Lumber Co. \(1895\) 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N.W. 93](#)

[Lawton v. Waite \(Lawton v. Chilton\) \(1899\) 103 Wis. 244, 45 L.R.A. 616, 79 N.W. 321, 6 Am. Neg. Rep. 403](#)

Scotland

[Wright v. Roxburgh \(1864\) 2 Ct. Sess. Cas. 3d series, 748](#)

If one by his negligence injures another, it is no defense in a suit against him to assert that they were both employed under one master. [Lawton v. Waite \(Wis.\) supra](#).

In [Hanna v. Granger \(1894\) 18 R. I. 507, 28 Atl. 659](#), which involved the question of the liability of the master for the negligent injury of a servant by his fellow servant, the court says that the injured servant may sue his fellow servant for his negligence, but not the master.

In [Schumpert v. Southern R. Co. \(1903\) 65 S.C. 332, 95 Am. St. Rep. 802, 43 S.E. 813, 13 Am. Neg. Rep. 676](#), where the question was as to whether or not master and servant could be sued jointly for negligent injury to a fellow servant, the court says counsel do not dispute the proposition that the servant is liable for his own tort.

In [Coalgate Co. v. Bross \(1909\) 25 Okla. 244, 138 Am. St. Rep. 915, 107 Pac. 425](#), which involved the question of the right to join the negligent servant with the principal in an action by an injured fellow servant for damages, it seems to be assumed that the servant was liable, the court saying that it is argued that the cause of action of one servant against another grows out of the legal duty that each owes to the other to use care for the other's safety in the conduct of the common undertaking, and that the liability of the master being founded on a different principle, the parties could not be joined.

When a yard foreman, after ordering brakemen to couple two broken cars together with chains, permitted the engine to come against the standing cars so as to drive together the cars upon which the employees were working, to their injury, the foreman was held personally liable for the injury. [Lake Erie & W. R. Co. v. Charman \(1903\) 161 Ind. 95, 67 N.E. 923](#).

And the same ruling was made in the Federal court between the same parties, the court holding that where a brakeman ordered to couple broken cars together with a chain was killed by the negligence of the yardmaster in permitting the engine to back against the train in which he was working, the duty of the person in charge of the switch yard growing out of the exigency of the social order was so to conduct himself about his master's business as not to injure a fellow servant by his negligence or want of due care. The negligence of the person in charge of the switch yard gave rise to a twofold breach of duty; namely, that of the person in charge of the switch yard and that of the railroad company. [Charman v. Lake Erie & W. R. Co. \(1900\) 105 Fed. 449](#).

The engineer of a train is liable for the death of a railroad employee through the negligence of the engineer and cannot escape responsibility on the contention that he acted merely as agent for another. [Martin v. Louisville & N. R. Co. \(1894\) 95 Ky. 612, 26 S.W. 801.](#)

In an action to hold one in charge of construction work liable for injury to an employee through his negligence, the court says: "An agent of the owner of property who has the complete control and management of the property or premises is bound to keep and maintain or control it as not to injure others, and for this breach of duty is liable to third persons for injury proximately resulting to the latter while using the premises in an ordinary and appropriate manner. The agent cannot excuse himself on the plea that his principal is liable. It is not his contract with the master that exposes the agent to liability to such third persons; it is the liability of the servant, independent of that of the master, by reason of the servant's common-law obligation to so use that which he controls as not to injure another. The mere relation of agency does not exempt a person from liability for an injury to a third person proximately resulting from the neglect of duty of such agent for which he would otherwise be liable. ... The agent, having entered upon the construction of the cottonseed bins in question, was in duty bound to use reasonable care in the manner of executing that work as not to cause any injury to third persons (working thereon under him or going thereby) which may be the natural consequence of his actionable negligence in construction of the bins and their insecurity and dangerous condition. He may not exempt himself from liability to any person who suffers injury by reason of his having it so negligently constructed and left without the proper safeguard of a sufficient and adequate support." [Wright v. McCord \(1920\) 205 Ala. 122, 88 So. 150.](#)

But to render the employee liable to a coemployee he must, of course, owe him some duty the breach of which causes the injury.

For a servant of a miner can be held liable for injury to another miner by the fall of a rock in the mine only so far as the individual acts or omissions within the scope of his employment contribute to the injury. [Allen v. Bear Creek Coal Co. \(1911\) 43 Mont. 269, 115 Pac. 673.](#)

An employee acting under immediate direction of superior officers, without knowledge of the perilous position of a servant injured, is not liable for the injury. [Chandler v. Chicago & A. R. Co. \(1913\) 251 Mo. 592, 158 S.W. 35.](#)

The foreman of a packing plant does not owe any duty to employees to have the working place safe, so as to become liable for injury in case of defect in such place. [Macutis v. Cudahy Packing Co. \(1913\) 203 Fed. 291.](#) The court says the act of the foreman was a mere nonfeasance,—mere omission on his part to perform the master's duty as to inspection and repairs. For this the foreman is not liable to the injured employee. The consensus of judicial opinion is such that there cannot be said to be a fair, debatable question as to the joint liability of master and servant for the servant's misfeasance.

An agent employed to operate a mine is not liable merely because of his agency to an employee injured by an explosion of gas in the mine. [Stiewel v. Borman \(1896\) 63 Ark. 30, 37 S.W. 404.](#) The court says if he owed the employee no duty he was not liable. A legal duty is an essential element of negligence without which there can be no negligence, and there can be no duty to do an act when there is no legal right to do it. An agent stands in the relation of confidence and privity to no one except his principal. To him alone he is under obligations to perform those duties which he expressly or impliedly assumed when he entered into that relation, and hence to him alone is liable for their nonperformance. Consequently, no third person is entitled to recover against him for damages sustained by reason of the nonperformance or neglect of duty which he owed to his principal. He,

however, like other persons, in discharging his duties to his principal, is bound to recognize and respect the rights and privileges of others. He must take care that he does not by his own act unnecessarily injure another. If he fails to do so, either negligently or intentionally, and thereby causes an injury to another, he is liable for damages to the person injured. The fact that he is acting as agent at the time will not relieve him of the liability. The court, after citing cases holding that an agent in charge of real estate, or of the construction of a building, might be liable for negligence, says: The same rule applies to agents having full and complete control and management of any business enterprise or undertaking, and the power and authority to do whatever, in the exercise of ordinary prudence, he finds reasonably necessary to prevent injury to others. But whether the failure to use such precautions be misfeasance there is a conflict of opinion, but the question is of no particular importance. The liability of the servant rests upon his failure to discharge a duty, as in misfeasance. He is under obligation so to use what is under his control as not to injure another. For a failure to discharge this duty he is liable in damages to a person injured.

2. Acts of commission

There is no doubt that if the servant commits an act of positive negligence by which his fellow servant is injured, he will be liable for the consequences.

A servant is liable to his coservant for misfeasance in pushing upon him a hand car which they are engaged in loading onto another car. [McGinnis v. Chicago, R. I. & P. R. Co. \(1906\) 200 Mo. 347, 9 L.R.A.\(N.S.\) 880, 118 Am. St. Rep. 661, 98 S.W. 590, 9 Ann. Cas. 656.](#)

The general managers of an electric power company are liable to a lineman where they turn the power on a line on which he is at work without giving him any warning of the danger. [Hoag v. Washington-Oregon Corp. \(1914\) 75 Or. 588, 144 Pac. 574, rehearing in \(1915\) 75 Or. 597, 147 Pac. 756.](#)

An engineer is liable for injuries inflicted upon a postal clerk by his negligent handling of his engine. [Illinois C. R. Co. v. Houchins \(1905\) 121 Ky. 526, 1 L.R.A.\(N.S.\) 375, 123 Am. St. Rep. 205, 89 S.W. 530.](#)

A train despatcher who, through the negligent transmission of orders, causes a collision and death of a brakeman, is personally liable for the injury. [Louisville & N. R. Co. v. Gollihur \(1907\) 40 Ind. App. 480, 82 N.E. 492.](#)

An agent in charge of a station may be held liable for injury to a boy who is painting barrels, and whom he instructs to wash in gasoline and burn the gasoline when he is through, if he is found to have been negligent in giving such instructions, and the boy is injured in carrying them out. [Standard Oil Co. v. Marlow \(1912\) 150 Ky. 647, 150 S.W. 832.](#)

In [Hare v. McIntire \(1890\) 82 Me. 240, 8 L.R.A. 450, 17 Am. St. Rep. 476, 19 Atl. 453](#), which was an action by an employee in a quarry against another employee for injuries caused by the negligent firing of a blast, the court said the right of action, if it exists, must be founded "on the defendant's misfeasance, which, even if it could be deemed a breach of his contract with his master, would not, for that reason, exempt him from liability to others injured thereby, provided such misfeasance was a violation of a duty springing from the relation between them. And we are of opinion that where two or more persons are engaged in the same general business of a common employer, in which their mutual safety depends somewhat upon the care exercised by them respectively, each owes to the other a duty resulting from their relation of fellow servants, to exercise such care in the prosecution of their work as men of ordinary prudence usually use in like circumstances; and he who fails in that respect is responsible for a resulting personal injury to his fellow servant."

Employees of a mill who attach a block and tackle to the ceiling and leave it in such a manner as to be dangerous to other employees at work in the mill will be liable for an injury caused by its fall on such employees. [Osborne v. Morgan \(1881\) 130 Mass. 102, 39 Am. Rep. 437](#). The court says: "In the case at bar, the negligent hanging and keeping by the defendants of the block and chains in such a place and manner as to be in danger of falling upon persons underneath was a misfeasance or improper dealing with instruments in the defendant's actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action. ... The plaintiff's action is not founded on any contract, but is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence. The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby."

In that case, the court in effect overrules [Albro v. Jaquith \(1855\) 4 Gray \(Mass.\) 99, 64 Am. Dec. 56](#), which was an action to hold the superintendent of a mill liable for injuries to an employee through his negligence with respect to the handling of the gas by which the mill was lighted. In the latter case the court said: "An agent or servant is always responsible to his principal or employer for the negligent or unfaithful performance of his duty, where loss or damage results from it. But, in reference to third persons, there is a qualification of his liability. There is a well-established distinction between nonfeasance and misfeasance. As to the former, which is merely negligence or carelessness in the performance of duty, the responsibility to the principal arises from some express or implied obligation between particular parties standing in privity of law or contract with each other. In such case the responsibility is commensurate with the obligation assumed. But this is the extent and limitation of his liability. He is not bound to answer for such violation of duty or obligation, except to those to whom he has become directly bound or answerable for his conduct ... This principle, applied to the facts stated in the declaration, is decisive against the right of the plaintiff to maintain her present action. No fea- sance or positive act of wrong is charged or imputed to the defendant. The whole ground of complaint against him is that, having the care and superintendence of the apparatus and fixtures used in the mill of the Agawam Canal Com- pany, for the purpose of generating, containing, and burning inflammable gas, he was negligent, careless, and unskilful in the management of them. His obligation to be faithful and diligent in this particular resulted either from an express contract with his principal, or is to be implied from the nature and character of the service in which he was engaged. And because this is the sole origin and foundation of his duty, he is responsible only to the party to whom it was due for the injurious consequences of neglecting it. It is not pretended that he had entered into any stipulation, or made any positive engagement, with the plaintiff, in relation to the service which he had agreed to render to their common employer. She, therefore, can have no legal right to complain of his carelessness or unfaithfulness; for he had made himself, by no act or contract, accountable to her."

An agent intrusted with the management of a construction job is personally liable for injury to a servant through the fall of a scaffold, due to the negligence of the agent. [Fort v. Whipple \(1877\) 11 Hun \(N.Y.\) 586](#).

Where a railroad hand was injured by the movement of the train by the engineer while the hand was between the cars, the court said: "It is contended that the failure of the engineer to give notice to the plaintiff of his intention to move the train while the plaintiff was between the cars was a mere act of nonfeasance, for which the plaintiff must look to the master, and not to the servant. This contention cannot be supported. Conceding, without deciding, the rule to be that, for mere nonfeasance, the servant of the master cannot be made responsible to third persons injured thereby, we are clearly of opinion that the act of the engineer in backing the engine vol- untarily, without giving notice, was misfeasance, instead of nonfeasance; that the knowledge he had, or ought to have had, of the presence of the plaintiff between the cars, made his movement of the train without giving notice

a direct trespass or wrong committed by him against plaintiff, without regard to the relation existing between each of them and the railway company. No case has been cited to us in which such an act of a servant in the business of his master has been held to be nonfeasance." [Warax v. Cincinnati, N. O. & T. P. R. Co. \(1896\) 72 Fed. 637.](#)

Car inspectors are liable for placing a car with a board projecting from its roof in a yard in such a position that persons working on their trains are likely to come into contact with it. [Hukill v. Maysville & B. S. R. Co. \(1896\) 72 Fed. 745.](#) The court says: "It is urged that nothing is charged against them but mere omission or nonfeasance in violation of their duty to their employer, and that, while this may subject the company to liability to the plaintiff for injuries suffered by him because of such nonfeasance, it gives him no right of action against them, for the reason that there is no relation of privity between him and them. Conceding the validity of the distinction by which a servant is held liable directly to a stranger only for positive conduct which the servant might reasonably anticipate would result in injury, and which did so while acting in the business of his master, and not for an entire failure to enter upon his master's business at all, the averments of the petition make it inapplicable here. The petition charges that the defendants (which includes the defendant car inspectors), with gross and wanton negligence, placed the car with the board projecting therefrom in a defective, unsafe, and dangerous condition, whereby the defendant was injured. This was misfeasance, because, but for their act in placing the car where it was, in its dangerous condition, the plaintiff would not have been injured."

An agent of the owner of a lighter, who, by his negligent instructions as to loading it, causes it to overturn, to the injury of an employee, cannot escape liability on the theory that he is only an agent. The court said he would be liable for requiring the master to do a dangerous thing which caused the injury. [Chiarello Bros. Co. v. Pedersen \(1917\) 155 C. C. A. 258, 242 Fed. 482.](#)

Where the servant in charge of construction of a building caused a trench to be dug at the bottom of the wall in such a manner that it fell and injured another servant at work on the building, it was contended that a servant was not liable for injuries happening through his negligence to a fellow servant, but the court said that it did not clearly perceive how it could well be that, in the little community of employees of the same master, upon the same general undertaking, the common duties of humankind in society generally should cease to exist, and, as a consequence, liability for breach of them. [Hinds v. Harbou \(1877\) 58 Ind. 121.](#)

One employee is liable for ordering another into a dangerous place to work, this being a misfeasance. [Jewell v. Kansas City Bolt & Nut Co. \(1910\) 231 Mo. 176, 140 Am. St. Rep. 515, 132 S.W. 703.](#)

In [Republic Iron & Steel Co. v. Lee \(1907\) 227 Ill. 246, 81 N.E. 411,](#) in which a servant was injured by reason of a negligent order given him by his superior, and sued him for the resulting injury, the court said that the superior, personally and individually, owed the injured servant the duty not to give him an order negligent in character. If the order was given by the superior, it was an affirmative wrong done by him in violation of his duty, and rendered him liable to suit.

A servant who directs a fellow servant to make use of an unsafe ladder, to the injury of the latter, will be liable for the injury. [Steinhauser v. Spraul \(1893\) 114 Mo. 551, 21 S.W. 515, 859.](#)

The action failed, however, on a subsequent appeal, on the ground of assumption of risk, although the opinion of Sherwood, J., contains a discussion not concurred in by a majority of the court, upon the distinction between nonfeasance and malfeasance, holding that, in this case, there was mere nonfeasance. [Steinhauser v. Spraul \(1895\) 127 Mo. 541, 27 L.R.A. 441, 28 S.W. 620, 30 S.W. 102.](#)

The act of a superintendent of a bridge company in refusing to adopt proper precautions to protect employees from injury when rolling iron bars along the uncovered beams of the bridge is one of misfeasance for which he is personally liable to an employee, injured by the fall of a roller between the beams. [Kenney v. Lane \(1894\) 9 Tex. Civ. App. 150, 36 S.W. 1063.](#)

A foreman having direct supervision of a mine, who knows the dangerous condition of overhead rock, and takes no steps to remedy it, to the injury of an employee, is personally liable for the injury. [Gennaux v. Northwestern Improv. Co. \(1913\) 72 Wash. 268, 130 Pac. 495.](#)

3. Acts of omission

If one servant owes another a duty the failure to perform which will result in injury to such other, he will be liable for injury resulting from failure to perform such duty. The true reason of this liability is the failure to perform the duty owing; but some of the courts which have felt themselves hampered by the formula with respect to misfeasance and nonfeasance have held that the omission was a misfeasance, notwithstanding it was negative in character.

The foreman of a mine may be liable to an employee for neglect of a duty to examine the walls for the purpose of discovering whether or not there was loose material liable to fall and injure persons working in the mine. [Evans Chemical Works v. Ball \(1914\) 159 Ky. 399, 167 S.W. 390.](#)

"A car inspector, who, after inspection and approval, sends out a car which he knows, or, by the exercise of ordinary care, could have known, was defective, is liable in damages to a brakeman who, because of the defect, is injured in attempting to use it in the ordinary manner, in the absence of contributory negligence on his part." [Ward v. Pullman Car Corp. \(1908\) 131 Ky. 142, 25 L.R.A.\(N.S.\) 343, 114 S.W. 754.](#) The court says: "The petition here charges more than a mere nonfeasance. The cars could not go out on the road until they were inspected and passed inspection. When the inspectors inspected the cars and approved them, they went out on the road. Their approval sent the car out on the road for the use of the trainmen; if they sent a car out which was defective, and which they knew, or by ordinary care could have known, was defective, they are as fully liable to the brakeman who was injured by reason of this, as if they had with their own hands handed him a wrench, telling it was safe and proper to be used, when it was in fact in a dangerous condition; and they either knew this, or could have known it by ordinary care in such inspection as they were required to make. They did not deliver the car by their own hands to the brakeman, but they approved it, and their approval put the car in the hands of the brakeman. It is not a case of mere failure to act, but it is a case of one who was charged with the duty of seeing that the car was safe before delivering it to another to be used, with actual knowledge that, if it was unsafe, it would endanger his life; for they must be charged with knowing what they should have known by the exercise of ordinary care when they made the inspection and passed the car. If they had not inspected the car at all, and had not approved the car in any way, they would have done no positive act, and a different question would be presented."

In [Southern R. Co. v. Miller \(1907\) 1 Ga. App. 616, 57 S.E. 1090](#), affirmed in [\(1907\) 3 Ga. App. 410, 59 S.E. 1115](#), the crew of a train which had taken a switch to let another pass it, left the switch open, so that the oncoming train ran into it and collided with the standing train, to the injury of the former. Negligence was charged against them in leaving the switch open and failing to observe that it was open. These were claimed to be merely acts of nonfeasance, but the court says: "We do not so construe the acts of negligence set up. They really involve acts both of omission and commission. They present a case not where the agents failed to perform the acts which it was their duty to perform, but where they did actually perform them, but in a negligent manner. They were all co-operating in the running of the train, and in the specific acts of negligence in reference to the switch, and oth-

er acts charged which caused the injury to the plaintiff. 'Nonfeasance is the total omission or failure of the agent to enter upon the performance of a distinct duty or undertaking which he has agreed with his principal to do.' "

In [Daves v. Southern P. Co. \(1893\) 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708, 13 Am. Neg. Cas. 367](#), a judgment against a section foreman for leaving a switch open, by reason of which a section hand was killed, was affirmed.

Where the agent in charge of a sawing machine set an inexperienced hand to work upon it when the saw was insecurely fastened, so that the hand was injured, the question arose as to the liability for the injury. [Greenberg v. Whitcomb Lumber Co. \(1895\) 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N.W. 93](#). The court says the principle is well settled that the servant or agent is responsible to third persons only for injuries which are occasioned by his misfeasance, and not for those occasioned by his mere nonfeasance. It further says that it was defendant's duty to have the machine safe. His neglect to do so was nonfeasance. But that alone would not have harmed plaintiff if he had not been set to work upon it. To set him to work upon the defective and dangerous machine was doing improperly an act which one might do in a proper manner. It was a misfeasance. The misfeasance was the efficient cause of the accident.

One operating a derrick to assist timbers to their place in a building is liable for injury to an employee receiving the timbers on the wall, by his negligent operation of the derrick, so that such receiving employee is thrown to the ground. [Fox v. Sandford \(1856\) 4 Sneed \(Tenn.\) 36, 67 Am. Dec. 587](#).

One in charge as agent of the transferring of logs from one railroad company to another is liable for injury to an employee through the breaking of an unsafe chain which he furnishes for use of the employees. [Malone v. Morton \(1884\) 84 Mo. 436](#). The court emphasizes, however, the fact that the injured employee did not know that defendant was a mere agent.

A foreman who, in erecting a derrick, himself selects the material and directs how and where the stays shall be located and fastened, is liable to a fellow servant for injuries caused by its proving insecure and falling, through his negligence. [Atkins v. Field \(1896\) 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375](#). The court says: "The defendant calls our attention to a distinction made in some cases between the misfeasance and mere nonfeasance of a person in the situation of the defendant. Such a distinction cannot avail here. If the defendant had not undertaken to rig and set up the derrick, or, in so doing, had simply executed the will of a lawful superior as to details of mode and material, there might be said to be mere nonfeasance on his part. But he did undertake the work, and practically exercised his own discretion as to mode and material. He was then bound to act carefully in every respect, and his carelessness in any respect was a misfeasance."

In [Camp v. Church of St. Louis \(1852\) 7 La. Ann. 321](#), where one engaged in the construction of a church was injured by the fall of a portion of the work, the court was evenly divided on the question whether or not the contractor was personally liable for the injury. The chief justice says the undertaker who puts up, to the danger of the public, a building defective in design, materials, or work, is liable in damages for its falling down. Indeed, a stronger moral responsibility exists on his part. The owner is rendered liable from the policy of the law alone. On the other hand, the undertaker is the responsible man.

A locomotive engineer is liable for injury to the fireman by his negligence in failing properly to protect a gauge which he installs in the engine. [Brower v. Northern P. R. Co. \(1910\) 109 Minn. 385, 25 L.R.A.\(N.S.\) 354, 124 N.W. 10](#). The court says defendant undertook to execute the duty of replacing the gauge, and performed it negligently. Hence his act was one of misfeasance, and not of nonfeasance. Strictly speaking, the act of the en-

gineer in failing to put on the guard was nonfeasance,—that is, not doing an act which he was required to perform. But the distinction between misfeasance and nonfeasance is sometimes fanciful.

In [Hagerty v. Montana Ore Purchasing Co. \(Hagerty v. Wilson\) \(1908\) 38 Mont. 69, 25 L.R.A.\(N.S.\) 356, 98 Pac. 643](#), where the superintendent of a mine was sought to be held liable for injury to a miner because of the unsafe condition of a shaft, it was contended that, at most, he was guilty of nonaction, or omission of duty, in failing to have the shaft in working order, or in not forbidding its use, and that such omission or nonaction amounts only to nonfeasance, for which he is not liable to a third person, but, if liable at all, merely to his principal; and that the maxim "respondeat superior" applies. The court says: "If Wilson's misconduct in permitting the shaft to be out of repair, and in permitting its use while in such condition, amounts only to nonfeasance, then the contention of his counsel may be well founded. But we are not able to agree with them in their conclusion. ... The courts and text-writers have not always been accurate in defining the terms 'nonfeasance' and 'misfeasance,' or in discriminating between them. As applied in cases of this character, we think the term 'nonfeasance' refers to the omission on the part of the agent to perform a duty which he owes to his principal by virtue of the relationship existing between them; but, whenever the omission on the part of the agent consists of his failure to perform a duty which he owes to third persons, then, as to such third persons, his omission amounts to 'misfeasance,' for which he is responsible."

In an action to hold employers and their foremen liable for death of an employee, due to the falling of a platform, the necessary repair of which the foremen had been instructed to look after, the court held that the question of liability for nonfeasance had not been properly raised, but proceeded to state: "The agent or servant is himself liable as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and nonfeasance. For the former the servant is, in general, liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity and to perform the duties committed to him. An omission to perform them may subject third persons to harm, and the master to damages. But the breach of the contract of service is a matter between the master and servant alone, and the nonfeasance of the servant, causing injury to third persons, is not, in general, at least, a ground for a civil action against the servant in their favor." [Murray v. Usher \(1889\) 117 N.Y. 542, 23 N.E. 564](#).

A mine superintendent who is required by statute to examine the working conditions of the mine each day is personally liable for injury to an employee through his failure to perform the duty so imposed upon him. [Durkin v. Kingston Coal Co. \(1895\) 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237](#). The court says that with the knowledge of the conditions with respect to overlying rock he did nothing to protect employees from the consequences of its fall; and continues: Whether his conduct be considered with reference to the statute or regardless of it, his failure to do what he must have known to be necessary was a neglect of duty such as should render him liable to his fellow servant who has suffered by it.

Other cases in which the servant has been held liable after a discussion of the doctrine of nonfeasance are found *infra*, V. c. 1.

V. Nonfeasance

a. Absence of duty to third person

Notwithstanding the fact that a discussion of the question of the distinction between misfeasance and non-

feasance upon the servant's liability is found in very many of the cases in which actions have been brought against the servant, the cases in which the action has failed are comparatively few. As has already been suggested the fundamental question which must ultimately furnish the rule of decision in this class of cases is whether or not a servant owes a duty to the person injured. If he does, he is liable; if he does not, he is not liable. Some of the cases have made this test the rule of decision, as will appear from the following citations:

Where a man, as agent for his wife, impounds cattle trespassing on her land, and places them in her possession, he is not answerable for injuries caused by failure to mark them. [Kimbrough v. Boswell \(1903\) 119 Ga. 201, 45 S.E. 977](#). The court says that while an agent is personally liable to those injured by his misfeasance, he is ordinarily not liable for mere nonfeasance.

A laborer employed to dig a ditch in a public highway is not personally liable for injuries caused by failure to properly guard it at night, since that duty rests upon his employer. [Jessup v. Sloneker \(1891\) 142 Pa. 527, 21 Atl. 988](#).

The agent of the owner of the property, who, under a permit from the city, constructs a covering over the sidewalk while improvements are in progress on the property, is not liable for injury to a passer-by through its collapse. [Scheller v. Silbermintz \(1906\) 50 Misc. 175, 98 N.Y. Supp. 230](#). The court says the agent owed no duty to plaintiff, and unless a servant is guilty of actual misfeasance or tort, he cannot be held liable with his master. If he neglects duty which the master owes to third persons, the remedy is against the master alone.

Where an action was brought against a railroad company for delay in shipment of freight due to a strike of engineers of the road, the court, as a reason for holding the railroad company liable, said the engineers owed no duty to the shipper which the law can recognize. If they had committed a positive tort or trespass upon the property, the owner might pass by the principal and hold them responsible; but for a nonfeasance, or simple neglect of duty, they were only answerable to their employers. The maxim "respondeat superior" applies. [Blackstock v. New York & E. R. Co. \(1859\) 20 N.Y. 48, 75 Am. Dec. 372](#).

In [Hill v. Caverly \(1834\) 7 N.H. 215, 26 Am. Dec. 735](#), where, by direction of the owner of a dam, his agent kept the gates shut until an unsafe head of water had been raised, so that the dam gave way, to the injury of a lower riparian owner, the court held the servant not liable, saying that no action can be maintained against a servant unless he can be considered as a wrongdoer. He is never liable for a neglect of his master. The court stated that the shutting of the gates was no wrongful act to anybody. The owner had a right to raise a head of water as high as the dam would safely bear. If the gate ought to have been raised sooner, that was the business of the owner, and not of the agent. He had no authority to raise it except when directed so to do. The case discusses no wrongful act, no breach of duty in the agent, no negligence which can render him liable to the lower owner. The case was evidently decided as one of fact, but it is submitted that the court took too narrow a view of the duties of the servant to a third person. Can it properly be said that an agent can cooperate in raising a head of water behind a defective dam with the knowledge that it is merely a question of the height to which the water rises when the dam will give way and devastate property along the stream below, without personal liability for the act? It would seem that the servant, under such circumstances, owed some duty to the lower owners, and if they were injured, he could not shield himself behind the directions given him by the employer. The court argued that the agent, who was under contract to follow directions of the owner in everything relating to the stoppage or flowage of the water, cannot be held personally liable for damages to lower proprietors, caused by the breaking away of the dam, although it may have been imprudent and improper to raise such a head of water with such a dam. That he had no authority from his master to raise the gate except when directed to do so. Such reasoning is cer-

tainly peculiar. If the master had directed the servant to load and aim a gun at the neighbor's house and attach to it a time clock which would discharge the gun at a given hour, and then watch to see that nothing interfered with the prepared mechanism, could it be possible that the servant would not be liable for the injury caused by the discharge of the gun merely because he was obeying the master's orders, and had no authority from the master to interfere with the mechanism which had been set in operation?

An agent in charge of a mill, who had nothing to do with the erection of the dam, is not personally liable for setting back the water onto upper wheels merely because he maintains the dam in the condition and at the height intended by the owner. *Levi L. Brown Paper Co. v. Dean* (1877) 123 Mass. 267. The court says, in respect to his liability, that he had no such control as would authorize him to change or remove any such structure erected upon the premises by the owner. It is very plain, therefore, that he could not be liable to other persons for failing to do what he had no right to do.

Where a building the raising of which was being superintended by an architect, fell and injured a workman, the architect was held liable for the injury. *Lottman v. Barnett* (1876) 62 Mo. 159. The court said defendant is not assumed to be held responsible for omissions of duty to his employers. He is held responsible only for positive misfeasance, for negligence in the work which he undertook and carried out, but in which he failed to exhibit the care and skill which the law imposed upon him. For this want of care and skill,—in other words, for negligence,—he is responsible to persons injured by reason of his acts.

Where a foreman whose duty it was to see to the repair of the rolling stock of a railroad put into an engine a sight tube which was furnished by the railroad company, but which was alleged to have been of an improper kind, so that it burst, to the injury of an engineer, and he was made a party to an action for the injury, the court said: "Can a servant be made liable to one of another grade for the master's failure to provide safe and suitable machinery, although it was the superior servant's duty to look after the condition of the machinery? For such servant's careless or negligent act, which is called a 'misfeasance,' he is liable to anyone injured thereby. In its nature it is or becomes a trespass. And the fact that he is acting for another, or even under the positive directions of another, will not excuse him. But where the injury results to some third person because the servant failed to act,—that is, because of his nonfeasance,—it is held upon authority that generally the servant is not personally liable, though his master is. ... Whether this doctrine, in its fullest extent, can be sustained in sound reason, it is unnecessary for us to examine. Whether the nonfeasance of Brown was a negative act, in that it was a failure to do what he had undertaken to do, and therefore had done it imperfectly, we are relieved from considering by the state of the pleadings and of the records; for it is not charged that Brown had it in his power to do anything other than exactly what he did. To hold him liable in this state of case would be to hold that every servant is personally charged with the same liability as his master, although the sole fault was that of the master, over whose action the servant, of course, had no control. Such a rule would be unreasonable." *Cincinnati, N. O. & T. P. R. Co. v. Robertson* (1903) 115 Ky. 858, 74 S.W. 1061.

In an action by the owner of cotton against the agent of a factor to recover damages because of his failure to transmit to the factor the owner's instructions as to the disposal of the cotton, which resulted in a substantial loss to the owner, the court said it was conceded at the argument that the agent is not liable for damages to a third person resulting to him from nonperformance or neglect of a duty which the agent owes to the principal. The court says that by statute, where a tort is for a violation of any private obligation, that obligation results from the relations of the parties, created by contract, express or implied. *Reid v. Humber* (1873) 49 Ga. 207. Now, what relations existed between the plaintiff and defendant in this case, created by contract, either express or implied? To constitute a legal contract, there must be a consideration. Was there any here? A party shipped his cotton to

his factor; he then told the agent of that factor, who was at another depot from where the cotton was shipped, that he did not wish the cotton sold until further orders. Was there a legal obligation on that agent towards the shipper to transmit his directions to the factor? From what did it spring? The agent was bound to his principal, and would have been responsible to him for any damages recovered against the principal, on account of the agent's failure. And the shipper may have been entitled to recover against the principal, either for the neglect of the agent in not forwarding the instructions, or for the violation of them by the principal, if that had been communicated. But we cannot see that there was any such relation between the agent and the shipper to render the agent liable to him for the neglect. Had the shipper made the agent his own agent in the matter for a consideration, the case would be different.

"An agent who has charge of the renting of a building owned by a nonresident, and promises a tenant that he will pay for connecting a drain with a sewer, but expressly refuses to take any responsibility in directing the work, and says that authority must be obtained from some other source, is not liable for the negligence of the tenant in leaving an ungraded excavation in the street while doing the work." [Crandall v. Loomis \(1884\) 56 Vt. 664.](#)

It seems probable that the result reached in some of the above cases was influenced by the idea that the servant was not liable for omission to perform duties owing his master, the court reasoning that if the delict was with respect to a duty owing the master, there would be no delict towards a third person; and it may be that the decision might have been changed had the question of duty to the person injured been considered with the mind free from the misfeasance-nonfeasance formula.

b. Cases denying liability for nonfeasance

A few cases have adopted and made a rule of decision the principle that the servant is not liable for nonfeasance. That principle being without foundation to support it, the decisions on the facts in the respective cases were merely fortuitous, and may or may not have been right, according to whether or not a duty was owing to plaintiff by defendant. The following cases have held that a servant was not liable to a stranger for mere nonfeasance:United States

[Carey v. Rochereau \(1883\) 16 Fed. 87](#)

[Cheatham v. Red River Line \(1893\) 56 Fed. 248](#), reversed on other grounds in [\(1894\) 60 Fed. 517](#)

[Burch v. Caden Stone Co. \(1899\) 93 Fed. 181](#)

[Kelly v. Chicago & A. R. Co. \(1903\) 122 Fed. 286](#)

[Bryce v. Southern R. Co. \(1903\) 125 Fed. 958](#)

[Floyd v. Shenango Furnace Co. \(1911\) 186 Fed. 539](#)

[Plunkett v. Gulf Ref. Co. \(1919\) 259 Fed. 968](#)

Indiana

[Dean v. Brock \(1894\) 11 Ind. App. 507, 83 N.E. 829](#)

Iowa

[Williams v. Dean \(1907\) 134 Iowa, 216, 11 L.R.A.\(N.S.\) 410, 111 N.W. 931](#)

[Minnis v. Younker Bros. \(1908\) — Iowa, —, 118 N.W. 532](#)

[Cramblitt v. Percival-Porter Co. \(1916\) 176 Iowa, 733, L.R.A.1917C, 77, 158 N.W. 541](#)

[Wendland v. Berg \(1919\) 188 Iowa, 202, 174 N.W. 410](#)

Kentucky

[Dudley v. Illinois C. R. Co. \(1907\) 127 Ky. 221, 13 L.R.A. \(N.S.\) 1186, 128 Am. St. Rep. 335, 96 S.W. 835](#)

Louisiana

[Delaney v. Rochereau \(1882\) 34 La. Ann. 1123, 44 Am. Rep. 456](#)

Mississippi

[Feltus v. Swan \(1884\) 62 Miss. 415](#)

Missouri

[Bissell v. Roden \(1863\) 34 Mo. 63, 84 Am. Dec. 71](#)

[O'Neil v. C. Young & Sons' Seed & Plant Co. \(1894\) 58 Mo. App. 628](#)

New York

[Denny v. Manhattan Co. \(1846\) 2 Denio, 115, affirmed in \(1846\) 5 Denio, 639](#)

[Phinney v. Phinney \(1859\) 17 How. Pr. 197](#)

[Burns v. Pethcal \(1894\) 75 Hun, 437, 27 N.Y. Supp. 499](#)

[Van Antwerp v. Linton \(1895\) 89 Hun, 417, 35 N.Y. Supp. 318, affirmed in \(1899\) 157 N.Y. 716, 53 N.E. 1133](#)

[Potter v. Gilbert \(1909\) 130 App. Div. 632, 115 N.Y. Supp. 425, affirmed in \(1909\) 196 N.Y. 576, 90 N.E. 1165](#)

Ohio

[Stevens v. Little Miami R. Co. \(1850\) 1 Ohio Dec. Reprint, 335](#)

[Chambers v. Ohio L. Ins. & T. Co. \(1857\) 1 Disney, 327](#)

[Henshaw v. Noble \(1857\) 7 Ohio St. 226](#)

Tennessee

[Erwin v. Davenport \(1871\) 9 Heisk. 44](#)

[Drake v. Hagen \(1902\) 108 Tenn. 265, 67 S.W. 470](#)

Texas

[Labadie v. Hawley \(1884\) 61 Tex. 177, 48 Am. Rep. 278](#)

[Morrison v. Ashburn \(1893\) — Tex. Civ. App. —, 21 S.W. 993](#)

In *Bissell v. Roden* (Mo.) *supra*, which was an action against a subcontractor by the property owner for injury to the property by negligent performance by the subcontractor of his contract, the court sets out the section of Story's Agency relating to the servant's liability for misfeasance and nonfeasance, and declares that the case comes within the operation of the principle thereby set out, and that there is no liability.

In *O'Neil v. C. Young & Sons' Seed & Plant Co.* (Mo.) *supra*, which involved the question of liability of an officer of a corporation, the court says it is only where the agent has been guilty of active negligence—that is, of

some act of misfeasance—that he can be made to answer to third persons.

Where an action was brought against transfer agents of a foreign corporation because of their refusal to transfer stock on the books of the corporation, which were in their possession for that purpose, the court held that if the plaintiff had a cause of action against anyone, it was against the principal, and not the agents, saying that for a neglect to discharge this duty they were answerable to their principal, and to no one else. If third persons are injured by the negligence of a known agent, the rule is respondeat superior. *Denny v. Manhattan Co.* (N.Y.) supra.

Employees of a bank are not personally liable for turning over to a third person money, where the bank had agreed with the depositor not to turn over such money until such person signed a certain receipt, which he had not done when the money was turned over. *Morrison v. Ashburn* (Tex.) supra. The court says the attempt is merely to hold them liable for failure to perform a duty to the bank as its agents.

An agent for the rental of real estate, who permits the tenant to place a cooking range on the property, is not personally liable for injuries to neighboring property by operation of the range when its use proves to be a nuisance. *Labadie v. Hawley* (Tex.) supra. This ruling is placed upon the doctrine of nonliability for nonfeasance. The court, as a preliminary to the discussion, however, states that neither the construction of the range nor failure to move it caused the injury, which resulted solely by the manner in which the range was operated. Therefore, the liability must rest, if at all, upon the ground that he had not done something which he might have done. The court then cites with approval various textbooks which have laid down the rule of nonliability for nonfeasance.

Where agents for the care of property were sued because of injury to a tenant by the unsafe condition of the property rented by them, the court disapproves of the contention that their act was one of misfeasance instead of nonfeasance, saying: "An agent, while obeying the command or performing the service of the principal, is not justified in committing a tort, and if he does, not only the principal, but the agent, may be made to answer in damages therefor. But where a duty rests on the principal, and not on the agent, its nonperformance by the latter creates no liability against him, if injury results. True, he may owe a duty to the principal to faithfully discharge his duties as agent, but he owes no duty to others except that, in the performance of those duties, he shall not do anything which will cause injury to them. If the agent fails to perform a duty which he owes to the principal, and by reason of such nonperformance or neglect of duty a third person sustains injury, no action can be maintained against the agent by such third person on account thereof." *Dean v. Brock* (1894) 11 Ind. App. 507, 38 N.E. 829. The court further says the case cannot be said to be one of malfeasance, because the agents were under no legal duty to keep the property in repair and safe for use. They simply neglected to perform for their principal the duty which he owed to his tenant. Their failure to do this was merely a nonfeasance, and not a misfeasance.

In *Cramblitt v. Percival-Porter Co.* (1916) 176 Iowa, 733, L.R.A.1917C, 77, 158 N.W. 541, it appeared that contractors for the wiring of an apartment house left an improperly protected hole in a passage during the progress of the work, and a tenant of the building was injured and sought to hold agents of the building liable for the injury. There was nothing to show that they had anything to do with the work, the contract having been let by the owner, and the agents having no notice of the defect in the passageway. There was, therefore, no ground on which they could have been held liable, but the court, in disposing of the case, said that the most that can be said of these defendants is that they neglected to perform some affirmative duty which they owed to the owner. It is a case of nonfeasance, and not of malfeasance, on the part of these defendants, as to anyone. No liability can be predicated by this plaintiff upon the failure of these agents to discharge a contractual duty which they

owed to the property owner. The court says: "The general rule is that an agent is not liable to a stranger simply for nonfeasance,—for a failure to discharge some duty which he owes to his master or principal,—even though the master and principal owes that duty to the person injured. The agent may be liable as for a breach of contract, but only to his principal. Such breach, however, is not a tort of which a stranger may complain. In the instant case, if these defendants owed any duty to keep this building in safe repair, it was a duty which they owed to the owner, growing out of some relationship existing between them. If they assumed to discharge this duty, and were guilty of some active negligence to the hurt of the plaintiff, they would be clearly liable to her as for tort; but a mere failure to discharge the obligations assumed under the contractual relationship with the owner,—a mere failure to perform those duties,—was a breach of the contractual duty to the owner of which the owner might complain, but of which no stranger to such contractual relationship could complain."

Agents for the care and rental of property who had no knowledge of the danger are not liable for injuries to a tenant by the caving of a covered well thereon. [Wendland v. Berg \(1919\) 188 Iowa, 202, 174 N.W. 410](#). The court says an agent may be held personally liable for wrongful acts of misfeasance committed by him. But when a charge of negligence against an agent is based upon mere nonfeasance, quite a different question is presented. Negligence by nonfeasance can occur only by failure to perform some duty owing to the injured person. It is the general rule, recognized in this state, that the agent is not personally liable to a third person for mere nonfeasance.

In [Chambers v. Ohio L. Ins. & T. Co. \(1857\) 1 Disney \(Ohio\) 327](#), which was an action for injury to a passer-by through the fall of a cornice into the street, which was brought against the owner of the building, the court, in the course of its argument, said: It is proper to advert to a distinction which has been noticed in one of the cases, that if the act itself be unlawful, if it could not be done otherwise than in an unlawful manner, if it be a wrong and trespass, then it may well be that he who orders or procures it to be done, and he who does it, will be responsible; but if the thing to be done is lawful and proper, and the wrongful act which causes injury is neglect on the part of those actually employed, then their principal is responsible to third persons, and those acting as servants or agents are not responsible.

Where an agent in charge of property for leasing failed to repair the defective covering of a drain, or to inform an incoming tenant of the defect, so that the tenant fell through the covering and was injured, the court held that it was a mere act of nonfeasance on the part of the agent, and that he was not liable for the injury. [Drake v. Hagan \(1902\) 108 Tenn. 265, 67 S.W. 470](#). The court says that an agent is not liable to third persons for injuries received by them in consequence of his not performing some duty he owes his principal.

In [Williams v. Dean \(1907\) 134 Iowa, 216, 11 L.R.A.\(N.S.\) 410, 111 N.W. 931](#), which was an action against directors of an agricultural society for injuries to a patron of a ball game because of insufficiency of the back stop, the court says the defendants were agents of the society. If liable at all it was because of what they did. If they were guilty of some misfeasance or trespass, as distinguished from mere nonfeasance, then they are liable, and cannot shield themselves by saying that they were acting as agents for the society. On the other hand, no agent is liable to a stranger simply for nonfeasance; that is to say, for failure to do some act which his principal commits to his charge. He may be liable for breach of contract to his principal, but not to a stranger for a tort.

Where ice formed on the pavement in front of property for the care and rental of which defendants were agents, an action was brought against them for injury caused by a fall on the ice. There was nothing to show that the agents were in any way responsible for the ice, or had knowledge of it. The court says the defendants were

guilty of no misfeasance, and it is the rule of Iowa that an agent is not liable unless he is guilty of misfeasance. [Minnis v. Younker Bros. \(1908\) — Iowa, —, 118 N.W. 532.](#)

In [Erwin v. Davenport \(1871\) 9 Heisk. \(Tenn.\) 44](#), the court held that subordinate agents of the state were liable for their positive wrongs to third persons to the same extent as private agents. They were responsible for misfeasance, but not for nonfeasance.

While an architect may be liable for the fall of a building, due to defects in the plans prepared by him, he is not liable for injury to a third person by his failure to comply with his contract with the owner to supervise the erection of the building, so that unsafe or insecure work gets into it. This is merely nonfeasance, for which he is not responsible to third persons. [Potter v. Gilbert \(1909\) 130 App. Div. 632, 115 N.Y. Supp. 425](#), affirmed in [\(1909\) 196 N.Y. 576, 90 N.E. 1165](#). The court says: "The architect may owe a duty to the owner to visit and inspect the work hourly, daily, or weekly, but he owes no duty to the employees of the contractor to remain on the ground any given length of time, or to inspect the work at given intervals, to see that the plans and specifications, which fully and definitely prescribe materials and dimensions and quantities, are followed by the contractor, who is presumed to be competent, or to employ a superintendent or foreman competent to follow them. It was the duty of the employer of the decedent, under his contract with the owner, to follow the plans and specifications. The supervising power conferred upon the architect was to insure this result for the protection of the owner. If the architect were guilty of an affirmative act which contributed to the accident, as by directing a departure from the plans or specifications, or the use of improper materials, or knowingly suffering such departure from the plans or specifications, or such use of improper materials, or failing to condemn improper work, he would doubtless be liable; but there is no such charge made in the complaint." The dissenting judge, however, said: "I think the complaint states a cause of action, because it charges the defendant with misfeasance, and all of the authorities agree that for that an agent may be held liable to a third party. It alleges that the defendant undertook to supervise the construction of the building; that he had supervision of the work when the wall fell, which was occasioned by the negligent manner in which he performed his work; that the improper construction of the wall was known to him, or would have been if he had exercised reasonable diligence in the performance of his duties. The negligent performance of his contract with Graves, not mere nonperformance, is what is alleged. This is equivalent to a charge of misfeasance, and not nonfeasance."

Negligence of a committee appointed by a corporation owner of exhibition grounds to construct a stand for the use of patrons of a game to be played on the grounds, in failing to see that it is safe for the use to which it is to be put, is mere nonfeasance for which they are not personally responsible. [Van Antwerp v. Linton \(1895\) 89 Hun, 417, 35 N.Y. Supp. 318](#), affirmed in [\(1899\) 157 N.Y. 716, 53 N.E. 1133](#). The court says: "In this state an agent or servant is not liable to third persons for nonfeasance. As between himself and his master he is bound to serve him with fidelity; and for a breach of his duty he becomes liable to the master, who, in turn, may be charged in damages for injuries to third persons occasioned by the nonfeasance of the servant. For misfeasance the agent is generally liable to third parties suffering thereby. The distinction between nonfeasance and misfeasance has been expressed by the courts of this state as follows: 'If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable.' ... Appellant urges that although these individual defendants were charged by the corporation with the duty of erecting this stand, and the acts complained of consisted in omitting to provide for a construction of sufficient strength to withstand the strain to which it was subjected, nevertheless they were guilty of misfeasance rather than nonfeasance."

The contention, however, was disallowed in [Feltus v. Swan \(1884\) 62 Miss. 415](#), in which it was alleged that a levee had been built by the owners of two adjacent plantations for protection against high waters, and that it had always been the custom for the owner of one to have the water from his plantation drain through the other, and that it was the duty of the owner of the latter to keep open a drain on his property for the purpose of such drainage. Neglect of the performance of this duty by the owner of the servient plantation and his manager was alleged, to the injury of the dominant estate. There is nothing to show the foundation of the duty or its extent, but the court disposes of the case by saying that the manager, being a mere agent, was not liable for an omission of duty except to his principal. The charge against him was only that he failed to do, and not that he had done anything mischievously, and for nonfeasance, or omission to act at all, the agent is answerable only to his employer.

In an action by a passenger against the railroad company and the engineer and conductor, for injuries caused by the derailing of a train, the court says an agent or servant is not always personally liable to third persons for negligence. When he is charged with negligence, the facts must be stated wherein the negligence exists,—whether in the omission of an act he should have done, or in the commission of an act he should not have done. For the former, he will not be liable. [Bryce v. Southern R. Co. \(1903\) 125 Fed. 958](#).

"For mismanagement of an estate by an agent he is responsible only to his principal, and not to other persons who may claim to be the rightful owners of the property." [Phinney v. Phinney \(1859\) 17 How. Pr. \(N.Y.\) 197](#).

In [Stevens v. Little Miami R. Co. \(1850\) 1 Ohio Dec. Reprint, 335](#), the court, in arguing in favor of the liability of a master for injury done by one servant to another, said that if the plaintiff had sued his fellow servant, he would have been turned out of court, on the ground that there was no privity of contract; and that as to negligence or nonfeasance, the servant is responsible to his master, and not to his fellow servant.

In an action by an employee against his master and a coemployee for injuries caused by the falling upon him of a derrick, the court says it is not shown that the coemployee was guilty of any wilful or intentional wrongdoing respecting the derrick or the operations of the corporation by which plaintiff was injured. In the absence of any statement that he was guilty of any wilful wrongdoing, or that he had control superior to that of plaintiff over the operations of the derrick, and in the absence of any statement connecting him with the operations of the derrick in any manner not directed by the principal, or not within the scope of his employment, no cause of action is shown against him. With respect to the servant, it is a case of negligence only; and mere negligence, however gross, would not render the servant liable unless it was wilful or malicious. [Burch v. Caden Storage Co. \(1899\) 93 Fed. 181](#).

The failure of a yardmaster to perform his duty to inspect an engine, and permitting it to go out on the road, to the injury of an employee, is a mere act of nonfeasance or omission, and nothing more. The servant or agent is personally liable to third persons for doing something, i. e., committing a positive act, which he ought not to have done, but not for not doing something which he ought to have done. In the latter case he is liable only to his employer. [Kelly v. Chicago & A. R. Co. \(1903\) 122 Fed. 286](#).

Where a miner was injured by defects in a ladderway leading from one level to another, and sued the mine captain for damages on the theory that it was his duty to see that the way was safe, the court said the only negligence charged against him is simply nonfeasance, in that he failed to perform the positive duty of the master properly to inspect and repair the ladderway. Upon well-established principles of the common law he was not li-

able to third persons or coemployees for nonfeasance. For that he is liable only to his employer. [Floyd v. Shengango Furnace Co. \(1911\) 186 Fed. 539.](#)

Where a servant engaged in cleaning tar from a boiler or vat was badly scalded by a piece of false bottom splashing the tar, and brought an action against the superintendent of construction as well as the employer, alleging negligence in using a defective appliance, and failing to warn him of the danger, the court said the claim was that the superintendent was guilty, at most, of nonfeasance, and not of misfeasance, such as would make him, an employee, liable. [Plunkett v. Gulf Ref. Co. \(1919\) 259 Fed. 968.](#) The court says: "Taking this declaration altogether, the only possible wrong that can be charged to the defendant Plunkett is that, knowing the tar tank to have a false bottom, he failed to give the plaintiff notice thereof. The only thing, according to the declaration, which caused injury to the plaintiff, was the falling of the false bottom into the tar, causing it to splash on the plaintiff, severely burning him. ... The most that the defendant Plunkett could be responsible for is for not telling the plaintiff of this false bottom and that it was likely to fall, and that is clearly nonfeasance. And it is well settled ... by the authorities, that for mere nonfeasance an employee of a corporation will not be liable to a third person for injuries received."

In [Dudley v. Illinois C. R. Co. \(1906\) 127 Ky. 221, 13 L.R.A.\(N.S.\) 1186, 128 Am. St. Rep. 335, 96 S.W. 835,](#) a railroad employee having charge of the water tanks and appliances was sued for injuries to a brakeman because of his alleged failure to remedy a defect to which his attention had been called. The court said that the evidence did not show what his authority over the structure was, whether he could have placed it further from the track or supplied different appliances, or that he had it in his power to do anything more than he had done. But the court says: "Assuming that it was the duty of Mitchell to keep these tanks and appliances in repair, and that the water pipe that struck appellant was hanging too low down, Mitchell could not be held liable to appellant, unless a servant, such as Mitchell was, is liable for nonfeasance, or for his failure to affirmatively take some action to remedy defects or dangerous appliances to which his attention may be directed." And the court, on the authority of the Robertson Case, held that the employee was not liable; but it will be remembered that in [Cincinnati, N. O. & T. P. R. Co. v. Robertson \(1903\) 115 Ky. 858, 74 S.W. 1061,](#) the employee used in repair the materials which were furnished him, so that he was not in fact negligent; while in the Dudley Case, he did not do so, but left a known dangerous condition, to the injury of his coemployee. The case is explained, however, in [Ward v. Pullman Car Corp. \(1908\) 131 Ky. 142, 25 L.R.A.\(N.S.\) 343, 114 S.W. 754,](#) as resting upon the ground that the servant had done all that was in his power, and therefore was not negligent.

In [Burns v. Pethcal \(1894\) 75 Hun, 437, 27 N.Y. Supp. 499,](#) an action was brought to recover for the death of a laborer in a trench, against the foreman of the job, who was alleged to have been negligent in permitting the laborer to work at the place where the accident occurred, because of its dangerous condition. The court was of opinion that the evidence did not show any negligence on his part, but placed its ruling against the liability on the ground that the foreman was guilty of nonfeasance only, if negligent at all. The court says: "The conflict in the authorities upon this question is more apparent than real. It has arisen to a great extent from a failure to observe clearly the distinction between misfeasance and nonfeasance, and from an omission to point out the fact that while a servant is liable in the one case, he is not in the other. Disregarding this distinction, some judges and authors have stated in general terms that a servant is liable for his own negligence to a person injured thereby. Such a statement is inaccurate and misleading. Nonfeasance is the omission of an act which a person ought to do. Misfeasance is the improper doing of an act which a person might lawfully do. If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is li-

able. ... We are of the opinion that, as the defendant in this action was charged only with nonfeasance, and not with misfeasance, and as the evidence disclosed that the defendant was guilty only of an omission of duty which devolved upon him, if at all, purely from his employment, and not in his individual character, he was not, under the principle of the authorities cited, liable for the injury to the plaintiff's intestate, and that the court erred in refusing to grant the defendant's motion for a nonsuit."

In [Cheatham v. Red River Line \(1893\) 56 Fed. 248](#), reversed on other grounds in [\(1894\) 9 C. C. A. 124, 23 U.S. App. 19, 60 Fed. 517](#), which was in the Federal court in Louisiana, an action was brought against the master and owners of a vessel for death of a deck hand alleged to have been killed through the negligent handling of the boat. The court said it did not think the action would lie against the master. He was acting avowedly as the agent of others and within the scope of his authority, and he was guilty of no wilful or malicious act. His acts are, therefore, by the well-settled principles of law, those of his principal alone.

In [Carey v. Rochereau \(1883\) 16 Fed. 87](#), there was nothing in the report of the case to show what the delict on the part of the agent was, but the court says an agent is liable only to his principal for nonfeasance. At common law, this proposition is not disputed. The same is true under the law of Louisiana. It is very doubtful if the agent per se is liable to a third person on any account. A person acting as agent for another is liable for his own misfeasance, but this results not from the agency, but in spite of it.

In [Henshaw v. Noble \(1857\) 7 Ohio St. 226](#), which was an action against owners, contractors, and servants, for negligently excavating on property adjoining that in which plaintiff's goods were stored, so that the building was thrown down, to the injury of such goods, it was objected that an action on the case for negligence could not be maintained by a third person against an agent, where the negligence consists of omission of duty imposed. The court says: "The agent is ... personally liable to third persons for his own misfeasance and positive wrongs. But he is not, in general, liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons; the privity exists only between him and his principal. And hence the general maxim, as to all such negligences and omissions of duty, is, in cases of private agency, 'respondeat superior.' ... A mere nonfeasance, or neglect to perform a duty, however wrongful such negligence may be, cannot constitute a technical trespass, which is a positive act of misfeasance, accompanied with force. For such acts of misfeasance, all the agents, and those under whose authority they act, are jointly and severally liable. If, therefore, the injury for which the plaintiff sues in this case was occasioned by the digging in the street, or upon the adjacent premises leased to Curtis and Brown, we apprehend trespass would not be the proper remedy. Curtis and Brown might lawfully dig a cellar upon their own premises, and they might lawfully dig in the street, by the license of the proper authority. Neither of these acts is a direct, forcible invasion of the plaintiff's premises. Their wrongful character arises solely from the careless and negligent manner in which they were performed; from a want of such precautionary measures as the law demanded under the circumstances, in order to prevent consequential injury to the plaintiff's property. For this want of care and consequential injury, the remedy is by action on the case; and the liability of the defendants must be determined by the rules governing cases of negligence, and not by those applicable to trespass."

In [Delaney v. Rochereau \(1882\) 34 La. Ann. 1123, 44 Am. Rep. 456](#), agents of a nonresident owner of a building permitted the gallery in front of it to become out of repair and dangerous. They permitted the property to stand vacant, and one evening, without their knowledge, third persons gained admission to it and proceeded to hold a party, during which the gallery fell, precipitating guests of the party to the sidewalk, and killing one, for whose death the agents were sought to be held liable. There is nothing to show any liability whatever to the per-

sons who had taken possession of the property, because they were plainly trespassers; but the court says the theory on which the suit rests is that the agents are liable to third persons injured for their nonfeasance. The court says: "At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done; the agent, in the latter case, being liable to his principal only. For nonfeasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct. Everyone, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character, and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either by his negligence in respect to duties imposed by law upon him in common with all other men.

An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations towards third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible."

c. Cases recognizing liability for nonfeasance

1. In general

The numerical weight of authority as well as of reason ignores the fact that the delict of the agent was a mere nonfeasance toward his master, and tests the question by the duty which the servant owes to the person injured. Alabama

[Mayer v. Thompson-Hutchison Bldg. Co. \(1894\) 104 Ala. 611, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 620](#)

Georgia

[Southern R. Co. v. Rowe \(1907\) 2 Ga. App. 557, 59 S.E. 462](#)

[Southern R. Co. v. Sewell \(1916\) 18 Ga. App. 544, 90 S.E. 94](#)

Illinois

[Baird v. Shipman \(1890\) 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N.E. 384](#)

[Rising v. Ferris \(1919\) 216 Ill. App. 252](#)

Indiana

[McNaughton v. Elkhart \(1882\) 85 Ind. 384](#)

[Tippecanoe Loan & T. Co. v. Jester \(1913\) 180 Ind. 357, L.R.A.1915E, 721, 101 N.E. 915](#)

Kansas

[Wells v. Hansen \(1916\) 97 Kan. 305, L.R.A.1916F, 566, 154 Pac. 1033, Ann. Cas. 1918D, 230](#)

[Dowell v. Chicago, R. I. & P. R. Co. \(1910\) 83 Kan. 562, 112 Pac. 136](#)

This proposition was approved by the United States Supreme Court in [\(1913\) 229 U.S. 102, 57 L. ed. 1090, 33 Sup. Ct. Rep. 684](#)

Kentucky

[Haynes v. Cincinnati, N. O. & T. P. R. Co. \(1911\) 145 Ky. 209, 140 S.W. 176, Ann. Cas. 1913B, 719](#)

[Murray v. Cowherd \(1912\) 148 Ky. 591, 40 L.R.A.\(N.S.\) 617, 147 S.W. 6](#)

Maine

[Campbell v. Portland Sugar Co. \(1873\) 62 Me. 552, 16 Am. Rep. 503](#)

Maryland

[Consolidated Gas Co. v. Conner \(1910\) 114 Md. 140, 32 L.R.A.\(N.S.\) 809, 78 Atl. 725](#)

Massachusetts

[Osborne v. Morgan \(1881\) 130 Mass. 103, 39 Am. Rep. 437](#)

Michigan

[Ellis v. McNaughton \(1889\) 76 Mich. 237, 15 Am. St. Rep. 308, 42 N.W. 1113](#)

[Bannigan v. Woodbury \(1909\) 158 Mich. 206, 133 Am. St. Rep. 371, 122 N.W. 531](#)

Missouri

[Orcutt v. Century Bldg. Co. \(1907\) 201 Mo. 424, 8 L.R.A. \(N.S.\) 929, 99 S.W. 1062](#)

[Carson v. Quinn \(1907\) 127 Mo. App. 525, 105 S.W. 1088](#)

New Hampshire

[Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. \(1902\) 71 N.H. 522, 60 L.R.A. 116, 53 Atl. 807, 13 Am. Neg. Rep. 363](#)

New Jersey

[Horner v. Lawrence \(1874\) 37 N.J.L. 46](#)

[Van Winkle v. American Steam Boiler Co. \(1890\) 52 N.J.L. 240, 19 Atl. 472](#)

Pennsylvania

[New York & W. Printing Teleg. Co. v. Dryburg \(1860\) 35 Pa. 298, 78 Am. Dec. 338](#)

Virginia

[Belvin v. French \(1887\) 84 Va. 81, 3 S.E. 891](#)

Washington

[Lough v. John Davis & Co. \(1902\) 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491, 17 Am. Neg. Rep. 146](#)

[Howe v. Northern P. R. Co. \(1902\) 30 Wash. 569, 60 L.R.A. 949, 70 Pac. 1100](#)

It will be noticed that the above list contains citations from two or three states which appear in the list in the preceding subdivision. This may be accounted for, perhaps, by the fact that the cases may be distinguished on the facts; but if not, the cases upholding the liability are the more recent, so that they must be regarded as representing the present rule in those states.

Where an action was brought against the managing agent of a corporation which had contracted to construct a building adjacent to a sidewalk, for injury caused to a passer-by by a brick which fell from the top of the building, the court said: "If the proof had shown that the injury resulted from culpable negligence in the construction of the wall, the agent in control, by whose orders it was thus constructed, would be guilty of misfeasance, and jointly liable with the contractor. We think all the authorities are to this effect. ... The second count charges the defendants with neglect, in their failure or omission to erect scaffold or guards so as to prevent brick from falling to the ground. On this proposition the defendant Thompson invokes the doctrine that an agent or servant is

not liable for a mere omission or nonfeasance. ... The principle upon which the rule is founded, as declared by Story, is that there is no privity between the servant or agent and third persons, but the privity exists only between him and the master and principal. This relation of privity is that from which arises the maxim 'respondeat superior.' The liability of the principal or master to third persons does not depend upon any privity between him and such third persons. It is the privity between the master and servant that creates the liability of the master for injuries sustained by third persons on account of misfeasance and nonfeasance of the servant or agent. It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give a sound reason why a person who, acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person, whether suffered from one acting as principal or agent; and his rights ought to be the same against the one whose neglect of duty has caused the injury. ... We hold that the mere relation of agency does not exempt a person from liability for any injury to third persons, resulting from his neglect of duty, for which he would otherwise be liable." [Mayer v. Thompson-Hutchison Bldg. Co. \(1894\) 104 Ala. 611, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 620.](#)

In [Haynes v. Cincinnati, N. O. & T. P. R. Co. \(1911\) 145 Ky. 209, 140 S.W. 176, Ann. Cas. 1913B, 719](#), which was an action for death of a fireman because of alleged negligence of the engineer, the court held that the evidence did not show that he was negligent, but said: "If the accident had been caused by either misfeasance or nonfeasance amounting to a breach of duty on the part of the engineer, we would hold him liable. In some jurisdictions the servant is not held accountable to third persons for nonfeasance, but is for misfeasance; but a contrary rule, and one that is in accord with the weight of modern authority, prevails in this state. We do not recognize any distinction, so far as the accountability of the servant is concerned, between acts of misfeasance and nonfeasance. ... If a servant performs in an unlawful manner an act that results in injury to a third person, or if a servant fails to observe a duty that he owes to third persons, and injury results from his fault of omission, he is liable in damages. There is no reason for making a distinction between acts of commission and omission, when each involves a breach of duty. The servant is not personally liable in either case because the breach of duty was committed by him while acting in the capacity of servant, but responsibility attaches to him as an individual wrongdoer, without respect to the position in which he acts, or the relation he bears to some other person. It is the fact that the servant is guilty of a wrongful or negligent act amounting to a breach of duty that he owes to the injured person that makes him liable. It is not at all material whether his wrongful or negligent act is committed in an affirmative or wilful manner, or results from mere nonattention to a duty that he owes to third persons, and that it is entirely within his power to perform or omit to perform. There are innumerable situations and conditions presented in the everyday affairs of life that make it the duty of persons to so act as not to harm others, and when any person, whatever his position or relation in life may be, fails, from negligence, inattention, or wilfulness, to perform the duty imposed, he will be liable."

In [Rising v. Ferris \(1919\) 216 Ill. App. 252](#), where the manager of a theater was sought to be held liable for negligence in leaving an unguarded electric switchboard where a child, taking part in a performance on the stage, came in contact with it and was injured, liability was resisted on the ground that the manager was not liable for mere nonfeasance. The court held that the statements of nonliability under such circumstances were too broad, in that they seemingly failed to recognize the fact that an agent may, in some cases, owe a duty to third persons at the same time that he owes a duty to his principal; and that the common duty to guard the rights of others is none the less binding upon a person because he happens to be, at the time, an agent. And the court held the manager guilty of such negligence as to render him personally liable.

In an action against one charged with the duty of inspecting telephone poles, to hold him liable for fall of a pole across a highway, to the injury of a passer-by, he contended that his negligence, at most, was mere nonfeasance, and that a servant is not answerable for mere nonfeasance,—that failure to perform his duty made him answerable only to his employer. And the court said that it was not his position as servant, but his relation as an individual wrongdoer to the person injured, which fixed his liability. It was this defendant's duty to inspect and maintain the poles. He owed travelers an affirmative duty, in the exercise of reasonable care, to inspect and maintain the poles in safety. For his negligent failure to perform this duty, whether it be called nonfeasance or misfeasance, liability attaches to him in favor of one injured by it. [Murray v. Cowherd \(1912\) 148 Ky. 591, 40 L.R.A.\(N.S.\) 617, 147 S.W. 6.](#)

In [Southern R. Co. v. Sewell \(1916\) 18 Ga. App. 544, 90 S.E. 94](#), special attention is directed to a statement found in 31 Cyc. 1559, that while an agent is not responsible to third persons for injury resulting from nonfeasance, the meaning of the term "nonfeasance" in this connection is confined to the omission by the agent to perform a duty which he owes solely to his principal by reason of his agency. In other words, if the injuries arise on account of the failure to perform a duty which he has undertaken to perform by virtue of a contract with his principal, but which nevertheless (when once undertaken) involves an obligation on his part to third persons or to the public generally, he must perform the duty, which is not in that case solely to his master, in such a way that injury may not result to third persons on account of negligent, reckless, or wanton failure on his part to carry out and perform the duty he has so undertaken to perform.

Where a gas company under contract to supply gas to a city for illuminating purposes, and to keep the service pipe in repair, was sued for injuries to occupants of abutting property because of gas escaping from a defective pipe, it contended that its duty was merely to the city, whose agent it was, and any neglect to perform it could be regarded only as a nonfeasance for which it would not be liable to third persons. [Consolidated Gas Co. v. Connor \(1910\) 114 Md. 140, 32 L.R.A.\(N.S.\) 809, 78 Atl. 725.](#) The court says: "The distinction between these two classes of negligence has been frequently considered, and it is well settled that nonfeasance is the nonperformance of a duty for which the agent is liable only to his principal, while misfeasance is the improper performance of a duty for which the agent is liable to third persons injured by such negligence. If, for example, the gas company in this case had failed to supply gas to the city lamps, in accordance with its contract, this would have been a nonfeasance, for which the company would have been responsible only to the city. But when, in carrying out the contract, it distributes the gas through defective pipes, and thus permits it to escape into the streets and houses of the city, there is manifestly involved an affirmative element of negligence amounting to misfeasance, and for this the company is liable to anyone who may suffer in consequence."

A demurrer to a declaration to hold persons who had contracted to furnish heat to a mill liable for injury to goods of a tenant of the basement of the mill through the bursting of water pipes in the mill, due to failure to furnish the heat, was overruled in [Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. \(1902\) 71 N.H. 522, 60 L.R.A. 116, 53 Atl. 807, 13 Am. Neg. Rep. 363.](#) The court says the ground of defendant's liability to others is explained upon the analogy of the liability of a servant to third persons. As a general rule, a servant or agent who has contracted to perform a duty owed by his master or employer is liable only to his employer for his mere failure to perform such duty, and is not liable to third persons. So long as the servant does nothing, his contract creates no liability to third persons; but the moment he enters upon the work, the obligation of care arises. He cannot create a dangerous situation and suddenly abandon the work without care for the danger to others.

An insurance company which, upon insuring a steam boiler, takes upon itself the duty of inspection and management of the boiler, is liable to a stranger injured by explosion of the boiler, due to its failure properly to

perform its obligation. [Van Winkle v. American Steam Boiler Co. \(1890\) 52 N.J.L. 240, 19 Atl. 472](#). The court says: "In all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill. The law hedges round the lives and persons of men with much more care than it employs when guarding their property, so that, in this particular, it makes, in a way, everyone his brother's, keeper; and therefore it may well be doubted whether, in any supposable case, redress should be withheld from an innocent person who has sustained immediate damage by the neglect of another in doing an act which, if carelessly done, threatens, in a high degree, one or more persons with death or great bodily harm."

In [New York & W. Printing Teleg. Co. v. Dryburg \(1860\) 35 Pa. 298, 78 Am. Dec. 338](#), which involved the question of the liability of a telephone company to a sendee for missending the message, it was contended that there was no liability, because the corporation was the agent of the sender, and was therefore not liable to the sendee for negligence. The court says: "For nonfeasance, I agree, the agent is responsible only to his employer, because there is no privity of consideration betwixt the agent and a third party. The remedy in such cases must be sought in the maxim 'respondeat superior;' but, even to this rule, there is an exception in the instance of masters of ships, who, although they are the agents or servants of the owners, are also, in many respects, deemed to be responsible as principals to third persons, not only for their own negligences and nonfeasances, but for those of subordinate officers and others employed under them." And the court held that the company was guilty of misfeasance for which the action would lie.

One who, having been employed to haul logs, obtains permission to go through a neighbor's property on condition that the gate be kept shut to prevent escape of hogs pastured there, is liable for loss of hogs, due to his failure to keep the gate shut. [Horner v. Lawrence \(1874\) 37 N.J.L. 46](#). The court says the loss was due to his own misfeasance, for which he cannot claim exemption as agent, against the claim of the person injured.

Where the conductor of a vestibule train refused to open the door to relieve a passenger whom he knew was clinging to the handrails in a perilous position, so that he fell from the train and was injured, the court said: "The conductor was under contract to operate the train of the railway company between certain points on its line, on certain days or during certain periods. Had he failed altogether to take charge of the train on any particular day or date, as required by his contract with the railway company, and in consequence of his failure to perform his contractual obligation the train had departed on its journey in charge of some flagman or other underling, through whose incompetency injury resulted to passengers thereon or to the general public, or if, on account of a breach of his contract, the departure of the train was delayed and damage thus resulted to any patron of the railway company, the persons injured would have no right of action against him, but the master alone might call him to account for the breach of his contract. He would be guilty of nonfeasance, in that he had failed to perform a duty which he owed solely to the master; that is, the duty of running and operating the train of the master in accordance with the contract between himself and the master. On the other hand, where a conductor undertakes to operate the train in compliance with his obligation to his master, but in its operation neglects to observe that degree of care and caution required of him, or improperly performs some duty, and injury results to a third person thereby, the injured person has a right of action against him as well as against the master, because the negligent performance of the duty undertaken amounts to more than nonfeasance, and may properly be characterized either as misfeasance or malfeasance. ... While running the train, the conductor was in the performance of a duty which exacted from him a due regard for the rights and safety of the public; and it cannot be said that he would incur no personal or individual liability if, on account of his failure to perform his duty towards the general public, injury resulted to one of that public, even though the injured person was at fault." [Southern R. Co. v.](#)

[Sewell \(1916\) 18 Ga. App. 544, 90 S.E. 94.](#)

Where a locomotive engineer negligently injured a track hand, it was contended that he was not liable to third persons for mere omission of duty, but the court said: "This contention overlooks the theory that a servant owes duties to third persons as well as to his master. A servant or employee of a corporation cannot well escape liability for the nonperformance of a duty which he owes to an injured third party. ... If it were granted that Johnson was not liable for mere nonfeasance, he would nevertheless be liable for the negligence charged against him in appellee's petition. The allegation is that he carelessly and recklessly ran down and injured appellee with an engine of which he was in charge. This amounts to a charge of violating his duty to appellee and of doing something to the latter's injury. Johnson's act was something more than a breach of contract with his master or an omission of duty to the railway company. It was a positive wrong to appellee,—a misfeasance,—and he cannot be relieved from liability for it because of his contract relation with his master." [Dowell v. Chicago, R. I. & P. R. Co. \(1910\) 83 Kan. 562, 112 Pac. 136.](#) This proposition was approved by the United States Supreme Court in [\(1913\) 229 U.S. 102, 57 L. ed. 1090, 33 Sup. Ct. Rep. 684.](#)

In an action against a section boss for injuries arising to a traveler on the highway by falling into a trench which he had dug across the highway for drainage purposes and failed to cover, it was contended that the petition charged only an act of nonfeasance. The court said it must be remembered that misfeasance may be negligence only. The section boss would be guilty of misfeasance if the ditch were improperly dug or improperly guarded, or if, without regard to the rights of others, it was negligently left in such a condition as to endanger the public or passers-by. Misfeasance is the omission to do an act as it should be done. The court summarizes by saying misfeasance is the improper doing of an act which the agent might lawfully do. Where the agent fails to use reasonable care or diligence in the performance of a duty, he will be personally responsible to a third person who is injured. His liability in such cases is put upon the ground that he is a wrongdoer, and, as such, responsible. [Southern R. Co. v. Rowe \(1907\) 2 Ga. App. 557, 59 S.E. 462.](#)

"It is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance,—doing improperly." [Osborne v. Morgan \(1881\) 130 Mass. 103, 39 Am. Rep. 437.](#)

2. Management of property

A situation which brings out very clearly the inadequacy of the formula that an agent is liable for misfeasance, but not for nonfeasance, to solve the question of liability, is that where an agent having charge of property, with authority to care for and rent it, permits it to become out of repair by a mere act of nonfeasance, so that someone is injured by its defective condition. Here, he owes a duty to the property owner to keep the property in repair; but having sole charge of it, and being, perhaps, the only one to whom the public can look for redress in case of injury, because of nonresidence of the property owner, there is a strong tendency on the part of the courts to hold the agent personally liable.

Thus, an agent having absolute control and management of property for rental purposes is liable for letting the property with a rotten and unsafe railing to the veranda, which gives way, to the injury of the tenant. The

contention was that defendant was not liable, because his act was a mere nonfeasance, but the court says: "The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligations between the particular parties standing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation of their principal between the commission of an act by the agents which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operations, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. ... If the omission of the act or the nonfeasance does not involve a nonperformance of duty, then the responsibility would not attach. If it does involve a nonperformance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. ... Instances in the ordinary transactions of life might be multiplied almost without end, the very statement of which shows conclusively the fallacy of the rule. ... The obligation, whether for misfeasance or nonfeasance, does not rest in contract at all, but is a common-law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as principal, or in the operation of the property of another as agent." [Lough v. John Davis & Co. \(1902\) 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491.](#)

And that case was followed in [Howe v. Northern P. R. Co. \(1902\) 30 Wash. 569, 60 L.R.A. 949, 70 Pac. 1100.](#)

An agent in charge of property of his nonresident principal, who rents the property with knowledge that it is unsafe, is personally liable for injuries caused by the defects. [Baird v. Shipman \(1890\) 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N.E. 384.](#) The court says: "An agent is liable to his principal only for mere breach of his contract with his principal. He must have due regard to the rights and safety of third persons. He cannot, in all cases, find shelter behind his principal. ... It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable."

In an action to hold the agent of a building liable for negligence in permitting the fastening of an elevator door to become out of order, so that the door stood open and plaintiff fell into the well, where it was objected that the negligence was mere nonfeasance for which the company was not liable, the court said: "The real ground, as we see it, for the application or nonapplication of the rule as to liability, is not one of agency, but a question of the duty imposed by general principles of law upon the owner, or those in control of property for him, to so use or manage the property as not to injure the property of another by its negligent use, or to injure the person of another who is where he has a right to be, or is in the use of property, for which use he pays. There is a privity in law, by virtue of which everyone in charge of property is under obligation to so use it as not to injure another. It is a duty imposed by law, it is true, but privity arises from the obligation to those in a situation to

insist upon its respect, and the neglect of performance must, in order to render the agent liable, be neglect of performance of a duty which he owes third persons, independent of and apart from the agency, which arises from contract. ... In the case at bar, even upon the theory of an agent not being liable for nonfeasance, but for misfeasance or malfeasance only, the nonfeasance was not inspecting or not keeping the elevator apparatus in repair, and the misfeasance in causing it to be operated in that condition. If ... nonfeasance is held to apply only to cases where the agent fails to enter upon the performance of his contractual obligations, and not to cases where he has entered upon such performance, but neglected his duties in some respects, the confusion would not arise. That is to say, that for failure to perform his contractual obligations to his principal, a third person cannot hold him liable; but for negligence of omission or commission, after he has undertaken performance, he is liable under common-law rules. The violation of a duty giving rise to injury and a cause of action arises as much and as frequently from omission to do a thing which ought to be done in the discharge of his duty to his principal,—nonfeasance,—as in doing it in the discharge of that duty, in such a manner as to injure another,—misfeasance." [Tippecanoe Loan & T. Co. v. Jester \(1913\) 180 Ind. 357, L.R.A.1915E, 721, 101 N.E. 915.](#)

In [Campbell v. Portland Sugar Co. \(1873\) 62 Me. 552, 16 Am. Rep. 503](#), where the agents in charge of a wharf to which the public were invited let it become out of repair, so that one going there on business fell through a hole in the planking, the court said that the agents were in no better position than their principal. It was the actual personal negligence of the agents that constituted the constructive negligence of the principal. When the acts or neglect of the agents result in injuries to third persons, they are equally responsible with their principals.

An agent having charge of the erection of a building is personally liable for failure to replace a walk in front of it, which was torn up by workmen so as to render it unsafe for passers-by. [Ellis v. McNaughton \(1889\) 76 Mich. 237, 15 Am. St. Rep. 308, 42 N.W. 1113](#). The court says he was bound to use reasonable care in the erection of the building so as not to cause injury to third persons. "To say that he only was guilty of a nonfeasance—an omission of duty to his principal—does not cover the case. He not only omitted a duty he owed to the traveling public, but by his acts he increased the danger, and every day committed a wrong and was guilty of a misfeasance in keeping this walk torn up, and using it as a driveway, in the execution of a particular work which he had entered upon, and of which he had complete superintendence and control. Irrespective of his relation to his principal, he was bound, while doing the work, to so use the premises, including this sidewalk, as not to injure others. Misfeasance may involve, to some extent, the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances; as, for instance, when he does not exercise that care which a due regard for the rights of others would require. This is not doing, but it is the not doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable."

In [Orcutt v. Century Bldg. Co. \(1907\) 201 Mo. 424, 8 L.R.A.\(N.S.\) 929, 99 S.W. 1062](#), an agent having entire charge of a building was held personally liable for injuries caused by negligent operation of an elevator in it. The court says: We concede that for mere nonfeasance, pure and simple, the agent or servant is not liable to third persons. But when the agent undertakes the management of the building, it undertakes to do for the principal a particular work; and after it enters upon the performance of the work, any act which it does, whether by omission or commission, is misfeasance. After making this contract, had it stood aloof and refused to take the management of the building, and in so doing thereby failed to do something which resulted in injury to a third person, it would not have been liable, because we would thus have had mere nonfeasance. But after it assumed the management and thereby commenced to do the work it contracted and agreed to do, then acts of omission or

commission constituted misfeasance, or failure properly to do things which it had, in the line of its duty, commenced to do.

Where the agent in charge of a tenement building, in constructing a walk along a common passage, left a hole in it, into which a tenant fell and was injured, the court says: "All hold that the agent is liable to a third party for misfeasance and for acts of positive wrong. ... A difficulty often arises to determine, under the facts and circumstances of the case, whether the act of the agent was misfeasance or mere nonfeasance. Plaintiff insists that the making of the hole in the court common to all the tenants occupying the premises, and leaving it open, in the circumstances shown in the evidence, exposed the tenants to danger and was a positive wrong,—a misfeasance. Defendant, on the contrary, argues that the making of the hole was a necessary improvement, and leaving it open was a mere omission of duty, and therefore should be classed as nonfeasance. ... Defendant directed and superintended the construction of the hole or trap, had exclusive control of and supervision over the premises; and plaintiff's evidence tends to show he left the hole uncovered, and thus exposed the tenants to danger. In these circumstances, the omission to cover the hole was not mere nonfeasance, but a violation of the duty defendant owed the plaintiff and other tenants; it was a positive wrong for which he is liable." [Carson v. Quinn \(1907\) 127 Mo. App. 525, 105 S.W. 1088.](#)

Executors who, as such, care for and lease property belonging to the estate, are personally liable for injuries to a pedestrian, due to the unsafe condition of a coalhole in the sidewalk in front of the property. [Belvin v. French \(1887\) 84 Va. 81, 3 S.E. 891.](#) The court says it was the duty of the defendants to keep the cover in a safe and secure condition, and this duty, without any sufficient excuse, they failed to perform. A fiduciary ought not to be permitted to manage a trust estate in his hands in such manner as to injure others with impunity so far as any personal liability on his part is concerned, and to hold that defendants are not personally liable in this case would be as inconsistent with natural justice as with the well-settled principles of the common law.

An agent for the care and rental of property is liable to a tenant when he employs an incompetent person to repair a walk on the premises, and falsely informs the tenant that the walk is repaired and safe. [Wells v. Hansen \(1916\) 97 Kan. 305, L.R.A.1916F, 566, 154 Pac. 1033, Ann. Cas. 1918D, 230.](#)

Where an agent in charge of city property employs men to make an excavation in the sidewalk in front of it, he is personally liable in case the excavation becomes a nuisance, and a passer-by is injured by falling into it. The court said that he is guilty of a misfeasance. [McNaughton v. Elkhart \(1882\) 85 Ind. 384.](#) But in that case the court held that it agreed with counsel that there are cases where the agent employed about his master's business, and acting under his direction, is not liable to third persons for mere omissions.

One employed to repair a walk on leased premises is liable for injury to the tenant if he makes insufficient repairs, but reports to the tenant that the walk is safe and ready for use. [Wells v. Hansen \(Kan.\) supra.](#)

In [Bannigan v. Woodbury \(1909\) 158 Mich. 206, 133 Am. St. Rep. 371, 122 N.W. 531,](#) which involved the liability of an administrator for injury caused by the dangerous condition of property under his control, the court says an agent in the control of property is responsible for his own tortious acts. And judgment in favor of plaintiff was reversed on a second appeal in that case for admission of incompetent evidence, but the court does not seem to question the soundness of the rule as above laid down. [\(1911\) 166 Mich. 491, 132 N. W. 77.](#)

The cases which have not held those intrusted with the care of buildings liable for injuries caused by their failure to keep them in repair are as follows:Indiana

[Dean v. Brock \(1894\) 11 Ind. App. 507, 38 N.E. 829](#)

Iowa

[Williams v. Dean \(1907\) 134 Iowa, 216, 11 L.R.A.\(N.S.\) 410, 111 N.W. 931](#)

[Minnis v. Younker Bros. \(1908\) — Iowa, —, 118 N.W. 532](#)

[Cramblitt v. Percival-Porter Co. \(1916\) 176 Iowa, 733, L.R.A.1917C, 77, 158 N.W. 541](#)

[Wendland v. Berg \(1919\) 188 Iowa, 202, 174 N.W. 410](#)

Ohio

[Chambers v. Ohio L. Ins. & T. Co. \(1857\) 1 Disney, 327](#)

Tennessee

[Drake v. Hagan \(1902\) 108 Tenn. 265, 67 S.W. 470](#)

CUMULATIVE SUPPLEMENT

Statute providing that an agent is liable to third persons for wrongful acts taken in the course of the agency only makes an agent liable for affirmative misfeasance; it does not render an agent liable to third parties for the failure to perform duties owed to his principal. [West's Ann.Cal.Civ.Code § 2343. Ruiz v. Herman Weissker, Inc., 29 Cal. Rptr. 3d 641 \(Cal. App. 4th Dist. 2005\).](#)

An agent, although innocent, may be liable for a conversion by assisting in it on behalf of the principal, because he stands in the shoes of his principal. [All Business Corp. v. Choi, 634 S.E.2d 400 \(Ga. Ct. App. 2006\).](#)

Defendant, once assuming dominion over the property of another, hostile to the rights of the true owner, was liable for his own tort after being afforded, as an agent, the opportunity for reasonable inquiry to make his refusal to surrender the property absolute. [Kachurin v. American Iraq Shipping Co., 187 Misc. 178, 61 N.Y.S.2d 414 \(Sup 1946\).](#)

An employee or agent who participates in his employer's or principal's tortious acts may be held individually liable regardless of whether he receives any personal benefit from the tortious act. [Cass v. Stephens, 156 S.W.3d 38 \(Tex. App. El Paso 2004\)](#), reh'g overruled, (Oct. 13, 2004) and application for mandamus filed, (Dec. 2, 2004) and rule 53.7(f) motion granted, (Mar. 16, 2005).

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