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LIABILITY OF AN AGENT IN TORT.

By WARREN A. SEAVERY.*

"Every one, whether principal or agent, is responsible directly to persons injured by his own negligence in fulfilling obligations resting upon him in his individual capacity and which the law imposes upon him independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. * * * 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 obligation 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."

This language, used in Delaney vs. Rochereau, 34 La. Ann. 1123 (1882), has been quoted so frequently with approval by the courts of this country that it may fairly be said to represent the typical judicial attitude. Though spoken by the court of a jurisdiction in which the law is, in part, based upon the Code Napoleon, it was uttered as an expression of common law principles, upon which the decision rested. As used, it applied to the liability of an agent in charge of real estate, who had failed to repair the premises, in consequence of which, through the fall of the gallery upon which he was standing, the plaintiff was injured. Although the language was not necessary to a decision of the case, both because the plaintiff was a trespasser and because it was not shown that the defendant had been directed by his principal to make repairs, it was the ratio decidendi. And, although the application of the principle to the general situation in the case, i. e., where an agent has charge of property, has been denied by a number of the courts, there has been no noticeable dissent upon the correctness of the maxim-like phrase that the agent "neither increases nor dimin-

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ishes his obligations to strangers by becoming an agent.' The purpose of this paper is to discuss the correctness of this.

ONE DOES NOT DIMINISH HIS OBLIGATIONS TO STRANGERS BY BECOMING AN AGENT.

Upon this portion of the phrase, we need spend little time. There is no common law principle which exempts one from the consequences of his acts because of the command of another, at least unless there are present some elements of physical compulsion. It is necessary then, to consider only a few cases, which have at times been thought near the line of non-liability. The cases dealing with conversion, trespass, deceit, and defamation, are too plain to need comment.

Where there are physical injuries flowing directly from an affirmative act, there is no question today but that the agent is personally liable to the one injured. The cases of this sort are numerous and varied. Thus an agent placing property in a place where he should know it would be a source of danger to others is liable. It is likewise immaterial whether one in control of a moving train approaching a crossing without ringing the bell is an employee or the owner of the road. It would seem to be true also that where a manager directs a servant into a place which he should have known to be dangerous, he is liable because of a direct obligation, as the one in command,

1 Cf. Pollock, Torts, Ninth Eng. Ed. p. 179. The rule excusing a sailor when he obeys reasonable commands of his captain exists because of the quasi judicial position of the commander of a ship.


3 Southern Ry. vs. Grizzle, 124 Ga. 735, 53 S. E. R. 244 (1906); Hough vs. Ill. Cent. Ry., 149 N. W. R. 885 (Ia., 1914); Ill. Cent. Ry. vs Coley, 121 Ky. 385, 89 S. W. R. 234 (1905). But see Erwin vs. Davenport, 9 Heisk 44 (1871), where the court held that an engineer running a train inattentively and with lack of caution was not liable to plaintiff whom the train injured, holding the neglectfulness to be nonfeasance.
not to injure others, and aside from the obligation of the employer to provide a safe place for employees. He has caused the employee to enter a dangerous place and produced the result as surely as a conductor or train-dispatcher who has given the wrong order.

The occasional slip of a court into error, through taking too seriously for modern times the identity of principal and agent, may be disregarded. But there are a few cases in which a limitation is suggested which should not be allowed to remain. In Kentucky employees using appliances known to them to be defective are excused as to co-employees if using appliances as

4 Breen vs. Field, 157 Mass. 277, 31 N. E. R. 1075 (1892); Jackson vs. Orth Lumber Co., 121 Minn. 461, 141 N. W. R. 518 (1913); Gonnaux vs. W. W. In. Co., 72 Wash. 268, 130 Pac. R. 495 (1913); Greenberg vs. Whiteman Lumber Co., 90 Wis. 225, 63 N. W. R. 93 (1893); see also Hagerty vs. Montana Purchasing Co., 18 Mont. 69, 98 Pac. R. 643 (1908); and the discussion in the Appollo (1891), A. C. 499 and the Rhosina (1884), L. R. 10 Prob. Div. 24. Contra: Steinhouse vs. Spraul, 127 Mo. 541, 28 S. W. R. 630 (1894); Burns vs. Petheal, 27 N. Y. Supp. 499 (1894); Moyse vs. N. P. Ry., 108 Pac. R. 1062 (Mont., 1910). In O'Neil vs. Young & Sons, 58 Mo. App. 628 (1894), the court held that there was no obligation unless the manager knew of the danger.

5 The liability attaches where there is no relation of service between the one representing the safety of the place and the one hurt: Necker vs. Harvey, 49 Mich. 517, 14 N. W. R. 503 (1883).

6 Louisville & N. Ry. vs. Gollihur, 40 Ind. App. 480, 82 N. E. R. 492 (1907); Morrison vs. N. P. Ry., 34 Wash. 70, 74 Pac. R. 1064 (1904).

7 It may be doubted that the judges of past centuries would have held liable the agent of a bailee who negligently lost bailed goods. It was said obiter in Savage vs. Walthew, 11 Mod. 135 (1707), and in Cavenaugh vs. Such, 1 Price 328 (1815), that he would be liable only in case of conversion. No action would lie against him on the contract of carriage, but the rule to-day is, of course, to hold the agent liable for negligence: Schlosser vs. G. N. Ry., 20 S. D. 406, 127 N. W. R. 502 (1910).

In Cheatham vs. Red River Line 56 Fed. R. 248 (1893), the court held not liable the captain of a steamer who made a mooring negligently, in consequence of which a freight hand was drowned, on the ground that the defendant was acting as agent. The language, if not the decision, is unsound. So also: Henshaw vs. Noble, 7 Ohio St. 223 (1857), and Phinney vs. Phinney, 17 How. Pr. 197 (1859).
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supplied by the common employer. And in Atkins vs. Field, where the defendant was held liable for faultily erecting a derrick, the court said, by way of dicta: "If the defendant had simply executed the will of a lawful superior as to details of mode and materials, there might be said to be a mere nonfeasance on his part." That these decisions and statements are wrong scarcely needs demonstration. The user of a negligently dangerous instrument can not be excused because someone else has supplied it; the economic compulsion to act according to the will of the superior can scarcely be a defence. The law does not distinguish the personality of agent as it does that of executor.

There is also a number of other cases in which the servant was in fact affirmatively negligent towards the plaintiff and no liability was enforced, on the ground that the servant was guilty only of nonfeasance. In these cases, to be discussed presently, the courts were however in accord with the language in Delaney vs. Rochereau, that "no man* diminishes his obligations to strangers by becoming an agent."

ONE MAY INCREASE HIS OBLIGATIONS TO STRANGERS BY BECOMING AN AGENT.

In considering whether an agent increases his obligations to third persons by the assumption of his obligations as agent, it is necessary to discuss very briefly elementary tort principles.

In every case of legal injury, there is predicated a direct legal obligation from the defendant to the plaintiff and a breach by the defendant. There must be an interest which the law protects, an injury to that interest either by an affirmative act or a failure to act when there is an obligation to act, and a reasonably close connection between the act or failure and the final result. An injury to A's rights alone gives no cause of action to B, though it may cause damnum to B. Promises to A,

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* N. O. & T. P. Ry. vs. Robertson 25 Ky. L. R. 285, 74 S. W. R. 1061 (1903); Cinn., N. O. & T. P. Ry. vs. McElroy, 146 Ky. 688, 142 S. W. R. 1009 (1912). The fact that the defendant could not correct the defect (Mechem, Agency, 2nd. Ed. §1478) is immaterial as he was in control.

* 89 Me. 281, 36 At. R. 375 (1896).
therefore, or obligations running to A cannot of themselves confer rights upon B; and a failure to perform the promises or obligations can not be the basis of an action by B. There must, in addition, be a breach of a direct obligation to him.

Since we are considering the obligations of an agent to the principal only in order to determine the existence of an obligation to a third person, an agent may be considered, for our purposes, as one under an obligation to another (his principal) to perform or refrain from performing certain acts. So far as the effect upon third persons is concerned, since the law does not recognize the personality of agent in actions against him, it is immaterial whether or not the obligation to act or to refrain from acting is created through the status of agency. A contractual obligation between A and B would have the same effect in creating an obligation between A and C as an agency relationship between A and B. Furthermore, there may be situations where the breach of a non-censensual duty existing from A to B may cause damnum to C and therefore fall within the general scope of the discussion, for the purpose of analogies.

Our question may, then, be phrased thus: Under what circumstances does one (an agent), under a primary obligation to another (his principal) to act or refrain from acting, owe, because of this obligation, a further primary obligation to a third person to act or refrain from acting, so that the latter, if suffering damnum from the failure has a direct right against the agent.

*Control Creates Obligation.*

In considering this question, the most obvious case is that where an agent is in control of tangible property and especially where, owing to his failure to repair, the property becomes dangerous to third persons. It is in this field that we find the arguments centered around nonfeasance and misfeasance, a needless and profitless discussion, as has been pointed out often.\(^\text{10}\)

\(^{10}\) Labatt Master and Servant, Vol. 7, p. 7967. But see Mechem, Agency, 2nd. Ed. §1466. Mr. Mechem's discussion of the subject matter covered by this article is very valuable and it is my misfortune that I did not see this edition of Mr. Mechem's work until after the completion of this article.
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The whole basis of tort liability, so far as physical injuries are concerned, at least, lies in control, or the power to control. Everyone has an obligation not to allow anything subject to his control to injure another, either as a result of his conscious intent to injure, or because of his negligence, or, in special cases, irrespective of fault. The distinction to be made is between causing harm and failing to confer benefits, rather than between misfeasance and nonfeasance. Wherever property subject to one's control becomes dangerous to a third person, there is an obligation to act affirmatively. Thus, where a building becomes unsafe to neighbors, from any cause whatever, there is an obligation to remove the danger.\(^1\)

And, in a number of jurisdictions, a landowner is liable for damage caused by fires started on his land, irrespective of the manner of origin, which he "neglectfully\(^2\)" fails to put out.\(^8\) So, through the medium of estoppel, if A sees that B is selling A's land as that of B, to C, A becomes liable, having the power to prevent that in which he has control from injuring C.\(^4\) In placing responsibility upon


\(^2\) The common law immunity of landowners from action where his property in its natural condition caused damnum to a neighbor (Roberts vs. Harrison, 101 Ga. 773, 28 S. E. R. 995, (1897), is but an example of the limitation of the interests of one because of the seemingly greater necessities of another. The limit of the right of a legislature to compel a landowner to change the nature of his land, without compensation, under our system of law, seems to be at the line drawn between injury and the conferring benefits. See Tide Water Co. vs. Coster, 18 N. J. Eq. 518 (1866).


\(^4\) Baillarge vs. Clark, 145 Cal. 589, 79 Pac. R. 268 (1904); Coram vs. Palmer, 63 Fla. 116, 58 So. R. 721 (1912).
one alleged to be the master of one doing a wrongful act, it is
the right to control which is important. If it be urged that
there was an affirmative act in these cases, i.e., when control
was assumed, it may be answered that in the first two cases, there
has never been a suggestion that liability would be less if the
defendant were an infant who had inherited and knew nothing
of the property.

But further, we may find an obligation to act where the sole
danger lay in the person of the defendant. For instance, he has
a contagious disease and fails to warn those coming near him.\(^5\)
He has not assumed any obligation here, yet, being in control
of his body, an instrumentality which has become dangerous to
others, he must act to prevent the injurious result. Or to take
another case for which no decision directly analogous can be
found. A is seized while asleep and placed in the middle of the
road. When he awakens he discovers that he is a menace to
travelers, but remains, though free to leave. A traveler riding
a bicycle runs upon him, non-negligently and is injured. Irre-
respectively of any obligation to the state, our legal sense tells us
that A is liable to the traveler; the reason is that his body has
become a source of danger, and being in control, A must remove
it. These are, of course, exceptional cases, as normally control
must be assumed by a volition, and one is not legally in control
of all that over which he has physical power. Of course there
may be liability without immediate control.\(^6\) Wherever control
does exists, however, liability exists irrespective of the manner
of its acquisition.

In the agency cases, then, if we can find that the
agent was in control of the property which he knew or ought
to have known was dangerous to others, he becomes liable, not as
agent, of course, and irrespective of whether or not he is per-
forming his duties to his employer. "Control" is not an easy
word to define, nor do I think it necessary to attempt what I feel

\(^{15}\) Hendricks vs. Butcher, 144 Mo. App. 671, 129 S. W. R. 431 (1910);
and see: King vs. Vantandillo, 4 M. & S. 72 (1815); Smith vs. Baker, 20
Fed. 709 (1884); Christy vs. Butcher, 153 Mo. App. 397, 134 S. W. R.
1058 (1911).

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sure would be as profitless as most attempts at definition. It is something like "possession" as used in criminal law, though it is obviously much broader. It has not been suggested that the subtleties between custody and possession should be perpetuated in torts. One to whom a dynamite bomb has been delivered by his master is in control of it, though he may not be able to steal it. And there may be effective control of situations, where, from the nature of things, it is impossible to have possession, which connotes physical and localized property.

An Agent in Control of Physical Property which Injures the Plaintiff.

To consider some of the cases which have arisen and beginning with the least difficult. It is clear that an engineer at the throttle is in control of a boiler, being placed there to exercise superintendence over it; and it should not need demonstration that it is immaterial whether he ties down the safety valve or fails to untie it, whether he "affirmatively" injures the boiler or continues to use a defective one. It would be absurd to hold that a servant placed at the open door of a tiger's cage with instructions to close the door when there is any indication that the tiger will escape and who goes to sleep, is not liable to a member of the public injured through the escape of the tiger because he was guilty only of "nonfeasance." Only in the amount of alertness required does he differ from the agent given exclusive management of real estate. The latter may allow the property to become a menace to human life as truly as the sleeping attendant. It is true that the question is entirely independent of the question of agency. He would be equally liable if, with a contract to repair, he were placed in control. To this extent and in this situation, the court in Delaney vs. Rochereau was correct in saying that one does not increase his


obligation to strangers by becoming an agent. The underlying difficulty with the language of the court and with the reasoning in other opinions which make the liability of the agent depend upon the existence of something more than non-feasance in similar cases, is that one in control is relieved from liability, seemingly because he is an agent.

Divided Control.

It is necessary, however, to consider the question of the obligation to the principal for the purpose of determining the existence of control; for generally control is taken over from the principal or some former agent. In the case of a chattel in the custody of an agent, or in the case of a moving force managed by an agent, there is usually undivided control. But where that control is separated, it may be difficult to decide whether the agent has that control which will make him responsible for failure to take means to prevent injuries. An engi-
neer at the throttle is normally in control of the engine. That he was directed by his employer to allow the safety valve to remain tied down would be no defence. Operating a force dangerous to others, he is liable whether or not he breaks an agreement with his master and whether or not he increases the danger or merely fails to decrease it. 22

On the other hand where there is not this direct manual custody, it is often necessary to consider the authority of the agent to determine whether or not effective control has been taken. A real estate agent, for instance, who is permitted by the owner to make only a certain class of repairs has not control over the premises. 23 If he is to make all needed repairs and manages the property he is in control. This distinction explains cases like Hill vs. Caverly. 24 In this case the defendant, as servant, shut the gates of a dam, acting within the rights possessed by his employer. He failed to open the gates later at a time when keeping them closed was dangerous to the plaintiff, who was injured by the breaking of the dam. But, if the court was correct in its interpretation of the facts, the defendant was not

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22 An exception seems to exist as to the continuance of a nuisance existing at the time of taking control: Penruddock's Case, 5 Rep. 100b (1598). In case of a dam, one taking control is liable to a lower owner whose land is wrongly flooded, only after notice to remove, unless, after taking control, he increases the height or changes the form: Noyes vs. Stillman, 24 Conn. 15 (1855); Pillsbury vs. Moore, 44 Me. 154 (1857); Carleton vs. Redington, 1 Foster (N. H.) 291 (1850). An agent in control would not be liable therefore, until after notice.


24 7 N. H. 215 (1834).
given full control; his instructions were to open only at the command of the company and at the time of the accident he had no more authority to open them than any stranger. He had assumed control and then surrendered it. He was like a chauffeur who starts the engine of a car and then surrenders the wheel to his employer. The fact that he remains in the machine and has it in his physical power to apply the brake does not make him liable to a third person injured by the careless driving of his employer, unless it can be said to be a common enterprise.

Control at a Time Prior to the Injury.

One servant may start a force and then rightfully turn control over to another without being subjected to liability for the latter's failure or without creating any obligation to take subsequent positive action.25 On the other hand if, in Hill vs. Caverly, the defendant had known, or perhaps, should have known, that his principal did not intend to open the gates of the dam, he would be liable, not because he was in control at the time, but because he had set a force in motion under circumstances which indicated that it would injure third persons. Continuing the chauffeur example, one may have a right to start a machine on the land of his employer, but if his orders were to start the machine and he knew that no provision would be made for stopping it, he would be liable if it escaped into the street and injured a pedestrian. In this case there exists a necessity for positive action because the first act was wrongful; in the other case it is the control at the time which makes the affirmative action necessary. As stated before, the duties of the agent should be considered only for the purpose of determining the existence of control; when that is found, it is immaterial whether or not the agent commits a breach of his agreement with his employer.

25 So one may dig a ditch in a place in which it would be dangerous to others, if he has reason to believe that his employer will protect the public against injury, by warning: Jessup vs. Sloneker, 142 Pa. 527; 21 At. R. 988 (1891). So an agent, seizing cattle under his principal's right, is not liable where his principal subsequently takes control over them and wrongly keeps them: Kimborough vs. Boswell, 119 Ga. 201, 45 S. E. R. 977 (1903).
There are other cases where there is no actual control at the time of the injury and in which the use of nonfeasance and misfeasance seems to create difficulty. For instance, a mechanic fails properly to inspect a part of the machine and there is a subsequent injury to a third person. Or there is a duty of inspection which is not performed and the defective part, which would have been repaired if there had been a proper inspection and report upon it injures someone. In these cases, there was partial control at one time and, in theory, they are like, in a number of aspects, the case of the manufacturer or bridge builder who makes a defective product which later causes injury to a third person. There is the same primary obligation to the purchaser or principal in both cases and the same sort of injury to the one injured. In the "manufacturer cases," the grounds of convenience upon which recovery is denied, save in cases of the most glaring type, are well known. While, in some of these cases, the point is made that there was no control at the time of the accident (which only emphasizes the necessity of control at some period in the transaction), the real difficulty is that of remoteness. Considering the seriousness of the probable injury, the defendant's obligation of care is not extended so as to include the person injured.

The courts which reach this result of non-liability in the agency cases are wrong in at least two aspects. First, when a servant fails to inspect a boiler or railway car, he is dealing with something intrinsically dangerous and, under the generally accepted exception built up from Thomas vs. Winchester, he should be liable. And, secondly, when the defendant is employed to provide against the very contingency which occurs, it can not be said that the consequence is too remote.

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26 As in Albany vs. Cunliff, 2 N. Y. 165 (1859).
27 See Daugherty vs. Herzog, 145 Ind. 255, 44 N. E. R. 457 (1896); Curtin vs. Somerset, 140 Pa. 70, 21 At. R. 244 (1891); First Presbyterian Congregation vs. Smith, 163 Pa. 561, 30 At. R. 279 (1894).
28 6 N. Y. 397 (1852).
29 Murray vs. Cowhead, 148 Ky. 591, 147 S. W. R. 6 (1912), servant had duty of inspecting telephone poles, one of which fell on plaintiff; Van Winkle vs. Am. Steam Boiler Co., 52 N. J. L. 240, 19 At. R. 472 (1890), where agent failing to inspect boiler was held liable to third person injured.
But it is said, in some cases, that the situation is not the same as that of the manufacturer, who actively places a dangerous machine on the market; the agent who is guilty only of non-feasance has created no active force; he is not a cause and he has simply failed to prevent an injury. He is not a legal cause since he neither adds to the original force nor gives it new direction. But this proves too much. The same is true of many who control property. One taking possession of dynamite, which he allows to remain in a dangerous position, causes the injury to one injured by an explosion, only to the same extent. If affirmative action is required, it takes place when he assumes control and thereby prevents others from eliminating the danger. In the same way, the agent who neglectfully fails to inspect, produces the injury, as his assumption of control, with his failure to properly exercise it, allows an instrumentality, which we may assume as a fact, generally, would have been made innocuous, to remain dangerous.

The case is not essentially different from that where a watchman is stationed to give warning of a blast about to be fired or a package to be dropped from a window upon the sidewalk. One so stationed scarcely could resist liability on the ground that there was a mere failure of duty as servant. Neither could one who was to place a red lantern upon an obstruction in the street by explosion; Durkin vs. Kingston Coal Co., 171 Pa. 193, 33 At. R. 237 (1895), foreman liable where he had negligently failed to discover a defect by which workman was injured. Contra: Kelley vs. Chicago & A. R. Ry., 122 Fed. R. 286 (1903), the court relying upon Story, Agency, 9th Ed. §308; Floyd vs. Shenango Furnace Co., 186 Fed. R. 539 (1911), manager not liable for failing to discover defects in premises.

It is generally true, as stated in Wiley vs. West Jersey Ry. Co., 44 N. J. L. 247 (1882), that failure to act does not "break causal connection" between the act of a wrongdoer and the final result. This cannot mean, however, that failure to act is not a cause, nor that it may not be a legal cause. For instance, A throws B into shallow water face down, and B, thinking it a convenient time to die, resolves to remain there and drown and does so. Did A (alone) kill B, or is it not true that B's volition to remain there is at least a legal cause of his death. Cf. Hendrickson vs. Commonwealth, 85 Ky. 281, 3 S. W. R. 166 (1887).

Boyd vs. Ins. Patrol, 113 Pa. 269, 6 At. R. 536 (1886) semble.
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The one who employed him, by that fact, showed that he was prepared to keep it from being dangerous. The danger is created by the defendant's assumption of control, i.e., his representation that he would place the lantern upon it, added to his subsequent failure. He has intermeddled to the injury of the one injured.

It is true that the obligation to his employer may not be the measure of his duty to the third persons. He may have guaranteed that the lantern would be in place, while he would be liable to third persons only if he failed to use due care or was at fault. Or he may have been an infant whose contract was not binding. But this only serves to show again that the recovery by the injured party is not dependent upon any contract existing between master and servant, but upon the assumption of control, for the particular purpose, over the instrumentality.

Some of the courts, retaining the distinction between non-feasance and misfeasance, but defining misfeasance very broadly in order to achieve substantial justice, say that a servant is liable who enters upon the undertaking, but that he does this only when he takes physical steps towards performance. But in fact when does he enter upon the undertaking? When he starts with the lantern, or when he accepts the duty of placing it upon the obstruction? Is it material whether an inspector of boilers actually begins the inspection or remains away. The effect is the same in either case; the quality of the defendant's act is the same. In both cases he has control over the situation. A priori, it would seem that one who consciously refrains from acting, after an assurance that he would act, would be in a worse position than one who negligently fails in the work. It would seem, therefore, that unless misfeasance can be interpreted as being the assumption of an obligation to the employer and a neglectful or wilful failure to enter upon the duties, under such circumstances that the employee ought to expect

31 See Galbraith vs. Ill. Steel Co., 133 Fed. R. 485 (1904). In case of one building for another, the obligations of the first to the public are not measured by the terms of the contract, but by the probability of danger to the public in the erection of the building.

that physical injury to third persons would result from such failure, to hold that there can be liability only for misfeasance is to disregard the plainest tort principles. The agent does increase his obligations to third persons by becoming an agent, where that agency places him in control of property which may injure others.

Looking at the matter from another angle, a failure to hold the servant to accountability to the third person is illogical. A master is in many cases held liable for the non-action of a servant where the master has no affirmative duties of protection, but is subject to a duty only to keep his property from injuring them after he knows or should know it is dangerous. For instance, Smith owns a warehouse which catches fire during the night. We will assume, as is generally a fact, there is no obligation upon him to watch it to see that it does not take fire. If, then, he places no watchman there, he is not liable if fire does catch and a neighbor’s house is burned. If however, a watchman were present and he failed to give the alarm or do what he could to extinguish the blaze or keep it from going to the neighbor’s house the master is liable. And he is liable to the third person because he, through his extended personality, the servant, was negligent in the control of the property. He is liable obviously not because the servant has been guilty of a fault against him, for A cannot complain of an act wrong only as to B, but because the servant failure to act was wrongful as against the third person. To hold the employer of the servant, who was only vicariously in control, and not to make the one whose fault was the cause and who was in actual control liable directly to the third person, is anomalous.

**Control of a Situation; the Agent Interferes with the Plaintiff’s Relations with Others.**

In all of the cases thus far dealt with, the plaintiff has been injured by something in the control of the defendant and owned by the principal. The principal, as well as the agent is liable in an action of tort, because the plaintiff’s right to security,

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existing against everyone, has been interfered with. Cases may be suggested, however, in which the plaintiff has been injured by the defendant (agent), either as to his person, physical property, or pecuniary interests, only in the sense that through the action of the defendant, he has failed to receive something from a third person which he would have received otherwise. For instance, a company contracts to guard A, or a fire extinguisher company contracts to install an efficient system of fire protection for A, or a physician is about to send medicines to A, or a broker has agreed to sell shares to A. In all of these cases assume that the agent, to whom the affair was entrusted, fails to guard, or to put in the extinguishers or to deliver the medicine or to sell the shares, and that A is beaten or continues sick, or suffers loss of goods by fire or is unable to get the title to the shares. Can the assumption of the obligation to the principal be the basis of liability to A, or do we have here the case of a duty to one which cannot create an obligation to another?

Where the Agent Intends the Result When Assuming the Obligation.

Where the defendant intends the result, there is little difficulty in finding a breach of a legal duty. Suppose, for instance, the agent knew that A was in danger and entered the employ of the company having the contract to guard him in order that A might be deprived of this protection. The assumption of the duty was simply a means of depriving A of something to which he had a right. For this reason, the same result is reached if

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35 Failure to act in these cases was said by the court in Consolidated Gas Co. vs. O'Connor, 114 Md. 140, 78 At. R. 725 (1910), to be nonfeasance for which one would not be liable to third persons, while failure to take even the first step towards acting in the situations previously discussed is malfeasance. So also (semble) in Tippecanoe L. & T. Co. vs. Jester, 180 Ind. 357, 101 N. E. R. 915 (1913). And see Orcutt vs. Century Bldg. Co., 201 Mo. 424, 29 S. W. R. 1062 (1907). Cf. Mechen, Agency, 2nd Ed., §1471.

36 A's action being entirely distinct from the right of action on the contract is not affected by the common-law rule that "malice" does not increase the amount of recoverable damages in case of breach of contract. Baumgarten vs. Alliance Assurance Co., 159 Fed. R. 275 (1908). In civil
the "guarding company" was under no legal obligation to guard A. It is sufficient if the company would have protected A but for the defendant's assumption of the duty, as A had the legal right to receive help from others. So in the "medicine case." It is the same as if A, drowning near shore, is about to be rescued by B, when the defendant forcibly prevents the rescue or gives him false information which causes B to leave. Recovery can be had here as in the case of interference with contractual or other voluntary relationships. The accepting of the duty with knowledge that it will not be performed and the intention to keep aid from the other is the gist of the wrong.

It would seem, further, that it is not necessary to have specific "malice," but merely an intent not to perform. In deceit it is not necessary to have a specific desire to injure; nor is it in the case of interference with business relationships. It is enough that there is knowledge that the effect of the transaction will be to deprive the plaintiff of something to which he has a legal right. Of course in the first and second cases suggested above, there may not be certain knowledge that the assistance will be needed. On the other hand, the plaintiff is deprived of the protection he needed and the defendant acted or failed to act with full consciousness of the possibility of the result. Recovery is not sought upon the contract with the employer; it is based upon wrongful interference, or the wrongful taking of control.

If this is correct, the acceptance of a contractual obligation in favor of one may create a non-contractual duty to act affirmatively as regards another. For although the gist of the wrong in the above cases may be the deceitful acceptance, the legal injury does not take place until the failure to act affirmatively, for only then would there be the damnum necessary for an

law jurisdictions, even the contracting parties could recover more in case of a "malicious" breach of contract. See Civil Code of La., §1934; Civil Code of Lower Canada, §1054.

So also where there is a misrepresentation as to title, which forms the basis of estoppel: Horn vs. Cole, 51 N. H. 287 (1868). And see Conway Nat. Bk. vs. Pease, 76 N. H. 319, 82 At. R. 1068 (1912). Refusing to allow one to recover or claim property because of an estoppel in pats is, of course, making him responsible for his misrepresentation.
action on the case. It is true that the totality of the defendant's act may be said to be more than non-feasance, since his acceptance was used only as a tool to cause injury to the plaintiff. But as I understand the cases using the term nonfeasance, and the language of the court in Delaney vs. Rochereau, failure to act after the acceptance is considered nonfeasance, and there is no more than this in the supposed cases.

Assumption of Obligation In Good Faith With Subsequent Neglect. Physical Injuries.

Assuming there is no original "deceit" or wrongful act, can this mere "nonfeasance" be a breach of duty to the third party? Did the assumption of the duty create an obligation to act affirmatively in respect to the third person? Assume that the "agent to guard" negligently oversleeps, or the "agent to deliver the medicine" failed to call for it, or the agent to install extinguishers omitted to do so, intentionally or neglectfully. The actual damnum is clear; the plaintiff has suffered loss which he would not have suffered but for the defendant's interference in the transaction, since it may reasonably be assumed as a fact that A would have received the thing contracted for through some other more reliable agent. (If the facts do not develop this last point, of course, there will not be a case for the plaintiff under this view.) The plaintiff's interest is one which the law protects, for if "malice" is injected his right of action is clear. There is physical damage to the person or tangible property, so that it is not a part of the plaintiff's case, as it seems to be where there is only injury to pecuniary interests, that the defendant intended the result. The sole question would seem to be one of causation; whether or not there is sufficiently close connection between the defendant's action and the final result to create in favor of the third person, a duty not to intentionally or neglectfully fail to perform the obligation he has assumed to the principal.

Analogies: "Manufacturer" Cases.

Before considering the matter further on principle, we may consider certain situations where the defendant, in committing a breach of an obligation to one, causes damage to another. The
first of these exists when a manufacturer sells a machine in fact dangerous and which in fact injures the ultimate purchaser. In these cases the courts have sometimes felt that to allow recovery would be to interfere with the contractual relations between buyer and seller—that there is no privity. This view, of course, ignores the fact that the gist of the injury is causing a thing, in fact dangerous, to injure the plaintiff through the medium of an innocent instrumentality, the buyer. The manufacturer should be liable where without warning he gives something to another which he knows or ought to know is dangerous and probably will cause damage to the class of persons of whom the plaintiff is one. The strongest ground for the support of the cases is that of remoteness, i.e., that the defendant's act is not sufficiently close to the final result. This ground, as previously pointed out, cannot be urged in the agency cases, for the agent's duties are such as to preclude the possibility that he does not have the result in mind.

"Water Company" Cases.

The cases where a water company fails to supply water for fire purposes and the plaintiff's house is thereby burned, are more nearly in point. The language in most of these cases seems to be against the principle now contended for. In many of the cases, however, the action was brought upon the contract with the municipality and the plaintiff failed to show that he was a party to it. In others, the plaintiff went no further than to show that the contract with the city was not performed by the defendant. In some, it is assumed that to impose liability at

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84 See Krahn vs. J. L. Owens Co., 125 Minn. 33, 145 N. W. R. 626 (1914). There is, in any case of neglectful conduct, no duty as to all the world. The duty is only to that class which the defendant might reasonably expect would be injured by his conduct. See Garland vs. B. & M. Ry., 76 N. H. 556, 86 At. R. 141 (1913).
81 As in German Alliance Co. vs. Home Water Co., 226 U. S. 220 (1912).
all would make the water company an insurer in case of failure to keep up the pressure contracted for. But this last supposition is an argument against an imaginary evil. For, to create tort liability, there must be conduct, which, in view of the obligation undertaken and the probability of the damage, would be considered negligence. In addition the plaintiff would have to prove causal connection between the defendant's failure and the loss. With these elements present there is no good ground for refusing recovery.

"Fire Department" Cases.

It is difficult to differentiate the above cases from those where there is a wrongful interference with a hose or a fire company about to save the plaintiff's property, in which cases the courts are almost unanimous in allowing recovery. In Metallic Compression Casting Co. vs. Fitchburg Railroad, the court makes the distinction of remoteness—that the advantage to the plaintiff in these cases is not prospective (as in the waterworks cases) but immediate. But in Chicago M. & St. P. Ry.

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42 Hone vs. Presque Isle Water Co., 104 Me. 217, 71 At. R. 769 (1908).


45 109 Mass. 277 (1872).

46 See also opinion in German Alliance Co. vs. Home Water Co., in 174 Fed. R. 764 (1909), where the court, admitting the possibility of recovery on principle, denies it in the case, as the imminence of the danger was not great. In these cases the courts seem to overlook the fact that, while damage to any particular individual plaintiff cannot be foreseen, damage to one of the class is an almost certain result of the company's failure to supply water.
vs. Housen, the wrongful conduct was in negligently blocking the road before the beginning of the fire, so that the firemen, upon being called were obliged to wait and the plaintiff's building was more severely damaged than it would have been without the blockade. In White vs. Colorado Ry. Co., the wrongful conduct was in blocking the way to the plaintiff's goods so that when a fire began they could not be rescued. It may be said, however, that the person to be injured is more clearly marked out than in the waterworks cases and this distinction, slight though it is, seems to make an important difference in the manufacturer cases.

In all of the cases used as analogies, save where the court has felt itself bound by a previously announced rule, the effort has been to discover whether the plaintiff might have been expected reasonably to foresee an injurious result of the same general sort as that which occurred and whether his conduct was an efficient cause of the final result. In all of them, where the court has ruled against recovery, it has invaded, rightfully enough perhaps in most cases, the function of the jury in making it a matter of law that the plaintiff could not reasonably have expected such result or that the act was not an effective cause. We must not be deceived into thinking, however, that what the courts have treated as law is not a matter of fact; the courts have simply made convenient classifications. The decisions should not be authorities against recovery in cases in a distinct class.

And in the agency cases the plaintiff should succeed. Leaving aside any questions of what would constitute justification, when the agent knowingly fails to perform, he is consciously subjecting a known person to known danger. He is like a manufacturer who knowingly sends out a defective machine in which

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48 Fed. Cas. 17, 543 (1879).
49 As in Ellis vs. Birmingham Waterworks Co., 65 So. R. 805 (Ala., 1914). The Alabama court is consistent in refusing recovery where one interferes with a fire company on its way to a fire, by a passive blockade: Louisville & N. Ry. vs. Scruggs, 161 Ala. 97, 49 So. R. 399 (1909).
case it is conceded that liability exists. Where the agent acts negligently, he should be liable, not only because he must have had in mind the possibility of damage, but also because he knows the individual upon whom the injury will fall, something the decisions, rightfully or wrongly, make important in the analogous cases. He who keeps another from giving assistance is, for this purpose, as much a cause of the result, i.e., the assault or the burning, as the active agent. In fact the case is a complement to that where one is made liable to A for injuries received by A in attempting to rescue B from a position of danger in which the defendant had negligently placed B. In this latter case, as in the agency cases, the theory of recovery is that the defendant's breach of duty, i.e., wrongful conduct, to B, is wrongful as to A because the defendant should have anticipated that it would cause physical damage to A's person or property.

Some of the difficulties suggested to allowing the third person to recover from the agent have been mentioned previously. The principal and agent will not be free in their contractual relations, it is said. But the plaintiff can not recover unless the agent fails to fulfil the terms of his understanding, with the principal, whatever it was, unless there was affirmative action. Nor will the agent be an insurer; he is liable only for fault. But it is said that the plaintiff will in fact be recovering upon a contractual or at least a consensual agreement between the agent and principal. This is not true. The plaintiff is not suing as a beneficiary on the contract, but because his legally protected interests have been interfered with. He is not claiming that the defendant should have conferred a benefit upon him, which is the distinguishing mark of a contract. His complaint is that the defendant has put him in a worse position than that he would have occupied without the defendant's interference, which, when legally protected interests are involved and there is no affirmative defence, constitutes a tort. Another objection

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51 Levy vs. Langridge, 4 M. & W. 337 (1838).
52 Perpich vs. Leetonia Mining Co., 118 Minn. 508, 137 N. W. R. 12 (1912).
raised is that the agent and principal may settle all affairs
between them and still leave the agent liable to a third person.
But there is no more reason why this settlement should effect
the rights of the third person, who has suffered an independent
injury, than should a settlement with the savages in Tarleton vs.
McGauley52 have been a defence to the plaintiff's action. The
question of due care may be a troublesome one, but that is in-
herent in the subject. It is the care which an "undertaker"
should use. There has been no great difficulty in defining the
care which should be used by a surgeon in the pay of a city
treating a charity patient, a situation, by the way, in which it
has not been suggested that the surgeon would not be liable
where he has failed to give the proper medicine, as well as
where he has given the wrong kind.54

This last case suggests another fundamental reason for hold-
ing the agent to accountability. He is in control of the situation.
An illustrative case suggests the soundness of this method of
approach. Suppose A, who wishes to descend into a deep pit,
does so upon B's gratuitous promise, given in good faith, to
stand by and pull him out. B subsequently goes to sleep and
A dies of exposure. There is here no contractual obligation, nor
is there any deceit; yet B's liability could scarcely be ques-
tioned. It does not help us to say that a gratuitous agent is
liable for negligently failing to act after the assumption of the
agency,55 unless we give the underlying reason for liability. We
may fairly use the analogy of the gratuitous bailee, or even
the bailee for hire, who is sued for injury to the goods, not in
contract but in tort. The real reason for liability seems to be
that there is possession or control, subject to the general obliga-
tion to be efficient in that control.56

52 Peake, 205 (1804).
54 Edwards vs. Lamb, 59 N. H. 599, 45 At. R. 480 (1899); Nelson vs.
Harrington, 72 Wis. 591, 40 N. W. R. 228 (1888). And see cases cited
14 L. E. A. 429.
(1909).
56 Thus one promising to take charge of (assume control of) one hav-
ing a contagious disease is liable to a third person catching disease through
273, 66 S. W. R. 449, aff. 68 S. W. R. 802 (1902).
Taking a step further, suppose B, getting tired of remaining, but still feeling his obligation to A, gets C to promise that he will draw B to the surface and, upon receiving C’s promise, B goes away. C then goes to sleep, and A, perforce, remains in the pit. Will the legal result be different than before, because the defendant’s promise was made, not to A, but to the intermediary. The effect is the same in both cases and so is the quality of the neglectful act. The liability is the same as that where one takes control of a child or other helpless person and fails to feed it or preserve it from harm. The hunger felt by the child follows as a result of the control assumed by the defendant and wrongly exercised. The assumption of control creates the same sort of relationship for the purposes of torts as that created by a contract between the parties. It would follow then that when an agent consents to act for the principal in regard to another person, there is a special relationship created between the agent and that other person, which creates a duty on the agent, within the limits of his assumption, to perform his duties in such a manner that physical harm shall not come to the person or property of the other.

Injury to Pecuniary Interests.

Where there has been no physical injury and the sole damage is to the plaintiff’s pecuniary interests, there is little in the cases in support of liability, where there is no fraud at the
beginning of the undertaking. Dealing with analogous cases first, the courts have refused recovery where a defendant committed a tort against A the effect of which was to injure B. Thus there was no recovery where the defendant beat an actor, who was thereby prevented from fulfilling an engagement with the plaintiff;\textsuperscript{60} where the defendant enticed the plaintiff’s husband to commit adultery;\textsuperscript{61} or where the defendant injured the plaintiff’s husband;\textsuperscript{62} or where the defendant killed one insured by the plaintiff’s company;\textsuperscript{63} or injured an employee of the plaintiff whom the latter was obliged to compensate under the employer’s liability act;\textsuperscript{64} or caused wrongfully a ship to leave the plaintiff’s wharf so that the latter was deprived of his wharfage dues;\textsuperscript{65} or where the defendant negligently broke an electric wire in the street causing the plaintiff, who used electric power, to stop business.\textsuperscript{66}

In these cases the plaintiff in breaking an obligation to one caused \textit{damnum} to the plaintiff’s pecuniary interests. So far as the plaintiff (third person) is concerned, it is immaterial whether the defendant’s wrongful act was a tort or a breach of contract against the one whose relations with the plaintiff have been interfered with which make them analogous, roughly, to the agency cases. But in many of them there were special reasons why recovery should not be had. Thus in some of them the wife’s historical disability to sue for injuries to her through her

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\item Taylor vs. Neri, 1 Esp. 386.
\item Nieberg vs. Cohen, 92 At. R. 214 (Vt., 1914).
\item Ins. Co. vs. Brame, 95 U. S. 754 (1871); Conn. Mut. L. Ins. Co. vs. Ry., 25 Conn. 265 (1856); Rockingham etc. Ins. Co. vs. Bosher, 39 Me. 253 (1856).
\item Gregory vs. Brooks, 37 Conn. 365 (1870).
\item Byrd vs. English, 117 Ga. 191, 43 S. E. R. 419 (1903). For other cases of the same general sort, see: Central Ga. P. Co. vs. Stubbs, 141 Ga. 172, 80 S. E. R. 636 (1913); Anthony vs. Slade, 11 Metc. 290 (1846); Perry vs. Hayes, 213 Mass. 296, 102 N. E. R. 313 (1913); Cue vs. Breeland, 78 Miss. 864, 29 So. R. 850 (1901); Brink vs. Wabash Ry. Co., 160 Mo. 87, 68 S. W. R. 1058 (1901); Deaderick vs. Bank, 100 Tenn. 458, 45 S. W. R. 786 (1898).
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husband; in the insurance cases the defendant was subject to an entire liability to the one injured and there had been no interference with contractual or business relationships. But the main ground for decision in all of them was remoteness—that the defendant could not have foreseen reasonably the result of his act, and in general the duty of care towards people or people of a class is dependent upon foreseeability. The courts were wrong in many of the cases on the facts and the attitude of the courts, especially in Byrd vs. English, was much like that in Ryan vs. New York Central Ry., a case now pretty well discredited even in its own jurisdiction. But accepting their reasoning as sound it will not apply to the agency cases, where, since the agent knew the nature of the injury to be suffered and the one to be injured, it can not be said that the result is too remote.

Whatever measure of comfort may be derived from these cases is taken away, however by the agency cases themselves. It has been held, or implied sub silento that there is no legal wrong to the third person where the agent failed in his duty to his principal in turning over property to the third person, or in presenting the plaintiff's draft for payment, or in delivering shares of stock to the plaintiff, or in paying the plaintiff; or in transmitting instructions for the plaintiff. So also where a number of employeesconcertedly stopped work, with the incidental effect of damaging the plaintiff. In most of these cases, it is true, the pleading or evidence showed only that the agent failed to act and not that it was wrongful as between principal and agent. But the attitude of the courts seems unmistakably clear and in accord with the language of the court in the sole case which seems to be a square decision against

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67 35 N. Y. 210 (1866).
69 Montgomery County Bk. vs. Albany City Bk., 7 N. Y. 459 (1852).
70 Denny vs. Manhattan Co., 2 Denio, 115, 5 Denio 639 (1846).
71 Poydras vs. Delamere, 13 La. 98 (1839); Stephens vs. Bacon, 7 N. J. L. 1 (1822); Colvin vs. Holbrook, 2 N. Y. 126 (1848).
72 Reid vs. Humber, 49 Ga. 207 (1873).
liability, Denny vs. Manhattan Co. Here the declaration alleged that the defendant fraudulently had failed to transfer stock which the plaintiff was entitled to receive from the defendant's employer and which it was the defendant's duty as agent to transfer to the plaintiff. "Defendants were not the agents of the plaintiff and owed them no duty. For a neglect to discharge their agency, they were answerable to their principal, and to no one else."

The language in none of these cases is very convincing and should not be an obstacle to a court which is willing to do more than repeat the formula that for failure to act an agent is liable only to his principal. The Denny case, at least, is wrong on the grounds of Lumley vs. Gye. The agent had it in his control to perform the contract for his principal, and, knowing that he was preventing the plaintiff from obtaining that to which he was entitled, refused to act. The agent had the same measure of control over the relations between his principal and the third person, though in a different way, as that held by a combination with power to boycott. And this power of control must not be exercised intentionally to interfere in the relations between others, unless there is some affirmative defence. An affirmative act is not required. A manufacturer who refuses to employ men who trade at the store of a personal enemy, where the failure to employ is for the purpose of injuring the enemy, is liable. Upon the same grounds, an agent who refuses to deal with a particular person should be liable. Nor is personal ill will necessary; following the labor cases, it would be enough that there is knowledge that the result would injure and that there is no justification.

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74 Note 70, supra. This decision is at least consistent with the holdings of the New York court that an agent in control of tangible property which he fails to keep in repair is not liable to third persons for injuries to them.

75 2 E. & B. 216 (1853).

76 This result was reached in a peculiar way in Eastin vs. T. & P. Ry., 99 Tex. 654, 92 S. W. R. 832 (1906), aff. in 100 Tex. 556, 102 S. W. R. 105 (1907), where the agent of a railroad refused to ship the plaintiff's goods by a short route and was held personally liable. Contra, semble, Arnold vs. Moffit, 30 R. I. 310, 75 At. R. 502 (1910).
THE LIABILITY OF AN AGENT IN TORT

Following the same analogies, it would seem that a neglectful failure by the agent to perform his duties to his principal would not give a third person a right of action. Negligence, at present forms a small part of the law dealing with injuries to pecuniary interests. That its victory will be no less sweeping here than in case of other interests which have been longer recognized and more fully protected seems beyond question. We may expect to find in the future, then, that an agent whose failure to perform his principal's business is due to a personal fault (in the Tort sense) will be liable to a third person whose right to do business with the principal has been interfered with, where the agent should have known that the result was probable from his act or failure to act.

In reviewing the cases and the drawing of legitimate inferences from them, it becomes reasonably clear that the quotation placed at the beginning of this paper is not correct. As there is no special rule of agency which relieves an agent, liable under the ordinary rules of Tort law, from the legal consequences of his transgressions, neither is there a peculiar rule which causes his liability to be greater. But, by becoming an agent, one usually does increase responsibility under the rule that the assumption of control over any situation creates liability to those whose legally protected interests are injuriously affected by the faulty exercise of that control, whether the fault lies in doing or in not doing. As different interests are protected by law at present in varying degrees, and as there are various rules of convenience used by the courts in determining causal connection, no categorical rule of liability can be stated. Wherever the courts have protected interests against neglectful acts, the

\[\text{\textsuperscript{77}}\] This explains, in addition to some of those cited, the cases where a careless abstractor makes a wrong report to his principal upon which plaintiff relies, and cases of the same general sort. See Mechem, Agency, 2nd Ed. §1480.

The American cases allowing recovery against a telegraph company by the addressee for a negligent failure to transmit a telegram are in advance of the general legal rules. It may be that they are based on the theory that the public service duties include a direct obligation to addressee as distinct from the contractual duty to the senders.
liability of the agent should depend upon whether he saw or should have foreseen that by his negligent failure to perform his duties he would cause the general kind of damage which in fact followed his fault, to the class of persons of whom the plaintiff was one. Where an interest is protected only against intentional interference, the duty should be limited accordingly.

Aside from all technical legal reasoning, there are eminently sound practical grounds for reaching this result. A large part of the world's work is to-day carried on by means of various agencies. More and more we rely upon the performance of those who are employees. Our lives, property and enjoyment are in their hands. The principals are often in distant places. In many cases if there is no relief against the agent, there is none at all; in any event the remedy through the principal is a circumlocution. Going with the extension of the rule of respondeat superior, based on the power to control, should be a recognition of the fullest personal and direct responsibility of the agent, the one in actual control. The statement that "no man increases—his obligations to strangers by becoming an agent" is not good in law, sound in justice, nor satisfying in its economic effects.