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Liability of Fellow Servants in the Same Employment for Injuries Caused by Them to Each Other

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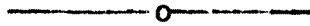
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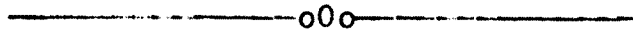
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T H E S I S



LIABILITY OF FELLOW SERVANTS IN THE SAME EMPLOYMENT
FOR INJURIES CAUSED BY THEM TO EACH OTHER.



by

John Kern Patterson, Jr.

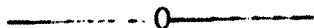


Cornell University

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LIABILITY OF FELLOW SERVANTS IN THE SAME EMPLOYMENT
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While actions brought against employers by their servants and by third persons are very common at the present day, yet those actions in which one servant sues his co-servant under the same master, to recover for injuries caused by the other to him are uncommon, and seldom appear in the reports. This is probably due to the facts that the servant or employee is not, in general, as responsible a person in a financial way, as the employee or master is. Such an action as this is usually brought only when the action against the common employer has failed, by reason of a failure to prove that the master was not guilty of negligence, or for some reason could not be held.

But whatever may be the reason for the infrequency of actions by one servant against his fellow servant, it is nevertheless true that an action does lie in some cases. It is a well settled principle of law that every person is liable for his own crimes and positive wrongs done to every other person. A servant is under no less a duty to others to abstain from committing crimes and positive wrongs, merely because he is a

servant. He cannot shield himself from liability in such cases by showing that he acted under orders from his employer. No person can authorize another to do a wrong. But every one whether he be master or servant, employer or employee, is responsible to others who are injured by reason of his negligence in fulfilling obligations resting upon him in his individual character. These are the obligations which the law imposes upon all persons, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent or servant; but if, in the course of his agency, he comes into contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence in the performance of duties imposed by law upon him, in common with all other men.

It has been held in some cases that an action could not be maintained by one servant against another in the same employment, for injuries caused by the other, merely for the reason that they were fellow servants. That, on reason, such should not be the case is evident from a consideration of the relations of master and servant. In such a case, a servant would have no recovery against any one unless he could prove that his master was himself negligent, no matter how careless his

fellow servant might be. In one of the early English cases, that of Southcote v. Stanley, 1 H. & N. 247, decided in the Court of Exchequer in 1856, Chief Justice Pollock is said to have uttered this dictum: "Neither can one servant maintain an action against another for negligence while engaged in their common employment". But this was mere dictum and another report of the same case does not contain it. It has since been decided otherwise in later English cases. In Albro v. Jaquith 4 Gray, (Mass) page 101, which was an action of tort, brought against the superintendent of a cotton and woolen mill in West Springfield, to recover damages for injuries sustained by the plaintiff, while in the employment of the company, from the escape of gas, occasioned by the negligence, carelessness and unskillfulness of the defendant in the management of the apparatus and fixtures used in the mill for the purpose of generating etc. inflammable gas for the lighting of the mill, Merrick J., said,— "Many of the considerations of justice and policy, which led to the adoption of the general rule, now perfectly well established, that a party who employs several persons in the conduct of some common enterprise or undertaking, is not responsible to any one of them for the injurious consequences of the mere negligence or carelessness of the others in the performance of their respective duties, have an equal signif-

icancy and force when applied to actions brought for like cause by one servant against another. In the latter, as in the former case, they are presumed to understand and appreciate the ordinary risk and peril incident to the service in which they are employed, and to predicate the compensation they are to receive, in some measure, upon the extent of the hazard they assume. The knowledge that no legal redress is afforded for damages occasioned by the inattention or unfaithfulness of other laborers engaged in the same common work, will naturally induce such one to be not only a strict observer of the conduct of others, but to be more prudent and careful himself, and thus by increased vigilance to promote the welfare and safety of all". In *Osborn v. Morgan*, 130 Mass. 102, which was an action for damages brought by one servant against his fellow servant, Judge Gray, commenting on the case of *Albro v. Jaquith*, supra, says, "Upon consideration, we are all of the opinion that that judgment is supported by no satisfactory reasons and must be over-ruled." And at page 105, he says: "Even the master is not exempt from liability to his servants for his own negligence; and the servants make no contract with, and receive no compensation from each other. It may well be doubted whether a knowledge, on the part of the

servants that they were in no event to be responsible in damages to one another, would tend to make each more careful and prudent himself." Griffiths v. Wolfrain, 22 Minn. 185 and Hinds v. Harbou, 58 Ind. 121, and numerous other authorities are to the same effect. Both on reason and authority, therefore, it seems to be well settled at the present day that the fact that they are fellow servants will not be an obstacle in the way of a recovery.

The authorities being unanimous at the present day in holding that the fact that the parties are fellow servants, does not interfere with the right of action, let us see in what cases one servant may recover against another, a fellow-servant, for injuries caused by the latter. We have already seen that a recovery may be had by one servant against another for his crimes and positive wrongs. But are fellow servants liable to each other negligence, or only for their misfeasance, as distinguished from their nonfeasance? Misfeasance is the doing what a person may lawfully do, in an improper manner. Nonfeasance is the not doing of that which it is a person's duty to do. By the weight of authority in most of the states a distinction is made between misfeasance and nonfeasance, the servant being held answerable for the former but not

for the latter. Such a distinction seems unjust, at the least. The idea that a servant in charge of a piece of work is to be held civilly liable, where he makes an honest attempt to perform his duty, but through an unintentional blunder, does the work allotted to him in what is called a careless and negligent manner ; while another servant engaged in the same line of work and under the same obligation, who positively and intentionally fails or refuses to perform his work in any part is to be excused from all liability to one injured by or through his non performance, seems unjust indeed. Griffiths v. Wolfrain, 22 Minn. 185, was an action brought by a plaintiff to recover for injuries received by him through the negligence of the defendants, fellow servants with him, in constructing an arch. No distinction was made in this case between misfeasance and non feasance, although it was clearly a case of misfeasance, or the improper doing of what a person might lawfully do. Gilman, C. J., at page 187, says, "Whoever was guilty of the negligence if there was any, is liable to the plaintiff, unless there was contributory negligence on his part, for any injury which he sustained by reason of it. This liability does not rest upon any liability imposed by privity of contract, for in such cases there may not be, and

frequently is not, any such privity. But the duty of each to do the work with proper care grew out of the relation which existed between them as persons engaged in the same work, in which the negligent or unskillful performance of his part by one may cause danger to the others, in which each must depend for his safety upon the good faith, skill and prudence of each of the others in doing his part of the work, then it is the duty of each to the others engaged in the work, to exercise the care and skill ordinarily employed by prudent men in similar circumstances." *Hinds v. Harbou*, 58 Ind. 121, was an action brought by Harbou, a carpenter in the employ of Studebaker Brothers Manufacturing Company against the defendant Hines and the company. It appeared that the plaintiff was at work as a carpenter on the second story of the building near the wall which fell, and that he knew nothing of the character of the excavation going on at the foot of the wall; which excavating was so negligently done at the direction of the defendant, Hines, that the wall fell and injured the plaintiff. In this case also, no distinction was made between misfeasance and nonfeasance, the court saying at page 126, "The point is made that this action will not lie; that a servant is not liable for

injuries happening through the negligence to a fellow servant in the employment of the same master in the same general business. *Albro v. Jaquith*; *Southcote v. Stanley*. Elementary writers doubt or deny the authority of these cases. We do not clearly perceive how it may well be that in the little community of employees of the same employer, upon the same general undertaking, the common duties of man to man in society generally should cease to exist, and as a consequence, liability for breaches of them. We think the action may be maintained." In this last case the court had before it the distinction between misfeasance and nonfeasance, because it cited the cases of *Albro v. Jaquith* and *Southcote v. Stanley*, although it did not follow them, but held that an action would lie for negligence generally.

In New York there is a well settled distinction between misfeasance and nonfeasance. The first case in this state in which the question, as to the liability of one fellow servant to another for injuries, came up, was in *Fort v. Whipple*, 11 Hun, 586. In that case it ~~is~~ *appeared* that one Shipman contracted to build a bridge and employed the defendant, a skillful builder, and gave him the sole management and control of the work and of the manner of carrying it on, all the other

employees being in all respects subject to his orders. Under defendant's direction and supervision a scaffold was erected, secured by stay laths, upon which laborers worked and materials were placed. Some of these laths were removed by the direction of the defendant, the plaintiff aiding in so doing. Subsequently the scaffold fell and the plaintiff was injured thereby. The court, by Rockes, J., after holding that the defendant was an alter ego of the principal and that therefore there was no insuperable difficulty in law growing out of the relation of the parties to each other as coemployees, said, "We are not now called upon to decide the question whether an action may or may not be maintained for negligence by one employee against another where both are engaged in the same service under a common employer, in a case where the latter would not be liable. Of course an action would lie in such a case for a direct injury as a trespass, but perhaps there might be a question whether an action would lie in such a case for a mere nonfeasance or neglect of duty." Murray v. Usher, 117 N. Y. 542, was an action brought by plaintiff to recover damages for alleged negligence causing the death of Blanchard, plaintiff's intestate, who was employed by the defendants Murray and Usher as a day laborer in their saw mill. While so employed a

platform on which he was fell, and he received injuries causing his death. Lewis and the plaintiff's intestate were co-servants of the owners of the mill, the former having general charge and superintendence of the business under the supervision of the owners, who themselves gave directions from time to time. They instructed Lewis to look after the necessary repairs and the evidence justified the inference that, in respect to the platform, he omitted to perform his duty. Andrews, J., said, "The general rule of respondeat superior charges the master with liability for the servant's negligence in the master's business causing injury to third persons. They may in general treat the acts of the servant as the acts of the master. But 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 is not, in general at least, a ground for a civil action against the servant in their favor." The Murray case was followed in a late case in the Supreme Court of New York, Burns v. Pethcal 27 N. Y. Supp. 503, in which Martin, J., delivering the opinion says:—"The question is presented whether this action could be maintained by the plaintiff to recover for the death of her intestate against the defendant who was a coemployee. This question was raised by the defendant's motion for a nonsuit, made at the close of the plaintiff's evidence, and renewed after all the evidence in the case had been received. One of the grounds of the motion was that there was no such relation existing between two coemployees as authorized one to bring an action against another on the ground of negligence. The English authorities upon the question of the liability of a servant or agent to a third person for an act or omission performed or omitted by him while engaged in the business of the master, are to the effect that the servant is liable for misfeasance, though the act be in obedience to the master's order, but not for mere nonfeasance or omission of duty to

third persons, but only to the master, who alone is answerable to third persons for the master's neglect. We think it may be safely said that the English rule prevails generally in this and other states, notwithstanding the broad declarations of some judges and text writers to the effect that a servant is liable to third persons injured by his negligence, either alone or jointly with his master. The conflict with the authorities upon the question is more apparent than real. It has arisen 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 rested upon him in his individual character, and was one that the law

imposed upon him independent of his agency or employment, then he is liable. That such is the doctrine in this state, and that when applied to the case before us, it requires us to hold that this action cannot be maintained, is rendered quite manifest, we think, by an examination of the case of *Murray v. Usher*, supra". Other cases in support of this distinction are *Fetters v. Swan*, 62 Miss. 415; *Delaney v. Rochereau*, 34 La. Ann. 1123; *Reid v. Huber* 49 Ga. 207; *Labadie v Hawley*, 61 Tex. 177; *Osborne v. Morgan*, 13 Mass. 102; *Albro v. Jaquith*, 4 Gray (Mass.) 101.

We have seen that by the weight of authority a servant is answerable civilly for misfeasance as distinguished from nonfeasance, rather than for his negligence generally. For his negligence not consisting of misfeasance, he is responsible only to his master. But how are we to distinguish between misfeasance and nonfeasance? How to apply the distinction to a given case? It must necessarily be very difficult of application. Judge Story says, in section 309 of his work on agency, "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 over refinement of the old doctrines of the common law. It seems, however, to be founded upon this ground, that no authority from a superior can furnish to any party a just defence for his own positive torts and trespasses; for no man can authorize another to do a positive wrong. But in respect to nonfeasance or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in priority of law and contract with each other, and no man is bound to answer for any such violation of duty or obligation, except to those to whom he has become directly bound or answerable for his conduct. Whether the distinction be satisfactory or not, it is well established, although some niceties and difficulties occasionally occur in its practical application to particular cases". Let us see how the cases apply the distinction.

Bell v. Josselyn, 3 Gray (Mass.) 309, was an action brought by plaintiff to recover damages from the defendant for causing water to over-flow from a sink in a second story of a building to the first floor, thus damaging some goods belonging to the plaintiff. It appeared that the board of water

commissioners had caused the water to be shut off from the premises for non-payment of the water rates, and that the defendant, who was the agent of his wife, who owned the premises being informed that one of the tenants wanted the water, went to the water commissioner, paid the water rates, and directed the water to be let on, which was done; and the faucet in an upper room was left open so that the water, after filling the sink, overflowed and soaked through the floor into the plaintiff's shop and damaged his property. Metcalf, J., delivering the opinion said, "The defendant's omission to examine the state of the pipes in the house before causing the water to be turned on, was a nonfeasance. But if he had not caused the 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 are the nonfeasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a nonfeasance." *Howell v. Wright*, 3 Allen (Mass.) 167, was an action of tort to recover damages for injuries to the plaintiff sustained by falling

into the Charles River in the night time, at the draw of the Warren Bridge, through the negligence of the defendant who was the tender of the draw-bridge, in not shutting the gates and hanging out lanterns while opening the draw. Dewey, J., who delivered the opinion, said, "Under these circumstances, a personal liability attached to him for an injury to a third person, caused by his improper discharge of his duties. His act was not a mere naked act of nonfeasance. The opening of the draw was the cause of the injury. That act was done by the defendant. It is true that it was lawful and proper to open the draw, but such opening was to be done in a proper manner. That required due regard and caution for the safety of travellers passing the bridge, and the use of reasonable safeguards for their protection. The defendant, by omitting to discharge his duty in this respect, may be held responsible for an injury occasioned thereby."

Albro v. Jaquith, 4 Gray (Mass.) 99, was an action of tort brought against the superintendent of a cotton and woolen mill at West Springfield to recover damages for injuries sustained by the plaintiff, while in the employment of the company, from the escape of gas, occasioned by the carelessness negligence and unskillfulness of the defendant in the management

ment of the apparatus and fixtures used in the mill for the purpose of generating, containing, conducting etc., inflammable gas for the lighting of the mill. Merrick, J., said, "No misfeasance of 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 fixtures for the purpose of generating gas etc., he was negligent, careless and unskillful in the management of them. His obligation to be faithful and diligent in this particular resulted either from an express contract with 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 is due for the injurious consequences of neglecting it. She therefore can have no legal right to complain of his carelessness or unfaithfulness; for he he had made himself by no act or contract, accountable to her." This case was commented on by the highest court of Massachusetts in the case of Osborne v. Morgan, 130 Mass. 102, and was declared to be overruled. In this latter case it appeared that while the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up by direction of the corpo-

tation certain partitions in a room in which the corporation was conducting the business of making wire, the defendants, one the superintendent and the others agents and servants of the corporation, being employed in that business, negligently and without regard to the safety of persons rightfully in the room, placed a tackle block and chains upon an iron rail suspended from the ceiling of the room, and suffered them to remain there in such a manner, and so unprotected from falling, that by reason thereof they fell upon and injured the plaintiff. Judge Gray said: "But, upon consideration, we are all of the opinion that that judgment (*Albro v. Jaquith*, supra) is supported by no satisfactory reasons and must be overruled. The principal reason assigned was, that no misfeasance or positive act of wrong was charged, and that for nonfeasance, which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer, an agent or servant was responsible to him only, and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only and not for nonfeasance. And 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 one who can maintain any action against him for nonfeasance. But if the agent once undertakes and enters upon the execution of a particular work, it is his duty to use particular and reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences 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 or doing improperly. Negligence and unskillfulness in the management of inflammable gas by reason of which it escapes and causes injury, can no more be considered as mere nonfeasance within the meaning of the rule relied on than negligence in the control of water as in *Bell v. Josselyn, etc. supra*,. 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 defendants' actual use or control."

In all four of these cases last cited there was a direct

act, which though perfectly lawful and proper of itself, became a misfeasance by reason of its being connected with a nonfeasance in such a way as to cause injury. They were all cases of doing that which a person might lawfully do, but in an improper manner. Those cases were all within the definition of, and the rule as to misfeasance. But let us take the case where the only act done consisted in undertaking a particular work. It may be perfectly lawful and proper to do so, and generally is, but may it not become a misfeasance by reason of being joined or connected with a nonfeasance by the same person, just as any other act may be. I think so. *Ellis v. McNaughton*, 76 Mich. 237, was an action for damages brought by the plaintiff against the defendant for allowing a sidewalk to remain torn up. It appeared that the defendant was the agent of his wife and superintended the erection of a building in front of which plaintiff was injured. A portion of the sidewalk was removed, against the orders of the defendant, while the building was going on, to permit teams to go in from the street to the lot. The wagons, in passing through, made ruts. The plaintiff fell into one of these ruts in the night time and was injured. Morse J., said in delivering the opinion, "The negligence charged in the declaration was not alone

the tearing up or removal of the walk, but also in allowing it to remain torn up and in a dangerous condition from April until the time of the injury. Every day it was so permitted to remain, when the defendant had the entire control of it, and the authority without question to replace it, was a wrong and a misfeasance. It was his duty, knowing that the walk was removed, to have it put down again and made reasonably safe for travel. Chief Justice Gray, in *Osborn v. Morgan* (cited supra) 130 Mass. 102, says, 'It is often said in the books that an agent is responsible for misfeasance only, and not for 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 consequences 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 doing misfeasance,— doing improperly'. In the case before us the defendant had entered upon the work of erecting this building ----- 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."

This case would seem to support the proposition that if a servant once undertakes a particular work, he is liable for a want of due care in executing it. But of course, if he does not begin the work, although he contracted to do so, he is not liable. A good case in support of this proposition is *Osborn v. Morgan*, supra. However all of the courts do not seem to sustain this proposition. *Murray v. Usher*, supra, is one, although in that case it was not necessary to the decision. In that case the defendant was instructed to look after the re-

pairs but failed to do so, and although not necessary for the decision, the court said it was a nonfeasance.

I think that the better doctrine is otherwise, but the courts are not unanimous on this subject as yet.

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