CHAPTER VIII.

LIABILITY FOR WRONGS COMMITTED BY OTHERS.

A PERSON may be liable in respect of wrongful acts or omissions of another in three ways:—

(A) As having ratified or authorized the particular act:

(B) As standing towards the other person in a relation entailing responsibility for wrongs done by that person though not specifically authorised, and even, in some cases, though expressly forbidden: and

(C) As having abetted the tortious acts committed by others.

(A) RATIFICATION.

"It is a known and well-established rule of law, that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or advantage, to the same extent, and with all the consequences which follow from the same act if done by his previous authority" (per Tindal, C. J., in *Wilson* v. *Tumman*, 6 M. & G. 242). *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (every ratification of an act relates back and thereupon becomes equivalent to a previous request). Only such acts bind a principal by subsequent ratification as were done at the time on the principal's behalf (*Wilson* v. *Tumman*, 6 M. & G. 236). What is done by a person on his own account eannot be effectually adopted by another. The doctrine of ratification may thus briefly be presented:—

1. If A commit a trespass, whether to the person or

to property, professing at the time to act on behalf of B, though without authority from him, and B afterwards knowingly ratify the trespass, B may thus be rendered liable for it.

2. If A does a tortious act, either on behalf of himself or as agent for B, and C, with whom A has had no previous communication in regard to it, afterwards ratifies or adopts the act, C will not, by so ratifying or adopting it, incur liability *ex delicto* in respect of it.

To make a man trespasser by relation, from having ratified an act of trespass done in his name and for his benefit, it must be shown that the act was ratified by him with full knowledge of its being a trespass, or of its being tortious, or it must be shown that in ratifying and taking the benefit of the act he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and to adopt the transaction, right or wrong (*Rani Shamasundari* v. *Dukhu Mandal*, 2 B. L. R. A. C., 229).

Ratification of a tort by a principal will not free the agent from his responsibility to third persons.

Where a landlord authorized bailiffs to distrain for rent due to him from his tenant of a farm, expressly directing them not to take anything except on the demised premises; and the bailiffs, however, distrained cattle belonging to another person, supposing them to be the tenant's, beyond the boundary of the farm; and the cattle were sold and the landlord received the proceeds; it was held that the landlord was not liable for the value of the cattle unless it were found that he had ratified the acts of the bailiffs with knowledge of the irregularity, or unless it were found that he chose, without enquiry to take the risk upon himself, and to adopt the whole of their acts (*Lewis* v. *Reade*, 13 M. & W. 834).

Indian cases.—The plaintiff let a cargo boat to U, who had been employed by the defendants to land certain goods. During the landing of the goods a dispute arose between him and the plaintiff as to the terms of the hiring, and the plaintiff refused to give up 53 bales of goods still on board. U, and an assistant of the defendants, forcibly took the bales, without satisfying the plaintiff's lien thereon, and the defendants received them into

their godowns. The defendants had received the bales into their godowns without knowing how they had been obtained. Held, that in the absence of of such knowledge on their part, the receipt of the goods did not amount to a ratification of the wrongful act of their assistant and U, so as to render them liable (*Girish Chandra Das* v. *Gillanders & Co.*, 2 B. L. R. O. C. J., 140. See the judgment of Loch, J., in *Rani Shamasundari* v. *Dukku*, *sup.*). Where the evidence showed that certain acts of trespass by one of the defendants were for the benefit and on behalf of the members of the committee, and were afterwards adopted and taken advantage of by them when they had acquired a full knowledge of those acts, the defendants for whose benefit the acts were done were liable for the trespass (*Venkata Naiker* v. *Srinivassa*, 4 Mad. 410).

(B). LIABILITY BY RELATION.

Under this head comes the liability arising from relation such as that of—

I. Master and Servant.
II. Owner and Independent Contractor.
III. Principal and Agent.
IV. Company and Directors.
V. Firm and Partner.
VI. Guardian and Ward.
VII. Husband and Wife.

I. *Master and Servant.*

The relation between a master and servant gives rise to four kinds of liabilities—(1) Liability of master to third persons; (2) liability of servant to third persons; (3) liability of master to servant; and (4) liability of servant to master.

(1) LIABILITY OF MASTER TO THIRD PERSONS.

A master is liable to third persons for every such wrong of his servant as is committed in the course of his employment, and for the master's benefit, although the master did not authorize, or was not cognisant of, or had even expressly forbidden the act or omission in question (*Story*. *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 265; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas.

326; *Mackay* v. *Commercial Bank of New Brunswick*, 43 L. J. P. C. 31; *Anunt Dass* v. *Kelly*, 1 N. W. P. 107). But a master is not liable for the torts or negligences of his servant in any matter beyond the scope of the employment, unless he has expressly authorized them to be done, or has subsequently adopted them for his own use and benefit (*Story*). The principle of the liability of a master for the wrongful acts of his servant is a principle of the law of agency, not merely of the law of torts, and is equally applicable whether the agency is for a corporation in a matter within the scope of the corporate powers or for an individual (per Lord Selbourne in *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 326).

Why master liable.—1. Liability of the master is based on the fiction of an "implied command" (*Blackstone*).

2. It is again said, that it is founded on the maxim *respondeat superior* (let the principal be liable).

There are several limitations to this maxim. It would seem that a master is not liable in trespass for wilful act of his servant if done for the servant's own purposes, and not in furtherance of the interests of his master. The maxim does not apply where the relationship existing between the parties has terminated before the commission of the act complained of. Nor does it apply to make the master responsible to a servant who sustains bodily hurt whilst discharging the duties incidental to the employment, such hurt having been caused by his own carelessness or negligence through a defect in machinery, or a deficiency of hands, of which the injured party must necessarily have been cognizant, or occasioned by the negligence of a fellow servant, provided the master had been reasonably cautious in selecting as his associates persons possessed of ordinary skill and care (*Broom*).

3. *Qui facit per alium facit per se* (he who does a thing through another is in the same position as if he does it himself); but this is in terms applicable only to authorized acts, not to acts that, although done by the agent or servant in the course of the service, are specifically unauthorized or even forbidden (*Pollock*).

4. It is said that the master ought to be careful in choosing servants: but if this were the reason, a master could discharge himself by showing that the servant for whose wrong he is sued was chosen by him with due care, and was in fact generally well-conducted and competent: which is certainly not the law (*ib.*).

5. According to Chief Justice Shaw "this rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents, or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it" (*Biglow L. C.* 688). Pollock says that this is somewhat too widely expressed, for it does not in terms limit the responsibility to cases where at least negligence is proved.

6. A master is considered as bound to guarantee the public against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business (per Lord Cranworth, in *Barton's Hill Coal Co.* v. *Reid*, 3 Macq. 283). And it is but reasonable that it should be so, for surely it is more just that he whose orders a servant is bound to receive and obey, should suffer for the misconduct of that servant, in matters within the scope of the authority which he has given to the servant, than that an innocent third person should be prejudiced by such misconduct.

Servant and master.—A *servant* is a person who voluntarily agrees, whether for wages or not, to subject him-

self at all times during the period of service to the lawful orders and directions of another in respect of certain work to be done. A *master* is the person who is legally entitled to give such orders and to have them obeyed (*Eversley*, 907). Servants may be roughly classified as: (1) menial servants, including domestic servants; (2) persons employed in non-domestic occupations, such as clerks and persons engaged in offices, shops, factories, and other business occupations, labourers, artisans, and other workmen, etc.; and (3) apprentices (*ibid*). The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other.

A master is under no liability for the acts of the servant whom he has temporarily lent to another person, the acts of the servant being for the time being beyond his control. When, therefore, an individual lends his servant to another for a particular employment, the servant in respect of acts done in such employment must be considered as the servant of the person by whom he is for the time being employed, although he remains the general servant of his master who has temporarily lent him to such person, and this, apparently, whether his master receives consideration for the services of the servant or whether he lends his servant gratuitously (*Donovan* v. *Laing*, (1893) 1 Q. B. 629; *Rourke* v. *White Moss Colliery Co.*, 2 C. P. D. 205).

A person will be considered a servant whether he is hired by the employer personally, or by those who are entrusted by the latter with the hiring of servants or other agents.

If a carriage and horses are let out to hire by the day, week, month or job, and the driver is selected and appointed by the owner of carriage and horses, the latter is responsible for all injuries resulting from the negligent

and careless driving of the vehicle, although the carriage and horses may be in the possession and under the control of the hirer (*Laugher* v. *Pointer*, 5 B. & C. 572; *Waldock* v. *Winfield*, (1901) 2 K. B. 596): but the owner will not be responsible where the hirer drives himself or appoints the coachman and furnishes the horses (*Hall* v. *Pickard*, 3 Camp. 157; *King* v. *Spurr*, 8 Q. B. D. 104). Where the owner of a carriage, horses and harness, was supplied with a driver by a livery-stable keeper, and provided his own livery for the driver who had driven for him continuously for six weeks, it was held that the driver was the servant of the owner of the carriage, and not of the livery-stable keeper, and the owner therefore was liable for the accident caused by him (*Jones* v. *Scullard*, (1898) 2 Q. B. 565). A hack-driver, employed on the usual terms of paying so much a day for his hack and keeping the rest for himself, is, as between the cab-proprietor and the public, the servant of the proprietor, who is therefore liable for the cab-driver's negligence while acting within the scope of the purposes for which the cab is intrusted to him (*Powles* v. *Hider*, 6 El. & Bl. 207). A person who has borrowed a horse and chaise for his own use and enjoyment, and who rides about in it, driven by a friend whom he allows to drive, is responsible for the negligence of the driver (*Whateley* v. *Palrick*, 2 M. & W. 650).

Some colliery proprietors had agreed with a contractor that he should do some sinking and excavating for them, and that they should place certain of their servants under his entire control. One of these servants, an engineer, fell asleep when he ought to have been particularly wide awake. It was held that the plaintiff, who had suffered injury in consequence, could not maintain an action against the colliery proprietors, because though the engineer remained their general servant, yet he was acting as the contractor's servant at the time of the accident (*Rourke* v. *White Moss Colliery Co.*, 2 C. P. D. 205; *Donovan* v. *Laing W. & Syndi.*, (1893) 1 Q. B. 692; see also *Murray* v. *Currie*, L. R. 6 C. P. 24). The defendants lent a crane with a man in charge to another firm. While under the orders of the other firm, the man in charge worked the crane negligently and injured the plaintiff. Held, that although the man remained the general servant of the defendants, yet as he was not under their control, they were not responsible for his negligence (*Donovan* v. *Laing*, (1893) 1 Q. B. 629). A ship-owner appointed a captain to his ship A, leaving the appointments of the officers and crew to the captain. In the course of a voyage down a river, the ship A, through the negligence of those on board caused damage to the ship B. Subsequently in consequence of a storm the ship A sank in the fair way and became a total wreck. Ship C, not knowing of and not being able to see the wreck of ship A, ran foul of it and was damaged. It was held that the ship-owner was liable for the acts of those on board though he did not appoint them and that B could claim compensation

from the owner of the ship A as the damage resulted from the negligence of his men; but he was not liable for damage to ship C, as after the wreck of A its owner ceased to have any control over it (*Brown* v. *Mallett*, 5 C. B. 599). Shipowners contracted with stevedores to discharge a ship, but agreed with them that the tackle of the ship used in the discharge should be worked by members of the crew, who were to be in the employment and control of the ship-owners. By the negligence of a member of the crew, a winchman, so using the tackle, a labourer in the employ of the stevedores was injured. Held, that as the winchman was not in the employ of the stevedores nor subject to their order and control, the ship-owners remained liable for his negligence (*Union Steamship Co.* v. *Claridge*, (1894) A. C. 185).

Indian cases.—The plaintiffs sued the proprietor of a buggy for damages sustained by them by reason of the negligence of the driver of the buggy who had run against and killed one of the plaintiffs' horses. It was proved that the arrangement between the defendant and the driver was that the driver should be entrusted with the buggy and the use of two horses for the day to be used entirely at the driver's discretion for the purpose of plying for hire. The driver was to pay a certain sum for the use of the buggy and horses, and all that he made above that sum was his perquisite for his labour. Held, that the relation between the proprietor and the driver was that of the master and servant, and therefore the proprietor was liable (*The Bombay Tramway Co.* v. *Khairaj Tejpal*, 7 Bom. 119).

Course of employment and '**scope of authority**,' are equivalent terms, and both extend the master's liability beyond the actual authority given to the servant (*Dyer* v. *Munday*, (1895) 1 Q. B. 742). The injury done by a servant in the course of his service or employment for which the master becomes liable is very admirably classified by Pollock (and his classification is followed in the recent case of *Iswar Chunder* v. *Satish Chunder*, 30 Cal. 211) in the following manner :—

(1). The wrong may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders.

Here the servant is the master's agent in a proper sense, and the master is liable for that which he has truly commanded to be done. He is also liable for the natural consequences of his orders, even though he wished to

avoid them and desired his servant to avoid them (*Gregory* v. *Piper*, 9 B. & C. 591).

Where the defendant, who disputed the plaintiff's right of way through a yard, employed a labourer to lay down rubbish in order to obstruct the way, but gave him orders not to let any of the rubbish touch the plaintiff's wall; the labourer executed those orders as nearly as he could, but some of the rubbish, it being of a loose kind, naturally shingled down towards and ran against the plaintiff's wall: the defendant was held liable (*Gregory* v. *Piper*, *sup.*). A was riding on a public road with B, a groom, accompanying him on horse-back. A pushed on, and B who was behind, in order to keep up with him, spurred his horse just as he was passing a waggoner C. The horse kicked and injured C. B was held to have been acting within the scope of his employment. He was A's instrument and A was answerable to C (*North* v. *Smith*, 10 C. B. N. S. 572). Where servants of A brought a coach with two ungovernable horses into a public place to train them, and they being not to be managed ran upon the plaintiff, A was held liable for the damage occasioned (*Michael* v. *Alestree*, 2 Lev. 172). Masters have been held liable for negligent driving (*Jones* v. *Hart*, 2 Salk. 441) or for negligently lighting fire (*Tuberville* v. *Stampe* Ld. Raym. 264; *Filliter* v. *Phippard*, 11 Q. B. 347; *Black* v. *Christchurch*, (1894) A. C. 48).

(2). The wrong may be due to the servants' want of care in the carrying on the work or business in which he is employed.

Here it must be established that the servant is a wrong-doer, and liable to the plaintiff, before any question of the master's liability can be entertained. If the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of his servant in doing it (*Mitchell* v. *Crasweller*, 13 C. B. 237).

Whether the servant is really bent on his master's affairs or not is a question of fact. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is

not merely deviation, but *a total departure* from the course of the master's business, so that the servant may be said to be "on a frolic of his own" the master is no longer answerable for the servant's conduct.

There is no rule of law to prevent a master being liable for negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damage complained of. Whether the original negligence was an effective cause of the damage is a question of fact in each case (*Englehart* v. *Farrant & Co.*, (1897) 1 Q. B. 240).

Master liable.—Where a contractor forbade his workmen to leave their horses, or to go home during the dinner hour and owing to disregard of this order, a horse which was left unattended ran away, and injured plaintiff's railings, the master was held responsible, on the ground that the workman was acting within the general scope of his authority to conduct the horse and cart during the day. In this case, there was a temporary deviation (*Whatman* v. *Pearson*, L. R. 3 C. P. 422). Lipton, a grocer, had kept a van for the purpose of his business, and in accordance with an arrangement made between him and the other defendants, Farrant and Co., they supplied him with a horse and a driver, named Mears, he himself providing a boy, named Tucker, to deliver goods from the van at the customer's houses. The boy was expressly forbidden to drive, and Mears was expressly forbidden not to leave the van. While the van was being used in Lipton's business, Mears stopped it outside his house in order to get some oil for the lamp which the boy used inside the van, and left the boy in charge of the van. While Mears went into his house to get the oil, Tucker drove the van about 50 yards down the road, in order to turn and so save time, and while so doing he drove the van into the plaintiff's vehicle and injured it. The plaintiff brought an action to recover damages. It was held that defendant Lipton alone was liable, because both Mears and Tucker were in his service, and the defendants, Farrant and Co., were not liable. Lopes, L. J., remarked:—"If Tucker had not been in the cart, and Mears had left the cart unattended, and the horse had moved on, and an injury had been caused to a passer-by, or if a passer-by had jumped into the cart and driven it and injured some person by negligent driving, Lipton would have been liable. Again, if Mears had asked a passer-by to stand at the head of the horse while he was absent, and the passer-by had left the horse, and the horse had gone

on, and injury had been caused to any person, Lipton would be liable" (*Engelhart* v. *Farrant & Co., and Lipton*, (1897) 1 Q. B. 240).

Defendant's coachman struck plaintiff's horses with his whip, in consequence of which they moved forward and the plaintiff's carriage was upset. At the time when the horses were struck the two carriages were entangled. The defendant was held liable. "If a servant driving a carriage, in order to effect some purpose of his own, *wantonly* strike the horses of another person, and produce the accident, the master will *not* be liable. But if, in order to perform his master's orders, he strikes, but *injudiciously* and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master *will be* liable, being an act done in pursuance of the servant's employment" (*Croft* v. *Alison*, 4 B. & A. 590). A master was held liable for the negligent driving of his cart in the city by his servant, although it was proved that it ought not, in carrying out his orders, to have been in the city at all (*Joel* v. *Morison*, 6 C. & P. 501). Where defendant's general manager was possessed of a horse and gig, which he used for the defendant's business as well as his own, and was allowed to keep them on the defendant's premises at his expense; and on one occasion the manager, on putting the horse into the gig, told the defendant he was going to S to collect a debt for him (defendant) and afterwards to see his own doctor; but before he got to S he ran the gig against and killed the plaintiff's horse. Held, that the defendant was responsible (*Patten* v. *Rea*, 26 L. J. C. P. 235; 2 C. B. N. S. 606). Where defendant's two servants were directed to take two horses from their stables to a forge to be shod; and they raced along the road to see who could get to the forge first, and the noise they made caused the plaintiff's horse to take fright and bolt, whereby the plaintiff was upset and injured. Held, that the defendant was liable (*Gracey* v. *Belfast Tramway Co.* '01, Ir. R. 322). Where the defendants sent a barge under the management of a lighterman to a wharf to be loaded; but he was unable to get up to the wharf, in consequence of a barge belonging to the plaintiff lying in the way, without any one in charge of it; the foreman of the wharf told him to shove the other barge away, as it had no business there, and to bring his alongside; he then moved the plaintiff's barge from the wharf, and made it fast to a pile in the river; but when the tide went down, the barge settled upon a projection in the bed of the river and was injured. Held, that the defendants were liable (*Page* v. *Defries*, 7 B. & S. 137). A ship entered a dock to load while crossing the dock she was disabled, and there being no dry dock, with the permission of the harbour-master put into a lock to ground. On grounding she sustained damage owing to the existence of a silt at the lock's bottom, which the harbour-master had represented was level. Held, that the harbour-master was guilty of a breach of duty by giving the permission and making the representations, and that the dock owners were liable (*Owners*

of Apollo v. *Port Talbot Co.* (1891) A. C. 499).

Where a stevedoor employed to ship iron rails had a foreman, whose duty it was to carry the rails from the quay to the ship after the carman had brought them to the quay and unloaded them there, and the carman not unloading the rails to the foreman's satisfaction the latter got into the cart, and threw out some of them so negligently that one fell upon and injured the plaintiff; it was held that the foreman's act made the stevedoor liable (*Burns* v. *Poulson*, L. R. 8 C. P. 567). M, a cloak-room clerk in the defendant's employ, used to take up parcels for passengers from the cloak-room to the train as part of his duty. A passenger had asked him to take a parcel to the train, which he did, and as he was running back, he ran against another porter, who in his turn came against the ticket-collector, and the ticket-collector upset the plaintiff's wife, causing injuries which resulted in her death. Held, that the defendants were liable (*Milner* v. *G. N. Ry.*, 50 L. T. 367). The plaintiff, who was a manufacturer of jewellery, hired from the defendant, who was a job-master, a brougham and horse with a driver at £3 a week, the brougham to be used by the plaintiff's traveller for taking out his goods. While the brougham was out one day with the plaintiff's traveller, the latter left it standing outside an hotel where he went in to have his lunch. The driver thereupon went away to have his dinner, leaving the brougham unattended; while so unattended the brougham was driven away and the contents were stolen. In an action to recover the value of the goods lost owing to the negligent act of the driver in leaving the brougham unattended, it was held, that the defendant was liable for the negligence of the driver (*Abrahams* v. *Bullock*. 18 T. L. R. 701).

Indian case.—A boat which S let to G for unloading a ship was lost in consequence of the negligence of the mate. S sued the captain for the damage sustained. Held, that the captain was not absolved from liability because the injury was caused by the negligence of the crew, although they acted contrary to his orders (*Sutherland* v. *Shaw* Bourke, A. O. C. 92).

Master not liable.—Where the defendant employed a carpenter to make a sign board, and obtained permission for him to make it in the plaintiff's shed and the carpenter in lighting his pipe negligently set fire to the shed, it was held that the plaintiff could not recover against the defendant; for the act of the carpenter in lighting his pipe was not connected with the employment on which he was engaged by the defendant (*William* v. *Jones*, 3 H. & C. 602).

In cases where *the enterprise is entirely the servant's*—if, for instance, he takes his master's carriage without leave for purposes entirely his own—the master is not responsible. A city wine-merchant sent a clerk and carman with a horse and cart to deliver wine, and to bring back a quantity of empty bottles. On the homeward journey, after crossing a bridge, they should have

turned to the *right*: instead of that they turned to the *left*, and went in the opposite direction on some *private matter of the clerk's*. While thus going quite against the orders, they ran over a child. It was held that the wine-merchant was not responsible (*Storey* v. *Ashton*, L. R. 4 Q. B. 476; *Mitchell* v. *Crassweller*, 13 C. B. 237).

B, a coachman of A, without A's knowledge, took his carriage out for his *own* purposes, and in the course of the drive ran it up against C's carriage. A was not held liable although B had used the opportunity of being out with the cart to call on A's customers and do jobs of such a nature as he was usually employed to do (*Rayner* v. *Mitchell*, L. R. 2 C. P. 357). Where the plaintiff had been injured by the negligent driving of the conductor of an omnibus who, at the end of a journey, and in the absence of the regular driver, took charge of the omnibus and drove it round through some neighbouring by-streets, apparently with the intention of turning it round, ready to start for the next journey, the defendants (masters) were not held liable (*Beard* v. *London General Omnibus Co.* (1900) 2 Q. B. 530). A passenger was getting out of an omnibus before it stopped, when the conductor told her to wait. She continued to move towards the door, and he took her hand and supported her to the step, from which she fell to the ground. Held, that this was not such negligence on the part of the servant as to render the master liable (*Limpard* v. *Kirkpatrick*, 15 L. T. 245).

The plaintiffs were law-publishers, and the defendants were some solicitors occupying premises over the plaintiffs' shop. In the private room of one of the defendants was a lavatory, which the clerks had clear instructions *never to use*. One day a disobedient clerk, thinking no one would ever know, went into the room to wash his hands. He turned the tap, but the water did not flow: and then went out. But after he had gone out, the water did flow, and flowed so abundantly that a large number of treatises of the plaintiffs down below were spoilt. In the action against the solicitors for the mischief thus inflicted, it was held that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and therefore his masters were not liable (*Stevens* v. *Woodward*, 6 Q. B. D. 380; 50 L. J. Q. B. 231). But where a clerk upon leaving off his day's work, turned on the tap in a lavatory provided for the *use of himself and other clerks* in the defendant's service, and then went away without turning the tap off, so that in the night the water flowed, and going through the floor, damaged the plaintiff's goods in the room below, the employer of the clerk was held responsible for the clerk's negligence (*Ruddiman* v. *Smith*, 60 L. T. 708).

Where defendant's servant burnt down a house demised to the defendant by lighting furze and straw, with a view to cleanse a chimney which smoked, *although she had been cautioned* against the danger of such a proceeding (*M'Kenzie* v. *M'Leod*, 10 Bing. 385; 3 L. J. C. P. 79); where defendant sent

his servant on an errand *without providing* him with a horse and he met a friend who had one and who permitted him to ride, and an injury happened in consequence (*Goodman* v. *Kennell*, 3 C. & P. 167); where the manager of defendants, the proprietors of a sewage farm, trespassed upon the land of an adjoining owner, *without their express authority*, to improve the drainage from the farm and benefit the neighbourhood (*Bolingbroke* v. *Swindon Local Board*, L. R. 9 C. P. 575); where a master of a ship signed a bill of lading for goods which had *never* been shipped (*Grant* v. *Norway*, 10 C. B. 665; see *Whitechurh* v. *Cavanagh*, 85 L. T. 349; *Coleman* v. *Riches*, 16 C. B. 105); and where defendant employed another to do an act which might be done in a *lawful* manner, but the latter in doing it committed a public nuisance (*Peachey* v. *Rowland*, 13 C. B. 105), it was held in all these cases that the defendants, masters, were not at all responsible.

(3). The servant's wrong in excess or mistaken execution of a lawful authority.

To make the master liable it must be shown here that:—

(*a*) the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do;

(*b*) the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful. The master is chargeable only for acts of an authorized class which in the particular instance are wrongful by reason of excess or mistake on the servant's part. For acts which he has neither authorized in kind nor sanctioned in particular, he is not chargeable. Interference with passengers by guards and arrest of supposed offenders by servants fall under this head.

It is not necessary to show that the master expressedly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority; and this although he departed from the private instructions of the master, abused his

authority, was reckless in the performance of his duty, and inflicted unnecessary injury (*Rounds* v. *Delaware*, 64 N. Y. 129). When the act would not be *within the scope of his authority*, though done properly, the master is not liable.

When the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being *violently pulled out* of a railway carriage by one of the defendants' porters who acted under the erroneous impression that the plaintiff was in the wrong carriage (*Bayley* v. *M. S. & L. Ry.*, L. R. 7 C. P. 450); where a passenger was ejected from a railway carriage by the railway company's servants *without excessive violence* under an erroneous supposition that he was travelling wrongfully in the carriage (*Lowe* v. *G. N. Ry.*, 62 L. J. Q. B. 524); where there was authority to arrest a passenger for non-payment of his fare for the benefit of the company and the servants of the company arrested the plaintiff by mistake (*Goff* v. *G. N. Ry.*, L. R. 6 Q. B. 65); where the servant was authorized by the railway company to arrest persons supposed to be guilty of committing offences for which the company had power to arrest, and the servant made a mistake, and arrested a person whom he supposed to be, but who in fact was not guilty of such an offence (*Moore* v. *Metropolitan Ry.*, L. R. 8 Q. B. 36; *Kirkstall Brewery Co.* v. *Furness Ry.*, L. R. 9 Q. B. 468; *Vanden Eynde* v. *Ulster Ry.*, Ir. R. 5 C. L. 6); where a bye-law of a railway company forbade any persons to ride on luggage cars; and one of the officials, while the train was in motion, ordered a passenger to get off one of the luggage cars; and on his not complying with it, kicked him off, whereby he fell under the wheels, and was much injured (*Rounds* v. *Delaware &c. Railroad*, 64 N. Y. Ry. 129); where the plaintiff, while standing on the railway platform waiting for her train, was struck and injured by a long bag containing personal luggage which a porter was negligently swinging round (*Buck* v. *L. & N. W. Ry.*, T. L. R. Apr. 1880); and where a porter negligently let a portmanteau fall on C, who was passing along the platform (*Tubutt* v. *B. & E. Ry.*, L. R. 6 Q. B. 73); it was held in all these cases that the railway companies were liable.

Where a partially intoxicated passenger in an omnibus refused to get out and pay his fare when the omnibus arrived at its destination, and the conductor dragged him out violently and recklessly, and caused him to fall under the wheel of a passing cab, it was held that the servant had committed a wrongful act, in the course of his employment about his master's business, and, therefore, the omnibus proprietor was responsible for the injury (*Seymour* v. *Greenwood*, 7 H. & N. 355). A conductor of a tram car had by the company's by-laws power to collect fares which were payable on demand, and to prevent people travelling without paying. A passenger refused to pay his

fare, and thereupon the conductor took him by the collar and pushed him off the car. Held, that the company were liable in respect of the assault upon, and injuries sustained by, the passenger (*Smith* v. *North Metropolitan Tram Co.*, 55 J. P. 630).

For acts wholly outside authority, a master is not liable. He is not answerable if the servant takes on himself, though in good faith, and meaning to further the master's interest that which the master has no right to do, even if the facts were as the servant thinks them to be.

Where a station master having demanded payment for the carriage of a horse conveyed by defendant company arrested and detained plaintiff for non-payment thereof until it was ascertained by telegraph that all was right, and the railway company had no power to arrest for non-payment of carriage; it was held that the railway company were not liable, as the station master in arresting the plaintiff did an act which was wholly illegal not merely in the mode of doing it, but in the doing of it at all (*Poulton* v. *L. N. S. W. Ry.*, L. R. 2 Q. B. 534). A foreman porter in the service of a railway company, who in the absence of the station master is temporarily in charge of station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and if he gives an innocent person in charge on such suspicion, the company is not liable (*Edwards* v. *L. & N. W. Ry.*, L. R. 5 C. P. 445). A company's booking clerk gave into custody a person suspected of robbing the till, after the attempt had ceased; it was held that as there was no implied authority for the act the company was not liable (*Allen* v. *L. & S. W. Ry.*, L. R. 6 Q. B. 65).

A quarrel having arisen on the premises of a railway company between a servant of the company and a number of persons amongst whom was plaintiff, the servant gave him into custody on a charge of assaulting him and obstructing him in the discharge of his duty. In an action by the plaintiff against the company for an assault and false imprisonment, it was held that the company was not responsible (*Lumsden* v. *L. & S. W. Ry.*, 16 L. T. 609).

The manager of a bank has no implied authority to give a man into custody for stealing a bill of exchange when the arrest is not necessary for the protection of the property of the bank, but was only for the purpose of punishing him and vindicating the law (*Bank of New South Wales* v. *Owston*, 4 App. Cas. 270).

Where a tramway company gave to their conductors printed *instructions not to give* passengers into custody without the authority of an inspector or time-keeper, and the conductor of a car detained the plaintiff on a charge of

attempting to pass false money; it was held, in an action of false imprisonment, that they were not liable (*Charleston* v. *L. T. Co.*, 86 W. R. 367), but where *no* such instructions were given the company were held liable (*Furlong* v. *S. L. Tram. Co.*, 48 J. P. 329).

Plaintiff had offered defendant's bar manager, a foreign gold coin, and on its being refused, gave a half-sovereign in its place for which he received change, and shortly afterwards left the house. The bar manager followed the plaintiff and subsequently gave him in custody for attempting to pass bad coin; it was held that the defendant was not liable, for the manager had no implied authority to arrest the plaintiff as defendant's property was no longer in danger (*Abrahams* v. *Deakin* (1891) 1 Q. B. 516; *Stevens* v. *Hinshelwood*, 55 J. P. 341). The manager of a restaurant gave plaintiff, who had partaken of refreshments there, into custody for refusing to pay the amount of the bill, the accuracy of which the plaintiff *bona fide* disputed. In an action against the proprietors of the restaurant for false imprisonment, the jury found that the manager gave the plaintiff into custody to make him pay the bill; it was held that the proprietors were not liable for the act of the manager (*Stedman* v. *Baker & Co.*, 12 T. L. R. 451: following the above case). The plaintiff was head barman and cellarman in a public house of which the defendant was owner. While the plaintiff was superintending the operation of bringing mineral waters into the cellar, the defendant's manager, acting under the mistaken impression that whisky was being removed from the cellar, sent for a policeman and gave the plaintiff into custody on a charge of stealing whisky. Before reaching the police station the manager admitted that he had made a mistake, and on arrival at the police station the plaintiff was released. In an action by the plaintiff for false imprisonment it was held that the defendant was not liable, as the manager had no implied authority from the defendant to give the plaintiff into custody, and the manager's act was not necessary for the protection of his master's property (*Hanson* v. *Waller* (1901) 1 K. B. 390).

Leading case.—**Poulton v. London & S. W. Ry.**

Indian cases.—The servant of the defendant, who was staying in the plaintiff's hotel, broke a filter, the property of the plaintiff. In a suit by the plaintiff for damages it appeared that the servant when he broke the filter was not acting within the scope of his employment, nor on the defendant's business, or for his benefit. The defendant offered to the plaintiff as compensation Rs. 30 (which was refused), but without acknowledging any liability. Held, that the defendant was not liable for the act of his servant, and that the plaintiff was not entitled to a decree for Rs. 30 (*Gray* v. *Fiddian*, 15 Mad. 73). On a claim by the Official Receiver for damages for the wrongful felling and carrying away of trees growing on part of the estate

held on trust by him, those acts, to the injury of the owners whom he represented, were proved against certain of the defendants holding some employment under others, who were co-defendants with them in this suit. These co-defendants were not proved to have ordered such acts, nor was there any evidence that to cut or carry away timber was within the scope of the employment of any of the defendants. The co-respondent employers were not, therefore, under any legal responsibility in the matter (*Casperz* v. *Kishori Lal Roy*, 23 Cal. 922).

(4). A wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes.

A master may be liable for wilful and deliberate wrongs committed by the servant provided they be done on the master's account and for his purposes; and although the servant's conduct is of a kind actually forbidden by the master (*Limpus* v. *The London General Omnibus Co.*, 1 H. C. 526; *Ward v. The London General Omnibus Co.*, 42 L. J. C. P. 265; *Smith* v. *The North Metro. Tram. Co.*, (1891) 55 J. P. 630; *Black* v. *Christchurch Finance Co.*, (1894) A. C. 48. The first part of this proposition is followed in *Iswar Chunder* v. *Satish Chunder*, 30 Cal. 207, but the second part is expressed to be too broad, *ib.* 211). But he will not be liable for the wilful acts of his servant done contrary to his orders (*Green* v. *Macnamara*, 1 L. T. 9).

Liable.—The driver of an omnibus wilfully and contrary to express orders from his master, pulled across the road, in order to obstruct the progress of the plaintiff's omnibus. In an action for negligence it was held that if the act of driving across to obstruct the plaintiff's omnibus, although a reckless driving, was nevertheless an act done in the course of the driver's service, and to do that which he thought best for the interest of his master, the master was held responsible (*Limpus* v. *L. G. O. Co.*, *sup.*).

Not liable.—A servant who committed an unnecessary assault in levying a distress was not acting within the scope of his authority and did not make his employers responsible (*Richards* v. *The W. M. Waterworks Co.*, 15 Q. B. D. 660: see *Furlong* v. *S. L. T. Co.*, 1 C. & E. 316; 48 J. P. 329).

Leading case.—**Limpus v. London Gen. Omni. Co.**

Fraud of servant.—A person may be liable for a

fraud committed by his agent or servant, if the agent or servant committed it while acting within the scope of his authority, while doing and purporting to do, something on behalf of his employer, although in doing it he commits a wrong which his employer neither sanctioned nor intended. But if the agent or servant is not acting or purporting to act for his employer, the fraud cannot be treated as the fraud of the employer (*Thorne* v. *Heard*, (1895) A. C. 495). It is furthermore necessary, in order that the employer may be rendered liable, that the fraud should be committed by the agent or servant for his employer's benefit (*Barwick* v. *English Joint Stock Co.*, L. R. 2 Ex. 259; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *British Mutual Banking Co.* v. *Charnwood Forest Ry.*, 18 Q. B. D. 714). There is no difference between a fraud carried out by means of forgery and any other fraud (*Shaw* v. *Port Philip Gold Mining Co.*, 13 Q. B. D. 103). Thus a sheriff has been held liable for the fraud of his officer (*Raphael* v. *Goodman*, 8 A. & E. 565), and an attorney has been compelled to pay costs occasioned by his clerk fraudulently simulating the seal of the Court upon a writ (*Dunkey* v. *Ferris*, 11 C. B. 457). No sensible distinction exists between the case of fraud and the case of any other wrong (per Wills, J., in *Barwick* v. *English &c.*, *sup.*). But a master is not liable in an action of deceit for the fraudulent act of a servant committed for the servant's private end (*The British Mutual Banking Co.* v. *The Charnwood Forest Ry.*, 18 Q. B. D. 714; *Coleman* v. *Riches*, 16 C. B. 104).

Delegation of duty.—A master is not liable for the tortious acts of a stranger to whom his servant has, without authority, delegated his duties, eventhough there may be an urgent necessity,

The driver of an omnibus, when within a quarter of a mile of his master's

premises, was forbidden by the Police to drive further on the ground that he was not sober. A bystander volunteered to drive the omnibus home, and was authorised to do so by the driver and conductor, no effort being made to communicate with the master. Held, that there was no evidence upon which it could be held that any necessity to delegate the duty of driving to the bystander had arisen, so as to render the master liable. Lord Esher, M. R., said: "The principle of agency of necessity does not extend to such a case, but is restricted to certain well-known cases, such as those of the master of a ship, of the acceptor of a bill of exchange for the honour of the drawer, and of salvors" (*Gwilliam* v. *Twist*, (1895) 2 Q. B. 84).

Criminal act of servant.—A master may be liable to a civil action in respect of the criminal act of his servant (*Smith* v. *North Metropolitan Tramways Co.*, (1891) 7 T. L. R. 459). The defence that the act complained of amounted to a felony will not free the master from liability (*Osborn* v. *Gillett*, L. R. 8 Ex. 88; 42 L. J. Ex. 53; *Dyer* v. *Munday*, (1895) 1 Q. B. 742). See also the responsibility of principals for the criminal acts of their agents.

The defendant's servant in the course of his employment assaulted the plaintiff and was fined for the assault. The plaintiff brought an action against the defendant for the assault. Held, that the mere fact of the assault being criminal and not merely tortious did not affect the defendant's liability for the acts of his servant (*Dyer* v. *Munday*, *sup.* See *Coppen* v. *Moore*, (1898) 2 Q. B. 306).

Compulsory servants.—An exception from the rules by which masters are responsible for the acts of their servants is to be found in those cases where they have been obliged by law to employ particular persons, *e. g.*, compulsory pilots. But a master is not relieved from his responsibility for the wrongful act of his servant while doing his master's work, merely because an Act has limited and controlled the choice of the master in the selection of his servants, and has compelled him to choose from a particular class of skilled or educated persons, supposed to be peculiarly fitted for the performance of the duties intrusted to them to discharge (*Martin* v. *Temperley*, 4 Q. B. D. 298).

Indian law.—Where the employment of a pilot is com-

pulsory on board a vessel, and, such pilot being on board, an accident happens through negligence in the management of the vessel, it lies upon the owners, in order to exempt themselves from liability, to show that the negligence causing the accident was that of the pilot. If such negligence is partly that of the master or crew, and partly that of the pilot, the owners are not exempted from liability. If it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them (*Muhammad* v. *P. & O. S. N. Co.*, 6 Bom. H. C. O. C. J. 99).

Servant under two masters.—Where injury is caused by reason of the negligence of defendant's servants, the fact that they are under the direction of another person at the time will not, in all cases, excuse the defendant. Indeed both may be liable.

The lessee of a ferry had hired a steamer of the defendants, with a crew who were the latter's servants. Held, that the defendants were liable for injury to passengers caused by the negligence of the crew, although the passengers had contracted with the lessee of the ferry for conveyance in the steamer, and had paid their fares to him. The ground taken by the Court was that the defendants were by their crew in possession of the vessel; and the liability of the defendants was not changed by the fact that the lessee also might have been liable.

(2). LIABILITY OF SERVANT TO THIRD PERSONS.

With regard to the liability of a servant to third persons in respect of tortious acts committed by him in the course of his employment, it has been laid down that in respect of acts of non-feasance or negligence in the performance of duty a servant, as such, is under no liability, but in respect of acts of misfeasance or positive wrong he

is liable (*Lane* v. *Cotton*, 12 Mod. 488). A servant is responsible for his fraudulent acts, and if he knowingly commit a fraud in the course of his master's business, he will be personally liable for it, even if it were authorised by his master, and this in addition to his master's liability (*Cullen* v. *Thomson*, 6 L. T. 870). He cannot discharge himself from liability on the ground that he acted under unavoidable ignorance (*Hutchinson* v. *York and Newcastle Ry.*, 5 Exch. 350; *Stephens* v. *Elwall*, 4 M. & S. 261; *Bennett* v. *Bayes*, 5 H. & N. 391, 29 L. J. Ex. 224).

Whoever commits a wrong is liable for it himself, and it is no excuse that he was acting as an agent or servant on behalf of and for the benefit of another. When that other person is also liable the party wronged has his remedy against both or either of them at his choice (*Sri Rajah Bounnadevara* v. *Putman*, 10 M. L. J. R. 185).

The plaintiff entered into a contract with one M, by which the latter was allowed to take loose stones lying, on the surface of certain hills belonging to the plaintiff. In breach of this contract M employed the defendants, his contractors, to excavate and quarry stones. The plaintiff sued the defendants for damages sustained by him by this unlawful quarrying. Held, that the defendants were liable (*Sri Rajah Bounnadevara* v. *Putman*, *sup.*). Where plaintiff's land was entitled to a supply of water upto a certain date, and the defendant, a Government officer, closed the channel fifteen days too soon, but without any malice or intention to cause harm to the plaintiff, it was held that inasmuch as the plaintiff's right to supply of water was founded on contract, a right of action, in case of the water being improperly withheld, might exist as against Government, but that there was none as against the defendant, by whom no legal injury had been committed. If malicious intention on the defendant's part had been proved the plaintiff might have had a cause of action (*Chinnappa* v. *Sikka*, 21 Mad. 36).

(3). LIABILITY OF MASTER TO SERVANT.

The liability of a master for accident happening to his servant is, it has been said, not due to principles peculiar to the relation of master and servant, so much as to the application of the general governing principles of law that

where fault is there is liability, *culpa tenet suos auctores tantum*, and that in the absence of fault there is, *prima facie* at any rate, an absence of liability. The duty which the master owes the servant is just the same that he owes to every other person with whom he has business relations; he must not conceal from him dangerous circumstances which if known might cause him to alter his position, nor personally be negligent in any respect (*Beven*, i. 734).

Liability of master to servant for injuries incurred by a servant during service will arise in three different ways:—(1) At Common law; (2) under the Employers' Liability Act, 1880; and (3) under Workmens' Compensation Acts, 1897 and 1900.

(1) *Common law.*

The Common law rule is that a master is not liable to his servant for injuries received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service (*Priestly* v. *Fowler*, 3 M. & W. 1; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326). A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both (per Erle C. J., in *Tunney* v. *Midland Ry.*, L. R. 1 C. P. 296; *Hutchinson* v. *The Y. N. B. Ry.*, 5 Ex. 343; *Redgrave* v. *Belsey*, 13 T. L. R. 484; *Waller* v. *S. E. Ry.*, 2 H. & C. 102).

Where several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness against which their employer cannot secure them, and they must be supposed to contract with reference

to such risks (per Lord Cranworth in *Bartons Hill's Coal Co.* v. *Reid*, 3 Macq. 295).

For damage caused by the ordinary risks of employment the master is not liable. First, because there is no fault in the master; second, because the risk arises out of the very thing to be done—the coming in contact with agencies that may be dangerous and men who may be negligent, with respect to which the master can exercise no absolutely protective power, or does not specifically contract to do so; third, because workmen undertaking a work must be supposed to have a provision of its ordinary risks as well as of its labours, and as they secure by their engagement remuneration for the one they must be held to secure insurance in their wages against the other (*Beven*, i. 735). Thus if the person occasioning, and the person suffering, the personal injury, are fellow-workmen engaged in a common employment, and under a common master, such master is not responsible for the results of the injury. The principle of the master's immunity in such cases, frequently termed the doctrine of collaborateur, is of comparatively recent origin. In the law of England it can hardly be traced further back than *Priestley* v. *Fowler* (3 M. & W. 1) which was decided in 1837.

Although a workman may, having full knowledge and appreciation of the risk he runs, nevertheless agree with his employer to run this risk, yet it is no part of the implied contract of service that the workman takes the risk of injury arising from his employer's negligence, neither can such a contract be implied from the workman's continuance in the employment with knowledge of the risk (*Smith* v. *Baker*, (1891) A. C. 3; *Williams* v. *Birmingham B. & M. Co.*, (1899) 2 Q. B. 338).

Common employment does not necessarily imply that both servants should be engaged in precisely the *same* or

even *similar* acts (*Barton's Hill Coal Co.* v. *Reid*, 3 Macq. 266). There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages (per Blackburn, J., in *Morgan* v. *Vale of Neath Ry.*, L. R. 1 Q. B. 149). All persons engaged under the *same* employer for the purposes of the same business, however different in detail those purposes may be, are fellow servants in a common employment, *e.g.*, a carpenter doing work on the roof of an engine-shed, and porters moving an engine on a turn-table (*Morgan* v. *Vale of Neath Ry.*, *ubi. sup.*); a chief engineer and one of the ordinary seamen employed by the same company (*Searle* v. *Lindsay*, 11 C. B. N. S. 429); a railway guard and a gauger of plate-layers in the service of the same company (*Waller* v. *South-Eastern Ry.*, 2 H. & C. 102; 32 L. J. Ex. 205); a builder's labourer and his foreman (*Wigmore* v. *Jay*, 5 Ex. 354; 19 L. J. Ex. 300); the master of a ship and one of the sailors employed by the same company (*Hedley* v. *Pinkney Shipping Co.* (1894) A. C. 222); a labourer employed in loading trucks and a deputy foreman of plate-layers (*Lovegrove* v. *L. B. & S. C. Ry.*, 16 C. B. N. S. 669); one of a gang of scaffolders and the foreman of the gang (*Gallagher* v. *Piper*, *ibid*); a miner and an underlooker whose duty it was to superintend the mining operations (*Hall* v. *Johnson*, 3 H. & C. 589); a manager of barges and a man employed in lowering sacks (*Lovell* v. *Howell*, 1 C. P. D. 161); a general traffic manager and a milesman (*Conway* v. *B. & N. C. Ry.*, Ir. R. 11 C. L. 345). But a compulsory pilot is not a fellow-servant of the crew (*Smith* v. *Steele*, L. R. 10 Q. B. 125); nor are the crew of a tug and

the crew of the tow (*Bland* v. *Ross*, 14 M. P. C. 210; *Spaight* v. *Tedcastle*, 6 App. Cas. 217); nor the masters and crews of two different ships belonging to the same owners (*The Petrel*, (1893) P. 320).

One test of common service is that when the two servants are servants of the *same* master, and where the service of each will bring them so far to work in the same place and at the same time, that the negligence of one in what he is doing as part of the work which he is bound to do, may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other, for it is a common service (*Charles* v. *Taylor*, 3 C. P. D. 492). The relative rank of servants is immaterial.

Unless the injured person and the servant whose negligence caused the injury were not only engaged in common employment, but were in the service of a common master, the defence of common employment is not applicable (*Johnson* v. *Lindsay*, (1891) A. C. 371). The injured man must be at the time of the injury in the defendant's actual employment in the relationship of master and servant (*Cameron* v. *Nystrom*, (1893) A. C. 308).

At Common law the following duties are imposed on masters or employers:—

1. The master is bound to provide proper and competent fellow-servants (*Wilson* v. *Merry*, L. R. 1 H. L. 326). If he has employed a servant, knowing him to be incompetent, or without satisfying himself that he is competent for the duties required of him, he would be responsible, but not otherwise (*Laning* v. *N. Y. C. Ry.*, 49 N. Y. R. 521; *Wiggett* v. *Fox*, 11 Ex. 832; *Wigmore* v. *Jay*, 5 Ex. 354; *Barton's Hill Coal Co.* v. *Reid*, 3 Macq. 266; *Scarle* v. *Lindsay*, 11 C. B. N. S. 429; *Smith* v. *Howard*, 22 L. T. 130; *Allen* v. *New Gas Co.*, 45 L. J. Ex. 668).

2. The master is bound to take all reasonable precautions to secure the safety of his servants or workmen (*Brydon* v. *Stewart*, 2 Macq. 30; *Paterson* v. *Wallace*, 1 Macq. 748). On the master rests "the duty of taking reasonable care to provide appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk" (per Lord Herschell in *Smith* v. *Baker* (1891) A. C. 325). Every master, who employs servants and workmen to work upon his land, house, or premises, is bound to take all reasonable precautions for their safety, and if hidden and secret dangers exist upon his premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, that they may take precautions against them (*William* v. *Claugh*, 3 H. & N. 258). And it is in all cases the master's duty to be careful that his workmen be not induced to work under the notion that the tackle, scaffolding, or rope with which they work is secure, when the master knows or has reasonable ground for believing that it is unsafe and dangerous. He must provide safe and efficient machinery (*Williams* v. *Mathieson*, 4 Macq. 215). A negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act (per Lord Halsbury in *Smith* v. *Baker*, (1891) A. C. 339).

But "the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may be reasonably expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief" (per Lord Abinger in *Priestley* v. *Fowler*, 3 M. & W. 6).

3. The master should not be guilty of personal negligence causing injury to the servants (*Williams* v. *Birming-*

ham Battery Co., (1899) 2 Q. B. 338; *Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183). For his own personal negligence a master is always liable (per Lord Herschell in *Smith* v. *Baker*, (1891) A. C. 325; per Bowen, L. J., in *Thomas* v. *Quartermain*, 18 Q. B. D. 685). This liability exists although there may also be negligence on the part of a fellow-servant (*Roberts* v. *Smith*, 2 H. & N. 213; *Ormond* v. *Holland*, E. & E. 102). This Common law duty is a personal duty only, and passes from the master when he delegates his duties as employer to other hands. Thus, if a master does not personally interfere and leaves the selection of materials to a *competent* foreman or superintendent he is not liable (*Wigmore* v. *Jay*, 5 Ex. 358; *Gallaghan* v. *Piper*, 16 C. B. N. S. 669; *Feltham* v. *England*, 7 B. & S. 676).

Master liable.—Where the plaintiff, a collier, was employed by the defendants in their mine and was dangerously wounded by a stone by reason of the unsafe condition of the shaft owing to the defendants' negligence, and the mine was worked under the superintendence of one of the defendants, and the plaintiff was not aware of the state of the shaft, it was held that the defendants were liable (*Mellors* v. *Shaw*, 30 L. J. Q. B. 333). Where a master ordered a servant to take a bag of corn up a ladder which the master knew and the servant did not know, to be unsafe, and the ladder broke, and the servant was injured, the master was held liable (*Williams* v. *Claugh*, 3 H. & N. 258). Where defendants, well-knowing that certain carcasses were diseased and infectious, employed the plaintiff, who was ignorant of that fact, to cut them up, whereby the plaintiff was injured, it was held that the defendants were liable (*Davies* v. *England*, 33 L. J. Q. B. 321). Plaintiff was employed by defendant as a dressmaker. It was no part of her duty to go down into the kitchen, but on one occasion she went there, at the request of the defendant, to fetch something up. As she was leaving the kitchen a savage dog, which was generally tied up, rushed from under the table and bit her leg. The plaintiff was aware that a dog of this kind was kept on the premises. Held, that the defendant was liable, inasmuch as the risk was not incidental to the service (*Mansfield* v. *Baddley*, 34 L. T. 696). C owned a mischievous dog, which was kept at his stables under the care and control of his coachman, who knew the dog to be mischievous. C supposed the dog to be quite harmless. B having been bitten by the dog, and having brought an action for the injuries, the master was held

liable as the knowledge of servant was sufficient evidence of *scienter* (*Baldwin* v. *Casella*, L. R. 7 Ex. 325). Where a cab proprietor sent out a restive horse, he was held liable for injuries resulting to driver (*Fowler* v. *Lock*, 30 L. T. 810). Where A, the owner of a dock, under a contract with B, erected a staging round B's ship, it was held that A had a duty to provide appliances fit for use at the time, and was therefore liable to C, a workman employed by B to work on the ship, who was injured from a defect in the staging, though after its erection it ceased to be under A's control (*Heaven* v. *Pender*, 11 Q. B. D. 503).

Where a workman was employed on an elevated tramway and his employers provided no ladder or other safe means of ascending to or descending from it, and the servant in descending from it slipped and was killed by his fall, it was held that the master was liable (*Williams* v. *Birmingham B. & M. Co.*, (1899) 2 Q. B. 338).

Where the injury to the plaintiff was caused by the fall of the iron door of his employer's warehouse it was held that where the injury was from the unsafe state of the premises, the claim must allege not only that the master knew, but that the servant was ignorant of the danger (*Griffiths* v. *London & St. K. Dock Co.*, 13 Q. B. D. 259). Plaintiff was a workman in the employ of builders who were erecting a house. The defendants contracted with the builders to construct a lift in the house, and the plaintiff, at their request, was selected by the builder's foreman to D, their man, in putting up the lift. In obeying D's order the plaintiff received injury. Held, that the defendants were liable for the injury (*Wild* v. *Waygood*, (1892) 1 Q. B. 783). If one partner acts as a workman, or otherwise interferes, and by negligence causes damage to his workman, all his partners are also equally liable (*Ashworth* v. *Stanwix*, 7 Jur. N. S. 467).

Where two vessels come into collision with each other, belonging to the same owners and the same line, and frequent the same port and river in which the collision occurred, the master and crew of one vessel are not in a common employment with the master and crew of the other vessel (*The Petrel*, (1893) P. 230).

Master not liable.—A master is not liable to an action, at the suit of his servant, for an injury to the thigh sustained by the latter caused by the breaking down of a carriage in which the servant was riding on his master's business through a defect in the carriage which was overloaded of which the master was not aware (*Priestly* v. *Fowler*, 3 M. & W. 1; 7 L. J. Ex. 42). Where the thigh of defendant's servant was fractured owing to the over-loading of a cart in the charge of another servant, it was held that the servant was not entitled to recover damages (*Charles* v. *Taylor*, 3 C. P. D. 498). Where a workman at the top of a building carelessly let fall a heavy substance upon a fellow workman at the bottom, the master was held not to be responsi-

ble, without proof of the incompetency of the workman causing the injury to discharge the duty in which he had been employed (*Wiggett* v. *Fox*, 25 L. J. Ex. 188). The plaintiff was in the service of the defendant, a maker of locomotive engines. The defendant had control over his establishment but was not present; his foreman or manager directed a crane, on which an engine was hoisted to be moved over fresh piers of brick-work, and ordered the plaintiff to get on the engine to clean it. The piers gave way, the engine fell, and the plaintiff was injured; it was held that the fact that the servant who was guilty of negligence was a servant of superior authority, whose lawful directions the other was bound to obey, was immaterial, and as there was no evidence of personal negligence on the part of the defendant, and nothing to show that he had employed unskilful or incompetent persons to build the piers, he was not liable to the plaintiff (*Feltham* v. *England*, L. R. 2 Q. B. 33). Where A contracts with B to be supplied with sound road-worthy coaches, and to keep them in repair, and A hires C as driver for one of the coaches, which from a defect breaks down and maims C, he cannot sue his master A, for it was an ordinary risk and he will be without remedy against B also, though B was guilty of negligence, unless there was found on the part of B a knowledge of the defect and of the intention that C should use the coach (*Winterbottom* v. *Wright*, 10 M. & W. 109).

The plaintiff was a carpenter in the employ of the defendant company, and was standing on a scaffolding at work on a shade close to the line of a railway, and some porters carelessly shifted an engine on a turn-table, and it struck a ladder supporting the scaffold, and thereby the plaintiff was thrown to the ground and injured; it was held that the company was not liable on the ground that whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to that employment (*Morgan* v. *Vale of Neath Ry.*, *ubi. sup.*; *Lovell* v. *Howell*, 1 C. P. D. 161).

Where the plaintiff fell into an insufficiently-fenced cooling vat at the defendant's, his employer's, brewery, and it was found that both plaintiff and defendant knew of the defect, it was held that the maxim *volenti non fit injuria* applied, and therefore the plaintiff could not recover (*Thomas* v. *Quartermain*, 18 Q. B. D. 685). Where a labourer was killed through the fall of a weight, which he was raising by means of an engine to which he attached it by fastening on a clip, and the clip had slipped off; it was held that although another safer mode of raising the weight was usual and had been discarded by the master's orders, no action lay by his representative against his master (*Dynen* v. *Leach*, 26 L. J. Ex. 221). A hoarding had been erected by the defendant, a builder, which projected too far into the street, but sufficient room was left for

carts to pass. A heavy machine was placed inside the hoarding and close to it. A cart in passing, struck against the hoarding and knocked down the machine against the plaintiff, a workman in the defendant's employ. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work though the machine was not moved; it was held that the master was not liable (*Alsop* v. *Yates*, 2 H. & N. 768; *Griffiths* v. *Gidlow*, 3 H. & N. 648). An accident was caused to a seaman through a defective rope, which was in a proper condition when supplied, but had got frayed through use. Held, that the owners were not responsible to the seaman for the captain (a fellow-workman) not keeping it in repair (*Gordon* v. *Pyper*, (1892) W. N. 169). Defendants' servant, in the performance of his duties, went down a manhole into the sewer for cleaning a screen. On descending a short distance he was overcome by noxious gas and shouted up to a fellow-workman at the top of the manhole that he felt very faint. His fellow-workman called to him to come up at once, and the deceased man proceeded to ascend the ladder, but after going a few steps fell back into the sewer dead. There were three other men, under the control of an engineer or foreman near at hand. These men on coming up, first one and then the others, went down in turn to the rescue, and all were killed, including the foreman, who went down last. It was contended that the defendant had been guilty of negligence in that there was no cradle or life line to meet any emergency, that the ventilating pipes were allowed to be blocked up, and that the engineer had been negligent in not having tested the air in the manhole; it was held that the defendants were not liable because there was no wrong on their part (*Digby* v. *E. H. V. D. Council*, 13 T. L. R. 11).

The plaintiff, who was employed by a railway company, was a labourer, and one of the terms of the engagement was that he should be carried by the train from Birmingham where he resided to the spot at which his work for the day was to be done, and be brought back in the evening. The train by which he was returning came into collision with another train, through the negligence of the guard who had charge of it and was injured; it was held, that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule, which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of common employment (*Tunney* v. *M. Ry.*, L. R. 1 C. P. 291; *Hutchinson* v. *Y. N. & B. Ry.*, 5 Ex. 343). Where two railway companies A and B have a joint-stock of signal-men, and one of them gets injured through the negligence of the private engine-driver of company A, such company will not be liable: for, although the injured man is the servant of A and B, and the engine-driver is the servant of A only, yet they were engaged in a common pursuit so far as company A were concerned, although the signal-man was also engaged in a

further and additional pursuit on behalf of B (*Swainson* v. *N. E. Ry.*, 3 Ex. D. 341). But where one of the two companies has the user of the other's station, and not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply (*Warburton* v. *G. W. Ry.*, L. R. 2 Ex. 30; *Turner* v. *G. E. Ry.*, 33 L. T. 431). Where A contracts with B, to do work on A's premises, as a railway line, and C while employed by and under B is injured in the course of the ordinary traffic on the line, he cannot recover from A, and clearly has no cause of action against B (*Woodley* v. *Met. D. Ry.*, 2 Ex. D. 384; see *Thrussell* v. *Handyside*, 20 Q. B. D. 359).

Indian case.—Where the plaintiff's husband, a plate-layer in the company's services, died from injuries received in a train he was travelling in while in the defendant's service, the accident being occasioned by the negligence of fellow-servants of the company, it was held that the company was not liable, as there was no failure on their part to provide competent workmen and fit tackle and machinery (*Turner* v. *S. P. & D. Ry.*, *All. unrep.*).

Leading cases :—**Priestly v. Fowler; Mellors v. Shaw.**

Volunteers.—If a stranger, invited by a servant to assist him in his work, or, who volunteers to assist him, is, while giving such assistance, injured by the negligence of another servant of the same master, he is considered to be a servant *pro tempore*, and no action will lie against the master. The stranger, by volunteering his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant (*Degg* v. *Mid. Ry.*, 1 H. & N. 773; *Potter* v. *Faulkner*, 1 B. & S. 800). But a person who, having an interest in what the servants are doing, goes not only to help them but also to attend to a matter in which he as well as the defendant is interested, is not in the position of a mere volunteer, and so has not bound himself to undertake the risks of the employment (*Wright* v. *L. & N. W. Ry.*, 1 Q. B. D. 252).

A railway company contracted to carry a heifer by train. The plaintiff travelled by the same train, and on arriving at the place of destination, he, with the assent of the station-master, assisted to shunt the horse-box, in which the heifer was, in order to hasten delivery and while so doing was injured by the servants of the company. Held, that the company was liable (*Wright* v. *L. N. W. Ry.*, *sup.*). Where the servants of a railway company were turning a

truck on a turn-table, and a person not in the employment of the company volunteered to assist them, and whilst so engaged, other servants of the company negligently propelled a steam-engine, and thereby caused the death of a person who so volunteered; it was held that the company was not liable (*Degg* v. *Midland Ry.*, *sup.*). A passer-by who is casually appealed to by a workman for information respecting a thing, which the latter is doing in a public thorough-fare is not to be consi lered a volunteer assistant so as to exonerate the workman's master from liability (*Cleveland* v. *Spier*, 16 C. B. N. S. 399).

Action.—In all cases, where the servant sues the master for negligence, he must prove that the master knew or ought to have known of the danger, and that the servant did not (*Griffiths* v. *L. & St. C. D. Co.*, 13 Q. B. D. 259). But contributory negligence by the servant is a defence to an action by him for injury suffered through the negligence of his master (*Weblin* v. *Ballard*, 17 Q. B. D. 122).

A master, moreover, is not liable to a servant for injuries sustained in the performance of orders which he was not bound to obey, *e. g.*, a servant is not bound to risk his life or limb in obedience to his master's orders (*Smith*, 226).

(2). *The Employers' Liability Act*, 1880.

A very eminent Judge has observed that *Priestly* v. *Fowler* introduced a new chapter into the law. By far the greatest blow to the practical utility of the employer's Common law liability was dealt by this case. It decided that the principle expressed by the maxim *qui facit per alium facit per se*, of universal application to other relationships, should have no application to the relationship between employer and workmen. The application of this maxim would have rendered an employer responsible to a workman for the negligence of his agents and other workmen engaged in the execution of his work for his profit. In the case of injuries arising out of another servant's negligence, the workmen stood, before the Employer's Liability Act, at a disadvantage as compared with the world outside.

For damage done by the negligence of his servants acting within the scope of their employment, the master, on the principle of *respondeat superior*, was responsible to strangers. But a workman injured by the negligence of a fellow-workman had no such redress (*Thomas* v. *Quartermain*, 18 Q. B. D 685).

The general scope and object of this Act is to so far expand the employer's responsibility as to make him liable for the negligent acts or default of those to whom he has delegated his duties of control and management and of those whom he has placed in positions of authority over his workmen. Subject to this inroad the doctrine of common employment is allowed to remain as a defence to the employer, with the exception that in the case of railway servants, owing probably to the hazardous nature of their employment, its application is further restricted (*E. L. E.*).

By the Employers' Liability Act, 1880, "a railway servant, or any person to whom the Employers' Workmen Act, 1875, applies," *i. e.*, any labourer, servant in husbandry, journey-man, artificer, handicraftsman, miner, or person otherwise engaged in manual labour "not being a domestic or menial servant, or a seaman" can bring an action against his employer where personal injury is caused to him from any of the following causes :—

1. (1) By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer.

(2) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence.

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman, at the time of injury was bound to conform or did conform, where such injury results from his having so conformed.

(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with

the authority of the employer in that behalf; or,

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway :—

The workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases :—that is to say—

(1) Under sub-section one of the section one, unless the defect therein mentioned arise from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition ;

(2) Under sub-section four of section one unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned ; provided that where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of Her Majesty's principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of an Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective bye-law;

(3) In any case where the workman knew of the defect or negligence which caused him injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer, or such superior, already knew of the said defect or negligence.

The sum recoverable as compensation is limited to three years' average earnings (s. 3). The injured servant or his representatives, must give notice (stating the cause of injury and the date at which it was sustained—s. 7) of his claim to the employer within six weeks of the accident, unless in the case of death, the judge thinks there was reasonable excuse for not giving it. Money payable under penalty is to be deducted from compensation under the Act (s. 5). The action must be brought in a county Court but may be removed into a superior Court (s. 6). The action must be commenced by the injured servant within six months, or

by his personal representatives (if he is killed) within twelve months (s. 4).

The master may rely by way of defence, (1) on contributory negligence, (2) on the maxim *volenti non fit injuria*, (3) on any contract by which the workman has contracted himself out of the Act (*Griffiths* v. *Lord Dudley*, 9 Q. B. D. 357). But he cannot set up in cases under the Act, the defences available at Common law, *viz.*, (1) common employment, (2) that the servant has undertaken the risk and (3) contributory negligence.

This Act has not in any way affected the application of the maxim *volenti non fit injuria*; and if a man voluntarily undertakes with his eyes open exceptional risks incident to an employment, he cannot recover in respect of injuries arising thence, unless his employer has been guilty of a breach of duty, such as that referred to in the proviso to section 1.

When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control—the danger being created or enhanced by the negligence of the employer—the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the above maxim applicable in case of injury. The question whether the servant has so undertaken a risk as to bring himself within the maxim is one of fact and not of law. This is so both at Common law and in cases arising under the Employers' Liability Act, 1880 (*Smith* v. *Baker*, (1891) A. C. 325). In order that a man may be *volens* "mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring the workman within the maxim" (per

Lord Esher, M. R., in *Yarmouth* v. *France*, 19 Q. B. D. 647). The mere fact that a man knew of a danger and yet incurred it, is not conclusive that he incurred it willingly within the meaning of the maxim (*Thomas* v. *Quartermain*, 18 Q. B. D. 685). A workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot be held as a matter of law to have impliedly agreed to incur that danger or to have voluntarily incurred it because he does not refuse to face it (per Lindley, L. J., in *Yarmouth* v. *France*, *sup.*). But Lord Herschell goes further in *Smith* v. *Baker*, and says that where a servant has been subjected to risks owing to a breach of duty on the part of his employer, the mere fact that he continues his work, eventhough he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty by reason of the doctrine *volenti non fit injuria*.

The defence arising from this maxim is not applicable to cases where the injury arises from the breach of a statutory duty on the part of the employer (*Baddeley* v. *Granville*, 19 Q. B. D. 423; Smith, 222).

(3). *The Workmen's Compensation Acts, 1897 & 1900.*

The Act of 1897 is supplemental to the Employers' Liability Act, 1880. The principle upon which it is based is entirely new. It introduces a liability not founded upon any breach of duty, either at Common law or statutory. The employer is to be henceforth an insurer against accidents which occur in the course of the execution of his work, and is to pay a limited compensation in respect of accidents, whether due to want of care on his part or on the part of his servants or not. The measure being a tentative one is applied to part only of the industries of England.

The right of the workmen included in this Act, if they prefer it, to sue under the Employer's Liability Act, or at Common law, is preserved. An employer is not to be liable to pay compensation both under this Act and independently of it.

It will never be worth while for the representatives of workmen killed by accident to bring an action, the damages to which they are entitled under this Act being equal to the maximum allowed to be given under the Employers' Liability Act, 1880.

In one case only is the compensation given by the Act to be disallowed. This case is where the injury is attributable to the workman's own serious and wilful misconduct (s. 1 (2) (*c*)).

Only those classes of workmen named in the Act are entitled to compensation under it (s. 7).

All questions as to liability to pay compensation under this Act, and the amount and duration of the compensation, including any question as to whether or not the employment is one to which this Act applies, are to be settled by arbitration (s. 1, sub-s. 3). No action at law can be brought to decide them, or any of them.

The requirements of notice are similar to the Employer's Liability Act, 1880.

The employer and his workmen can contract themselves out of this Act only if the contract provides a scheme of compensation.

Where the workman is injured in the course of his employment under circumstances creating a legal liability in some person other than the employer, the workman can either proceed at law against such person, or claim his compensation under this Act, but he cannot do both.

By the Workman's Compensation Act of 1900, the provisions of the Act of 1897 have been extended "to the

employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment" (s. 1).

(4). LIABILITY OF SERVANT TO MASTER.

A servant is, no doubt, liable to his master, though not to others, for the consequences of his non-feasances or wrongful omissions. If damages have been recovered from the master by reason of the servant's negligence in doing the master's work, or in executing his orders, these damages may be recovered by the master from the servant (*Green* v. *New River Co.*, 4 T. R. 590).

II. *Owner and Independent Contractor.*

One employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them (*Dalton* v. *Angus*, 6 App. Cas. 740). Thus, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable (*Pickard* v. *Smith*, 10 C. B. N. S. 470). Such negligence is sometimes called casual or collateral negligence.

An independent contractor is one who undertakes to produce a given result, without being in any way controlled as to the method by which he attains that result. In the actual execution of the work he is not under the order or control of the person for whom he does it, but uses his own discretion in things not specified beforehand. He who controls the work is answerable for the workman; the remoter employer who does not control is not answerable when work which can lawfully be done without injury to others is placed in the hands of a contractor. The test whether a man employed to do work is a servant or an in

dependent contractor is the question: does the employer exercise, or has he right to exercise, control over the workman (*Martin* v. *Temperley*, 4 Q. B. 298), and direct him *how to do his work*? (*Sadler* v. *Hemlock*, 5 El. & Bl. 570; *Ruth* v. *Surrey Com. Dock Co.*, 8 T. R. 116). If so, the relation is that of master and servant.

The principle—*respondeat superior*—does not extend to make an employer responsible for the unlawful act of a person, not in his service, with whom he has contracted to do the work, in the course of which the default occurred (*Allen* v. *Hayword*, 7 Q. B. 960). A person who employs another to do a lawful act is presumed, in the absence of evidence to the contrary, to employ him to do it in a lawful and reasonable manner (*Butler* v. *Hunter*, 7 H. & N. 826).

Employer's right to inspect works, to decide as to the quality of materials and workmanship, to stop the works or any part thereof at any stage, to modify and alter them, and to dismiss disobedient or incompetent workmen employed by the contractor, will not thereby render himself liable to third persons for the negligence of the contractor in carrying out the works (*Reedie* v. *L. & N. W. Ry.*, 4 Ex. 244; *Steel* v. *S. E. Ry.*, 16 C. B. 550; *Hardaker* v. *Idle Dis. Council*, (1896) 1 Q. B. 335; *Glover* v *L. & N. W. Ry.* 5 Ex. 66).

Some bales of cotton were insecurely piled in a warehouse by cotton porters acting under the control of the warehouse-keeper, but in the employ of the defendant, a cotton merchant, to whom the bales belonged. The plaintiff, being lawfully in the warehouse to re-canvas the bales of another cotton merchant, was injured by the fall of one of the defendant's bales. Held, that the defendant was responsible (*Murphy* v. *Caralli*, 3 H. & C. 462). A labourer, particularly skilful in making drains, who was employed to cleanse a drain for the defendant, who paid him five shillings for the job, was held not to be a contractor, and the defendant was held liable for injuries caused through the labourer's negligence (*Sadler* v. *Henlock*, 4 E. & B. 570).

Exceptions.—There are five exceptions to the rule that a person employing a contractor is not liable for his (con-

tractor's) wrongful acts :—

1. Where the employer retains his control over the contractor, and personally interferes and makes himself a party to the act which occasions the damage (*Burgess* v. *Gray*, 1 C. B. 578).

2. Where the thing contracted to be done is itself illegal (*Ellis* v. *Sheffield Gas Co.*, 2 E. & B. 767 ; *Angus* v. *Dalton*, 6 Ap. Cas. 740).

3. Where a legal or statutory duty is incumbent on the employer to carry out a particular work efficiently, and the contractor either omits or imperfectly performs such duty (*Hole* v. *Sittingbourne Ry.*, 6 H. & N. 488 ; *Grey* v. *Pullen*, 5 B. & S. 970) ; *Hardaker* v. *Idle Dis. Council*, (1896) 1 Q. B. 335 ; *The Snark*, (1900) P. 105 ; *Maxwell* v. *British Thomson Houston Co.*, 18 T. L. R. 278).

Where person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor (*Penny* v. *Wimbledon Urban Council*, (1899) 2 Q. B. 76). A person who is engaged in the execution of dangerous works near a highway cannot avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway (per Smith, L. J., in *Holliday* v. *National Telephone Co.*, (1899) 2 Q. B. 400).

4. Where the thing contracted to be done, although lawful in itself, is likely, in the ordinary course of events, to damage another's property unless preventive means

are adopted, and the contractor omits to adopt such means (*Hughes* v. *Percival*, 8 App. Cas. 443; *Bower* v. *Peate*, 1 Q. B. D. 321; *Angus* v. *Dalton*, *sup.*), *e. g.*, injury to neighbouring houses by pulling down property. To escape liability in such cases the employer must show that the contractor was not acting within the scope of his contract, but was a trespasser when he did the act complained of (*Black* v. *Christchurch Finance Co.*, (1894) A. C. 48).

5. Under section 4 of the Workmen's Compensation Act 1897, if "undertakers" employ a contractor, such contractor's servants can recover compensation from the "undertakers," who in their turn have a right to be indemnified by the contractor (*Cooper & Crane* v. *Wright*, (1902) A. C. 302).

Exception 1.—Where the defendant employed a contractor to make a drain, and he left some of the soil in the highway, in consequence of which an accident happened to the plaintiff, and afterwards the defendant, on complaint being made, promised to remove the rubbish, and paid for carting part of it away, *and it did not appear that the contractor had undertaken to remove it;* it was held that the defendant was liable (*Burgess* v. *Gray*, 1 C. B. 578). Under a contract to discharge a ship the whole work was not to be done by the stevedores, but the shipowners were to control and employ members of the crew to work the tackle. Held, that the shipowners were liable for injury to a servant of the stevedores occasioned by the negligence of a winchman who was a member of the crew and not in the employ nor under the control of the stevedores (*Union S. Co.* v. *Claridge*, (1894) A. C. 185).

Exception 2.—A gas company, not authorized to interfere with the streets of Sheffield, directed their contractor to open trenches therein, the contractor's servant in doing so, left a heap of stones, over which the plaintiff fell and was injured; it was held that the defendant company was liable, as the interference with the streets was in itself a wrongful act (*Ellis* v. *Sheffield Gas Co.* 23 L. J. Q. B. 42; 2 E. & B. 767).

Exception 3.—Where the defendants were authorized, by an Act of Parliament, to construct an opening bridge over a navigable river, and the plaintiff having suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable, and could not excuse themselves by throwing the blame on their contractor (*Hole* v. *Sittingbourne Ry.*, 6 H.

& N. 486). The occupier of the refreshment room at a railway station was held liable for an injury caused by the trap of his coal-cellar being negligently left open by the servants of the coal-merchant who had been delivering coal there (*Pickard* v. *Smith*, 10 C. B. N. S. 470). But in another case the coal merchant was held liable (*Whitely* v. *Pepper*, 2 Q. B. D. 276). A person maintaining a lamp projecting over a high way for his own purposes is bound to maintain it so as not to be dangerous to passengers, and if it causes injury owing to want of repair it is no answer on his part that he employed a competent person to put it in a safe state of repair (*Tary* v. *Ashton*, 1 Q. B. D. 314). A contractor employed to make a sewer, negligently omitted to keep a gas pipe properly supported during excavations so that it broke and the gas escaping caused injury to the plaintiff. Held, that his employers, though acting under statutory authority, were responsible (*Hardaker* v. *Idle Dis. Council*, (1896) 1 Q. B. 335). A contractor was employed to make up a road, and in carrying out the work, he negligently left on the road a heap of soil unlighted and unprotected. A person walking along the road after dark fell over the heap and was injured. Held, that his employers, though acting under statutory authority to make the road, were liable, because, from the nature of the work which they had employed the contractor to do, danger was likely to arise to the public using the road (*Penny* v. *Wimbledon Ur. Coun.*, (1899) 2 Q. B. 72). Defendants employed a contractor to make up a road. Plaintiff was driving on the road and was seriously injured by being jolted against a girder of a railway bridge owing to a ridge having been left in the road. The defendants were held liable although the injury was caused by the neglect of the contractor (*Hill* v. *Tottenham*, 106 L. T. 127). A company was laying telephone wires underneath the pavement of a street and contracted with a plumber to solder the joints of the pipes in which the wires were laid. To do this the soldering material was melted in an iron pot put on the pavement, and in accordance with a common and proper practice a benzoline lamp was dipped into the molden metal for the purpose of getting a flare. In consequence of the negligent way in which this was done, an explosion ensued and the plaintiff, who was passing along the high way, was injured. The district council was held liable, as they were bound to take care that the public using the highway were protected against any act of negligence by a person acting for them in execution of the works (*Holliday* v. *National Tele. Co.*, (1899) 2 Q. B. 392). A barge of defendants was sunk in the Thames. They employed an underwaterman to raise her: but owing to the guard-vessel placed by him, with lights upon it, to mark the submerged barge, having been negligently allowed to get out of position, the plaintiff's steamship coming up the river, without negligence, ran upon the wreck and sustained damage. Held, that the defendants were personally responsible, and could not escape the liability by throwing the blame on the contractor (underwaterman) employed by them to

do the work (*The Snark*, (1900) P. 105 ; *The Utopia*, (1893) A. C. 492).

Indian cases.—The plaintiff claimed to recover Rs. 63,500 for damages sustained by him in consequence of his having fallen into a hole dug on the land of the first defendants, by an *employe* of the second defendant. The plaintiff occupied a house near the land and had been in the habit of crossing the land daily in going to and from his place of business. There was a regularly constructed road from his house to the high road, which he might have used, but, as a short cut, he and others were in the habit of using the beaten track across the land. No express permission had ever been given to any of the persons who were in the habit of using it. On one day the plaintiff had gone to his place of business as usual by the short cut across the land : while returning at about 11 o'clock at night he fell into a hole which had been dug during the day right across the pathway by the *employe* of the second defendant, for the purpose of ascertaining the suitability of the soil for building purposes, for which purposes the second defendant had obtained an agreement to lease the land from the first defendants. The hole was several feet deep and was unfenced and unlighted. Held, that there had been negligence on the part of the *employe* of the second defendant, for which the second defendant alone was liable ; and a sum of Rs. 17,000 was awarded as damages (*Evans* v. *Trustees of the Port of Bombay & Sirdar Dilar Dowlat*, 11 Bom. 329).

Plaintiff was driving a buggy along a street in Calcutta by night and fell into a hole opened in the road, which was left unfenced and insufficiently lighted, and had been badly injured. It appeared that the road had been opened by an engineer in the employment of the Government, who had applied to and obtained permission from the corporation to open the road, subject to the condition that he employed one of the contractors licensed by the Municipality to do such works, and such a contractor had been employed. The plaintiff sued for damages, making the Secretary of State, the corporation, and the contractor, defendants. It was held that the Secretary of State was not liable, because he came within the established rule that one who employs another to do what is perfectly legal must be presumed to employ that other to do this in a legal way ; that the Corporation who had a statutory obligation imposed upon them to repair and maintain the roads were liable to the plaintiff for a breach of their statutory duty ; that where there was a dangerous obstruction, and *a fortiori* where such dangerous obstruction resulted from a permission granted by the Commissioners, they were liable for damages caused by it ; and that the contractor also was liable (*Corporation &c. of Calcutta* v. *Anderson*, 10 Cal. 445). The Municipal Committee of Lahore, having resolved to repair a certain public road within the limits of the Municipality employed a contractor to perform the work. Though, in order to avoid danger to persons driving along the road at night, it was necessary that the road should be lighted, the contractor negligently omitted to light the road at night while under repair, and in consequence of his

omission the plaintiff, while driving along the road, sustained damage. Held, that the Municipal Committee was liable for the negligence of the contractor, and was bound to make good to the plaintiff the damage he had sustained (*Keough v. Municipal Committee of Lahore*, P. R. 108 of 1883).

Exception 4.—Defendant liable.—Where defendant employed a contractor to pull down an old house and erect a new one; and the contractor expressly undertook to support the plaintiff's house, and to be liable for all damage, it was held that the defendant was liable for the damage (*Bower* v. *Peate*, 1 Q. B. D. 321; *Le Maitre* v. *Davis*, 19 Ch. D. 281). Defendant employed a contractor to take down his house and rebuild it. In doing this the contractor negligently cut into the party-wall between the defendant's house and the adjoining house of B, and this caused the defendant's house to fall and do damage to the plaintiff's house. There was no question whether the plaintiff had any right of support from the defendant's house. Held, that the defendant was liable, upon the ground that the work ordered by him was necessarily attended with risk to the plaintiff's house, and that it was therefore the defendant's duty to see that proper precautions were taken to prevent injury to that house (*Hughes* v. *Percival*, 8 App. Cas. 443, overruling *Butler* v. *Hunter*, 7 H. & N. 826). Defendants, landowners, contracted with a man to fell and to burn bush on their land, and they made certain stipulations as to the time when the burning was to take place. The contractor disregarded these stipulations and negligently made a fire which spread to the plaintiff's land and injured his buildings and crops. Held, that the defendants were liable (*Black* v. *Christchurch F. Co.*, (1894) A. C. 48).

Indian case.—The plaintiffs were owners of a house consisting of a ground floor and upper story and measuring 77 feet in length. On the south side of the house was a gully, 3 feet and 6 inches wide, separating it from another upper-storied house. The plaintiffs in this suit complained that in January 1891 the defendant by his servants dug a trench, 8 feet deep, along the whole length of the gully for the purpose of laying a drain pipe, and that the work was done so negligently that the plaintiffs' house was injured and became in such a dangerous condition that it had to be pulled down. The plaintiffs claimed Rs. 3,996 as damages. The defendant denied the negligence, and alleged that the work was not done by his servants or agents, but by a contractor. Held, that the defendant was liable for the act of his contractor. The work was necessarily attended with *risk*, and the defendant could not free himself from liability by employing a contractor. The defendant as well as the contractor were liable to the plaintiffs (*Dhondiba* v. *Mun. Commrs. of Bombay*, 17 Bom. 307).

Defendant not liable.—Two ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses and a driver by the day to drive. They gave the driver a gratuity for each day's drive, and provided

him with a livery hat and coat, which were kept in their house; and, after he had driven them constantly for three years, and was taking off his livery in their hall, the horse started off with the carriage, and inflicted an injury upon the plaintiff. It was held that the ladies were not responsible, as the coachman was not their servant, but the servant of the job-master (*Quarman* v. *Burnett*, 6 M. & W. 499).

Where a company, empowered by an Act of Parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence, and the workmen, in constructing a bridge over a highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him, it was held, in an action against the company by the administratrix of the deceased, that they were not liable (*Reedie* v. *L. & N. W. Ry.*, 4 Ex. 344). A person who erects a building by contract and employs a clerk of the works to superintend the erection, is not liable for injury to a workman in the building by reason of its negligent construction, unless he personally interfered, or negligently appointed an incompetent clerk of the works, with knowledge of his incompetency (*Brown* v. *Accrington Cotton Spng. Co.*, 3 H. & C. 511). The owner of a ship who employed a master stevedore to execute the work of unloading the vessel was held not liable for the negligence of a man employed by the stevedore, though the man, being one of crew, was the defendant's general servant (*Murray* v. *Currie*, L. R. 6 C. P. 24).

Where a butcher bought a bullock and employed a *licensed* drover to drive it home, and the drover employed a boy, through whose negligence the bullock injured the plaintiff's property; it was held that the butcher was not liable as the drover exercised a distinct calling, and the boy who caused the mischief was *his* servant, not the servant of the butcher (*Milligan* v. *Wedge*, 12 A. & E. 737).

A contractor employed by navigation commissioners, in the course of executing the works, flooded the plaintiff's land, by improperly, and without authority, introducing water into a drain insufficiently made by himself, it was held that the contractor was liable and not the commissioners (*Allen* v. *Howard*, 7 Q. B. D. 260).

Indian case.—In a suit for alleged damage done to the plaintiff's premises by excavations for drainage purposes, which the defendants were authorized to make by Beng. Act VI of 1836, it being shown that the defendant Justices had entrusted the execution of the work to skilled and competent contractors; it was held that the Justices were not liable (*Ullman* v. *The Justices of the Peace of Calcutta*, 8 B. L. R. 265).

Leading cases.—**Quarman v. Burnett; Reedie v. L. & N. W. Ry.**

Sub-contractor.—If one contracts for the performance

of an entire work, and then sub-contracts for a portion of the entire work, and that is done under the immediate control and superintendence of the sub-contractor, the latter is alone liable for any wrong done by his workmen (*Story*).

A builder was employed to make certain alterations in a club-house. He sublet to a gas-fitter the work of preparing the gas-fittings. In consequence of the negligence of the latter or of his servants, the gas exploded and injured the plaintiff. It was held that the plaintiff's remedy was against the gas-fitter and not against the builder (*Rapson* v. *Cubitt*, 4 M. & W. 710). A had contracted with parish officers to pave a certain district, and made a sub-contract with B, by which the latter was to lay the paving of a certain street with materials to be furnished by A. Preparatory to paving, the stones were laid by servants of B on the path-way and there left in such a manner as to obstruct the same. C fell over them and broke his leg. It was held that C could not maintain an action against A as the injury was not caused by *his* workmen (*Overton* v. *Freeman*, 11 C. B. 867). A sub-contractor, was, for some purposes, the servant of defendant. The defendant had employed him as his general servant and surveyor; and he had the management of the defendant's business, for which he received an annual salary. In this particular case the defendant engaged him by contract for £40 to erect a scaffold, which had become necessary in building a bridge; and the defendant was to furnish materials. It was held that the defendant was not liable for damages sustained by reason of the negligence of his sub-contractor's workmen (*Knight* v. *Fox*, 5 Ex. 721).

III. *Principal and Agent.*

1. LIABILITY OF PRINCIPAL.

The law upon this subject is founded upon the same analogies as exist in the case of masters and servants.

In order that responsibility may attach to the principal, in respect of a tortious or fraudulent act—whether criminal or not (*Dyer* v. *Munday*, (1895) 1 Q. B. 742)—it is necessary: (1) that he shall have authorized it in the first instance; or (2) that it shall have been done on his behalf and he shall have ratified it (*Wilson* v. *Tumman*, 6 M. & G. 236; *Marsh* v. *Joseph*, (1897) 1 Ch. 214); or (3) that it shall have been committed for his benefit by the agent in the course and as part of his employment (*Burns* v. *Poul-*

son, L. R. 8 C. P. 536), even though he has expressly forbidden it (*Collman* v. *Mills*, (1897) 1 Q. B. 396). That this last is sufficient is obvious from those cases in which masters have been held liable for the negligence of their servants (*Patter* v. *Rea*, 2 C. B. N. S. 606); litigants, for irregularities committed by their solicitors in the course of litigation to conduct which they are retained (*Collett* v. *Foster*, 2 H. & N. 365); merchants, for frauds committed by their factors and brokers whilst acting on their behalf (*Hern* v. *Nichols*, 1 Salk. 289); and shopkeepers, for the wrongful acts of their shopmen whilst in the shop and attending to its business (*Grammar* v. *Nixon*, 1 Str. 653).

The principal is not liable for the torts of his agent, except upon one or other of the three above-mentioned grounds. Thus, a principal is not liable for the wilful acts of his agent, if not done in the course of his employment and as part of his business (*McManus* v. *Crickett*, 5 R. R. 518; *Croft* v. *Alison*, 4 B. & A. 590); and this is true not only of assaults, batteries, libels, and the like, but also of frauds. The maxim *respondeat superior* does not render a principal liable for the frauds of his agent, if the agent has been dealt with as a principal (*Ex parte Eyre*, 1 Ph. 227); nor unless the frauds have been committed by the agent for the benefit of his principal, and in the course, and as part of his own employment (*Grant* v. *Norway*, 10 C. B. 665; *Coleman* v. *Riches*, 16 C. B. 104; *Barwick* v. *Joint Stock Bank*, 2 Ex. 259; *Blake* v. *A. L. Ass. Society*, 4 C. P. D. 94; *Swire* v. *Francis*, 3 App. Cas. 106; *British Mutual Bank* v. *Charnwood F. Ry.*, 18 Q. B. D. 714; *Thorne* v. *Heard*, (1895) A. C. 495; *Weir* v. *Bell*, 3 Ex. D. 238).

Criminal acts of agents.—The fact that the wrongful act is a felony does not constitute any defence (*Osborne* v. *Gillett*, L. R. 8 Ex. 88). Thus, if an agent, in the ordinary course of his employment on the principal's behalf,

commits a trespass (*Hatch* v. *Hale*, 15 A. & E. 10), or infringes a patent or trade-mark (*Betts* v. *De Vitre*, L. R. 3 Ch. 429; *Tonge* v. *Ward*, 21 L. T. 480), or wrongfully converts the goods or chattels of a third person, by refusing to deliver them up to him on demand (*Giles* v. *Taff. Vale. Ry.*, 2 El. & Bl. 822; *Yarborough* v. *Bank of England*, 16 East 6), or by selling or otherwise disposing of them without his authority (*Tronson* v. *Dent*, 8 M. P. C. 419; *Ewbank* v. *Nutting*, 7 C. B. 797; *Carman* v. *Meaburn*, 1 Bing. 243), the principal is civilly liable for the trespass, infringement, or conversion, even if he did not authorise it, to the same extent as he would have been if he had committed the wrong himself.

Liability.—The liability of a principal for the wrongs of his agent is a joint and several liability with the agent. The injured party may sue either or both of them, but if he chooses to sue the agent alone, and recovers judgment against him, such judgment, though unsatisfied, is a bar to any proceedings against the principal (*Brinsmead* v. *Harrison*, L. R. 7 C. P. 547; *Wright* v. *L. G. O. Co.*, 2 Q. B. D. 271).

2. LIABILITY OF AGENTS.

Agents
- Private
  - for acts of misfeasance or positive wrongs—personally liable to third persons.
  - for acts of non-feasance or mere omissions of duty—not liable to third person, but solely to his principal.
- Public
  - for malfeasance, misfeasance, non-feasance, &c—personally liable to third persons, the Government being in no case liable.

1. **Private agents.**—The agent is personally liable to third persons for his own misfeasance and positive wrong (*Bell* v. *Josleyn*, 3 Gray 309; *Lane* v. *Cotton*, 12 Mod. 488), whether he did the wrong intentionally or ignorantly by

the authority of his principal and for his benefit; or for his own benefit. But he is not, in general (for there are exceptions), liable to third persons for his own non-feasances, 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 (Story)*.

If goods are delivered by the owner to A to keep, but if he delivers them to B to keep for the use of A, and B wastes or destroys them, the owner may have an action for the tort against B, although the bailment was not made to him by the owner; for B is a wrong-doer (1 Roll. Abr. 90). If A delivers his horse to a black-smith, and he delivers him to another black-smith, who wantonly lames him, A may have an action against the latter notwithstanding A did not authorize the bailment, for he is a wrong-doer (*ibid*).

If the servant of a common carrier negligently loses a parcel of goods, intrusted to him, the principal, and not the servant, is responsible to the bailor or the owner (*Lane* v. *Cotton*, 12 Mod. 488). If the servant of a black-smith so negligently conducts himself in shoeing a horse that the horse is consequently injured, or afterwards becomes lame, the master and not the servant, will be liable for the negligent injury (1 Bl. Com. 431). But, if the servant, in shoeing a horse, has pricked him, or has maliciously and wantonly lamed him, an action will lie personally against the servant himself (*Story*).

If the principal is a wrong-doer, the agent, however innocent in intention, who participates in his acts, is a wrong-doer also. Thus, if the agent of a merchant who has received goods from a bankrupt after a secret act of bankruptcy, should, pursuant to orders from his principal, sell the goods, an action of trover would lie in favour of the assignees against the agent, however ignorant he might be of the defect of title; for a person is guilty of a conversion who intermeddles with the property of another without due authority from the true owner; and it is no answer that he acted as an agent, under the authority of a person supposed at the time to be entitled as the owner (*Stevens* v. *Elwall*, 5 M. & S. 259).

There is one important exception to the rule already stated as to non-liability of agents to third persons for the negligence and omissions of duty of themselves and of their sub-agents, founded upon the principles of maritime law.

It is the case 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 misfeasances, but also for the negligences, non-feasances and misfeasances of the subordinate officers and others employed by and under them.

2. **Public agents.**—It is plain, that the Government itself is not responsible for the misfeasances or wrongs, or negligences or omissions of duty, of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, difficulties and losses, which would be subversive of the public interests; and, indeed, laches are never imputable to the Government (*Seymoure* v. *Van Slyek*, 8 Wend. 403; *United States* v. *Kirkpatrick*, 9 Wheat. 920). And the public officers and agents are not responsible for the misfeasances, or positive wrongs, or for the non-feasances, or negligences or omissions of duty, of the sub-agents, or servants, or other persons properly employed by or under them, in the discharge of their official duties, such as the Postmaster-General, the Lords Commissioners of the Treasury, the Commissioners of Customs and Excise, the Auditors of the Exchequer, &c. (*Smith* v. *Powditch*, Cowp. 182; *Whitfield* v. *Le De Spenser*, Cowp. 754; *Rowning* v. *Goodchild*, 2 W. Bl. 906; *Mersey D. T. & H. B.* v. *Gibbs*, L. R. 1 H. L. 124). But such subordinates shall be held *personally* responsible to third persons (*Story*).

Again, a public officer will not be exempted from responsibility for the act of one who is his *own* servant (*Lord North's case*, Dyer 161; *Boson* v. *Sandford*, 3 Mod. 321).

3. RIGHTS OF AGENTS AGAINST THIRD PERSONS.

The remedy of agents against third persons in tort, as a general rule, are confined to cases where the right of possession is injuriously invaded, or where they incur a personal responsibility, or loss, or damage in consequence of the tort (*Story*). Thus, where an agent has actual possession of property belonging to his principal, he may maintain an action for any tort, committed by a third party, whereby such possession is affected (*Fowler* v. *Down*, 1 B. & P. 47). Where goods have been bailed, and a third person wrongfully deprives the bailee of the use or possession of them, or does them any injury, the bailee is entitled to bring a suit for such deprivation or injury (I. C. A. s. 180).

IV. *Company and Director.*

1. LIABILITY OF COMPANY.

Although companies are seldom created to do what is wrong, and can seldom be said to have in fact authorized the wrongful acts of their directors or servants, it is plain that the ordinary principles of agency apply to companies; and on these principles, companies are liable for the negligence of their servants, and for torts committed by them in the course of their employment; and it never has been admitted, as a sufficient reason for non-liability on the part of the company, that it did not in fact authorize the very act complained of. All that is necessary to charge the company is that the act complained of should be *intra vires*, and not *ultra vires*, and should be committed for the company by its agent or servant in the course of the business to which it is his duty to attend, or as it is sometimes expressed, in the course and as part of his employment (*Lindley*, i. 257).

Upon this principle it has been held that the Bank of England is liable for a wrongful detention of bank-notes by its servants (*Yarborough* v. *Bank of England*, 16 East 6); that a banking company is liable for the loss of securities

entrusted to it and carelessly kept (*Johnston's claim*, 6 Ch. D. 212); that a company is liable for a wrongful seizure of goods made by its servants for non-payment of tolls (*Maund* v. *Monmouthshire Canal Co.*, 4 M. & G. 452; *Smith* v. *Birmingham Gas Co.*, 1 A. & E. 526); for wrongful assaults (*Butler* v. *M. & S. Ry.*, 21 Q. B. D. 207) and arrests if made by persons authorized to act for the company in removing persons or giving them into custody (*Moore* v. *M. Ry.*, L. R. 8 Q. B 36); for negligence in laying down gas-pipes (*Scott* v. *Mayor of Manchester*, 1 H. & N. 59); for reckless driving (*Green* v. *London General Omnibus Co.*, 7 C. B. N. S 290; *Limpus* v. *L. G. O. Co.*, 1 H. & C. 526); for the infringement of a patent by its servants contrary to the orders of its directors (*Betts* v. *Devitre*, 3 Ch. 441); and for the publication of a libel by transmitting it by telegraph (*Whitfield* v. *S. E Ry.*, E. B. & E. 115; *Lawless* v. *Anglo Egyptian &c., Co.*, L. R. 4 Q. B. 262); or dictating it to a copying clerk (*Pullman* v. *Walter Hill & Co.*, (1891) 1 Q. B. 524). Moreover, in such cases, as those now in question, it is not necessary, in order to fasten liability on the company to prove any formal appointment of the agent by the company (*Giles* v. *Taff Vale Ry.*, 2 E. & B. 822; *Lindley*, i. 258).

It is, however, essential in order that a company may be liable for the wrongful acts of its servants that those acts should be such as the company could have authorized, and that they should have been authorized or ratified by the company, or have been done by the servants in the course of their employment, and not when acting in matters to which it is not their duty to attend (*Lindley*, i 259).

A company was not held liable for injuries committed by a dog kept in a yard, there being no evidence to show that the savage nature of the dog was known to any one who had charge of it, nor to the company's manager, nor, in fact, to any one whose knowledge could be considered as the knowledge of the company, although it was proved to be known to one or two of its servants (*Styles* v. *C. S. B. Co.*, 4 N. R. 483).

2. PERSONAL LIABILITY OF DIRECTORS.

Directors are personally responsible for any torts which they may themselves commit or direct others to commit, although it may be for the benefit of their company (*Mill* v. *Hawker*, L. R. 9 Ex. 309). In a recent case where a company had been formed, and registered under a name calculated to deceive, for the fraudulent purpose of obtain-

ing the benefit of another trader's name and reputation, the directors, who were the seven signatories and sole shareholders of the company, were held liable for the fraud, and an injunction was granted to restrain them from allowing the company to remain registered under that name (*La Societe A. L.* v. *Panhard L. &c.*, (1901) 2 Ch. 513). It was held in a case in which a company infringed a patent, that the directors were personally liable for the costs of a suit to restrain the infringement (*Betts* v. *De Vitre*, 5 N. R. 165). But it would be contrary to principle to hold directors personally responsible for the negligent or other acts of other servants of the company, unless the directors are themselves personally implicated in such act (*Lindley*, i. 348).

V. *Firm and Partner.*

The relation of partners *inter se* is that of principal and agent, and therefore each partner is liable for the acts of his fellows. Every partner is liable to make compensation to third persons in respect of loss or damage arising from the *neglect* or *fraud* of any partner in the management of the business of the firm (I. C. A. s. 250). The neglect or fraud complained of must have been committed in the ordinary course of the partnership business; and while he is acting within the scope of his authority. The fact of the co-partner's complete innocence and non-participation in the fruits of the fraud is irrelevant. But if the transaction is unconnected with the firm's business, or if the fraud is committed while the partner is not acting as a member of the firm, the loss occasioned cannot be thrown upon the innocent members of the firm. Thus, if one partner by fraud induces a person to join the firm, such fraud cannot be imputed to the firm, unless he had authority to find another partner. A fraud committed by a partner whilst acting on his own

separate account is not imputable to the firm, although had he not been connected with the firm he might not have been in a position to commit the fraud.

A partnership is liable for the negligence of its servants acting in the course of their employment by the firm (*Staples* v. *Eley*, 1 C. & P. 614). A firm of coach-proprietors is answerable for the negligent driving of a partnership coach of one of the firm, the coach being driven for the firm in the ordinary course of business (*Moreton* v. *Hordern*, 4 B. & C. 223; *Steel* v. *Lester*, 3 C. P. D. 121); and two partners are liable for not keeping the shaft of a mine in proper order, although one of them only actually superintended it (*Mellors* v. *Shaw*, 1 B. & S. 43; *Ashworth* v. *Stanwix*, 3 E. & E. 701); and all the members of a firm of solicitors are liable for the negligent advice given by one of them to a client of the firm (*Blyth* v. *Fladgate*, (1891) 1 Ch. 337; *Morgan* v. *Blyth*, *ib.* 354; *Smith* v. *Blyth*, *ib.* 364); or for a fraud committed by one of them in the ordinary conduct of their business (*Brydges* v. *Bromfil*, 12 Sim. 369).

As a rule, the wilful tort of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable, unless all the members are, in fact, privy to the malicious prosecution (*Arbunckle* v. *Taylor*, 3 Dow. 160). But a wilful tort committed by a partner in the course and for the purpose of transacting the business of the firm may make the firm responsible (*Limpus* v. *L. G. O. Co.*, 1 H. & C. 526). A customer deposited a box containing various securities with his bankers for safe custody, and afterwards granted a loan of a portion of such securities to one of the other partners in the banking-house, for his own private purposes, upon his depositing in the box certain railway shares, to secure the replacing of the securities. This partner afterwards for his own purposes, and without the knowledge of the customer, subtracted the railway shares, and substituted others of a less value. It was held, that, as the proceeds of the railway shares were not applied to the use of the partnership, the banking firm were not answerable for this tortious act of their partner for his own benefit, nor for any loss occasioned by this subtraction of the shares, on the ground of negligence (*Ex parte Eyre*, 3 Mont. D & De G. 12).

Action against partners.—It is not every tort which, though committed by several persons acting together, is legally imputable to them all jointly; but supposing a tort to be imputable to a firm an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants (*Sutton* v. *Clarke*, 6 Taunt. 29),

and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself (*Mitchell* v. *Tarbutt*, 2 R. R. 684; *Ansell* v. *Waterhouse*, 6 M. & S. 385—*Lindley*).

Action by partners.—With respect to actions by partners founded on some tort, the general principle is that where a joint damage accrues to several persons from a tort, they ought all to join in an action founded upon it (*Addison* v. *Overend*, 6 T. R. 766; *Sedgworth* v. *Overend*, 7 T. R. 279); whilst on the other hand several persons ought not to join in an action *ex delicto* unless they can show a joint damage (*Story*).

Discharge.—As partners may all be affected by the tort of one partner, so also a discharge or release of one, on account of the tort, will amount to a discharge or release of all the other partners (*Cock* v. *Nash*, 9 Bing. 341; *Cheetham* v. *Ward*, 1 B. & P. 630—*Story*).

VI. *Guardian and Ward.*

Guardians are not personally liable for torts committed by minors under their charge (*Luchman Dass* v. *Narayan*, 3 N. W. P. 191). But guardians can sue for personal injuries to minors under their charge on their behalf (*Modhoo Soodun* v. *Kaemoollah*, 9 W. R. 327).

VII. *Husband and Wife.*

See Chapter III.

(C). ABETMENT.

In actions of wrong, those who abet the tortious acts are equally liable with those who commit the wrong (*Kashee Nath* v. *Deb Kristo*, 16 W. R. 240; *Golab Chand* v. *Jiban*, 24 W. R. 437; *Wharton* v. *Muna Lal*, 1 Agra 96).