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Respondeat Superior

Fred Moore Whitney
Cornell Law School

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T H E S I S

for the Degree of Bachelor of Laws

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T H E D O C T R I N E
O F
R E S P O N D E A T S U P E R I O R .

-----by-----

Fred Moore Whitney.

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Cornell University law School,

1891.

C O N T E N T S

	page
Introduction	1
Origin of the Maxim	4
Limitations of the Roman Law	5
General rule in Anglo-American Law	8
Liability of Master for act of Servant	
done under his command	10
Rule in Gregory v Piper	11
Who are "servants" within the rule?	12
Liability of master when servant acts	
beyond the scope of his authority	16
Whatman v Pearson	18
Story v Ashton	19
Liability of master for servant's wilful	
or malicious acts	21
Rule in McManus v Cricket	21
History of the New York doctrine	
as to wilful acts	23
Exceptions to the rule	26
Liability of Proprietor for negligence	
of independent contractor	29
Rule in Bush v Steinman	29
" " Hilliard v Richardson	31
Who are independent contractors?	32
What work contracted for is wrongful	
<u>per se</u>	33

	page
Where the work is dangerous to others	34
"Collateral" acts of contractors	35
Effect of negligence in selecting contractor	36
Proprietor is liable if he assumes control	36
Application of the doctrine to corporations	38
Illustrative Cases	40
Conclusion	44
Authorities	46

I N T R O D U C T I O N .

Proverbs, it has been said, are the "salt of knowledge,"—"the gatherings of ages." They are the manual of practical wisdom and understanding drawn from the school of experience. Their precepts are the result of real life; and not the erroneous conclusions of speculative inquirers. It has been said that there is no proverb which is not true, because "they are the result of experience itself, which is the mother of all sciences." Lord Bacon has truly observed that "the genius, wit, and spirit of a nation are discovered by their proverbs."

A maxim is in law what a proverb is in the ordinary affairs of life. They were termed by the Roman Civilians "~~legen~~ leges,"— law of laws. Lord Coke defines a Maxim of law to be a "conclusion of reason"; and considered them of such importance that in enumerating the several sources, or, as he calls them, "fountains" of the law, from which he draws his proofs and arguments, he heads the list with the Maxims of the

common law.

Such being the importance of maxims, it follows that they occupy a prominent place in all legal systems, ancient and modern. In the absence of such guides as these, the body of every legal system would be a maze and perplexing labyrinth. With them a confusing mass of infinite details are thrown into definite and compact groups. Without them the lawyer would often be in despair at the abundance of his material. With them he has his clue from which to work.

A lawyer can at the present day, owing to the rapid multiplicity of judicial reports, find a case in point on both sides of almost every stated question; and so it is that resort must be had to that which underlies all decisions--the conclusions of sound reason. Following these he is placed above the confusion of conflicting rulings. For the able jurist is not he who can ground his opinions on the greatest number of cases in point, but rather upon the deduction of reason.

It is with one of these Maxims that we have to deal in the following pages, viz: "Respondeat Superior,"

or as the phrase implies "let the principle answer."
Involving, as it does, a knowledge of Agency, and Mas-
ter and Servant, its practical importance in every day
affairs of life manifests itself at once.

ORIGIN OF THE DOCTRINE.

From the early days of our jurisprudence it has been stated as an universal rule that a principal or master is civilly responsible for all wrongs committed by his servants while acting about his business; but it is difficult to quote a distinct reason in support of it.

Many of our principles of law are of such universal application, and result so manifestly and directly from motives of public policy on which our social relations depend, that they seem, at first thought, to have always existed as an inherent part of our legal system. The fact that these Maxims,—principles of law,—are so universally applied, and are the result of such gradual, continuous growth, makes it the more difficult to determine just at what particular time and under what circumstances they originated.

The rule of law under consideration is analogous to that universal rule which the law imposes upon every member of society, which compels a man to so control his business as not to injure others. With such an

obligation the law justly charges a man with the same responsibility for acts done by the hands of another, under his direction, as for acts done by his own hands. This rule of law takes its form in the maxim — "qui facit per alium, facit per se," what he does through another, he does through himself. The technical distinction between this maxim and the one under consideration, — *Respondeat Superior*, — is that the former applies more particularly to actions ex delicto, while the latter is used with reference to actions ex contractu.

The principle underlying the maxim probably first originated among the Romans; still no trace of the maxim itself appears to have been found in the works of the Roman Jurists. Although a large portion of our law is borrowed from the Civilians, still, as their social and political relations were radically different from ours in many respects, necessity demanded a very different set of rules which were peculiarly applicable to that time. So we find that the Roman's¹ treatment of this subject was affected by several considerations which we do not apply to ourselves. The use of the

term Servant, in the sense in which we now hold it, was then applied only to the slave. Secondly, their idea of Freeman had associated with it a degree of haughty independence, which was entirely inconsistent with such a subordination as the doctrine of Respondet Superior assumes. They also held that this notion of independence did not apply to the filius familias, but that for the acts of the filius familias the pater familias was under certain circumstances liable. Justinian (1) lays down the rule on this subject as follows: "Where a delict is committed by a slave, a noxal action lies against the master, who on being condemned, has his option of paying the damages awarded, or surrendering the slave in satisfaction of the injury." In the early days of Rome these actions were applied to wrongs committed by children in power no less than by slaves; but "the feeling of modern times has rightly rebelled against such inhumanity, and the noxal surrender of children under power has quite gone out of use."

The Roman law on the subject of vicarious liability may be briefly stated in the three following propo-

(1) Inst. IV, Tit., 8.

sitions: — (a) The master was liable for all acts of his slave. Under the old law, as was stated, the master could relieve himself from this liability by surrendering the slave under the principle *Noxa caput sequitur*, the crime follows the author or head. This rule was, however, subsequently changed in the master's favor, as it was alleged, by putting the Master in the slave's place so far as to make him responsible for the slave's delicts. (b) The *pater familias* was, under the old law, liable to an action for the misconduct of the *filius familias*. Here the basis of the action was the theory of the subjection of the family to the *pater familias*. They declared that the father could not take the benefits of his supremacy without its burdens; in other words, if he was to receive the profits, it was just that he should be charged with the loss. (c) Where a person undertook by contract to perform a certain piece of work, and such work required the co-operation of employers, he was liable for any negligence of the employers which occurred in discharging their duties.

The first mention of the maxim in the English law

is found in Coke's Institutes (1) where Sir Edward Coke, observing that "it is good to know how the law commonly called Respondeat Superior holdeth in our courts," says in conclusion, of an old case, "if Balivins has not the ability to respond, then the master responds." The rule suggests that the master will, in all cases, be liable for wrongs committed by his servant, when acting about the master's business, through inattention or want of skill. All of the authorities, from the earliest cases down, support this. The rule is so plain that an example by way of elucidation, would not make it clearer. Nor is there any difficulty in applying it so as to charge the master for injuries inflicted by the servant in executing different orders. As for example where A employs B to cut down trees on his land and omits to instruct B so that he might distinguish the boundaries of his --(A's) -- land. A will be liable for the trees of an adjoining owner which B improperly cut down. (2)

As has already been stated, the liability of anyone, other than the party actually guilty of the wrongful act, proceeds upon the theory qui facit per alium,

(1) 4 Inst.. 114.

(2) Carman v Moyer of N.Y. 14 abb. Pr. 301.

facit per se. The party employing has the selection of the party employed, and it is reasonable that he who has made the choice of an unskillful, careless person, should be made to answer for any injury resulting from the want of skill, or want of care of the person employed. But the party sought to be charged must stand in the character of employer to the party by whose negligent and careless conduct the injury has been occasioned; otherwise the true principle underlying the rule, nor the rule itself ~~cannot~~ apply.

L I A B I L I T Y O F M A S T E R F O R
A C T S O F S E R V A N T D O N E U N D E R
H I S C O M M A N D .

The leading case on the liability of a master for acts of the servant done under his command is that of Gregory v Piper (1) decided in the court of Queens Bench in 1829. The action was trespass for placing large quantities of rubbish against the walls and gates of the plaintiff. It appeared that the plaintiff occupied a public house called the "Rising Sun" with a stable yard belonging to it where he put up the horses of his guests. The way to the stable was through a yard in the rear called the "Old Kings Yard." Subsequently the defendant purchased the Old Kings Yard and disputed the plaintiff's right to pass along the same to his stable. He employed one S. to lay down rubbish in order to obstruct the way. S., when called as a witness, testified that he had been instructed by the defendant not to let any of the rubbish to touch the wall of the plaintiff; that he had executed those orders as nearly

(1) Gregory v Piper, 17 E.C.L. 454.

as he could, and that the rubbish, being of a loose kind, as it became dry naturally tumbled against the plaintiff's wall. The question before the court was whether the trespass was the act of the master, or of his servant. The evidence show^{ed} that the natural consequence of the act ordered to be done was, that the rubbish should go against the wall, and so the master was held answerable in trespass. Littledale J. after presenting a hypothetical case, concludes by saying; "if the servant therefore in carrying into execution the orders of the master, uses ordinary care, and injury is done to another, the master is liable." Park J. was of the same opinion and thought the defendant liable. He says: "if a single stone had been placed against the wall it would have been sufficient. The defendant must be taken to have contemplated all the probable consequences of the act which he had ordered to be done; and one of those probable consequences was that the rubbish would touch the plaintiff's wall. If that was so, the laying of the rubbish against the wall was as much the defendant's act, as if it had been done by his express command."

The defendant was, therefore, the person who caused the act to be done, and for the necessary or natural consequences of his own act, he was held liable.

Several questions suggest themselves upon a study of this case which well deserve a careful consideration. As to whether the servant was the defendant's servant, there was no doubt in this particular case; nor was it disputed that the servant acted beyond the scope of his authority. But the question very frequently arises in cases of this sort,— who are included within the term "servant?" The very nature of this subject will show the importance of solving such a question at the outset; or rather of laying down some test by which the relation of master and servant may be ascertained. Having determined who are servants it becomes necessary to understand what is meant by the terms, which occur so frequently in the cases and text books, "scope of authority" and "course of employment, and first,-----
Who are servants within the meaning of the rule?-----

The maxim, which is used to express the doctrine under consideration, implies that the person to be charg-

ed must stand in the relation of superior to the person who commits the wrongful act. Therefore, in order that the maxim may apply to any particular case there must be a superior and a subordinate whose wrongful act is the ground of complaint. (1) In the ordinary acceptance of the term "servant" an element of menial or base service seems to be conveyed; but the term is not restricted to persons engaged in a menial or even domestic service. The term servant covers a broad field and is applicable to any relation in which, with reference to any matter out of which an alleged wrong has sprung, the person sought to be charged has the right to control the action of person doing the alleged wrong. This right of control appears to be the most reliable test by which to determine whether the relation^{of} master and servant exists. As was said by Bennett J. in a recent Vermont case, (2) "the responsibility of the master grows out of, and is measured by his control over his servants; and in fact it begins and ends with it; although there are cases where the rule has been satisfied with a slight degree of actual control over the servant; without the

(1) Blackwell v Wiswell, 24 Barb. 356.

(2) Town of Pawlet v E.R.Co. 28 Vt. 297.

existence of this essential element of control and direction over the servant, it is difficult to discover any principle which can, in law, make the acts of the servant the acts of the master." This right of controlling the conduct of another implies the power to discharge him from the service or employment for just cause; accordingly the power to discharge is said to be a guide by which to determine whether the relation exists. "The true test to determine who is the master, and consequently who is liable to the party injured, is to determine who employed the servant and who had the power to discharge him." (1) The difficulty in all these cases is not found in the rule of *Respondeat Superior* itself, for that is simple and easily understood, but the trouble lies in ascertaining whose servant the person is that does the injury. When the last is decided the question is solved.

The rule is, to a marked degree, founded on a certain power which the servant is privileged to exercise, and which, for the prevention of injuries to third parties, he is bound to exercise over the acts of his subordi-

(1) *Michael v Stanton*, 3 Hun. 462.

ates; therefore, where no such power exists, the rule cannot be exercised. Hence this direct and absolute co-existence of the maxim with the relation to which it is applicable, and to the particular subject matter to which that relation extends, is an important proposition in determining to what cases the rule may be extended.

There is one important qualification to be observed in this connection, namely; that there can be but one responsible superior for the same subordinate at the same time, and in respect to the same transaction.

The old cases regarded absolute ownership in the property, in the use of which some injury had occurred, as a conclusive test in determining who was liable for the servant's acts in the use of the same; but this is not regarded as law now. Ownership may, however, be material as evidence in showing whose servant its custodian was. As for example permitting one's name to remain over the door of a house of business and on a cart, is evidence that such person holds himself out as owner of the cart and master of the driver, so as to

charge him for liability for the driver's negligence.(1)

To conclude, therefore, a general rule may be laid down as follows: The servant must, at the time of the accident, have been in the charge of the master's property by his consent and authority, engaged in his business, and in respect to that property and business, under the master's control.

The French law on this point is in harmony with our own. But in their interpretation of the article the French lawyers have qualified the doctrine so far as regards the "Commettant" and "préposé" by saying that to make the former liable for the negligence of the latter, the préposé must be acting "sous les ordres, sous la direction et la surveillance du commettant;" that is, the servant must be acting not only under the orders, but under the direction and surveillance of the principle.

. Liability of the master when the Servant acts beyond the scope of his authority.--- The general rule is that a master will not in any case be liable for wrongs committed by his servant when not acting about

(1) Sloane v Elmer, 1 Hun 310.

his master's business; or what is substantially the same thing, while not acting within the scope of his authority. This statement is so reasonable and is based on grounds so obvious that they need scarcely be suggested. In all affairs of life men are obliged to accomplish some acts through others. But where could such persons be found who would venture so to act, if the mere circumstance that they were employed by another about any business, made them insurers against all wrongs which they might commit during the period of the employment. Our law does not even put a father to such an onerous responsibility in respect of the torts of his minor child. Although for reasons of public policy the husband was formerly held liable "civiliter" for the torts of his wife. But in all other cases where the relation of master and servant subsists by virtue of contract, and the servant acts outside of his employment, the maxim Respondeat Superior does not apply.

What is meant by the terms "course of employment" and "scope of authority?"----- These expressions are found in nearly all the text books relating to this subject, and are current in the arguments and decisions of -----

this class of cases. They are phrases which have a settled signification, but their meaning can only be accurately defined by the illustration of authoritatively decided cases. There are two cases which may serve as illustrations; in the one the defendant was held liable, in the other not. The distinction, if any, between the circumstances of the two cases is very fine, but they are the leading cases and thus give the key to the whole line of authorities on the subject. In the first case, *Whatman v Pearson*, (1) a contractor, - defendant Pearson — was employed under the district board of Greenwich in carting away the soil excavated from a highway during the construction of a sewer, and for this purpose employed a number of men with horses and carts. The duty of the men so employed was to travel with their carts for a certain number of hours each day over a specified route, with an hours interval for dinner, but never to leave their horses or carts, or quit their work. One of the men went home to dinner at a place about a quarter of a mile out of the line of his work, and left his horse and cart in the street

(1) *Whatman v Pearson*, L.R. 3 C.P. 422.

in front of his house. While the driver was thus absent, the horse ran away and injured the plaintiff's railings; for which damage, action is brought. The judge at the trial left it to the jury to say whether the driver had been guilty of negligence, and whether he was at the time acting within the scope of his authority. They found that he was, and gave their verdict for the plaintiff on both points. This decision was sustained by the higher court.

The second case, Story v Ashton (1) was this; The defendant was a wine merchant, and on the day in question sent his clerk and carman with a horse and cart to deliver wine at B. They delivered the wine and received some empty bottles to return. It was the duty of the carman to have driven back directly to the defendant's office, left the bottles there, and taken the horse and cart around to the stables which were near. Instead of doing this the carman, when within a short distance from home, at the persuasion of the clerk, turned off in another direction on an errand for the clerk. While driving along the road in pursuit of this errand, he heedlessly drove over the plaintiff. The

(1) Story v Ashton, L.R. 4 J.B. 476.

question before the court was, whether the defendant was liable for the negligence of the carman; and this was decided in the negative. Cockburn J. says; "The true test is, that the master is only responsible so long as the servant can be said to be doing the act, the doing of which he is guilty of negligence in the course of his employment as servant..... Here the carman started on an entirely new and independent journey, which had nothing at all to do with his employment."

The first case is perhaps an extreme one for the inference of the master's liability.

LIABILITY OF THE MASTER
FOR THE SERVANT'S WILFUL
OR
MALICIOUS ACTS.

The more recent, and as it is generally conceded, the better rule, is that, although the act was wilfully performed, the master will not be relieved from liability, provided the act was done in the course of the master's business and within the scope and limits of the servant's employment. Upon the authority of the earliest case on this point, *McManus v Cricket*, (1) holding that a master is not liable for the wilful acts of a servant in driving his master's carriage against another, without the direction or assent of the master, a long line of decisions arose. The rule declared in these cases was that the master was liable only, where the injury was caused wholly by the servant's negligence in the discharge of the master's business, and not where the servant's acts were intentionally wrongful and malicious. The theory on which the decisions are put seems to be, that authority from the master to the ser-

(1) *McManus v Cricket*, 1 East., 106.

vant to commit a wrong or a crime will not be implied, and that such wilful acts will be deemed those of the servant and not the master. They recognize a peculiar mental condition of the servant at the time the act was done, and make the moral quality of the act the test of the Master's liability, instead of leaving it to depend upon the inquiry whether or not the act was done in the course of the master's business. Under the operation of such a rule the master would get the benefit of all his servants acts done for him, whether right or wrong; and would escape the burden of all intentional acts done for him which were wrong. In other words, it would enable the master to escape liability for certain acts, because done by another, for which he would be responsible if done by himself; and the public, obliged to deal with his agents, might be wholly without redress for any intentional injuries done by the servants. According to this it would always be safer for a man to conduct his business vicariously than in his own person.

A doctrine so fruitful of mischief could not long stand unshaken in an enlightened system of jurisprudence,

and so we find it repudiated by eminent writers. (1)
 "The language in *McManus v Cricket*", as said by Judge Redfield, (2) "is either misunderstood, or is not law in America, and never has been." But this dictum must be taken with some qualification, for the case was followed for some considerable time in many of the states of this country; as the development of the New York law on this point (see below) will indicate.

The question is, therefore, in all cases in which the master is sought to be charged for the act of the servant, not whether the act was wilful or malicious, but whether it was done while the servant was engaged in the course of the master's business and within the scope of his employment. This rule is received with approval as being the more just and reasonable interpretation of the liability of the servant, and one which places it upon a clear and equitable foundation.

History of the New York doctrine as to wilful acts:----- The progress of the law on this point is not more interesting in the state of New York than in many other states of the union. Still as illustrative of

(1) Cooley on Torts 535; Reeves Dom. Rel. 640.

(2) *Howe v Newmarch*, 11 Allen 49.

how unwilling the courts are to depart from any apparently established precedent, this state furnishes a good example. And although it may be necessary to reiterate to some extent what has already been said, still a brief résumé of the law must necessarily be indulged in, if any attempt is made to treat of the development of this subject in New York state.

The doctrine that the master is not liable for the servant's wilful act was followed in New York at an early date. The first case was *Wright v Wilcox* (1) in which it was said that the master could not be held liable for the servant's wilful act of mischief. The decision was based upon the theory that the wilful act of the servant was deemed to be a departure from the masters business. The effect of this rule -- as already stated pg. 22 -- was to make the wilfulness of the act, in every case, the test of liability. For if the servant was engaged in his master's business and committed a wilful act, his employment, so far as that act was concerned, terminated eo instanti. If then the act was wilful or malicious, the plaintiff who suffered from it,

(1) *Wright v Wilcox*, 19 Wend. 348.

could not as a matter of law recover.

Several cases follow this, one of which especially deserves brief mention. This is the case of *Isaacs v Third Ave. R.R.Co.*, (1) one which gave rise to much difficulty upon the question as to what acts of the servant the master is liable for. Here a lady passenger upon a horse car desiring to alight, stepped out upon the platform of the car and requested the conductor to stop it; declining to get off until the car had come to a full stop. While the car was still in motion, the conductor threw the lady from the same with great violence, so that, falling upon the pavement, she was seriously injured. The court of appeals held the act was wanton and malicious, and not in performance of any duty of the master; and therefore the master was not liable. The case has been severely criticised, and eminent authority has declared it erroneously decided. (2) It is, without a doubt, a border case; and although the true test for the liability of masters is there recognized, still the difference in opinion arose from the peculiar facts, and the case cannot be considered as

(1) *Isaacs v Third Ave. R.R.Co.* 47 N.Y. 122.

(2) *Moak's Underhill on Torts* 31.

seeking to overrule or qualify the doctrine in any manner. The R.R.Co. contracted with the passenger for a safe and courteous exit from the car, and the conductor, being in charge of the car, was charged with the duty of providing it. SO that when he violated that duty he was guilty of a breach of the duty for which he was responsible.

The true rule as finally laid down in *Mott v Consumers Ice Co.* (1) seems to be that for the acts of a servant within the general scope of his employment, while engaged in his master's business, the latter is responsible whether the act be done negligently, wantonly or even wilfully; the quality of the act does not excuse. Thus was the rule of *McManus v Cricket*, as laid down in *Wright v Wilcox*, gradually relaxed and at last completely overthrown in the state in which it received the most emphatic recognition.

Exceptions as to the application of the rule regarding the servant's wilful or malicious acts:---There are certain classes of cases in which the application of the test --see page 23-- as to wilful acts, is not

(1) *Mott v Consumers Ice Co.* 73 N.Y. 545.

of essential importance, but in which the master is nevertheless held responsible for injuries caused by the wrongful acts of his servants. These are cases where he is under an absolute, imperative duty to do a certain act. Such are the following: (a) Where the master has made a contract to do a certain thing, and his servants, by wrongful acts, have prevented its fulfilment, though such acts be wilful and malicious. (1) (b) Where the master is a common carrier of passengers, and therefore, under the legal obligation to protect its patrons while in his charge and give them a safe and comfortable journey. It is the carrier's duty to treat his passengers respectfully, and protect them against the violence and insults, not only of strangers and co-passengers, but particularly of his own servants. If therefore the passenger is assaulted and insulted through the wilful misconduct of an employee, the master is held liable. In one aspect, this duty may be regarded as flowing from an implied contract; so that the master would be liable on the same ground as in case (a) above. (2)

(1) Weed v Panama R.R.Co. 17 N.Y. 545.
 Blackstone v N.Y. & Erie R.R.Co. 20 N.Y. 48.

(2) Bryant v Rich, 106 Mass. 180.
 Goddard v Grand Trunk R.R.Co. 57 Me. 202.

(c) Where the servant, by his wrongful act, creates a nuisance upon the master's premises, or does an act in the use or improvement of such premises, which causes a trespass to adjacent property; as, where servants are blasting on their master's land, and stone and earth are thrown upon the adjacent premises. (1)

(d) Where the master is an innkeeper, and therefore absolutely responsible at common law for the safety of the goods entrusted to him, (except from injuries occasioned by the act of God or the public enemy) and his servants cause the loss or destruction of the goods, or injury to them. The master is liable for the loss sustained, although the servants did the wrongful act wilfully.

(1) Hay v Cohoes Co. .2 N.Y. 189.

L I A B I L I T Y O F P R O P R I E T O R
 F O R N E G L I G E N C E O F
 I N D E P E N D E N T C O N T R A C T O R .

The application of the doctrine Respondeat Superior frequently gives rise to questions of great nicety respecting the responsibility for acts or negligence of a contractor.

Before considering the various cases, a general rule as a result of them may be laid down as follows: One who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control except as to the results of his work, will not be answerable for the wrongs of such contractor, his sub-contractors, or his servants committed in the prosecution of such work.

The starting point from which all the modern cases on this question have been argued, is the case of Bush v Steinman. (1) Briefly stated the case is this: A
 owning a house by the roadside, contracted with B to

 (1) Bush v Steinman 1 Bos. & Pull. 404.

repair it for a stipulated sum; B contracted with C to do the work; C with D to furnish materials. The servant of D brought a large quantity of lime to the house and placed it in the road by which the plaintiff's carriage was overturned. It was held that A was answerable for the damages sustained. Eyre C.J. says, however, that he has "great difficulty in stating accurately the ground on which the action is to be supported" Hooke J. decides the case on the ground that "one having work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs." According to this a man who builds a house is responsible for the negligence of every man, and his servants, who furnishes material for the same, whereby damages result to third parties;— and this, regardless of how remote or inconsequential the damage.

An examination of the authorities on which Bush v Steinman is decided, will justify the conclusion that the case does not even recognize the principles on which the former cases are decided; for in them, the acts done, which were the subject of the complaint, were either un-

der the control of the defendant , or else amounted to a nuisance committed upon the premises to the injury of the plaintiff's estate.

The question, which seemed to be unsettled, came up again in *Quarman v Burnett*, (1) a case as to the liability of the owner of a carriage, who had hired horses and a driver from a livery stable, for negligence of the driver by which a third person was injured. The court held that the defendant was not liable on the ground that he did not do the act which caused the injury, or in any way controlled or directed it. This case has been uniformly followed in England, and is regarded as having settled the question there.

The decisions in the United States have not been entirely uniform. The leading case,— *Hilliard v Richardson*,— (2) follows the holding of *Quarman v Burnett*. Thomas J., in an elaborate opinion reviewing all prior cases, says of *Bush v Steinman*;— "if a case can be said to have been overruled, indirectly and directly, by reasoning and authority, this has been. No one could have examined the case without feeling the dif-

(1) *Quarman v Burnett*. 6 M. & W. 499.

(2) *Hilliard v Richardson*, 3 Gray. 349.

ficult of that clear headed judge, Chief Justice Eyre, of knowing on what ^{ground} its decision was put." In New York there has been a multitude of cases and for a time they seemed inclined to follow the lead of *Bush v Steinman*. But in *Blake v Ferris* (1) it was declared that the principle laid down in *Bush v Steinman* was not law in New York state.

Who are independent contractors? --- It is important to distinguish between a servant and a contractor. The term "contractor" is used to designate a person who is not, like a servant, under the constant and immediate direction and control of his employer in the prosecution of the work which he is engaged to do, but who accomplishes a particular end or result, controlling the work during its progress. An independent contractor as defined by a Pa. judge (2) is "one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." The contractor must answer not only for his own wrongs but for the wrongs committed in the course of the work

(1) *Blake v Ferris*, 5 N.Y. 48.

(2) *Harrison v Collins*, 86 Pa. St. 159.

by his servants.

Under the operation of such a rule the public will be better protected; for the contractor, being responsible for his own negligence, will thus be taught caution; while a suffer from the negligence of his servants, will not be compelled to resort for compensation to the insolvent servants.

Where work contracted for is wrongful per se,-----
 If a proprietor of real property contracts for work which is wrongful per se,-- that is, if in ordinarily performing the same it amounts to a nuisance, or is directly or necessarily injurious to third parties,-- he will be responsible to such third parties for damages resulting from the work, or nuisance. Otherwise a responsible proprietor having work to perform, the execution of which would be attended with danger and perhaps injury. to third parties, could let the doing of the work by contract to an irresponsible party with the view and for the purpose of avoiding personal liability for any damages resulting from its execution in the manner required. The liability of the master in such

cases, however, rests upon the idea that he is a co-trespasser, by reason of his directing or participating in the work done, and not on the principle of Respondent Superior.

Where the work is dangerous to others.-----
 If, according to previous knowledge and experience, the work which a proprietor engages a contractor to do is likely to be dangerous to others, although carefully performed, it rests with the proprietor to foresee such mischief and guard against it. In other words the proprietor directs an act to be done from which injurious consequences will result, unless some means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as a part of the contractor's duties. The proprietor is not, therefore, in the position of a man who has simply authorized and contracted for the execution of a work from which, if executed with due care, no injury can arise; but is responsible, if in the progress of the work, injury arises from the negligence of the contractor and his servants.

Liability for "collateral" acts of contractor.-----

A. "collateral" act as here referred to, is one not directly connected with the work engaged in; as, leaving work unguarded at night, or a pile of dirt in the highway. The rule is well stated by the supreme court of the United States in *Robbins v Chicago*(1). Clifford J. says: "when the obstruction or defect created or caused in the street is purely collateral to the work contracted to be done, the rule is that the proprietor is not liable."

There was a line of cases which distinguished between a contractor and a servant in that an employer was not liable for a "collateral" act of negligence by a contractor, whereas he was liable for such acts on the part of a servant. But it is questionable whether such is the law now.

Statutory regulations make proprietor liable.-----

Where a duty is imposed by statute upon a person to perform an act, he cannot invoke the rule of *Respondent Superior* to excuse any default or non-performance. This is so plain that nothing more need be said regarding it;

 (1) *Robbins v Chicago*, 4 Wall.(U.S.) 657.

although there are many cases decided on just this ground.

Effect of negligence in selecting contractor.-----

The relation of master and servant depends in a measure upon this right which the party employing has of selecting the party employed. No one can be held responsible as **principle**, who has not the right to choose the agent from whose acts the injury flows. So if the proprietor choose a contractor wholly incompetent for the work engaged in, and injury ensues, the proprietor is liable for his own negligence in making such a choice.

Proprietor is liable when he personally interferes with the contractor's workman.---- An employer may make himself liable by assuming control of the work or any part of it, so that the relation of master and servant is created, or so that an injury which ensues may be traced to this interference. The rule laid down by Bosworth J. in *Hefferman v Benkard*, (1) is that "if an owner modifies in any respect his contract with those contracting to erect a building, so that in doing any particular act the workmen are obeying the direc-

(1) *Hefferman v Benkard*, 1 Robt. (N.Y.) 486.

tions of the owner, if that act is dangerous and negligent, and damage ensues, the owner is liable."

What supervision by the proprietor will take the case out of the rule depends necessarily upon the circumstances of each case, and the interpretation of the contract itself. The mere fact that the proprietor retains a general supervision over the work for the purpose of satisfying himself that the contractor carries out the stipulations of the contract, is not control sufficient to make him responsible for the wrongs done to third persons in the prosecution of the work.

If control is stipulated for at all, it must not be so absolute as to make the discretion of the contractor subordinate to that of his principle, and thus create the relation of master and servant.

APPLICATION OF THE DOCTRINE
to
CORPORATIONS.

The doctrine of respondeat Superior applies to corporations as well as to individuals. It may be broadly stated that in respect to the liability for the acts of their servants, corporations stand on the same footing as individuals with this limitation; that the business about which the servant was acting when the wrong was committed, must have been such a business as the corporation could lawfully engage in; that is, it must have been intra vires; and not ultra vires; for the corporation cannot exercise other powers than those which are conferred by legislative authority.

Formerly the rule did not apply to municipal corporations so as to charge them for the delicts of their servants; but now they are held to the same liability in respect to the delicts of their officers and servants, when acting about their official employment, which attaches to private corporations and individuals. This liability is necessary vicarious, and resting upon

the maxim Respondeat Superior. Some states (New York) (1) have modified the rule that acts must be intra vires to the extent, that a corporation is liable for the acts of its officers, done within the scope of their general powers, though the particular act which the officer assumed to do, is one which the corporation could not rightfully do.

(1) Booth v Farmers Bnk., 50 N.Y. 396.
E.H.Co. v McCarthy, 96 U.S. 298.

I L L U S T R A T I V E C A S E S .

Agents of public officers.---- Here there is a distinction between officers who act directly for the public and those who act distributively for the individuals and indirectly for the public. Those who act indirectly for the public are responsible to the individuals for whom they undertake to act, in a private action. But officers whose duties are of a public nature are not usually held liable for the wrongs of those through whose agency they are obliged to act; they may, however, be liable to the public in a criminal prosecution. They are agents of the public and not of those superior officers whose orders they receive and obey. For example, no instance is disclosed where an attempt has been made to hold a military commander liable for the wrongs of his subordinates, unless such a wrong could be directly traced to some negligence of his own.

On the other hand, officers, and sheriffs, who act distributively for the public and receive their fees from the particular individuals for whom they act,

are generally held liable for the wrongs of their deputies.

Postmasters, although answerable for the want of attention to the official conduct of their subordinates, are not responsible for their secret and individual delinquences. Therefore an action does not lie against a postmaster for the stealing of a letter by a sworn assistant, appointed and retained by him in good faith. But it is otherwise if the postmaster employ a private person, not duly appointed and sworn as an assistant; because this is official misconduct on the part of the postmaster. So it has been held that a mail carrier who has not been sworn according to law is not an officer of the government, but a servant of the contractor who appoints him, so that the latter is responsible for his defaults.

Shipping. --- Whether the master or the owner of a ship is liable for the negligence of a crew depends upon the contract between the master and the owner, ^{as} explained by surrounding circumstances. The relation of master and servant does not cease unless the owner has

given up all control of the vessel and of her employment, and all the immediate and direct interest in the freight earned by her. In other words, if the charter party is such that the owner is to provide everything and have a crew of his own choosing, or retains power to dismiss the officers and crew, or in fact hires, pays and controls them, the owner, and not the master, is to be deemed the master of the crew. But it is obvious that if a contract amounts to a demise of the vessel for a definite term, then the charterer becomes the owner pro hac vice, and the crew are his servants. The tendency of the courts is to hold the crew the servants of the owner instead of the charterer. (1)

Licensed public carmen or draymen, and others who, under a public license, follow certain vocations on behalf of any one who may hire them to do a particular job within the bonds of their license, do not stand in the relation of servants to the one hiring them; but are deemed independent contractors in respect of that particular job. The mere fact, however, that a man is obliged by law, to select servants from a particular

(1) Annett v Foster. 1 Daly 502.

class who are skilled in their respective callings, and are so licensed, does not necessarily exclude the relation of master and servant existing between them.

C O N C L U S I O N . .

Such is a brief outline relating to the responsibility of masters to third parties for the torts of their servants; but the distinctions as to when a servant is, and when not acting within the scope of his employment, or even whether he be a servant at all, are so refined, and the authorities are so conflicting that a thorough and careful study is necessary in order that the difference may be distinguished.

The writer has attempted to first lay down general rules and then point out the more important exceptions and limitations to the same, which could be gathered from the cases. It is impossible to lay down any set of "iron clad" and inflexible rules applicable to all cases of this nature, for the reason that exactly the same circumstances are not likely to occur in any two cases. However, certain rules may be deduced from the almost infinite mass of law on the subject, which apply to classes of cases, the facts of which are of the same general character.

In conclusion, if what has already been said shall materially aid or serve as a guide in solving any question respecting a master's liability for his servants' torts, one purpose of the writer will have been attained.

A U T H O R I T I E S .

	page
Annett v Foster, 1 Daly 502	42
Blackstone v N.Y.& Erie R.R.CO. 20 N.Y. 48.	27
Blackwell v Wiswell, 24 Barb. 556.	13
Blake v Ferris, 5 N.Y. 48.	32
Booth v Farmers Hnk., 50 N.Y. 396.	39
Bryant v Rich, 106 Mass. 180.	27
Bush v Steinman, 1 Bos. & Pull. 404.	29
Carman v Mayor of N.Y. 14 Abb. Pr. 301.	8
Cooley on Torts 535; Reeves Dom. Rel. 640.	23
Gregory v Piper, 17 E.C.L. 454	10
Harrison v Collins 36 Pa. St. 159.	32
Hay v Cohoes Co. 2 N.Y. 159.	28
Hefferman v Benkard, 1 Robt. (N.Y.) 436	36
Hilliard v Richardson, 3 Gray 349.	31
Howe v Newmarch, 11 Allen 49	23
Goddard v Grand Trunk R.R.Co. 57 Me. 202.	27
Inst. Iv, Tit. 8	6
4 Inst. 114.	8

	page
Isaac v Third Ave. R.R.Co. 47 N.Y. 122.	25
McManus v Cricket, 1 East 106.	21
Michael v Stanton, 3 Hun. 462	14
Moak's Underhill, on Torts 31	25
Mott v Consumers Ice Co. 73 N.Y. 543.	26
Quarman v Burnett, 6 M. & W. 499.	31
R.R.Co. v McCarthy, 96 U.S. 298.	39
Robbins v Chicago, 4 Wall.(U.S.) 657.	35
Sloane v Elmer, 1 Hun. 310.	16
Story v Ashton, L.R. 4 Q.B. 476.	19
Town of Pawley v R.R.Co. 28 Vt. 297.	13
Weed v Panama R.R.Co. 17 N.Y. 362.	27
Whatman v Pearson, L.R. 3 C.P. 422.	18.
Wright v Wilcox, 19 Wend. 343.	24
