This exception to the rule is commonly referred to the conception, that, under such circumstances, the employer is a joint tort-feasor with the contractor(*b*). In a logical point of view this

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(*b*) "It is not necessary that the relation of principal and agent, in the sense of one commanding and the other obeying, should subsist, in order to make one responsible for the tortious act of another; it is enough if it be shewn to have been by his procurement and with his assent. The cases where the liability of one for the wrongful act of another has turned upon the relation of principal and agent, are quite consistent with the party's liability irrespective of any such relation; as, if I agree with a builder to build me a house according to a certain plan, he would be an independent contractor and I should not be liable to strangers for any wrongful act unnecessarily done by him in the performance of his work; but clearly I would be jointly liable with him for a trespass on the land, if it turned out that I had no right to build upon it." *Upton* v. *Townend* (1855) 17 C.B. 30, 71, 25 L.J.C.P.N.S. 44, 1 Jur. N.S. 1089, 4 Week. Rep. 56, per Willes, J.

"There can be no such thing as an innocent agency in the commission of a tort; and doing an illegal or tortious act by another is doing it by one's self." *Alabama M.R. Co.* v. *Coskry* (1890) 92 Ala. 254, 9 So. 202.

"Where the act contracted to be done is itself a wrong, the enployer is liable to the injured party, as though he himself had done the injury. This liability does not, as when the wrongful act is done by his servant, rest upon the principle of *respondeat superior*, but upon the fact that the employer is liable as a co-trespasser with the independent contractor." *Crisler* v. *Ott* (1894) 72 Miss. 166, 16 So. 416.

"In none of these exceptional cases does the question of negligence arise. There the action is based upon the wrongful act of the party, and may be maintained against the author or the person performing or continuing it." *Berg* v. *Parsons* (1898) 156 N.Y. 109, 41 L.R. A. 391, 66 Am. St. Rep. 542, 50 N.E. 957.

"Before a case can be made calling for an application of that principle [i.e., *respondeat superior*] it must appear, not only that the relation of master and servant existed, but that the servant, without the assent of the master, has done some act, or omitted some duty, while executing the lawful commands of the master, to the injury of a third person. . . . But when the servant has done only that which the master commanded or permitted, the latter is chargeable as a joint participator in the wrong, and made liable for his own unlawful conduct, in the same manner as though no such relation had existed." *Carman* v. *Steubenville & I. R. Co.* (1854) 4 Ohio St. 399.

The following of the statement of the law by Wills, J., in *Holliday* v. *National Teleph. Co.* [1899] 1 Q.B. 221, 68 L.J.Q.B.N.S. 302, was not impugned in any way by the Court of Appeal, although the decision itself was reversed in [1899] 2 Q.B. 392, 68 L.J.Q.B.N.S. 1016, 81 L.T.N.S. 252, 47 Week. Rep. 658. It is quoted at length for the reason that it explains very clearly the rationale of the doctrine which, in the present point of view, determines the extent of the employer's liability. "If a person orders a thing to be done which, when done, or as done, is an interference with the safety or rights of another who, at the time he is injured, is in the exercise of his lawful rights, it is no answer to say that the person for whom the offending thing has been done has procured it to be done by virtue of a contract with some one independent of his interference or control—'independent contractor' of the books. A man has a hole dug for him, into which a person lawfully passing near or over the spot falls without fault of his own and is injured; a man has a piece of pavement laid down for him in a public highway and leaves part of it projecting so that a passer-by, though exercising due care, trips against it and is