

the power of the defendant to control the agent by whose act the injury was caused. Eyre, Ch.J., after stating that all the judges were of opinion that the action could be maintained remarked: "I find great difficulty in stating with accuracy the grounds on which it is to be supported. The relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large." But he considered that the defendant might be charged with liability on the authority of three cases, *Stone v. Cartwright*, 6 T.R. 411, 3 Revised Rep. 220, and *Lonsdale v. Littledale* (1793) 2 H. Bl. 267, 269, and one which had not been reported, but which Buller, J., recollected.

With regard to the first of these cases, it is to be observed that the injury was caused by the acts of the defendant's servants, a circumstance which, if the law had been then definitely settled in its present form would clearly have rendered it inapplicable as a precedent. In the second case the negligent persons were the immediate servants of the defendant, as they were hired by his steward or foreman. Its effect and rationale were stated by the learned Chief Justice as follows: "Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference) that an injury was done to the plaintiff's house, and his Lordship was held responsible. Why? Because the injury was done in the course of his working the colliery; whether he worked it by agents, by servants, or by contractors, still it was his work; and though another person might have contracted with him for the management of the whole concern without his interference, yet the work being carried on for his benefit, and on his property, all the persons employed must have been considered as his agents and servants notwithstanding any such arrangement; and he must have been responsible to all the world, on the principle of *Sic utere tuo ut alienum non laedas*. Lord Lonsdale having empowered the contractor to appoint such persons under him as he should think fit, the persons appointed would in contemplation of law have been the agents and servants of Lord Lonsdale. . . . The principle of this case therefore, seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point." Such language would, it is clear, not be used by any modern judge.

The ruling in the third case dealt merely with the liability of a master for the acts of a person employed by his servant, and was irrelevant as an authority, if its applicability be tested with reference to the law as it now stands.

The length to which the Chief Justice was prepared to go is further indicated by a subsequent passage in his opinion in which it was held that the owner of a house who was rebuilding or repairing it would be equally liable for the nuisance created by carrying a hoarding so far out as to encroach on the street, whether the work was done by his own servants or by a contractor.

The actual position of the court is equally apparent in the remarks made by the other judges.

Heath, J., said: "I found my opinion on this single point, viz.: That all the subcontracting parties were in the employ of the defendant. It has been strongly argued that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further. Thus a factor is not a servant; but being employed and trusted by the merchant, the latter according to the case in *Salkeld* is responsible for his acts."

Rooke, J., said: "He who has work going on for his benefit, and on his own premises, must be civilly answered for the acts of those whom he employs. According to the principle of the case in 2 Lev. it shall be intended by the court, that he has a control over all these persons who work on his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own. He ought to reserve such control, and if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. . . . The person from whom the whole authority is originally derived, is the person who ought to be answerable and great inconvenience would follow if it were otherwise."