this connection, it should be observed that, as the principle, Respondeat superior, operates independently of the presence or absence of the element of incompetency, a plaintiff cannot recover on this footing, unless he declares specifically upon the master's negligence in employing or retaining an unfit person.[2] The burden of proving negligence in respect of the employment or retention of the servant lies on the plaintiff.[3]

(2) Where the tortious act was done either by the orders of the master, or with his sanction as implied from the fact that he was present when it was done and refrained from exercising his power of control for the purpose of preventing it.[4]

(3) Those in which the injury was caused by some defect in the vehicle or horse entrusted to the servant, and the existence of that defect evinced negligence on the master's part. In cases of this type recovery may be had without proving that the servant was guilty of misconduct in managing these instrumentalities.[5]

3. Liability negatived on the ground of the servant's want of power to do the act which caused the injury.—The injured person will be precluded from recovering damages from the master of the tortfeasor, if the evidence discloses either of two situations.

(1) One of those situations is presented where it appears that the management of the vehicle or riding-horse which

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[2]For cases in which evidence respecting the unfitness of the servant was held to have been properly excluded on the ground that it was not averred in the declaration, see *American Strawboard Co.* v. *Smith* (1901) 94 Md. 19, 50 Atl. 414; *Dinsmoor* v. *Wolber* (1899) 85 Ill. App. 152.

[3]*Warren* v. *Porter* (1906: Mich.) 108 N.W. 435, (team was frightened and ran away, owing, as was alleged, to its having been driven on the wrong side of a street car).

[4]*Chandler* v. *Broughton* (1832), 1 Cr. V.M. 29; *McLaughlin* v. *Pryor* (1842), 4 M. & G. 48; *Strohl* v. *Levan* (1861), 39 Pa. 177. The actual point determined in all these cases was that, under the given circumstances the appropriate form of action against the master was trespass. See § 12, *post*.

[5]*Johnson* v. *Stevens* (1908) 123 App. Div. 208, 108 N.Y. Supp. 407, where owing to the unsafe and suitable character of a wagon, a portion of the load fell upon the team and caused it to run away.