Canada Law Journal.

VOL. XLI. FEBRUARY 1, 1905. NO. 3.

LIABILITY OF AN EMPLOYER FOR THE TORTS OF AN INDEPENDENT CONTRACTOR.

PART II.

IV. EMPLOYER LIABLE WHERE THE INJURY WAS THE DIRECT RESULT OF THE WORK CONTRACTED FOR.

43. Generally.

44. Employer liable where the stipulated work is illegal.

45. —and where the performance of work will involve the commission of a trespass.

46. —or will necessarily cause injury.

47. —and where the work is done according to the plans furnished by the employer.

47a. —or according to the methods prescribed by the employer.

V. LIABILITY OF EMPLOYER FOR INJURIES CAUSED BY THE PERFORMANCE OF WORK WHICH IS DANGEROUS UNLESS CERTAIN PRECAUTIONS ARE OBSERVED.

48. Doctrine stated generally.

49. Limits of the doctrine.

50. Effect of stipulation by contractor to take appropriate precautions.

50a. Necessity of showing that the contractor was acting under the authority of the employer.

51. Liability of employer where the work is dangerous to persons using highways.

(*a*) *Erection of buildings.*
(*b*) *Delivery of goods through openings in foootpaths.*
(*c*) *Construction or repair of highways.*
(*d*) *Other construction work on highways.*
(*e*) *Removal of wrecks from navigable rivers.*

52. —and to adjoining landowners.

53. —and to persons invited on the defendant's premises.

54. —and to tenants.

55. —and to owners of vessels navigating rivers.

VI. LIABILITY OF EMPLOYER FOR INJURIES RESULTING FROM THE NON-PERFORMANCE OF ABSOLUTE DUTIES.

56. Generally.

57. Duty to comply with a statute.

58. Duty of a municipality to keep highways in safe condition. Generally.

59. Liability incurred where the contractor is employed by the municipality itself.

60. Liability incurred where the ntractor is employed by a private person.

60a. Necessity of showing that the municipality had notice of the dangerous conditions.

61. Duties imposed on grantees of franchises and special privileges in respect to highways.

62. Duties incident to the exercise of corporate and other franchises. Generally.

62a. Liability in respect to construction work.

62b. Liability in respect to the operation of the completed plant.

(*a*) *Liability of railway companies—Generally.*
(*b*) *Liability of railway companies considered with reference to the legality of the contractual arrangements.*
(*c*) *Liability of companies other than those operating railways.*

63. Duty to see that no nuisance is created or maintained.

64. Duty to insure safety.

64a. Duty to avoid interfering with the right of lateral support.

65. Duty not to impede the public in the use of highways.

66. Duties assumed by an express contract.

67. Duties arising out of implied contract.

(*a*) *Carriers of passengers.*
(*b*) *Carriers of goods.*
(*c*) *Consignees of goods conveyed on railways.*
(*d*) *Persons giving public exhibitions.*
(*e*) *Masters.*
(*f*) *Landlords.*

68. Duty to rebuild party wall.

VII. LIABILITY OF EMPLOYER WHERE HIS OWN ACT WAS A PROXIMATE CAUSE OF THE INJURY.

69. Employment of a contractor who is incompetent or otherwise unfit.

70. Non-performance by employer of duties not cast by the contract upon the contractor.

71. Employer's tortious act co-operating with that of the contractor to produce the injury.

72. Failure to remedy a nuisance.

73. Control of or interference with the work.

74. Employer's ratification or adoption of the contractor's tort.

VIII. LIABILITY OF EMPLOYER AFTER HE HAS ASSUMED CONTROL OF THE SUBJECT-MATTER OF THE WORK EXECUTED BY THE CONTRACTOR.

75. Generally.

76. Necessity of showing that dangerous conditions were known to the employer.

IV. EMPLOYER LIABLE WHERE THE INJURY WAS THE DIRECT RESULT OF THE WORK CONTRACTED FOR.

43. Generally.—It is well settled that the rule as to the non-liability of an employer for the negligence of independent contractor is "inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do"(*a*).

(*a*) *Pickard* v. *Smith* (1861) 10 C.B.N.S. 470, 4 L.T.N.S. 470, per Williams, J. This passage was quoted with approval by Vaughan Williams, L.J., in *Penny* v. *Wimbledon Urban Dist. Council* [1899] 2 Q.B. 72, 77, 68, L.J.Q.B.N.S. 704, 80 L.T.N.S. 615, 47 Week. Rep. 565, 63 J.P. 406.

"I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself." *Ellis* v. *Sheffield Gas Consumers' Co.* (1853) 2 El. & Bl. 767, 770, 2 C.L. Rep. 249, 23 L.J.Q.B.N.S. 42, 18 Jur. 146, 2 Week. Rep. 19, per Lord Campbell.

One of the grounds on which a person may be held responsible for an act of negligence which he did not himself commit is that he "authorised" that act. *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196, per Smith, L.J.

A person who employs a contractor to do a particular act is liable for the injurious acts of the contractor which "flow out of the fulfilment of the contract." *Pitts* v. *Kingsbridge Highway Board* (1871) 19 Week. Rep. 884, 25 L.T.N.S. 195.

"The distinction appears to me to be that, when work is being done under a contract, if an accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the em-

ployer must be taken to have authorized the act, and is responsible for it." *Hole* v. *Sittingbourne & S.R. Co.* (1861) 6 Hurlst. & N. 488, 497, 30 L.J. Exch. N.S. 81, 3 L.T.N.S. 750, 9 Week. Rep. 274, per Wilde, B. In the same case Pollock, C.B., remarked that "when the contractor is employed to do a particular act, the doing of which produces mischief," the doctrine by which the employed is exempted from liability is not applicable.

In his well-known opinion, delivered to the House of Lords in *Mersey Docks & Harbour Board* v. *Gibbs* (1864) L.R. 1 H.L. 93, 114, 11 H.L. Cas 686, 35 L.J. Exch. N.S. 225, 12 Jur. N.S. 571, 14 L.T.N.S. 677, 14 Week. Rep. 872, Blackburn, J., drew attention to the necessity of bearing in mind the "distinction between the responsibility of a person who causes something to be done which is wrongful, . . . and the liability for the negligence of those who are employed in the work," and observed that "liability for doing an improper act depends upon the order to do that thing," and that, in the cases to which this principle is applicable "it is quite immaterial whether the actual actors are servants or not."

"If a contractor faithfully performs his contract, and a third person is injured by the contractor in the course of its due performance or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury." Seymour, J., in *Lawrence* v. *Shipman* (1873) 39 Conn. 586, quoted with approval in *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32.

"If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible." *Eaton* v. *European & N.A.R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

"One who authorizes a work which is necessarily dangerous, and the natural consequence of which is an injury to the person or property of another, is justly to be regarded as the author of the resulting injury." *Jefferson* v. *Chapman* (1889) 127 Ill. 438, 11 Am. St. Rep. 136, 20 N.E. 33

The rule exempting employers from liability for negligence of independent contractors does not apply "where the performance of the contract in the ordinary mode of doing the work necessarily or naturally produces the defect or nuisance which caused the injury." *Carlson* v. *Stocking* (1895) 91 Wis. 432, 65 N.W. 58.

The antithesis between injuries arising from the manner in which the work is done, and injuries arising from the fact that it is done, is frequently traceable in the language of judges. See, for example, *Boswell* v. *Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345 (Heath, J., arguendo); *Omaha* v. *Jensen* (1892) 35 Neb. 68, 37 Am. St. Rep. 432, 52 N.W. 833.

In a case where it is sought to hold a lessor liable "for the tortious conduct of a lessee, if the terms of the lease led to the wrong complained of, the authorities shew that in that case the lessor would be liable." . . . "But if the subject be let for a lawful purpose, and the lease does not expressly or by implication permit any injurious act to be done, the lessor would not be liable." *Duncan* v. *Magistrates of Aberdeen* 1877; Ct. of Sess. 14 Sct L.R. 603, per Lord Ormidale.

One of the cases in which the Georgia Civil Code of 1895, § 3819, declares the employer to be liable, is "when the work is wrongful in itself, or, if done in the ordinary manner, would result in a nuisance."

The fact that the injury did not arise from the thing itself which the contractor agreed to do is the diagnostic mark of those torts, to which the term "collateral" or one of its equivalents is applied, see § 39, *ante*.

In any case where the evidence renders such an instruction appropriate, a jury is correctly charged to the effect that, "if the necessary or probable effect of the performance of the work would be to injure third persons, or create a nuisance, then the defendant is not relieved from liability, because the work was done by a contractor over which it had no control in the mode and manner of doing it." *Southern Ohio R. Co.* v. *Morey* (1890) 47 Ohio St. 207, 7 L.R.A. 701, 24 N.E. 269.

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

---

(*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

explanation seems to be decidedly preferable to that which is based upon the notion that, in cases of this type, "it cannot properly be said that the company reserves no control over the work, and the relation of master and servant does not exist;" that "the contract controls and directs the action which causes the injury;" and that "the contractor, in following the contract, becomes the agent or servant" of the employer(c).

A plaintiff who seeks to hold the employer liable on the ground that the injury resulted from the act which the contrac-

---

injured by the fall; a man has works constructed for him, not unlawful in themselves, but which when done, by reason of their being badly or carelessly done, narrow an ancient highway, or infringe the provisions of an Act of Parliament which says that a certain space must be left between the ground and the under side of a bridge, and in consequence an accident occurs causing injury to another;—in all these cases the person ordering the work to be done is liable. He has interfered with the status quo, having no right as against his neighbour to do so, and his neighbour has suffered injury in consequence. So if a man puts up a sign projecting over a highway, and it falls by reason of imperfect construction and some one is injured. The person to whom the thing which does the mischief belongs, or who has caused it to be put, or who has maintained it, where it does the mischief, is liable, no matter whom he has employed to do it. The principle which underlies all these illustrations is that the person for whom the work has been done has failed to see to the doing of something which it was his duty to do, either by himself or by some one for him. The man who disturbs, or who fails to create, a state of things which other people have a legal right to expect at his hands, is liable for such disturbance or failure. The man who maintains an insecure weight hanging over the heads of passers-by fails in taking care that it shall not expose them to danger. The man who contracts a right of way, vertically or laterally, which the public have a right to enjoy in all its own height or width, and the man who digs a hole in a place where others have a right to expect no hole, disturbs a state of things to which they have a legal right, and does it at his peril if an accident happens by reason of what has been done. In the same way, if the hole deprives a neighbouring house of support to which it is entitled, the disturbance of the status quo is at risk of him who brings it about. But there is a broad and well-established distinction between such cases and those in which an accident has happened, not because the thing which has been ordered has been done badly, and in its bad state interferes with the rights of others, but because some process which may be natural or necessary in the course of effecting the result to be produced, forming as it were a mere incident in the train of operations and leaving no trace upon the completed work, has been carelessly done by the contractor's servant. This is what Lindley, L.J., has termed (adopting language previously used) 'casual or collateral negligence,' and, as he has pointed out, the difficulty lies rather in the application than in the enunciation of the principle." *Holliday* v. *National Teleph. Co.* [1899] 1 Q.B. 221, 228, 68 L.J.Q.B.N.S. 302. Wills, J.

That the liability of the employer under such circumstances "rests upon the idea that he is a trespasser, by reason of his directing and participating in the work done, and not on the principle or respondeat superior" was also laid down in *Kellog* v. *Payne* (1866) 21 Iowa, 575; *Atlanta & F.R. Co.* v. *Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277.

(c) *McDonnell* v. *Rifle Boom Co.* (1888) 71 Mich. 61, 38 N.W. 681.

tor agreed to do has the burden of proving that that act was inherently wrongful and that it was authorized by the employer(*d*).

44. Employer liable where the stipulated work is illegal.—Where the necessary authority to undertake the specified work has not been obtained, or where it cannot be performed without violating an express legislative enactment, the mere fact that it is entrusted to an independent contractor will not relieve the person for whose benefit it is done from liability for such injuries as its execution may produce(*a*).

(*d*) Where it is fairly inferable that the work "could have been done in a lawful manner, it is to be presumed that the contractor was employed to do the work in a lawful, and not in a negligent or unlawful manner." *Harrison* v. *Kiser* (1887) 79 Ga. 588, 4 S.E. 320.

(*a*) "If the thing complained of,—that is, the work which the defendants procured to be done,—could not be done otherwise than in an unlawful manner, no doubt they would be responsible for the consequences." *Peachey* v. *Rowland* (1853) 13 C.B. 182, 22 L.J.C.P.N.S. 81, 17 Jur. 764, per Maule, J.

In *Ellis* v. *Sheffield Gas Consumers' Co.* (1853) 2 El. & Bl. 767, 2 C.L. Rep. 249, 23 L.J.Q.B.N.S. 42, 18 Jur. 146, 2 Week. Rep. 19, the plaintiff, while passing along a street, fell over a heap of stones which had been left on the footway by the servants of a firm which had contracted to open trenches in order that the defendant might lay gaspipes. The trenches had been opened without any authority, and constituted a public nuisance. It was objected, for the defendants, that the cause of the accident was the negligence of the servants of the contractors, for which the defendants were not responsible. It was answered that the contract was to do an illegal act, viz., to commit a nuisance; and, that being so, that the defendants were responsible. Discussing the contention of defendants, counsel, Lord Campbell said: "He argues for a proposition absolutely untenable, namely, that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. I perfectly approve of the cases which have been cited. In those cases the contractor was employed to do a thing perfectly lawful: the relation of master and servant did not subsist between the employer and those actually doing the work: and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do, and, that being lawful, he was not liable at all. But in the present case the defendants had no right to break up the streets at all; they employed Watson Brothers, to break up the streets, and in so doing to heap up earth and stones so as to be a public nuisance: and it was in consequence of this being done by their orders that the plaintiff sustained damage. It would me monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done." The remarks of Wightman, J., were to the same effect: "It seems to me, as it did at the trial, that the fact of the defendants having employed the contractors to do a thing illegal in itself made a distinction between this and the cases which have been cited. But for the direction to break up the streets, the accident could not have happened: and, though it may be that if the workmen employed had been

careful in the way in which they heaped up the earth and stones the plaintiff would have avoided them, still I think the nuisance which the defendants employed the contractors to commit was the primary cause of the accident." Erle, J., succinctly stated his conclusion as follows: "I agree that there should be no rule, on this specific ground that, as I understand the facts, the cause of the accident was the very thing done in pursuance of the specific directions of the defendants contained in their contract; and that in my opinion makes the distinction between the present case, and those cited, in which the cause of the accident was the negligence of those doing the thing, not the thing itself."

An employer is responsible for damages resulting from work done in the course of the performance of a contract which authorized the contractors to make use of materials which could not be taken without infringing a statute. *Pitts* v. *Kingsbridge Highway Board* (1871) 19 Week. Rep. 884, 25 L.T.N.S. 195.

A landowner who enters into a contract for the erection of a building on a plan which is prohibited by a valid by-law of a city is liable to an adjoining proprietor for any damage which may be caused by the erection of the building. *Walker* v. *McMillan* (1882) 6 Can. S.C. 241, affirming (1881) 21 N.B. 31.

A person who, without special authority, makes or continues a covered excavation in a public street or highway, for a private purpose, is, in the absence of negligence in the party injured, responsible for all injuries resulting from the way being thereby rendered less safe, irrespective of any degree of care and skill in the party who makes or continues the excavation. *Congreve* v. *Smith* (1858) 18 N.Y. 79 (plaintiff fell through a flagstone over an area which the defendant had excavated without obtaining a license). The court said: "It is no answer to the present action that the covering of the area was done under the contractors, who had contracted to do the work properly, and that the defendants are not responsible for the negligence of the contractors' servants. The act was that of the defendants; they procured it to be done, and do not appear to have objected to it. Besides, the action may well stand on the basis of continuing the area and the stone covering it, they making the easement unsafe, compared with what it otherwise would have been. That is a sufficient ground of liability. The defendants were bound, at their peril, to make and at all times to keep the street as safe as it would have been if the area had not been constructed."

In a later case Seldon, J., in discussing the doctrine thus enunciated, remarked that it could not be material whether the excavation was a covered or an open one, provided it was unauthorized, and proceeded thus: "The fact chiefly relied upon in the defendant's behalf, that the injury resulted immediately from the negligence of a contractor, who was doing the work upon his own responsibility, and was bound by his contract with the defendant to guard, by proper precautions, against accidents does not constitute a defense to the action. The excavation was made on the defendant's account and at his request, in a public street, for a private purpose of the defendant, in which the public had no interest, and, so far as the case discloses, without the consent of the corporate authorities. The act of making the excavation was wrongful, without reference to the manner in which it was made or secured. The defendant was, therefore, liable for the injury which the excavation produced to third persons, without fault on their part, whether the workmen were guilty of negligence or not. . . . The basis of the defendant's liability is his own wrongful act in procuring the excavation to be made without authority, and not the negligence of the contractor or his workmen in performing or guarding the work." *Creed* v. *Hartmann* (1864) 29 N.Y. 591, 86 Am. Dec. 341 (plaintiff fell through planks stretched across a trench dug for a sewer).

If the plans supplied by the defendant for a building to be erected by him did, as a matter of fact, violate the provisions of a specific statute applicable to the class of work in question, he cannot exculpate

It will be observed that, by changing the logical standpoint, the cases which have been made to turn upon this principle may without difficulty be brought within the purview of another principle which will be discussed in a later section (57), viz., that a person who is subject to a statutory duty must, at his peril, see that it is fulfilled, whether the work to which it is incident is or is not let out to an independent contractor.

45. —and where the performance of work will involve the commission of a trespass.—"Where a trespass has been committed upon the rights or property of another, by the advice or direction of a defendant, it is wholly unimportant what contractual or other relation existed between the immediate agent of the wrong and the person sought to be charged. The latter cannot shelter himself under the plea that the immediate wrongdoer did the act in execution of a contract, or that he came within the definition of an independent contractor as to the performance of the work in the execution of which the tortious act was committed. If he advised or directed the act his liability is established"(*a*).

---

himself by shewing that they were approved by the officials of the civic department which exercises a supervision over such work. Such a department cannot authorize the execution of work on an illegal plan, nor absolve the defendant from his statutory duty. *Pitcher* v. *Lennon* (1896) 12 App. Div. 356, 42 N.Y. Supp. 156 (where the provisions of the New York Building Law were not complied with).

One is liable for an injury caused by the slipping of a stone which was so placed on the sidewalk of a city street, in front of his premises, in violation of an ordinance, as to constitute a nuisance, although it was placed there by an independent contractor only two or three days before. *Skelton* v. *Larkin* (1894) 82 Hun, 388, 31 N.Y. Supp. 234, affirmed in (1895) 146 N.Y. 365, 41 N.E. 90.

In *Clark* v. *Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590, the court, while recognizing the principle exemplified in the cases above cited, reversed the judgment for the plaintiff for the reason that the trial judge had instructed the jury on the theory that an excavation made by a contractor in front of the defendant's premises was necessary unlawful, because it was not done under a license.

For other cases in which the principle stated in the text has been recognized, see *Shea* v. *River Bride & K. Drainage Board* (1880) Ir. L.R. 6 C.L. 179 (opinion of O'Brien, J., as stated in § 52, note, post); *Ware* v. *St. Paul Water Co.* (1870) 2 Abb. (U.S.) 261, Fed. Cas. No. 17, 172; *Colgrove* v. *Smith* (1894) 102 Cal. 220, 27 L.R.A. 590, 36 Pac. 411; *Wabash, St. L. & P.R. Co.* v. *Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N.E. 296; *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Berg* v. *Parsons* (1898) 156 N.Y. 109, 41 L.R.A. 391, 66 Am. St. Rep. 542, 50 N.E. 957.

(*a*) *Ketcham* v. *Newman* (1894) 141 N.Y. 205, 24 L.R.A. 102, 36 N.E. 197.

A railway company is liable for the trespass of a contractor in building a portion of the road upon land not owned by it if it appears

that the work was done under its direction or the contractor's action was ratified by it. *Eaton* v. *European & N.A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

A railroad company, by whose direction a contractor for the construction of its road enters and builds the road upon the land which it has acquired, without having condemned an existing leasehold interest, or acquired that interest in any other manner, is liable, as a joint tort-feasor with the contractor and his servants, for damages done by them, in the prosecution of the work, to the crops of the lessee. *Ullman* v. *Hannibal & St. J. R. Co.* (1877) 67 Mo. 118. The court said: "The right of way acquired by the defendant was subject to the leasehold interest of the plaintiff; it is clear that the defendant had no right to enter upon the land in question without the plaintiff's consent; and having no such right itself, it could confer none upon the contractor and his workmen. The contractor and his workmen were, therefore, trespassers, and having gone there at the instance and by the direction of the defendant, for the purpose of constructing its road, the defendant was also a trespasser with them, and as such was jointly liable for all damages directly resulting from the work done by them in the execution of the contract." *Clark* v. *Hannibal & St. J. R. Co.* (1865) 36 Mo. 202, was distinguished on the ground that the defendant had there acquired a complete and perfect right to enter upon the land of the plaintiff and construct its road, and the trespasses complained of were committed by the servants of the contractors who had engaged to do the work.

In a case where the injury complained of was that the construction of a railway was commenced before the legal condemnation of the land, the defendant company's answer was, that the acts complained of were done by sub-contractors for the construction of its road, and that, in order to construct the same, it was necessary to enter upon plaintiff's land. The court said that this was in effect an admission that the work constituting the acts complained of was done under a contract entered into by defendant, or, in other words, that the defendant had contracted for its performance, and thereby directed it to be done, and that, under such circumstances the defendant's liability was the ordinary liability of one who commands or directs the commission of a trespass. *Leber* v. *Minneapolis & N.W.R. Co.* (1882) 29 Minn. 256, 13 N.W. 31.

If the facts presented are such as to render the distinction material, a requested charge to the effect that a railway company is not liable for trespasses committed by a contractor for the construction of the road is properly qualified by the proviso, that, if the construction was attempted under such circumstances as to make an entry on the premises for that purpose a trespass, the defendant was liable notwithstanding the contract. *Houston & G.N.R. Co.* v. *Meador* (1878) 50 Tex. 77 (fences were torn down by the contractor, and the crops in a field were damaged).

The council of a city, being empowered to abate nuisances, and also to straighten, widen and otherwise improve the bed or channel of either branch of a river within the city limits, passed an ordinance declaring one branch of said river, within said limits, a public nuisance, and providing for its abatement by the excavation of a new channel across plaintiff's premises. Afterwards, pursuant to a contract let by the board of public works of said city, in its name, for the excavation of said new channel, acts were done by the contractor constituting a trespass on plaintiff's premises. Held, that the city was liable, the action of the council being within the scope of its general powers, and taken in the belief that it was exercising a lawful power for the public good. *Hamilton* v. *Fond du Lac* (1876) 40 Wis. 47.

When a city acting within its general power to improve streets, makes a contract for the grading of a street, by the terms of which the contractors, in consideration of doing such grading, are to receive and appropriate to their own use all the stone in the street, and, under and in accordance therewith, the contractors proceed and remove the stone, they are the agents of the city in the premises, and the city is responsible for their acts. *Rich* v. *Minneapolis* (1887) 37 Minn. 423, 5 Am. St. Rep. 861, 35 N.W. 2.

46. —or will necessarily cause injury.—In a large number of decisions employers have been held responsible for the acts of independent contractors, on the ground that the stipulated work, however carefully it might be performed, would necessarily cause some definite and specific damage either to the complainant individually, or to the particular class of persons to which

---

The State is liable for all trespasses committed by a contractor with the knowledge and acquiescence of its agents, in executing a contract to excavate rock from the bed of a stream in which it has no right to use the water. Its responsibility is then referable to the fact that its original entry upon the land and its direction to do the work were wrongful per se. But its liability for the act of the contractor in piling waste material upon riparian land, where it has the right to remove the rock from the stream, depends upon the fact whether or not such act was authorized, sanctioned, or directed by it. *Coleman* v. *State* (1892) 134 N.Y. 564, 31 N.E. 902.

That a person who employs an independent contractor to build a house on land on which the employer has no right to build it is jointly liable with the contractor for trespass was a doctrine treated by Willes, J., as being beyond dispute. *Upton* v. *Townend* (1855) 17 C.B. 30, 25 L.J.C.P.N.S. 44, 1 Jur. N.S. 1089, 4 Week. Rep. 56. (For the entire passage see § 43, note (b), ante.

Where the alleged ground of an action of trespass to real estate was the extension of an excavation for a cellar and foundation of a building beyond the defendant's lot upon that of the plaintiff, and it appeared that such excavations were made by the defendant's son under a very indefinite contract with the defendant for the erection of a house for the defendant, it was held, that if such trespass was committed by the direct execution of plans devised and employed by the defendant, either by his previous command or by his subsequent ratification, he would be liable for the same. *Mamer* v. *Lussem* (1872) 65 Ill. 484.

An instruction is erroneous, which embodies the doctrine that a person who contracts for the erection of a building is not responsible, where the work has been let to a contractor, although he may have told such contractor to make the building 66 feet front, and this direction may have rendered it necessary to encroach upon the adjoining premises in making the excavation for the foundations. The defendant was bound to know the width of his lot; and if he becomes a party to any encroachment upon the premises of his neighbour, and his neighbour's house is destroyed, he is a co-trespasser, and is as responsible as though he himself made the excavation. *Williamson* v. *Fischer* (1872) 50 Mo. 198 (neighbour's house fell, because deprived of lateral support).

An instruction embodying the doctrine that the independence of the contract was conclusive in the defendant's favor was held to have been properly refused, where that contract provided for the cutting of timber upon another person's land. *Orister* v. *Ott* (1894) 72 Miss. 166, 16 So. 416.

It has been held that the owner of a building is not liable for injuries to the child of a tenant because of the negligence of an independent contractor to whom such owner has surrendered possession of the premises for the purpose of improving the building, although such owner has not received the consent of the tenants to enter upon the premises. *McDermott* v. *McDaneld* (1894), 55 Ill. App. 226. The court remarked that "entering upon work without the consent of the parents of the child was no wrong to anybody else, whether a member of the family or not." But the decision seems to be of very dubious correctness.

he belonged, or to the public generally(*a*). Upon this ground the principal employer has been held liable under the following circumstances:

Where the property of an abutting owner was damaged as a result of the grading of a street by a municipal corporation(*b*).

Where access to the premises of a landowner was obstructed as a result of the excavation of a railway cutting, which entailed an alteration of the grade of the street on which the premises abutted(c).

(*a*) In *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32, and *Hughes* v. *Cincinnati & S.R. Co.* (1883) 39 Ohio St. 461, the following passage from Cooley, Torts, p. 547, is referred to with approval: "The employer must not contract for that the necessary or probable effect of which would be to injure others."

An employer is liable for the acts of an independent contractor under a "contract in its very nature and necessarily injurious to a third person." In such a case the injury does not result from the manner in which the work is done, but from the fact that it is done at all. *Williams* v. *Fresno Canal & Irrig. Co.* (1892) 96 Cal. 14, 31 Am. St. Rep. 172, 30 Pac. 961.

In denying the right of the plaintiff to recover against the employer the courts sometimes take occasion to declare the inapplicability of this rule;—as where it is stated that the case was not one in which the defendant "contracted for work to be done which would necessarily produce the injuries complained of." *McCafferty* v. *Spuyten Duyvil & P.M.R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267.

The form in which this rule is enounced above indicates that it is not applicable, generally speaking, to cases in which the work would not have entailed any injurious consequences if it had been carefully executed. In *Chartiers Valley Gas Co.* v. *Waters* (1888) 123 Pa. 220, 16 Atl. 423, the trial judge had charged the jury that if the defendant gas company undertook to lay its main along the street of a certain city, it owed to another company which already had its pipes there, and to the property holders, and to the public, a duty of supporting such pipes, and that, if an escape of gas was caused by its failure to perform this duty, the fact that the work of laying the main had been entrusted to a contractor did not absolve it from liability. Commenting upon this instruction, the Supreme Court said: "The learned judge seems to think that because the pipe of the Philadelphia Company was necessarily undermined and therefore contemplated by the contract, it changes the rule, because it is a necessary interference with the rights of others. The answer is, there is no necessary interference with the rights of others unless negligence exists. Both companies had their rights, and they are perfectly consistent with each other. If the company itself was guilty of negligence she would be liable for consequent injury to another's rights; if the contractor alone is guilty, he alone is liable." It is very doubtful, however, whether this ruling would be accepted as correct in all jurisdictions. The circumstances would rather seem to demand an application of the doctrine reviewed in Subtitle V.

(*b*) *Sewall* v. *St. Paul* (1874) 20 Minn. 511, Gil. 459.

(*c*) *Alabama M.R. Co.* v. *Coskry* (1890) 92 Ala. 254, 9 So. 202. It was remarked that responsibility is imposed upon a railway company for every wrong done by a contractor within the limits of his duties in grading its roadbed for the reason that such grading is conclusively

Where in the proper performance of a contract for the construction of a public sewer, the surface of adjoining land, no part of which was taken for the purpose of the work, cracked and settled, and buildings thereon were injured by reason of the removal of the subsoil, consisting in part of quicksand(*d*).

Where a landlord, without his tenant's consent, authorized an adjoining owner to tear down and rebuild a party wall of the store occupied by the tenant(*e*).

Where the creation of a nuisance wa a direct and necessary incident of the stipulated work as a whole(*f*). Under this head

---

presumed to have been done pursuant to its directions given through its engineer. The court therefore declined to accept the contention of counsel, that the proof failed to connect the defendants with the commission of the wrong complained of, inasmuch as, for aught that appeared, the sub-contractor who did the grading was alone responsible for the depths of the cuts or excavations, and that he might, by shallower cuts, have avoided the injury for which plaintiff claimed damages.

A similar ruling was made in *Alabama M.R. Co.* v. *Williams* (1890) 92 Ala. 277, 9 So. 203, where it was held that an action lies under such circumstances, although the landowner has sold to the railroad company a right of way through his property, unless the terms of the sale or the attendant circumstances authorize the inference that the resulting damage was included in the compensation paid.

(*d*) *Cabot* v. *Kingman* (1896) 166 Mass. 403, 33 L.R.A. 45, 44 N.E. 344 (Holmes, Knowlton, and Lathrop, JJ., dissented). It was held to be immaterial that the soil was removed by means of pumps from the trench with which it had fallen by its own weight, or had been carried by percolating water. In *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91, recovery was denied for a similar injury on the ground that the damages were consequential, and the plan adopted was reasonably safe.

(*e*) *Northern Trust Co.* v. *Palmer* (1898) 171 Ill. 383, 49 N.E. 553, affirming (1897) 70 Ill. App. 93. The contract here in question was made with the adjoining owner. In the Court of Appeals the decision was put upon the ground that the stipulated work was such as would necessarily damage the tenant. In the Supreme Court the operations were viewed as a breach of an implied covenant that the lessee should quietly enjoy.

(*f*) *Peachey* v. *Rowland* (1853) 13 C.B. 182, 17 Jur. 764, 22 L.J.C.P.N.S. 81 (arg.); *Dressell* v. *Kingston* (1864) 32 Hun, 533; *Johnston* v. *Phoenix Bridge Co.* (1901) 169 N.Y. 581, 62 N.E. 1096, Affirming (1899) 44 App. Div. 581, 60 N.Y. Supp. 947 (injury resulted from the failure of the contractor to place lights to warn passers-by of the presence of an obstruction created by a barrier which he erected round a ditch dug in the street); *Ware* v. *St. Paul Water Co.* (1870) 2 Abb. (U.S.) 261, Fed. Cas. No. 1, 7, 172 (wagon overturned by obstruction in street created by trenches dug for laying water-pipes and by steam drills); *Deford* v. *State* (1868) 30 Md. 179 (cornice projecting dangerously far out into the street fell on a passer-by); *Spence* v. *Schultz* (1894) 103 Cal. 208, 37 Pac. 220 (excavation 14 feet deep in the sidewalk of a street in a city); *Earl* v. *Beadleston* (1877) 10 Jones & S. 294 (part wall weakened as a result of the taking down of a house); *Salvas* v. *New City Gas Co.* 1879; Quebec, 2 L.N. S.C. 97 (horse fell into pit

excavated in street of city); *Seymour* v. *Cummins* (1889) 119 Ind. 148, 5 L.R.A. 126, 21 N.E. 549 (action held maintainable where the injury charged was, that a drainage ditch obstructed the plaintiff's access to his premises; that the soil of his lot fell into it; and that stagnant and filthy water was allowed to remain in it).

In *Blake* v. *Thirst* (1863) 2 Hurlst. & C. 20, 32 L.J. Exch. N.S. 188, 8 L.T.N.S. 251, 11 Week. Rep. 1034, where the plaintiff was injured by falling at night into an unfenced and unlighted sewer, which a subcontractor had been employed to excavate, Pollock, C.B., expressed the opinion, during the argument of counsel, that the principal contractor was liable on the ground that the injury was caused by the thing contracted to be done. In his judgment he put his decision on the ground that "the act which caused the mischief was done by the order and under the immediate directions of the defendant."

In *Hole* v. *Sittingbourne & S.R. Co.* (1861) 3 Hurlst. & N. 488, 30 L.J. Exch. N.S. 81, 3 L.T.N.S. 750, 9 Week. Rep. 274, a contractor employed by a railway company to build a drawbridge over a navigable river executed the work so unskilfully that it was found impossible to open the bridge for vessels passing up and down. The company was held to be liable for damages caused by the obstruction to the navigation which had thus been created. Pollock, C.B., said that he rested his judgment "simply on the ground that there is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed to do." Wilde, B., said: "The present defendants were authorized to take land for the purpose of their railway, and to build a bridge over the Swale. Instead of erecting the bridge themselves, they employed another person to do it. What was done was done under their authority. In the course of executing their order, the contractor, by doing the work imperfectly, obstructed the navigation. It is the same as if they had done it themselves. It is not distinguishable from the case where a landowner orders a person to erect a building upon his land which causes a nuisance. The person who ordered the structure to be put up is liable, and it is no answer for him to say that he ordered it to be put up in a different form." As the act which authorized the company to build the bridge in this case provided that it should not be lawful to detain any vessel navigating the river for a longer time than was sufficient to enable any carriages, etc., ready to traverse, to cross the bridge, it would seem that the defendant might have also been held liable on the ground of the contractor's having infringed a statutory duty. See § 57, post.

A canal company is liable to a landowner adjoining the line of the canal for damages caused by a contractor's scraping off the surface of his field to obtain material for the banks of the canal, where the contract, as drawn, cannot be executed without doing the work in this manner. *Williams* v. *Fresno Canal & Irrig. Co.* (1892) 96 Cal. 14, 31 Am. St. Rep. 172, 30 Pac. 961.

In *Skelton* v. *Fenton Electric Light & P. Co.* (1894) 100 Mich. 87, 58 N.W. 609, it was held that the plaintiff, a worker in marble, would be entitled to recover upon proof of the facts set out in a declaration which alleged that his monuments were injured by large quantities of soot and other substances which collected on the defendant's iron smokestack, and were blown on to the monuments on the plaintiff's premises. As the injury was the natural result of erecting such a smokestack at that place, the defendant was precluded from raising the defence that it had been erected by an independent contractor.

In *Carlson* v. *Stocking* (1895) 91 Wis. 432, 65 N.W. 58, the liability of the employer was held to be a question for the jury, where the plaintiff's land was flooded by the water which escaped through a dam belonging to the employer, when it was opened by the contractor to give a passage for the logs which he had agreed to drive to a certain point.

On the express ground that the fact that some of the garbage which had been deposited in a lake was carried against a fishing net by the ordinary movement of the water was not a necessary or natural result of

particular attention should be directed to several cases in which the defendant was held to be liable for injuries caused by blasting operations(*g*). The theory upon which these cases were

---

the work of depositing such garbage, it was held that the defendant city was not liable for the negligence of the person who had contracted for the deposit of the garbage at some point not less than fifteen miles from the city. *Kuehn* v. *Milwaukee* (1896) 92 Wis. 263, 65 N.W. 1030.

For other cases recognizing the doctrine that the employer is liable if the act contracted to be done will produce a nuisance, see *Shea* v. *River Bride & K. Drainage Board* (1880) 11 Ir. L.R. 6 C.L. 179 (§ 52, note(g), post); *Overton* v. *Freeman* (1852) 11 C.B. 867, 874, 3 Car. & K. 52, 21 L.J.C.P.A.N.S. 52, 16 Jur. 65, per Cresswell, J.; *Ware* v. *St. Paul Water Co.* (1870) 2 Abb. (U.S.) 261, Fed. Cas. No. 17, 172; *McNamee* v. *Hunt* (1898) 30 C.C.A. 655, 59 U.S. App. 9, 87 Fed. 298; *Birmingham* v. *McCary* (1887) 84 Ala. 469, 4 So. 630; *Boswell* v. *Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345; *Atlanta & F.R. Co.* v. *Kimberly* (1891) 87 Ga 161, 27 Am. St. Rep. 231, 13 S.E. 277; *Florsheim* v. *Dullaghan* (1895) 58 Ill. App. 593; *Wabash St. L. & P.R. Co.* v. *Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N.E. 296; *Kellogg* v. *Payne* (1866) 21 Iowa 575; *Conners* v. *Hennessey* (1873) 112 Mass. 96; *State, Redstrake, Prosecutor* v. *Swayze* (1889) 52 N.J.L. 129, 18 Atl. 697; *Berg* v. *Parsons* (1898) 156 N.Y. 109, 41 L.R.A. 391, 66 Am. St. Rep. 542, 50 N.E. 957; *Uppintgon* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Southern Ohio R. Co.* v. *Morey* (1890) 47 Ohio St. 207, 7 L.R.A. 701, 24 N.E. 269; *Sanford* v. *Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67; *Emmerson* v. *Fay* (1896) 94 Va. 60, 26 S.E. 396.

The fact that the contract was not one which looked to the creation of conditions amounting to a nuisance is frequently adverted to as an element in cases where the employer was held not to be liable. See for example *Sadler* v. *Henlock* (1855) 4 El. & Bl. 570, 24 L.J.Q.B.N.S 138, 1 Jur. N.S. 677, 3 Week. Rep. 181, 3 C.L. Rep. 760; *Hackett* v. *Western U. Teleg. Co.* (1891) 80 Wis. 187, 49 N.W. 822; *Moline* v. *McKinnie* (1888) 30 Ill. App. 419 (excavation in front of a house under erection); *Martin* v. *Tribune Asso.* (1883) 30 Hun. 391 (vault dug under a street by permission of the city authorities); *Ryan* v. *Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123 (passer-by fell through a grating into a cellar underneath a sidewalk); *City & Surburban R. Co.* v. *Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643 (steam engine used to haul cars along a railway track on a highway); *Ferguson* v. *Hubbell* (1884) 97 N.Y. 507, 49 Am. Rep. 544 (clearing off wood and brush from land); *Susquehanna Depot* v. *Simmons* (1886) 112 Pa. 364, 56 Am. Rep. 317, 5 Atl. 434 (same facts); *Vanderpool* v. *Husson* (1858) 28 Barb. 196 (derrick extending over a sidewalk and used to raise a roof to a house); *Smith* v. *Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113 (ditch dug in street for the purpose of laying a pipe from a spring).

In a case where the defendant, the landlord of the plaintiff, had employed a contractor to remove the walls of an adjacent building also owned by him, it was held that no recovery could be had for the damage which the plaintiff's goods suffered as a consequence of the performance of the work. The decision was put upon the ground that the work did not necessarily entail the infliction of the injury. But emphasis was also laid on the fact that the lease did not contain any covenant to repair, or keep in repair, the premises, or that the adjacent property should remain in the same condition as at the time of hiring. (See § 66, post.) *Rotter* v. *Goerlitz* (1891) 16 Daly 484, 12 N.Y. Supp. 210.

(*g*) In *Hay* v. *Cohoes Co.* (1849) 2 N.Y. 159, 51 Am. Dec. 279, the defendant was a canal company, and while engaged in excavating a canal, which it was authorized by law to construct, upon land of which it claimed to be owner, it knocked down the stoop of the plaintiff's house and part

of his chimney, and did other injuries. The court held that the defendant was liable in damages, notwithstanding that the work was done by a contractor (see (1848) 3 Barb. 42), observing that it could not accomplish a legal object in an unlawful manner. To the same effect is *Tremain* v. *Cohoes Co.* (1849) 2 N.Y. 163, 51 Am. Dec. 284.

These decisions were followed in *Buddin* v. *Fortunato* (1890) 16 Daly, 195, 10 N.Y. Supp. 115 (where the plaintiff's premises were injured by blasting which was necessary for the performance of certain work which the defendant had contracted to do for a city); and in *Carman* v. *Steubenville & I. R. Co.* (1854) 4 Ohio St. 399. In the latter case the specifications provided that the "solid rock," as defined therein, was to be "removed by blasting," and an injury to the plaintiff's house was caused by a fragment of such rock thrown out by a blast. Discussing the evidence the court said: "No proof was given that the work was not prosecuted with care and prudence, or that the injury was not the unavoidable consequence of blasting in that particular locality. Now, it seems very clear, that the contractors did nothing that the defendants had not authorized to be done. But the defendants had no right to use their own lands, or authorize others to use them, so as to interfere with the undisturbed possession and lawful enjoyment of adjoining lands. . . . We do not construe the agreement as absolutely binding the contractors to remove the rock in this particular manner. They might, undoubtedly, have adopted other and more expensive modes of doing it, without affording the defendants any cause of complaint. But nothing of that kind was contemplated. The defendants put them in possession with the right to remove rock, wherever found, in the manner mentioned in the contract; and having enjoyed the benefits of this cheaper mode of doing the work, they cannot escape the responsibilities attending it. If they reserve no power to prevent injury, where blasting could not be safely employed, they were clearly in fault in giving so unrestricted a license. If they had the power, it is almost equally clear they should have exerted it." "A principle as old as civilization itself, and no less of morals than of law, requires of every one to so use his own property as not to injure others. This devolves upon every owner of real estate the affirmative duty of preventing it from becoming a nuisance to adjoining proprietors. Whether he can divest himself of this obligation consistently with the full operation of this important principle, while he retains the possession and control of the property, so as to escape liability when he suffers it to be occupied by a contractor who erects a nuisance upon it to the injury of others, is a question that I am very far from being prepared to answer in the affirmative."

In Vermont a railroad was held liable for its failure to remove rocks thrown on land adjoining the right of way, as a result of blasting operations conducted by a contractor. *Sabin* v. *Vermont C.R. Co.* (1853) 25 Vt. 363. In this case the point that a contractor had been employed was not even raised by the defendant's counsel.

See also *Brennan* v. *Schreiner* (1892) 28 Abb. N.C. 481, 20 N.Y. Supp. 130 (where the court overruled a demurrer to a petition for an injunction restraining the blasting of a stratum rock which extended under the premises of the plaintiff and defendant).

In this connection reference may be made also to the very able dissenting opinion which Dwight, C., filed in *McCafferty* v. *Spuyten Duyvil & P.M. R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267; although it has now being settled in New York by this and other decisions, (see § 40*a*, ante), that an employer cannot be held liable for injuries caused by the negligence of a contractor in blasting. The fundamental principle upon which the learned commissioner based his conclusion was that, "where the employer is under a duty to do an act in a particular way, and where the act causing the injury is not indirect and casual, but the very act which the employee was directed to do, the distinction between a servant and a contractor vanishes. The employer is, in a true sense, the cause of the wrongful act. Negligence ceases to be material." He considered that the case before him fell within the scope of this principle, as the plaintiff

decided distinguishes them, in a logical point of view, from those in which recovery has been allowed on the ground that such operations are intrinsically dangerous, and impose upon the employer an absolute duty to see that special precautions are taken. See §§ 51, 52, *post*.

47. —and where the work is done according to the plans furnished by the employer.—The employer is manifestly liable, as the actual author of the injury complained of, where it is shown to have been due to conditions or occurrences which the immediate result of performing the stipulated work in the manner designated by the plans and specifications which were furnished to the contractor(*a*).

---

and defendant were each proprietors of land, and as such proprietors each were bound by the rule so to use his own as not to injure another. "This rule," he remarked, "would make a proprietor liable for casting out stone upon his neighbor's land whether by blasting or in any other manner; even though that might be necessary to enable him to prosecute his lawful business." He also pointed out that the contractor, among other things, was directly employed to do blasting, and that he was not acting merely under a general contract to build the road. The necessity of blasting was therefore anticipated, and it was provided for. He then summed up as follows: "The ground upon which the decision of this case is to be rested is substantially this: Railway companies, in excavating for their works, if they cast stones and earth, by blasting or otherwise, upon the lands of adjoining proprietors, are presumptively liable for the injuries caused, as having committed a breach of duty imposed upon them by the general rule of law, that one must use his own property so as not to injure an adjoining proprietor. This presumption may be repelled by shewing that the act of casting out the stones, etc., was necessary to the construction of their works, as authorized by the legislature, in which case the act becomes damnum absque injuria. Unless the presumption can be repelled in this manner they are liable for the consequences of the unlawful act caused by their breach of duty, and cannot shift off responsibility by shewing that the act was done through the medium of a contractor. This rule is particularly applicable where the contractor is employed to do the very act which, in its results, causes such breach of duty." The reasoning and conclusions thus adopted are entirely in harmony with the general principles underlying the cases cited above.

(*a*) *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91 (arguendo); *Pitcher* v. *Lennon* (1896) 12 App. Div. 356, 42 N.Y. Supp. 156; *Meier* v. *Morgan* (1892) 82 Wis. 289, 33 Am. St. Rep. 30, 52 N.W. 174; *Boswell* v. *Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345 (arguendo); *Lancaster* v. *Connecticut Mut. L. Ins. Co.* (1887) 92 Mo. 460, 1 Am. St. Rep. 739, 5 S.W. 23 (wall not being sufficiently supported fell on plaintiff's building); *Cloud County* v. *Vickers* (1900) 62 Kan. 25, 61 Pac. 391 (defectively planned bridge fell on workman while it was being constructed.) *Tyler* v. *Tehama County* (1895) 100 Cal. 618, 42 Pac. 240 (bridge abutment so built as to turn water of river on to plaintiff's land.)

An independent contractor is liable, in exoneration of the employer, only for the defects in doing the work, and not for defects in design. *Church of the Holy Communion* v. *Paterson Extension R. Co.* (1902) 68 N.J.L. 399, 53 Atl. 449 (retaining wall on railway failed to furnish

In cases of this description the guilt of the employer is undoubtedly aggravated in a moral point of view, if he still persists in having the work executed after he has been informed

---

support to landowner abutting on a railway); *Church of the Holy Communion* v. *Paterson Extension R. Co.* (1902) 68 N.J.L. 405, 53 Atl. 1079.

That the defendant railway company could have been liable for a nuisance caused by the insufficient capacity of a culvert in an embankment, if it had been shewn that the specifications in the contract required such a pipe to be placed there, was conceded in *Atlanta & F.R. Co.* v. *Kimberley* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277.

Where the wall of a house adjacent to one which is being erected for the defendant falls, as a result of the fact that the trench of the wall of the new house is excavated by the contractor for the work to the depth indicated by the plans, and by reason of such contractor's failure to shore up the adjacent wall properly, the injury is deemed to be the consequence of the act which the contractor was employed to do, and the landowner is therefore liable. *Wheelhouse* v. *Darch* (1877) 28 U.C.C.P. 269.

A person who contracts with another for the building of a house on his own land is liable for the consequences of the erection of a wall of insufficient strength, where he reserves the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail, or execution of the contract, without in either case invalidating the contract. *McMillan* v. *Walker* (1881) 21 N.B. 31.

In commenting upon the efforts of the defendant to prove that the work of constructing the building in question had been turned over to the contractors before the plaintiff, a servant of a sub-contractor, had been injured by the fall of a floor and a wall, the court said: "The accident certainly occurred after this—but if the defendant's plans of re-building, as recommended by his architect, required the use of materials and structures that were unsafe, his responsibility, for any injury accruing by reason of such plans, was not transferred to the contractors." *Horner* v. *Nicholson* (1874) 56 Mo. 220.

An owner of land who contracts for an excavation is not relieved from liability for failure to support an adjoining building by the fact that the excavation was deeper than contemplated by the contractor under which he parted with possession to the contractors, where he made a subsequent contract providing that the excavation should be made to such depth. *Cohen* v. *Simmons* (1892) 5 N.Y.S.R. 146, 21 N.Y. Supp. 385.

The mere fact that specifications for a building only state the depth of the foundation for a single one of the walls will not render the employer liable for the negligence of the contractor in sinking other parts of the foundation to a smaller depth. Under such circumstances, the specifications, though incomplete on their face, cannot mislead the contractor, since mentioning the depth of the foundation at one point is a sufficient direction to him to construct the entire foundation of at least that depth. *Neumann* v. *Greenleaf Real Estate Co.* (1898) 73 Mo. App. 326.

In a case where a building collapsed in consequence of a violation of N.Y. Laws, 1892, chap. 275, § 483, limiting the weight allowable in a superficial foot of brickwork foundation, the court, in discussing the inferences drawn by the jury from the evidence, said: "In truth the jury might have made a much stronger finding against the defendant than knowledge and permission of the unlawful act, viz., that he contracted for and instructed the doing of it. He furnished to the builder both the plans and specifications by which they were to construct, and the material, the insufficiency of which was the direct cause of the accident. Thus whether the fatal vice inhered in the plans originally or was due to a faulty detail of construction, the defendant would be liable, for he directed the use of both plans and material." *Pitcher* v. *Lennox* (1896) 12 App. Div. 356, 42 N.Y. Supp. 156.

by the contractor that the plans are defective(*b*) But this added element is plainly not necessary to complete the cause of action in the present point of view.

47a. —or according to the methods prescribed by the employer.—It is also held that the intervention of an independent contractor is no protection to the employee where the injury was the result of adopting inherently dangerous methods of work, which were appointed, prescribed, or contemplated by himself(*a*). In cases

---

(*b*) Such were the circumstances in *Cloud County* v. *Vickers* (1900) 62 Kan. 25, 61 Pac. 391.

(*a*) In *McDonnell* v. *Rifle Boom Co.* (1888) 71 Mich. 61, 38 N.W. 681, it was proved that the contractors were required by the defendant company to keep during the driving season, and until the whole of the logs were run down, a jam of logs two and one-half miles above the mouth of the river, so as to keep the space below and between said jam and the sorting grounds filled with logs as fast as the company wanted to use them. The trial judge charged the jury in substance that if, in order to fulfill this contract it was necessary that such quantities of logs should be kept below the lower dam as would cause a solid jam of several miles in length, and by so doing the water was backed upon plaintiff's land, the defendant was liable. The court said: "This proposition was correct; and it needs no argument to sustain it. The defendant had exclusive control and management of this river, in the first place, and if, in turning over its control to a contractor, it burdened such contractor with conditions which, if complied with, necessarily caused damage to plaintiff, it became responsible for such damage. The question was left to the jury to say whether or not this contract could have been performed by the contractor without damage to the plaintiff, and they were instructed that, if they found it could have been so performed, then the contractor, and not the company, would be liable for the injuries done plaintiff." The jury were also instructed as to the letting out of water from the lower dam, and the injuries resulting therefrom. They were told, in effect, that if it was necessary, in order to fulfill their contract with the company, so to flood the river as to damage plaintiff, then the company must settle for such damage; but if it was not necessary, the contractor must be the one to recompense the plaintiff. This instruction was held to be in accordance with the well-settled general principles of the law, as applied to contractors, and to be as favorable to the defendant as it could ask.

Where the roof of a hall on the upper floor of a building broke through under the weight of the snow accumulated upon it, a tenant of the ground floor whose goods were damaged by the water which ran down was held entitled to recover against the landlord, on the ground that while the building was being altered, he had directed that the posts on which the roof rested should be removed, and that the roof should be supported by iron bars running across the building and fastened outside. *Evans* v. *Murphy* (1898) 87 Md. 498, 40 Atl. 109.

In *Murray* v. *Arthur* (1901) 98 Ill. App. 331, the employer was held liable, where he insisted on the use of a certain kind of brick for the construction of a chimney, the result being that the rain washed out the mortar and descended through the wall into the plaintiff's store.

In *Lockwood* v. *New York* (1858) 2 Hilt. 66, the defendant was held liable for injuries caused by the subsidence of a house, resulting from the withdrawal of the sheath-piling of a sewer, as required by the defendant's agents.

in which the employer's intention is not defined by an explicit provision in the agreement the question, whether he contemplated that the work should be executed in the manner in which it was actually executed, is to be determined from a consideration of any circumstantial evidence that is available(*b*).

In *Threlkeld* v. *White* (1890) 8 New Zealand L.R. 513, where the defendant was held liable for the negligence of a contractor for the clearance of land in allowing fire to spread on to the adjoining premises, one of the grounds assigned for the decision was that the fire was used "as a part of the work undertaken." The court laid it down that, if the evidence shews that a landowner contemplated the use of fire for the purpose of clearing his land, he is legally in the same position as if he had by the contract expressly allowed the use of fire.

(*b*) *Andrews* v. *Runyon* (1884) 65 Cal. 629, 4 Pac. 669, where it was sought to charge one who had employed an independent contractor to repair a levee near a highway with liability for an injury caused by an excavation which the contractor had made in the highway for the purpose of obtaining materials, the jury were instructed that, if, at the time the contract was made, it was the fair understanding and intention of all parties that the road was to be dug up for the purpose of building the levee, then whoever made the contract was liable, because if those were the facts, the digging up of a public road was an inherent part of the scheme of building the levee. These remarks were held to be misleading. "As to defendant's liability in this regard," said the court "the direction should have been that the jury must be satisfied that it was a part of the contract to build the levee with dirt taken from the road, or they were to disregard it. The law does not justify the holding of a party bound for the consequences of an illegal act, from a mere suggestion in a conversation in regard to a matter of contract, unless there can be justly inferred from it an intention on his part to bind himself contractually. The understanding and intention are to be inferred from what was agreed on contractually."

In *McNamee* v. *Hunt* (1898) 30 C.C.A. 653, 59 U.S. App. 9, 87 Fed. 298, the gist of the action was, that the contractor was a negligent and careless man, within the knowledge, or means of knowledge, of the defendant; that no provision was made in the contract for the observance of proper precautions in doing a piece of work which necessarily required blasting in the heart of a city; that in fact the contractor did this work without taking such precautions, and so negligently that a piece of rock was thrown out by the blast, and struck the leg of the plaintiff below, who was at the door of an hotel on a public street, out of sight of the blasting. The court, in discussing the position of the plaintiff, that the case came within the scope of the rule which affects the employer with liability, where the work is such that a nuisance necessarily results from doing it in the ordinary manner, said: "This being so, a decisive question in the case is whether, when McNamee made this contract, he authorized blasting to be done in order to complete it; or, in other words, whether, in order to fulfill his contract, the contractor necessarily had to blast, and McNamee knew this. If blasting was not in terms authorized, or if blasting was not necessary to be used in performing the contract of excavating the foundation, or if McNamee did not contemplate blasting, then blasting which injured the plaintiff below was purely collateral to the work contracted to be done, and McNamee would not be liable, because he never authorized blasting to be done. Examining the contract, we see that blasting is not provided for in express terms. The advertisement called for bids at a stated sum, and not for bids by cubic yard. The bid does refer to excavating hard rock at so much per cubic yard. But, following the advertisement, the lump sum offered is accepted, and nothing is said

In determining the legal effect of the contract and the construction to be put upon its terms it is permissible to consider the situation of the parties and their methods of doing the same class of work, and to assume that the contract was made with reference thereto. Hence, although it is ordinarily presumed that the contractor is employed to do an act in a reasonable and careful manner, yet if the employer is aware that he has methods of his own which are in themselves negligent or unlawful the inference will be that he was left free to adopt his own negligent method, and that the injury was, in a juridical sense, "the result of executing the work in the manner contemplated by the parties in making the agreement"(c).

about blasting in the acceptance. . . . . The evidence tends to shew that there was nothing in the surface appearance of this lot to indicate that blasting was necessary. McNamee, in his evidence, without objection, swore that there was not, that in fact he did not think there was any, and that in point of fact he did not suppose that there was any necessity for the use of blasting. There may have been an inference from Britt's bid that blasting was necessary, as he included in his bid a charge for removing 'hard rock.' But this was only an inference, and the offer was neither accepted nor noticed by McNamee. It therefore becomes a question of fact whether the condition of the soil where the foundation was to be dug was such that McNamee must have known that blasting was necessary, and also whether he did not acquire this knowledge during the performance of the contract."

In a case where the injury was due to the use of a steam-engine for handling materials for the repair of a turnpike, it was shown by the evidence of the contractor's superintendent that the machinery used in and about the work was of the ordinary kind used for such purposes; and it also appeared that the contractor required the contractor "to make all necessary connections with present track to run cars to crusher." The conclusion of the court was, that the Turnpike Company had reason to believe a steam engine would be used in the execution of the work, but it was considered that as the use of the steam-engine on the road in question was not a nuisance per se, there was no obligation on the company to prohibit its use. *City & Suburban R. Co.* v. *Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 645.

(c) *Brannock* v. *Elmore* (1892) 114 Mo. 55, 21 S.W. 451, where the plaintiff was injured by a fragment of rock thrown by a blast, the accident being caused by the contractor's failure to cover the rock to be blasted before firing the shot. Discussing the evidence that court said: "We think the contract between defendant and these employees which may be fairly deducted from the foregoing evidence together with the circumstance in which it was made was that Railey and Crowburger were employed by defendant, at forty cents per yard, to make an excavation of defined dimensions into the rock, by means of blasting, in their customary way, they to furnish all needful material, adopt their own methods and to be free from the control or direction of defendant in other respects, except that defendant reserved the right to put his servants into the same excavation to remove dirt and loose rock, but not to interfere with the work of Railey and Crowburger. . . . If the contract had been in writing and had specified that the work should be done in a particular way, which was in itself negligent, then under the foregoing decisions defendant would be

In order to charge an employer with liability for an injury resulting from conditions which were created by his consent, and therefore understood by him to be incidental to the performance of the work, it must be shown that those conditions were the legal cause of the injury complained of. No action can be maintained for that injury, if it resulted proximately from the unauthorized act of a third party(*e*).

---

held liable for damages resulting from its execution in the negligent manner provided, though no further control had been obtained over the work. The same rule should apply here if the contract was made with the knowledge, on the part of defendant, that under it the work would be done in a negligent manner. In such case permission should be held equivalent to direction."

Compare also *McNamee* v. *Hart* (1898) 30 C.C.A. 653, 59 U.S. App. 9, 87 Fed. 298, as stated in note (*b*), supra.

(*e*) In *Cuff* v. *Newark & N.Y. R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205, the plaintiff's intestate was killed by the explosion of a can of nitro-glycerine upon a section of the defendant's road, the grading of which was to be done by one F. V. S., who with the defendants had made a sub-contract with one Shaffner for the rock excavation, the understanding of all parties being that nitro-glycerine was to be used for the removal of the rock. The accident was due to the negligence of one Burns, a servant of Shaffner, who had charge of the nitro-glycerine. After the contract had been sublet to Shaffner he applied to the engineer of the company for permission to occupy a portion of their land upon which he might erect a magazine in which he might store the oil necessary for the work of blasting. The permission was granted, and the magazine was located by the direction of the company's engineer. But it was further established that Shaffner had without the knowledge or permission of the company, clandestinely engaged in the business of selling the explosive to outside parties, and that the accident occurred about 150 yards from the magazine, while Burns was taking part in this unauthorized traffic. Discussing the contention that the injury resulted from a nuisance, erected and maintained on the lands of the defendant by its consent, the court said: "It is obvious that the injury received by the deceased, from which death resulted, is too far removed from the act of the company to impose a liability for it upon them. It did not result naturally or proximately from the nuisance they admitted on their their lands, but was caused directly by the unauthorized and independent act of a third person intervening between the nuisance they consented to and the injury. . . . . If the case had shewn that they had consented to the use of their lands for the traffic in which Shaffner had engaged, they might have been held for any injury that resulted immediately in connection with the transaction of that business. No such case was made at the trial. The injury was not caused by the nuisance which had the approbation and consent of the company. Their consent was to the erection of a magazine to be used for the limited purpose of storing materials for the necessary operations of their works, in the handling and management of which Burns would have been continually under the observation of others engaged on the works, who would have detected any unfitness for his business arising from intoxication. At most, consent to the erection of the magazine for that purpose can only be said to have afforded an opportunity for the unauthorized act of Shaffner in appropriating it to another use, and the negligent act of Burns, who in law is a stranger to the defendants, and for whose acts Shaffner alone is responsible."

V. LIABILITY OF EMPLOYER FOR INJURIES CAUSED BY THE PERFORMANCE OF WORK WHICH IS DANGEROUS UNLESS CERTAIN PRECAUTIONS ARE OBSERVED.

48. Doctrine stated generally.— In another large group of cases the inability of the employer to avail himself of the defence that the occurrence or conditions which caused the injury in suit resulted from the act of an independent contractor is referred to a doctrine which in one aspect may be regarded as a special application of the principle discussed in the preceding subtitle, but which, having regard to its operation and the ground upon which, in the last analysis, it depends, would seem to be more properly associated with the still wider principle which is dealt with under the following subtitle.

An examination of the cases shows that the doctrine may be enunciated in two slightly different forms.

One of these is exemplified in the phraseology of the following sentence which is extracted from the opinion delivered by Romer, L.J., in a recent English Case:

"When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not takes these precautions"(*a*). The learned judge added that

---

(*a*) *Penny* v. *Wimbledon Urban Dist. Council* [1899] 2 Q.B. 72, 68 L.J.Q.B.N.S. 704, 80 L.T.N.S. 615, 47 Week. Rep. 565, 63 J.P. 406.

To the same effect are these remarks of Lord Watson: "In cases where the work is necessarily attended with risk he [the employer] cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done." *Dalton* v. *Angus* (1881) L.R. 6 App. Cas. 740, 832, 50 L.J.Q.B.N.S. 689, 44 L.T.N.S. 844, 30 Week. Rep. 196.

Compare also the following extracts from the judgments of American courts.

"If, according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed, the employer will be liable and not the contractor, because, it is said, it is incumbent on him to foresee such danger and take precautions against it." *Atlantic & F. R. Co.* v. *Kimberley* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277.

"Where the work contemplated by the contract is of such a nature that the public safety requires something more to be done than the mere

"accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand, and do not come within this rule."

A second mode of stating the doctrine is indicated by the language of Cockburn, Ch. J., in an oft cited case: "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and hand-

---

construction of the improvement, we think the owner of the property owes a duty to the public to see that the proper safeguards are taken, and that, where such precautions are not taken, he should not escape liability for resulting injuries." *McCarrier* v. *Hollister* (1902) 15 S.D. 366, 91 Am. St. Rep. 695, 89 N.W. 862.

"Where the act must necessarily result in a nuisance, unless it be prevented by proper precautionary measures, the owner [of the premises on which the work is to be done] is bound to the exercise of such measures." *Robinson* v. *Webb* (1875) 11 Bush, 464.

"If I employ a contractor to do a job of work for me, which in the progress of its execution obviously exposes others to unusual peril, I ought, I think, to be responsible, . . . for I cause acts to be done which naturally exposes others to injury." *Norwalk Gas Light Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32, quoting from the opinion of Seymour, J., in *Lawrence* v. *Shipman* (1873) 39 Conn. 586.

"The rule, then, seems to be this: Where work is contracted to be done which is not of itself dangerous, but becomes so by the negligence of the contractor the employer is not liable for injuries resulting therefrom; but if the work is dangerous of itself, unless guarded, and the employer makes no provision in his contract for its being guarded, and does not make a proper effort to guard . himself, then he is negligent, and cannot escape liability on the ground that the work was done by a contractor." *Wood* v. *Independent School Dist.* (1876) 44 Iowa, 30.

The rule as to the non-liability of the employer for the acts of a contractor "does not apply, where the contract directly requires the performance of a work intrinsically dangerous however skilfully performed." Dill. Mun. Corp § 1029. This statement has been quoted with approval in *White* v. *New York* (1897), 15 App. Div. 440, 44 N.Y. Supp. 454, and the other cases cited in note (i), infra.

Under the Georgia Code, 1895, § 3819, one of the cases in which the employer is liable is when "according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed."

ing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented no matter through whose default the omission to take the necessary measures for such prevention may arise"(*b*).

(*b*) *Bower* v. *Peate* (1876) L.R. 1 Q.B. Div. 321, 45 L.J.Q.B.N.S. 446, 35 L.T.N.S. 321.

In *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196, Lindley, L.J., after referring to several cases, said that the employer was held responsible, because it was his duty "to take whatever care was necessary to prevent injury from what he was doing."

Similar language is used in the American cases.

"If however the work is one that will result in injury to others, unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do to prevent such injurious consequences. In the latter case the duty to so conduct one's own business as not to injure another continuously remains with the employer." *Bailey* v. *Troy & B.R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129.

"The law devolves upon everyone about to cause something to be done, which will probably be injurious to third persons, the duty of providing that reasonable care shall be taken to obviate those probable consequences." *Southern Ohio R. Co.* v. *Morey* (1890) 47 Ohio St. 207, 7 R.L.A. 701, 24 N.E. 269. The reporter's headnote to this case, which was approved as a correct statement of the law in *Covington & C. Bridge Co.* v. *Steinbrock* (1899) 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N.E. 618, runs as follows: "One who causes work to be done is not liable ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an independent contractor." The court remarked that the application of the rule as to the non-liability of an employer for the negligence of an independent contractor is "confined to the cases where from the nature of the work or the circumstances under which it is to be performed, no particular duty is imposed on the party procuring the work to be done, to see that it is carefully done."

"It is as sound a rule of law as of morals, that when, in the natural course of things, injurious consequences will arise to another from an act which I cause to be done, unless means are adopted by which such consequences may be prevented, I am bound, so far as it lies within my power, to see to the doing of that which is necessary to prevent the mischief. Failure to do so would be culpable negligence on my part." *Norwalk Gas-light Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32.

It is possible that the kinds of work to which each of these forms of statement is more especially appropriate are, in a strictly logical point of view susceptible of differentiation. But the distinction, if there be any, is too refined to supply a practical basis for the classification of the decisions. Inasmuch as the "danger" which, in one form of statement, the employer is declared to be absolutely bound to guard against by reasonable care possesses a juridical significance only in so far as it may produce the "injury" which is adverted to in the other form of statement, it is clear that the ultimate consequence upon which the employer's responsibility is predicated is really the same, whichever may be the standpoint from which the evidence is considered. As a matter of fact, no court has ever, so far as the writer is aware, undertaken to discriminate between the decisions by assigning them to different categories, according as the employer's duty might be conceived to arise out of his obligation to avert danger or his obligation to avert injury.

The quality of the work which is contemplated by the doctrine above enunciated has also been defined by the terms "intrinsically dangerous"(*c*); "inherently dangerous"(*d*); "dan-

---

"Even if the relation of principal and agent, or master and servant, do not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him, as a probable consequence of the work let out to the contractor." *City & Suburban R. Co.* v. *Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643.

"The fact that the exhibition was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm." *Thompson* v. *Lowell, L. & H. Street R. Co.* (1898) 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N.E. 913.

The fact that the case was not one in which "the work, even if properly done, created a peril unless guarded against" is in some cases noted as a negative element which makes in favor of the employer. *Tooh* v. *Fox* (1902) 71 App. Div. 288, 75 N.Y. Supp. 913; *Boomer* v. *Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 172, 57 N.E. 1004.

(*c*) *Birmingham* v. *McCary* (1887) 84 Ala. 469, 4 So. 630; *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Joliet* v. *Harwood* (1877) 86 Ill. 110, 29 Am. Rep. 17; *Chicago Economic Fuel Gas Co.* v. *Myers* (1897) 168 Ill. 139, 48 N.E. 66; *Buddin* v. *Fortunato* (1890) 16 Daly, 195, 9 N.Y. Supp. 115; *Madigan* v. *Wellington & M.R. Co.* (1883) New Zealand L. R., 2 S.C. 209; *Martin* v. *Sunlight Gold Min. Co.* (1896) 17 New South Wales L. R. 364 (description held not to be applicable to the work of trucking and hauling in a gold mine).

(*d*) *Wiggin* v. *St. Louis* (1896) 135 Mo. 558, 37 S.W. 528; *Richmond* v. *Sitterding* (1903) 9 Va. Law Reg. 41, 43 S.E. 562 (description held not to be applicable to the construction of the brickwork of a house abutting on a street).

gerous in itself"(*e*); "in its nature dangerous"(*f*); "necessarily dangerous"(*g*); "ordinarily attended with danger"(*h*).

As in the cases dealt with under the preceding subtitle, the party authorizing such work "is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract"(*i*).

In one case it was argued that, as the security of third persons will not be any the more effectually secured, if an employer retains the control of a dangerous piece of work which he desires to have done, but which, owing to his lack of knowledge or skill, he cannot himself perform, it is unreasonable to charge him with responsibility for the negligence of those to whom he entrusts the work. But this contention did not prevail(*j*).

(*e*) "Where work is dangerous in itself, or of such a character as to be likely to become dangerous, the person who orders the work to be done is not absolved from responsibility by the employment of a contractor." William, J., in *Bossence* v. *Kilmore* (1883) 9 Vict. L. Rep. (L.) 35, 4 Australian Law Times 151.

These descriptive words have been held to be inapplicable to the work of raising a party-wall. *Negus* v. *Becker* (1894) 143 N.Y. 303 25 L.R.A. 667, 42 Am. St. Rep. 724, 38 N.E. 290; to the work of floating logs down a stream. *Pierrepont* v. *Loveless* (1878) 72 N.Y. 211; to the work of excavating for a foundation near a house. *Crenshaw* v. *Ullman* (1893) 113 Mo. 633, 20 S.W. 1077. Upon the facts, however, this last cited decision is contrary to the weight of authority, as indicated by the cases collected in § 51, post.

(*f*) *Angus* v. *Dalton* (1878) L.R. 4 Q.B. Div. 162, 187.

(*g*) *Ferguson* v. *Hubbell* (1884) 97 N.Y. 507, 49 Am. Rep. 544, denying that the work of clearing off wood and brush from a piece of land could properly be so described.

Neumann v. *Greenleaf Real Estate Co.* (1898) 73 Mo. App. 326, where a one-story building, the foundation of which was seven feet from the wall of an adjacent house was being erected by a contractor, it was held that this description was not applicable to the work.

(*h*) *Boomer* v. *Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 172, 57 N.E. 1004.

(*i*) Dill. Mun. Corp. § 1009, quoted with approval in *White* v. *New York* (1897) 15 App. Div. 440, 44 N.Y. Supp. 464; *Birmingham* v. *McCary* (1887) 84 Ala. 469, 4 So. 630, and *Joliet* v. *Harwood* (1877) 86 Ill. 110, 29 Am. Rep. 17.

For other cases in which a similar point of view is indicated, see *Chicago Economic Fuel Gas Co.* v. *Myers* (1897) 168 Ill. 139, 48 N.E. 66; *Matheny* v. *Wolffe* (1865) 2 Duv. 137; *Dillon* v. *Hunt* (1881) 11 Mo. App. 246.

(*j*) *Covington & C. Bridge Co.* v. *Steinbrock* (1899) 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N.E. 618. In discussing the contention thus pressed upon it, the court said: "There is a seeming force in this, but only so. It is not agreeable to the principles of distributive justice. For it is equally a hardship that one should suffer loss by the negligent performance of work which another procured to be done for his own benefit, and which he in no way promoted and over which he had no control.

If the case is one in which the law casts upon the employer the duty of seeing that reasonable precautions are taken by the contractor to protect third persons the mere circumstance that the particular act which was the immediate cause of the injury was unnecessary, and was not only unauthorized, but positively forbidden, will not enable the employer to escape liability(*k*).

Hence where work is to be done that may endanger others, there is no real hardship in holding the party, for whom it is done, responsible for neglect in doing it. Though he may not be able to do it himself, or intelligently supervise it, he will nevertheless, be the more careful in selecting an agent to act for him. This is a duty which arises in all cases where an agent is employed; and no harm can come from stimulating its exercise in the employment of an independent contractor, where the rights of others are concerned."

(*k*) This doctrine was laid down by the House of Lords, in rejecting the contention to the opposite effect which was put forward by the defendants counsel in *Hughes* v. *Percival* (1883) L.R. 8 App. Cas. 52 L.J.Q.B. N.S. 719, 49 L.T.N.S. 189, 31 Week. Rep. 725, 47 J.P. 772, 443, 450, the facts of which are given in § 52 note(c) post. Discussing the argument urged with reference to the cutting of the wall, Lord Watson said: "Unnecessary it certainly was, because the staircase might have been securely fixed without interfering with the wall. Unauthorized and forbidden it also was, in this sense, that by the terms of the contract and relative specification, the contractor was bound to leave the wall untouched. But the terms of the contract and specification are, in my opinion, of no relevancy as in a question with the respondent. If there were any reason to suppose that an ordinary workman entrusted with the job might cut into the wall, the appellant took a very proper precaution when he bound his contractor not to cut it, but he failed in his duty to the respondent when he permitted the contractor, and his workmen to neglect that precaution. I am of opinion that the appellant could not establish a good defence to the respondent's claim, by simply proving that it was not in the least necessary to cut the wall, and that the contractor was under an obligation not to do it. It appears to me that he could not escape from liability unless he further proved that it could not have been reasonably anticipated that any workman of ordinary skill in such operations, who was neither insane nor dishonest, would have dreamt of cutting the wall. I can find no allegation to that effect, nor do the statements made by the appellant's counsel appear to me to sustain the inference that the cutting of the wall was an act of that improbable description. It is not said that the contractor's workmen were deficient in ordinary skill, or that their act, however ill-judged, was dictated by any other motive than a desire to perform their work efficiently. In these circumstances the only inference in fact which I can draw is that these men ought to have been specially directed not to interfere with the wall, and that care should have been taken that they obeyed the direction." To the same effect see the remarks of Lord Blackburn.

In *Thompson* v. *Lowell, L. & H. Street R. Co.* (1898), 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N.E. 913, the facts of which are stated in §53, note (b), post, the defendant asked for an instruction that it "was not responsible unless the exhibition was in its nature such that it would necessarily bring wrongful consequences to pass, unless guarded against, and the defendant failed to exercise due care to prevent harm." The judge, instead thereof, instructed the jury that "the defendant is not responsible unless the exhibition was in its nature such that it would necessarily or probably cause injury to some person present

The questions, whether the stipulated work itself was essentially dangerous, and whether it was the understanding of the employer that the contractor was to adopt an essentially dangerous method of executing the work, should be submitted to the jury, where the evidence is such that these issues may without impropriety, be decided in the plaintiff's favor(*m*).

49. Limits of the doctrine.—One of the subsidiary propositions which are deducible from the general principle under which an employer is relieved from responsibility for the torts of an independent contractor may be thus enunciated: "If the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care"(*a*). In the practical application of such a doctrine there is an obvious difficulty in fixing the boundary line between the cases which are properly governed by it, and those which fall within the domain of the doctrine now under discussion. The difficulty is twofold.

In the first place, it seems to be scarcely possible, in stating the latter doctrine, to avoid the use of phraseology which shall not be suggestive of a field of operation so wide as to bring it in to conflict with the former doctrine(*b*).

---

under the defendant's invitation, unless guarded against, and the defendant failed to exercise due care to prevent harm." The substituted instruction was held to be correct.

(*l*) So held in a case where contractors who let to another a contract for the dragging of piles through the streets of a city in violation of an ordinance, and a child was killed while the work was being executed. *Doran* v. *Flood* (1891) 47 Fed. 543. The court said: "If these defendants had contracted for dragging these logs along the streets as they were dragged, and so dragging them caused the injury, they would, without doubt, be liable. Letting the hauling for that distance at that price, to a person not a common carrier, who had no trucks or connection with facilities for doing it otherwise than by dragging, would have some tendency towards shewing that the understanding with the defendants was that it was to be done by dragging, as it was done. The jury might have found that moving such logs in such streets was dangerous in itself; and the circumstances of the injury tended to shew that dragging the logs instead of trucking them caused it."

(*a*) *Engel* v. *Eureka Club* (1893) 137 N.Y. 100, 33 Am. St. Rep. 692, 32 N.E. 1032, Reversing (1892) 45 N.Y.S.R 940, 18 N.Y. Supp. 945, in which the Supreme Court had adhered to its former judgment as reported in (1891) 59 Hun, 593, 14 N.Y. Supp. 184.

(*b*) This source of embarrassment is adverted to in judicial criticisms of some of the formularies which have been proposed. In *Hughes* v.

Percival (1883) L.R. 8 App. Cas. 443, 52 L.J.Q.B.N.S. 719, 49 L.T.N.S. 189, 31 Week. Rep. 725, 47 J.P. 772, Lord Blackburn thus criticized the language of Cockburn, Ch. J., in *Bower* v. *Peate* 1876) L.R. 1 Q.B. Div. 321, 45 L.J.Q.B.N.S. 446, 35 L.T.N.S. 321 (see §48, ante): "I doubt whether this is not too broadly stated. If taken in the full sense of the words it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant, but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers." It is not easy to admit, however, that the doctrine, as enounced, does really involve the extreme consequences thus ascribed it. As was pointed out by Smith, L.J., in *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 347, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196, "it is not in the natural course of things, to be expected, when a man hires post-horses and a coachman from an innkeeper, that, unless means are adopted to prevent them, injurious consequences will arise to his neighbour." In the last cited case Lindley, L.J., also refers to the difficulty of expressing the general principle in terms which will apply to all cases.

In *Bibb* v. *Norfolk & W.R. Co.* (1891) 87 Va. 711, 14 S.E. 163, the Virginia Court of Appeals, after quoting the statement in Mechem, Agency, §747, to the effect that "it is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken, and he cannot escape this duty by turning the performance over to a contractor," proceeded thus: "In stating the first branch of this proposition, the author was not as guarded in the language employed as he might and, perhaps, should have been, in the light of the decided cases upon which he seems to have based his statement of the principle. The language, at first blush, seems to be open to the interpretation that every person, natural or artificial, who does in person, or causes to be done by another, work which from its nature is liable, unless precautions are taken, to do injury to others, must see to it in person that the necessary precautions are taken, and cannot escape liability for the non-performance of such duty by turning the whole performance over to a contractor, although the employer has exercised proper care in the selection of a skilful and competent person, exercising an independent employment, and has contracted with such person for the execution of the entire work by the means and methods of his own selection. Work is constantly being performed by independent contractors, as well as others, which in the nature of things may, in the course of its execution, result in injury to others; but it by no means follows that an employer in any such case must personally supervise the work and see that the necessary precautions are taken, and that, for his failure to do so, he must be held liable in damages for injuries to other persons. For if, in the nature of things, the mere liability of the work to result in injury to some one be made the test, then it is obvious that the line of distinction becomes shadowy and indistinct between acts which are unlawful, or are per se nuisances, or that cannot be done without doing damage, and those the performance of which not only may, but in the nature of things must often be committed to others; as is the case with a railway company in the construction and repair of its roadway, bridges, and other structures. . . . There is manifestly a broad distinction between the statement of the author (Mechem) and that of the judge whose language is quoted as illustrating the distinction stated by the former. In the former the author makes the fact that the act to be performed is, in its nature, liable to result in injury to others the test; while the judge, whose language is quoted, applies as the test the fact that the work is one that will result in injury to others unless preventive measures be adopted." The judicial statement here referred to is that which was quoted in §48, ante, from the opinion in *Bailey* v. *Troy & B.R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129. It should be observed, however, that the phraseology used by Mr. Mechem, even if not entirely warranted by the case which he cites, is quite in harmony with the language used in the cases referred to in note (b) to the preceding section.

In the second place, although it cannot be disputed that, as a matter of abstract logic, there is a distinction between work which may be safely done if due care is taken, and work which is dangerous, unless due care is taken in respect to the observance of certain precautions, it is often far from easy, in dealing with the infinitely diversified groups of concrete facts which present themeselves in litigation, to give effect to this distinction by determining the category to which the work in question should be assigned. The extent of the region covered by a doctrine the applicability of which in each particular instance depends upon the meaning of a phrase so extremely vague as "work which is likely to cause danger or injury to others," is a matter which can only be determined by judicial legislation; and the arbitrary and empirical nature of the tests which are available for this process is shown in a very striking manner by the antagonistic decisions which have been rendered in regard to similar or identical circumstances. The cases in which, as shown in the ensuing sections, the employer has been held liable for the failure of a contractor to take proper precautions to protect the certain classes of persons from dangers created by unguarded excavations, by the removal of lateral support, and by the use of explosives for blasting purposes, are in singular conflict with those in which the employer has been absolved from liability for injuries traceable to the same causes, on the ground that the damage was due to the manner in which the work was done. See §§ 40, 41, *ante*. In some instances, however, this conflict is possibly to be accounted for by the fact that the doctrine discussed in the present subtitle was not brought to the attention of the courts, which pronounced the employer to be free from liability. Cases which lie near the border line, and which are not concluded by precedents so close as to be binding, will always continue to be a source of embarrassment(c).

(c) The difficulties which such cases involve may be usefully illustrated by adverting to one recent decision in which the question of the applicability of the doctrine dealt with in this subtitle was directly raised by the language in which the instructions to the jury were couched. *Boomer* v. *Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 172, 57 N.E. 1004. There the injury was caused by a brick which a mason employed to repair a chimney let fall into the street, and the trial judge charged that, if "such work on the chimneys would ordinarily be attended with danger

50. Effect of stipulation by contractor to take appropriate precautions. —(See also § 58, *post*). In any case where the doctrine stated in § 48, *ante*, is applicable, the employer "may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it"(*a*).

---

to the public, unless proper precautions to avoid it were taken, the defendants were bound to take proper precautions, or to see that proper precautions were taken, for the safety of the public." This instruction was held to be erroneous for reasons thus explained: "This is not a case where the work, even if properly done, creates a peril, unless guarded against, as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but, as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public. The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held."

(*a*) *Dalton* v. *Angus* (1881) L.R. 6 App. Cas. 740, 829, 50 L.J.Q.B. N.S. 689, 44 L.T.N.S. 844, 30 Week. Rep. 196, per Lord Blackburn.

A similar statement of principles by the same distinguished jurist was made in another case in which he observed that a person, upon whom the law casts a duty is at liberty to employ another to fulfil that duty, and, if they so agree together, to exact a stipulation that he is to be indemnified if injury results from the non-fulfilment of the duty; but the employer still remains subject to that duty, and liable for the consequences if it is not fulfilled. *Hughes* v. *Percival* (1883) L.R. 8 App. Cas. 443, 52 L.J.Q.B.N.S. 719, 49 L.T.N.S. 189, 31 Week. Rep. 725, 47 J.P. 772.

For other cases embodying a similar doctrine, see *Bower* v. *Peate* (1876) L.R. 1 Q.B. Div. 321, 45 L.J.Q.B.N.S. 446, 35 L.T.N.S. 321; *The Snark* [1899] Prob. 74, 68 L.J.Q.B.N.S. 22, 80 L.T.N.S. 25, 47 Week. Rep. 398, 8 Asp. Mar. L. Cas. 483; *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Cabot* v. *Kingman* (1896) 166 Mass. 403, 33 L.R.A 45, 44 N.E. 344.

In *Osborn* v. *Union Ferry Co.* (1869) 53 Barb. 629, the court expressed the opinion that, where the contractor has stipulated to use the necessary precautionary measures to protect the public against accidents, the owner or employer is relieved from responsibility. The court considered this to be the effect of *Buffalo* v. *Holloway* (1852) 7 N.Y. 493, 57 Am. Dec. 550, and *Storrs* v. *Utica* (1858) 17 N.Y. 104, 72 Am. Dec. 437. But the construction thus put upon these cases is clearly erroneous. The first mentioned is not in point, as it simply deals with the right of a defendant who has been compelled to pay damages in satisfaction of an absolute liability to secure indemnification from a contractor whose negligence was the immediate cause of the injury. The second case is, as an authority, directly antagonistic to the proposition in support of which it is cited, as Comstock, J., explicitly declared that, even though the employer might insert in the agreement a clause that the contractor should adopt certain specified precautions for the protection of the public, such a stipulation had no effect upon the liability of the employer.

In *Donovan* v. *Oakland & B. Rapid Transit Co.* (1894) 102 Cal. 245, 36 Pac. 516, where a street railway company for which a contractor had

It scarcely needed a specific decision to establish the doctrine that a stipulation binding the contractor to use all precautionary measures to protect the public will not protect the employer where the gravamen of the action is his failure to remedy a positive nuisance. But it has been so ruled in New York(*b*).

50a. Necessity of showing that the contractor was acting under the authority of the employer.—A contractor who proceeds to perform dangerous work on his employer's premises before the date specified in the contract is a mere trespasser, whose negligence in failing to take proper precautions is not imputable to the employer. Whether he was, as a matter of fact, authorized to commence the work at the time when he did so must be determined from the provisions of the contract(*a*).

---

dug a post-hole of the size and at the place designated by its superintendent was held liable for injuries received by a traveller who fell into it two or three days after it was finished, the court laid stress upon the fact that the contract did not require the contractors to guard the hole for the protection of travellers on the street, nor for any other purpose, in any manner, at any time—certainly not after it was finished—and arrived at the conclusion that since the negligence which caused the injury was that of failing to guard the hole after it was finished by the contractors, it must be imputed to the defendant. The reference thus made to the absence of any stipulation as to guarding the hole seems to imply that, if such a stipulation had been inserted, the defendant would have been absolved from liability. Yet in a case decided during the same year, *Colgrove* v. *Smith* (1894) 102 Cal. 220, 27 L.R.A. 590, 36 Pac. 411, that the defendants were liable for the breach of an ordinance by their contractor in improperly filling a trench opened in a street, although the contract provided that the earth was to be properly tamped, so as to prevent vehicles from sinking into it. It may be that this court recognizes a distinction between precautions prescribed by statute and precautions which are obligatory on account of the inherently dangerous nature of the work. But the weight of authority, as shewn by the cases cited above is opposed to such a theory.

(*b*) *Osborn* v. *Union Ferry Co.* (1869) 53 Barb. 629.

(*a*) In *Black* v. *Christchurch Finance Co.* [1894] A.C. 48, 63 L.J.P.C. N.S. 32, 6 Reports, 394, 70 L.T.N.S. 77, 58 J.P. 332, "the contract taken as a whole, was one for the clearance of the ground of all growing bush and timber, to be effected by the consecutive operations of felling and burning. It is stipulated that the first of these operations shall be begun at once, and concluded by the end of November following," and the contractor agreed to "burn in a favorable time, about February next." It was contended by counsel that the specification of time to burn "about February next" had the practical effect of separating the operations of felling and burning so completely as really to create two contracts, though for a lump payment, and that the contractor, if he went on the land sooner than "about February" to light the bush, was to be regarded in the same way as an intruder or a stranger for whose act the defendant company would have no responsibility. This argument prevailed in the New Zealand Court of Appeal. *Christchurch Finance Co.* v. *Black* (1891) 10 New Zealand L.R. 238; *Dalton* v. *Angus* (1881) 50 L.J.Q.B.N.S. 689, L.R.

51. Liability of employer where the work is dangerous to persons using highways.—(See also §§ 58, 59, *post*). As applied to one large group of cases the general principle stated in § 48, *ante*, involves the corollary that one who employs a contractor to execute on or near a public way any kind of work which, in its normal and customary course, will expose persons using the way to certain definite perils, is liable for injuries caused by the failure of the contractor to take such precautions as may be appropriate for the purpose of preventing those perils from becoming active for mischief(*a*). The following sub-sections will show the various

---

6 App. Cas. 740, 44 L.T.N.S. 844, 30 Week. Rep. 196, and *Hughes* v. *Percival* (1883) 52 L.J.Q.B.N.S. 719, L.R. 8 App. Cas. 443, 49 L.T.N.S. 189, 31 Week. Rep. 725, 47 J.P. 772 (see § 52, post) were distinguished on the ground that, in those cases the principal, being aware of what was going on, was bound to see that the contract was properly performed, while in the case under review the company did not know that the work of burning was in progress, or was likely to go on till the date fixed by the contract. The Privy Council did not agree with this view of the contractor's position. In delivering the judgment, Lord Shand said: "The contract bound the contractor "to burn in a favorable time." It cannot be suggested that, if he had violated this condition only of his contract, the defendant's would have escaped responsibility. Having authorized and entrusted the operation of burning to another they must answer for his proceedings, however much he may have violated their instructions or the detailed conditions of his contract with them. . . . But assuming that there was a violation of the terms of the contract on the contractor's part in burning so early as the end of December this cannot in their Lordship's opinion affect the defendant's liability to third parties injured by the act of their contractors. It is clear that the contractor had the right under his contract to be on the ground from time to time as he thought fit, until the whole operations were completed for felling, for clearing away the timber he was entitled to remove, for making a road to enable him to do so, and for the burning of the bush. Their Lordships cannot adopt the view that the contracts for felling and for burning the bush are to be regarded as in any proper sense separate or independent, and that the separate contract to burn the bush did not come into operation until about February. There was but one contract, to fell and to burn, that is to clear the land, and though the contractor disregarded the stipulation which the defendants made with him as to the time of burning, this cannot relieve them from responsibility. The defendants might have stipulated that an interval of two months should elapse after the time of felling and before the burning should take place. If the contractor having leave under his contract to be on the land had allowed a shorter interval only, it could not be said he was a trespasser when he lighted the fire, so that the defendants would not be liable for this act. So also if the contractor disregarded or violated stipulations as to the manner of lighting, or the place at which the fire should be lit. Their Lordships are unable to draw any distinction in legal principles between such cases and the present in which the condition related to the time at which the fire was to be lighted."

(*a*) The rule with regard to work of this description has been thus stated by an American author of high reputation: "Where the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purposes of public

circumstances under which defendants have been held responsible on this ground.

(*a*) *Erection of buildings.*—Where a building is erected in a city by a contractor, and the plan of construction involves the making of an excavation or the formation of some other kind of dangerous opening under or adjacent to the street on which the premises abut, the owner is liable for any injury which a passer-by may receive by reason of the negligence of the contractor in leaving it open and omitting to guard it by lights and barriers(*b*). More especially is it proper that the defendant should

---

travel unless properly guarded or protected, the employer, (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party." Dill. Mun. Corp. sec. 1030, quoted with approval in *Birmingham* v. *McCary* (1887) 84 Ala. 469, 4 So. 630.

This doctrine is not accepted in Pennsylvania. See *Chartiers Valley Gas Co.* v. *Lynch* (1888) 118 Pa. 362, 12 Atl. 435, where the writer of the opinion took occasion to express individually, his regret that corporations, such as plaintiff in error, invested with the right of appropriating private property and entering upon public highways for the purpose of laying pipes in which to transport and distribute one of the most dangerous natural agencies in existence, should be permitted to relieve themselves of the duties and responsibilities incident to the business, by letting part of the work, requiring the highest degree of care, to an independent contractor.

(*b*) In *Chicago* v. *Robbins* (1862) 2 Black, 418, 17 Led. 298, a landowner who contracted for the erection of a building, on a plan which provided for converting into an area the space left between the front of the building and an embankment made for the purpose of raising the level of the street, was held liable for injuries received by a person who fell into the pit thus formed. The court said: "This area when it was begun was a lawful work, and if properly cared for, it would always have been lawful; but it was suffered to remain uncovered, and thereby became a nuisance, and the owner of the lot, for whose benefit it is made, is responsible. He cannot escape liability by letting work out like this to a contractor, and shift responsibility on to him if an accident occurs. He cannot even refrain from directing his contractor in the execution of the work so as to avoid making the nuisance. A hole cannot be dug in the sidewalk of a large city and left without guards and lights at night, without great danger to life and limb, and he who orders it dug, and makes no provision for its safety, is chargeable, if injury is suffered. It is said that Robbins did not reserve control over the mode and manner of doing the work, and is not therefore liable; but the digging this area necessarily resulted in a nuisance—was the result of the work itself—unless due care was taken to make the area safe. This is a clear case of 'doing unlawfully that might be done lawfully; digging earth in a street without taking proper steps for protecting from injury.' *Newton* v. *Ellis* (1855) 5 El. & Bl. 115, 24 L.J.Q.B.N.S. 337, 1 Jur. N.S. 830, 3 Week. Rep. 467." The decision of the circuit being reversed, there was a new trial, and on the second appeal, reported sub nom, *Robbins* v. *Chicago* (1866) 4 Wall. 657, 18 Led. 427, the Supreme Court thus reiterated the views which it previously expressed:

"Import of the decision of this court in reversing the former judgment of the Circuit Court, and remanding the cause for a new trial, was,

be held responsible under such circumstances where the hazardous conditions were created by himself before the place where they existed was transferred to the control of the contractor(c).

---

that the party contracting for the work was liable, in a case like the present, where the work to be done necessarily constituted an obstruction or defect in the street or highway which rendered it dangerous as a way for travel and transportation, unless properly guarded or shut out from public use; that in such cases the principal for whom the work was done could not defeat the just claim of the corporation, or of the injured party, by proving that the work which constituted the obstruction or defect was done by an independent contractor. Strictly speaking, that question was not open in this case, but the arrangement was allowed to proceed; and, lest there should be a doubt upon the subject, it is proper to say that we again affirm the proposition. Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party."

In the following cases also the employer was held liable for injuries caused by excavations which had been made either under or in close proximity to public ways, and not properly guarded. *Ann* v. *Herter* 1903) 79 App. Div. 6, 79 N.Y. Supp. 825; *Murphy* v. *Perlstein* (1902) 73 App. Div. 256, 76 N.Y. Supp. 657 (held that the evidence of the contract was properly excluded in a case where the excavation was adjacent to street); *Spence* v. *Schultz* (1894) 103 Cal. 208, 37 Pac. 220; *Matheny* v. *Wolffe* (1865) 2 Duv. 137; *Wiggins* v. *St. Louis* (1876) 135 Mo. 558, 37 S.W. 528.

In *Palmer* v. *Lincoln* (1876) 5 Neb. 136, 25 Am. Rep. 470, the court, in sustaining a demurrer to a plea stating that the excavation had been left unguarded by a contractor who was then in control of the premises, said: "So far as appears from the answer the injuries complained of were the direct result of making the necessary excavation for the erection of the building, such excavation having been made in pursuance of the contract."

In *McCarrier* v. *Hollister* (1902) 15 S.D. 366, 91 Am. St. Rep. 695, 89 N.W. 802, where the injury was caused by an open trench dug for a drain which was to connect a house with a sewer, the court said: "The work contracted for could not be done without creating a condition in the public thoroughfare from which mischievous consequences might reasonably be expected to arise unless preventive measures were adopted. An excavation for the purpose of constructing a sewer may not be unlawful, but it is certainly intrinsically dangerous, and, unless properly guarded, liable to cause personal injuries. The nature of the work demands more than its proper performance. Digging the ditch and laying the pipe are not enough. Lights, barriers, or other safeguards are required during the progress of the work to protect persons from such accidents as the one resulting in plaintiff's injury."

(c) A jury is properly instructed that, if the defendants who were engaged in constructing a building had themselves made an excavation in the sidewalk for the purpose of building the coal vaults and area walls, and thus made a hole in a public street into which travellers in passing would probably fall if it was not properly guarded, they could not, by a contract giving a temporary occupancy and control of the excavation to the contractor, for the building of the vaults and walls, relieve themselves of further care in guarding the hole. *Hoover* v. *Whalen* (1892) 49 Ohio St. 69, (81), 14 L.R.A. 828, 29 N.E. 1049.

In the construction of buildings in cities it often becomes necessary to remove a sidewalk temporarily in order to excavate cellars and carry in the material used in the construction of the buildings. Such a temporary removal does not constitute a nuisance; but the person doing it is bound to guard the dangerous place properly, and furnish reasonably safe passages for the public(*d*).

An employer is also liable for injuries caused by the negligence of a contractor in regard to any instrumentality which is ordinarily used, when a building is being erected, and which if it is carelessly placed or handled, will be dangerous to the public(*e*).

(*d*) *Ster* v. *Tuety* (1887) 45 Hun. 49. In that case where the plaintiff, after passing over a part of a footpath from which the planks had been removed, stumbled at the place where they began again, evidence to the effect that the dangerous conditions were created by a contractor who had been let into possession of the premises, for the puprose of building a house for the defendant was held to have been properly admitted, since, if the defendant could have shown that the premises had been let by him to another, who had entered into the exclusive and entire possession thereof, with the right to control the same, and, after acquiring such possession, had removed the sidewalk without the knowledge or consent of the defendant, and that he had no notice actual or constructive, of such removal, these facts would have constituted a good defence. But as the defendant failed to establish his defence in this regard, it was held that the court had properly instructed the jury that, by making the contract, he did not relieve himself from the responsibility of keeping the sidewalk in a reasonably safe condition for persons travelling thereon.

(*e*) In *Evans* v. *Martin* (1880) 6 Vict. L. Rep. (L.) 176, 2 Australian Law Times 7, a builder who had been licensed to erect a hoarding which encroached on the street, constructed it with a movable panel which, when materials were to be delivered, was removed and placed so as to lean against the boarding. On one of these occasions, as the workman whose duty it was to take out the panel was absent, a carter in the employ of a person who had made a sub-contract for the delivery of flagging took it down himself, and left it so insecurely placed, that it was blown down by a gust of wind, and injured a passer-by. The builder was held liable, on the ground that the defendants, having received a license to encroach upon a public street, in order to facilitate the erection of his building, was under a special obligation to the public to take care that the exercise of that privilege should not interfere with the safety of persons passing along the street. Nothing, it was remarked, had been shown which took the case out of the operation of the principle, that the privilege allowed to the defendants carried with it a correlative special duty to keep the gate safe. It was essentially a matter for the jury to determine whether the gate was attended to in such a manner as to guard against injury to or by the person dealing with, and also whether the defendants ought not to have had a man constantly in attendance to manage, or direct the management of the gate.

Compare also the cases as to blasting which are cited in § 52, post and *James* v. *McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S.W. 435, cited in § 63, post.

(*b*) *Delivery of goods through openings in footpaths.*—A person who maintains for his own convenience, on the surface of a public footpath adjacent to the premises occupied by him, an aperture which is normally covered by a grating, scuttle, or a trapdoor, and who makes a contract which requires that the aperture shall be opened, while the stipulated work is being performed, is answerable for injuries received by a passer-by in consequence of the failure of the contractor's servants to close the aperture or to fasten the covering securely (*f*).

It has been held to be error to charge a jury that, if an owner of a building contracts with another to raise a roof to his house and in that work a derrick is employed, extending over a sidewalk which is a great thoroughfare, where many persons are continually or frequently passing, and that derrick was necessarily so extended or it was known to the owner that it was so extended, or would be extended, then it was the duty of the owner to cause a barricade to be placed to prevent persons passing by, or to place a person there to give warning to the persons passing, and for the omission of such duty the owner is liable as for his own neglect. *Vanderpool* v. *Husson* (1858) 28 Barb. 196. The ordinary rule as to the non-liability of an employer for the acts of a contractor was held to be controlling where an injury is caused by the careless management of such an appliance. It will be observed, however, that this ruling was made before the introduction and general adoption of the doctrine discussed in this subtitle. Considered with reference to the more recent authorities, it would seem to be of rather dubious correctness.

(*f*) Refreshment-rooms and a coal cellar at a railway station were let by the company to one S., the opening for putting coals into the cellar being on the arrival platform. A passenger while leaving the station in the usual way fell into the cellar opening, which a coal merchant's servant had negligently left insufficiently guarded. The court held that S. was responsible for his negligence. Williams, J., was of the opinion that the railway company also would be liable, but not the coal merchant. *Pickard* v. *Smith* (1861) 10 C.B.N.S. 470, 4 L.T.N.S. 470. "In the present case," said Williams, J., "the defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse, either in good sense or law."

In the recent case of *Penny* v. *Wimbledon Urban Dist. Council* [1898] 2 Q.B. 212, 67 L.J.Q.B.N.S. 734, 78 L.T.N.S. 748, the effect of this decision was said by Bruce, J., to be this:—"that, when a 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." It was also considered to be an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lafully entitled so to do.

In a case where the cover of the scuttle-hole which the defendant company was licensed to maintain for his personal use was so negligently

(c) *Construction or repair of highways.*—The nature and extent of the obligation of the principal employer to safeguard the public against dangers incidental to the construction or repair of roadways is indicated by the decisions cited below(g).

---

replaced by the servants of one who had contracted to deliver a certain amount of coal every week that it turned under the foot of a passer-by, the defendant was held liable on the ground that it owed to the public who had the right to use the footpath an absolute duty to exercise reasonable care to keep that footpath in a safe condition, and that this duty revived immediately after the contractor's servants had taken their departure after leaving any particular load of coal. *Benjamin* v. *Metropolitan Street R. Co.* (1896) 133 Mo. 274, 34 S.W. 590. It was held to be a question for the jury whether notice of the dangerous condition of the scuttle was imputable to the defendant fifteen minutes after the delivery of a load of coal.

(g) A District Council is answerable to one injured by the negligence of a contractor employed by it to repair the highway, in leaving a pile of dirt unlighted and unprotected. *Penny* v. *Wimbledon Urban Dist. Council* [1899] 2 Q.B. 72, 68 L.J.Q.B.N.S. 704, 80 L.T.N.S. 615, 47 Week. Rep. 565, 63 J.P.406. Affirming [1898] 2 Q.B. 212, 67 L.J.Q.B.N.S. 754, 78 L.T.N.S. 748. In the lower court the decision was put by Bruce, J., on the ground that "the District Council employed the contractor to do work upon the surface of a road, which they knew was being used by the public, and they must have known that the works which were to be executed would cause some obstruction to the traffic, and some danger, unless means were taken to give due warning to the public." This statement of the law was expressly approved by two of the Lords Justices of Appeal, (Smith and Vaughan Williams). Romer, L.J., expressed his views in similar language: "The work done in this case was the making up of a road frequented by the public. From the nature of this work danger was likely to arise to the public accustomed to use the highway by the alteration of level, and by the heaps of soil and the holes almost inevitable in work of the kind. The usual precaution to take in such a case is to put up lights or other warnings to prevent persons falling into the holes or over heaps of soil. In my opinion, it is unreasonable not to take those precautions, and the passages from the contract that I have referred to in the course of the argument show that this view is correct."

On the ground that the work was intrinsically dangerous, if special care was not taken, a railway company has been held liable, where a contractor employed to grade its road, continued for a considerable period to excavate the side of a hill in such a manner as to frighten the horses of travellers, and cast the materials on a public highway. *Madigan* v. *Wellington & M. R. Co.* (1883) New Zealand L.R. 2 S.C. 209.

Where a municipal council undertakes the repair of a bridge, and also has a temporary road made to accommodate the public, while the repairs are in progress, it is not responsible for injuries received by a traveller, as a result of the temporary road's being left unfenced and unlighted, although it employed an independent contractor to do the work, and he had agreed to fence and light the road. *Bossence* v. *Kilmore* (1883) 9 Vict L. Rep. (L.) 35. (This case seems to have been decided partly on the general grounds discussed in this subtitle, and partly on the ground of the failure to fulfill a statutory duty. See § 57, post).

In *Weber* v. *Buffalo R. Co.* (1897) 20 App. Div. 292, 47 N.Y. Supp. 7, where the defendants were held liable for the negligence of a contractor in failing to guard an opening in a bridge which was being constructed to carry a street railway over a canal, the court said: "As the very nature of the work which the company here undertook to do involved danger to persons lawfully on the highway, who might approach the bridge in the

(*d*) *Other construction work on highways.*—Numerous cases in which the employer was held liable for injuries resulting from the failure of contractors to use proper precautions in executing work on highways are collected in the note below(*h*).

night time and attempt to cross it, it was bound to see that proper safeguards or warnings were provided while the work was going on, so as to afford reasonable protection to the public. * * * A duty was imposed by law upon the defendant towards the plaintiff, as one of the public, not to interfere with the right which the plaintiff possessed of using a public highway in such a manner as to impede or injure him when passing along it. The defendant is liable for the breach of the duty thus imposed upon him, although the act or default which caused the injury may have been the act or default of the defendant's contractor and not of defendant itself. The negligent act or omission, if established, constituted an unlawful invasion of the plaintiff's right of transit over the public highway."

(*h*) *Street railways.* In *Woodman v. Metropolitan R. Co.* (1889) 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N.E. 482, the plaintiff was held entitled to recover for an injury caused by tripping over some rails which were allowed to project beyond a barrier placed to guard an excavation. Holmes, J., after remarking that "it would not stretch the words of the Public Statutes and of the defendant's charter very much to say that such a personal duty was imposed upon it," to see that the public was properly protected against such risks, proceeded thus: 'But further, apart from statute, if the performance of a lawful contract necessarily will bring wrongful consequences to pass unless guarded against, and if, as in the present case, the contract cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer at his peril to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs. * * * Laying the track for the defendant necessitated the digging up of the highway, and the obstruction of it with earth and materials. This obstruction would be a nuisance unless properly guarded against. The work was done under a permit issued to the defendant. Considering the general principle of the law, and also the special relations of horse railroads to the highway and the policy of the statutes, so far as the legislature has expressed itself upon the subject, we are of opinion that the defendant, having caused the highway to be obstructed, was bound at its peril to see that a nuisance was not created."

This decision was cited with approval in *Johnston v. Phoenix Bridge Co.* (1899) 44 App. Div. 581, 60 N.Y. Supp. 947, where it was held that where a corporation which has contracted to construct a section of an elevated railroad, and has undertaken to become responsible for all damages to persons or property "occasioned by the omission, neglect or carelessness of itself, its agents or employees, during the performance of the work," sublets a portion of the contract to sub-contractors, who agree "to remove all the surplus excavation and other material used in the foundation work from the ground and to take your place under your contract with the Brighton Bridge Company above mentioned [principal employer] for furnishing these foundations," the corporation is liable to a pedestrian who, while walking at night along the sidewalk of the street in which the work is being performed, sustains injuries by falling over an unguarded pile of earth excavated by the sub-contractors and deposited by them upon the sidewalk. Woodward, J., said: "While it is possible, of course, that the sub-contractor in the case at bar might have made the excavation, taking all of the dirt removed upon private ground, this was not contemplated by the contract, nor is it in accord with the usual method of doing this particular kind of work. The language of the contract is not that Creem & Co. will remove all the excavation and other materials from the

ground adjacent to the excavation in the progress of the work, but is intended to say that on finishing the work they will 'remove all the surplus excavation and other material used in the foundation work from the ground.' This is no more than a promise to complete the work by clearing away all of the incumbrances after the work of placing the foundation had been completed, and it in no manner relieved the defendant from the obligation which it owed to the public of guarding the excavation as well as the materials which had been thrown out upon the street as an incident to the work. The obstruction which resulted in the accident was not 'purely collateral to the work,' as in the case of blasting rocks in the process of excavating, but was a direct and necessary incident of the undertaking; and in the absence of plain and unmistakable language the subcontractor cannot be held to have contemplated removing the earth to private grounds, a portion of it to be returned in filling up the excavation after the foundations were laid."

As the work of making in the street an excavation to receive one of the columns which are to support an elevated railway is intrinsically dangerous the company owning the line cannot, by entrusting the work to an independent contractor, escape its obligation to see that the pitfall thus created is so guarded as to prevent its being a cause of injury to passers-by. Since this obligation is imperative so long as the excavation exists notice that it is not sufficiently protected is not a condition of legal responsibility for injuries resulting from it. *Flynn* v. *New York Elev. R. Co.* (1883) 17 Jones & S. 60 (wheel of track slipped into the hole).

An electric railroad company which lets to independent contractors the digging of a certain number of post holes in a public street, by a contract fixing the size of the holes and nothing more, is liable for an injury caused by falling into one of the holes which was completed two or three days before the accident. *Donovan* v. *Oakland & B. Rapid Transit Co.* (1894) 102 Cal. 245, 36 Pac. 516.

Where a railway company, acting under the provisions of a statute, constructed a track along a public highway on the premises of a board of Dock Commissioners, and was made responsible by the statute for the condition of the track, it was held that a person who was injured by the defective condition of the highway, resulting from the operation incident to the alteration of the track, could not maintain an action against the Dock Commissioners. The case imposing liability on the employers of independent contractors, on the ground of the infraction of non-delegable duties, were cited by plaintiff's counsel. But it was considered by Huddleston, B., that the case was analogous rather to those in which a landlord who has not undertaken to repair demised premises is not liable for injuries caused by the defective state of those premises while the tenant is in possession thereof. The circumstances upon which he relied, as sustaining his conclusion were these:—that the positions of the railway company of the Dock Commissioners were altogether different and independent: that the railway company were in the sole possession of the place where the accident happened; that the railway company must be considered as doing the work, not under the orders, or as licensees of the Dock Commissioners, but under the powers of the Act of Parliament upon property which was made theirs. *Barham* v. *Ipswich Dock* (1885) 54 L.T.N.S. 23.

Area underneath footpath. In *Silvers* v. *Nerdlinger* (1868) 30 Ind. 53, it was held that the owners of the building alongside which the excavation was made, having caused the work to be done by virtue of a license granted by the municipal authorities, were bound "to use every reasonable care that the privilege thus granted should be so exercised as not to become a nuisance, or produce injury to others." "The digging of the area was lawful. It was not a nuisance, per se, but was rendered such by the neglect to keep it properly protected and guarded so as to avoid injury."

In *Ryan* v. *Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123, recovery was denied for an injury received by a person who fell into an unguarded and unlighted excavation which had been dug under a footpath, and the court stated that the doctrine of the earlier case just cited was not binding on it, for the reason that the question of the employer's liability for the

negligence of the contractor was not really involved, the action having been brought by the employer to recover from the contractor the damages which the former had been compelled to pay to the injured person. This view of the decision is clearly erroneous, as the only ground in which the action could be maintained was, that the employer was himself primarily liable for the negligence of the contractor.

Sewer. *Detroit* v. *Corey* (1861) 9 Mich. 165, 80 Am. Dec. 78 (pedestrian fell into trench which was left unguarded). The court, after observing that the power under which the city of Detroit acted was not a power given to it for government purposes, but a special legislative grant with respect to a thing which was its private property, proceeded thus: "The donee of such a power, whether the donee be an individual or a corporation, takes it with the understanding—for such are the requirements of the law in the execution of the power—that it shall be so executed as not necessarily to interfere with the rights of the public, and that all needful and proper measures will be taken, in the execution of it, to guard against accidents to persons lawfully using the highway at the time. He is individually bound for the performance of these obligations; he cannot accept the power divested of them, or rid himself of their performances by executing it through a third person, as his agent."

In Illinois it was held that, if a city employs a person to do work which is intrinsically dangerous, such as the blasting of rock in a street for a sewer, and damage results to another from a stone thrown by the blasting, the city will be liable to respond in damages for the injury. *Joliet* v. *Harwood* (1877) 86 Ill. 110, 29 Am. Rep. 17.

Ditch. The plaintiffs were held entitled to recover in Southern O. *R. Co.* v. *Morey* (1890) 47 Ohio St. 207, 7 L.R.A. 701, 24 N.E. 269, and *Baxter* v. *Warner* (1876) 6 H[illegible], 585, on the ground that the ditches which caused these injuries had been left open and unguarded by the contractors.

In *Storrs* v. *Utica* (1858) 17 N.Y. 104, 72 Am. Dec. 237, Comstock, J., while expressing his full agreement with the general principle relied upon in *Blake* v. *Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304, offered the following reasons for his opinion that the principle had not been correctly applied under the circumstances in evidence: "There was no complaint of negligence in the actual performance of the work. The ditch was carefully and skilfully dug. There was no careless projection of rocks against horses or travellers. The plaintiff's carriage and horses were driven into the ditch, because it was not guarded at night. The cause of the accident, therefore, was not in the manner in which the work was carried on by the laborers; if it had been, their immediate employer, and he only, was liable for the injury. But in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skilfully performed. A ditch cannot be dug in a public street and left open and unguarded at night without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers or lets it out by contract? If by contract, then I admit that the contractor must respond to third parties, if his servant or laborers are negligent in the immediate execution of the work. But the ultimate superior or proprietor first determines that the excavation shall be made, and then he selects his own contractor. Can he escape rsponsibility for putting a public street in a condition dangerous for travel at night by interposing the contract which he himself has made for the very thing which creates the danger? I should answer this question in the negative."

Pipe line. In *Colgrove* v. *Smith* (1894) 102 Cal. 220, 27 L.R.A. 590, 36 Pac. 411 (plaintiff fell into open trench), it was remarked that the fact that the defendant's obtained from the city a franchise or permission to dig up the street, and lay their pipes, merely relieved them of the consequences of doing unlawful work.

In *O'Brien* v. *Board of Land & Works* (1880) 6 Vict. L.R. Rep. (L.) 204, 2 Australia Law Times 22, the plaintiff was held entitled to recover for injuries caused by falling over a pipe laid down by the servants of a

carter in such a manner as to project over a crossing in a street. Under the contract the pipes were to be deposited in such continuous lines as might be pointed out, in such a manner as not to interfere with the traffic, and to the satisfaction of the officer who might be present; any of the contractor's workmen who refused to obey the instructions of the officer with regard to the handling of the pipes was not to be allowed to convey them; the contractor was in every respect to carry out the instruction and directions of the superintending officer. The evidence showed that no officer was present when the pipes were deposited. Stowell, Ch. J., considered the action to be maintainable on two distinct grounds. First, the negligent act of the carter was not entirely collateral to the work which he was employed to do. The injury resulted from the careless manner of performing the work, and the defendants were not absolved from liability by employing a contractor to do the work for them. Secondly, "by accepting the authority given them to do acts which, without such authority, would constitute a public nuisance, the defendants undertook an obligation to use all the care necessary to protect the public from injury," and they could not, by employing a contractor, relieve themselves of the obligation. The learned judge also intimated that the defendants might be held liable on the ground that "reasonable vigilance" had not been exercised in that no officer was present to direct the manner in which the pipes should be deposited. Stephen, J., considered the case to be not distinguishable from *Ellis* v. *Sheffield Gas Consumers' Co.* (1853) 2 El. & Bl. 767, 2 C.L. Rep. 249, 23 L.J.Q.B.N.S. 42, 18 Jur. 146, 2 Week. Rep. 19, and took the position that, although the defendants had power to break up the streets and deposit pipes, they were bound to exercise this power in such a way as not to create a dangerous nuisance.

A person who has authorized work to be done which requires the propulsion of explosive gas through pipes not yet thoroughly cemented and joined together, cannot, upon the plea that the man engaged in the work were servants of a contractor, escape liability for injuries caused by an explosion resulting from their negligence. *Chicago Economic Fuel Gas Co.* v. *Meyers* (1897) 168 Ill. 139, 48 N.E. 68. Affirming (1896) 64 Ill. App. 270. (The other grounds of the decision are stated in secs. 37, 62.)

Telephone line. In *Holliday* v. *National Telephone Co.* [C.A. 1899] 2 Q.B. 392, 81 L.T.N.S. 352, 68 L.J.Q.B.N.S. 1016, 47 Week. Rep. 658, Reversing [1898] 1 Q.B. 221, 68 L.J.Q.B.N.S. 302, the defendants, a telephone company, were lawfully engaged in laying telephone wires along a street. They passed the wires through tubes which they laid in a trench under the level of the pavement. The defendants contracted with a plumber to connect these tubes at the joints with lead and solder, to the satisfaction of the defendants' foreman, at the sum of 12s. per joint. There was evidence that the work was done by the plumber under the supervision of the defendants' foreman, and that one of their men was assisting him in it. In order to make the connections between the tubes, it was necessary to obtain a flare from a benzoline lamp, which could not be done without the application of heat to the lamp. The lamp used for the purpose was provided with a safety-valve. The plumber, for the purpose of obtaining the necessary flare, dipped the lamp into a caldrom of melted solder, which was placed over a fire on the footway for the purpose of the work, and which was unprotected by any screen or tent. Dipping the lamp into the solder would have been a proper and usual mode of obtaining the flare provided the lamp had been in good order. The safety valve of the lamp not being in working order, as the plumber ought to have known, the lamp exploded, with the result that the plaintiff who was passing on the highway was splashed by the molten solder and thereby injured. In an action by him against the defendants in the city of London court for damages in respect of the injuries so occasioned to him, the deputy judge held that the plumber was not doing the work as an independent contractor, but under the defendants' supervision and control, and that the defendants were responsible for his negligence as above mentioned. It was held by the Court of Appeal, that the judgment of the deputy judge

(c) *Removal of wrecks from navigable rivers.*—A navigable river being a public highway at common law(*i*), a person who

---

was right on the grounds, first, that there was evidence that the defendants and the plumber were jointly engaged in the performance of the work under such circumstances as to render the defendants liable for the negligence of which the plumber had been guilty, (see § 71, post); and, secondly, that, if the plumber were not an independent contractor, the defendants, having authorized the performance upon a highway of work, which from its nature was likely to involve danger to persons using the highway, were bound to take care that those who executed the work for them did not negligently cause injury to such persons. Lord Halsbury said: "There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorized by the proper authority. The telephone company so authorized to interfere with a public highway are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works. In this case the work to be done was the soldering together of pipes, and for that operation it appears to have been necessary to have molten metal at hand for the purpose of being instantly applied, and it was, as the deputy judge finds, a common and proper practice, with which it may be assumed that the defendants were familiar as they themselves did part of the work, to dip a benzoline lamp into the caldron of molten metal for the purpose of getting a flare. If the lamp were in good order, the operation would be harmless; but, if the safety-valve of the lamp were out of order, an explosion must ensue. Therefore, works were being executed in proximity to a highway, in which in the ordinary course of things an explosion might take place. It appears to me that the telephone company, by whose authority alone these works were done, were whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that persons passing along the highway were not injured by the negligent performance of the work." Smith, L.J., said: "The defendants were a telephone company who were engaged in the execution on a highway of works which were clearly dangerous. It obviously involves a certain amount of danger to have a caldron of molten lead on a highway. The defendants, therefore, on the hypothesis that Highmore was an independent contractor, were delegating to him the execution of dangerous work upon a highway. * * * In my opinion, since the decision of the House of Lords in *Hughes* v. *Percival* (1883) L.R. 8 App. Cas. 443, 52 L.J.Q.B.N.S. 719, 49 L.T. N.S. 189, 31 Week. Rep. 725, 47 J.P. 772, and that of the Privy Council in *Black* v. *Christ Church Finance Co* [1894] A.C. 48, 63 L.J.P.C.N.S. 32, 6 Reports, 394, 70 L.T.N.S. 77, 58 J.P. 332, it is very difficult for a person who is engaged in the execution of dangerous works near a highway to 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. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Highmore was engaged to perform."

Where a child 5 years old was injured by voluntarily seizing with its hands a rope which was being drawn through a pulley, while the servants of one of who had contracted to erect telephone poles and wires on a street were stretching the wires on the poles it was held that the negligence was not in obstructing the street, but in failing to keep the child away from the rope, and that the duty owing by the telephone company was not one from which, as between it and the public, the telephone company could not relieve itself by contracting with another to do the work. *Vosbeck* v. *Kellogg* (1899) 78 Minn. 176, 80 N.W. 957.

(*i*) 1 Beven, Neg. p. 570; Shearm. & Redf. Neg. § 333.

employs a contractor to perform on such a river work which is in its nature dangerous to vesseds passing up and down the channel is bound, at his peril, to see that such precautions are taken as may be necessary to secure the safety of those vessels(*j*).

52. —and to adjoining landowners.— In other cases the interposition of an independent contractor has been held to be no protection to the defendant, for the reason that the stipulated work was to be executed on land owned or occupied by him, and that its performance would be accompanied by certain incidents which would be likely to produce injury to the adjoining premises, unless the appropriate precautions were adopted. Upon this ground the plaintiff has been allowed to recover under the following circumstances.

(1) Where the work of making an excavation for a building was so negligently executed that a building on the adjoining premises was damaged by the withdrawal or weakening of its lateral support(*a*). The liability imputed under such circumstances is in no degree qualified by the fact that the owner of the

---

(*j*) Although the person employed to raise a sunken vessel for the owner may be placed in actual physical custody of the wreck "the owner does not . . . discharge himself from the duty towards the public which rested upon him of using reasonable care to warn other vessels of the position of the wreck which remains his property." *The Snark* [1899] Prob. 74, 80 L.T.N.S. 25, 47 Week. Rep. 398, 68 L.J. Prob. N.S. 22, 8 Asp. Mar. L. Cas. 483. Affirmed by the Court of Appeal in [1900] Prob. 105, 69 L.J. Prob. N.S. 41, 82 L.T.N.S. 42, 48 Week. Rep. 279, 9 Asp. Mar. L. Cas. 50 (wreck not lighted during salvage operations). See further as to this case, § 55, note.

(*a*) The leading case on this subject is *Bower* v. *Peate* (1876) 35 L.T. N.S. 321, L.R.1 Q.B. Div. 321, 45 L.J.Q.B.N.S. 440. There the defendant, having determined to pull down his old house and build another on the same site, proposed to carry the foundation and walls of his new house to a lower depth than those of the plaintiff; for which purpose it would be necessary to excavate and remove the soil which before the alteration was adjacent to the plaintiff's house and land, and by which it had been supported. In order to do this without injury to the plaintiff's house it would, as the defendants knew, be necessary to resort to underpinning or some other mode of supporting or shoring the plaintiff's soil and walls during the operations. In the specifications referred to in the contract was the following clause: "The adjoining buildings must be well and sufficiently propped and upheld during the progress of the works by the contractor, who shall be required to take the responsibility, and make good any damage occurring thereto." There was also a provision of a similar purport in the contract itself. Owing to defective underpinning, or want of other support to the plaintiff's soil and walls, while the excavation was being made, the plaintiff's house suffered the injuries for which the action was brought. Cockburn, C.J., in delivering the judgment of the court, said: "No question was made on the argument as to the right of the plaintiff to the support of the adjacent soil of the defendant for his house;

nor was it doubted that the injuries to the house of which the plaintiff complained had been occasioned by the removal of such soil in the excavation of the defendant's works. But it was contended that the defendant, having committed the execution of the work to a contract or, both as regards the taking down and rebuilding his house, and the measures necessary for the protection of the adjoining house, the contractor and not the defendant, became liable for any injury arising from want of due care in shoring or otherwise supporting the plaintiff's house. The argument, as put on behalf of the defendant, may be shortly stated thus: According to the doctrine in *Backhouse* v. *Bonomi* (1861) 9 H.L. Cas. 503, 34 L.J.Q.B.N.S. 181, 7 Jur. N.S. 809, 4 L.T.N.S. 754, 9 Week. Rep. 769, and taking away the soil, to the support of which an adjoining owner is entitled, is not in se wrongful. It only becomes so when followed by injurious consequences to the neighbor. And if, therefore such injurious consequences can be averted by efficient means, as by the substitution of artificial for the natural support previously afforded by the soil, the removal of the soil is in no respect wrongful. Here, the defendant, in one and the same contract, employed the contractor to execute the work he desired to have done, and to take the necessary measures for protecting the plaintiff's premises. He authorized him to do the former only on condition of his preventing it from causing injury to the plaintiff, and only so far as it could be done consistently with the safety of the premises of the latter. If, therefore, the work which the contractor was employed to do had been carried out in conformity with the instructions of the defendant, the work would have been perfectly lawful, and would have been attended with no injurious consequences. The injuries complained of have arisen from the negligence of the contractor alone. The defendant is, therefore, entitled to the benefit of the general rule, that when a person employs a contractor to do a work lawful in itself, and involving no injurious consequences to others, and damage arises to another party from the negligence of the contractor or his servants, the contractor and not the employer is liable.

It appears to us that upon a correct view of the facts, this reasoning cannot prevail. In the first place, because the assumption on which it is founded altogether fails. The contractor was not employed to give support to the plaintiffs' house as part of the work he was to do for the defendant. It was not included in the specification, and formed no part of the work he contracted to do, except so far as it was necessary to satisfy his obligation to provide the necessary support of the plaintiff's house. In addition to which the defendant stipulates that the contractor shall 'take upon himself the risk and responsibility of shoring and supporting the adjoining buildings affected by the alterations,' and shall 'make good any damage which might be sustained by the said buildings in consequence of the works,' and shall 'satisfy any claims for compensation arising therefrom.' The effect of this is, not that the defendant orders, or stipulates for, any specific work necessary for the support of the adjoining buildings, but that he leaves the recourse to such work entirely at the discretion of the contractor, stipulating only that the latter shall bear him harmless in the event of any damage taking place. In other words, he directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damage to the adjoining property. He is, therefore, not 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, and who is therefore not to be held responsible if, while the work is going on, injury arises from the negligence of the contractor or his servants." It was also considered that the action was maintainable on the broader ground already stated in the passage quoted in s. 48, ante.

In *Dalton* v. *Angus* (1881) L.R. 6 App. Cas. 740, 50 L.J.Q.B.N.S. 689, 44 L.T.N.S. 844, 30 Week. Rep. 196, the owner of a house who was held to have acquired by prescription an easement of lateral support from the soil of the adjoining premises was allowed to recover damages for injury

caused to the house by excavations made in the course of the performance of a contract for the erection of a new building on the servient premises. Lord Blackburn expressed the opinion that, if the state of the evidence in *Bower* v. *Peate* (1876) L.R. 1 Q.B. Div. 321, 45 L.J.Q.B.N.S. 446, 35 L.T. N.S. 321, and in *Butler* v. *Hunter* (1862) 7 Hurlst. & N. 826, 31 L.J. Exch. N.S. 214, 10 Week. Rep. 214, with which it was in conflict was really such that the facts were not distinguishable, the reasoning in the former case was the more satisfactory. This criticism he repeated in the judgment delivered two years afterwards in *Hughes* v. *Percival* (1883) L.R. 8 App. Cas. 443, 447, 52 L.J.Q.B.N.S. 719, 49 L.T.N.S. 189, 31 Week. Rep. 725, 47 J.P. 772, where he remarked with regard to *Butler* v. *Hunter*: "I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer, I am obliged to differ from them." In the Court of Appeal (*Angus* v. *Dalton* (1878) 4 Q.B. Div. 162) a different conclusion had been arrived at with respect to the question whether the plaintiff had, under the circumstances, acquired an easement of lateral support for his buildings. But Cotton, L.J., accepted as correct the general doctrine enunciated in Chief Justice Cockburn's judgment in *Bower* v. *Peate* (1876) L.R. 1 Q.B. Div. 321, 45 L.J.Q.B.N.S. 446, 35 L.T.N.S. 321, the effect of which he summarized as follows: "Where a defendant has employed a contractor to do work, which in its nature is dangerous to a neighboring property, and damage is the result of the work done, the employer is liable though he has employed a competent contractor and given him directions to take precautions in executing the work." Brett, L.J., did not express any specific opinion on the point, as it was not material in the view which he took of the case.

In *Shea* v. *River Bridge & K. Drainage Board* (1880) Ir. L.R. 6 C.L. 179, O'Brien, J., anticipated the above-mentioned criticism of Lord Blackburn upon *Butler* v. *Hunter*.

A few years before the decision in *Dalton* v. *Angus* supra, had been rendered, the Virginia Court of Appeals had arrived at precisely the same conclusion with reference to a case which involved essentially similar circumstances. *Stevenson* v. *Wallace* (1876) 27 Gratt. 77. No cases were cited.

The decision in *Dalton* v. *Angus* was followed very soon afterwards in a case where a contractor to whom had been entrusted the work or rebuilding a tenement in which a prescriptive easement of lateral support had been acquired by the owner of the adjoining tenement executed the work so negligently as to cause the subsidence of an arch in the vault of the latter tenement and the bulging of the walls of the vault. *Lemaitre* v. *Davis* (1881) L.R. 19 Ch. Div. 281, 51 L.J. Ch. N.S. 173, 46 L.T.N.S. 407, 30 Week. Rep. 360, 46 J.P. 324. The court said: "The defendant Davis doing the works with the assistance of a contractor was doing his own works, and it was his duty to see that the works were properly done and that certain precautions were taken, either by himself or his agent, by shoring, to prevent any injury to his neighbour's vault. Such precautions were not taken. The defendant Davis cannot shift the responsibility from himself by saying that he employed a contractor and that it was his wrongful act."

In *Brown* v. *Werner* (1873) 40 Md. 15, it was assumed by the court in its argument that a house owner is liable to his neighbours for the damage caused by the sinking of a party wall, in consequence of the negligence of a contractor in not underpinning it properly.

In *Bonaparte* v. *Wiseman* (1899) 89 Md. 12, 44 L.R.A. 482, 42 Atl. 918, the defendant had asked that the jury should be instructed to the effect that he was not liable for the injury to the plaintiff's house by the excavation on his lot, because the work was done by an independent contractor. This request was held to have been properly denied, the rule applicable to the circumstances being thus announced by the court: "One who causes an excavation to be made on his own lot of ground, although by an independent contractor, is liable for injury thereby caused to the

injured tenement has licensed the contractor's employer to carry out the operations by means of which it is proposed to protect that tenement, while the work which creates the danger is in progress. Such a license is presumed to have been granted upon an implied condition that the licensee will see that the operations authorized are executed in a skilful and careful manner(*b*).

(2) Where one of two adjacent houses was rebuilt upon a plan which involved such a use of the party wall by which they were separated, that the safety of the other house depended upon its being kept intact, and a certain portion of the work was executed

---

house of an adjoining lot owner when such injury might reasonably have been anticipated as a probable consequence of the excavation and when no notice has been given to the adjoining lot owner to protect his property. The question whether such injury was a probable consequence of the excavation is a question of fact for the jury."

In *Chicago* v. *Norton Milling Co.* (1906) 07 Ill. App. 651, Affirmed in (1902) 196 Ill. 580, 63 N.E. 1045, the employer was held liable for so excavating for the abutment of a bridge that the plaintiff's building settled.

The above cited decisions outweigh the authority of one in which it was laid down that a landed proprietor is not liable for injuries to a house on an adjacent lot, caused by excavations for building purposes on his own lot, when done by a skilled contractor, to whom the job had been let. *Myer* v. *Hobbs* (1876) 57 Ala. 175, 29 Am. Rep. 719; and of another in which it was held that the work of excavating a foundation for a house was not, "in its nature dangerous" to adjacent property in such a sense as to render the employer liable for the negligence of a contractor engaged to do such work. *Crenshaw* v. *Ullman* (1893) 113 Mo. 633, 20 S.W. 1077.

In a case where the plaintiff claimed damages from his landlord for injuries caused to his goods by the collapse of the leased building, the accident being due to the negligent manner in which a contractor had made an excavation for a new party wall, Seymour, J., reasoned as follows: "If I employ a contractor to do a job of work for me which in the progress of its execution obviously exposes others to unusual peril, I ought, I think to be responsible upon the same principle as in the last case, for I cause acts to be done which naturally exposes others to injury. The case now before me could not, however, I think, come under this head. The peril, whatever it was, was mainly to the defendants' own tenement, and cannot be treated, notwithstanding the unfortunate event, as one at all imminent to the plaintiffs." *Lawrence* v. *Shipman* (1873) 39 Conn. 586. It is submitted, however, that the circumstance thus emphasized is not adequate to serve as a differentiating element. If the work involved imminent danger to the plaintiff's prpoerty it is hard to see why the fact that the defendant's own property was also endangered should exclude him from the benefits of the rule now under discussion.

The fact that a house-owner employs an independent contractor to make an excavation for his cellar does not exempt such owner from the duty of preserving from injury "any party or other wall on adjoining land," as is prescribed by ch. 6. New York Laws, 1855. The contractee is the person "causing the excavation to be made," within the meaning of that statute. *Dorrity* v. *Rapp* (1878) 72 N.Y. 307. Affirmed (1877) 11 Hun. 374.

(*b*) *Waller* v. *Lasher* (1890) 37 Ill. App. 609 (underpinning of party wall was so negligently done that it settled).

so negligently as to drag down the wall and with it the other house(c).

(c) *Hughes* v. *Percival* (1883) L.R. 8 App. Cas. 443, 52 L.J.Q.B.N.S. 719, 49 L.T.N.S. 189, 31 Week. Rep. 725, 47 J.P. 772. Affirming (1882) L.R. 9 Q.B. Div. 441. There the defendant whose house was on one side adjacent to that of the plaintiff, and on the other to that of a man named Barron entered into a contract for the demolition of his house and its reconstruction on a plan which required the tying together of the new building and the party wall, the obvious consequence of such an arrangement being that, if the defendant's house fell, the plaintiff's would inevitably be damaged. A servant of the contractor, while fixing a staircase, negligently cut into the party wall between the defendant's house and Barron's, the result being the injury in suit. All the members of the Court of Appeal were agreed that the defendant would have been liable if the contractor's servants had been guilty of negligence, while the operation of tying together the houses of the plaintiff and defendant was in progress. Holker, L.J., was of opinion that, when this operation was finished, that part of the work which was essentially hazardous was concluded, and that the absolute duties which the law casts upon an employer who engages a contractor to execute work answering to that description were not predicable as to the work which was the immediate occasion of the injury. With this view Baggallay and Brett L.JJ., did not agree, and theid opinion was upheld by the House of Lords. The following passage from Lord Watson's judgment contains the clearest statement of the rationale of the decision. "The appellant does not deny that many of the operations which he contemplated, and which he had employed a contractor to execute, were such as would necessarily or possibly imperil the stability of the party-wall, if no precautions were used; nor does he dispute that it was incumbent upon him to see that these operations were safely carried out by the contractor. What he did (by the counsel)) allege, and offer to prove before the jury, was that all these hazardous operations had been brought to a safe termination months before the occurrence which resulted in damage to the respondent's house. Now looking to the terms of the contract and specification I think it does appear that extensive structural operations fraught with obvious risk to the party-wall in question had been carefully and successfully executed: and if I had been able to come to the conclusion in fact that after these were completed there remained nothing to be done by the contractor which could reasonably be supposed to involve danger to the party-wall, I should have been disposed to agree with Lord Justice Holker. I do not think that the combination in one contract of operations hazardous, and operations in no reasonable sense hazardous, can affect the character of these operations, or impose upon the employer legal duties and liabilities to which he would not have been subject had he employed a different contractor for each operation. But I am not satisfied that the fitting-up of a wooden staircase from the basement floor of the appellant's tenement to the cellar below was an operation which could occasion no risk to the party wall."

Referring to the plan of reconstruction, Lord Blackburn said: "The defendant had a right so to utilize the party-wall, for it was his property as well as the plaintiff's; a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it: but I think that the duty went as far as to require him to see that reasonable skill and care were exercised in those operations, which involved a use of the party-wall exposing it to this risk. If such a duty was cast upon the defendant, he could not get rid of responsibility by delegating the performance of it to a third person."

(3) Where a party wall separating two houses was so negligently pulled down that the other house suffered damage(*c*).

(4) Where building operations are so negligently carried on as unnecessarily to damage the business and goods of the occupant of the adjoining premises(*d*).

Lord Fitzgerald's views were stated as follows: "The event shows the that the danger was not over, and I should have thought that it could not be as long as anything was being done that could affect the stability of either party-wall. Lord Justice Holker seems to have been of opinion that though the operation as a whole was perilous, yet that the peril had ceased though the work was not completed. He says as to the particular portion of the work: 'It seems to me perfectly clear that it was not hazardous work, and the workmen exceeded their duty; they made a mistake.' But it is open to us to divide the work thus into sections and say, 'As to a particular part, taken by itself, it carried with it no special peril, and you the defendant are not responsible?' It seems to me that this cannot be done. We would not be justified in thus breaking it into parts, or considering the case as if the putting in the stairs or the stone steps was the sole work which the defendant was getting done. The conclusion I have reached is, that the defendant had undertaken a work which as a whole necessarily carried with it considerable peril to his neighbors. . . What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbors, or warranting them against injury. It is not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbors from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another."

(*c*) In *Earl* v. *Headlestone* (1877) 10 Jones & S. 294, it was conceded that, if the weakening of a party wall between two adjoining houses was a highly probable consequence of pulling down one of them, that is, if it would follow unless precautions were taken, the defendant might have been bound to take these precautions, or at least to have given notice to the plaintiff that he might take them. But it was denied that this point was involved in the case, inasmuch as there was no proof as to the probable consequences of taking defendant's building down, and it could not be inferred the mere fact of a building having its beams in a party-wall, that it could not be done without weakening the wall or taking out the ends of the beams in the wall.

In *Fowler* v. *Saks* (1890) 7 Mackey, 570, 7 L.R.A. 649, it was held that a house-owner was liable for injuries inflicted on an adjoining building by the manner in which a contractor for the re-construction of the party-wall did his work. In one part of the opinion the court seems to base its conclusion on the doctrine discussed in this subtitle, as it was laid down that a person who is "under an antecedent obligation to do a thing, or to do it in a particular way" cannot get rid of his responsibility by deputing it to somebody else. But in another place the language used implies that the rationale of the decision is that the stipulated work was "necessarily and per se a nuisance." There seems to be a logical confusion here between two distinct conceptions, unless it is meant that the work was a nuisance unless certain precautions were used.

(*d*) *Cameron* v. *Fraser* (1881) 9 Sc. Sess. Cas. 4th series 26, where the damage was caused by the excessive dust, and by breaking into a chimney and throwing soot and rubbish down it. This decision, however, seems to be a somewhat dubious correctness. Circumstances such as those

(5) Where gas pipes were so negligently dealt with during the progress of the work of constructing a sewer, in a street, that the gas escaped into the house of an abutting owner and caused an explosion(*e*).

(6) Where a similar accident occurred while the operation of laying a line of gas pipes was in progress(*f*).

---

complained of can hardly be regarded as ordinary incidents of building operations in such a sense that an employer is bound to foresee and take precautions against them.

(*e*) *Hardaker* v *Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196. Lindley, L.J., said: "The council are not bound in point of law to do the work themselves, i.e., by servants of their own. There is nothing to prevent them from employing a contractor to do their work for them. But the council can not by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly. . . . . Their duty in sewering the street was not performed by constructing the proper sewer. Their duty was, not only to do that, but also to take care not to break any gas-pipes which they cut under: this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which contractor performed the district council's duty for them, but did so carelessly; the case is one in which the duty of the district council, so far as the gas-pipes were concerned, was not performed at all. It was contended for the district council that, although they might be liable to the owner of the gas-pipes, they were not liable to the plaintiff, as they were under no duty to him. But this is not consistent with *Gray* v. *Pullen* (1864-5) Best & S. 970, 34 L.J.Q.B.N.S. 265, 11 L.T.N.S. 569, 13 Week. Rep. 257, nor with *Terry* v. *Ashton* (1876) L.R. 1 Q.B. Div. 314, 45 L.J.Q.B.N.S. 260, 34 L.T.N.S. 97, 24 Week. Rep. 581, in neither of which was the defendant under any duty to the plaintiff, except as one of the public. Smith, L.J., said: "Digging under gas-pipes in use must necessarily be attended with risk, unless all reasonable precautions are taken to guard against it. If a gas-pipe be left unsupported it is obvious that it may become fractured, and then an escape of gas, with its attendant consequences, will necessarily result. And indeed it is obvious, from clauses 14, 45 and 46 of the contract in this case, that risk was apprehended, for those specific provisions were inserted in order to obviate the danger. It was not attempted on behalf of the district council to prove that they had taken any precautions whatever. The sole point taken at the trial on their behalf was, that they had delegated the performance of the works to a contractor and therefore were not liable, and upon that they asked the learned judge to enter judgment for them, and he did so."

(*f*) A servant of a construction company having been injured through the negligence of his foreman in giving an order which led to the escape and explosion of gas, the defendant was held liable on the ground that it "authorized a work to be done, which required the propelling of explosive gas through pipes not yet thoroughly cemented and joined together," and that "it could not escape liability for the consequences of such dangerous

(7) Where lands were flooded as a result of the negligent manner in which the operations undertaken for the drainage of a district were c ed on (*g*).

---

work, upon the plea that those engaged in it were the servants of a construction company." *Chicago Economic Fuel Gas Co.* v. *Myers* (1897) 168 Ill. 139, 48 N.E. 66.

(*g*) In *Shea* v. *River Bride & K. Drainage Board* (1880) Ir. L.R. 6 C.L. 179, a Drainage Board constituted under the drainage Act of 1863 employed a contractor to carry out drainage works, consisting of the deepening of a river and the construction of a new bridge. In the execution of these works the contractor erected a temporary dam across a river, and excavated certain loop drains, for the purpose of carrying off the water penned back by the dam. These drains being of insufficient dimensions to contain the water which came down the river during the ensuing wet season, the plaintiff's land was overflowed. From the evidence set out in the special case submitted by counsel it appeared that, although the erection of the dam was not mentioned or referred to in the articles, specifications, or plans, and was not a part of the work contracted for, such erection was absolutely necessary for the proper execution of the works which the contractor was expressly employed to execute, and that, at the time of the signing of the contract, the engineer who acted for the Board was aware that it would be necessary to erect the dam, and consequently that it would also be necessary to make loop drains or put a proper sluice gate in the dam. Under these circumstances the Board was held liable for the damage caused by the overflow from the drains. O'Brien, J., based his conclusion upon the ground that the erection of the dam was an illegal act, as it interfered with the water rights of the riparian owners and other parties, and that, although it was not one of the works which the contractor had agreed to execute, it was a work which was necessary to be done, in order to enable the contractor to do what he had specifically agreed to do. (See §§ 43-47a, ante, for other cases involving this principle). *Allen* v. *Hayward* (1845) 7 Q.B. 960, 4 Eng. Ry. & C. Cas. 104, 15 L.J.Q.B.N.S. 99, 10 Jur 92, was relied upon by defendant's counsel, but distinguished on the grounds, that the work during which the negligence complained of had occurred was not illegal, and that the decision was based on the fact that the bank which failed was part of the works which was specified in the contract, and which the contractor had expressly covenanted to execute in a substantial and workmanlike manner to the satisfaction of the Commissioners' Surveyor, whereas in the case before the court there was no reference to the drains in the contract and the contractor's covenant for the due execution of the works was confined to the works expressly specified. Fitzgerald agreed in this conclusion and in the reasons assigned for it and also added a special reason for his concurrence, viz., that the power conferred by the Drainage Act were such as required great care in their application, and that in viw of the nature of the works to be executed. The failure of the Board to use more than ordinary care and precaution would obviously cause, great injuries to owners and occupiers either within or without the Drainage District. He was of opinion that a Drainage Board could not get rid of responsibility to those within the district by simply transferring their powers and the execution of the works to a contractor. They might employ a contractor; but if they did they were bound to see that every reasonable precaution should be taken to prevent injury arising to the local proprietors by reason of the execution of the drainage works, to be done, though of a critical character, could have been carried out safely by adopting a simple and reasonable precaution. The Board intrusted the actual execution of the work to a contractor; but imposed no obligation on him to take any precaution to guard against the injurious results likely to ensue.

(8) Where the materials dredged from the water in front of a piece of land and deposited thereon were allowed to escape on the land of an adjoining proprietor(*h*).

(9) Where the work of demolishing the ruined walls of a building which had suffered damage from fire was so carelessly executed as to injure a neighbor's premises(*i*).

(10) Where fire which was being made use of for clearing land or for other purposes escaped on to the premises of an adjoining proprietor(*j*).

(*h*) An owner of shore land, who contracts with another to dredge in front of it, and deposit the dredging on the rear, without providing means of preventing it from sliding on the land of an adjacent owner, is as much a trespasser as the contractor, where the deposit spreads on the adjacent land. *Braisted* v. *Brooklyn & R.B.R. Co.* (1899) 46 App. Div. 204, 61 N.Y. Supp. 674 (bulkhead was so constructed that it allowed the mud deposited against it to slip through).

(*i*) *Covington & C. Bridge Co.* v. *Steinbrock* (1899) 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N.E. 618, where the contractor pulled down one of the walls so negligently that it fell outward on the property of the plaintiff. The decision was based upon the ground that the injury resulted from the negligent manner in which work which "necessarily involved great danger to others unless great care was used" had been executed and that the accident should have been anticipated as a probable consequence, in case due care was not observed. See however in § 41 (a), note subd. (4) a case which conflicts with this decision.

(*j*) In *Black* v. *Christchurch Finance Co.* [1894] A.C. 48, 63 L.J.C.P. N.S. 32, 6 Reports, 394, 70 L.T.N.S. 77, 59 J.P. 332, reversing (1891) 10 New Zealand L.R. 238, the defendant was held liable, where the ground of the plaintiff's claim was that the defendants lighted or caused or procured the fire to be lighted on their own land in a negligent and improper manner, and wrongfully and negligently permitted the fire to spread to the lands of the plaintiff, with the result that the injury complained of was done to the plaintiff's growing crops of grass-seed, and fences and firewood. In delivering the judgment of the Privy Council, Lord Shand said: "It has not been disputed that, if Nyman in what he did was acting under the defendants' contract by which the burning of the bush had been let or contracted for, the defendants must be responsible for the consequences. The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precaution to prevent the fire extending to his neighbor's property (sic utere tuo ut alienum non lædas). And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences. See *Hughes* v. *Percival* (1883) L.R. 8 App. Cas. 443, 52 L.J.Q.B.N.S. 719, 49 L.T.N.S. 189, 31 Week. Rep. 725, 47 J.P. 772, and authorities there cited [note (c), supra]. Cases may indeed occur in which no precautions could be adopted which could reasonably be expected to avert the danger, of which the present appears to be a pretty clear instance, for it is scarcely conceivable that when once the fire was lit, not at a suitable or favorable time, but with the wind blowing as it was, any means which could be suggested would have saved the consequences which occurred. In any view no preventative means of any kind were adopted, and there can be no

(11) Where it was understood that explosives would be used for the purpose of blasting out rock or materials which it was necessary to remove in the course of the performance of the stipulated work(*k*).

---

doubt as to the liability of the defendants if they are responsible for Nyman's act."

In *Cameron* v. *Oberlin* (1897) 19 Ind. App. 142, 48 N.E. 886, a landowner who employed a contractor to burn up certain brush and rubbish was held liable for injuries caused by the spread of the fire to a neighbour's premises, the ground of the decision being that, as the materials to be burnt was in direct contact with similar materials on his neighbour's premises, and he had arranged to have the work done after a long drought, while the materials were in a highly inflammable condition, the injury was a natural and probable consequence of the performance of the work in the time and manner agreed upon.

A municipal council which contracted with a person for the destruction of dead animals by burning in a paddock belonging to the council, the work being highly dangerous at the time when the contract was made, but susceptible of being safely performed if certain precautions were observed, was held responsible for injuries caused to the plaintiff's property, as a result of the contractor's failure to observe these precautions. *Hannan* v. *Shepparton* (1892) 14 Australian Law Times 83.

(*k*) In Connecticut the doctrine laid down is, that the use of dynamite in the "operation of blasting out an excavation for a sewer is intrinsically dangerous" as a matter of law, but that the question whether under all facts in the case, the work contracted to be done for the construction of the particular sewer under discussion demanded, in its natural, ordinary and reasonable execution, the use of such intrinsically dangerous agency and means as would have obviously exposed the plaintiff's property to probable injury therefrom, is for the jury to determine. It was said that, for an injury inflicted upon property by the manner in which such an operation is conducted, the sufferer is entitled to recover, not on the ground that it is necessarily injurious to his property, but on the ground that, although it may be performed without causing any injury, it exposes the property to probable injury or unusual risk which the employer is, at his peril, bound to avert, so far as he does so by the exercise of reasonable care. Accordingly an instruction excusing the defendant, provided the work could be done by ordinary means of performing such work without necessarily injuring the plaintiff's property, was held to be inappropriate to the facts of the case. *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 526, 28 Atl. 32.

In Massachusetts a plaintiff has been held entitled to recover damages for an injury to his property caused by the blasting of rocks on the adjoining premises of the defendant. *Wea[illegible]rbee* v. *Partridge* (1900) 175 Mass. 185, 78 Am. St. Rep. 486, 55 N.E. 894.

For the purposes of this decision it was assumed that the contract contemplated that blasting would be done, and that the place where it was done was within 3 or 4 feet of the line between the plaintiff's and the defendant, and about 8 or 9 feet from the plaintiff's house. "Under such circumstances," said Holmes, Ch. J., it was plain that the performance of the contract would bring to pass the wrongful consequences of which the plaintiffs complain, unless it was guarded against, and if the principle recognized in *Woodman* v. *Metropolitan R. Co.* (1889) 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N.E. 482, applies, the defendant was bound to see that due care was used to prevent harm. We are of opinion that the principle does apply. In some cases of blasting under an independent contract we might go no further than to hold that there was a question for the jury, whether the danger was so great as to make the

53. —and to persons invited on the defendant's premises.—The duty of a landowner is to take reasonable care to keep his premises in such a state that persons whom he invites to come thereon shall not be unduly exposed to danger(*a*). This duty being absolute and non-delegable, he cannot escape liability for an injury occasioned by its non-performance by showing that the immediate cause of the injury was the existence of a danger created by the fault of an independent contractor. The mere fact that he negligently failed to guard against it is sufficient to render him responsible(*b*). In other words, "when the owner of premises which

---

defendant liable. But in the case at bar the danger was so obvious that only one conclusion was possible, and the defendant did not ask to go to the jury upon this point. What he wanted was to have a verdict directed in his favor. Cases sustaining the conclusion to which we have come are *Jolliet* v. *Harwood* (1877) 86 Ill. 110, 29 Am. Rep. 17; [see § 51, ante], *James* v. *McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S.W. 435; [§ 63, post] *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32 [see above]. There are some other cases in which the subject has been approached solely from the point of view of master and servant, although not without dissent. These decisions we are not prepared to follow. *McCafferty* v. *Spuyten Duyvil & P.M.R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267, *Tibbets* v. *Knox & L.R. Co.* (1873) 62 Me. 437; *Edmundson* v. *Pittsburgh, M. & Y.R. Co.* (1885) 111 Pa. 316; 2 Atl. 404. Compare *Stone* v. *Cheshire R. Corp.* (1849) 19 N.H. 427, 51 Am. Dec. 192; *Wright* v. *Holbrook* (1872) 52 N.H. 120; 13 Am. Rep. 12." The antagonistic cases here cited and others to the same effect are cited in § 40a, ante.

(*a*) Blackburn, J., in *Welfare* v. *London, B. & S.C.R. Co.* (1869) L.R. 4 Q.B. 693, 38 L.J.Q.B.N.S. 241, 20 L.T.N.S. 743, 17 Week. Rep. 1065.

(*b*) *Samuelson* v. *Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N.W. 499, where it is pointed out that *Pickard* v. *Smith* (1861) 10 C.B.N.S. 470, 4 L.T.N.S. 470, which has been already discussed under § 51 (b), may be regarded as an illustration of this doctrine.

In *Welfare* v. *London, B. & S.C.R. Co.* (1869) L.R. 4 Q.B. 693, 38 L.J. Q.B.N.S. 241, 20 L.T.N.S. 743, 17 Week. Rep. 1065, where a railway passenger at a station was injured by the fall of a heavy plank from the roof of a station which was being repaired, by a mechanic, the plaintiff's counsel argued that the defendant should be held liable under this doctrine. This contention did not prevail for the reason that there was deemed to be no evidence to show that the company knew they were exposing the persons coming on their premises to undue danger.

A street railway company was held liable to a person who, while present at an exhibition of marksmanship given at a pleasure resort owned and advertised by it, although the performer was provided and conducted by an independent contractor, was injured by a small fragment of a bullet or other metallic substance, which broke off when the bullet hit the butt, and struck the plaintiff in the eye. *Thompson* v. *Lowell, L. & H. Street R. Co.* (1898) 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N.E. 913.

Contrast with this ruling *Knottnerus* v. *North Park Street R. Co.* (1892) 93 Mich. 348, 17 L.R.A. 726, 53 N.W. 529, in which, on the ground that the operations contemplated were not such as necessarily involved injury to visitors, it was held that the owner of a pleasure resort and street railway leading to it did not, by leasing the privilege of operating a switch-

are under his control employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner is not relieved by reason of the contract from the obligation of seeing that due care is used to protect such persons"(c).

54. —and to tenants.— A house owner who undertakes to make repairs on the demised premises is bound to adopt such precautionary measures as will protect the persons and property of his tenants and their sub-tenants in the building from any injury which will naturally result from the character of the work so undertaken. The employment of a contractor to execute the work will not relieve him from his responsibility for the proper performance of this duty(a).

---

back railway at the resort, and advertising it as one of the attractions of the place, become an insurer against accidents to persons patronizing the lessee, or become liable for his carelessness.

Where a party who contracted with a school district for drilling a well in the school-house grounds left his drilling machine unlocked and unguarded, and in his absence one of the children was injured while playing with it, it was held that the employer could not be held liable on the ground that the work was dangerous in itself, and that he failed to take such precautions as were appropriate under the circumstances. *Wood* v. *Independent School Dist.* (1876) 44 Iowa 30.

(c) *Curtis* v. *Kiley* (1891) 153 Mass. 123, 26 N.E. 421 (visitor to one of the defendant's tenants was injured by falling into a trench dug near the passage way by a contractor employed to do certain work on the premises).

This decision was followed in a case in which a street railway company which advertised a balloon ascent at a park owned and controlled by it was held liable for the death of a child at such ascension caused by the fall of a pole to which the balloon was attached, although the person making the ascent was employed as an independent contractor, the evidence being that proper notice of the fact that it would fall was not given. *Richmond & M.R. Co.* v. *Moore* (1897) 94 Va. 403, 37 L.R.A. 258, 27 S.E. 70.

(a) *Wilber* v. *Follansbee* (1897) 97 Wis. 577, 72 N.W. 741, 73 N.W. 559 (tenant stumbled over rubbish left in the dall and fell down a staircase; *Sulzbacher* v. *Dickie* (1876) 6 Daly, 469 (damage done to the goods of a tenant by rain which found its way into the building while a new roof was being put on); *Malony* v. *Brady* (1891) 38 N.Y.S.R. 803, 14 N.Y. Supp. 794; second appeal (1892) 45 N.Y.S.R. 864, 18 N.Y. Supp. 757 (similar occurrence); *Wertheimer* v. *Saunders* (1897) 95 Wis. 573, 37 L.R.A. 146, 70 N.W. 824 (similar occurrence); *Meyers* v. *Easton* (1878) 4 Vict. L. Rep. (L.) 283 (similar occurrence).

With these rulings may be contrasted one to the effect that a landlord is not liable, under an implied covenant of quiet enjoyment, for injuries to the personal property of a tenant caused by the tortious acts of the servants of an independent contractor for a one story extension to

55. —and to owners of vessels navigating rivers.—A person whose vessel has been sunk on the fairway of a navigable river is bound to use reasonable care to warn other vessels of the position of the wreck, and cannot escape the responsibility attaching to him by delegating the discharge of that duty to a contractor(*a*).

---

the building, while using a part of the demised premises as a means of access to their work. *Hyde* v. *Wilmore* (1895) 14 Misc. 340, 35 N.Y. Supp. 681.

(*a*) *The Snark* [1899] Prob. 74, 80 L.T.N.S. 25, 47 Week. Rep. 398, 68 L.J. Prob. N.S. 22, 8 Asp. Mar. L. Cas. 483, Affirmed by the Court of Appeal in [1900] Prob. 105, 69 L.J. Prob. N.S. 41, 82 L.T.N.S. 42, 48 Week. Rep. 279, 9 Asp. Mar. L. Cas. 50. In that case a barge belonging to the defendants, without negligence on their part, was sunk in the fairway of the river Thames. They employed an underwaterman to conduct the salvage operations necessary to raise her and, for that purpose, put him in possession and control; 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. In the lower court Gorell Barnes, J., stated his conclusions in the following language:—"If the owner transfer the wreck to some other person, who takes from him the possession and control thereof, that person takes over the duties and liabilities of the owner. *White* v. *Crisp* (1854) 10 Exch. 312, 2 C.L. Rep. 1215, 23 L.J. Exch. N.S. 317, 2 Week. Rep. 624. The owner's position is correctly stated in Addison on Torts, 7th ed. p. 622, and in Garrett, on Law of Nuisances, 2d ed. p. 93. If, however, the owner, having the possession and control, in the sense above stated, merely employ another person to raise and remove the wreck for him, there is no transfer of the wreck; and although the person employed may be placed in actual physical custody of the wreck, the owner does not, in my opinion, discharge himself from the duty towards the public which rested upon him of using reasonable care to warn other vessels of the position of the wreck which remains his property. Even if the other person be expressly employed on the terms that he shall light the wreck properly during the salvage operations, he is employed by the owner to discharge for the owner a duty which rested upon the latter. The owner does not get rid of his liability by employing some one to perform it for him. The case is not precisely the same, but presents analogy to the cases of which *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196, is one. . . . The argument forcibly addressed to me by council for the defendants, that there is no difference between the case of an owner of a wreck sunk in and obstructing a navigable river and that of an owner who employs a contractor to navigate her in ordinary circumstances from one place to another, as regards his duty to the public, appears to me to be fallacious. In the one case the wreck is a dangerous nuisance, and the owner's rights and liabilities are such as I have already stated. In the other case there is only an employment by the owner of a contractor to do work about which there is no danger if properly performed, and not an employment to discharge a duty which rests upon the owner; see the judgment in *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196"

The Court of Appeal rejected the special contentions of the defendants' counsel, viz., that the doctrine discussed in the present subtitle, although it might apply to matters arising on land, did not apply to matters arising on water, or matters arising, as in the case under review with regard to a sunken barge in the river Thames. The defendants were also held to be

VI. LIABILITY OF EMPLOYER FOR INJURIES RESULTING FROM THE NON-PERFORMANCE OF ABSOLUTE DUTIES.

56. Generally.—Another of the qualifications of the general doctrine enunciated in § 1, *ante*, results from the operation of a principle to which, as already remarked in § 48, the cases reviewed in the preceding subtitle may be referred but which covers a much wider domain of facts than that which is presented in those cases—the principle, namely, that "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor"(*a*).

---

liable for an additional reason, viz., that they were under an obligation to protect other vessels from receiving injury from the sunken barge, as the employment of the contractor did not amount to an abandonment or transfer of the possession, management, and control of the wreck. On this part of the case the judgment of the Privy Council, delivered by Sir Francis Jeune in *The Utopia* [1893] A.C. 492, 62 L.J.P.C.N.S. 118, 1 Reports 394, 70 L.T.N.S. 47, 7 Asp. Mar. L. Cas. 408, and referred to by Gorell Barnes, J., in his judgment, was regarded as controlling.

(*a*) *Dalton* v. *Angus* (1881) L.R. 6 App. Cas. 740, 829, 50 L.J.Q.B.N.S. 689, 44 L.T.N.S. 844, 30 Week. Rep. 196, per Lord Blackburn.

In an earlier case the same eminent judge, (then a member of the Court of Queen's Bench), had, in an opinion which was submitted to the House of Lords, as embodying the conclusions of all the judges, noted the distinction between the responsibility of a person who "fails to perform something which there was a legal obligation to perform, and the liability for the negligence of those who are employed in the work." He also remarked that "the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done;" that, in the cases which are governed by this principle, "it is immaterial whether the actual actors are servants or not." *Morsey Docks & Harbour Board* v. *Gibbs* (1864) L.R. 1 H.L. 93, 114, 11 H.L. Cas. 686, 35 L.J. Exch. N.S. 225, 12 Jur. N.S. 571, 14 L.T.N.S. 677, 14 Week. Rep. 872.

In both of these cases Lord Blackburn refers with approval to the observations of Williams, J., in *Pickard* v. *Smith* (1861) 10 C.B.N.S. 470, 4 L.T.N.S. 470, that the rule respecting the non-liability of an employer for the tortious acts of a contractor "is inapplicable to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." This remark was also cited with approval in *Penny* v. *Wimbledon Urban Dist. Council* [1899] 2 Q.B. 72, 78, 68 L.J.Q.B.N.S. 704, 80 L.T.N.S. 615, 47 Week. Rep. 565, 63 J.P. 406, and *Bower* v. *Peate* (1876) L.R. 1 Q.B. Div. 321, 323, 45 L.J.Q.B.N.S. 446, 35 L.T.N.S. 321.

In *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 344, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196, Smith, L.J., laid it down that one of the grounds on which an employer may be charged with liability is, that he "owed such duty to the person injured that he could not by delegating its performance to a contractor, rid himself of the duty." He cited *Hole* v. *Sittingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 30 L.J. Exch.N.S. 81, 3 L.T.N.S. 750, 9 Week. Rep. 274; *Pickard* v. Smith (1861) 10 C.B.N.S. 470, 4 L.T.N.S 470; *Tarry* v. *Ashton* (1876)

The particular applications of this principle will be reviewed in the ensuing sections.

57. Duty to comply with a statute.—(Compare cases cited in § 44, *ante*.) The reports contain a large number of cases in which the plaintiff has been held entitled to recover on the ground that the damage suffered by him resulted from the infringement of a duty imposed upon the defendant by a statute or a municipal ordinance(*a*). In order that a contractee may be held liable

---

L.R. 1 Q.B. Div. 314, 45 L.J.Q.B.N.S. 260, 34 L.T.N.S. 97, 24 Week. Rep. 581; *Gray* v. *Pullen* (1864) 5 Best & S. 970, 34 L.J.Q.B.N.S. 265, 11 L.T. N.S. 569, 13 Week. Rep. 257; and observed that "the ratio decidendi of these cases is, that, as the duty was imposed upon the defendant by law, he could not escape liability by delegating the performance of the duty to a contractor, for the obligation was imposed upon the defendant to take the necessary precautions to ensure that the duty should be performed."

"That one upon whom the law devolves a duty cannot shift it over upon another so as to exonerate himself from the consequences of its non-performance is, we think, quite clear." *Southern Ohio R. Co.* v. *Morey* (1890) 47 Ohio St. 207, 7 L.R.A. 701, 24 N.E. 269.

"When a corporation owes a duty either to its employés or to the public, it cannot delegate the performance of that duty to a substitute." *Texas & P. R. Co.* v. *Jeuneman* (1895) 18 C.C.A. 394, 30 U.S. App. 541, 71 Fed. 939.

No one can escape from the burden of an obligation imposed upon him by law by the engaging for its performance by a contractor." *Sanford* v. *Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67.

(*a*) In *Gray* v. *Pullen* (1864) 5 Best & S. 970, 34 L.J.Q.B.N.S. 265, 11 L.T.N.S. 569, 13 Week. Rep. 257, the plaintiff declared for damage to his wife for falling into a drain made in the highway by the defendant under a power given by the Metropolis Local Management Act, 18 & 19 Vict., chap. 120. The injury was caused by the negligence of the contractor engaged for the work, who had not filled the drain properly, as was required by the statute. The plaintiff contended that the person making the drain was responsible if the duty imposed on him by the statute was not performed and damage is caused thereby, and that the complaint was of an omission to perform a duty imposed by statute, not of a wrongful act of commission by a contractor beyond the scope of his employment. In discussing this contention, Erle, Ch. J., referred to the principles laid down in *Hole* v. *Sittingbourne R. Co.* (1861) 6 Hurlst. & N. 488, 30 L.J. Exch. N.S. 81, 3 L.T.N.S. 750, 9 Week. Rep. 274, and *Pickard* v. *Smith* (1861) 10 C.B.N.S. 470, 4 L.T.N.S. 470, and proceeded thus: "For these reasons it appears to us that the defendant Pullen is not excused from liability for the omission to fill up the drain properly, on the ground that he had employed a contractor to do that duty for him, and the contractor was negligent and left the duty unperformed. We think that the duty was implied in the grant of the power to open the drain in a highway in § 77, and was expressed in § 110; and that this statutable duty is created . . . by § 111 imposing a penalty to be enforced solely by enforcing the penalty. The penalty imposed by § 111 appears to us to be a cumulative remedy. The question is, whether the verdict should be entered against the defendant Pullen [the employer], and we answer that question in the affirmative."

In *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196, this decision was

cited with approval by Lindley, L.J., who noted that Lord Chelmsford in *Wilson* v. *Merry* (1868) L.R. 1 H.L. Sc. App. Cas. 326, 341 19 L.T.N.S. 30, had expressed some doubts as to its correctness; but that it had never been overruled or considered unsatisfactory by any other judge.

Section 58 of the English Railways Clauses Consolidation Act, 1845, provides that, if the company shall in the course of making the railway use or interfere with any road, they shall from time to time make good all damage done by them to such road. A railway company used certain roads by the carriage of stone, bricks, timber and other materials, over the same, to be used, and which were actually used, in the making of the said railway and works. In the opinion of two justices, they had thereby done damage to such roads:—Held, that under the above provision they were liable to make good the damage so done, although the materials were really conveyed in the carts of the contractors, or sub-contractors, or of other persons employed by them. *West Riding & G.R. Co.* v. *Wakefield Local Bd. of Health* (1864) 33 L.J. Mag. Cas. N.S. 174. Blackburn, J., said: "The company have not in the present case used the road by their immediate servants; but they have used it in the way which the legislature must, I think, have intended, and have caused great additional traffic along the road by the contractors, and by people put in motion by the contractors."

The liability of a street railway company to pay damages to third persons for injuries resulting from its performance of the work of reconstructing a highway bridge over a canal, such work being done under a permit granted upon the condition that those damages shall be paid cannot be avoided by delegating the work to a contractor. *Weber* v. *Buffalo R. Co.* (1897) 20 App. 202, 49 N.Y. Supp. 7, where the court after stating its conclusion, that in availing itself of the license so given, the defendant impliedly undertook to perform the same duty in respect to the highway as that which the state itself was bound to discharge through its agents, viz., to place proper safeguards for the protection of the travelling public, proceeded thus: "If this construction be correct, then the defendant was liable for damages occurring from its neglect or failure to perform this duty as it would be for any other neglect of duty. The company stands exactly in the position of the State, and is equally liable for its negligence in this regard. When it assumed the duties imposed by the permit, it made itself liable for all injuries resulting from its non-performance or insufficient performance. The company could not relieve itself from the obligation imposed by its covenant with the State, by contracting with another to fulfill it. It was an imperative duty required by the permit, and the company was not absolved from its duty and responsibility because it employed a contractor to do the work, who assumed to protect and save harmless the company. A failure to safeguard an excavation or opening in a public highway or bridge by those who have assumed that duty from the State, makes the party who has assumed the obligation liable to an action at the suit of any one who has sustained a special damage."

Where one who had contracted with a city for the construction of a sewer injured the plaintiff's business by an unnecessary prolongation of the work, it was held that, as the statute under which the municipality acted created a liability to "persons who might *in any wise* suffer injury to their persons or property," recovery might be had for the injury thus inflicted, although it was consequential in its nature. *Williams* v. *Tripp* (1877) 11 R.I. 454. The court said: "A statute confers upon the city of Providence the power to make sewers in the streets of the city. This power cannot be exercised without a remission of the duty, and, therefore, by implication, the duty is suspended, while a sewer is making, for so long a time as is reasonably necessary to do the work. But beyond that the implication does not go, and, therefore, if more time is taken, it is taken in violation of the statutory duty, and any person who is specially injured thereby, either in his person or his property, is entitled to indemnity under the statute. This would hardly be disputed if the city had

made the sewer for itself. The contention is that the city did not incur liability, because, instead of making the sewer for itself, it let it out to be made by a contractor." The court remarked that the cases cited would have value as precedents, if the city were being sued for some tort or negligence of the contractor or his men, not amounting to a public nuisance, but that under the circumstances they had no pertinency. "Here the city is sued for neglecting its statutory duty. It says in excuse that the duty was suspended for the time being by the making of a sewer in the street, under an authority conferred on the city by statute. The answer is, that the work on the sewer was unreasonably prolonged. The city replies that it is not to blame for that, because the making of the sewer was committed to a contractor. Then comes the question whether the city can, by making a contract for its own benefit, relax the obligation of a duty imposed upon it by statute, for the benefit of the public. We think it cannot. The city has both the duty to perform and the power to exercise, and if it exercise the power, it is bound to exercise it so as not unnecessarily to circumscribe or suspend the duty. It may make the sewer itself, or it may commit the making to contractors; but if it elects to commit the making to contractors, it must still see to it that the streets are not unnecessarily obstructed; for, in whichever way the work is done, the duty to keep the streets safe and convenient is the same."

The owner of a building constructed by independent contractors is liable for the death of one killed by a collapse of the building because of a violation of N.Y. Laws 1892, chap. 275, § 483, limiting the weight allowable on a superficial foot of brickwork foundation, if such owner knew of the violation. *Pitcher* v. *Lennon* (1896) 12 App. Div. 356, 42 N.Y. Supp. 156; (1896) 16 Misc. 609, 38 N.Y. Supp. 1007. The court said: "It is a matter of little moment whether we designate the action as one framed for negligence in fact or negligence in law, or for the creation of a nuisance, because, upon the allegations of the complaint and the proof offered, there was legal warrant for holding the defendant liable upon the ground that he knowingly violated a statute which, among other things, was enacted to protect human life. . . . Apart from the favorable view which the learned trial judge took of the defendant's position, by charging requests on the subject of negligence, he in effect predicated defendant's liability upon the finding of two facts by the jury, first, that the buildings fell because of too much weight at a given point in violation of the statute; and, second, that the defendant knew the unlawful weight was imposed or had notice of it. Such a finding, with evidence to support it, firmly establishes the defendant's liability, because it cannot be doubted that an owner who permits the doing of an illegal act by one whom he has employed, from which damages flow, is liable therefor when such act is committed in the performance of the work to be done, and constitutes a breach of the duty laid upon such owner. He is not at liberty to stand by, with knowledge of the breach of law, and escape liability merely because the actual work is being done by another, whether such other be an independent contractor or an agent for whose doings he would, in general, be responsible. The duty is laid upon the owner; and, although possibly cases might exist where he would not be liable, this cannot be true where he has knowledge of what is being done and makes no effort to stop it."

Where the ordinance of a municipal corporation required the owner of any materials which formed an obstruction in its streets or sidewalks to prepare and place lights thereon before dark, with such care and diligence as reasonably to secure their burning until daylight, such owner is liable for any injury that arises to others in consequence of the negligent performance of this duty, whether it was performed by himself or by a contractor employed by him. *Wilson* v. *White* (1883) 71 Ga. 506, 51 Am. Rep. 269. It was held that the trial judge had properly refused to charge that if the defendants sub-let the work to a contractor, they would not be liable, if the injury was caused by his negligence or his servants, "if

the lights were in point of fact displayed, the lamps properly filled and lighted, and were, from some unknown cause extinguished, or from no negligence of defendants, that was all the law required; that it did not require the defendants to stand guard over the lights all night."

A person injured by falling through a wooden trapdoor over an excavation in a sidewalk can, where such coverings are prohibited by an ordinance of the city, recover against the owner of the adjoining premises, notwithstanding the fact that a few days before the accident such owner employed a carpenter, who was an independent contractor, to repair the door, and the negligence of the latter contributed to the accident. *Barry* v. *Terkildsen* (1887) 72 Cal. 254, 1 Am. St. Rep. 55, 13 Pac. 657.

A railroad corporation operating the road of another corporation under a contract is an "agent" of the latter company within the meaning of § 43 of the general railroad act of Michigan (Comp. Laws, § 1987); and the neglect by such agent of the duty to erect or maintain fences along the line of the road, enjoined by the statute, will render the corporation owning the road liable for all consequent damages. *Bay City & E.S.R. Co.* v. *Austin* (1870) 21 Mich. 390.

The employer was also held liable under the following circumstances:

Where a contractor for the construction of a railway violated the provisions of a statute requiring railway companies to make proper highway crossings and keep them in repair. *Taylor, B. & H.R. Co.* v. *Warner* (1895; Tex. Civ. App.) 31 S.W. 66, reversed in (1895) 88 Tex. 642, 32 S.W. 868 (holding that a charge which embodied the theory that the fact that the company's engineer had no authority over the contractor, except to see that the road was constructed according to details, conclusively negatived the company's liability, was erroneous, as being inapplicable to the evidence). On the second appeal of this case (1893) 92 Tex. 535, 50 S.W. 120, this aspect of the defendant's liability was not alluded to, recovery being allowed on the ground of the company's having exercised a reserved power to select the location of the crossing. See § 18, note (b), *ante*.

Where such contractor infringed the duty imposed upon the company to place cattle-guards or stops at the points of entering and leaving the fields or inclosures through which the line runs. *Houston & G.N. R. Co.* v. *Mendor* (1878) 50 Tex. 77.

Where such a contractor failed to comply with a statute requiring railway companies and their agents to erect and maintain fences along the line of the road. *Gardner* v. *Smith* (1859) 7 Mich. 410, 74 Am. Dec. 722 (liability of railway company affirmed, *arguendo*, in a case where the contractor was the defendant).

Where such a contractor failed to comply with a statute requiring railway companies to restore to a safe condition highways upon which they entered in the course of prosecuting the work of construction. *Deming* v. *Terminal R. Co.* (1900) 49 App. Div. 493, 63 N.Y. Supp. 615.

Where the contractor for the construction of a street railway infringed a statute, requiring the company to put the streets and highways, in which it laid any rails, in as good condition as they were, and keep in repair such portions of the streets as should be occupied by its tracks. *Sanford* v. *Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Art. 67 (where, however, it was held that the obligation created by the statute had no relevance, as the accident was caused by the negligence of the contractor in stretching a wire across the street during the progress of the work).

Where the defendant obtained permission from civil authorities to open a trench in a street, and the contractor employed failed to fill it in the manner required by an ordinance. *Colgrove* v. *Smith* (1894) 102 Cal. 220, 27 L.R.A. 590, 36 Pac. 411.

Where the contractor maintained, in contravention of a municipal ordinance, an excavation in a street. *Spence* v. *Schultz* (1894) 103 Cal. 208, 37 Pac. 220.

on the ground that the contractor violated a duty of this description, the terms of the statute or ordinance must be such as to show that the legislative body intended to subject the contractee to an express and definite obligation (*b*).

Where an ordinance requiring excavations in streets to be fenced at nights was violated by a contractor. *Kepperly* v. *Ramsden* (1876) 83 Ill. 354.

Where a contractor failed to fence off a building under erection in accordance with the provisions of a Police Act. *Binnie* v. *Parlane* (1825) 4 Sc. Sess. Cas. 1st series, 122; *Chapman* v. *Parlane* (1825) 3 Sc. Sess. Cas. 1st series, 585.

Where a house owner, in rebuilding a party-wall infringed the building regulations of the municipality. *Fowler* v. *Saks* (1890) 7 Mackey, 570, 7 L.R.A. 649.

See also the cases dealing with the liability of municipalities for the unsafe condition of highways, § 58, post.

As to the statutory duty in England to rebuild a party-wall with reasonable dispatch after it has been taken down, see *Jolliffe* v. *Woodhouse* (1894) 10 Times L.R. 553 (§ 68, post).

One of the cases in which the Georgia Civil Code of 1895, § 3819, declares an employer to be liable is "when the wrongful act is the violation of a duty imposed by statute." See *Atlanta & F.R. Co.* v. *Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277.

(*b*) In *Halifax* v. *Lordly* (1892) 20 Can. S.C. 505, where the plaintiff, in the darkness which supervened when an electric light went out suddenly, was injured by coming into collision with a hydrant on the footpath, the court, while fully conceding the correctness of the principle, that, "where a particular duty is imposed upon any person as incidental to the doing of any work which he by statute is authorized to do, such person cannot, by employing a contractor to do the work authorized, evade responsibility to a person injured by the non-fulfilment of the incidental duty imposed," denied that this principle was applicable under the circumstances. It was considered that the statutes concerning the lighting of the city had not imposed upon the council the duty of lighting the city by works of their own, or enabled them to raise the funds necessary for the purchase or erection and maintenance of the necessary works; that they had in effect no power but that of entering into contracts with persons able to supply the light which in the exercise of their discretion the council should think necessary, and that they had exercised this power by the contract into which they had entered with the electric light company. By thus exercising the statutory power vested in them they had fully discharged the duty imposed upon them by the statute: they were not in the position of one who employs another to do work which the employer is bound to do himself. The case therefore was governed by the ordinary rule which declares that, if any one suffers injury from any negligence in the execution by the contractors of the work they have undertaken, the contractors alone are responsbile.

In *Chartiers Valley Gas Co.* v. *Lynch* (1888) 118 Pa. 362, 12 Atl. 435, where an explosion of gas occurred as a result of the fact that an elbow in the pipe broke, in consequence of the negligent manner in which the trench was filled, the court declined to accept the contention that the rule now under review was applicable to the case, since the statute relied upon for the purpose of charging a gas company with liability for an explosion of gas merely declared that "any company laying pipe-line under the provisions of the act should be liable for all damages occasioned by reason of the negligence of said company."

If the statute relied upon expressly provides for the contingency of the works being executed under an independent contract, and declares that the duty must be fulfilled by the employer or the contractor, the statute will not ordinarily be construed as enlarging the personal liability of the employer, the intention of the legislature being presumed to be, that the duty shall be discharged by the employer only when the work is done under his immediate control(*o*).

58. Duty of a municipality to keep highways in safe condition. Generally.—The accepted doctrine in the United States is that a municipality which is charged with the duty of keeping certain highways in safe condition for public travel, and which has either

---

(*o*) Such was the conclusion arrived at with regard to the effect of the New York ordinance which was approved September 25, 1895, amended November 18, 1895, and continued in force by Greater New York Charter, § 41, and which provided, under penalties, that "the owner or general contractor engaged in the construction" of a building over five stories in height shall build a temporary roof over the sidewalk in front of the building. *Koch* v. *Fox* (1902) 71 App. Div. 288, 75 N.Y. Supp. 913. The court after adverting to the fact that courts have sometimes, in the construction of a statute, declared that "or" was used in the sense of "and" and vice versa, in cases where, from the context or other provisions of the statute, or from former laws relating to the same subject and indicating the policy of the state thereon, such clearly appeared to have been the legislative intent, proceeded thus: "Here there was no former statutory law or ordinance, and we find nothing in the context to indicate an intent that the ordinance should operate on both owner and contractor. Why should both owner and contractor be required to erect a structure over the walk? The ordinance is quite general, and it contains no plan or specification. It does not prescribe the height of the structure or specify the materials to be used in its construction or their dimensions. If both are required to erect the covering, a conflict might arise between them with reference to the manner of complying with the ordinance. Both could not well do the work, and one might neglect the duty, relying upon the other, who might fail to perform it. The purpose of the ordinance was to require the protection of people upon the walk. It is wholly immaterial who erects the shed or roof. The essential requirement is to have it erected. The terms of the ordinance are satisfied by a construction which requires compliance by the owner if he be doing the work by day labour or through contractors for separate parts, so that he retains charge and control, and compliance by the general contractor if the work be all let by one contract, so that the contractor may be said to be independent, in that he has full charge and control of the entire work, subject only to such supervision as will insure to the owner compliance with the plans and specifications." It was further held that, even if the ordinance imposed a duty on the owner which afforded a cause of action to the person injured by reason of his omission to comply therewith, yet the failure to fulfil that duty was not the proximate cause of the injury, since the accident would not have occurred but for the negligence of the employés of the contractor, who was bound to perform his contract with care and to safeguard the work, to the end that people lawfully upon the street would not receive injury.

authorized, or has been constrained by the operation of a statute to permit, the performance of work which, in the absence of certain precautions, will necessarily render one of these highways abnormally dangerous for the time being, is liable for injuries caused by the absence of those precautions, whatever may be its relation to the party who is actually engaged in doing the work. The municipality lies in this regard under a primary, absolute, or non-delegable duty, in the performance of which it is bound to use reasonable care and diligence(*a*). This doctrine is applicable to counties, no less than to towns and cities(*b*).

From the responsibility to which a municipality is thus subjected it cannot relieve itself by inserting in the contract a provision requiring the contractor to see that third persons are adequately protected while the work is in progress(*c*). Compare § 50, *ante*.

In England the liability of a municipality, or other public body having charge of highways, for injuries due to unsafe conditions caused by the negligence of an independent contractor has never, as it would seem, been discussed with specific reference to the conception of an absolute obligation; and the cases, as they stand, appear to be rather unfavorable to the inference

(*a*) See generally *Turner* v. *Newburg* (1888) 109 N.Y. 301, 4 Am. St. Rep. 453, 16 N.E. 344; *Brusso* v. *Buffalo* (1882) 90 N.Y. 679; and the cases cited in the following notes.

The duty of maintaining the streets in safe conditions "rests primarily, as respects the public, upon the corporation, and the obligation to discharge this duty cannot be evaded, suspended, or cast upon others, by any act of its own." Dill. Mun. Corp. § 1027. This statement has frequently been adopted by American courts.

"As the city is the principal in the duty imposed, it must occupy the same position when damages are claimed for a neglect of that duty. . . A corporation, like individuals, is required to exercise its rights and powers, and with such precautions, as shall not subject others to injury." *Springfield* v. *Le Claire* (1869) 49 Ill. 476.

(*b*) *Park* v. *Adams County* (1891) 3 Ind. App. 536, 30 N.E. 147; *Anne Arundel County* v. *Duvall* (1880) 54 Md. 350, 39 Am. Rep. 393.

(*c*) *Jefferson* v. *Chapman* (1889) 127 Ill. 438, 11 Am. St. Rep. 136, 20 N.E. 33; *Baltimore* v. *O'Donnell* (1879) 53 Md. 110, 36 Am. Rep. 395; *Detroit* v. *Corey* (1861) 9 Mich. 165, 80 Am. Dec. 78, *Brooks* v. *Somerville* (1871) 106 Mass. 271; *Russell* v. *Columbia* (1881) 74 Mo. 480, 41 Am. Rep. 325; *Omaha* v. *Jensen* (1892) 35 Neb. 68, 37 Am. St. Rep. 432, 52 N.W. 833; *Storrs* v. *Utica* (1858) 17 N.Y. 104, 72 Am. Dec. 437; *Creed* v. *Hartman* (1864) 29 N.Y. 591, 86 Am. Dec. 341; *Turner* v. *Newburg* (1888) 109 N.Y. 301, 4 Am. St. Rep. 453, 16 N.E. 344; *Pettengill* v. *Yonkers* (1889) 116 N.Y. 558, 15 Am. St. Rep. 442, 22 N.E. 1095; *Dressell* v. *Kingston* (1884) 32 Hun, 533; *Scanlon* v. *Watertown* (1897) 14 App. Div. 1, 43 N.Y. Supp. 618; *McAllister* v. *Albany* (1890) 18 Or. 426, 23 Pac. 845.

that an action is maintainable on this basis(*d*). In view of the decisions cited in § 56, *ante*, it is perhaps reasonable to anticipate that, whenever the point is directly raised, the non-delegable quality of the duty of keeping highways secure for travellers will be affirmed. But, even if a contrary conclusion should be arrived at, it would seem that the doctrine discussed in the preceding subtitle would enable a plaintiff to succeed in almost every instance in which he would be allowed to recover under a declaration alleging the defendant to be subject to a primary and specific duty with respect to the maintenance of safe conditions(*e*).

In one of the Canadian Provinces and one of the Australian States decisions have been rendered which embody doctrine similar to that which has been adopted by the American

---

(*d*) In *Reid* v. *Darlington Highway Board* (1877 Q.B.D.) 41 J.P. 581 the plaintiff was denied recovery for injuries caused by a heap of stones left on a road which was under repair. (See § 41, note (a), subd. 8, ante). But the report is extremely meagre, and it does not appear whether the right of action was argued by counsel, or considered by the court with reference to the question whether such a duty was involved.

In *Taylor* v. *Greenhalgh* (1876) 24 Week. Rep. 311, Reversing (1874) L.R. 9 Q.B. 487, 43 L.J.Q.B.N.S. 168, 31 L.T.N.S. 184; *Pendlebury* v. *Greenhalgh* (1875) L.R. 1 Q.B. Div. 36, 45 L.J.Q.B.N.S. 3, 33 L.T.N.S. 472, 24 Week. Rep. 98, an assistant surveyor of highways was held liable for an accident caused by the want of a light and a fence on a road which was being altered. The conclusion of the court was based upon the theory that, under the terms of the contract, the duty of lighting and fencing had not been transferred to the contractor—a ratio decidendi which implies that, by employing appropriate language in the contract, the surveyor might have relieved himself from the obligation to perform this duty. But as the actions were not brought against the highway authority itself, the cases are not strictly relevant in the present point of view.

As the action in *Overton* v. *Freeman* (1852) 11 C.B. 867, 3 Car. & K. 52, 21 L.J.C.P.N.S. 52, 16 Jur. 65, to recover for the negligence of the sub-contractor was brought against the contractor, and not against the local board which employed him, it may perhaps be inferred that, in the opinion of counsel, that board was not in any event liable.

In *Austin's Case*, 1 Ventr. 90, it is laid down that "every parish of common right ought to repair the highways, and no agreement with any person whatever can take off this charge which the law lays upon them." But this statement has no bearing on the question, whether a parish would be absolutely liable for dangerous conditions produced by the progress of work which affected the safety of a highway.

(*e*) See *Penny* v. *Wimbledon Urban Dist. Council* [1899] 2 Q.B. 72, 68 L.J.Q.B.N.S. 704, 80 L.T.N.S. 615, 47 Week. Rep. 565, 63 J.P. 406, as stated in § 51, ante.

In this connection it may be observed that, in some of the American decisions, the intrinsically dangerous character of the work authorized is specified as a cumulative reason for holding the defendant liable. See, for example, *Jefferson* v. *Chapman* (1889) 127 Ill. 438, 11 Am. St. Rep. 136, 19 N.E. 860.

courts(*f*); and that doctrine possibly prevails in Newfoundland also(*g*).

59. Liability incurred where the contractor is employed by the municipality itself.—The general doctrine laid down in the preceding section has frequently been applied in cases where municipalities had employed contractors to do work which would necessarily expose travellers on highways to certain abnormal perils, and the contractor had failed to adopt the appropriate precautions for safeguarding the public against those perils. Under these circumstances the person executing the work, notwithstanding the general independent nature of his employment, is regarded as a quasi-agent of the municipal authorities(*a*). Accordingly it has been held by most of the American courts who have had occasion to determine the point that "where a dangerous excavation is made and negligently left open (without proper lights, guards, or coverings, in a travelled street or sidewalk) by a contractor under the corporation for building a sewer or other improvements, the corporation is liable to a person injured thereby"(*b*). A like rule is applied where the injury was due

(*f*) *Carty* v. *London* (1887) 18 Ont. Rep. 122; *Bell* v. *Shire of Portland* (1876) 2 Vict. L. Rep. (L.) 197; *Bossence* v. *Shire of Kilmore* (1883) 9 Vict. L. Rep. (L.) 35; *Badenhop* v. *Sandhurst* (1864) 1 W.W. & A.B. (L.) 136.

(*g*) That a Board of Works which is under a statutable obligation to keep a road in repair is liable for an injury caused by defective conditions incident to the operation of repairing it, although such conditions were created by a contractor, seems to be assumed by the court in *Duchemin* v. *Board of Works* (1880) Newfoundland Rep. (1874-1884) 236.

(*a*) *Birmingham* v. *McCary* (1887) 84 Ala. 469, 4 So. 630.

(*b*) 2 Dill. Mun. Corp. § 1027. This language has been frequently cited with approval. See, for example, *Birmingham* v. *McCary* (1887) 84 Ala. 469, 4 So. 330; *Jefferson* v. *Chapman* (1889) 127 Ill. 438, 11 Am. St. Rep. 136, 20 N.E. 33; *Turner* v. *Newburg* (1888) 109 N.Y. 301, 4 Am. St. Rep. 453, 16 N.E. 344.

"What then is the obligation of a city corporation when it undertakes to construct a sewer in a public street? Can it in that undertaking and in any mode of providing for the execution of the work throw off the duty in question and the responsibilities through which that duty is to be enforced? Although the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take those precautions." *Storrs* v. *Utica*

(1858) 17 N.Y. 104, 72 Am. Dec. 437. The propriety of the distinction taken by Comstock, J., in his judgment in this case, between one who directs a ditch to be dug in a highway, although he do the work by a contractor, and one who directs rocks to be blasted in a highway, and does that work under contract, was impugned by Ingraham, J., in *Creed* v. *Hartman* (1864) 29 N.Y. 591, 86 Am. Dec. 341.

Commenting on *Storrs* v. *Utica* the Supreme Court recently remarked: "The law as thus enunciated it will be seen, is made to depend upon the principle that the defendant, being a municipal corporation, and charged as such, with the performance of a public duty, cannot escape liability by interposing a contract made with a third party; and herein, as we conceive, lies the main reason for distinguishing the case from *Blake* v. *Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304, which was an action between individuals, and, therefore, one which called for the application of the general principle that in order to make one person responsible for the negligent or tortious act of another, the relation of principle and agent, or master and servant, must be shown to have existed at the time of and in respect to the transaction between the wrongdoer and the person sought to be charged." *Deming* v. *Terminal R. Co.* (1900) 49 App. Div. 493, 63 N.Y. Supp. 615.

In *St. Paul* v. *Seitz* (1859) 3 Minn. 297, 74 Am. Dec. 753, Gil. 205, an action was held to be maintainable by a person who fell into an excavation made in the course of grading operations. The court said: "If the grading of the street involved the digging of this 'pit or hole,' into which the plaintiff fell, and the referee reports that it was dug 'under and pursuant to said contract,' then the city was placing a dangerous obstruction in the street which did not previously exist, and it was bound to see that no one was injured by its acts. We think in all such cases, corporations are responsible under the principles of the case of *Storrs* v. *Utica* (1858) 17 N.Y. 104, 72 Am. Dec. 437, and that where a prior duty exists to keep the street in safe condition, it cannot divest itself of its obligation in this respect, by contracting to have the danger guarded; whether it could or not in a case like the one at bar, is less certain. The distinction between cases in which there is a duty resting upon a city to keep a street in safe condition, and cases like the one at bar, where no such duty exists, is this—that in the former the city is liable for accidents arising from a failure on its part to repair damages, or remove obstructions occasioned by natural causes over which it had no control, and in which it had no agency, such as the washing of a street by excessive rains, and similar occurrences, while in the latter no such liability would arise, but to charge the corporation, it must have been in some way instrumental in occasioning the injury."

In the following cases involving similar facts the plaintiff was held entitled to recover damages for injuries received through the contractor's negligence. *Birmingham* v. *McCary* (1887) 84 Ala. 469, 4 So. 630 (excavation for sewer); *Savannah* v. *Waldner* (1873) 49 Ga. 316 (same facts); *Sterling* v. *Schiffmacher* (1892) 47 Ill. App. 141 (same facts); *Springfield* v. *Le Claire* (1869) 49 Ill. 476 (same facts); *Dooley* v. *Sullivan* (1887) 112 Ind. 451, 2 Am. St. Rep. 209, 14 N.E. 566 (same facts); *Scanlon* v. *Watertown* (1897) 14 App. Div. 1, 43 N.Y. Supp. 618 (same facts); *McAllister* v. *Albany* (1890) 18 Or. 426, 23 Pac. 845 (same facts); *Oiroleville* v. *Neuding* (1885) 41 Ohio St. 465 (large cistern for sewer); *Omaha* v. *Jensen* (1892) 35 Neb. 68, 37 Am. St. Rep. 432, 52 N.W. 833 (similar excavation); *Wilson* v. *Wheeling* (1882) 19 W. Va. 323, 42 Am. Rep. 780 (open excavation prepared for box culvert); *Brusso* v. *Buffalo* (1882) 90 N.Y. 679 (trench for laying water-pipe); *Brooks* v. *Somerville* (1871) 106 Mass. 271 (same facts); *Butler* v. *Bangor* (1877) 67 Me. 385 (same facts); *Dressell* v. *Kingston* (1884) 32 Hun, 533 (hole near sidewalk for reception of curbstone); *Jefferson* v. *Chapman* (1889) 127 Ill. 438, 11 Am. St. Rep. 136, 20 N.E. 33 (cross-walk over a ditch, not being properly secured, tipped up and precipitated the plaintiff into the ditch).

to the dangerous conditions of a highway bridge(*c*); and by the failure to fence and light a temporary road which was constructed to accommodate the public, while a highway was under repair(*d*); by a pile of earth, rocks, gravel, etc., left in a street(*e*); by a water-pipe laid across a footpath(*f*); by a stone thrown out by a blast set off while an excavation was being made(*g*); by a loose stone in a cross walk, in which it had been

The fact that the injury received by a person who fell into a sewer trench which crossed the street along which he was walking resulted from the momentary failure of the servants of a street railway company to replace the barriers which they were instructed to remove whenever a car passed does not relieve the defendant from liability. If the municipality sees fit to entrust to them the duty of keeping the trench properly guarded, it is answerable for their neglect, momentary or otherwise. *Blessington* v. *Boston* (1891) 153 Mass. 409, 26 N.E. 1113.

In *Berry* v. *St. Louis* (1852) 17 Mo. 121, where the plaintiff fell into an open sewer, which was being constructed by a contractor, the court held that sound policy indicated that the contractor alone should be held responsible, for the reason that, in making the sewer, he had the immediate charge of the work, and the temporary occupancy of the street in which the work was progressing; that he was upon the ground with his materials and servants, and could more securely and conveniently than any officer of the city, protect his work from injuring others; and that the public would be better protected from injuries such as the one for which the action was brought, if it was held that the contractor was liable. In *Schweiokhardt* v. *St. Louis* (1876) 2 Mo. App. 571, this decision was regarded as having the effect of throwing the responsibility for such injuries upon the contractor alone, and no doubt was expressed as to its soundness. It was, however, disapproved in *Welsh* v. *St. Louis* (1880) 73 Mo. 71 (where the same facts were involved), and in *Haniford* v. *Kansas* (1890) 103 Mo. 172, 15 S.W. 753, and cannot be regarded any longer as authoritative, even in the State where it was rendered.

(*c*) *Hawcshurst* v. *New York* (1887) 43 Hun, 588 (bridge while under repair was not barricaded); *Ray* v. *Poplar Bluff* (1897) 70 Mo. App. 252 (portion of sidewalk taken up for the purpose of laying a water-pipe underneath the bridge); *Park* v. *Adams County* (1891) 3 Ind. App. 536, 30 N.E. 147 (floor of bridge was being relaid).

(*d*) *Bossence* v. *Shire of Kilmore* (1883) 9 Vict. L. Rep. (L.) 35.

(*e*) *Fettengill* v. *Yonkers* (1880) 116 N.Y. 558, 15 Am. St. Rep. 442, 22 N.E. 1095, affirming (1886) 39 Hun. 449; *Hincks* v. *Milwaukee* (1879) 46 Wis. 559, 32 Am. Rep. 735, 1 N.W. 230; *Nashville* v. *Brown* (1871) 9 Heisk. 1, 24 Am. Rep. 289; *Bell* v. *Portland* (1876) 2 Vict. L. Rep. (L.) 197.

(*f*) *Beatrice* v. *Reid* (1894) 41 Neb. 214, 59 N.W. 770.

(*g*) *Joliet* v. *Harewood* (1877) 86 Ill. 110, 29 Am. Rep. 17; *Logansport* v. *Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166. In the latter case the court said: "If in the progress of the work, blasting was dangerous and unnecessary, the appellant's duty to its inhabitants and the public required that it should prevent such blasting; and if, on the other hand, the blasting was necessary, and though dangerous, the danger could be averted by the use of proper precautions, the appellant's plain duty was to require its contractors to use such precaution. The appellant could not by any contract it might make, avoid its liability to third persons for injury or death resulting from a breach of its duty in the care and control of its streets."

replaced by a contractor for the construction of a sewer(*h*); and by a rope or wire stretched across a street for the purpose of preventing traffic on a portion of it which was being repaired(*i*).

In another group of cases the municipality has been held answerable for the negligence of a party who had undertaken, for a specific period, to keep the whole or part of a highway in repair(*j*).

(*h*) *Turner* v. *Newburgh* (1888) 100 N.Y. 301, 4 Am. St. Rep. 453, 16 N.E. 344.

(*i*) *Baltimore* v. *O'Donnell* (1879) 53 Md. 110, 36 Am. Rep. 395. In that case a lamp which had been suspended on the rope had been broken immediately afterwards by some mischievious boys, and taken away to be repaired, so that there was no warning signal at the time when the plaintiff was injured by driving his vehicle against it. No officer of the city had notice of the rope being stretched across the street, and the superintendent had no orders from the city authorities or any other person on the subject. Under these circumstances the plaintiff was held entitled to recover on the ground contended for by his counsel, viz., that where the person, for whom the work to be done is under a pre-existing obligation to have the work done in a particular way, or to have certain precautions against accident observed, he cannot be discharged by creating the relation between himself and another of employer and contractor. *Barry* v. *St. Louis* (1852) 17 Mo. 121, and *Painter* v. *Pittsburgh* (1861) 46 Pa. 213, were disapproved.

In *Glasgow* v. *Gillenwaters* (1902) 23 Ky. L. Rep. 2375, 67 S.W. 381, the municipality was held able for a nuisance which a contractor employed to repair a street had created by stretching a barbed wire across it.

(*j*) Municipalities have been held liable in the following cases: *Jacksonville* v. *Drew* (1882) 19 Fla. 106, 45 Am. Rep. 5 (work of making repairs let out by contract—injury caused by defective bridge); *Eyler* v. *Alleghany County* (1878) 49 Md. 257, 33 Am. Rep. 249 (canal company had bound itself to keep bridge in repair); *Blake* v. *St. Louis* (1867) 40 Mo. 569 (plaintiff fell into opening left unguarded and unlighted in a part of a street which it was the duty of a company having charge of a certain market to keep in repair).

Acting under a statute which authorized a municipality to enter into an agreement for the construction of a street railway, and to pass by-laws for the purpose of carrying any such agreement into effect, a municipal council passed a by-law, providing that the strip between the rails and adjacent thereto should be kept in repair by the company constructing the railway; that the company should remove all ice and snow from the tracks under the direction of the city commissioner; that the company should be liable for all damages occasioned to any person by reason of the construction, repair, or operation of the railway, or by reason of any default in repairing those parts of the streets which the company was required to keep in repair; and that the municipality should be indemnified by the company from all liability in respect to any such damages. During a certain winter the company had removed the ice and snow from their tracks, and laid them in the centre of the street, the result being the formation of a deep depression where the tracks were. The plaintiff's sleigh was overturned by the runners getting into this trench, his horse ran away, and he was severely injured. Held, that, notwithstanding the legislation, agreement, and by-law, above referred to, the defendant was

The better and more logical view would seem to be, that, as the rationale of the liability predicated in cases of this class is the absolute and non-delegable quality of the duty to which the municipality is subject, the mere fact that the agents of the defendant municipality are required by a statute to give to the lowest bidder any contracts which they may have occasion to make for such work as that which had been negligently performed to the injury of the plaintiff should not be regarded as a differentiating element which will take the case out of the operation of the general rule. And so it has been held by some courts(*k*). But in California a different doctrine prevails, the

---

liable to the plaintiff under § 531 of the Municipal Act, Rev. Stat. Ont. chap. 184; but that they had a remedy over against the railway company. *Carty* v. *London* (1889) 18 Ont. Rep. 122.

(*k*) In *Mahanoy Twp.* v. *Scholly* (1877) 84 Pa. 136, the court, in discussing the effect of the Act of Jan. 19th, 1860, which directs that the supervisor of the township shall give to the lowest and best bidder the contract for making and repairing the roads therein, remarked that the question to be determined was simply, whether the statute relied on put the contractor in the place of the township in the control and supervision of the roads and proceeded thus: "Has the township discharged its whole duty to the public, when it has contracted for the making and repairing of its roads? This question is answered in the mere statement thereof. The affirmance of the proposition would be contrary to the express terms of the act itself; for the supervisor is to inspect the making and repairing of the public roads at least once every month, and he is to be fully satisfied that the contracts have been fully complied with before the contractors are paid for their work. Not only so, but these contractors are required to give bond for the proper performance and fulfilment of their several contracts, and also, to save and keep harmless, the township from damages consequent upon accident resulting from neglect in keeping the roads in proper order. These provisions indicate very clearly the legislative intent to charge the township with the duty of seeing that its roads were properly opened and repaired, and that it should not be relieved from the responsibility of accidents resulting from a want of proper construction or repair. . . . The weak point of the defence is found in the supposition that the power given to the township to contract for the doing of that which before had been done by its officers changed the character of its responsibility to the public. But a little reflection must dispel this idea; for, after all, the roads are the roads of the township, and the means employed by it for their construction can make no difference as to its responsibility for their character. For, whether constructed by contractor or by supervisor they are constructed for the township, and we must come, eventually, to the one final and conclusive question: are they safe or unsafe? If they are in good order it is the township which, by its judicious supervision, has made them so; if unsafe it is the township, alone, that has the money and power to make them safe."

See also *Denver* v. *Rhodes* (1886) 9 Colo. 554; 13 Pac. 729. *Detroit* v. *Corey* (1861) 9 Mich. 165, 80 Am. Dec. 78, in which the actions were held maintainable in spite of the fact that the powers of the corporation were restricted by a provision of this kind. Campbell, J., however, dissented.

theory being that a provision of this character brings the circumstances within the scope of the general principle thus enunciated by Story (Agency § 456): "Whenever a person is absolutely compellable, by law, to employ a particular individual in a given matter, the law which compels him to employ that individual, takes away his responsibility arising from the acts of that individual"(*l*).

60. Liability incurred where the contractor is employed by a private person.—The absolute quality of the duty of a municipality to keep the highways under its control in safe condition may be further illustrated by the decisions in which an action has been held to be maintainable for injuries caused by the negligence of persons who had been authorized to perform some work which rendered the surface of the highway abnormally insecure, and had omitted to protect the public against certain dangers which were the natural and necessary consequence of what they had undertaken to do(*a*); for injuries caused by abnormal dangers

---

(*l*) *James* v. *San Francisco* (1856) 6 Cal. 528, 65 Am. Dec. 526 (excavation not lighted); *O'Hale* v. *Sacramento* (1874) 48 Cal. 212 (excavation not lighted); *Krause* v. *Sacramento* (1874) 48 Cal. 222. In the last cited case, where a sidewalk under construction had been left in a dangerous condition, it was held that a complaint by which recovery was sought on the ground that the work was being done at the instance of the city was demurrable, for the reason that, in view of the legislation prescribing that work done in improving streets should be let out by contract, except in certain cases where the street commissioner may require it to be done by the abutting owners, such an allegation would be construed as meaning that the work was being done in one of these modes, and the intendment would accordingly be, that the negligence charged was not that of the city.

(*a*) A municipal corporation which is permitted by a statute to suffer miners to dig mines under the streets which it manages, subject to certain restrictions and conditions which they may think fit to impose, is not absolved by this permission from the original responsibility cast upon them, as managers of the streets, to take care that those streets are preserved in good order. *Badenhop* v. *Sandhurst* (1864; Vict. Sup. Ct.) 1 W.W. & A'B. (L.) 136 (horse fell into one of the holes so dug). Stowell, Ch. J., remarked: "In the present case there was a nuisance, and it was incumbent on the defendants to see that persons whom they allowed to commit the nuisance limited it to the narrowest extent possible."

Where the excavation which caused the injury was authorized by the defendant city, as a necessary part of the construction of the roadbed of a street railway line, the intervention of an independent sub-contractor for any part of the work which was essentially embraced within the general plan, as authorized by the city, will not relieve the city from liability for its failure to enforce the taking of such precautions in the course of the work, as would keep adjacent portions of the public thoroughfare reasonably safe. *Hanford* v. *Kansas* (1890) 103 Mo. 172, 15 S.W. 753.

which resulted from building operations carried on by a contractor in the employ of an abutting landowner(*b*); and for injuries received by travellers, owing to the existence of abnormally dangerous conditions produced in highways by the operations of railway companies acting under the authority of the legislature(*c*).

Cities have been held to be liable for an injury received by one who drove at night against a pile of building materials which a contractor for the erection of a house had obtained permission to leave in the street. *King* v. *Cleveland* (1885) 28 Fed. 835; *Magee* v. *Troy* (1888) 48 Hun. 383, 1 N.Y. Supp. 541.

Compare also the cases cited in §§ 61, 62, post.

(*b*) A street, on the margin of which is a deep, unprotected excavation extending from an adjacent lot, is not in a reasonably safe condition for travel. If the excavation renders travel on the street dangerous, it is as much the duty of the city to protect the public against such dangers, as it would have been had the excavation been in the street itself. *Wiggin* v. *St. Louis* (1896) 135 Mo. 558, 37 W. 528.

(*c*) In *Currier* v. *Lowell* (1834) 16 Pick. 170, where the complainant fell into a cutting which a railway company had made through a highway, the court thus stated its conclusions: "The case stands in regard to travellers just as if the inhabitants of the town were making extensive alterations in a highway, or were making a new bridge or repairing an old one upon a highway. They must conduct the work in such manner as that the persons and property of the travellers passing, shall not be unreasonably exposed. Suppose a road or bridge were carried away by a torrent, the legislature intended that the repairs should be made within a reasonable time, and that proper guards or cautions should be set up and made known to travellers to prevent injuries. The remedy for the traveller who is injured in person or property, is immediately against the town, upon which the liability is imposed by the statute."

This case was cited with approval in *Willard* v. *Newbury* (1850) 22 Vt. 458, involving very similar facts. The court said: "Inasmuch, then, as the road remained a public highway, the duty and obligation of the town continued,—not, however, to keep the road at this place passable at all times, for this might be impracticable, while the railroad was being constructed; but we think the town was bound, during the interruption of the travel by the construction of the railroad, to see, that a suitable by-way was provided by the public, and to take all proper and reasonable precautions to guard them against passing upon the highway, while it remained unsafe by reason of the operations of the railroad company in the construction of their road."

Two other cases in which the same ruling was made with reference to injuries received under similar circumstances are *Batty* v. *Duxbury* (1852) 24 Vt. 155, and *Phillips* v. *Veazie* (1855) 40 Me. 98.

Where a railroad company was required, by its charter, so to construct its railroad as not to obstruct the safe and convenient use of any highway, and while it was building an embankment for its track across a highway, a traveller sustained special damage from the obstruction, the town was held liable to the sufferer. *Elliot* v. *Concord* (1853) 27 N.H. 204.

In cases of this type the municipality is not absolved from its duties and liabilities to the public by the fact that the company is subjected by the statute from which it derives its powers to certain obligations in respect to the construction of its road across highways. *Willard* v. *Newbury* (1850) 22 Vt. 458; *Phillips* v. *Veazie* (1855) 40 Me. 96. But it is

Such decisions, however, do not properly fall within the scope of the present monograph, and for a complete collection of the authorities treaties on the law of Negligence and of Highways should be consulted.

60a. Necessity of showing that the municipality had notice of the dangerous conditions.—In cases where the person doing the work in question was a contractor employed by the municipality itself, and the danger from which the accident resulted was a necessary incident of the operations, it is manifestly not a prerequisite to recovery, that the municipality should have received special notice of the existence of the danger(*a*). On the other

---

entitled to recover from the company such damages as it may be compelled to pay to a person whose injury resulted from the defective condition of the highway. *Willard* v. *Newbury* (1850) 22 Vt. 458.

(*a*) *Brusso* v. *Buffalo* (1882) 90 N.Y. 679 (trench for water-pipe); *Birmingham* v. *McCary* (1887) 84 Ala. 469, 4 So. 630 (ditch); *Springfield* v. *Le Claire* (1869) 49 Ill. 477 (sewer); *Omaha* v. *Jensen* (1892) 35 Neb. 68, 37 Am. St. Rep. 432, 52 N.W. 833 (sewer); *Sterling* v. *Schiffmacher* (1893) 47 Ill. App. 141 (sewer).

"In contemplation of law, the excavation referred to in the declaration was made by the town itself; and therefore, there was no occasion to prove that it had any notice, actual or constructive, of the condition of the street. There could be no occasion to notify the defendants of their own acts." *Brooks* v. *Somerville* (1871) 106 Mass. 271.

"If a municipal corporation rightfully causes an improvement to be constructed or other work to be done, whether by an independent contractor or otherwise, it is bound to take notice of the . . . condition, whether safe or dangerous, of its streets and grounds as affected by the prosecution or performance of such improvement or work." *Beatrice* v. *Reid* (1893) 41 Neb. 214, 59 N.W. 770.

In *Hawxhurst* v. *New York* (1887) 43 Hun, 588, the trial judge charged the jury that the city had a right to presume, in the absence of notice, that the contractor had properly guarded the approach to the bridge in question, while it was under repair, and was not liable, without either express or constructive notice, for the negligence of the contractor. The court held this charge to be erroneous, saying: "Unquestionably, it was the duty of the defendants . . . to maintain the bridge in a condition which should be safe for public traffic. The very nature of the improvement which they undertook to make involved danger to persons lawfully on the highway, who might approach the bridge at night and attempt to cross it. In causing this improvement to be made, therefore, the city of New York . . . were bound to see that proper safeguards were provided while the work was going on, so as to afford reasonable protection to the public. *Hawxhurst* v. *New York* (1887) 43 Hun, 588.

In a case where the injury was caused by a hole left in the course of the grading of a street, the court remarked: "It may be also noted that in such case the duty of notice to the corporation of the existence of the obstruction or defect is removed, inasmuch as the thing itself contracted to be done creates the liability." *Dressell* v. *Kingston* (1884) 32 Hun, 533.

The doctrine of these cases might seem, at first sight, to be contravened by the language used in *Savannah* v. *Waldner* (1873) 49 Ga.

hand if the tortious act which created the danger was collateral in its nature, the municipality is not chargeable with responsibility unless notice, actual or constructive, is established(*b*).

Another class of cases in which notice is not a condition precedent to recovery is composed of those in which the hazardous conditions were an inseparable concomitant of work performed with the express sanction of the municipality, but not by a person who has contractual relations with it(*c*).

316, where the conclusion of the court was stated thus: "If the builders of the sewer in this case, negligently left it unguarded, by not having proper barriers, or lights, or other protection against danger, and it was so permitted to continue for an unreasonable or unnecessary time by the municipal authorities, who had notice, or there are facts from which notice could be reasonably inferred, they are liable for injuries resulting from such neglect to perform their duty." These words, however, are to be considered with reference to the remainder of the opinion, from which it appears that the court was arguing that, under the supposed circumstances, the defendant was *at least* as much liable as if the obstruction had been created by a wrongdoer, and the evidence had been such as to charge it with notice.

(*b*) *Turner* v. *Newburgh* (1888) 109 N.Y. 301, 4 Am. St. Rep. 453, 16 N.E. 344 (loose stone in cross-walk which had been taken by a contractor for the construction of a sewer); *Evansville* v. *Senhenn* (1898) 151 Ind. 42, 41 L.R.A. 728, 734, 68 Am. St. Rep. 218, 47 N.E. 634, 51 N.E. 88 (lumber unsafely piled by persons who had contracted to deliver it); *Pettengill* v. *Yonkers* (1889) 116 N.Y. 558 15 Am. St. Rep. 442, 22 N.E. 1095, affirming (1886) 39 Hun, 449 (plaintiff drove against unlighted embankment made by earth thrown out of a sewer trench). Upon the facts, the last cited case is difficult to reconcile with those cited in the last note. It is submitted that the dangerous conditions in this instance were, in a reasonable sense, as much a necessary incident of the work, as that which arose from the open excavation itself.

In a case where a contractor employed by a landowner to lower the grade of a sidewalk in front of his premises, as prescribed by an ordinance applicable to the street on which he lived, left the altered section of the sidewalk, at one of its ends, more than a foot lower than the adjacent section, and the plaintiff, on the ensuing night was injured by stepping into this depression, it was urged by the plaintiff's counsel that the injury was not occasioned by any negligence in doing the work, but by reason of leaving the abrupt descent unguarded, and it was insisted that there was a direct and independent duty devolving on the defendants to keep the streets and sidewalks within the corporate limits in safe condition for travel, and that they were liable to respond in damages to all persons, who, without fault on their part, should receive injury from neglect of such duty. But the court held that the want of evidence which would authorize a jury to find that the municipality had notice of the defect was fatal to the claim. *Sweet* v. *Gloversville* (1877) 12 Hun, 302.

(*c*) A gas company empowered by law to lay its gas pipes through the streets of a city with the consent of the city authorities, obtained such consent, and in the prosecution of its work opened a ditch in one of the streets, which, for want of pipe was left open for several days. Whilst so exposed, plaintiff, passing at night, fell in and was hurt. Held, that the city having given the company permission to occupy the street was liable to the same extent as if the ditch had been opened by its own servants, i.e., without proof of notice. *Russell* v. *Columbia* (1881) 74 Mo. 480, 41 Am. Rep. 325.

61. Duties imposed on grantees of franchises and special privileges in respect to highways.— The doctrine applied in several decisions is that, whenever a person or corporation is permitted by a statute or a municipal ordinance to interfere with, or temporarily obstruct, a public highway, such permission carries with it, and imposes upon the person or corporation, a corresponding duty to protect travellers by such precautionary measures as may be appropriate under the circumstances, and that this duty cannot be so delegated to a contractor as to relieve the licensee from the consequences of his failure to perform it(*a*). The virtual effect of this doctrine is, that the privilege

---

(*a*) In *Veazie* v. *Penobscott R. Co.* (1860) 49 Me. 119, a town was held entitled to recover from a railway company the damages which it had been compelled to pay to a traveller who had fallen into an unguarded and unlighted cutting which the company had made through a highway. The court said: "We place the decision on this point on the well settled doctrine, that, where the Legislature, as guardian of the rights of the public in a highway, permits a corporation or individual to use or interfere with the way, and to obstruct its use, on condition, express or implied, that all requisite care is to be taken to protect others from injury, the right thus granted must be exercised by the party to whom it is granted, and cannot be assigned, so as to relieve the party from the faithful execution of the power. The company may doubtless make contracts for the performance of the work; but cannot avoid their obligation to protect the public against danger, by the stipulations they may make. The grant of the Legislature is to a known and responsible company, as it is to be presumed, over which the Legislature has more or less control. Important rights are to be affected, and it would be a dangerous, as well as an unsound doctrine, to allow such a body to transfer their liabilities and obligations to the public and the individual citizens, to irresponsible or transient contractors. In the execution of such a trust, or power, the company must be responsible, whatever contracts they may make."

Commenting upon this case in a later judgment the same court said: "No private person or corporation has a right to interfere with a highway, and can only do so by authority from the Legislature; and then, as the authority is personal, the act, by whomsoever done, remains personal. The act of a contractor, being unauthorized except from the legal privilege of his employer, logically becomes the act of the latter, permitted by law in derogation of the public right. That is the doctrine of *Veazie* v. *Penobscot* (1860) 49 Me. 119, and it is not applicable here." *Leavitt* v. *Bangor & A.R. Co.* (1897) 89 Me. 500, 36 L.R.A. 382, 36 Atl. 998. The explanation thus given disposes of the criticisms made upon the *Veazie Case* in *Eaton* v. *European & N.A.R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430, where the court misapprehended the true rationale of the decision.

In *Deming* v. *Terminal R. Co.* (1900) 49 App. Div. 493, 63 N.Y. Supp. 615, the essential facts involved were as follows: The Supreme Court of New York, acting in pursuance of its statutory powers, had authorized the defendant railway company to build a bridge over its track at a point where it was crossed by a street, and had also ordered the defendant to comply with the requirements of the General Railroad Law of that State which authorizes railroad companies to excavate, fill in, or change the grade of a highway, when necessary to carry its line across the roadway. When the embankment by which the overhead crossing was to be approached had been partially formed, the plaintiff's

so granted is regarded as being subject to the implied condition that the licensee shall see to it, at his peril, that the safety of the public is secured, so far as that result can be attained by the exercise of reasonable care. *A fortiori* will the licensee be held liable for the non-performance of that duty where an express condition of this effect was attached to the grant of the privilege(*b*).

---

carriage came into collision with the obstruction thus made on the highway, the contractor for the work having failed to guard it by lights. For the injury caused by the upsetting of the carriage the defendant was held liable, on the ground that the duty imposed by the statute involved care and vigilance in the prosecution of the work, as well as a substantial restoration of the highway when the work was completed. The court said: "Manifestly, as it seems to us, the obligation assumed by a railroad company when it takes possession of a highway for the purpose of effecting a crossing thereof is analogous for the time being to that which pertains at all times to a municipality in its care of its streets, and we are consequently of the opinion that the statute under which the defendants were prosecuting their work imposed upon them duties similar to those which would have rested upon a municipality engaged in the same character of work and for precisely the same reason. It is true that the statute does not in express terms declare that when carrying its line of road across a public highway a railway company must guard and protect the travelling public from such damages as may reasonably be anticipated from its interference with the highway; but it does confer the right to excavate, fill in and change the grade of the highway, and this necessarily involves some obstruction and inconvenience to travellers thereon. If, therefore, in the conduct of its operations the obstruction is unnecessarily dangerous, or if it is permitted to remain for an unreasonable length of time, or if while it remains it is not properly guarded, it becomes a public nuisance, and certainly it is not the policy of the law to sanction the creation or maintenance of a nuisance which would be a constant menace to life and property."

In an earlier decision the same court had observed, arguendo, that chutes and coal holes maintained in the street by the owner of the abutting property, and excavations in the highway made in the course of laying a railroad or gas mains therein, were examples of the class of cases in which the person exercising the privilege or franchise is bound absolutely to guard the obstructions so created in the street. *Burke* v. *Ireland* (1898) 26 App. Div. 487, 50 N.Y. Supp. 369.

Persons obtaining a franchise to dig trenches and lay water-pipes for city waterworks cannot, by entering into a contract with third persons, which requires them to assume all the responsibility for the way in which the work is done by them, relieve themselves from liability for injuries caused by the negligent manner in which the work is done. *Colgrove* v. *Smith* (1894) 102 Cal. 220, 27 L.R.A. 590, 36 Pac. 411.

A person who obtains a license from municipal authorities to incumber a street while his ice-house is being filled is liable for injuries caused by unlawful obstructions created in the street by blocks and fragments of the ice, although the work is done for him by a contractor. *Darmstaetter* v. *Moynahan* (1873) 27 Mich. 188.

(*b*) "When certain powers and privileges have been specially conferred by the public upon an individual or corporation for private emolument, in consideration of which certain duties affecting the public health or the safety of public travel have been expressly assumed, the individual or corporation in the receipt of the emoluments cannot be

It will be observed that the facts involved in all the cases cited are such that the liability of the defendant might apparently have been referred to the more general principle which is re-

---

relieved from liability by committing the performance of these duties to another." *Lancaster Ave. Improv. Co.* v. *Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852. There the defendant company, by the terms of its charter, was invested with special public privileges, that of "constructing and maintaining a turnpike road" for the private gain of the company. The road had been completed and was open to public travel, and the company had for several weeks been in the regular receipt of tolls. In consideration of the right to collect such tolls, the proprietors of the road undertook to exercise due care and dilegence in keeping the road in such repair that it might be traveled with safety to life and property. It was held that, having undertaken to lower the grade whilst the road was open to travellers, it was the plain duty of the defendants to guard that part which they retained for public use, and to warn travellers of any danger that threatened by reason of obstructions in the road, and by suitable devices to direct them in the proper route. Of these duties, attaching them as trustees for the public, they could not divest themselves by shifting the responsibility upon others.

A corporation bound in consideration of the franchise to keep a road or bridge in repair, is liable for injury to a person from want of repair, whether the defect by patent or latent, unless he be in default or the defect was from inevitable accident, tempest or lightning, or the wrongful act of a third person of which they had no notice or knowledge, and this although ordinary care was used in the erection or repair, and the work was done by competent workmen under contract. *Pennsylvania & O. Canal Co.* v. *Graham* (1869) 63 Pa. 290, 3 Am. Rep. 549.

In *Downey* v. *Low* (1897) 22 App. Div. 460, 48 N.Y. Supp. 207, where the plaintiff fell into a coal-chute, the court said: "Without this license, the invasion of the highway would have been illegal and a nuisance per se. By the license, the defendant acquired a special privilege, but by the acceptance of the privilege there was imposed a duty and a burden. The privilege was to construct the chute. The duty was to maintain the chute safe and properly guarded. The defendant could not exercise the privilege without discharging the duty. The two at all times were coexistent, and the defendant could not absolve himself from liability by delegating the duty to another."

Where a private railway track is built to a manufacturing establishment, under a license given by a city, upon stringent conditions designed to prevent accident, and no one but the defendant has any right to build or maintain it, all persons using the track for the purposes for which it was constructed are deemed to be using it as the agents of the owner, and he is liable for their conduct. The use of a special franchise, under the direction and for the purposes of its grantee, can never be maintained except as his act. The owner of the establishment in question was accordingly held liable for the death of a person who was run over by the company which owned the railway with which that track was connected. *McWilliams* v. *Detroit Central Mills Co.* (1875) 31 Mich. 274. The court said: "The Central Railroad Company, when performing its service for defendant was not engaged in the performance of its own business under its charter, but was employed in a special and temporary service, differing in no sense from what might have been rendered by men or horses in drawing or pushing cars for defendant on defendant's premises. It was in no sense an independent and separate business, and the only authority under which it was justified or exercised was the city ordinance which granted the privilege to defendant. . . . The defendant was clearly bound to see to the safe use of its own franchise."

viewed in subtitle V., *ante*. Indeed a large number of rulings there cited relate to operations carried on, or conditions maintained, by the grantees of special privileges. It may be that the doctrine now under review would enable a plaintiff to recover in some cases besides those to which that general principle is applicable, but this point has never been specifically raised or discussed.

62. Duties incident to the exercise of corporate and other franchises. Generally.—The American reports contain a large number of decisions which are based upon the doctrine, that a corporation cannot, by delegating to another party the functions which it is empowered to perform, and which constitute the essential reason for its existence, escape responsibility for injuries caused by the non-performance of such duties as may be attached, either by its charter, or by the general laws of the state in which it is organized, to the exercise of franchises conferred upon it(*a*).

(*a*) "Where the wrong and injury for which the action is brought were committed in the performance of acts by virtue of the authority of the corporation derived from its charter, and could have been performed in no other way, then the party injured has the right to hold the corporation responsible, because it is really the corporation that is acting." *Sanford* v. *Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67.

In a leading Massachusetts case the following rule was declared to have been that which had been established by the authorities: "Where persons are invested by law with authority to execute a work involving ordinarily the exercise of the right of eminent domain, and always affecting rights of third persons, they are to be liable for the faithful execution of the power, and cannot escape responsibility by delegating to others the power with which they have been intrusted." *Hilliard* v. *Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743. In another part of the judgment it was said that the plaintiff's right to recover could not be put upon the ground that the negligent act had been done "in the execution of a work under the public authority, as the construction of a railroad or canal, and from the responsibility for the careful and just execution of which, public policy will not permit the corporation to escape by delegating their power to others." This case is criticized in *Wright* v. *Holbrook* (1872) 52 N.H. 120, 13 Am. Rep. 12, on the ground that it draws a distinction between railway and other corporations, and that this distinction is not recognized in the more recent English and American cases. This criticism however, clearly ascribes to the decision a more extensive significance than the reasoning of the court warrants.

In *Solomon R. Co.* v. *Jones* (1883) 30 Kan. 601, 2 Pac. 657, the court laid down the law as follows: "Where a corporation is organized for the purpose of doing any work, the work will be presumed, in the absence of any shewing to the contrary, to be done by it, and it will be held responsible for all that transpires. Especially is this true of a railroad corporation, for to it alone has the State given the privilege of exercising the right of eminent domain. And where the State grants a franchise of

The effect of this doctrine in the present connection may be conveniently shown by considering separately the results of its application, first, in cases where the thing to be done by the contractor related to the construction and preparation of the plant which was to be used for the purposes of the contractee's business, and, secondly, in cases where the thing to be done by the contractor related to the operation of that plant.

62a. Liability in respect to construction work.—Plaintiffs have been entitled to recover under the following circumstances:

(1) Where damages were sought for the non-performance of one of the conditions to which the exercise of the defendant's right to appropriate the land or materials which might be required for purposes of construction was subject(*a*).

(2) Where a trespass had been committed by a contractor

---

such importance, it has a right to assume for itself and all citizens that the party receiving the franchise is executing the work, and responsible for all that is done in such execution. Indeed, without some authority from the State it cannot transfer the franchise, or divest itself of responsibility; so where all that is patent to the public is the franchise, and the work done under it, the public has a right to treat the beneficiary of the franchise as responsible for the work."

In *West v. St. Louis* V. & T.H.R. *Co.* (1872) 63 Ill. 545, the court, referring to a class of cases which it regarded as being distinguishable from the one before it, said: "These were all cases in which redress was sought against a chartered company for wrongs done by persons while in the performance of acts which they would have had no right to perform except under the charter of the company. The court laid down the salutary rule that, as to such acts, the company could not escape corporate liability by having the acts performed or the work done by contractors or lessees. These persons must be regarded, in such cases, as the servants of the company, acting under its directions, and the company must see that the special privileges and powers given to it by its charter are not abused." The correct principle was considered to be substantially this: "The company may be held liable, when the person doing the wrongful act is the servant of the company, and acting under its direction; and though such person is not a servant as between himself and the company, but merely a contractor or lessee, still he must be regarded as a servant or agent when he is exercising some chartered privilege or power of the company, with its assent, which he could not have exercised independently of such charter. In other words, a company, seeking and accepting a special charter, must take the responsibility of seeing that no wrong is done through its chartered powers by persons to whom it has permitted their exercise."

(*a*) Liability has been imposed for injuries caused by the failure of the contractor to construct cattle guards. *Houston & G.N.R. Co.* v. *Meador* (1878) 50 Tex. 77; and to keep up fences to prevent cattle from straying on to and damaging land. *Chicago, St. P. & F.R. Co.* v. *McCarthy* (1858) 20 Ill. 385, 71 Am. Dec. 285.

In *Vermont C.R. Co.* v. *Baxter* (1850) 22 Vt 365, it was held that a person who was seeking damages for land which had been appropriated by the contractor for the purpose of the work could recover directly from the company.

in proceeding with the work of construction along the line on which the road had been located, but on land which had not yet been condemned or purchased by the company(*b*).

In *Lesher* v. *Wabash Nav. Co.* (1852) 14 Ill. 85, 56 Am. Dec. 494, it was decided that, where the charter of a navigation company authorized it to enter upon the lands adjoining a dam, which was to be constructed, and take material therefrom, leaving the owner of the land to apply to a specified court for an assessment of damages, the owner of material which was taken by contractors under the provisions of the charter and used for building the dam, was entitled to recover compensation from the company for the material so taken. The court said: "The contractors were none the less the servants of the company, because they were doing the work by contract, and for a stipulated price. The work was still done by the company, and under the authority of their charter. The privileges which the charter conferred upon the company to enable them to execute the work, devolved upon the contractors for the same purpose. The very erection of the dam across the river, was an obstruction to its navigation, and would have been unlawful but for the authority conferred by the charter. Had the Culberstons been prosecuted for a damage occasioned by reason of such obstruction they would immediately have sought protection under the charter. So too had Lesher objected to their taking the material which they did take they would have asserted their right . . . to the same extent that the company would have been had they prosecuted the work without the intervention of contractors. If it was necessary for the company to take private property to enable them to prosecute the work for the public good it was equally so for the contractors. . . . It is no answer to say that the contractors were bound by their contract to furnish all the materials at their own expense, and for which they were to recover a full compensation. The public were not bound to know the relations existing between the company and their servants. It was enough that they saw they engaged in the erection of the works of the company, and under the direction of the company's engineer. The person who was injured by reason of acts done by those in the employ of the company, in pursuance of their charter, had a right to look to the principal, who alone had authority to direct the acts to be done, for compensation, and was not bound to seek redress from every servant who cut a tree or removed a stone. Were the rule otherwise, the company might, by the employment of irresponsible servants, compel the owner of the land to stand by and see it stripped of all that made it valuable, without a hope of remuneration. They would derive the benefits secured by their charter, protected from the liabilities which it imposes. . . . It may be true that it is the duty of the contractors to pay these damages, as they were bound by their contract to furnish the materials; and if so, they will be liable over to the company for the damages which the company necessarily has to pay for the acts of the contractors, but this ultimate liability of the contractors does not relieve the corporation from their primary liability to pay the damages occasioned to individuals by the exercise of the chartered rights of the company, and in the mode, too, which the charter provides."

In *Hinde* v. *Wabash Nav. Co.* (1853) 15 Ill. 72, which involved similar facts, the court adhered to its former opinion.

In *Rockford, R.I. & St. L.R. Co.* v. *Wells* (1872) 66 Ill. 321, it was held that, upon a proper construction of the Illinois statute, requiring railroad companies to fence their tracks within six months after the road is open for use, a company is liable, if it fails to fence within six months after it begins to run trains on the track for construction purposes; and that the fact that the road is still under the control of the contractors does not change the liability of the company in that regard.

(*b*) *St. Louis & C.R. Co.* v. *Drennan* (1887) 26 Ill. App. 263 (contractor had cut ditches and raised embankments).

(3) Where the injuries resulted from the negligence of the servants of a contractor who had been permitted by the company to operate trains for the purposes of general traffic(*c*).

The conclusions arrived at by the Illinois courts in some of the cases in which the general principle stated in § 62, *ante*, has been applied, might seem to indicate an interpretation of

---

In a case where men employed a contractor engaged in the construction of a railway committed a trespass by entering upon the plaintiff's land and digging up the soil, and making embankments, it is not error to refuse evidence that the company had nothing to do in employing the hands doing the work, but that they were employed and paid by the contractors. *Cairo & St. L.R. Co.* v. *Woosley* (1877) 85 Ill. 370

(*c*) *Chattanooga R. & C.R. Co.* v. *Whitehead* (1892) 89 Ga. 190, 15 S.E. 44 (man was run over); *Lakin* v. *Willamette Valley & C.R. Co.* (1886) 13 Or. 436, 57 Am. Rep. 25, 11 Pac. 68 (similar accident). In the latter of these two cases it was held that, so far as the responsibility of the company was concerned, it was immaterial whether the defendant gave the privilege of using its road to the contractor or allowed him to use the road, or the using and operating of the road arose out of some consideration of the contract to build and contsruct it.

In *Macon & A.R. Co.* v. *Mayes* (1873) 49 Ga. 355, 15 Am. Rep. 678, where a tracklayer in the employ of a contractor was held entitled to recover for injuries received while he was travelling as a passenger on a train operated by the contractor, the court said: "In our judgment, if a railroad company sees fit to permit another person or corporation to run steam cars over its road, it is liable to third persons for damages caused by the negligence of such persons or corporations, just as though the company had itself been running the cars. . . . Here Hull & Company were using the franchise of running steam cars through the country, across the public roads and by the side of them—an act which is a nuisance unless by Legislative grant, and in the doing of this the damages came to the plaintiff. If the engine and tender were, at the time, under the orders of the president of the road, the case is clear. If under the orders of Hull & Company it was by the consent or permission of the company, and the case stands upon the rule we have discussed. We put the case, in this view, upon the ground that the use of the engine and tender for the purpose set forth in the record, to wit: to pass over the road with steam cars, from point to point, for the purpose of carrying Mr. Hazelhurst, was a use of the franchise of operating the railroad by steam, and that the corporation is liable, no matter who did it. The case might be different if the contractors were in the prosecution of their proper work, as moving dirt, etc., under circumstances, when they were not exercising the franchise of the company in operating the railroad by steam cars, so as to do that which, without the franchise, would be a nuisance."

See further as to the operation of trains by contractors the cases cited in note (g.) infra.

The statute of March 4th, 1863, 3 Ind. Stat. 413, makes the company owning a railroad jointly and severally liable with the "lessees, assignees, receivers, and other persons, running or controlling" the road, etc., for stock killed or injured. In *Huey* v. *Indianapolis & V. R. Co.* (1873) 45 Ind. 320, it was held that the phrase "other persons" embraced contractors and that it was no defence for a railroad company in an action to recover for stock killed by a train of cars run on its railway track, that the injury was done by the train of another company, which was in the exclusive use and possession of the contracted persons who had for the construction of defendant's line of road, but who had not finished the same, or delivered to the defendant the completed portion of said road.

that principle which would have the effect of charging companies with responsibility for all injuries resulting from tortious acts committed by contractors, while engaged in constructing the corporate plant(*d*). How far the judges in that State are prepared to go in this direction, it is difficult to conjecture. From the ruling cited below it is apparent that the responsibility of companies is deemed to be subject to some limitations(*e*). But the *indicia* of the cases which lie on either side of the boundary line which is supposed to separate liability from non-liability have not been defined with any precision. In the opinion of the present writer, the cases cited in note (*d*) have carried to an unwarrantable extreme the doctrine upon which they were based, and should rather have been referred to another doctrine which has been thus formulated: "The principle that a railroad company cannot delegate to an employe its chartered rights and privileges so as to exempt it from liability, does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without having first complied with the conditions of the legislative grant of authority"(*f*). The adoption of this position involves the consequence, that, unless the enabling

(*d*) Thus recovery has been allowed where cattle were killed by a construction train. *Chicago & R. I. R. Co.* v. *Whipple* (1859) 22 Ill. 105; and where a servant of a contractor was injured by defects in a handcar. *Toledo, St. L. & K. C. R. Co.* v. *Conroy* (1890) 39 Ill. App. 351; and where an explosion was caused by the negligence of the servants of a company which had contracted to lay gas-pipes in a city street. *Chicago Economic Fuel Gas Co.* v. *Myers* (1897) 168 Ill. 139, 48 N.E. 66, Affirming (1896) 64 Ill. App. 270; and where a contractor for the construction of an elevated railway dropped a heavy piece of steel on a passing pedestrian. *Metropolitan West Side Elev. R. Co.* v. *Dick* (1900) 87 Ill. App. 40. In the last cited case the court considered that the circumstances brought it within the scope of the broad principle, that "a contractor exercising the chartered power of a corporation, with its assent, must be regarded, in so far as the public and third persons are concerned, as the servant or agent of the corporation."

(*e*) On the ground that the injury was not the result of an act done in the exercise of any special power derived from the defendants' charter, a railway company was held not to be liable for the injury which a servant of a contractor for building the road received through handling timber which had been treated with a poisonous mixture for the purpose of retarding decay. *West* v. *St. Louis W. & T. H. R. Co.* (1872) 63 Ill. 545.

(*f*) *Cunningham* v. *International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632. This statement was adopted in *Sanford* v. *Pawtucket Street R. Co.* (1890) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67.

statute from which a company derives its power imposes on it, either expressly or by implication, the duty of building its own road, it has the right to make a contract with other parties for the construction of its road, and a contract of this character is not such a delegation of its chartered rights as to render the company liable for unauthorized wrongs committed by the contractor or his servants while they are engaged in the work(*g*).

(*g*) *Atlanta & F. R. Co.* v. *Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277; *Burmeister* v. *New York Elev. R. Co.* (1881) 15 Jones & S. 264, and the cases cited in the last note.

Other decisions in which it may be said that the doctrine in the text is taken for granted are collected in §§ 40, 41, *ante*.

It has been held in an action to recover damages for injuries caused to a child by a turn-table used in the operation of a railroad, which was still in possession of the contractor by whom it was being constructed and which was being used by him for carrying passengers and freight, an instruction to the effect that, "if the jury find that at the time of the injuries the turn-table and the road were in the possession of and operated by the corporation constructing and equipping the same for the purposes of construction only, the railroad company was not liable therefor, but if the said constructing corporation had possession of the road and was operating it for general purposes, the railroad company was not relieved from liability for the injuries,"—is erroneous, as being liable to mislead the jury to the prejudice of the railroad company. *Kansas C. R. Co.* v. *Fitzsimmons* (1877) 18 Kan. 34. The following extract from the opinion indicates the grounds upon which this conclusion was based: "The better authority is, that when a railroad is being constructed, and is in the exclusive possession of and operated by the contractor for its construction, and the railroad company at the time of the injuries being committed thereon has no control thereof, such company is not liable for the damages resulting from the injuries committed by the contractor in operating the road. . . . This general doctrine the court below substantially recognized in its charge to the jury, but made a distinction as to the liability of the railway company in the use for which the contractor operated the road. The liability of the railway company is attempted to be made to depend on the character of the use of the road, not the character or manner of the possession of the same by the contractor. . . . The instruction thus given was too broad and not sufficiently limited to be applicable to the case at bar. The real defence to the action was, that the railroad was being constructed by the Washington Improvement Company, was in its possession and under its control, and operated by it; that it had not yet been turned over to the railway company, and that the railway company had nothing to do with its operation or construction or the employment of its hands. If the improvement company held possession of the road and engaged in general traffic against the objections of the railway company under the charge, the railway company would be liable. If the contracting company had failed to properly equip the road, or had built defective bridges, and the railway company refused to accept the same, this charge of the court would hold the railway company liable for all damages caused thereby, if in defiance of the railway company's orders and authority the contracting company carried freight and passengers over the road. . . . The charge does not base this liability upon the improvement company being the lessee of the road, nor upon any contract by which the road is to be operated with the consent or for the benefit of the railway company. Nor can it be claimed from the instruction that the railway company had made any contract in violation of its charter, or to avoid its responsibility. It is conceded that the improvement company

had authority under its incorporation to construct and equip the road; and to hold, that while in the possession of the road and its appurtenances, the railway company should be responsible for its wrongful acts or omissions, because said improvement company ran trains and carried passengers and freight, would be deciding the law contrary to that given in the first part of the charge, and affirming in its broadest sense the principle that the employer is responsible for all acts and omissions of the contractor, the same as those of a servant. Such is not the law. . . . The act that the improvement company had no authority to operate a railroad in Kansas, as claimed by counsel for defendant in error, does not on the facts presented change the law in this case. If the improvement company, in carrying passengers and freight, was violating its own charter, as well as committing acts not authorized by the contract existing between it and the railway corporation, the reasons are still stronger in favor of holding the railway company not liable for such unlawful acts." Brewer, J. (now an Associate Justice of the Supreme Court of the United States) delivered a dissenting judgment in which he said: "All I understand the instruction to say is, that a railway corporation receiving a franchise from this State, with the high and peculiar privileges attaching to corporations, incorporated to discharge a public duty, as well as to subserve a private benefit, cannot shift upon others the duty and responsibility of a personal exercise of the corporate powers granted, except in the cases and under the conditions specified in the statutes. It may contract for the construction of its road. It may lease the road, when constructed, to another corporation whose road with its own will make a continuous line. (Laws of 1870, chap. 92, §§ 2 and 3.) But it cannot avoid responsibility by simply permitting another party, neither contractor nor lessee, to assume charge of the immediate running of the road."

The reasoning of the majority of the Kansas court was approved in *Rome & D. R. Co.* v. *Chastcen* (1889) 88 Ala. 591, 7 So. 94, where it was held error to give, at the instance of the plaintiff, a charge which grounded the company's responsibility upon the isolated fact, that one C., the party whose servants caused the injury, was transporting freight and passengers for a reward between certain points on the line. The court remarked that, under such a charge the jury was authorized to hold the company liable, though C. might have been operating the road without defendant's permission, and against its objection; or, though he might have been an independent contractor, having possession and control, and operating the finished portion in aid of the further construction of the road under a contract with the company.

It has been held that a wilful trespass of which a contractor's workmen had been guilty in wasting materials on land over which the defendant had not acquired any proprietary rights was not committed in the exercise of any corporate functions. *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461. Replying to the contention of plaintiff's counsel that the acts of the contractor's workmen were the acts of the company, since if it had not been for the company's charter, they would have been trespassers on plaintiff's land, and were doing work which the company alone was authorized to do, the court said: "This argument is fallacious. . . . Undoubtedly, the defendant could not transfer to its contractors the right to be a corporation, or the right of eminent domain, or the right to commit a trespass. If the defendant had sent its contractors upon land, where it had no right to go, for the purpose of building its road, or wasting material, its liability could not be doubted. The question in this case, however, is this: If a railway company by the exercise of its power of eminent domain, acquires all the land necessary to the construction of its road, and sends its contractors to construct its road thereon, is it necessarily liable for a trespass committed by them while engaged upon the work? . . . The work of constructing a railroad is not corporate work unless it be done by a corporation through its agents and servants. And a person may contract with a railroad company to construct its road, without becoming its agents or servants. . . . Of course any condition imposed upon the right to construct its road must be performed and the

62b. Liability in respect to the operation of the completed plant.— (*a*). *Liability of railway companies—Generally.* It is well settled that a railway company cannot, by any form of agreement, whether it be made with another company or with an individual, relieve itself from responsibility for the non-performance of the duties which are incident to the discharge of its functions as a common carrier. To this principle are referable the decisions in which recovery has been allowed for injuries caused by the negligence of one employed to haul by horse power a portion of the cars at one of the stations of the defendant(*a*), and of one employed to remove crippled and dead cattle from stock-trains(*b*), and of one employed to make openings in the company's fences for private purposes(*c*).

company cannot shift its responsibility for the performance. But this is no new principle, nor one applicable to railroad corporations alone. Where a right is possessed by a natural person and a duty is attached to the exercise of the right, such duty must be performed; such natural person cannot relieve himself from liability through the intervention of an independent contractor."

In *Rogers* v. *Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059, the court, in discussing the theory upon which the plaintiff relied, viz., that "when the employer as a corporation is charged with certain obligations, reciprocal to the privileges and franchise granted, it cannot shift the responsibility from itself by employing a contractor to do the work for it," said: "This is very general, and we do not know that we fully comprehend it. If it means that a railroad corporation on account of the large powers generally granted to them, eminent domain, etc., cannot be allowed to construct their track, etc., through an independent contractor, but must do such work through their own servants and employees, we have only to say that we have found no authority for such a position. . . . If it means that where certain obligations exist, growing out of the privileges and franchises granted to the corporation, which would be inconsistent with the right of the company to employ an independent contractor to meet said obligations, from public policy or otherwise, then the principle may be conceded; but the propriety of its application must be shewn. No obligation of the defendant has been pointed out here inconsistent with having its road graded by an independent contractor."

(*a*) *Philadelphia, W. & B. R. Co.* v. *Hahn* (Pa. Supr. 1888) 22 W.N. C. 32, 12 Atl. 479 (man was crushed between two cars). The court pointed out that, if the doctrine of non-liability under such circumstances were established, it might be the means of relieving the company from all its charter duties, so far, at least, as concerns the public safety, and proceeded thus: "The mere question of the power by which its cars are to be moved is of no consequence. If it can contract for horse-power, so may it for steam, and it follows that it might relieve itself of all responsibility by contract with its engineers and conductors for the running of its locomotives and trains. It needs no argument to shew that a railroad company cannot escape its charter obligations by a quibble such as this."

(*b*) *Texas & P. R. Co.* v. *Juneman* (1895) 18 C.C.A. 394, 30 U.S. App. 541, 71 Fed. 939 (plaintiff was injured, while crossing the track, by a steer which had been taken off a train, and allowed to roam at large through the yard).

(*c*) *Wabash R. Co.* v. *Williamson* (1891) 3 Ind. App. 190, 29 N.E. 455 (cattle were run over).

On the same ground a railway company is required to answer for negligent acts committed by the servants of another railway company on whose tracks it has been licensed to operate trains(*d*), or of a company which owns sleeping cars attached to its trains and constituting a part thereof(*e*).

(*d*) A company is liable for the negligent management of a switch, whereby a passenger receives injury, although it is provided and attended to by a servant of the company which owns the track. *McElroy* v. *Nashua & L. R. Corp.* (1849) 4 Cush. 400, 50 Am. Dec. 794. The court said: "As passenger carriers, the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers. The wife [of the plaintiff] having contracted with the defendants and paid fare to them, the plaintiffs had a right to look to them, in the first instance, for the use of all necessary care and skill. The switch . . . was . . . a part of the Nashua & Lowell railroad, and it was within the scope of their duty to see that the switch was rightly constructed, attended, and managed, before they were justified in carrying passengers over it. Had the action been, in form, on the implied contract of the defendants, in undertaking to carry a passenger, to have a safe road, and apply and use all necessary care and skill, the liability of the defendants might have been more clear and manifest; but the duty is the same, and in most cases of this kind of carelessness, negligence, or want of due skill, in the performance of duty undertaken to be done for hire and reward, it is at the election of the plaintiff to declare in assumpsit, and rely on the promise, or to declare in tort, and rest on the breach of duty."

Compare *Murray* v. *Lehigh Valley R. Co* (1895) 66 Conn. 512, 32 L.R.A. 539, 34 Atl. 506, where, in a very similar case the court came to the same conclusion, reasoning as follows: "This duty is imposed by law; and this measure for its performance rests upon a railroad corporation to its full extent. A railroad corporation is a carrier of passengers by virtue of the franchise granted to it by its charter, a franchise intended to be used for the public good. By asking for and receiving the franchise, the corporation comes under the obligation to answer in damages to everyone who may be injured by any negligence in the use of the privilege it has so received. And public policy will not permit the corporation to relieve itself from this obligation by any contract with others. A railroad company entering into contract relations with another company, by which the safety of its own passengers may be affected, is held to have made the other company in this respect its own agent. It is held to the exercise of due care for the safety of all persons while exercising its franchise, whether on its own road or that of another company. This duty was imposed by law when it received its charter, and this duty [of a railroad company to its passengers] holds good at all times and in all places. If the company operates its trains over the road of another company, it must see and know that the track is in good and safe condition, and that the trains of the other company are so ordered as not to interfere with the full discharge of its own duty to its own passengers, because such trains would be a danger against which it would be bound to provide."

In another case, on the broad ground that a railway company is bound to the exercise of care, for the safety of all persons, while exercising its franchises, whether on its own road or another, it was held that a company which operates its trains over the road of another, is liable for injuries caused to a passenger by a defective track. *Wabash, St. L. & P. R. Co.* v. *Peyton* (1883) 106 Ill. 534, 46 Am. Rep. 705.

(*e*) In the earliest case on the subject (*Kinsley* v. *Lake Shore & M. S. R. Co.* (1878) 125 Mass. 54, 28 Am. Rep. 200) the ruling was that, if

"a person, who has made a contract with a railroad corporation for his personal transportation from one place to another, takes a seat in a sleeping car, and there loses an article of personal baggage, through the negligence of a person in charge of the car, and without fault on his own part, it is no defence to an action against the corporation that the car was not owned by the defendant, but by a third person, who, by a contract with the defendant, provided conductors and servants, in the absence of evidence that the plaintiff had knowledge of these facts." See also *Louisville, N. & G. S. R. Co.* v. *Katzenberger* (1886) 16 Lea. 380, 57 Am. Rep. 232, turning upon the same facts.

The liability of the railway company was again discussed by the New York Court of Appeals in *Thorpe* v. *New York C. & H. R. R. Co.* (1879) 76 N.Y. 406, 32 Am. Rep. 325, and the law was laid down as follows: The persons in charge of drawing-room and sleeping-cars owned by parties other than the railway company operating the rest of the train are to be regarded and treated, in respect to any matter involving the safety or security of passengers as the servants of the company, and it is responsible for their acts to the same extent as if they were directly employed by it. "The business of running drawing-room cars in connection with ordinary passenger cars," said the court, "has become one of the common incidents of passenger traffic on the leading railroads of the country. These cars are mingled with the other cars of the company, and are open to all who desire to enter them, and who are willing to pay a sum in addition to the ordinary fare for the special accommodation afforded by them. They are put on presumably in the interest of the road. They form a part of the train, and the manner of conducting the business is an invitation by the company to the public to use them, upon the condition of paying the extra compensation charged. Passengers cannot know what private or special arrangement, if any, exists between the company and third persons, under which this part of the business is conducted, and they have, we think, in taking one of these cars, a right to assume that they are there under a contract with the company, and that the servants in charge of the drawing-room cars are its servants. Otherwise there would be two separate contracts in the case of each passenger in these cars, one with the company, and one with Wagner [the proprietor of the cars]. Such a condition of things would involve a confusion of rights and obligations, and divide a responsibility which ought to be single and definite. Take the case of a passenger in a drawing-room car who should be burned by the negligent upsetting or breaking of a lamp by the porter, or the case of a passenger in a sleeping car, injured by the porter's negligence. Is the passenger, in these or other similar cases which might be supposed, to be turned over, for his remedy, against Wagner [the proprietor of the cars] on the ground that the servant who caused the injury was his servant, and not the defendant's? The public interest, and due protection to the rights of passengers, require that the railroad company which is exercising the franchise of operating the road for the carriage of passengers, should be charged with and responsible for the management of the train, and that all persons employed thereon should, as to passengers, be deemed to be the servants of the corporation."

The same rule was laid down even more emphatically a year later by the Supreme Court of the United States in *Pennsylvania Co.* v. *Roy* (1880) 102 U.S. 451, 26 Led. 141. There the railroad company was held liable for an injury caused by the fall of a sleeping birth, the grounds of the decision being stated as follows: "The undertaking of the railroad company was to carry the defendant in error over its line in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger car; with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping-car, constituting a part of the carrier's train, for an additional sum paid to the company owning such car. As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car to whom

(*b*). *Liability of railway companies considered with reference to the legality of the contractual arrangements.* It is settled by a multitude of authorities that, unless such a transfer has been expressly authorized by statute, a railway company does not divest itself of its liabilities to third parties by selling(*f*), or by leasing (*g*) its property. But for the reasons stated in

---

was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passengers over its line. In performing that duty, it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency, for safe conveyance, was discoverable upon the most careful and thorough examination. If it chose to make no such examination or to cause it to be made; if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars,—it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping-car in which Roy was riding when injured, exercised such control with the assent of the railroad company. For the purpose of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the volving the safety or security of passengers while being conveyed ,was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."

The rationale of the liability thus imposed on the railroad company is that "the relation of master and servant, and the liability of the master, is placed upon the law applicable to common carriers, though in direct contravention of contracts between the two companies." *Jones* v. *St. Louis S. W. R. Co.* (1894) 125 Mo. 675, 26 L. R. A. 718, 46 Am. St. Rep. 514, 28 S.W. 883.

For other rulings to the same effect, see *Cleveland, C. C. & I. R. Co.* v. *Walrath* (1882) 38 Ohio St. 461, 43 Am. Rep. 433; *Williams* v. *Pullman Palace Car Co.* (1888) 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85; *Dwinelle* v. *New York C. & H. R. R. Co.* (1890) 120 N.Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N.E. 319, Reversing (1887) 45 Hun, St. Rep. 369, 15 N.E. 60; *Louisville & N. R. Co.* v. *Ray* (1898) 101 Tenn. 1, 46 S.W. 554.

(*f*) *Ricketts* v. *Birmingham Street R. Co.* (1888) 85 Ala. 600, 5 So. 353 (plaintiff thrown to the ground by the sudden starting of a street car).

(*g*) The liability of a railway company for the torts of another company operating its line under a lease executed without any statutory authority had apparently not been considered in England. But the statement in the text is in full accord with the doctrine that a covenant to make such a lease is void. *East Anglian R. Co.* v. *Eastern Counties R. Co.* (1851) 11 C.B. 775, 7 Eng. Ry., etc., Cas. 150, 21 L.J.C.P.N.S. 23, 16

Jur. 249; and with the doctrine that an unauthorized agreement amounting to a delegation of statutory powers is also void. *Beman* v. *Rufford* (1851) 1 Sim. N.S. 550, 27 L.J. Ch. N.S. 530, 15 Jur. 914; *Great Northern R. Co.* v. *Eastern Counties R. Co.* (1851) 9 Hare, 306, 7 Eng. Ry., etc., Cas. 643, 21 L.J. Ch. N.S. 837.

In the United States, "it is the accepted doctrine . . . that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees. The operation of the road . . . does not change the relations of the original company to the public." *Washington, A. & G. R. Co.* v. *Brown* (1873) 17 Wall. 445, 21 L. ed. 675.

This principle has been applied or recognized in the following cases: *Murray* v. *Lehigh Valley R. Co.* (1895) 66 Conn. 512, 32 L.R.A. 539, 34 Atl. 506; *Driscoll* v. *Norwich & W.R. Co.* (1894) 65 Conn. 230, 32 Atl. 354; *Lakin* v. *Willamette Valley & C. R. Co.* (1886) 13 Or. 436, 57 Am. Rep. 25, 11 Pac. 68; *Virginia Midland R. Co.* v. *Washington* (1890) 86 Va. 629, 7 L.R.A. 344, 10 S.E. 927. *Whitney* v. *Atlantic & St. L. R. Co.* (1857) 44 Me. 362, 69 Am. Dec. 103; *Stearns* v. *Atlantic & St. L. R. Co.* (1858) 46 Me. 116; *Wyman* v. *Penobscot & K.R. Co.* (1858) 46 Me. 162; *Nugent* v. *Boston, C. & M. R. Co.* (1888) 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797; *Nelson* v. *Vermont & C. R. Co.* (1854) 26 Vt. 717, 62 Am. Dec. 614; *Clement* v. *Canfield* (1856) 28 Vt. 302; *Abbott* v. *Johnstown, G. & K. Horse R. Co.* (1880) 80 N.Y. 27, 36 Am. Rep. 572; *Rome & D.R. Co.* v. *Chasteen* (1889) 88 Ala. 591, 7 So. 94; *Galveston, H. & S.A. R. Co.* v. *Garleiser* (1895) 9 Tex. Civ. App. 456; *Central & M.R. Co.* v. *Morris* (1887) 68 Tex. 59, 3 S.W. 457; *International & G.N.R. Co.* v. *Kuehn* (1888) 70 Tex. 582, 8 S.W. 484; *International & G.N.R. Co.* v. *Eckford* (1888) 71 Tex. 274, 8 S.W. 679; *East Line & R. River R. Co.* v. *Lee* (1888) 71 Tex. 538, 9 S.W. 604; *East Line & R. River R. Co.* v. *Culberson* (1888) 72 Tex. 375, 3 L.R.A. 567, 13 Am. St. Rep. 805, 10 S.W. 706; *Trinity & S.R. Co.* v. *Lane* (1891) 79 Tex. 643, 15 S.W. 477, 16 S.W. 18; *Buckner* v. *Richmond & D.R. Co.* (1895) 72 Miss. 873, 18 So. 449; *McCoy* v. *Kansas City, St. J. & C.B.R. Co.* (1889) 36 Mo. App. 445; *National Bank* v. *Atlanta & C. Air Line R. Co.* (1886) 25 S.C. 220.

The precise position of the Illinois courts is not easy to determine; but it would almost seem from the decisions that the lessor is deemed to be liable for all kinds of injuries whether caused by the conditions of the road itself or by the manner in which it is operated by the lessee, and irrespective of whether the lease was authorized or not. In *Ohio & M.R. Co.* v. *Dunbar* (1850) 20 Ill. 623, 71 Am. Dec. 291 (plaintiff recovered for an injury to live stock on a train) and *Chicago & G.T.R. Co.* v. *Hart* (1902) 104 Ill. App. 57 (servant of lessee recovered for injury caused by defective car), the lease was unauthorized but this circumstance does not appear to have been regarded as a differentiating factor. In *Chicago & R. I. R. Co.* v. *Whipple* (1860) 22 Ill. 105, where the injury was caused by a construction train operated by a contractor, the court observed, *arguendo*, that the lessees of a railway "stand in the relation of servants to the lessors."

In the following cases the injury was caused by the operation of the road, but it is not stated whether the lease was or was not authorized. *Peoria & R.I.R. Co.* v. *Lane* (1876) 83 Ill. 448; *Wabash, St. L. & P.R. Co.* v. *Shacklet* (1883) 105 Ill. 364, 44 Am. Rep. 791; *Chicago & E.R. Co.* v. *Meech* (1896) 163 Ill. 305, 45 N.E. 220; *Chicago Union Traction Co.* v. *Stanford* (1902) 104 Ill. App. 99; *Pennsylvania Co.* v. *Ellett* (1890) 132 Ill. 654, 24 N.E. 559. In the last mentioned case the doctrine accepted in Illinois was stated broadly as follows: "The grant of a franchise, giving the right to build, own, and operate a railway, carries with it the duty so to use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others, and where injury results from the negligent or unlawful operation of the railroad,

the note below it is held that the negligent lessee company alone is liable where the injured person was its own servant(*h*).

---

whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable."

In other cases the duty violated was statutory, and the liability of the lessor might have been put on this ground. But the decisions would seem to have been put upon the general doctrine just stated. *Pittsburgh, C. & St. L.R. Co.* v. *Campbell* (1877) 86 Ill. 443 (property destroyed by fire owing to lessee's failure to keep its right of way clear from dead grass, etc.); *Balsley* v. *St. Louis, A. & T.H.R. Co.* (1886) 119 Ill. 68, 59 Am. Rep. 784, 8 N.E. 859 (similar facts); *Chicago, St. P. & F.R. Co.* v. *McCarthy* (1858) 20 Ill. 385, 71 Am. Dec. 285 (fences not maintained); *Illinois C.R. Co.* v. *Kanouse* (1866) 39 Ill. 272, 89 Am. Dec. 307 (same facts); *Toledo, P. & U.R. Co.* v. *Rumbold* (1866) 40 Ill. 143 (same facts).

Liability for the negligence of a licensee running trains over the licensor's track is imputed on the same grounds and under the same circumstances as in the case of a lease. *Illinois C.R. Co.* v. *Barron* (1866) 5 Wall. 90, 18 L. ed. 591. In this case what was conceived to be the doctrine of the Illinois cases was explicitly adopted. But a situation different both from that created by a lease and by a license of the ordinary description exists, where there is a mutual arrangement for the joint use of terminal tracks between the company which owns them and another company which has also a chartered right to enter the same city. Under such circumstances they are entitled to make use of common tracks at the terminal point, and in doing this the licensee company exercises its own franchises, and not those of the proprietor. Accordingly the proprietor is not liable to its employees for injuries caused by the negligent use of a common track by the employees of the other company. *Georgia R. & Bkg. Co.* v. *Friddel* (1887) 79 Ga. 489, 11 Am. St. Rep. 444, 7 S.E. 214.

The doctrine stated in the text has, it seems, no application except in the case of obligations arising out of the exercise of public franchises. Thus, a concession from the Columbian Exposition Company prohibiting an assignment thereof save by the written consent of the company does not make an independent contractor with the concessionaires for the erection of certain structures an employee of the latter so as to make them liable for his negligence, which results in an accident while the structures are being erected. *De La Vergne Refrigerating Mach. Co.* v. *McLeroth* (1895) 60 Ill. App. 529. But see § 66, *ante*.

(*h*) In *East Line & R. River R. Co.* v. *Culberson* (1888) 72 Tex. 375, 3 L.R.A. 567, 13 Am. St. Rep. 805, 10 S.W. 706, the court said: "The lessor by accepting its charter, assumes the obligation to carry passengers safely over its line. If it entrusts that duty to another company, and a passenger is injured, it is responsible. It binds itself to carry all freight offered to it, and to deliver it safely. Should its lessee fail to do this, it is liable. It assumes to operate its road safely and carefully, so as not negligently to destroy or damage property, and not to injure persons who have the right to pass on or near the track. Should its lessee negligently do damage to property, or inflict personal injuries upon wayfarers crossing the road, this is failure of duty on its part, and it is responsible for the wrong. But the duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the

If any special provisions of a statute authorizing a lease have not been duly followed, the result is the same as if the contract had been wholly unauthorized(*i*).

---

company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, Does the latter owe him the duty of a master to his servant, or guarantee that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if . . . the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employees, by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable merely because it owned the road. In the case proposed to be made by the evidence offered, it seems to us that the liability of the . . . employer [of the deceased] would have been precisely the same on the defendant's road as if the train had been running upon its own at the time of the accident. The act of the Missouri, Kansas & Texas Company in operating the road without a license from the Legislature, if such was the fact, was merely illegal in the sense that it was unauthorized; and the object in holding the lessor responsible in such a case is certainly not to impose a mulct or fine by way of punishment. The reason for the rule is the protection of the public who need the protection. The passenger and the shipper of goods have no option, but must avail themselves of the services of the lessees, whether the lease is authorized or not. The law will not permit the owner of the road to shirk its duty to them by turning over its road to another company; nor will it permit it to deny its liability where it has allowed such other company, without authority of law, negligently to injure wayfarers over the track or property along the line. There is no privity between the persons injured in such case and the operating company. It is not so with an employee who voluntarily enters the service of the latter company with a knowledge of the facts, and participates knowingly in the wrong, if wrong it be."

This decision was followed in *Trinity & S.R. Co. v. Lane* (1891) 79 Tex. 643, 15 S.W. 477, 16 S.W. 18; and *Baltimore & O. & C.R. Co. v. Paul* (1895) 143 Ind. 23, 28 L.R.A. 216, 40 N.E. 519, where the court laid stress upon the fact that, "whatever the attitude of the operating company, that also is the attitude of the appellee, since he was an operative of the operating company. See also *Buckner v. Richmond & D.R. Co.* (1895) 72 Miss. 873, 18 So. 449, where the court emphatically stated his conclusion in the following words: "We have no hesitation to say that the servant of the lessee must recover, if at all, from his master and not another. 'To his own master he standeth or falleth.' To him he is answerable, and to him he must look for redress for all injuries sustained in his service. Whatever be the rights of strangers to the relation of master and servant to look to the lessor in any case for wrongs of the lessee, there is no principle or policy to sustain the claim of an employee to look elsewhere than to his employer."

(*i*) *Ricketts v. Chesapeake & O.R. Co.* (1890) 33 W. Va. 433, 7 L.R.A. 354, 25 Am. St. Rep. 901, 10 S.E. 801 (railroad company held liable for an assault by a conductor controlling the train of a licensee, a foreign company, which had not taken the steps which the statute prescribed as conditions precedent to a lawful use of the road); *Freeman v. Minneapolis & St. L.R. Co.* (1881) 28 Minn. 443, 10 N.W. 594 (road leased to foreign company which had not complied with provisions of statute).

In regard to the effect of legislation authorizing a sale or a lease there is some conflict of opinion.

It has not yet been determined whether a lessor company is relieved of its specific statutory duties, when it has demised its property under an enabling statute which contains an exemption clause couched in general terms. But the doctrine that, in the absence of such a clause, duties of that nature are binding upon the lessor after the possession of the road has been transferred, has been applied in a few decisions(*j*).

As respects cases in which a violation of specific statutory duties is not involved, the position taken by some courts is, that, if an exemption clause has been omitted, the lessor is responsible even for such injuries as may be traceable to the negligence of the lessee in respect to the operation and maintenance of the road(*k*).

(*j*) *Nelson* v. *Vermont & C.R. Co.* (1854) 26 Vt. 717, 62 Am. Dec. 614 (fences not maintained as required by the defendant's charter); *St. Louis, W. & W.R. Co.* v. *Curl* (1882) 28 Kan. 622 (omission to construct cattle guards, as required by statute). In the latter case Brewer, J., laid down the following rule: "If the injury results from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road, matters in respect to which the lessor company could in the nature of things have no control, then the lessee company will alone be responsible; but when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance—something connected with the building of the road—then we think the company assuming the franchise cannot divest itself of responsibility by leasing its track to some other company." *St. Louis, W. & W.R. Co.* v. *Curl* (1882) 28 Kan. 622, per Brewer, J.

In *Stearns* v. *Atlantic & St. L.R. Co.* (1858) 46 Me. 95; *Ingersoll* v. *Stockbridge & P.R. Co.* (1864) 8 Allen, 438; *Davis* v. *Providence & W.R. Co.* (1876) 121 Mass. 134, the defendants were held liable for damage caused to property along their lines by fire communicated from locomotives operated by the lessees, although the lease was authorized. But the effect of the omission or insertion of an exemption clause was not explicitly referred to.

The same remark is applicable to the Illinois cases involving breaches of statutory duties, which are cited in note(*g*), *supra*.

(*k*) *Logan* v. *North Carolina R. Co.* (1895) 116 N.C. 940, 21 S.E. 959 (servant who was injured as a result of obeying the order of a vice-prinicple was held entitled to recover); *Chollette* v. *Omaha & P. Valley R. Co.* (1889) 26 Neb. 159, 4 L.R.A. 135, 41 N.W. 1106 (passenger injured by premature starting of train); *Singleton v. Southwestern R. Co.* (1883) 70 Ga. 464, 48 Am. Rep. 574 (passenger injured); *Central & M.R. Co.* v. *Morris* (1887) 68 Tex. 49, 3 S.W. 457 (failure to transport freight).

In Georgia where the defense of common employment has been abolished by statute in regard to railway companies it has been held that a lessor is not liable for injuries received by a servant of the lessee through the negligence of his co-servant. The liability which has been predicated in *Singleton* v. *Southwestern R. Co.* (1883) 70 Ga. 464, 48 Am.

According to other courts the result of such an omission is, that the lessor remains liable for injuries caused by the defective construction of the road and its appurtenances, but is not answerable for injuries caused by the manner in which it is operated by the lessee(*l*).

Rep. 574 (see above), upon the absence of an exemption clause was deemed to be inapplicable in cases of this class. *Banks* v. *Georgia R. & B. Co.* (1901) 112 Ga. 655, 37 S.E. 992.

In *Harmon* v. *Columbia & G.R. Co.* (1887) 28 S.C. 401, 13 Am. St. Rep. 686, 5 S.E. 835, the ground is taken that, in the absence of an express provision granting exemption, a statute merely authorizing a railroad company to "farm out" its road to another company will not absolve the lessor from liability for the negligence of the lessee's servants in running the trains. The principle relied upon was that the lessor had not transferred all its chartered rights and privileges, as it still maintained its corporate organization. It could not be permitted, therefore, to escape its corresponding obligations, as it remained liable equally whether the injury complained of arose from some omission of a duty resting on the lessor,—such as the failure to keep the track in good condition,—or from the negligence of the lessee's servants.

(*l*) In *Nugent* v. *Boston, C. & M.R. Co.* (1888) 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797, where the servant of the lessee company was allowed to recover damages from the lessor for injuries caused by the improper construction of a station building, the court, after an elaborate review of the authorities, summed up its conclusions as follows: "An authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility."

In *Virginia Midland R. Co.* v. *Washington* (1890) 86 Va. 629, 7 L.R.A. 344, 10 S.E. 927 (fireman of lessee company injured by collision) it was held that the mere fact that there was no exemption clause did not render the lessor liable for injuries caused by the negligence of the lessee.

In *Kearny* v. *Central R. Co.* (1895) 167 Pa. 302, 31 Atl. 637, the lessee was held not liable for injuries caused by bridge negligently constructed by the lessor, the inference being, although it is not expressly so stated, that the court regarded the lessor as being the proper party to sue.

In *Mahoney* v. *Atlantic & St. L.R. Co.* (1873) 63 Me. 68, where the lease was made under a statute containing a special clause which declared that no contract made under the statute should exonerate a railway company from any duties or liabilities imposed upon it by its charter or the general laws of the state, it was held that a passenger who had been assaulted and expelled from a train operated by a lessee company could not recover damages from the lessor.

In *Arrowsmith* v. *Nashville & D.R. Co.* (1893) 57 Fed. 165, it was held that the omission of an exemption clause did not render the lessor liable for injuries caused by the lessee in operating the road,—as in this instance, by the improper position of a mail-crane.

The following cases in which the liability of the lessor was denied may also be cited in this connection, although it should be observed that the effect of the omission or insertion of an exemption clause was not directly referred to: *Miller* v. *New York, L. & W.R. Co.* (1890) 125 N.Y. 118, 26 N.E. 35 (injury caused by trestle which was not defective at the

The second of these theories, which simply embodies the principle that the lessor and the lessee shall each be held liable for the consequences of their own acts after the road has been transferred to the possession of the lessee, would seem to be the more reasonable. The extreme position that an express exemption clause is necessary to relieve the lessor from liability is possibly justified in some measure by the doctrine that grants by the state are to be construed most strongly against the grantee. But we doubt if this doctrine warrants a construction which involves giving a wholly new meaning to the words "lessor" and "lessee," and virtually attributes to the legislature an intention to bestow upon the lessor merely the privilege of appointing an agent. A more correct inference seems to be that railroad companies, when they are empowered to make leases, are placed on the same footing as individuals or private corporations who are liable only for injuries caused by permanently dangerous conditions which existed at the time when the lessees assumed control of the demised premises.

If there is an express provision in the enabling statute, negativing the theory that the responsibility is to be transferred by the lease, the task of the court is of course confined to giving effect to the intention of the legislature, as thus manifested(*m*).

(*c*). *Liability of companies other than those operating railways.* The general principle enunciated in § 62, *ante,* has also been applied for the purpose of charging an electric light company with liability for the negligent management of its plant

---

time when the road was transferred to the lessee); *Missouri P.R. Co.* v. *Watts* (1885) 63 Tex. 549 (servant injured by negligent operation of train); *Briscoe* v. *Southern Kansas R. Co.* (1889) 40 Fed. 273 (animal run over by train).

(*m*) Such a case was presented in *Quested* v. *Newburyport & A. Horse R. Co.* (1879) 127 Mass. 204, where a statute authorized a horse-railroad corporation to "lease its road and franchise, and to contract with any 'responsible' person for the management of its road, but provided that such lease or contract should not release or exempt the corporation from any duty or liability to which it would otherwise be subject."

See also *Whitney* v. *Atlantic & St. L.R. Co.* (1857) 44 Me. 362, 69 Am. Dec. 103, where the defendant had leased its road to a foreign corporation under the authority of a statute which declared that nothing contained in the statute or in any lease or contract that may be entered into under its authority, should exonerate the company or the stockholders thereof "from any duties or liabilities imposed upon them by the charter of said company or by the general laws of the state."

by certain persons who had agreed to operate it for a specified period and to furnish all the power needed(*n*).

Mention may also be made of a Scotch case in which suit was brought against a municipality for injuries caused by the negligent operation of a ferry by a lessee. It was assumed in the opinions delivered by the judges that, if the ferry had been a public one, the defendant would have been liable, since the municipal authorities would in such a case have been bound to work it themselves(*o*). The doctrine thus recognized is in harmony with that which is applied in the case of railway companies, and is therefore preferable to that which is embodied in a decision of the Supreme Court of New York by which it has been held that the unauthorized assignment of a ferry license, although it might subject the assignor to the statutory penalties provided for such a case, did not in any way enlarge the assignor's liability for injuries to third persons(*p*).

63. Duty to see that no nuisance is created or maintained.—It has been shown by the citation of numerous decisions that a defendant cannot avail himself of the plea that he employed an independent contractor, if it appears either that the stipulated work would necessarily cause a nuisance, however carefully it might be performed, (§ 46), or that the work would cause a

---

(*n*) *Capital Electric Co.* v. *Hauswald* (1898) 78 Ill. App. 359, where the injury was caused by the erection of a power-house near the plaintiff's dwelling. The decision was distinctly put upon the ground that the contractors exercised a charter power of the electric company, which could not be exercised independently of the franchise granted by the State and the city.

(*o*) *Duncan* v. *Magistrates of Aberdeen* 1877; Ct. of Sess. 14 Scot. L.R. 603.

(*p*) *Blackwell* v. *Wiswall* (1855) 24 Barb. 355, which was decided on the broad ground that the failure of the plaintiff to shew that the relation of master and servant existed between the defendant and the negligent party rendered it impossible for him to succeed in the action. The court also laid it down that, even supposing the defendant to be, as between himself and the government, guilty of a breach of duty when he made the contract to lease the ferry, such breach was not, per se, a wrongful act for which an action would lie in favor of a stranger, and that, in order to maintain an action founded upon the mere fact that the defendant had thus leased the ferry, it would still be necessary to shew that by this very act he had been guilty of a wrong which had resulted in injury to the plaintiff. This burden of proof, it was declared, the plaintiff had not satisfied, since it could not be pretended that the fact of the defendant's having allowed another person to exercise his right of ferrying was the cause of the accident.

nuisance if it should be executed without using certain precautionary measures, (§§ 51-55), or that the defendant was under an absolute obligation to keep the physical subject-matter of the work in a reasonably safe condition (§§. 58-60a). For the purposes of the present monograph it has been convenient to deal with these decisions under categories which have reference to certain special rules, which have been formulated as exceptions to the fundamental doctrine which declares an employer to be exempt from liability for the torts of an independent contractor (see § 1, *ante*). But, logically speaking, they might with equal propriety be treated as illustrations of the broad principle, that the duty to prevent the creation of a nuisance, and the duty to remedy an existing nuisance, are cast by the law upon everyone who is in possession and control of real property, and that these duties are essentially non-delegable in their quality(*a*). In this point of view the cases cited

(*a*) It has been laid down by a distinguished American jurist that a person having particular work to be performed "cannot, by any contract relieve himself of duties resting upon him as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance, and therefore an invasion of the rights of others." Cooley, Torts, 2d ed. 644. The doctrine here laid down was adopted in *Norwalk Gaslight Co.* v. *Norwalk* (1895) 63 Conn. 495, 28 Atl. 32, and *Hughes* v. *Cincinnati & S.R. Co.* (1883) 39 Ohio St. 461. To be entirely correct, however, it is clear that this statement should be amplified so as to comprehend all persons having the control of real property, whether the right of control be incident to ownership or possession.

A declaration which counts upon a breach of the general duty of an owner of fixed property to refrain from using it in such a manner as to create a nuisance is good upon demurrer. If the injury arose from the acts of a person to whom the law permitted him, under the circumstances, to delegate that duty, that fact will be matter of defence to set up by way of answer. *Dillon* v. *Hunt* (1881) 11 Mo. App. 246, overruling the demurrer in a case where the plaintiff averred that there was a duty on the party of the defendant to remove certain walls and chimneys which, left standing, were a dangerous nuisance; that he suffered certain persons to go upon his promises for this purpose; that he knew, or had good reason to know, that they intended to adopt a dangerous method for the accomplishment of this purpose; and that they did adopt this method, in consequence of which the walls were thrown upon the house occupied by the plaintiffs, crushing it in, and injuring the goods of the plaintiffs. This decision was affirmed in (1884) 82 Mo. 150, where, however, the ground of the judgment was that the complaint stated facts from which the relation of master and servant must be inferred. The reasoning of the Court of Appeals is referred to with approval in (1891) 105 Mo. 154, 24 Am. St. Rep. 374, 16 S.W. 516, where a new trial was ordered on the ground that certain evidence had been erroneously admitted.

In a case where the plaintiff was injured by a rock thrown up by a blast set off in the course of the work of excavating a cellar, it was held to be error to direct a verdict for the defendant on the ground that the

in § 41, *ante*, would constitute exceptions to the operation of that principle, and not examples of the application of the main doctrine which was stated in § 2, *ante*.

The cases illustrating the non-delegable quality of the obligation to remedy a nuisance after the work was completed are collected in § 75, *post*.

The failure to remedy a nuisance, in so far as it is viewed as a tort which makes the employer a joint author of the injury is dealt with in § 72, *post*.

64. Duty to insure safety.— In England the accepted doctrine is that "the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape"(*a*). That the duty thus predicated was assumed in the case cited to be absolute is a reasonable interference from the fact that it was not suggested either by the court or counsel that the defendant's responsibility was in any degree affected by the circumstance that the operations which caused the injury were carried out by a contractor. The immateriality of that circumstance has been taken for granted in a more recent English decision(*b*), and expressly

---

work was being done by an independent. In stating the principles which were to control the case at the second trial, the court said: "Where he [i.e., the employer] as a prudent man, has no reason to believe that the act contracted to be done is a nuisance, but is in itself lawful, and it turns out during the progress of the work that it is necessary to create a nuisance in order to do the work, then the contractee is not liable for injuries to third persons resulting from the nuisance before he had notice of its existence. But, in such case, upon receiving notice, it would be his duty to take such reasonably prompt and efficient means as are in his power to suppress the nuisance, else he will be responsible for injuries to third persons resulting from the nuisance after notice." *James* v. *McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S.W. 435.

See also the extracts given in § 75, note (*c*), post, from the opinion delivered by Blackburn and Lash, JJ., in *Tarry* v. *Ashton* (1876) L.R. 1 Q.B. Div. 314, 45 L.J.Q.B.N.S. 260, 24 Week. Rep. 581, 34 L.T.N.S. 97.

(*a*) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, 37 L.J. Exch. N.S. 161, 19 L.T.N.S. 220. The quotation in the text is extracted from the judgment delivered by Blackburn, J., in the Exch. Ch. (*Fletcher* v. *Rylands* (1866) L.R. 1 Exch. 265), and contains a statement of the law which was expressly approved by Lords Cairns and Cranworth.

(*b*) In *Blake* v. *Woolf* [1898] 2 Q.B. 426, the plaintiff was the tenant of the ground floor in a building owned by the defendant, used to take his supply of water from a cistern maintained by the defendant on an upper

affirmed by the New Zealand Court of Appeal(*c*).

64a. Duty to avoid interfering with the right of lateral support.—It is apparent that the liability of a landowner for acts of an independent contractor which have the effect of destroying or weakening the lateral support of the adjoining premises may be referred to the conception, that the duty of such landowner not to interfere with the right of lateral support is absolute in its quality(*a*).

---

floor. Having noticed a leakage from the cistern, the plaintiff informed the defendant who sent a plumber to remedy it. In consequence of the plumber's negligence an overflow occurred, which damaged the plaintiff's goods. It was held by Wright, J., that the operation of the rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, 37 L.J. Exch. N.S. 161, 19 L.T.N.S. 220, was excluded by the plaintiff's assent to the water's being on the premises, and that, for this reason, the case came within the scope of the ordinary doctrine as to an employer's non-liability for the negligence of an independent contractor.

(*c*) In *Threlkeld* v. *White* (1890) 8 New Zealand L.R. 513, where a landowner was held liable for the negligence of a contractor for the clearance of his land in allowing fire to spread to the adjoining premises, the principal ground of the decision was, that "the ordinary process of clearing land by fire, allowed by the defendant, involved the possible breach of his common-law duty to keep within his own boundary any fire lighted on his land at his command and by his consent." The court was of the opinion that "a landowner cannot escape responsibility for the use of fire in the cultivation of his land by employing a contractor who uses it for him." The ratio decidendi of another case involving similar circumstances was the non-delegable quality of the duty to take proper precautions. See *Black* v. *Chirstchurch Finance Co.* [1894] A.C. 48, 63 L.J. P.C.N.S. 32, 6 Reports, 394, 70 L.T.N.S. 77, 58 J.P. 332 (§§ 50*a*, 52, *ante*).

(*a*) In a recent English case Smith, L.J., made the following remarks: "I may refer also to the other class of cases, which is exemplified by *Bower* v. *Peate* (1876) L.R. 1 Q.B. Div. 321, 45 L.J.Q.B.N.S. 446, 35 L.T.N.S. 321, and *Dalton* v. *Angus* (1881) L.R. 6 App. Cas. 740, 50 L.J.Q.B.N.S. 689, 44 L.T.N.S. 844, 30 Week. Rep. 191, and in which it was held that a legal duty was imposed upon the defendant towards the plaintiff not to interfere with his right to have his land supported by that of the defendant. In each of those cases it was held that the defendant was liable to the plaintiff for breach of the duty thus imposed upon him, although the act or default which caused the injury was the act or default of the defendant's contractor, and not of the defendant himself." *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 346, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 60, 44 Week. Rep. 323, 60 J.P. 196. There seems to be a want of strict accuracy, however, in citing these cases, as exemplifying the liability of an employer for infringing an absolute right. The gravamen of the actions was negligence, consisting in the failure to use appropriate precautions to secure the safety of the adjoining buildings. See §§ 48, 52, *ante*, and the following note.

In a dissenting opinion Dwight, C., remarked, in the course of a discussion on the theory of non-delegable duties: "This same general principle is applicable where adjoining proprietors are entitled to the natural right of support. It is the duty of each toward the other to refrain from using his land so as to withdraw that support. He cannot

65. Duty not to impede the public in the use of highways.— In a recent English case Smith, L. J., included among the non-delegable duties that which is imposed upon various persons to refrain from interfering with the right which the public possesses of using a highway without being impeded or injured, when passing along it(*a*).

66. Duties assumed by an express contract.— In a case already discussed in § 46, *ante*, Pollock, C. B., lays down the general principle that, where a person "is bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do the work"(*a*). The mannner in which this principle is applied to cases falling within the scope of this monograph is indicated by the subjoined note(*b*).

---

dig, or permit contractors or others so to dig or excavate, as to withdraw that support." *McCafferty* v. *Spuyten Duyvil & P.M.R. Co.* (1874) 61 N.Y. 178, 187, 19 Am. Rep. 267.

(*a*) *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 345, 65 L.J.Q.B. N.S. 362, L.T.N.S. 69, 44 Week Rep. 323, 60 J.P. 196; citing *Hole* v. *Sittingbourne & S.R. Co.* (1861) 6 Hurlst. & N. 488, 30 L.J. Exch. N.S. 81, 3 L.T.N.S. 750, 9 Week. Rep. 274; *Pickard* v. *Smith* (1861) 10 C.B. N.S. 470, 4 L.T.N.S. 470; *Tarry* v. *Ashton* (1876) L.R. 1 Q.B. Div. 314, 45 L.J.Q.B.N.S. 260, 34 L.T.N.S. 97, 24 Week. Rep. 581; *Gray* v. *Pullen* (1864) 5 Best & S. 970, 34 L.J.Q.B.N.S. 265, 11 L.T.N.S. 569, 13 Week. Rep. 257. It should be noted, however, that these cases although they may be referred to the conception thus indicated, were all based upon principles of a much wider scope than that which is here suggested. See §§ 46, 51, 57.

(*a*) *Hole* v. *Sittingbourne & S.R. Co.* (1861) 6 Hurlst. & N. 488, 30 L.J. Exch. N.S. 81, 3 L.T.N.S. 750, 9 Week. Rep. 274.

(*b*) An incorporated company which undertook to lay water pipes in a city, agreeing that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which may occur by reason of the neglect of their employees on the premises" was held to be liable for injuries received by a person passing over the street, owing to the negligence of a sub-contractor to whom the work had been let out. *St. Paul Water Co.* v. *Ware* (1872) 16 Wall. 566, 21 L. ed. 485 (horses took fright at a steam drill which was suddenly set in motion).

Where a religious society expressly agreed to erect a scaffold for the use of the servants of a contractor whom it had employed to paint its church, it was held to be liable for injuries received by one of those servants, as a result of the defective condition of the scaffold, although it had been erected by an independent contractor. *Mulcahey* v. *Methodist Religious Soc.* (1878) 125 Mass. 487, approving of an instruction to the effect that, inasmuch as the defendants assumed the duty of furnishing this staging upon which this work was to be done by the contractor and his workmen, they undertook to furnish a safe staging for the purpose, and it made no difference to the plaintiff in this case whether they did it by letting out the job to a contractor or by employing persons to do the work by the day.

Where a contractor agreed with the owner of a building to put in a meter to measure the electricity furnished, and the contractor sub-contracted to one who exercised an independent employment, the original contractor is liable to the owner for damages from the negligence of the sub-contractor in making a defective installation. *Schutte* v. *United Electric Co.* (1902) 68 N.J.L. 435, 53 Atl. 204.

A person who has secured a right to construct a public work upon the land of another, under a contract to protect the owner against loss or injury from the work and the manner of its performance, cannot, on the ground that the work was let out to an independent contractor, escape liability for injuries inflicted on the landowner's property during the progress of the work. *Leeds* v. *Richmond* (1885) 102 Ind. 372, 1 N.E. 711.

Where the principal contractor for the construction of a building, who has expressly undertaken to furnish materials of the best quality generally used for such purposes, and to do the work in the most workmanlike manner, sub-lets any part of the contract, whether to an independent sub-contractor or not, it is their right and duty to see that the materials used by the sub-contractor are of the character specified in the contract. *Blast* v. *Leonard* (1870) 15 Minn. 304, Gil. 235 (building fell on adjoining premises).

In *McCleary* v. *Kent* (1854) 3 Duer, 27, it was held that, where a contractor for the erection of a building has agreed as one of the terms of his contract, to take such precautions as may be appropriate to prevent accidents, and it does not appear that he is released from this obligation by the provisions of a sub-contract with a blacksmith whom he has engaged to make a grating, he is liable for the negligence of the blacksmith in failing to cover or fence the opening made for the grating. Under such circumstances, however, it seems clear that the effect of the later decisions would be to render the contractor liable even if he had attempted to transfer the obligation to the sub-contractor. See § 50, *ante*.

A landowner who employs a contractor to make certain repairs which he is bound to make, is liable for injuries caused to a tenant by the failure of the contractor to execute the work. *Brennan* v. *Ellis* (1893) 70 Hun, 472, 24 N.Y. Supp. 426 (tenant fell through bridge between apartment house and other building), or by the negligent manner in which the contractor performed the work. *Lasker Real Estate Asso.* v. *Hatcher* (1894) Tex. Civ. App.) 28 S.W. 404 (goods of tenant damaged while roof was under repair).

See also *Rotter* v. *Goerlitz* (1891) 16 Daly, 484, 12 N.Y. Supp. 210, where the court, in refusing recovery for an injury suffered by the tenant, emphasized the fact that the landlord had not covenanted to repair (§ 46, *ante*); and *Northern Trust Co.* v. *Palmer* (1898) 171 Ill. 383, 49 N.E. 553 (§ 46, *ante*).

But in any case where the landlord is not under an antecedent obligation to have certain repairs made, there is no principle of law which prevents him from making with the tenant a special agreement by which needed repairs for their mutual accommodation are to be made by an independent contractor to be employed by the landlord. In such a case, as both parties are to be benefited by the work of the contractor, they must look to him, and not to each other, for compensation for damages caused by his negligence. *Lasker Real Estate Asso.* v. *Hatcher* (1894; Tex Civ. App.) 28 S.W. 404.

In § 70 note(*a*), will be found a statement of the facts in *Gilbert* v. *Beach* (1859) 5 Bosw. 445, in which it was held by the New York Court of Appeals, that a landowner who had failed to execute a certain piece of work which he had undertaken to do on a building which was being erected for him by a contractor, was not excused by reason of his having employed a contractor to execute the work for him.

A person who agrees to furnish certain parts of the equipment of a building is liable for injuries caused by the defective construction of a tank, although it was furnished by a sub-contractor. *Butts* v. *J. C. Mackey Co.* (1893) 72 Hun, 562, 25 N.Y. Supp. 531.

In *Nisbett* v. *Dixon* (1852) 14 Sc. Sess. Cas. 2d. series, 973, where a contractor employed by the lessee of iron stone working negligently set fire to a bin of iron stone, for the purpose of calcining it, and the fire was communicated to a coal mine lying between the surface of the ground and the iron stone workings, the conclusion that, as between the lessee and his landlord, the proprietor of the coal mine, the contractor was to be regarded as in law a servant of the lessee, was rested by two of the judges upon the theory that a non-delegable duty had been infringed. Lord Cuninghame said: "In the present case, the obligation of the principal tenants is broader and more direct than in most cases of injury complained of by third parties and strangers, from common obstruction and casualties occurring in places of public resort. In cases falling within the category of the present, there is a direct contract between an owner and a tenant, which cannot be transferred to any sub-contractor or assignee without the consent of the other principal contracting party." Lord Ivory said: "This is not the case of one who, being himself employed in one trade, calls in the assistance of another, who exercises a different trade, to do something which lies within his calling; but it is the case of a party calling in another to perform a subordinate part of his own trade. Everything done by the party so called in is done in a subordinate capacity—on the defendant's premises, under their control—and in the execution of their own trade. This view comes out more clearly if we look at the lease. That contract refers to a certain field of iron stone; and by it the defenders bind themselves to perform certain duties which are entirely their own. They cannot transfer or delegate those duties. They may employ subordinates, if they like; but they cannot interpose those parties between themselves and the landlord."

(For the other grounds upon which this decision was based, see § 22, *ante*).

A stipulation in a contract for the operation of a mine, that, when the contractor repaired the mine, the work should be done under the supervision of a person designated by the owner, cannot be construed as raising a personal duty to secure the safety of the contractor's workmen. The effect of such a stipulation is not that the owner shall supervise, but that he shall have the right to supervise, and it is for the protection of the owner himself. The neglect of his own interests is not a legal wrong to others in such a sense as to create a right of action in favor of one of the contractors' servants who suffers injury owing to conditions which might have been prevented if he had supervised the work. In short he does not assume a duty; he merely reserves a privilege. *Samuelson* v. *Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N.W. 499.

In one case it was argued that a provision in a license for the use of a street, to the effect that he should take certain precautions for the protection of the public, and be "answerable for any damages or injuries which might be occasioned to persons, animals or property" while the work was in progress, enured to the benefit of a stranger, so as to render the licensee liable to such stranger for the negligence of a contractor. But this contention did not prevail. *Blake* v. *Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304.

The doctrine laid down in the text seems to be ignored in an Australian case where it was held that one who had contracted with a borough council to make or repair a street, under conditions prohibiting any sub-letting of the contract without its consent, and requiring obstructions to be fenced and lighted, was not liable for an injury received by a person who stumbled over a heap of rubbish which was neither protected by a fence nor lighted, although the obstruction had been placed there by a party to whom he had without consent let a portion of the work. *Phillips* v. *Byrne* (1877) 3 Vict. L. Rep. (L.) 179. The effect of the infringement of the provision against sub-letting was not discussed. No authorities were cited, and the very brief opinion does not state the reasons on which the decision is based.

Liability for the torts of a sub-contractor cannot be imputed to the principle contractor on the mere ground that he fills that character(c).

67. Duties arising out of implied contract.—(a). *Carriers of passengers.* It is a well established doctrine, that a carrier is bound to exercise with regard to his passengers a "high degree of care"(a), but that "he does not contract against any unseen or unknown defect which cannot be discovered, or which may be said to be undiscoverable, by any ordinary or reasonable means of inquiry and examination"(b). The duty to use the measure of care which is thus defined under its positive and negative aspects is deemed to be non-delegable in such a sense, that, where a passenger has produced evidence which goes to show that his injury resulted from conditions which would not have existed, or from occurrences which would not have happened, if this obligatory standard of care had been attained. The mere fact that those conditions or occurrences resulted from the acts or omissions of an independent contractor will not operate as a bar to an action for the injury so received, the mere fact that

---

In the Georgia Civil Code of 1895, § 3819, one of the specified exceptions to the general rule respecting the non-liability of an employer for the torts of a contractor has reference to cases where the wrongful act is the violation of a duty imposed by express contract upon the employer.

In this connection reference may also be made to the cases in which carriers have been declared to be responsible for the negligence of connecting carriers. See Browne & Theobald, Railway Law, p. 303; Hodges, Railways, p. 620; Hutchinson, Carr, § 574; 2 Beven, Neg. pp. 1157, 1166, 1167; Shearm. & Redf. Neg. § 503.

In an action against a stage company for the death of a passenger, by an accident to their stage while upon a ferry boat not owned by them, but which constituted a part of their route, for which ferriage was paid by them, it was held error to instruct the jury that if the death occurred while the passengers and stage were in the ferry boat, and the accident occurred by negligence of the ferryman without participation of defendants, they are not liable. The court considered that, as to the passengers, the ferry company were in law the employees and agents of the defendants. *McLean* v. *Burbank* (1866) 11 Minn. 277, Gil. 189.

(c) *Overton* v. *Freeman* (1852) 11 C.B. 867, 3 Car. & K. 49, 21 L.J. C.P.N.S. 52, 16 Jur. 65, per Maule, J.

(a) *Readhead* v. *Midland R. Co.* (1869) L.R. 4 Q.B. 379, 392, 38 L.J. Q.B.N.S. 169. See also *Pennsylvania Co.* v. *Roy* (1880) 102 U.S. 451, 26 L. ed. 141; *Carroll* v. *Staten Island R. Co.* (1874) 58 N.Y. 126, 17 Am. Rep. 221; and the cases cited in Shearm. & Redf. Neg. §§ 494, 495.

(b) *Readhead* v. *Midland R. Co.* (1869) L.R. 4 Q.B. 379, 38, L.J.Q.B. N.S. 169; *Francis* v. *Cockrell* (1870) L.R. 5 Q.B. 185, 501, 508, C.T. 10 Best. & S. 850, 39 L.J.Q.B.N.S. 113, 291, 22 L.T.N.S. 203, 23 L.T.N.S. 466, 18 Week. Rep. 668, 1205.

those conditions or occurrences resulted from the acts or omissions of an independent contractor will not operate as a bar to an action for the injury so received. Accordingly, if it appears that the abnormally dangerous conditions in question might have been discovered by a reasonable examination, the proprietor of a coach will be held answerable for an accident which arose from an imperfection in the vehicle, although he employed a clever and competent coachmaker(*c*), and a railway company will be required to indemnify a passenger whose injuries were caused by defects in its rolling stock which are due to the negligence of the manufacturer(*d*), or by defects in a bridge which were the result of the builder's negligence(*e*), or

---

(*c*) *Sharp* v. *Grey* (1833) 9 Bing. 457, 2 Moore & S. 621 (effect of decision as stated by Parke, B., in *Grote* v. *Chester & H.R. Co.* (1848) 2 Exch. 251, 5 Eng. Ry. etc. Cas. 649. The rule was laid down that a carrier is liable for all defects in his vechile which can be seen at the time of constr n, as well as for such as may exist afterwards, and are discoverable a investigation.

(*d*) A plea averring that a locomotive, the crank-pin of which broke, was purchased from competent manufacturers thereof, and was not made by the defendant railway company is demurrable. There should also be an averment as to the care and skill applied in the manufacture of the engine or as to the care and skill exercised by them in the selection or inspection of the locomotive. *Burns* v. *Cork & B.R. Co.* (1863) 13 Ir. C.L. Rep. 543.

In *Hegeman* v. *Western R. Corp.* (1853) 16 Barb. 353, where the injury was caused by a defective axle, the law was thus laid down: "Whether the engine or car which they [i.e., the railway company] place upon the road for the purpose of carrying passengers has been manufactured in their own workshops, by agents employed directly for that purpose, or by a manufacturer engaged in the business of supplying such articles for sale, they are alike bound to see that, in the construction, no care or skill has been omitted for the purpose of making such engine or car as safe as care and skill can make it." This doctrine was approved by the Court of Appeals. See (1855) 13 N.Y. 9, 64 Am. Dec. 517.

To the same effect, see *Carroll* v. *Staten Island R. Co.* (1874) 58 N.Y. 126, 17 Am. Rep. 221 (crack in locomotive boiler caused an explosion); *McPadden* v. *New York C.R. Co.* (1871) 44 N.Y. 478, 4 Am. Rep. 705; *Meier* v. *Pennsylvania R.R. Co.* (1870) 64 Pa. 228, 3 Am. Rep. 581; *Toledo W. & W.R. Co.* v. *Beggs* (1877) 95 Ill. 80, 28 Am. Rep. 613.

(*e*) *Grote* v. *Chester & H.R. Co.* (1848) 2 Exch. 251, 254, 5 Eng. Ry. etc. Cas. 649. There it was left to the jury to say whether the engineer as well as the company had used due care and skill. For the defendants is was objected that they would not be liable unless they had been guilty of negligence, and after verdict for the plaintiff it was argued for the defendants that, as they had engaged the services of a most competent engineer in the construction of the bridge, they had done their duty. This contention did not prevail. "It seems to me," said Parke, B., "that they would still be liable for the accident, unless he also used due and reasonable care and employed proper materials in the work." "It cannot be contended," said Pollock, C.B., "that the defendants are not responsible for the accident, merely on the ground that they have employed a competent person to construct the bridge."

by defects in its track which were produced by the negligence of a person who had contracted to construct or maintain it(*f*).

(*f*) In *Virginia C.R. Co.* v. *Sanger* (1859) 15 Gratt. 230, the plaintiff alleged, and the evidence tended to shew, that the derailment of a train which caused the injury in suit resulted from the collision of a car with a large rock which had formed part of a ridge which a contractor for the ballasting of the road had distributed along the line, and which had been loosened and rolled down by the hasty movement of one of the contractor's labourers, when jumping off the ridge to avoid the train. The company's engineer testified that he had never at any time before the accident observed any of the heaps of rock dangrously near the track, while the foreman of the ballast train stated that he had repeatedly called the attention of the ballasting gang to the dangers created by the position of the piles. The legal principles governing the case were thus expounded by the court: "As accidents as frequently arise from obstructions on the track, as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions. It would seem to me to follow further, that where a railroad company, whilst using its tracks for the carriage of passengers, engages in a work to be done on its road, and in the immediate proximity of its track, negligence in the performance of which would, in the estimation and opinion of cautious persons, involve the hazard of obstruction to the passage of its cars, it would be just as incompetent for them, in the case of an accident to a passenger caused by an obstruction arising from negligence in the performance of such work, to show merely that they had placed the work in the hands of a contractor, and that the obstruction was caused by the carelessness of one of its employees, as it would be for them, in the case of an accident to a passenger, arising from a want of care or skill in the management and conduct of the train, to show that such management and conduct had been let out to a contractor, and that the accident was due exclusively to the carelessness of one of his employees. In neither case, I apprehend, could such a deputation by the company of its powers and duties to another, shield it against the complaint of an injured passenger. . . . The duties which a carrier of passengers owes to his passengers, and the duties which he owes to other persons, between whom and himself the relation of carrier and passenger does not exist, are essentially distinct. Decisions, therefore, settling how far it is competent for a company engaged in the business of carrying passengers to protect itself against a suit brought by a stranger for an injury received from the negligent act of an employee of a contractor of the company engaged in the prosecution of a work of the company by showing that such employee was not, in a legal sense, the servant of the company, do not see mto me to have any immediate bearing on the case in hand." Such cases, therefore, as *Reedie* v. *London & N.W.R. Co.* (1849) 4 Exch. 244, 6 Eng Ry. & C. Cas. 184, 20 L.J. Exch. N.S. 65, and *Steel* v. *South Eastern R. Co.* (1855) 16 C.B. 550, which had been relied on by the defendant's counsel were declared not to be in point, since the injury complained of was caused "not by any accident happening in the running of the train, but by an accident arising from the carelessness of employees of contractors engaged in the prosecution of a work altogether collateral to the running of the cars on the road."

In *Carrico* v. *West Virginia, C. & P. R. Co.* (1894) 39 W. Va. 86, 24 L.R.A. 50, 19 S.E. 571 (reiterating ruling on first appeal (1891) 35 W. Va. 389, 14 S.E. 12) where a railway car collided with a pile of rock which had been left near the track the court said: "One of the very plainest duties imposed upon a railroad company carrying passengers for pay is that it

The non-delegable quality of a carrier's duties is also the *ratio decidendi* of two rulings to the effect that a steamship company is liable for the negligence of stevedores in regard to bringing on board and placing in a certain part of the ship the baggage of passengers(*g*), and for an assault committed upon its passengers by a person who has contracted to carry them and their baggage, by tugs or tenders, to the steamers by which they are to be conveyed to their destination(*h*).

(*b*). *Carriers of goods.* The liability of a "forwarder" of valuable parcels is in no degree diminished by the fact that he uses various public conveyances for the purpose of transporting them. So far as the performance of his duties as a carrier is concerned, the persons operating such conveyances are deemed to be his agents and employees(*i*).

(*c*). *Consignees of goods conveyed on railways.* It has been held that a gaslight company which had employed persons to unload cars on a sidetrack or switch of a railroad leased by it, was liable to the railroad company for the negligence of such persons, or of their employees, in the performance of this duty,

---

shall keep its track in good and safe condition, free from obstructions endangering those passengers. . . . Passengers are entitled by the clearest principle to look to the carrier who has engaged to carry them in this respect, and cannot be told to follow some one, a stranger to them, and often irresponsible. The company can not divest itself of or shift this obligation."

In *Brehm* v. *Great Western R. Co.* (1861) 34 Barb. 256, it was held, in a case where a train fell through a gap in an embankment, that the trial judge had properly refused to charge that, if the defendant employed proper persons to construct and protect the embankment, and they were guilty of negligence in the performance of their duties, the plaintiff could not recover.

As to the liability of a railway company for the negligence of another company over whose track it is operating trains, see § 62, *ante*.

(*g*) *The Dresden* (1894) 62 Fed. 438 (duty which the officers of the ship were bound to see properly performed).

(*h*) *Barrow S. S. Co.* v. *Kane* (1898) 31 C.C.A. 452, 59 U.S. App. 574, 88 Fed. 197. Speaking of the undertaking of a common carrier to a passenger, the court said: "His obligation to transport the passenger safely cannot be shifted from himself by delegation to an independent contractor; and it extends to all the agencies employed, and includes the duty of protecting the passenger from any injury caused by the act of any subordinate or third person engaged in any part of the service required by the contract of transportation." The case was said to be analogous to those in which railway companies have been held liable for assaults committed by the servants of sleeping car companies. Shearm. & Redf. Neg. § 526, note 15.

(*i*) *Hooper* v. *Wells, Fargo & Co.* (1864) 27 Cal. 1.

although it had no immediate control over them while thus engaged. The decision was put upon the ground, that the gas company had impliedly assumed the duty of so using the track as to keep it clear from obstructions, and that this duty could not be cast upon another, so as to escape liability for its non-performance(*j*).

(*d*). *Persons giving public exhibitions.* A person who authorizes the erection of buildings or structures which it is proposed to use for public exhibitions or entertainments impliedly undertakes that those buildings or structures are reasonably safe for the purpose for which they are designed, and is liable for injuries caused by their unsafety, even though they may have been erected by an independent contractor(*k*).

(*j*) *Montgomery Gaslight Co.* v. *Montgomery & E. R. Co.* (1888) 86 Ala. 372, 5 So. 735 (train collided with cars on siding after they had been unloaded).

(*k*) In *Francis* v. *Cockrell* (1870) L.R. 5 Q.B. 185, 501, 10 Best. &So. 850, 39 L.J.Q.B.N.S. 113, 291, 22 L.T.N.S. 202, 23 L.T.N.S. 466, 18 Week. Rep. 668, 1205, it was held that, when money is paid by spectators at races or other public exhibitions for the use of temporary stands or platforms, there is an implied warranty on the part of the person receiving the money, that due care has been used in the construction of the stand by those whom he has employed, as independent contractors to do the work, as well as by himself. The court virtually adopted the doctrine contended for by plaintiff's counsel (Mellish, Q.C., afterwards Lord Justice of Appeal), viz., that if the duty to be implied from the contract of the defendant with the plaintiff is, that reasonable care has been used in the construction of the building, then if due care has not been used the defendant cannot get rid of that liability by showing that he employed a competent contractor. Kelly, C.B., basing his conclusions on certain authorities cited by him, said: "The defendant is liable for anything that he must be supposed to have contracted for; and he contracted for the sufficiency of this stand, which was in his own possession and control, and which, as in the case of the railway bridge in *Grote* v. *Chester & H.R. Co.* (1848) 2 Exch. 251, 5 Eng. Ry. etc., Cas. 649, though not erected and constructed by himself, was erected and constructed under his direction and for his benefit by a contractor he had employed. The liability extends, not only to a stand erected by the defendant himself, the person who enters into a contract of this nature, but to a stand erected by another who had contracted for the erection of it with the defendant."

This decision was followed in *Cox* v. *Buffalo Park* (1897) 21 App. Div. 321, 47 N.Y. Supp. 788 (portions of a platform and staircase gave way), and distinguished in *Searle* v. *Laverick* (1874) 30 L.T.N.S. 89, 22 Week. Rep. 367, 43 L.J.Q.B.N.S. 43, L.R. 9 Q.B. 122, where a shed belonging to a livery-stable keeper intended for the reception of carriages was blown down by a high wind while it was being erected by an independent contractor, the consequences being, that the plaintiff's carriages which had been placed in the lower story after its completion were injured. In the latter case the plaintiff's counsel offered to prove that due care had not been used by the builder to make the building reasonably safe. The trial judge then ruled "that defendant's liability was that of an ordinary bailee for hire, and that all he was bound to do was to use ordinary care

(e). *Masters.* For a general view of the cases bearing upon the question, whether a master can, by employing a contractor to perform one or more of the duties which he owes to his servants, relieve himself from liability for their non-performance, the reader is referred to §§ 558, 559, of the present writer's treatise on Master and Servant. The decisions are conflicting, but the weight of authority would seem to be distinctly in favour of the doctrine, that a master cannot escape his responsibility by such a delegation of his duties. This, it is submitted, is the only doctrine which is logically tenable, and which can be reconciled with the general principles reviewed in this and the preceding subtitles. In the subjoined note are collected a few more cases which support that doctrine, but which were overlooked when the above mentioned work was being compiled (*l*).

---

in the keeping of the plaintiff's carriages, and that, if in causing the shed to be built he did all that he did, by employing a builder and otherwise, with such care as an ordinary careful man would use therein he would be protected, and would be exempt from liability for an event which was caused by the careless or improper conduct of the builder of which the defendant had no notice." On this the plaintiff's counsel declined to give evidence as to the shed having been improperly built by the builder, the defendant having no knowledge thereof; and the plaintiff was thereupon nonsuited. This nonsuit was held proper on the ground that the liability of the livery-stable keeper had been correctly defined.

(*l*) In *Bibb* v. *Norfolk & W.R. Co.* 1891) 87 Va. 711, 14 S.E. 163, the applicability of the doctrine was denied merely for the reason that the injured person was a servant of the contractor, and not of the employer.

In *The Magdaline* (1898) 91 Fed. 798, a shipowner was held liable, where a servant, while working in the hold of a ship which was undergoing general repairs, was injured by a piece of wood which was let fall from the main deck by an employee of one of the contractors engaged on the repairs. The court said: "A master may not place his servant at a work made dangerous by the work of other servants, or persons performing work under contract, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the negligence of a co-servant or third person employed on the premises, the injury would not have happened. A servant may expect that his master will not surround him with dangerous agencies, or expose him to their operation, whether they are in charge of the master's servants or of any independent contractor." The case was considered to be different from one where the master employs his servant generally in a building undergoing repairs by an independent contractor, and the servant comes in contact with with the work which the contractor is doing, and is injured thereby.

In *Burnes* v. *Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41, 31 S.W. 347, where the injury was caused by a grain door which had been left on an elevated way in a railway yard, the court, in laying down the law with reference to a new trial, said that the defendant would not be exculpated by the fact that the obstruction was due to the negligence of a contractor's servants, provided it had not been in the way long enough to charge the defendant with notice of its presence.

In the present connection it will also be advisable to draw attention to that class of cases in which the injuries of the servant are caused by the defective conditions of instrumentalities which his master does not own, but uses for the purposes of his business. By referring to §§ 169-172 of the writer's treatise above mentioned, it will be seen that the decisions on this subject are hopelessly at variance. As only a portion of them are in harmony with the theory that a master is subject to certain absolute and non-delegable duties, it cannot be affirmed that every court would agree with the views lately expressed by one the Federal Courts of Appeals, in a case which proceeded on the principle that the servants of a railway company which has the privilege of using the tracks of another are or are not entitled to recover for injuries caused by the servants of the licensor company, according as the negligence complained of did or did not constitute a breach of one of the positive duties incumbent on the licensee company(*m*).

It is error to charge a jury that, if the defendants, not having themselves the skill necessary to enable them to erect a scaffolding, employed a person having that skill to erect it for them, they are not liable for injuries received by a servant owing to its unsoundness. *Macdonald* v. *Wyllie* (1898) 1 Sc. Sess. Cas. 5th series 339.

The duty of a railway company to see that its rolling stock is reasonably safe continues, as respects its servants, when they are sent out with a train which is to be used under the directions of a contractor, in executing construction work. *Savannah & U. R. Co.* v. *Phillips* (1892) 90 Ga. 829, 17 S.E. 82.

In a brief judgment it was held that where a contractor, being short of laborers, borrows a gang of men from a third party, and under the orders of the foreman of such third party one of such laborers is put in a dangerous place where he receives injuries, an action to recover the damages resulting therefrom is maintainable against the contractor and also against the third party *Rook* v. *New Jersey & P. Concentrating Works* (1894) 76 Hun, 54, 27 N.Y. Supp. 723.

(*m*) *Brady* v. *Chicago & G. W. R. Co.* (1902) 57 L.R.A. 712, 52 C.C. A. 48, 114 Fed. 100 (recovery denied on the ground that the injury had been caused by the negligence of the licensor company's servants in leaving a car standing on the track). The court observed that the licensee company is liable to passengers and shippers for the casual negligence of the licensor company and of its servants, whether that negligence occurs in the discharge of the positive duties of the master or in the performance of the primary duties of the servant, and proceeded as follows: "The reason for this rule is that the carrier contracts with the passengers and shippers to carry them and their property with reasonable safety, and the failure so to do is equally a breach of this contract, whether it results from negligence in the discharge of the duties of the master or of those of the servants. There is, however, no such contract between the railroad company and its employees. The relations and their liabilities are governed by the relative duties imposed upon them by the law. They join in a dangerous occupation. The servants know its dangers as well as

(*f*). *Landlords.* A landlord, when he exercises his right of entering, during a tenancy, and making such permanent repairs as are indispensable to the due protection of his reversionary interest, is bound to see that all reasonable care and skill is exercised in making those repairs, to the end that the tenant may suffer no damage(*n*). It has been laid down, however, that, if the tenant has consented for consideration to the making of the repairs, he cannot hold the landlord liable for the negligence of the contractor while engaged on the work. After giving such consent he stands in no better position than a stranger(*o*).

68. Duty to rebuild party wall.—(See also § 64 (*b*), *ante*). The damages caused to an adjoining proprietor by the breach of the duty of a house owner to rebuild with reasonable dispatch a party wall which he has taken down are imputable to him, although he has employed a competent architect and builder, and they are responsible for the negligence if any, which has given rise to the delay(*a*).

---

the master. If they are operating over the railroad or in the yards of a corporation which does not employ them, they are aware of that fact and of the risk of accident from the negligence of the employees of that corporation. All these risks which they know, or which they might know by the exercise of reasonable prudence and diligence, excepting only those dangers which it is the positive duty of the master to protect them from, they assume as between themselves and their master when they enter upon and continue in the employment. They may undoubtedly recover of those who are guilty of the negligence which causes their injury just as they may recover of any stranger who commits a tortious act that inflicts injury upon them while they are operating their trains. . . . But their master does not assume and is not not liable to them for the negligence of the servants of the licensing company when the latter are not engaged in the discharge of the positive duties of the master."

(*n*) *Sulzbacher* v. *Dickie* (1876) 6 Daly, 476.

(*o*) *Jefferson* v. *Jameson & M. Co.* (1897) 165 Ill. 138, 46 N.E. 72. Reversing (1895) 60 Ill. App. 587 (drain-pipe burst and damaged goods). In the lower court the decision was put on the ground that the license to make the improvements involved an undertaking upon the part of the licensee that the work, if done, should be performed in such a manner as to cause no unnecessary damage to the licensor.

(*a*) *Jolliffe* v. *Woodhouse* (1894; C.A.) 10 Times L.R. 553. "The defendant," said Davey, L.J., "had a statutory and common law license to take down this party wall, subject to the duty of using reasonable dispatch, and when he employed a contractor to do the work he took upon himself the responsibility of seeing that that duty was adequately performed."

VII.—LIABILITY OF EMPLOYER WHERE HIS OWN ACT WAS A PROXIMATE CAUSE OF THE INJURY.

As to injuries caused by following defective plans and methods prescribed by the employer, see §§ 47, 47a, *ante*.

69. Employment of a contractor who is incompetent or otherwise unfit.— In Minnesota it has been explicitly laid down that the only cases in which an employer can be held liable on the ground that he engaged an incompetent contractor are those in which the work to be done is intrinsically dangerous in its nature; and it was strongly intimated that, even under these circumstances, a servant engaged by the contractor to assist him in the work could not recover on this ground(a). But the weight of authority is opposed to the restricted doctrine thus enounced.

(a) *Schip* v. *Pabst Brewing Co.* (1896) 64 Minn. 22, 66 N.W. 3. There an action for injuries received by giving way of the floor of a building which the plaintiff's employer was taking down was held to have been properly dismissed, although the plaintiff's counsel offered to prove that the defendant knew of the contractor's incompetency. The court refused to allow the dicta in *Deford* v. *State* (1868) 30 Md. 204 and *Lawrence* v. *Shipman* (1873) 39 Conn. 589, to the effect that the defendant might be held liable on the ground contended for, and explained its own position as follows: "There are many cases which hold that the owner of premises cannot, by employing a contractor, relieve himself from the continuing duty which he owes to the public and to the adjoining owners not to maintain a nuisance on his premises, or license any one else to do so. But we can find no case which holds that the owner owes any such continuing duty to the servant of the independent contractor, engaged in the very work of abating the nuisance. . . . Neither has our attention been called to any case where the owner was held liable on the sole ground of failing to exercise with due care a tmporary duty of employing a competent contractor, (after which his responsibility would cease), but in every case there was a continued duty not to maintain a nuisance on his premises himself, or license others to do so. It is often laid down as one of the conditions required to relieve the owner from liability that he shall employ a competent contractor. But this language (where it is not mere dictum) is always used in cases where the owner owes such a continuing duty, and the work to be performed by the contractor will necessarily result in a nuisance to the public or the adjoining owner, unless great or extraordinary care is taken to prevent it from doing so. In such a case, the failure to use special care to employ a competent contractor is equivalent to licensing the nuisance which it is highly probable will result. But this rule is applied only to exceptional cases, where the work is necessarily intrinsically hazardous, such as carrying on blasting operating in the vicinity of the persons or property of others not connected with the work. But, even if this rule should be extended so as to cover injuries to the servants of the contractor, this case would not come within the class of cases where the work to be done by the contractor is 'intrinsically hazardous.' Again, there are many successful contractors who are thoroughly competent to estimate in advance with a high degree of accuracy the cost of the work, but who are not at all competent to oversee the actual operations of construction, and who usually sublet the work, or employ competent foremen. And unless we completely overturn the law that has always been applied to such cases as the one at bar, we cannot

Indirectly it is discredited by the fact that statements of the rule as to the non-reliability of an employer are frequently qualified by language implying that his immunity is conditional upon his having exercised due care in regard to the selection of the contractor(*b*). Language of this tenor is virtually meaningless unless it is deemed to have had reference to a positive obligation which was assumed to exist. A similar point of view is indicated by those cases in which one of the material elements adverted to by the court, as a reason for denying the right of recovery, is the fact that the contractor was not alleged or shewn to have been incompetent(*c*).

The doctrine that the employment of an incompetent contractor is culpable negligence which raises a cause of action in favour of any one who is injured by conditions or occurrences which would not have existed or happened if the contractor had been competent, is also sustained by categorical statements and explicit decisions(*d*). In the opinion of the writer these statements and decisions furnish a sufficient body of authorities to

---

hold that the owner's knowledge of the contractor's incompetency personally to superintendent the performance of the work will make the owner engaging him liable to the servants employed by him on the work. Such a rule would go far towards making an independent contractor a mere foreman, for whose acts the employer is liable."

(*b*) Thus we find it laid down that liability will not be imputed to an employer who has used reasonable diligence to select a competent contractor. *Camp* v. *Church of St. Louis* (1852) 7 La. Ann. 321.

So it has been declared that the employer is exempt from liability, unless the person contracted with was either unsuitable or without proper skill to do the work. *Conners* v. *Hennessey* (1873) 112 Mass. 96; *Dillon* v. *Hunt* (1884) 82 Mo. 155; *Powell* v. *Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W. 691; or unless he is "in default in employing an unskilful or improper person as a contractor." *Cuff* v. *Newark & N.Y.R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205; *State, Redstrake, Prosecutor* v. *Swayze* (1889) 52 N.J.L. 129, 18 Atl. 697; or provided there has been no negligence in selecting an unsuitable person. *Boardman* v. *Creighton* (1901) 95 Me. 154, 49 Atl. 663, quoting Cooley, Torts, p. 646; *Lancaster Ave. Improv. Co.* v. *Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

(*c*) *Braidwood* v. *Bonnington Sugar Ref. Co.* (1866; Ct. of Sess.) 2 Scot. L.R. 152; *Duncan* v. *Magistrates of Aberdeen* (1877; Ct. of Sess.) 14 Scot. L.R. 603; *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Burke* v. *Ireland* (1901) 166 N.Y. 305, 59 N.E. 914; *McCafferty* v. *Supyten Duyvil & P.M. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267; *Wiese* v. *Remme* (1897) 140 Mo. 289, 41 S.W. 797.

(*d*) "An employer cannot relieve himself from liability by giving the contract to one who is known to be incompetent or negligent." *Brannock* v. *Elmore* (1892) 114 Mo. 55, 21 S.W. 451.

"There is no question in this case but that Cooper was a competent and experienced stevedore, and the testimony satisfies us that no fault can be imputed to the defendant in contracting for the work with an incompetent party." *Sweeny* v. *Murphy* (1880) 32 La. Ann. 628.

"It was the business of the employer in this case to select a suitable and capable person, which was done, and leave the mode of removing the wall, and the details of the work to the control of the contractor." *Gallagher* v. *Southwestern Exposition Asso.* (1876) 28 La. Ann. 943.

In *Lawrence* v. *Shipman* (1873) 39 Conn. 586, Judge Seymour conceded that one who employed as a contractor a person incompetent and untrustworthy would be liable for injuries done to third persons by his carelessness in the execution of his contract, but was of opinion that this doctrine had no application to the case before him. This dictum was adopted as a correct statement of the law in *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32. There the trial judge charged the jury as follows: "If you find from the evidence that those contractors or either of them were unskilful and incompetent to perform the work assumed by them under the contract, and that the borough, knowing this, employed them to do the work, the borough would be negligent in knowingly employing such a person to do the work, and would be responsible for any negligence of such contractor in the same manner that the contractor would be liable for his own negligence." The Supreme Court was of opinion that this language imposed upon the borough too limited a measure of liability;—that it would be liable, as stated, not only in consequence of negligence, which would certainly be most gross, in knowingly employing incompetent contractors, but also in failing to exercise due and reasonable care to select such as were skilful and competent.

In one case the Supreme Court of New York has held that a person employing a contractor to engage in blasting operations does not perform the duty incumbent upon him with reference to learning of the contractor's competency, by an inquiry of one by whom he was informed that the contractor had done work in blasting sewers reasonably well, but who did not inform him that he had ever done the kind of work for which he was to be employed. *Berg* v. *Parsons* (1895) 84 Hun, 60, 31 N.Y. Supp. 1091. The decision itself was reversed by the Court of Appeals (1898) 156 N.Y. 109, 41 L.R.A. 391, 66 Am. St. Rep. 542, 50 N.E. 957. But this particular aspect of the evidence was not discussed in the opinion of the majority. The views of the minority were thus stated by Gray, J. (with whom three other members of the court agreed). "The conclusion, therefore, which I reach after a careful consideration of the question is that the defendant, in employing a contractor to blast out the rock upon his premises, a work obviously dangerous to the adjoining owner, owed a legal duty to the plaintiff to carefully select one who was both competent and careful and that for a failure to perform that duty, under the circumstances of this case, he became responsible for any injury to the plaintiff's property resulting from the contractor's negligence. I think that there was evidence adduced, from which the jury might infer that the defendant had not proceeded with that care and due regard for the plaintiff's rights, which were incumbent upon him. It may not have been very strong; but it cannot be said that there was none giving rise to inferences."

The Supreme Court must have considered that this judgment of the Court of Appeals did not preclude it from making another application of the doctrine, that an employer may be charged with liability on the ground of his having employed an incompetent contractor; for in the latter case of *Fox* v. *Ireland* (1900) 46 App. Div. 541, 16 N.Y. Supp. 1061, it was held that a nonsuit was improperly directed, because the defendant had not exonerated himself from liability, by showing that he employed a skilled and competent architect, and that he could rightfully rely upon him both for the preparation of plans and the superintendence and inspection of the work, and that he did not interfere with the architect in the discharge of the duties the latter assumed to perform for the owner. The

warrant the conclusion, that an employer may be held liable on the ground of negligence in selecting a contractor who does not possess that measure of skill and experience which the stipulated work demands. That no objection can be made on the score of principle to such a doctrine seems to be indisputable. The cases bearing directly on the question are, it must be admitted extremely few in comparison with those in which the same species of negligence has been discussed in regard to the choice of servants. But the importance which might otherwise be attached to this circumstance, as an indication that judicial opinion was, in the whole, opposed to allowing an action to be maintained on this ground, is greatly diminished, when we advert to two obvious considerations; first, that, in most instances,

---

architect could not be said to be skilled in his business, because the defendant considered him such, or the architect represented himself to be such, as by signing the plans. Nor was it enough for the defendant to say that he relied upon the approval of the plans by the building department, as a certificate of capacity or competency of the architect he employed.

In *Burke* v. *Ireland* (1901) 166 N.Y. 305, 59 N.E. 914, a case arising out of the same accident as *Fox* v. *Ireland* the employer was absolved from liability by the Court of Appeals. But the question of the competency or incompetency of the architect was not adverted to.

For another case in which the Supreme Court recognized the same doctrine as that which is embodied in *Berg* v. *Parsons*, see *Hawke* v. *Brown* (1898) 28 App. Div. 37, 50 N.Y. Supp. 1032, cited in the next note.

It has been laid down that although the relation of master and servant does not exist between a hospital and the physicians and surgeons engaged by it, the hospital impliedly undertakes to exercise reasonable care in selecting persons who are skilful and trustworthy in their profession, and that, if a patient receives injury through the neglect of the hospital to exercise such care, he is entitled to look to the hospital for indemnity, unless it enjoys some extraordinary exemption from liability. *Glavin* v. *Rhodes Island Hospital* (1879) 12 R.I. 411, 424, 34 Am. Rep. 675.

In *Evans* v. *Murphy* (1898) 87 Md. 498, 40 Atl. 109, it was held that a prayer for an instruction to the effect that defendant was not liable "if he employed an experienced an competent builder to do the work, who exercised ordinary care in the construction of the same," had been properly excepted to, as the proof was uncontradicted that the person so employed was not a builder, but a blacksmith, who had never built a house.

In *Ware* v. *St. Paul Water Co.* (1870) 2 Abb. (U.S.) 261, Fed. Cas. No. 17, 172, it was assumed by Nelson, J., in his charge to a jury that an employer is liable for the negligence of an incompetent or unsuitable contractor.

In *Robinson* v. *Webb* (1875) 11 Bush, 464, it was observed that one of the elements which must be present in a case in order that the employer may escape liability is that "the party employed is skilled in the performance of the duty which he undertakes."

In *Neumann* v. *Greenleaf Real Estate Co.* (1898) 73 Mo. App. 326, it was assumed by the court that, if there had been evidence to support such a theory the defendant might have been held liable on the ground that the contractor was not a fit person to be intrusted with the work.

persons exercising distinct and independent callings have acquired by experience or special training or measure of skill adequate to satisfy the legal standard; and, secondly, that the employer in his own interests may be expected to see, and usually does see, that the contractor whom he engages is competent. Having regard to these facts, it is clear that the evidence will seldom be of such a description that it will be worth while for a plaintiff to count specifically upon the unfitness of the contractor.

Both on principle and authority it is manifest that a defendant cannot be held liable on the ground of his having employed an incompetent or otherwise unsuitable contractor unless it also appears that he either knew, or by the exercise of reasonable care might have ascertained that the contractor was not properly qualified to undertake the work. Whether due diligence has been used in making inquiries is determined from a consideration of the evidence submitted(*e*). The mere fact that the contractor was negligent in respect of the work in question, affords no presumption that the employer was guilty of negligence in having engaged him. An employer has the right to place reliance upon the supposed qualifications and good character of the contractor, and is not bound to anticipate misconduct on his part(*f*).

(*e*) *Berg* v. *Parsons* (1895) 84 Hun, 60, 31 N.Y. Supp. 1001. See note (d), supra.

In an action against the city of New York for damages caused by negligent blasting in excavating a street, the exclusion of evidence which plaintiff offered to prove that the contractor who did the work "was notoriously incompetent and incapable to perform the work," was held to be proper for reasons thus stated: "The offer was not broad enough in offering merely the fact of the contractor being notoriously incompetent, without showing that the defendants had knowledge of such incompetency at the time of employment, or such facts as would show them guilty of negligence in making such contract. The corporation are not to be presumed to know more than other bodies corporate or individuals; and if they are sought to be held liable for employing improper persons to do the work of the public, it can only be after knowledge of such incompetency is shown." *Kelly* v. *New York* (1855) 4 E.D. Smith, 291.

In *Hawke* v. *Brown* (1898) 28 App. Div. 37, 50 N.Y. Supp. 1032, it was observed that this decision seems to have never been questioned or disapproved, in express terms, by any subsequent decision of the courts of New York, and that it was rendered after the judgment in the same case, as reported in (1854) 11 N.Y. 432, and was not reversed thereby, as had been erroneously stated in many of the books.

(*f*) *Hawke* v. *Brown* (1898) 28 App. Div. 37, 50 N.Y. Supp. 1032.

In formal contracts it is usual to insert some provision by which the employer reserves the power of engaging another contractor, if the work is not being performed in a satisfactory manner. As such a stipulation is obviously inserted for the benefit of the employer himself, there would seem to be sufficient ground for saying that it cannot in any way enlarge, as respects third persons, his obligation to remove an incompetent contractor. But the point is one which the courts have scarcely touched(*g*).

Whether a contractor whose financial means are insufficient to enable him to indemnify adequately the persons who may be injured by his negligence is unsitable in such a sense that the fact of his having been employed imports legal culpability as regards third persons is a question which, as yet, can hardly be considered as settled. The writer has found only two decisions which throw light upon the subject, and in these a disposition is shewn to restrict the employer's liability, as predicated on this ground, to cases in which the stipulated work is intrinsically dangerous(*h*). It may fairly be doubted, however, whether the position thus taken is tenable. There seems to be no logical alternative between a doctrine under which

---

(*g*) In *Gilbert* v. *Beach* (1855) 4 Duer, 423, it was remarked, arguendo, that, even if a landowner who has surrendered his premises to one who has agreed to erect a building thereon has the power of removing the contractor from the possession of the premises, "it is not a power which he is bound to exercise, or can be justified in exercising, unless the known misconduct of the contractor has been such as to render its exercise a positive duty."

(*h*) In *Kellogg* v. *Payne* (1866) 21 Iowa, 575, the following language was used: "If a responsible proprietor having a work to perform the execution of which would be necessarily attended with danger and probable injury to third persons should 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 that might result from its execution in the manner required, we will not say that such proprietor would not be liable for such damage. But his liability in such case, if it existed at all, might well be held to rest upon the fraud or mala fides of such proprietor."

In *Lawrence* v. *Shipman* (1873) 39 Conn. 586, Judge Seymour, discussing the contention that liability might be imputed on the ground that the person employed was pecuniarily irresponsible, said: "I am not prepared to say that this fact may not be of some weight where the work to be done is hazardous to others. If a person having an interest in a job which naturally exposes others to peril, should attempt to shield himself from responsibility by contracting with a bankrupt mechanic, I think the employers might be subjected for damages done by the contractor; but, as before stated, the work to be done by the contractor involved no peril in its usual performance, and I cannot hold the defendants liable under this claim."

the employer would be held liable, irrespective of the nature of the work, if he deliberately chose a contractor who was financially irresponsible, and a doctrine under which such action would always be imputed as negligence. The mischief resulting from the inability of a contractor to respond in damages to a person who has actually been injured is the same, whether the work is or is not dangerous.

70. Non-performance by employer of duties not cast by the contract upon the contractor.—It is obvious that the employer remains liable for the non-performance of any duties which arise out of the work in question, and which are not devolved upon the contractor. Whether the particular duty violated in the given instance has been so devolved is determined from a consideration of the contract and its subject-matter(*a*).

(*a*) In *Pendlebury* v. *Greenhalgh* (1875) L.R. 1 Q.B. Div. 36, 45 L.J.Q. B.N.S. 3, 33 L.T.N.S. 472, 24 Week. Rep. 98, defendant was surveyor of highways, appointed by the vestry of a parish at a salary. By a resolution of the committee of management for the highways, appointed by the vestry, it was ordered that about 150 yards of a road should be raised, and the defendant, as surveyor, was directed to carry out the resolution. Defendant contracted with G. to do the labor at 3 per yard, the vestry finding stones and materials. G. worked himself, and employed and paid his own men, and the defendant, as surveyor, employed men to cart materials to the ground. Defendant set the work out, and determined the levels, but ... nothing to do with the paving himself, except superintending on behalf of the committee. The work was carried out by raising one-half of the width of the road about a foot, leaving the other half at its old level; and a considerable length of road was left without light or fencing at night. In consequence of this, the dog-cart of the plaintiff, which he was driving along the road, was upset and he was injured. Defendant had been previously warned of the dangerous condition of the road. The jury found that leaving the road in its then state, without light or warning, was negligence; but that defendant did not personally interfere in doing the work, or directing the road to be left as it was:—Upon this evidence it was held,—the court having power to draw interences of fact,—that the defendant was liable. Referring to the order of the committee, Lord Cairns said: "I will assume that the defendant, as he could not have carried out the resolution with his own hands, would not have been responsible in the present instance, if he had contracted in a proper manner with a third person to carry out the work with all its incidents. But he did not contract with John Greenhalgh for the performance of the work as a whole. He contracted, at most, for the performance of a part only. . . . The work to be done was of a complex kind; it consisted of four parts, the material, labor, superintendence, and, as incident to the work, lighting and fencing during the night. We have therefore, to look and see what the defendant contracted for with John Greenhalgh out of these four items. I cannot see that he—it is stated expressly—contracted for anything except labor; the materials were found by the vestry, superintendence by the defendant, as surveyor. By whom was the fencing and lighting to be supplied? The defendant, no doubt, might have stipulated that the man supplying the labor should supply

the lighting or fencing. The contract, we are informed, was not in writing, and we must take it that the labor alone was contracted for. If the defendant did not contract for the fencing or lighting, then the duty of fencing and lighting remained in the defendant, for which he remained responsible." The view thus taken of the facts did not agree with that which had been previously taken by the court of Queen's Bench in *Taylor* v. *Greenhalgh* (1874) L.R. 9 Q.B. Div. 487, 43 L.J.Q.B.N.S. 168, 31 L.T. N.S. 184, 23 Week. Rep. 4, (Reversed in (1876) 24 Week. Rep. 311) in which the judgment had proceeded upon the assumption that the defendant had relieved himself of all responsibility by contracting with a third person for the carrying out of the work in its entirety.

In *Gilbert* v. *Beach* (1855) 4 Duer, 423, the carpenter employed upon the defendant's building had agreed to construct a suitable gutter to receive the water falling upon the roof, and a leader running down to the basement, where it was to be connected with a main pipe leading into the sewer. One Saturday evening this leader was left unfinished, with its lower end some 12 or 15 feet above the ground, and no effectual means were provided for carrying off the water, the consequence being that, during a heavy rainstorm which occurred before work was resumed on Monday, the water flowed through the leader on to the ground and thence into the premises of the plaintiff, and injured his goods. The liability of the defendant was denied by the lower court, which considered that the case was governed by the general principle, that an employer is not answerable for the negligence of an independent contractor, unless the misconduct which produced the injury was known to him, and it was his duty, and in his power, to have prevented the consequences of that misconduct. This judgment, by which a verdict for the plaintiff was set aside, was reversed by the Court of Appeals (1858) 16 N.Y. 606), which was of opinion that there had been a mistrial, inasmuch as the essential question of fact, whether the act which caused the injury had or had not been authorized had been ignored. On the second trial of the case the judge directed a verdict for the defendant, although evidence was introduced to the effect that he had undertaken to furnish the pipe which was to be connected in the basement of the building with the leader. The General Term affirmed the judgment entered on this verdict, holding that the injury had happened, not by the defendant's fault or neglect,—not because he had done or authorized to be done, anything which, if done, and as authorized by him to be done, was injurious or dangerous,—but because the servants or agents of the contractors were negligent in the manner of doing the work, and had left a portion of the work over Sunday in such a condition as to cause the damage. (1859) 5 Bosw. 445. The position contended for by the plaintiff, that the conclusion which would otherwise have been indicated by such a state of facts should not be drawn, for the reason that it was proved to have been the duty of the defendant, as between him and the contractors, to put in the iron pipe which was to conduct the water to the sewer in the street, was held to be untenable, since the omission to perform this duty could not prevent or hinder the contractors in the execution of their agreement to carry the leader down into the basement. There was accordingly no legal connection between the neglect of the defendant and the neglect of the contractors. This judgment was reversed by the Court of Appeals on the ground that, after the introduction of the evidence with respect to the defendant's undertaking to furnish the pipe and the possibility that the accident would not have occurred if it had been furnished in time, his non-liability should not have been declared, as a matter of law. See the report in (1859) 5 Bosw. 455.

In a case where a landowner had employed several contractors to execute different parts of the work of constructing a building and nothing appeared in the contracts as to the supervision of the work, or the duty of placing guards around the excavations made for the foundations, the court was of opinion that the duty of erecting and maintaining a sufficient barrier was not shifted from the defendant to the contractors, or either of them. *Homan* v. *Stanley* (1870) 66 Pa. 464, 5 Am. Rep. 389.

71. Employer's tortious act co-operating with that of the contractor to produce the injury.—On general principles, it is clear that recovery may be had against the employer, as a joint wrongdoer, whenever it is shewn that his tortious conduct co-operated with that of the contractor in producing the injury complained of(*a*).

Whether this doctrine is applicable in any given instance is primarily a question for the jury, to be determined with reference to the evidence adduced(*b*).

The fact that a railway company has employed a contractor to grade its roadbed will not release it from liability for damages caused by its failure to keep up the fences along the right of way. *Pound* v. *Port Huron & S.W.R. Co.* (1884) 54 Mich. 13, 19 N.W. 570 (crops injured by cattle which escaped from the right of way).

Where a building is being constructed by an independent contractor it is his duty, and not the owner's, to furnish sub-contractors and their subordinates with a correct copy of the plans and specifications as approved for their guidance, and the owner cannot be held liable for injury caused by an employee of a sub contractor on the ground that he failed to perform that duty personally. *Hawke* v. *Brown* (1898) 28 App. Div. 37, 50 N.Y. Supp. 1032.

(*a*) *Lawrence* v. *Shipman* (1873) 39 Conn. 586, where Seymour, J., said that, although he found no precedents to guide him as to the point, the general principles of the law led inevitably to this conclusion.

(*b*) In *Holliday* v. *National Teleph.* Co. [1899] 2 Q.B. 392, 81 L.T. N.S. 252, 68 L.J.Q.B.N.S. 1016, 47 Week. Rep. 658, reversing [1898] 1 Q.B. 221, 68 L.J.Q.B.N.S. 302 for facts see § 51 (d) *ante*), Lord Halsbury observed: "It appears to me that upon the evidence given, there are two definite and distinct grounds upon which the judgment of the deputy judge may be supported There was clearly evidence to the effect that the work, in the course of which the accident happened, was being done, not by the person whom the defendants call an independent contractor alone, but by that person and the defendants jointly; and I think the evidence justified the view that they were both engaged in the joint operation under such circumstances that both of them would be responsible if there were negligence in the performance of it such as that which occasioned the accident."

In *Slater* v. *Mersereau* (1876) 64 N.Y. 138, the defendant was held liable for damages to the plaintiff's premises caused by a body of water which flowed from two sources, one of them under the control of the defendant and the other under the control of a sub-contractor. The court said: "It is true the defendant and Moore & Bryant [the sub-contractors] were not jointly interested in reference to the separate acts which produced the damages. Although they acted independently of each other, they did act at the same time in causing the damages, etc., each contributing towards it, and although the act of each, alone and of itself, might not have caused the entire injury, under the circumstances presented, there is no good reason why each should not be liable for the damages caused by the different acts of all. . . . The water with which each of the parties were instrumental in injuring the plaintiff's was one mass and inseparable, and no distinction can be made between the different sources from whence it flowed, so that it can be claimed that each caused a separate and distinct injury for which each one is separately responsible."

72. Failure to remedy a nuisance.— Speaking generally an employer canot be held liable on the ground of maintaining a nuisance produced by the collateral torts of a contractor, unless he has actually accepted the results of the work, and assumed control of the subject-matter. See subtitle VIII, *post.* The immunity necessarily results from his having, *ex hypothesi,* divested himself, while the contract is being performed, both of the right and of the power to control the manner in which the stipulated work is done. The mere fact that he may have been notified of the existence of the nuisance will not render him responsible for its continuance(*a*).

This rule, however, is subject to exception, where the employer is exercising over the premises on which the stipulated work is done a right of control which is co-ordinate and concurrent with that which is vested in the contractor. Under such circumstances the nature and extent of the employer's responsibility is determined by the principle, that a person "must not suffer a nuisance to continue on his premises to the injury of others, although he is not responsible for its creation"(*b*). It follows, therefore, that he must indemnify anyone who has suffered damage by reason of the existence of the dangerous conditions, even though they may have resulted from the commission of some collateral tort by the contractor, and the work to which

---

In *Chicago Economic Fuel Gas Co.* v. *Myers* (1897) 168 Ill. 130, 48 N.E. 66, one of the grounds of the decision was that the explosion of gas which caused the accident, although it was partly due to the defective construction of the pipe line by the contractor resulted in part from the negligent manner in which the gas had been conveyed through the pipe. See also the cases cited in the following section.

(*a*) *Atlanta & F.R. Co.* v. *Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277, where the plaintiff had told the company's agent that, in his opinion, a culvert in an embarkment was not large enough to carry off the water. The court said: "If the railroad company had no control over the contractor as to the manner in which he should build the sewer or put in the pipe, any notice which the plaintiff might give its officers would not make it liable. The contractor being in an independent employment, whatever he does outside of or beyond his contract, is a collateral act for which the employer is not liable. He is not the servant or agent of the employer, and the employer cannot be held liable for any acts of negligence committed or omitted by him outside of his contract. Where the work he is engaged to do is lawful, the law presumes that he will do it in a lawful manner; and if he does it illegally, he is liable and not the employer."

(*b*) *Vogel* v. *New York* (1883) 92 N.Y. 10, 44 Am. Rep. 340.

the nuisance was incidental was still in progress when the injury was received (c).

(c) "If the owner of real estate should wilfully allow a nuisance to be created, or to be continued by another on, or adjacent to his premises, in the prosecution of a business for his benefit and under his authority, when he had full power to prevent or abate the nuisance, he would be justly liable for any injury which might result therefrom to another person. Here the owner would be in the actual wrong, in wilfully suffering the continuance of the nuisance, upon the maxim, 'Sic utere tuo ut alienum non laedas.'" *Clark* v. *Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590.

Where the owner of a house which has been burned leaves the walls thereof standing in an unsafe and tottering condition, he is guilty of negligence, rendering him liable to an adjoining proprietor for damages resulting from the fall of such walls upon the buildings of the latter; and it is no defense to allege that the injury occurred while his premises were in the sole charge of a skilful contractor, under a contract to rebuild the house. *Sessengut* v. *Posey* (1879) 67 Ind. 408, 33 Am. Rep. 98.

In a Louisiana case the court, while conceding that a person who permits the establishment of a public nuisance upon land or property under his control, will be liable for any damage caused by it, though such nuisance is incidental to a work otherwise lawful, and is produced by the act of an independent contractor, held that this rule was not applicable to a case in which a fire man in the employ of a city was knocked off his wagon by a "coal run" built across a street for the purpose of unloading coal from a barge. *Davie* v. *Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395.

A landowner who has notice that one who has contracted to erect a house for him has resorted to blasting for the purpose of excavating the cellar is bound to take such steps as are in his power to suppress the nuisance thus created. *James* v. *McMinimy* (1892) 93 Ky. 471, 40 Am St. Rep. 200, 2 Q.S.W. 435.

In *Osborne* v. *Union Ferry Co.* (1869) 53 Barb. 629, where the plaintiff was held entitled to recover for injuries caused by stumbling on a dark night over a piece of timber used to support a prop that up-held a cornice of a new ferry-house, which was then being built for the defendants by contractors. The exact place of the accident, and of the piece of timber over which he fell, was outside of the defendant's gate and premises, and on the public street; but still, almost adjoining the gate. The court said: "The question involved in this case is something more than a question of negligence. The piece of timber, over which the plaintiff fell, was placed and continued in the public street at the procurement and with the concurrence of the defendant. The placing of it there, and keeping in there, was the commission and continuance of a nuisance. It was an obstruction of the full and free enjoyment of the easement. The public being entitled to the use of the street or highway, whoever, without special authority, obstructs it, or renders its use hazardous, by doing any thing upon, above or below the surface, is guilty of a nuisance; and any one sustaining special damages from it, without any want of due care to avoid injury, has a remedy against the person continuing the nuisance." The position was also taken that, as the duty to abate the nuisance was one absolutely incumbent on the defendant company, it would be liable even if the contract contained a provision that the contractor should use all precautionary measures, to protect the public. (As to the erroneous assumption of the court that, if the gravamen of the action had been negligence, the insertion of such a provision would have protected the employer, see § 50, *ante*).

In *Hundhausen* v. *Bond* (1874) 36 Wis. 29, it was held that, where the evidence tended to charge both the employer himself, and a contractor, as principal in respect to the depositing of a certain pile of earth in a street, a jury was justified in finding them to be jointly liable for an

On general principles it seems manifest that another exception should be predicated in cases where the employer was subject to an absolute or primary duty to see that the physical subject-matter of the contract was kept in a reasonably safe condition (*d*).

If the injurious conditions are the consequence of the failure of the contractor to complete the stipulated work it is probably the duty of the employer in all cases to take the necessary steps to have it finished either by its own agents or by reletting the contract. He is at all events bound to do so if he has provided in the contract for such a contingency, and reserved the power of carrying on the operations upon their being abandoned by the contractor (*e*).

---

injury caused by the failure to remedy this obstruction in a reasonable time, and to take due precautions against accidents from it whilst it was still on the street.

(*d*) Most of the cases cited in the preceding subtitle may, in one point of view, be regarded as sustaining the statement. See more especially §§ 58, 59.

In a Pennsylvania case it was laid down that the fact that the street commissioner, or other authorities of a municipality have knowledge, that a license permitting the laying of water-pipes in a street was being misused or abused by the independent contractor of the licensee or by the licensee himself, in that the excavations for the pipes had been left in an unguarded and dangerous condition, will not render the municipality liable for damages resulting from such misuse or abuse of the license. *Susquehanna Depot* v. *Simmons* (1880) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434. This case, however, was decided in a state in which the doctrine as to the obligation of a municipality in regard to the condition of its highways while work is being executed by a contractor is different from that which prevails in most jurisdictions. See § 58, ante.

(*e*) In *Vogel* v. *New York* (1883) 92 N.Y. 10, 44 Am. Rep. 349, one K. entered into a contract with defendant to regulate, grade, etc., a portion of one of its streets, the work to be completed on or before a specified date. The contract provided that, if at any time the work should not progress according to the terms of the contract, the supervising officer of the city was authorized to complete the work at the expense of the contractor. K. commenced the work and dug a deep hole or trench in the street near plaintiff's lots, adjoining the street; in 1859 he dug another hole, but did little else toward the performance of the contract, and in 1859 abandoned it. In 1873 the city employed another person who completed the work. In consequence of such excavation, surface water, which before that had been accustomed to flow in a natural channel, was diverted and thrown upon plaintiff's premises, causing damage. This damage was done after the time for the performance of the contract had expired, and ceased when the work was completed. In an action to recover for said damage, it was held (Miller, Danforth, and Finch, JJ., dissenting), that defendant was liable, as it permitted these excavations to remain when it had the power and right to take charge of and complete the work, and thus protect plaintiff's property from injury. In the majority opinion we find the following passage: "Here, if this damage had been done to the plaintiff while Kinsley was in the active and proper performance of

73. Control of or interference with the work.— The effect of evidence shewing that the employer exercised control over some part of the stipulated work, while it was in progress, has been discussed under one of its aspects in § 21, *ante*.. Such evidence may also be considered from another standpoint, viz., as having a tendency to show that, although the contract as a whole was independent in its character, the employer had asssumed the position of a master with reference to the particular operation or operations which he undertook to direct(*a*). A defen-

---

his contract, there would be some ground for claiming that the city should not be made liable for the damage resulting from the improper manner in which he performed his work. Suppose A. enters into a contract with B. to do some work upon his land, his private property, and in doing this work B. does it so carelessly as to turn a stream of water upon the land of C. and then B. abandons his contract, and for years omits to proceed with it; could A. permit the water to run upon the land of C. for years and escape liability for the damage which should thus be caused? Clearly he would be held responsible for what he had caused to be done, or suffered to be done, upon his own land, to the injury of his neighbor, and he could not shield himself behind the claim that B. was an independent contractor when he did the act which first diverted the water."

(*a*) In *Overton* v. *Freeman* (1852) 11 C.B. 867, 3 Car. & K. 52, 21 L.J.C.P.N.S. 52, 16 Jur. 65, it was conceded, arguendo, that the principal contractor would have been liable for the negligence of his sub-contractor, if he had been present, and directed or sanctioned the doing of the work.

That the employer is liable in cases where he "expressly directed the wrongful or improper act" was laid down by Lord Gifford in *Stephens* v. *Thurso Police Comr's*, (1876) 3 Sc. Sess. Cas. 4th series, 535.

In *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32, the trial judge charged the jury, that if the injury to the plaintiff's property occurred in consequence of the negligence of the contractors or their workmen, the defendant would not be liable, provided it did not interfere with and assume control, and actually control said work and the method and means of its performance. Of this instruction the plaintiff complained insisting that the language treated the right to control as immaterial, and as imposing no liability until exercised. But the court said: "It is indeed true, as the plaintiff says, that 'it is not the fact of actual interference and control, but the right to interfere, which makes the difference between an independent contractor and a servant or agent.' But when, as we have held in this case, the relation is the former, it is then correct to say, as the court did, that the liability of the contractee in such cases arises from the fact of actual interference and control." This passage was quoted with approval in *Hawke* v. *Brown* (1898) 28 App. Div. 37, 50 N.Y. Supp. 1032, where the court remarked that "the employer may make himself liable by interfering with the contractor and assuming control of the work, or some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference."

Similar language was used in *Faren* v. *Sellers* (1887) 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363.

In a Pennsylvania case the court adverted to the fact that it was admitted by the plaintiff that the agreement in evidence relieved the defendant county from liability unless its agents "so interfered with the conduct of the work as to control its methods and thus, in spite of the contract, to become the responsible masters." *Eby* v. *Lebanon County* (1895) 166 Pa. 632, 31 Atl. 332.

dant cannot be charged with liability on this ground, unless some testimony is introduced which warrants the conclusion, that he did actually exercise control in respect to the thing which caused the injury(*b*). In the cases cited below that con-

---

In *Fox* v. *Ireland* (1900) 46 App. Div. 541, 61 N.Y. Supp. 1061 a nonsuit was held improper for the reason that the defendant had not shown that he did not control, direct, or interfere in any manner with the architect whom he had employed.

In *Fuller* v. *Citizens' Nat. Bank* (1882) 15 Fed. 875, the jury were instructed that, if they found that the employer had controlled or directed the person employed in his work, the latter was a mere servant.

That the cases in which the employer was assisting in or directing the work constitute an exception to the general rule by which he is exempted from liability for the negligence of an independent contractor, is also recognized in *Wright* v. *Holbrook* (1872) 52 N.H. 120, 13 Am. Rep. 12; *Berg* v. *Parsons* (1898) 156 N.Y. 109, 41 L.R.A. 391, 66 Am. St. Rep. 542, 50 N.E. 957; *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Eaton* v. *European & N.A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

The fact that there had been no evidence, or insufficient evidence of interference on the part of the employer is a circumstance sometimes emphasized in cases where the employer's liability has been denied. *Overton* v. *Freeman* (1852) 11 C.B. 867, 3 Car. & K. 52, 21 L.J.C.P.N.S. 52, 16 Jur. 65; *Murphy* v. *Ottawa* (1887) 13 Ont. Rep. 334; *Klages* v. *Gillette-Herzog Mfg. Co.* (1902) 86 Minn. 458, 90 N.W. 1116.

One of the cases in which an employer is declared by § 3819 of the Georgia Code of 1895 is where he "interferes and assumes control."

In *Atlanta & F.R. Co.* v. *Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277, the court referring to this provision, conceded that, if a certain drain-pipe which proved too small to carry off the water which accumulated on one side of a railway embankment, and caused a nuisance had been placed there by direction of the company, the plaintiff might have recovered. But there was held to be no sufficient evidence of any such direction.

(*b*) In *Steele* v. *South-Eastern R. Co* (1855) 16 C.B. 550, 553, it was conceded that if it could have been shown that the injury had been received in consequence of something done by the orders of the defendant's representative, it might have been said that the situation was the same as if that representative had done the thing with his own hands,—in which case the defendant would have been responsible.

Commenting on the evidence in a recent case befor the English Court of Appeal, Smith, L.J., remarked: "If the fracture of the gas-pipe in the present case had been caused by reason of the orders of the district council's inspector, that would have rendered the district council liable, because, as between the district council and the inspector, the relation of master and servant existed, and for his acts within the scope of his employment the council would be liable; but no proof was given that the fracture was occasioned by anything which the inspector either said or did. If the inspector was guilty of any negligent omission that was a breach of a duty which he owed to his employers, not to the plaintiffs." *Hardaker* v. *Idle Dist. Council* [1896] 1 Q.B. 335, 343, 344, 65 L.J.Q.B. N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196, Lindley, L.J., used similar language.

Where the plaintiff was injured by the swerving of certain pieces of timber which a contractor was hauling under the general superintendence of the contractee, Channell, B., directed a verdict for the defendant, as the only evidence of interference on the part of his foreman was, that just before the accident he had told the men under him to make the horses go on dragging the timber. *Dalton* v. *Bachelor* (1857) 1 Fost. & F. 15.

In a case where, at the time when the ship in question was turned over to the stevedore, the trimming hatch into which the libellant subsequently stepped was completely covered, the mere fact that the master had directed the foreman of the stevedore, that one inch of dunnage would be sufficient for case goods, the deck being covered with dunnage two inches in height, would not warrant holding the vessel liable. *The Wm. F. Babcock* (1887) 31 Fed. 418.

By chap. 6 of the New York Laws of 1855, lot owners in the City of New York who propose to excavate their lots to a depth of more than ten feet below the curb, are required to protect at their own expense a wall on or near the boundary line of adjacent premises from injury from such excavation, "if afforded the necessary license to enter on the adjoining land, and not otherwise." In *Ketcham* v. *Newman* (1894) 141 N.Y. 205, 24 LR.A. 102, 36 N.E. 197, Reversing *Ketcham* v. *Cohn* (1893) 2 Misc. 427, 22 N.Y. Supp. 181, defendants made a contract for the erection of a building of which the foundation was to be of a greater depth than ten feet, without having obtained the permission of the plaintiffs to enter upon their premises, but upon the assumption that the permission would be given; and the contractors bound themselves to do the shoring "as required by law." In an action against the defendants for a trespass committed by the contractors upon the adjoining premises while they were proceedings to fulfil the stipulation thus entered into, the trial judge charged the jury that, in the absence of a license, to enter, the defendants were lible under the provisions of the contract, as these were in law a direction to commit the trespass complained of. This instruction was held to be erroneous for reasons thus stated by the court: "They [i.e., the contractors] were not authorized by the contract to enter the adjacent premises without permission of the owners and occupants. It was necessarily implied that they were employed to discharge the obligation imposed upon the defendants by the Act of 1855, and it was a prerequisite that the consent of the owners or occupants should be obtained before entry could be lawfully made. The defendants neither in terms authorized an entry by the contractors as trespassers, nor can such intention be presumed. On the contrary, the contractors were to act 'as required by law.' It would have been a complete answer to a claim by the defendants for a breach of the contract by the contractors, that the latter were unable to obtain the permission of the plaintiffs to enter the premises to do the work required, and that it could not have been done without such entry. If there was any evidence that the defendants advised or directed the trespass, other than that furnished by the contract, it should have been submitted to the jury. There was none to justify a ruling as matter of law that in the absence of a license to enter the defendants were liable."

A landlord is not responsible in damages for a tort committed by his cropper in hiring or working servants previously employed by another master. *Duncan* v. *Anderson* (1876) 56 Ga. 398.

The mere fact that the engineer of the defendants with their assent got up steam on the day of the accident and furnished the employés of a contractor for the erection of an elevator with the power which enabled them to move it up and down when they wished, had no tendency to show such an interference on the part of the defendants as will make them responsible for the injury caused by the negligence of those employés in operating the elevator. *Long* v. *Moon* (1891) 107 Mo. 334, 17 S.W. 810.

Where county commissioners entered into a contract with a firm of contractors to place a stone curb upon a line dividing a park from the pavement of a much used public street, the fact that the commissioners in accordance with the terms of a provision in the contract, directed that the dirt should not be thrown upon the grass, and furnished boards upon which the dirt might be deposited, does not render the county liable for the negligence of the contractor, in heaping the dirt upon the pavement and leaving it unguarded and unlighted during the night. *Eby* v. *Lebanon County* (1895) 166 Pa. 632, 31 Atl. 332. Referring to what the commissioners had done, the court said: "This was in no sense an interference

clusion was established by specific evidence of the giving of orders or directions by the employer or his representative(c).

---

with the contractor's control. In the ordinary course this dirt would be put upon the pavement, since it was forbidden to go upon the grass, and the commissioners simply recognized the fact when they took the proper steps to protect the pavement from injury. Even if this be regarded as acquiescence by the commissioners in the temporary use of the pavement, acquiescence is by no means control of direction, and in this instance it brought no liability upon the county. Certainly it could not be regarded as consent that the dirt should lie on the pavement after dark unguarded and unlighted, and these alone are the acts or omissions of which the plaintiff has a right to complain."

Under a declaration framed on the theory that he was a servant, and injured by a breach of the duty of his master not to put him to work in an unsafe place, the plaintiff cannot recover, where the evidence shows that the defendants contracted to build a school house, and sub-let to plaintiffs a portion of the work, to be done to the satisfaction of the city superintendent of public property; that the contract gave the defendants no control over the plaintiffs and their associates; that no specific orders had been given to them to go to work at the particular place where the accident occurred, though defendants had been urging them to hurry the work for two or three days previous; that directions otherwise given by the defendants related to the general construction of the building of which they had charge. *Eldred* v. *Mackie* (1901) 178 Mass. 1, 59 N.E. 673.

According to a New Jersey case, the mere fact that a company under contract to construct a pipe line upon certain land incorrectly informed a sub-contractor that he had a right to enter upon the land will not render it liable for personal injuries received by the owner of the land while resisting the entry. The decision was put upon the ground that the giving of such information did not render the company a participator in the methods adopted by the subcontractor in laying the pipes. *Slingerland* v. *East Jersey Water Co.* (1896) 58 N.J.L. 411, 33 Atl. 843. The conclusion thus drawn seems to be a non sequitur from the circumstances relied upon. Information so given should, it is submitted, be regarded as being equivalent to an implied authorization or direction to commit the trespass.

Liability cannot be predicated merely on the ground that during the progress of the work, the employer was present from time to time. *Gourdier* v. *Cormack* (1853) 2 E.D. Smith, 254; *Cullon* v. *McKelvey* (1898) 26 App. Div. 46, 49 N.Y. Supp. 669 or on the occasion when the accident occurred. *East St. Louis* v. *Giblin* (1878) 3 Ill. App. 215.

(c) In *Leslie* v. *Pounds* (1812) 4 Taunt. 649, the tenant of a house was bound to repair it, but the landlord superintended the repairs; and, on being remonstrated with by the commissioners of pavement as to the dangerous state of the cellar, had promised to take care of it, and had put up some temporary boards as a protection to the public, but they proved insufficient. An accident having happened, he was held liable. That the ground of this decision was the defendant's personal interference about his own property was stated by Littledale, J., in *Laugher* v. *Pointer* (1826) 5 Barn. & Co. 547, 8 Dowl. & R. 556, 4 L.J.K.B. 369.

In *Chicago, K. & W.R. Co.* v. *Watkins* (1890) 43 Kan. 50, 22 Pac. 985, a railway company which had been sued for damages caused by the performance of construction work on land which had not been condemned sought to escape liability on the ground, that it was not responsible for the trespass, inasmuch as the grading, etc., was done by contractors. This plea was unsuccessful, and it appeared from the evidence and the admissions of the railway company upon the trial, that the contractors were set to work by the agents of the company to clear the right-of-way and construct its road-bed.

A city is liable for the flooding of land caused by the grading of a street, if the work is to be done under the supervision of its engineer, and

he pointed out to the contractor where to take the soil from and where to put it, and the contractor did the work as directed. *Nevins* v. *Peoria* (1866) 41 Ill. 502, 89 Am. Dec. 392.

Where the excavation work incident to carrying out a contract for the grading of a street, was so negligently done that a large amount of water was collected against the plaintiff's wall, the defendant municipality was held liable, on the ground that the work was done under directions of its surveyor, in accordance with a power expressly reserved in the contract. *Lacour* v. *New York* (1854) 3 Duer, 406.

If an owner modifies in any respect his contract with a person who has undertaken to erect a building so that in doing any particular act, the contractor is obeying the directions of the owner, the owner is liable, if that act is negligent, and damage ensues. *Heffernan* v. *Benkard* (1863) 1 Robt. 432 (side wall of house was blown down in consequence of its being carried up too high above the front wall).

The owner of premises who assumes control of building stones as they are delivered or directs the contractor where to put them may be held responsible for negligence for having them placed in an exposed position in the street, where they are liable to fall or be thrown and injure passersby. *Mahar* v. *Steuer* (1898) 170 Mass. 454, 49 N.E. 741.

Where the owner of a building directs the person having the contract to tear down the building to place the material in the street, and the city has given the owner permission to place the material in the street, provided the gutter was not obstructed, the owner is liable for damages caused by the contractor placing the material so as to obstruct the gutter. *Bohrer* v. *Dienhart Harness Co.* (1896; Ind. App.) 45 N.E. 668.

Where a wall falls upon a man in the employ of a sub-contractor who is engaged in excavating near it the foundations of a stack, the principal employer is liable for the resulting injuries, where it is shown that he forbade the wall to be taken down before the work was commenced, and its dangerous character was open and obvious. *Pender* v. *Raggs* (1896) 178 Pa. 337, 35 Atl. 1135.

Where the act complained of was that a trench for the foundations of a building had been dug so long and so deep as to endanger an adjacent building, and it was shown that the work was done precisely as ordered by the defendant's representative, who under the contract had power to give directions with regard to such an operation, it was held that the employer must answer for the results of this exercise of the discretion or judgment vested in his supervising agent. *Larson* v. *Metropolitan Street R. Co.* (1892) 110 Mo. 234, 16 L.R.A. 330, 33 Am. St. Rep. 439, 19 S.W. 416.

A railway company is liable for injuries caused by negligence in blasting, where it appears that, although the person employed to do the blasting was an independent contractor, the company's agent was at the time of the accident, showing how the blasting should be done. *Louisville & N. R. Co.* v. *Tow* (1901) 23 Ky. L. Rep. 408, 63 S.W. 27.

Where a person in turning to avoid a collision with an obstruction on one side of the highway ran his wagon against a heap of sand deposited on the other side by the defendant's direction, the mere fact that the man who put the sand there was an independent contractor will not absolve the defendant from liability. *Jones* v. *Chantry* (1874) 4 Thomp. & C. 63.

Whether an injury to an employé of an oil company shall be attributed to the company is a question for the jury, where the evidence is that a still was constructed by a machinist from the plans of the president, and that, upon its being found defective when tested, he suggested a certain methods of strengthening it. *Ardesco Oil Co* v. *Gibson* (1869) 63 Pa. 146.

An abutting owner who contracts with an independent contractor to grade certain streets and his lots, is liable for the negligence of the contractor in casting into a ravine, with his knowledge and procurement, a quantity of mud and quicksand which overflows another's land several hundred feet distant. *Kock* v. *Sackman-Phillips* Invest. Co. (1894) 9 Wash. 405, 37 Pac. 703.

But such evidence is not indispensable for the purpose of enabling the plaintiff to recover. The jury are entitled to infer, from the acts of the employer, that what was done by the employee was sanctioned and adopted by the employer(c).

(c) *Burgess* v. *Gray* (1845) 1 C.B. 578, 592, 14 L.J.C.P.N.S. 184. There the defendant, the owner and occupier of premises adjoining a highway, employed one Palmer to make a drain therefrom, to communicate with a common sewer. In the performance of this work, the workmen employed by Palmer placed gravel on the highway, in consequence of which the plaintiff driving along the road sustained personal injury. Before the accident the dangerous position of the heap was pointed out to the defendant who promised to remove it. Palmer had the sole management of the work and employed and paid D. to cart away part of the rubbish at a certain price per load, and had charged the defendant in his bill with the sum so paid. Held, that the defendant was liable to A. In support of his conclusion that there was evidence to leave to the jury in support of the charge in the declaration, that the defendant wrongfully placed, or caused to be placed, a heap of gravel in the highway, and so caused the accident, Tindal, C. J., said: "If indeed this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother Byles, and that the damage should be made good by the contractor, and not by the individual for whom the work was done. *Bush* v. *Steinman* (1799) 1 Bos. & P. 404. But, upon the evidence, the matter strikes me in a very different light. It appeared that Palmer had contracted to make the drain; and, perhaps, prima facie, it would be his duty to carry away the earth and rubbish: but, it further appeared that Palmer had charged the defendant at a certain rate per load for the removal of three loads. This was done on the 20th of July, and sufficient was then left to occasion the accident that happened on the 28th. Then, was there no evidence of personal interference on the part of the defendant? The drain was constructed under his order and for his benefit. He it was that applied to the commissioners of sewers for leave to break into the sewer. And there was the conversation with Barker, the policeman, before the accident, when the defendant, upon being told that the rubbish ought to be removed out of the road, said he would remove it as soon as he could. This was an admission that he was exercising a dominion over it. And, after the accident had happened, being told by the policeman that it had been occasioned by the rubbish so improperly placed in the road, the answer he made was, that he had witnesses to prove that the accident had not been occasioned by the rubbish, but by the plaintiff's careless and reckless driving. All this is evidence that the soil was placed upon the road with the defendant's consent, if not by his express direction."

Cresswell, J., said: "Unless Palmer had the entire control of the work, there was abundant evidence to charge the defendant. Palmer was employed by him to construct the drain. No precise contract for the work was proved; nor was it shown that Palmer was employed to do the work personally, the mode of doing it being left to his judgment and discretion. And in the absence of evidence to show that the defendant had parted with all control and authority in the matter, it must be assumed that he adopted all that was done by Palmer in carrying on the work. If it had appeared that Palmer had contracted with the defendant to construct the drain and to cart away the rubbish, it might have been said that the defendant had parted with all control. But, far from that, the evidence is that the defendant paid Palmer for the carting away of a portion of it. Then, when remonstrated with by the policeman for leav-

As the rationale of the employer's liability in cases of this class is usually considered to be that he was acting as a master in relation to some part of the work which, as a whole, was embraced within the scope of an independent contract, the fact that he may have exercised authority in respect to some matter or matters which had no connection with the injury will not necessarily render him liable. To have that result the exercise of authority must have been such as tended to shew that the contract was not an independent one at all(*d*).

If the injury resulted from an alteration made in the arrangements for the work by one who was acting as the employer's representative, recovery cannot be had, if in making that alteration he exceeded his authority(*e*).

---

ing the nuisance on the highway, the defendant promises to remove it as soon as he can. And, when the accident has happened, and the defendant is told that it was occasioned by the rubbish being left there, the defendant says that he has witnesses to prove that it was occasioned by something else. I think there was abundant evidence to show that the defendant at least sanctioned the placing of the nuisance on the road, and therefore that he is responsible for the consequences."

(*d*) The correctness of this doctrine is so obvious that it is scarcely necessary to sustain it by any specific decision. See, however, *Crudup* v. *Schreider* (1901) 98 Ill. App. 337.

Evidence that the physical conditions which existed prior to the time of the accident were produced by certain work in which the employer participated, and that he also participated in the actual operations which were the immediate cause of that accident, tends to show that the employee was a mere agent in regard to that work and those operations. *Carlson* v. *Stocking* (1895) 91 Wis. 432, 65 N.W. 58 (injury to the landowner through the negligent manner in which logs were floated down a stream.)

(*e*) A school district employed a contractor to make certain repairs and improvements to the school-house, under the direction of a superintendent named by the district. It was expressly agreed that the contractor should not enter upon the work until the school was dismissed for the season. The superintendent chosen by the district was the architect of the contemplated improvements, and was authorized only to direct the contractor as to the manner in which the work was to be executed. The contractor, by permission of the superintendent, began the work before the school was dismissed, and performed it so negligently that one of the school children was injured in consequence. It appeared that two of the members of the school board had visited the school-house after the work had begun, but did not interfere or direct it to be stopped. In an action by the injured child against the school district to recover damages for the injuries received it was held, that, as the superintendent had no power to alter the time when the work was to be performed, his permission to the contractor to enter thereon, before the dismissal of the school, did not bind the school district or render it liable for the contractor's negligence. It was also held, that the mere fact that certain members of the school board had observed the fact that work had been begun, and did not interfere or stop the same did not in any way render the school district liable for the contractor's negligence. *School District* v. *Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627.

74. Employer's ratification or adoption of the contractor's tort.—The fact that the wrongdoer was an independent contractor will obviously not preclude recovery from his employer if it should appear that the latter ratified or adopted as his own the particular act which produced the injury in suit. As in other classes of cases, such ratification or adoption may be established by direct testimony as to the employer's intention(*a*), or implied from his quiescence and inaction during the progress of the stipulated work(*b*), or inferred from his acceptance of the results of that work, with knowledge, actual or constructive, that it had involved the commission of a tortious act which entailed permanently injurious conditions(*c*).

(*a*) An ice machine company undertook to erect for a brewery company a refrigerator plant which included a large iron tank. The latter company was to fix the location for the plant, and make and put in proper supports for the tank. When the supports were completed the agent of the machine company notified the president of the brewery company that they were not sufficient, but afterwards, with this knowledge on the part of both companies, the agent of the machine company, with the approval of the brewery company, put the tank upon these insufficient supports, and commenced filling it with water, and sent one of its servants on the roof, who had no notice of the danger. While he was on the roof, the supports of the tank gave way, and he fell with the roof, and was killed. Held, that the companies were jointly liable for his death. *Consolidated Ice Mach. Co.* v. *Keifer* (1890) 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 699, 25 N.E. 799.

Where an owner of land through which an adjoining owner has a right of way for a water-supply pipe employs another to grade the lot containing the pipe, makes no provision in the contract for protection of the pipe, fixes the grade line himself, and is present most of the time while the grading is in progress and when the pipe is cut by the contractor and promptly adopts the act as his own, he cannot escape liability therefor on the ground that it was the act of the contractor. *Reynolds* v. *Braithwaite* (1889) 131 Pa. 416, 18 Atl. 1110.

(*b*) The judge who delivered the opinion of the court in *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461, laid it down, as his personal opinion merely, that, under a contract which gave the defendant's engineer the right to indicate the places in which the earth of the excavation should be deposited, the defendant was bound to furnish space for the deposit of waste material, and that, if it did not, the inference was justifiable that it assented to or procured the contractors to cast such material upon plaintiff's land.

For a case in which the mere fact of non-interference was held not to be conclusive against the defendant, see *School District* v. *Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627, as stated in § 73, note (e), *ante*.

(*c*) On this ground the action was held maintainable in a case where damages were sought for the wrongful appropriation of the plaintiff's lands. *Bloomfield R. Co.* v. *Grace* (1887) 112 Ind. 128, 13 N.E. 680. The court said: "The act of a contractor in appropriating real estate and devoting it to the purpose of constructing a railroad can not be considered the act of an independent contractor, for the corporation alone has the power to appropriate the private property to its use. In attempting to appropriate the land, the contractor cannot be considered as simply

VIII. LIABILITY OF EMPLOYER AFTER HE HAS ASSUMED CONTROL OF THE SUBJECT-MATTER OF THE WORK EXECUTED BY THE CONTRACTOR.

75. Generally.—In § 41, *ante*, a large number of decisions have been cited, which show that the doctrine which declares an employer to be exempt from liability for the collateral negligence of an independent contractor has frequently been applied, where the dangerous conditions to which the accident in suit was traceable were of a more or less permanent character. But it is clear that the immunity thus conceded is predicable only in respect to those cases in which the injury was received while the stipulated work was in progress. As soon as the control of the subject matter of the contract has been transferred to the employer, as a result of either of the completion or stoppage of the work, he incurs the responsibilities which the law attaches to the exercises of that control; and the mere fact that the dangerous conditions which caused the injury were originally created by the negligence, or other tortious act of a contractor, will not afford him any protection ,if he permits them to continue after it is in his power to remedy them(*a*).

Upon this ground the employer is held liable in two classes of cases:

---

engaged in the work of constructing the road; he really acts for and as the corporation. . . . Doubtless, the corporation would not be bound if he transcended his authority, unless it adopted or ratified his a[illegible] but where, as here, it does adopt his act, by receiving and adopting its fruits, it is undoubtedly bound."

One of the cases in which, under the Georgia Civ. Code, of 1895, § 3819, the independence of a contract is no defence is "When the employer ratifies the unauthorized wrong of the contractor." Construing this provision in a case where a railway embankment had been so constructed by the contractor as to cause a nuisance, the court held that, as the defendant company did not take possession of the road until several months after the time when the plaintiffs received the injury from the nuisance, and there was no evidence that the nuisance had been brought to its knowledge, it could not be said that the defendant had ratified any act of the contractor which created a nuisance. *Atlanta & F. R. Co.* v. *Kimberley* (1891) 87 Ga. 161, 27 Am. St. Rep. 321, 13 S.E. 277.

(*a*) "If one employs a contractor to do a work not in its nature a nuisance, but when completed it is so, by reason of the manner in which the contractor has done it, and he accepts the work in that condition, he becomes at once responsible for the creation of the nuisance, upon a principle very similar to that which makes a principal responsible for unauthorized wrongs committed by his agent by ratifying them." *Vogel* v. *New York* (1883) 92 N.Y. 10, 44 Am. Rep. 349.

See also the cases cited in the following notes to this section, and in note (a) to the following section.

(1) Where the dangerous conditions resulted from the execution of a contract which having for its object the construction or formation of a thing which had previously had no existence (*b*).

(*b*) In *Cleghorn* v. *Taylor* (1856) 18 Sc. Sess. Cas. 2d series 664, where a chimney-can fell through a skylight in the adjoining house and damaged the plaintiff's property, and it appeared that the accident was due to the unskilful manner in which it had been attached by the master tradesman employed to erect it, the judges held that the controlling principle in the case was, that every proprietor is bound to keep his property in such a condition that it shall not be a cause of injury to others. Whether therefore the tradesman was a mere servant, as was the opinion of most of the judges, or a contractor, the defendant was liable, for the reason that the work had been completed, and given over to him, and that he had become after such completion, as much responsible for the insecure condition of the chimney-can as for the ruinous state of any other part of his premises, supposing an injury to have resulted therefrom to a coterminous proprietor. Lord Wood remarked that, in all the English and other cases cited, in which the employer had been relieved from liability, the injury had been caused by the tortious act of the contractor during the progress of the work, and while, as yet the subject-matter, so far as the work was concerned, might be said to have been in possession of the contractor and his servants, for the purpose of being carried on and completed, and under his independent control. The learned judge then proceeded as follows: "It seemed to be considered extravagant to suppose that by the completion of the work, and the reception of it by the principal, any liability should attach to him for loss caused by its having been executed in an insecure and insufficient manner; but it appears to me to be the more unreasonable position to maintain that the original obligation of the proprietor should not have effect, after a work which a tradesman has been employed to perform has been finished, and is out of his hands, and the whole subject, with that work as a part of it, is again in the uncontrolled use and occupancy of the proprietor. When that takes place, I apprehend that the sound view is, that the proprietor stands, with reference to his coterminous proprietors in the same situation as to his whole property, without exception of any repairs or alterations that may have been made upon it, and that if, by the imperfect or insecure execution of the latter, loss is caused to an adjoining property, he is responsible just as much as he would be, had it been caused by defect or insecurity in any other part of his premises. In any other view, after several different repairs or improvements or a property have been made, the subject, as regards any claim for damage caused by their insecure and imperfect execution, would stand, (for years it might be), with as many separate responsibilities as there were separate and distinct pieces of work done by separate tradesmen, the proprietor all the while remaining free from all responsibility. I think such a state of things would be inconsistent with justice, and with every consideration of general policy and convenience." Lord Cowan referring to the fact upon which stress had been laid, that the work had been completed only about a month before the accident occurred, remarked that this plainly could not affect the principle of liability.

In connection with this case it will be useful to refer to another in which the proprietor of the house had been compelled to pay damages to a tenant whose goods had been injured by an overflow of water from a supply pipe which had been insufficiently closed by a plumber employed by such proprietor. The plumber was held liable to him for the expense to which he had thus been put, although the work had been done four years before the accident occurred. *McIntyre* v. *Gallagher* (1883) 11 Sc. Sess. Cas. 4th series, 64.

Where a steamer was injured by coming in contact with one of the sight-piles, driven into the channel of a river by contractors for the erecting of a railway bridge, who, under their contract, were bound to "provide all necessary machinery, etc., and to furnish (and remove, when done with) all scaffolding and piles that might be used while building," it was argued by the railway company, that they were not liable for the negligence which caused this injury, because the piles were not placed in the channel by their servants, but by those of the contractors; and that the case was not altered by the fact that the contractors were directed to do so by the engineers, who were the servants of appellants. This contention was rejected by the court in the following words: "If the contractors had proceeded to complete their contract, and left the piles in the condition complained of this defense to the action might have availed the appellants. But as the driving the piles for the legitimate purpose of the erection was by authority of the law and in pursuance of the contract, the contractors had done no wrong in placing them there. The nuisance was the result of the negligence in cutting off the piles, not at the bottom of the river, but a few feet under the surface of the water. This the contractors were bound to do, after the piles had served their legitimate purpose in the construction of the bridge, and after they had completed their contract. But before this, the railroad company determined to discontinue the erection of the bridge. They dismissed the contractors from the further fulfilment of their contract. Under such circumstances, it became the duty of the appellants to take care that all the obstructions to the navigation, which had been placed in the channel by their orders, and for the purpose of their intended erection, should be removed. The nuisance which resulted from leaving the piles in this dangerous condition was the consequence of their own negligence or that of their servants, and not of the contractors." *Philadelphia, W. & B. R. Co.* v. *Philadelphia, & H. de G. Steam Towboat Co.* (1859) 23 How. 209, 16 L. ed. 433.

The owner of land, who makes a contract with a firm of masons, by which the latter are to furnish all the materials and labor in building a party wall half on his land and half on the land of an adjoining owner, is liable in tort to such adjoining owner, after the wall has been completed and accepted, for an injury to his property by the fall of the wall, resulting from its defective and unsafe condition, whether owing to his own negligence or to that of the masons. *Gorham* v. *Gross* (1878) 125 Mass. 232, 28 Am. Rep. 234. The court said: "Assuming that the relations of the masons to the defendants was that of contractors, the former alone would be responsible to a third person for any injury caused by their negligence in a matter collateral to the contract, as, for instance, in depositing materials, handling tools, or constructing temporary safeguards, while doing the work; but where the very thing contracted to be done is improperly done, and causes the mischief upon the land of another, the employer is responsible for it, at least when it occurs after the structure has been completed to his acceptance."

In *Mulohey* v. *Methodist Religious Soc.* (1878) 125 Mass. 487 where the servant of a painter was injured by reason of the defects of a scaffold erected for the principal employer by a co-contractor of the painter, the court held that, while the defendants might not be liable for an injury occasioned by the negligence of such co-contractor in the course of building the staging and before its completion, they were responsible for any injury which, after it had been accepted by them, might result from its negligent construction .. persons whom they invited to use it.

In *Khron* v. *Brock* (1887) 144 Mass. 516, 11 N.E. 748, where it was a disputed question whether one B. who had contracted with the defendant to make certain repairs on the roof of his house, had completed his contract, the court expressed its disapproval of instructions requested, which, if given, would have relieved the defendant from any responsibility, if the carelessness of B. in leaving a certain piece of zinc unfastened was the primary cause of the injury. Such instructions would necessarily imply that the owner of the building was not responsible for the unsafe

condition, even if the contractor had completed his contract and had ceased to work.

If a person builds and maintains upon his premises a chimney so that, if it should fall, it will fall upon and injure the adjoining premises, he is bound, in the exercise of proper care, to construct it so that it will withstand the gales which experiences shows are reasonably to be anticipated in that locality, and he is liable for injuries caused by the neglect of his obligation in this respect; and the fact that he had the chimney examined by an experienced mason, who pronounced it safe, and relied upon his opinion, constitutes no defence. *Cork* v. *Blossom* (1894) 162 Mass. 330, 26 L.R.A. 256, 44 Am. St. Rep. 362, 38 N.E. 495.

If a person employs a contractor to construct a drain from his cellar into the common sewer in the street, through a plank barrier which surrounds, beneath the surface of the street, the block of buildings in which the cellar is situated, and the work is so negligently and improperly done that, after it is finished, tide water flows through the opening made in the barrier, and through the cellar into an adjoining cellar, the person employing the contractor is liable for the damage caused to the owner of the adjoining cellar. *Sturges* v. *Theological Educ. Soc.* (1881) 130 Mass. 414, 39 Am. Rep. 463. The court said: "In the case at bar, the defendant had the right to make an opening through the barrier for the purpose of laying a drain, but it was its duty to close it securely, so that the cellars should be protected from the tide. Having employed an independent contractor, it is not responsible for his negligent acts while doing the work, because in respect of such acts he is not its servant; but, if the work after it was done created a nuisance, and caused injury to the plaintiff, it is responsible. The jury would have been authorized in finding that the cause of the plaintiff's injury was the failure of the defendant to make the barrier tight after laying the drain. It was its duty to do this, and it cannot shield itself from responsibility by showing that it employed a contractor to do the work who was negligent."

In *McCamus* v. *Citizens' Gaslight Co.* (1863) 40 Barb. 381, where the filling of a trench was not properly packed and gave way under a horse and his rider, the court said: "that, whether the permission given to the defendants to lay their pipes in the streets was or was not accompanied by a condition to that effect, "it was their duty to restore the street to a condition of safety to passengers over it; and they cannot avoid the consequences of a failure to do so by showing that they contracted with others to perform their duty for them."

In *Wilkinson* v. *Detroit Steel & Spring Works* (1889) 73 Mich. 405 41 N.W. 490 (slate roof of rolling-mill split open and a fragment fell on plaintiff), the court remarked that, if the testimony was believed, there had been a trap constructed according to defendant's plans, dangerous to human life, and liable at any time to fall upon and injure persons or property in the highway. The defendant therefore could not escape liability by saying: "It was built according to plans which I procured, by a person whom I employed. I acted in good faith, and with reasonable care, in selecting my architect and builder and therefore I have discharged my whole duty in the matter.' The reason why this is not a sufficient answer is plain. The injury does not arise from the act of the contract or during the performance of a work over which defendant had no control. It has employed a man to do the lawful thing in an unlawful manner. It employed him to construct a building which, when done, necessarily resulted in the creation of a nuisance. It not only directed the act to be done, but it maintained the nuisance until it fell, and did the injury complained of."

A principal contractor who receives a structure in defective condition from a sub-contractor makes it his own work, and is jointly liable with the sub-contractor for injuries caused by its defects. *Carey* v. *Courcelle* (1865) 17 La. Ann. 108, distinguishing *Peyton* v. *Richards* (1856) 11 La. Ann. 62, as being a case in which the work had not yet been delivered.

(2) Where the dangerous conditions arose from the performance of a contract which provided for repairing or otherwise altering a thing which had previously existed and had constituted a part of the employer's property(*c*).

One is liable for an injury caused by the slipping of a stone which was negligently placed on the sidewalk leaning against a tree in front of his premises and left there more than a year, although it was placed there by an independent contractor. *Skelton* v. *Larkin* (1894) 82 Hun, 388, 31 N.Y. Supp. 234.

The fact that the bricks were piled in the street gutter by an independent contractor does not relieve the employer from liability for the destruction of a foundation wall caused by the diversion of water by bricks across an excavation and against the wall, after the contract relating to the bricks had been fully performed, although the contractor was at the time engaged in the performance of another and distinct contract with the employer relating to the excavation. *Bohrer* v. *Dienhart Harness Co.* (1898) 19 Ind. App. 489, 19 N.E. 296. Affirming (1896) 45 N.E. 668.

That a ladder which, during a high wind, fell upon one passing along the street, was left in position by an independent contractor, after he had completed the painting of the building, does not relieve the owner or municipality from responsibility for the maintenance of the nuisance. *Moore* v. *Townsend* (1899) 76 Minn. 64, 78 N.W. 880. The court said: "By employing an independent contractor the owner or occupant of the building could not relieve themselves of the continuing duty which they owed to the public not to create or maintain a public nuisance on their premises. Nor could the village absolve itself of a like duty in respect to permitting a nuisance to be maintained partly or wholly, in its streets."

In *Bailey* v. *New York* (1842) 3 Hill 532, 38 Am. Dec. 669, Affirmed in (1845) 2 Denio, 433, the defendants were held liable for injuries which had been caused to the lands of the plaintiff by the negligent construction of a dam which had been built by contractors for the defendants. The decision was put mainly upon the ground that the defendants were the owners of the property upon which the dam that occasioned the injury was built; that the dam was itself a nuisance; that the defendants by sustaining and continuing the nuisance were in effect the authors of the injury; and that it was an incidental obligation attached to the ownership of real estate that it should not be made the instrument of damage to others.

See also cases cited in the next section, and in § 72, *ante*.

(*c*) The defendant became the lessee and occupier of a house, from the front of which a heavy lamp projected several feet over the public foot-pavement. As the plaintiff was walking along in November, the lamp fell on her and injured her. In the previous August the defendant had employed an experienced gas-fitter, C., to put this lamp in repair. At the time of the accident a person employed by the defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron or bracket from which the lamp hung, and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination it turned out that the fastening by which the lamp was attached to the lamp-iron wis in a decayed state. The jury found that there had been negligence on the part of C., but no negligence on the part of the defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of the defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused it to fall:—Held, that the plaintiff was entitled to the verdict. *Tarry* v. *Ashton* (1876) L.R. 1

If the defect in work accepted from the contractor was caused, after its completion, by the manner in which other work, not embraced in the contract, was done by the workmen of the employer, this fact is sufficient to render the employer liable

---

Q.B. Div. 314, 45 L.J.Q.B.N.S. 260, 24 Week. Rep. 581, 34 L.T.N.S. 97, Blackburn, J., said: "It appears that the defendant came into occupation of a house with a lamp projecting from it over the public thoroughfare, which would do no harm so long as it was in good repair, but would become dangerous if allowed to get out of repair. It is therefore not a nuisance of itself. But if the defendant knowingly maintained it in a dangerous state he would then be indictable for the nuisance. . . . I do not wish to decide more than is necessary; and if there were a latent defect in the premises, or something done to them without the knowledge of the owner or occupier by a wrongdoer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition, I doubt—at all events, I do not say—whether or not the occupier would be liable. But if he did know of the defect, and neglect to put the premises in order, he would be liable. He would be responsible to this extent, that as soon as he knew of the danger he would be bound to put the premises in repair or pull them down. So also the occupier would be bound to know that things like this lamp will ultimately get out of order, and, as occupier, there would be a duty cast upon him from time to time to investigate the state of the lamp. If he did investigate, and there were a latent defect which he could not discover, I doubt whether he would be liable, but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would clearly be answerable for the consequences. Now in the present case there is ample evidence that in August the defendant was aware that the lamp might be getting out of repair, and, it being his duty to put it in repair, he employs Chappell to do so. We must assume, I think, that Chappell was a proper person to employ; and I may observe that he was clearly not the defendant's servant, as the jury say, but an independent contractor. But it was the defendant's duty to make the lamp reasonably safe, the contractor failed to do that; and the defendant, having the duty, has trusted the fulfilment of that duty to another who has not done it. Therefore the defendant has not done his duty, and he is liable to the plaintiff for the consequences. It was his duty to have the lamp set right; it was not set right."

Lush, J., said: "The question is, what is the duty of a person having a lamp projecting from his premises over the highway for his own purposes? Is it his duty to maintain it in a safe state of repair, or only to employ a proper person to put it in repair? Surely the mere statement is enough to shew that the duty must be in the first proposition. A person who puts up or continues a lamp in that position, puts the public safety in peril, and it is his duty to keep it in such a state as not to be dangerous; and he cannot get rid of the liability for not having so kept it by saying he employed a proper person to put it in repair."

This case was cited and followed in one where trespassers pulled down a wall at the end of a road, so as to open a passage to a piece of land which had been laid out in building lots, and left six or eight inches of the wall standing. The court laid down the general rule that, where property abutting on a highway becomes, through the wrongful act of strangers a nuisance to the public lawfully using the highway, the owner of such property has a duty cast upon him, from the moment he becomes aware of the danger to take steps to prevent his property from becoming a source of injury to the public. *Silverton* v. *Marriott* (1888) 59 L.T.N.S. 61, 52 J.P. 677.

for the injury, although his workmen were superintended in the work by the contractor(*d*).

Whether the work has been accepted in such a sense as to render the employer responsible thenceforward for the condition of the subject-matter is to be determined from the circumstances in evidence(*e*). Acts from which the assumption of a practical control over the subject-matter of the contract in its completed state is inferable will render the employer chargeable with the same measure of responsibility as a formal acceptance of the results(*f*).

76. Necessity of showing that dangerous conditions were known to the employer.—In several cases in which the rule discussed in the preceding section has been applied, it has been expressly declared or assumed by the courts that the imputation of liability is conditional upon the production of evidence which shows that the employer had either actual or constructive knowledge of the dangerous conditions which caused the injury(*a*).

(*d*) *Berberich* v. *Ebach* (1890) 131 Pa. 165, 18 Atl. 1008.

(*e*) Where the general contractor for the construction of a building has sub-let the work of building the walls, the fact that he used the walls for the purpose of doing the wood work upon the building, and paid subcontractor for the material furnished and work done by him is strong evidence to shew that he accepted the walls as a performance of the subcontract, and that the character of both work and materials was satisfactory to and sanctioned by them. *Bast* v. *Leonard* (1870) 15 Minn. 304, Gil. 235.

(*f*) On this ground one who had filled and used a standpipe for supplying water to his customers, was held liable for the flooding of the premises of an adjoining owner on the collapse of the standpipe, although the contractor was at the time trying to remedy a defect therein so as to make it acceptable to the employer. *Read* v. *East Providence Fire Dist.* (1898) 20 R. I. 574, 40 Atl. 760.

(*a*) "The Pennsylvania rule, deducible from all the cases, is, that if the employer, at the time he resumes possession of the work, from an independent contractor, knew or ought to have known, or from a careful examination could have known, that there was any defect in the work, he is responsible for any injury caused to a third person by defective construction." *First Presby. Congregation* v. *Smith* (1894) 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279 (sewer); *Berberick* v. *Ebach* (1889) 131 Pa. 165, 18 Atl. 1008 (stone foundation bulged and brick wall which rested on it fell upon the adjoining premises); *Chartiers Valley Gas Co.* v. *Lynch* (1888) 118 Pa. 362, 12 Atl. 435 (rule recognized, but its applicability was denied as no constructive knowledge was shown)

In a leading California case the court, in holding that, if the injuries complained of had been occasioned after the completion of the dam by the contractors, and its acceptance by the defendants, there could be no doubt of the liability of the latter, said: "Parties for whom work contracted for is undertaken, must see to it before acceptance, that the

work, as to strength and duribility, and all other particulars necessary to the safety of the property and persons of third parties, is subjected to proper tests, and that it is sufficient. By acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties the liability of the contractors has ceased, and their own commenced." *Boswell* v. *Laird*, (1857) 8 Cal. 469, 68 Am. Dec. 345.

In *Fanjoy* v. *Seales* (1865) 29 Cal. 243, where a defectively constructed cornice gave way under the weight of a painter's staging the law is thus laid down in the opinion: "The house was accepted by the defendant from the contractors some time before it was painted, and if at that time or afterward an injury, by reason of its defective construction, happened to any one for which an action might be maintained, the defendant is the person who would be answerable for being the owner and having the control of the property, the law imposes on him the duty of maintaining it in such a condition as to occasion no injury to others who are without fault. In such case, the doctrine of respondeat superior can have no application, because the relation of superior and subordinate did not exist when the accident happened. If the house was insufficiently built, the defendant was not bound to accept it from those who had contracted to build it in a substantial and workmanlike manner. By accepting it and allowing it to remain in its then condition, he assumed to third persons who might become concerned its sufficiency for the uses and purposes for which it was constructed." It was declared, therefore, that, if the cornice had been insufficiently fastened to the wall when the defendant had accepted the house as finished as to break away from it by its own weight, and in its fall had injured a passer-by on the sidewalk beneath, there would be no doubt of the defendant's liability. It was considered, however, that cornices are intended and constructed for ornamental purposes not for the use to which the one in question was put by the painters, and that the general custom of painters to use cornices for supporting the stagings and platforms necessary for the prosecution of their work of painting houses did not impose on the owners thereof the duty of constructing such cornices sufficiently strong to sustain burdens for which they were not designed.

If the materials furnished for a wall of a building by a sub-contractor, or the work done by him, were of such a character that the wall was unsafe and unfit for the purposes for which it was intended, and the principal contractor knew this, or might have known it in the exercise of reasonable care and diligence, and went on and made use of the wall, and incorporated his own work with it, and made payments to the sub-contractor, and accepted the work as it proceeded, and if in consequence of the unsafe and imperfect character of the materials so furnished, and the work so done by the sub-contractor, the building fell upon and injured the premises of the plaintiff, the principal contractor is liable for the resulting damage. *Bast* v. *Leonard* (1870) 15 Minn. 304, Gil. 235.

In *Neumann* v. *Greenleaf Real Estate Co.* (1898) 73 Mo. App. 326, recovery was denied on the ground that notice of the dangerous condition of a wall was not brought home to the employer.

In *Houston* v. *Isaacks* (1887) 68 Tex. 116, 3 S.W. 693, an accident was caused, a few days after the city had dismissed a contractor, by a hole which he had left in a street which he had undertaken to gravel, and the defence relied upon was, that no notice of the defect had been given in accordance with a clause of the city charter providing that it should not be liable "to any person for damages for injuries caused from streets, ways, crossings, bridges or sidewalks being out of repair, from gross negligence of said corporation, unless the same shall have remained so for ten days after special notice in writing given to the mayor or street commissioner." This provision, however, was held not to be applicable to the case at bar. The court said: "There may be some reason in requiring notice to the city authorities of a defect accruing from ordinary causes, such as the action of floods, the use of the street by the public, or it may be said from any cause except by the action of the city itself. But

This doctrine would seem to be so thoroughly in accord with the general principles which determine the existence of culpable negligence that it is difficult to see on what grounds its soundness can be successfully impugned in any case of the type now under discussion. It is true that Blackburn, J., in the passage which has been quoted from his opinion in *Tarry* v. *Ashton* (see § 75, note (*c*), *ante*), declined to lay it down categorically that the employer would not be liable for a latent defect; but it may perhaps be assumed that this remark was made *ex abundanti cautela*.

To what extent the employer is bound, when he takes control of the subject-matter of a contract, to enter upon an active investigation for the purpose of ascertaining whether there are any dangerous conditions to be remedied, is a point which cannot be adequately discussed without travelling outside the scope of the present monograph. It will be sufficient to mention that the great weight of authority, in the United States at all events, is in favor of the doctrine, that if the thing which is the subject-matter of the contract can be manufactured or constructed only by a person possessing special skill the party who engages him to manufacture or construct it is entitled, in the absence of facts which would put a prudent man on inquiry, to presume that the work has been properly done and that the thing produced is not in a dangerous condition(*b*).

---

in the present case the city put a contractor to work upon the street, stipulating to have an excavation made which was to be filled with gravel, and, after the work had been begun and the street had been rendered unsafe for travel, discharged the contractor and left the work in an unfinished condition. This action was taken by the very officers to whom the charter required the notice of defects to be given. The city is not sought to be held liable for any injury caused by a defect accruing from any extrinsic cause whatever, but for having by its own procurement made the street unsafe and knowingly left it in that condition."

(*b*) See the cases cited in § 153 of the present writer's treatise on Master and Servant.

The New York cases there mentioned seem to be inconsistent with an earlier ruling in the same State, to the effect that error would have been predicable, if the trial judge had refused to charge that the defendant could not justify on the sole ground that he had purchased the boiler from reputable manufacturers, and that this circumstance is merely one which the jury may properly consider as tending to exculpate him from the charge of negligence. *Losee* v. *Buchanan* (1873) 51 N.Y. 476, 10 Am. R. 623.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] [Nov. 3, 1904.

MONTREAL COAL & TOWING CO. *v.* METROPOLITAN LIFE INS. CO.

Evidence—Verdict—New trial—Life insurance—Conditions of contract — Misrepresentation — Non-disclosure — Accident policies—Warranty—Words and terms—Rule of interpretation.

Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted.

On an application for life insurance, the applicant stated, in reply to questions as to insurances on his life then in force, that he carried policies in several life insurance companies named, but did not mention two policies which he had in accident insurance companies insuring him against death or injury from accidents. The questions so answered did not specially refer to accident insurance, but the policy provided that the statements in the application should constitute warranties and form part of the contract.

Held, affirming the judgment appealed from, the Chief Justice dissenting, that "accident insurance" is not insurance of the character embraced in the term "insurance on life" contained in the application, and, consequently, that the questions had been sufficiently and truthfully answered, according to the natural and ordinary meaning of the words used, and even if the words used were capable of interpretation as having another or different meaning, then the language was ambiguous and the construction as to its meaning must be against the company by which the questions were framed. *Confederation Life Association* v. *Miller*, 14 S.C.R. 330, followed. *Mutual Reserve Life Ins. Co.* v. *Foster*, 20 Times L.R. 715, referred to. Appeal dismissed with costs.

R. C. Smith, K.C., and *Claxton*, for appellants. *Atwater*, K.C., and *Duclos*, K.C., for respondents.

B.C.] BORLAND *v.* COOTE. [Nov. 21, 1904.

Agreement for sale of land—Falsa demonstratio—Position of vendor's signature—Specific performance.

On the conclusion of negotiations between C. and B. as to the sale of two city lots on the corner of Hastings Street and Westminster Avenue, in Vancouver, B.C., C. signed a document as follows:

"Vancouver, June 28th, 1902.—Received from James Borland the sum of ten dollars being a deposit on the purchase of Lots No. 9 and 10, Block No. 10, District Lot 196, purchase price twenty thousand dollars ($20,000.00), the balance to be paid within . . . (10 July) . . . days, when I agree to give the said James Borland a deed in fee simple free from all incumbrances. "JOS. COOTE,

"N.W. Cor. Hastings & Westr. Ave."

The lots on the corner of the streets mentioned were, in fact, lots 9 and 10 in block 9, and the trial Judge found that these were the lots intended to be sold, and also that the words below the signature formed part of the receipt. In an action for specific performance of the agreement for sale of the lands;

Held, affirming the judgment appealed from (10 B.C. Rep. 493), Killam, J., dissenting, that the inaccuracy of the description in the receipt was a mere discrepancy which should be disregarded and the decree made for specific performance in respect of the lots actually bargained for between the parties. Appeal dismissed with costs.

Joseph Martin, K.C., for appellant. *Davis,* K.C., for respondent.

Ont.] [Dec. 14, 1904,

MITCHELL *v.* CANADA FOUNDRY CO.

Negligence—Employer and workman—Volenti non fit injuria—Finding of jury.

In an action claiming compensation for personal injuries caused by negligence, the defendant who invokes the doctrine of volenti non fit injuria must have a finding by the jury that the person injured voluntarily incurred the risk, unless it so plainly appears by the plaintiff's evidence as to justify the trial judge in withdrawing it from the jury and dismissing the action. Appeal dismissed with costs.

Du Vernet, for appellants. *Godfrey,* for respondents.

Province of Ontario.

COURT OF APPEAL.

From Anglin, J.] THE KING *v.* WHITESIDE. [Oct. 10, 1904.

Habeas corpus—Irregularity in caption—Warrant of commitment—Execution in another county without endorsement—Conveying prisoner to first county—Liquor License Act (Ont.), ss. 72, 101—Cr. Code, s. 844.

1. The Court will not upon habeas corpus enquire into any irregularity in the caption.

2. Where a warrant of commitment was issued in one county against the accused who was not then in custody, and he was arrested thereunder in another county without any endorsement of the warrant, and was brought back to the county in which the warrant issued, and there imprisoned as the warrant directed, the irregular arrest is not a ground for releasing the accused on habeas corpus.

The distinction between civil and criminal proceedings pointed out.

Cartwright, K.C., for Crown. *Tremeear*, for the prisoner.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Nov. 1, 1904.

DINI *v.* FAUQUIER

Executors and administrators—Action by administrator before issue of letters of administration—Stranger to estate—Order for issue—Judicial act—Time—Relation back.

Letters of administration issued after action and before the trial, where the plaintiff brings his action as administrator, are sufficient to support the action, even where the plaintiff has no interest in the estate.

Fell v. *Lutwidge*, Barnardiston Ch. 319, followed. *Humphreys* v. *Humphreys*, 3 P. Wms. 349; *Trice* v. *Robinson*, 16 O.R. 433; *Chard* v. *Rae*, 18 O.R. 371; and *Doyle* v. *Diamond Flint Glass Co.*, 7 O.L.R. 747; 40 C.L.J. 783, considered.

The order of the judge of the proper Surrogate Court, on the day this action was begun by the issue of the writ of summons, that letters of administration should be issued to the plaintiff, was a judicial act and was to be treated as taking precedence in point of time over the issue of the writ, which was not a judicial act; and the order was such a declaration of the plaintiff's right to obtain letters as would make them, when issued, relate back to the date of the order.

Judgment of IDINGTON, J., 40 C.L.J. 479, reversed.

W. M. Boultbee, for plaintiff. *D. C. Ross*, for defendants.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Nov. 5, 1904.

BESSEMER GAS ENGINE CO. *v.* MILLS.

Company—Extra-provincial corporation—Sale of goods without license—Resident agent.

The plaintiffs, a foreign corporation not licensed to do business in Ontario, authorized F., a resident of the Province, to sell their engines at certain specified prices, upon commission. F. never went out to solicit orders, but took only those which came to him at his place of business. He sold an engine for the plaintiffs to the defendant, and this action was brought to recover the price.

Held, that F. was a resident agent or representative of an extra-provincial corporation, within the meaning of s. 6 of 63 Vict. c. 24(O.), and the plaintiffs, being unlicensed, were, by s. 14, incapable of maintaining the action.

Judgment of the County Court of Lambton reversed.

Hanna, for defendant. *Riddell*, K.C., for plaintiffs.

Street, J.] IN RE MARTIN. [Nov. 24, 1904.

Will—Restraint upon alienation—Validity—Summary application to determine—Rule 938.

A testator devised lands to his sons, subject to a restraint upon alienation. The sons, desiring to mortgage the lands devised, applied under Rule 938 for a determination of the question whether the restraint was valid.

Held, that Rule 438 gives no authority to determine such a question.

J. M. Ferguson, for the devisees, the applicants. *J. E. Day*, for the executors. *J. A. Walker*, K.C., for the proposed mortgagees.

Britton, J.] IN RE CLARK. [Nov. 19, 1904.

Will—Construction—Gift to class—Death of member of the class before the testator—Right of children of deceased member of class.

The testator, who at the time of making his will in 1891, had four children living at Barnstable, England, devised two houses to his "children at Barnstable, England, to be divided among them in equal shares." One of the four children died after the making of the will and before the testator, leaving children.

Held, applying the principle of *Re Williams* (1903), 5 O.L.R. 345, that s. 36 of the Wills Act did not apply and that the children of the deceased child took no share.

W. Bell, for executors and children of testator. *F. W. Harcourt,* for children of deceased child.

Province of British Columbia.

SUPREME COURT.

Full Court.] KING *v.* WILSON. [Nov. 22, 1904.

Pleading—Sale of medical practice—Covenant not to open an office—Injunction restraining from practising—Judgment not supported by pleading.

Defendant agreed with plaintiff "not to open an office or have one for the practice of medicine in, etc." Plaintiff sued alleging that defendant had agreed "to refrain from practising as a physician" and that he had not ceased to practise "as he had agreed to." The relief sought was an injunction "to restrain defendant from practising." Defendant admitted that he had agreed "not to open an office nor to have one for the practise of medicine."

At the trial plaintiff's evidence was directed to proving that defendant in breach of the agreement did "open and have an office," and the defendant relying on the pleadings which had not been amended offered no evidence.

Judgment was given restraining defendant from opening or having an office.

Held, on appeal, that the judgment was not supported by the pleadings and must be set aside.

Sir C. H. Tupper, K.C., for appellant. *Davis,* K.C., for respondent.