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

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I. INTRODUCTORY.

1. General doctrine stated.—In this monograph it is proposed to discuss the effect, and define the limits, of a doctrine which may, according to the standpoint from which it is considered, be stated generally in one or other of these three forms:

(1) Where the injury complained of resulted from the tortious conduct of an independent contractor, the rule which is embodied in the maxim, Qui facit per alium facit per se, is not applicable (*a*). Similar statements are also made with regard to the inapplicability, under such circumstances, of the maxim, Respondeat superior (*b*).

(*a*) *Quarman* v. *Burnett* (1840) 6 Mees & W. 509, 9 L.J. Exch. N.S. 308, 4 Jur. 969, per Parke, B.; *Wiswall* v. *Brinson* (1849) 32 N.C. (10 Ired. L.) 554.

(*b*) "The only principle upon which one man can be liable for the wrongful acts of another is, that such a relation exists between them, that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant. The maxim of the law is: Respondeat superior. It is only applicable in cases where the party sought to be charged stands in the relation of superior to the person whose wrongful act is the ground of complaint." *Blackwall* v. *Wiswall* (1855) 24 Barb. 355. Similar phraseology is found in *Bibb* v. *Norfolk & W.R. Co.* (1891) 87 Va. 711, 14 S.E. 163; *Cincinnati* v. *Stone* (1855) 5 Ohio St. 38; *Du Pratt* v. *Lick* (1869) 38 Cal. 691; *Hilsdorf* v. *St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352; *Deford* v. *State* (1868) 30 Md. 179.

"The general principle to be extracted from them [i.e., the authorities] is that a person, either natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant or principal and agent exist between them; that, when an injury is done by a party exercising an independent employment, the party employing him is not responsible to the person injured." *Painter* v. *Pittsburgh* (1863) 46 Pa. 213.

"It seems to be settled law that, where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular

(2) A person who employs an independent contractor to perform a specific piece of work is not liable for injuries caused by any merely collateral or casual torts which he may commit while the work is in progress (*c*).

(3) An employer is not liable for an injury resulting from the performance of work deputed by him to an independent contractor, unless that work was positively unlawful in itself, or the injury was the necessary consequence of executing the work in the manner provided for in the contract, or subsequently prescribed by the employer, or was caused by the violation of some absolute, non-delegable duty which the employer was bound, at his peril, to discharge, or was due to some specific act of negligence on the part of the employer himself (*d*). It will be observed that the

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standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the person to whom the contract is let." *Vincennes Water Supply Co.* v. *White* (1890) 124 Ind. 376, 24 N.E. 747.

(*c*) "No one can be made liable for an act or breach of duty, unless it be traceable to himself or his servants or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong of negligence, the employer is not answerable." *Pickard* v. *Smith* (1861) 10 C.B.N.S. 470, 4 L.T.N.S. 470.

For other statements of a similar tenor see § 39, post.

(*d*) The various qualifying elements here mentioned are not all referred to in any single judicial enouncement of the doctrine; but, as each of them embodies the effect of certain distinct groups of cases which will be reviewed in subsequent sections, they are here collected in the same statement, for the purpose of showing the full extent of the limitations to which the doctrine is subject. The following paragraphs will serve as sufficient illustrations of the language used by courts and text-writers.

In a leading case Cockburn, Ch. J., refers to 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." *Bower* v. *Peate* (1876) L.R. 1 Q.B. Div. 321.

"It is now settled in that country [i.e., England] that defendants, not personally interfering or giving directions respecting the progress of a work, but contracting with a third person to do it, are not responsible for a wrongful act done, or negligence in the performance of the contract, if the act agreed to be done is legal." *Painter* v. *Pittsburgh* (1863) 46 Pa. 213; *Edmundson* v. *Pittsburgh, M. & Y.R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

The doctrine as to the non-liability of an employer for the acts of an independent contractor "has regard to cases where the contract is entirely lawful, and where the owner of the property upon which the contract is to be executed, can lawfully commit its performance to others." *Allen* v. *Willard* (1868) 57 Pa. 374.

"Where work which does not necessarily create a nuisance, but is in itself harmless and lawful, when carefully conducted, is let by an employer, who merely prescribes the end, to another who undertakes to accomplish the end prescribed, by means which he is to employ at his discretion, the latter is, in respect to the means employed, the master. If, during the progress of the work, a third person sustains injury by the negligent use of the means employed and controlled by the contractor, the employer is not answer-

torts which are covered by the descriptive epithets "collateral" and "casual," as used in the second form of statement, are identical with those which fall outside the scope of the exceptive clauses in the third.

The doctrine thus enunciated is a protection to a principal contractor in any case where the sole cause of the injury complained of was the negligent or otherwise wrongful act of a sub-

able." *Wabash, St. L. & P.R. Co.* v. *Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N.E. 296.

"When a contractor takes entire control of a work, the employer having no right of supervision or interference, the employer, if he is not negligent in his selection, is not liable to third parties for the contractor's want of care in the performance of it." *Lancaster Ave. Improv. Co.* v. *Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

"If damage result from the manner in which a contractor chooses to execute a perfectly valid contract without the proprietor's interference or direction, the latter is not responsible." *Davie* v. *Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395.

"It is well settled that, where the independent contractor and the contractee contract for the performance of work that is lawful in itself, and the work is performed in an unlawful manner, either by the wrongful or negligent execution of the work, and resulting in injury to others, the contractee is not liable in damages to such persons for the injury." *James* v. *McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S.W. 435.

"The great weight of the modern decisions upon this question establishes the rule that where the relation of independent contractor exists as to the use of real property, and the party employed is skilled in the performance of the duty he undertakes, and the thing directed to be done is not in itself a nuisance, or will not necessarily result in a nuisance, the injury resulting not from the fact that the work is done, but from the negligent manner of doing it by the contractor or his servants, the owner cannot be made to respond in damages." *Robinson* v. *Webb* (1875) 11 Bush 464.

"If the work to be done is committed to a contractor to be done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work." *Bailey* v. *Troy & B.R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129.

"The employer is not liable either for the fault or for the negligence of the independent contractor unless he expressly directed the wrongful or improper act." Lord Gifford in *Stephens* v. *Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 535.

Where parties enter into a contract which is in itself lawful, and the contractor, in carrying on his work does anything injurious to another, he alone is responsible. *Woodhill* v. *Great Western R. Co.* (1855) 4 U.C.C.P. 449.

"The general rule is, that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his sub-contractors, or his servants, committed in the prosecution of such work." 1 Thomp. Neg. 1st ed. s. 22, p. 899; 2nd ed. s. 621, cited with approval in several cases; *e.g.*, *Fink* v. *Missouri Furnace Co.* (1884) 82, Mo. 276, 283, 52 Am. Rep. 376.

Under the plea of the general issue alone, there is no error in charging to the effect that, "where one has a lawful work to do, and employs another, who has an independent business of his own including work of that class, to do it, and where the employer does not himself exercise any direction as to how it shall be done, he is not responsible for any wrongs that the employee may commit in the course of the work." *Harrison* v. *Kiser* (1887) 79 Ga. 588, 4 S.E. 320.

contractor (*e*). A fortiori the employer of the principal contractor is not liable for the torts of a sub-contractor (*f*).

In one of the American States the common law doctrine has been formally adopted in legislative enactments (*g*). In another the construction placed upon a provision of a less explicit character has been determined by the assumed existence of that doctrine (*h*).

2. History of the doctrine.—(*a*) *Bush v. Steinman considered.*—The doctrine now under discussion is one of comparatively recent growth. An examination of the language used by the judges, the authorities cited, and the arguments relied upon by the defendant's counsel, in the earliest of the reported cases on the subject, which was decided towards the close of the eighteenth century, will make it apparent that at that date the responsibility of an employer for the torts of a contractor was deemed to be the same in kind and degree as his responsibility for the torts of a servant or an agent (*a*). The influence of this decision is distinctly

(*e*) *Rapson* v. *Cubitt* (1842) 9 Mees & W. 710, Car. & M. 64, 11 L.J. Exch. N.S. 271, 6 Jur. 606; *Overton* v. *Freeman* (1852) 11 C.B. 867, 3 Car. & K. 52, 21 L.J.C.P.N.S. 52, 16 Jur. 65; *Pearson* v. *Cox* (1877) L.R. 2 C.P. Div. 369; *Wray* v. *Evans* (1876) 80 Pa. 102; *Slater* v. *Merserau* (1876) 64 N.Y. 138; *Powell* v. *Virginia Constr. Co.* (1890) 88 Tenn. 692, 13 S.W. 391; 17 Am. St. Rep. 925; *Schutte* v. *United Electric Co.* (N.J. 1902) 53 Atl. 204.

(*f*) *McLean* v. *Russell* (1850) 12 Sc. Sess. Cas. 2nd Series, 887; *Cuff* v. *Newark & N.Y. R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205; *Aldritt* v. *Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N.W. 741; *St. Louis A. & T. R. Co.* v. *Knott* (1891) 54 Ark. 424, 16 S.W. 9; *Moore* v. *Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

(*g*) "The employer generally is not responsible for torts committed by his employee when the latter exercises an independent business, and it is not subject to the immediate direction and control of the employer." Georgia Code, 1895, s. 3818.

(*h*) Article 2320 of the Revised Code of the Louisiana runs as follows: "Masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed; . . . responsibility only attaches when the masters or employers, or teachers, and artisans, might have prevented the act which caused the damage, and have not done it." This provision was held not to be applicable to a case in which the injury resulted from the manner in which an independent contractor employed by the defendant had performed work over which the defendant himself had no supervisory control. *Gallagher* v. *South-Western Exp. Ass.* (1876) 28 La. Ann. 943.

(*a*) *Bush* v. *Steinman* (1799) 1 Bos. & P. 404. The facts upon which recovery was allowed were these: A. having a house by the roadside, contracted with B. to repair it for a stipulated sum; B contracted with C. to do the work; and C. with D. to furnish the materials. The servant of D. brought a quantity of lime to the house and placed it in the road, the result being that the plaintiff's carriage was overturned. The contention of defendant's counsel was that the liability of the principal to answer for his agents is founded on the superintendence which he is supposed to have over them, (1 Bl. Com. 431), and that it was not in

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

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

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

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

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

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

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

traceable in two Nisi prius rulings made a few years afterwards (*b*).

(*b*) *Doctrine that different rules apply to real and to personal property.*—It was not until 1826 that the points involved in *Bush* v. *Steinman* were again discussed by a court of review. In that year the judges of the King's Bench were equally divided as to the propriety of a nonsuit which had been directed by Abbott, Ch.J., in an action brought to recover damages for an injury caused by the negligent driving of a coachman who had been sent with a pair of horses which the defendant had hired from a jobmaster to draw his carriage (*c*). The extract given in the

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(*b*) In *Sly* v *Edgley* (1806) 6 Esp. 6, the plaintiff was allowed to recover for an injury received through falling into a sewer opened by a bricklayer when he had employed jointly with others. One of the points taken by defendant's counsel was that the bricklayer was not the servant of the defendant, for whose acts he might be made responsible; that, as he was employed to do a certain work, and the mode of doing it, which had caused the injury, was entirely his own act, he only should be liable. According to the report Lord Ellenborough disposed of this contention by the remark: "It was the rule of respondeat superior; what the bricklayer did was by the defendant's direction; he had employed the bricklayer."

In *Mathews* v. *West London Waterworks Co.* (1813) 3 Campb. 403, where a verdict was obtained against a waterworks company for an injury resulting to the plaintiff from the negligence of men employed by certain pipe-layers, with whom the company had contracted for the laying down of certain water-pipes in a public street, Lord Ellenborough said he had "no doubt" as to the defendant's liability. The precise rationale of this ruling, however, is not very clearly apparent. The report is short and unsatisfactory, and the particular circumstances are not detailed. See the comments of Maule, J., in *Overton* v. *Freeman* (1852) 11 C.B. 867, 3 Car. & K. 52, 21 L.J.C.P.N.S. 52, 16 Jur. 65.

(*c*) *Laugher* v. *Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.K.B. 309. As the case was one of exceptional importance, and a difference of views developed itself among the judges of the King's Bench when the motion for a new trial was argued, it was ordered that the question submitted should be discussed before the whole body of the judges of the common law courts. The opinions finally delivered in the King's Bench, therefore, represent the results of an unusually exhaustive and searching examination of principles and authorities. It should be observed that two separate and distinct questions were suggested by the evidence, viz: (1) whether the effect of a contract of employment was to render the employer liable for the torts of the person employed, irrespective of whether the latter was a servant or a contractor, and (2) whether, supposing that no such general liability could be predicated, the coachman might not be regarded as the special servant pro tempore of the defendant, as long as he was driving the carriage. Confining our attention to the former question, with which alone we are now concerned, we find that Holroyd and Bayley, JJ., were of the opinion that the nonsuit was erroneous, their reliance being placed upon *Bush* v. *Steinman*, which was considered to have established the general propositions, that "responsibility is not confined to the immediate master of the person who committed the injury, and that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen." It should be noted that, in the case cited, the liability of the hirer of a job carriage for the negligence of the coachman who is sent with it was taken for granted by Heath, J., in his opinion. The

note below from the opinion of Littledale, J., shows that, even the judges who at this period rejected the broad and unqualified principle enounced in *Bush* v. *Steinman* were still inclined to accept that decision as binding with respect to injuries resulting from the performance of work on or near the employer's premises. This doctrine, that an employer's liability is measured by different standards, according as the negligence complained of was committed in reference to real or personal property, was applied or recognized in several later cases, English as well as American (*d*).

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opposite view was supported by Abbott, Ch.J., and Littledale, J. The former judge considered that if the defendant should be declared responsible simply on the ground of his having had the temporary use and benefit of the horses, it would follow that the hirer of a hackney carriage would be answerable for the negligence of the coachman, and the hirer of a wherry on a river would be answerable for the conduct of a wherryman. A doctrine which led to consequences by which "the common sense of mankind would be shocked" could not be sound. Littledale, J., referring to *Bush* v. *Steinman* and the decisions based upon it, said: "Supposing the cases to be rightly decided, there is this material distinction, that there the injury was done upon, or near, and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that, in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confirmed by the law to himself, and he should take care not to bring persons there who do any mischief to others . . . . It may be said that the defendant in the present case was owner of the carriage, and that therefore the principles of these latter cases apply; but, admitting these cases, the same principle does not apply to personal moveable chattels as to the permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employments, and the mere possession of that, where the care and direction of it is entrusted to such persons, who exercise public employments, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable. Movable property is sent out into the world by the owner, to be conducted by other persons: the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it."

(*d*) In *Quarman* v. *Burnett* (1840) 6 Mees. & W. 499, 9 L. J. Exch. N.S. 308, 4 Jur. 969, in which the defendant was held not liable upon evidence in its general features was virtually identical with that presented in *Laugher* v. *Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.K.B. 309, Parke, B., incorporated in the judgment which he delivered for the whole court the essential portion of the extract quoted in note (*e*), supra, from the opinion of Littledale, J., and declared that the reasons given by him for making a distinction between the two classes of cases were satisfactory.

Two years afterwards in *Rapson* v. *Cubitt* (1842) 9 Mees. & W. 709, Car. & M. 64, 11 L.J. Exch. N.S. 271, 6 Jur. 606, the same judge again expressed his approval of the same doctrine, saying: "If a man has anything to be done on his

own premises, he must take care to injure no man in the mode of conducting the work." In view of the later English cases, it is somewhat curious that this dictum should have recently been referred to without any expression of disapproval by Smith, L.J., 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.

In *Dutton* v. *Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N.E. 405, Lathrop, J., made the following remark: "Until the case of *Hilliard* v. *Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743, was decided, our decisions were in a somewhat anomalous state. Compare *Sproul* v. *Hemmingway* (1833) 14 Pick. 1, 5, 25 Am. Dec. 350, with *Stone* v. *Codman* (1834) 15 Pick. 297." In the former of these cases the owner of a vessel which was being towed was held not to be liable for a collision caused by the negligence of the crew of a tug-boat. Such a decision is in harmony with the modern rule, but the court cites *Bush* v. *Steinman* with approval, remarking that "it was decided principally on the ground, that the owner of real estate must be taken to be the employer of all those, who are engaged in making repairs for him; and that having the power to control and regulate the use of his own estate, he is bound to do it, in such a manner, that others may not be injured by the mode in which it is used." It is to be observed, moreover, that the court did not regard the contract for the towing as one of employment, but one which created relations similar to those which exist between a freighter and the crew of a general ship, or between a passenger and the crew of a packet. The defendants therefore were not regarded as "independent contractors" in the restricted sense in which that phrase is ordinarily used. In *Stone* v. *Codman*, the plaintiff was allowed to recover damages for an injury to his goods caused by water which escaped from a drain which was being dug from the defendant's house to a common sewer by a mason who procured the materials, and hired the labourers, charging a compensation for his services and disbursements. The decision was put expressly upon the ground that the relation of master and servant existed between the defendant and the mason, a conclusion which, according to the opinion in *Hilliard* v. *Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743, was deduced in a great measure from the fact that there was no contract, written or oral, by which the work was to be done for a specific price, or as a job. Compare cases cited in § 20, post.

In *Lowell* v. *Boston & L. R. Corp.* (1839) 23 Pick. 24, 34 Am. Dec. 33, the defendant was held liable for the damages which the plaintiff, a municipality, had been compelled to pay to a traveller who, as a result of the negligence of a contractor's workmen in omitting to replace the barriers which the plaintiff's agents had set up on each side of a cutting which had been opened through a highway, in the course of grading the defendant's roadbed, had driven into the excavation and suffered serious injuries. The court again expressed its approval of the decision in *Bush* v. *Steinman*, and took the broad ground that, as the work was done for the benefit of the company, under its authority, and by its direction, it was to be regarded as the principal, and that it was immaterial whether the work was done under contract for a stipulated sum or by workmen employed directly by the company at daily wages. This case was explained in *Hilliard* v. *Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743, as being sustainable on the following grounds: that the corporation being intrusted by the legislature with the execution of a public work such as the building of the railway in question, was bound, while the work was in progress, to protect the public against danger; that it could not escape this responsibility by a delegation of its power to others; that the work was done on land appropriated to the purposes of the railway, and under the authority of the corporation, vested in them by law for the purpose; that the barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders; that that servant had the care and supervision of them; and that the accident occurred through the negligence of a servant of the railroad corporation, acting under its express orders. The fact that *Bush* v. *Steinman* was expressly approved is disposed of with the passing remark that the decision of the case before the court did not involve the correctness of the rule in the case cited. The explanation thus given of the rationale of *Lowell* v. *Boston & L. R. Corp.* may be adequate to afford a justification for the decision on the special grounds enumerated. But it will be apparent to everyone who peruses p. 31 of the report in 23 Pick. that the court did not rely upon those special grounds, but upon the

(*c*) *Final rejection of this doctrine.*—That doubts as to the correctness of the doctrine reviewed in the preceding sub-section had been felt by some judges even at the time when its ascendancy seemed to be most assured, may be inferred from the fact that in 1840 Lord Denman intimated that he found great difficulty in accepting it (*dd*). At length, in 1849, it was definitely repudiated by a unanimous judgment of the Court of Exchequer. In the

broad rule embodied in the English case. From a consideration of the language used in these earlier Massachusetts decisions, it is apparent that the laboured attempt which was made in *Hilliard* v. *Richardson* to defend them merely adds one more to the long list of instances in which the courts have taken pains to demonstrate that the actual rulings in cases based upon discarded doctrines were, upon the evidence, reconcilable with the doctrines afterwards adopted.

In *Stone* v. *Cheshire R. Corp.* (1849) 19 N.H. 427, 51 Am. Dec. 192, a person injured by a rock which was thrown out of a blast set off by a contractor who was building a portion of a railroad was held entitled to recover on the ground that, "where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants or by contractors or their servants." This case is virtually overruled in *Wright* v. *Holbrook* (1872) 52 N.H. 120, 13 Am. Rep. 12, where, however, it was suggested that it might stand upon the same principle as *Lowell* v. *Boston & L.R. Corp.* (1839) 23 Pick. 24, 34 Am. Dec. 33, as that decision is explained in *Hilliard* v. *Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743. It is to be observed that, in this later New Hampshire case the court did not go to the length of categorically rejecting the doctrine that the owner of land is liable for acts which a contractor does upon that land for his benefit.

In *Wiswall* v. *Brinson* (1849) 32 N.C. (10 Ired. L.) 554, where the injury was caused by a hole in the street which a contractor employed to move a house had left uncovered, the plaintiff was held entitled to recover. The decision was put upon the ground that the stipulated work was to be done, "in respect to the defendant's property." Considering the date of this case, it is rather surprising to find in the opinion of the majority some language which indicated a more unqualified approval of *Bush* v. *Steinman* than is observable in any other case decided since *Laugher* v. *Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.K.B. 309. Ruffin, Ch.J., dissented. So far as his conclusion was determined by the doctrine as to a distinction between real and personal property, it was based upon the theory, that the liability which is predicated with reference to that distinction takes effect only when the nuisance created by the contractor is actually on the premises of his employer. In other respects his opinion emdodies what is now the generally received doctrine.

It will be noticed that, on the facts, both the New Hampshire and the North Carolina decisions might possibly be sustained on the ground that the employer was bound at his peril to see that appropriate precautions were taken to safeguard the public. See Subtitle V., post.

In *Memphis* v. *Lasser* (1849) 9 Humph. 757, the case of *Bush* v. *Steinman* was mentioned without any expression of disapproval, but the decision was really put upon the ground of a breach of a non-delegable duty.

Other American cases in which the distinction between the liabilities incident to the ownership or possession of real and of personal property is recognized more or less definitely are *Blattenberger* v. *Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309; *Moore* v. *Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209. The allusion to the doctrine in the latter case is somewhat remarkable, as it had been expressly condemned in *De Forest* v. *Wright* (1852) 2 Mich. 36.

(*dd*) *Milligan* v. *Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J.Q.B. N.S. 10. The remarks of Parke, B., in *Quarman* v. *Burnett*, which had been decided earlier in the same year, were explicitly referred to.

course of his opinion, Rolfe, B., intimated that, under some circumstances, the owner of real property may be responsible for nuisances occasioned by the mode in which his property is used by persons not standing in the relation of servants to him. But it was declared that, if any liability could be imputed on this ground, it must be founded on the principle, that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. It was suggested that the decision in *Bush* v. *Steinman* might possibly be supported on some such principle as this. But even conceding this to be so, the doctrine could not be applied to the case before the court, as the wrongful act complained of could not in any possible sense be treated as a nuisance (*e*).

Within the next few years similar views were established by carefully considered cases in several of the United States (*f*). In

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(*e*) *Reedie* v. *London & N. W. R. Co.* (1849) 4 Exch. 254, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N.S. 65, where the defendant was held not to be liable for the negligence of the servants of a contractor in letting fall a stone from a bridge which was under construction. A few years latter it was observed by Parke, B., in *Gayford* v. *Nicholls* (1854) 9 Exch. 702, 2 C. L. R. 1066, 23 L. J. Exch. N.S. 205, 2 Week. Rep. 453, that the principle of *Bush* v. *Steinman* "cannot now be considered law."

(*f*) In *Blake* v. *Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304, it was held error to give an instruction by which the jury were in effect told that the person who undertakes the erection of a building, or other work for his own benefit, is responsible for injuries to third persons, occasioned by the negligence of the servants of the builder or the person who is actually engaged in executing the whole work, under an independent employment, or a general contract for that purpose.

In *Barry* v. *St. Louis*, 17 Mo. 121, and *De Forrest* v. *Wright*, 2 Mich. 368, both decided in 1852, the doctrine of *Bush* v. *Steinman* was expressly disapproved.

In *Pack* v. *New York* (1853) 8 N.Y. 222, where the plaintiff's house was injured by a rock thrown up by a blast set off in the course of grading operations in a street, a charge to the effect that, if the jury believed that the contractor employed by the defendant to do the work had been guilty of negligence in blasting, and that injury to the plaintiff was caused by such negligence, the plaintiff was entitled to recover compensation for certain injuries specified by the Court, was held erroneous, inasmuch as it conflicted with the doctrine, "that a person who undertakes the erection of a building, or other work for his own benefit, is not responsible for injuries to third persons occasioned by the negligence of a person, or his servant, who is actually engaged in executing the whole work, under an independent employment or a general contract for that purpose."

In *Hilliard* v. *Richardson* (1855) 3 Gray 349, 63 Am. Dec. 743, the authorities were exhaustively examined and collated, and the doctrine of *Reedie* v. *London & N. W. R. Co.* was fully approved.

In *Boswell* v. *Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345, the Court referring to this English decision, said: "The doctrine laid down in this last case appears to us to be founded in good sense; and it follows from it that the distinction as to the liability of a party when he engaged a contractor to erect structures on his own premises, and when he engaged such contractor to erect them on the

the more recent American cases the ruling in *Bush* v. *Steinman*, whether viewed as one which embodies the broad principle that tortious acts committed in the course of his employment by a person who is doing work for the benefit of another are imputable to the latter, or as one which may be sustained on the ground that such a principle is applicable where the stipulated work is done on, near, or in respect to real property, has never been mentioned except with disapproval (*g*).

(*a*) *Effect of decision in Randleson v. Murray.*—During the period which saw the courts still hesitating as to the question whether a recognition should be accorded to the doctrine which draws a distinction between fixed and movable property, a case was decided which might seem to indicate a reversion to the much broader principle applied in *Bush* v. *Steinman* (*h*). From the

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premises of another, does not rest on any just principle. If the enterprise undertaken be a lawful one, and be entrusted to competent and skillful architects, there is no just reason why liability should attach to the proprietor for injuries occuring in its progress, any more than if such enterprise be executed on his own land, than if executed elsewhere."

(*g*) See *Myer* v. *Hobbs* (1876) 57 Ala. 175, 29 Am. Rep. 719; *Lawrence* v. *Shipman* (1873) 39 Conn. 586; *Kellogg* v. *Payne* (1866) 21 Iowa, 575; *Robinson* v. *Webb* (1875) 11 Bush, 464; *Eaton* v. *European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Clark* v. *Hannibal & St. J. R. Co.* (1865) 36 Mo. 203; *Hilsdorf* v. *St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352; *Independence* v. *Slack* (1895) 134 Mo. 66, 34 S.W. 1094; *Cuff* v *Newark & N. Y. R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205; *McCafferty* v. *Spuyten Duyvil & P.M.R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267; *Gourdier* v. *Cormack* (1853) 2 E. D. Smith, 254; *Hughes* v. *Cincinnati & S.R. Co.* (1883) 39 Ohio St. 461; *Painter* v. *Pittsburgh* (1863) 46 Pa. 213; *Cunningham* v. *International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632.

(*h*) *Randleson* v. *Murray* (1838) 8 Ad. & El. 109, 2 Nev. & R. 239, 1 W.W. & H. 149, 7 L.J.Q.B.N.S. 132, 2 Jur. 324, was held liable upon the following evidence: The defendants, for the purpose of removing some barrels of flour from their warehouse, had employed one Wharton, who was a master porter in Liverpool, and who used his own tackle, and brought and paid his own men. Taylor, a master carter, was employed by Wharton to carry the barrels away; Taylor also sent his own carts, etc., and his own men, one of whom was the plaintiff. The injury to the plaintiff was occassioned by a barrel falling on him in consequence of part of Wharton's tackle failing while it was being used by Wharton's men. The defendant's counsel unsuccessfully contended that Wharton was a bailee for a special purpose, and contended that the remedy of the plaintiff was against him, not against the defendants. The subjoined extracts from the opinions will shew the grounds upon which the decision was based:

Lord Denman, Ch.J.—"Had the jury in this case been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendants, there can be no doubt they would have found in the affirmative."

Littledale, J.—"It seems to me to make no difference whether the persons whose negligence occasions the injury be servants of the defendant, paid by daily wages, or be brought to the warehouse by a person employed by the defendant. The latter frequently occurs in a large place like Liverpool, where many persons exercise the occupation of a master porter. But the law is the same in each case."

Patteson, J.—"The case of a carrier is quite distinct. He has goods in his custody as bailee."

language used by the judges, however, it is quite apparent that recovery was allowed for the reason that the person engaged to do the work and his servants were deemed to have been in the service of the defendant while the work was in progress (*i*). That such a conclusion would not be drawn by any court at the present day from similar evidence, would seem to be a reasonable inference from many of the decisions cited in § 12, post; though it must be admitted that the authorities are not entirely uniform. See § 23, post. But whether this surmise is correct or not, it is at all events manifest that the case is not one which exemplifies any theory respecting the limits of an employer's liability for a person who is determined to be an independent contractor (*j*).

(*e*) *Subsequent development of the law.*—From the foregoing review it will be apparent that, about the middle of the nineteenth century, almost every court which had had an opportunity of expressing its views had definitely discarded not merely the broad principle embodied in *Bush* v. *Steinman*, viz., that a person must answer for the torts of all those who are in his employ, whether they are servants or contractors, but also the qualified doctrine upon which it had been for some time supposed that that decision could be supported, viz., that a responsibility of this extent is imputable wherever the injury resulted from the execution of work on, near, or in respect to real property belonging to the employer. What may be regarded as the characteristic, as it is certainly the most important, feature of the doctrinal develop-

(*i*) That this was the standpoint of the court is also shewn by the following comment which was made upon the decision by Lord Denman in *Milligan* v. *Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J.Q.B.N.S. 19; "The work was in effect done by the defendant himself at his own warehouse; if he chose, instead of keeping a porter, to hire one day by day, he did not thereby cease to be liable for injury done by the porter, *while under his control.*" This explanation, which, it should be observed, proceeded from a member of the court which decided the case, shews that Parke, B., misapprehended the rationale of the case when, in *Quarman* v. *Burnett* (1840) 6 Mees. & W. 499, 9 L.J. Exch. N.S. 308, 4 Jur. 969, he intimated that it might be classed with those in which the occupiers of land or buildings have been held responsible for acts of "others than their servants," done upon, or near, or in respect of their property.

(*j*) It is not easy to determine what was the precise point of view from which Pollock, C.B., was speaking, when he remarked in *Murphy* v. *Caralli* (1864) 3 Hurlst & C. 462, 34 L.J. Exch. N.S. 14, 10 Jur. N.S. 1206, 13 Week. Rep. 165, that "the case of *Randleson* v. *Murray* seems at variance with current of authority." He may have intended to express his disapproval of the decision as being an apparent recurrence to the doctrine of *Bush* v. *Steinman*, or he may merely have stated his opinion that, on the facts, the relation of master and servant was improperly inferred.

ments during the subsequent period is the gradual delimitation of the domain within which the general rule as to the non-liability of an employer for the torts of an independent contractor is controlled and overridden by the principle, that a person who is subject to an absolute duty cannot, by delegating it to another party, relieve himself from liability for injuries caused by its non-fulfilment. An examination of the cases cited in Sub-titles V., and VI., post, will show that the result of working out this principle in its application to certain situations has been the formation of several groups of precedents which, in any case involving similar facts, put a plaintiff, so far as his actual right of recovery is concerned, in a position which is very nearly, if not quite, as favourable as he would have occupied if the doctrine enounced in *Bush* v. *Steinman* had found a permanent place in Anglo-American jurisprudence (*k*). How far these encroachments upon the older doctrine of non-liability will be carried remains to be seen. In this respect the law is at present in a transition state. But in view of the trend of judicial opinion, as indicated by the most recent decisions, it seems perfectly safe to predict that, in some directions at least, the immunity of the employer will continue to be more and more abridged.

3. **Rationale of the doctrine.**—The doctrine enunciated in § 1, ante, is frequently put upon the ground, that the characteristic incident of the relation created by an independent contract is, that the employer has not the power of controlling the person employed in respect to the details of the stipulated work, and that it is a necessary juridical consequence of this situation that the former should not be answerable for an injury resulting from the manner in which those details may be carried out by the latter (*a*).

(*k*) It seems certain, however, that a plaintiff now suing for injury received under the same circumstances as those involved in that case could not recover under any of the more recent doctrinal developments. The work was not intrinsically dangerous, nor was there a violation of any absolute duty which the employer was bound, at his peril, to see performed.

(*a*) The employer is not liable, "because he has employed an independent person, and has not retained any control over processes or details, nor even interfered in any way with the work at any stage." Wills, J., in *Holliday* v. *National Telephone Co.* [1899] 1 Q.B. 221, 227, 68 L.J.Q.B.N.S. 302.

"The rule that prescribes the responsibility of principals, whether private persons or corporations, for the acts of others, is based upon their power of control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not master, for the relation implied by that term is one of power, of command; and if a principal cannot control his agent, he is not an

The doctrine has also been said to rest upon "the ground that a contractor, as between him and his employer, is responsible only for the fulfilment of his agreement, and, pending the performance of the work, is, to a certain extent, substituted for the party for whom the work is to be performed" (*b*). In this point of view any mischief which may have resulted from the performance of the work may be regarded as having been "done in the course, not of the employer's, but of the contractor's business" (*c*).

The doctrine has also been referred to as an application of the general principle, that, where an independent responsible cause is interposed between an alleged cause and the injury, the juridical connection between that alleged cause and the injury is broken (*d*).

None of these explanations, however, is adequate for the purposes of a fundamental inquiry, since they pre-suppose that an affirmative answer should be given to what is really the ultimate question to be decided, viz., the permissibility of allowing one person to depute to another a particular piece of work, on terms which will have the effect of relieving the former from the obligation of seeing that that work is executed with reasonable care and

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agent, but holds some other or additional relation." *Hilsdorf* v. *St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

"The liability of one person for the negligent acts and omissions of another rests upon the relation of superior and subordinate as master and servant, and the consequent control which the superior has over the acts of the subordinate in the performance of his duties. There can be no liability, therefore, unless such relation and such right of control exist, either by force of contract between the parties, or the duty to assume control is imposed, as a matter of law, by reason of some peculiar relation the person for whom the work is being performed bears to third persons with respect to the time, place, and manner of performance." *Aldritt* v. *Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N.W. 741.

"The liability of one person for damages arising from the negligence or misfeasance of another on the principle of respondeat superior is confined in its application to the relation of master and servant or principal and agent, and does not extend to cases of independent contracts not creating the relation of principal and agent, and where the employer does not retain the control over the mode and manner of the performance of the work under the contract." *Cincinnati* v. *Stone* (1855) 5 Ohio St. 38.

"It seems to us that the doctrine would be productive of great wrong, to hold that when owners of real estate, who contract with reliable, competent and skilful builders, and deliver the premises into the actual exclusive possession of the contractors for a definite period, and when neither the contractors or their servants are under the control of the owners, that they must be liable for all the negligent acts of the contractors and their servants." *Scammon* v. *Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

(*b*) *Reynolds* v. *Braithwaite* (1889) 131 Pa. 416, 18 Atl. 1110.

(*c*) See the remarks of Lord Denman in *Milligan* v. *Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J.Q.B.N.S. 19.

(*d*) Wharton, Neg. § 482.

skill. It seems clear from the not very numerous authorities which bear directly upon this question that the real, and in fact only available basis for the doctrine which declares such a delegation of functions to be under certain circumstances allowable is public policy (*e*). The juridical situation, therefore, would seem

(*e*) In the opinion delivered by Parke, B., for the whole court in *Quarman* v. *Burnett* (1840) 6 Mees. & W. 499, 9 L.J. Exch. N.S. 308, 4 Jur. 969, we find this passage: "The liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice Eyre says in the case of *Bush* v. *Steinman* (1799) 1 Bosw. & P. 404, and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, 'shock the common sense of all men:' not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street." The remark of Lord Tenterden here referred to was made in his judgment in *Laugher* v. *Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.K.Q. 309.

In *Daniel* v. *Metropolitan R. Co.* (1871) L.R. 5 H.L. 45, 61, 40 L.J.C.P.N.S. 121, 24 L.T.N.S. 815, 20 Weekl. Rep. 37 Lord Westbury made the following remarks: "It would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation . . . to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons."

In *Wiswall* v. *Brinson* (1849) 32 N.C. (10 Ired. L.) 554 the non-liability of an employer for the torts of an independent contractor was said to constitute "an exception to the generality of the rule, [i.e., Qui facit per alium facit per se], made necessary by public convenience and general usage and when the reason of the rule does not so fully apply." The opinion then proceeds as follows: "When one enters a railroad car, the engineer and hands serve him—do work for him—carry him and his goods. But he is not liable for their negligence or want of skill. So far from it the company is liable to him. This is an exception to the rule, for two reasons; he did not make the selection, and although in a large sense they are his servants, yet they are the servants of the company. It carries on a distinct, independent business, and is liable for their negligence or want of skill. The reason of the rule fails; and public convenience demands, that the party injured should be content with his remedy against the company or the individual whose fault caused the injury. If passengers were liable, no one would travel upon railroads. This is the principle, upon which the exception is based. It extends to an infinite variety of cases. The one given is 'ex grege' —it includes all who carry on independent trades or callings recognized as such by law or by common usage."

"To hold that a person is liable for all the damages resulting from the carelessness or negligence of all the servants or employees engaged in working for his benefit, although employed by contractors, without his knowledge or consent

to be simply this;—that the considerations of expediency which, according to the most generally accepted theory, constitute the only rational foundation of the rule which declares a master to be liable for the torts of his servant (*f*), are deemed to be inoperative, or to be superseded and overridden by other and antagonistic considerations of expediency, in some classes of cases where the person employed is exercising an independent business (*g*).

It has been strongly intimated in a recent New York case that, if a person is not competent to plan or carry out a piece of work, and yet attempts to do one of these things, he should be held responsible for an injury resulting from his having undertaken the charge of the work, and that it is his duty to devolve the planning and execution of the work upon persons possessing

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and without any right or ability on his part to control or discharge them, might ruin any man in the world." *Kellogg* v. *Payne* (1866) 21 Iowa, 575.

In *Painter* v. *Pittsburgh* (1863) 46 Pa. 213, the court reasoned thus: "The verdict determines that the fault was all that of the contractors. Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants, neither servants nor agents. They were in an independent employment. And sound policy demands that in such a case the contractor alone should be held liable. In making a sewer he has, necessarily, the temporary occupation of the street in which the work is done, and it must be exclusive. His servants and agents are upon the ground, and he can more conveniently and certainly protect the public against injury from the work than can the officers of the municipal corporation. The public will be better protected if it be held that the contractor alone is responsible for his negligence, and that the city does not stand between him and any person injured. Thus he will be taught by caution, while a sufferer by the negligence of his servants will not be compelled to resort for compensation to the insolvent servants." It must be admitted, however, that the presumption entertained in this passage, that the protection of that part of the public which will be exposed to danger by the progress of a given piece of work will be more effectively secured by casting the responsibility on the contractor, is far from being axiomatic in its nature. If the maximum of protection is the object to be considered, it is, to say the least, probable that this end will be better attained by imposing liability both upon the employer and the contractor. It seems clear, however, that the rule as to the non-liability of employers has been formulated rather with reference to their interests than with reference to those of possible sufferers from the torts of the contractors.

(*f*) See *Gregory* v. *Hill* (1869) 8 So. Sess. Cas. (3rd series) 282; *Farwell* v. *Boston & W.R.Corp.* (1842) 4 Met. 55; 38 Am. Dec. 399; *Chicago & N.W.R.Co.* v. *Moranda* (1879) 93 Ill. 314, 34 Am. Rep. 168; *Camp* v. *Church of St. Louis* (1852) 7 La. Ann. 321; *Coon* v. *Syracuse & U.R.Co.* (1849) 6 Barb. 231; *Carman* v. *Steubenville & I.R.Co.* (1854) 4 Ohio St. 399; Pollock's Essays in Jurisprudence, p. 116.

(*g*) There would seem to be plausible grounds for arguing that the exemption of an employer for the torts of a contractor should not be conceded without some restrictions in a case where the contractor himself is domiciled in a foreign jurisdiction. The inconvenience which is sometimes caused by compelling injured persons to obtain redress by following the contractor into another state is a serious evil. But the matter is one which can be dealt with only by the legislature. See the remarks of the court in *Sanford* v. *Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67.

sufficient knowledge and skill to accomplish what is contemplated without endangering the workmen and the public (*h*). Such a doctrine is doubtless in harmony with the general conception of legal negligence, as being "the absence of care according to the circumstances" (*i*). But it cannot be said to supply an adequate reason for exempting the employer from liability for the torts of the person whom he engages to perform the work. The existence of an obligation to appoint a substitute under the supposed circumstances is by no means incompatible with the existence of an obligation to answer for the acts and omissions of that substitute. See cases cited in § 59, note (*k*), post.

4. Extent of the employer's duty with respect to the supervision and direction of the work.—That an employer is not bound to supervise the progress of contract work, for the purpose of preventing the commission of collateral torts by the contractor, is well settled (*a*). This doctrine may be regarded as one which is

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(*h*) *Burke* v. *Ireland* (1901) 166 N.Y. 305, 59 N.E. 914.

(*i*) *Vaughan* v. *Taff Vale R. Co.* (1860) 5 Hurlst & N. 679, 688, 29 L.J. Exch. N.S. 247, 6 Jur. N.S. 899, L.T.N.S. 394, 8 Week Rep. 549, per Willes, J.

(*a*) In *Braidwood* v. *Bonnington Sugar Ref. Co.* (1886) 2 Sc. L.R. 152, it was argued, as a ground for imputing liability to the defenders, that "they did not so far separate themselves from those whom they employed and that they had an inspector looking after their interests." The reply made to this contention was as follows: "That makes no difference; the inspector failed in no duty which he was bound as the defenders' representative to discharge to the deceased. He was not there to attend to the interests of the deceased, or to any duty of the defenders to the deceased. The Company was not bound to have an inspector there, and it did not send him there to protect his [i.e., the decedent's] interests. Anything he failed to do he was answerable for to the Company and to no one else. He might be personally, no doubt, for his own delinquency but he could not bind the defenders."

Where the owner of a building contracts with a stair builder for the reconstruction of his stairway therein, and such stair builder has entire control of the stairway for the purpose of work, it is not the duty of the owner to see that cleats placed on the stairs, to protect them from injury before being painted, are properly placed there by the contractor's servant. *Louthan* v. *Hewes* (1902) 138 Cal. 116, 70 Pac. 1065.

A church society engaging a contractor to repair its church tower is not under the positive duty to see that such contractor leaves a shutter in the tower in an apparently safe condition, where he has loosened and rendered it insecure in the erection or removal of a scaffold erected for such repairs. *Woods* v. *Trinity Parish* (1893) 21 D.C. 540.

A railway company which contracts fo. the erection of a train shed is not under a duty to see that the workmen in the employ of the contractor and subcontractors handle their tools with reasonable care. *Fitzpatrick* v. *Chicago & W. I. R. Co.* (1888) 31 Ill. App. 649 (tool fell on trainman.)

A person for whom a building is being erected by a contractor is not under any duty or obligation to see that a sub-contractor does not deposit materials in a public street. *Aldritt* v. *Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N.W. 741.

In a case where water flowed into the plaintiff's cellar in consequence of the manner in which sub-contractor constructed a vault and side-walk in front of a building, the court concurred with the finding of a referee that the principal contractor was not liable for the resulting damage, as he was under no obligation by his contract to give any direction as to this portion of the work, and had no control or authority over the mode or manner of its performance, but only a right to insist generally that the work be done according to the terms of the contract. *Slater* v. *Merseau* (1876) 64 N.Y. 158.

In *Hawke* v. *Brown* (1898) 28 App. Div. 37, 50 N.Y. Supp. 1032. The court said: "There is no authority for the proposition that the employment of an architect to make plans and specifications for work of this character and to supervise the work in its progress to completion is a legal duty owing by the employer either to the contractor or to third persons. We are not aware of any such rule of law. An architect is usually retained for the protection of the proprietor. If there was no negligence imputable to the proprietor in the employment of the contractor, or negligence in other respects, the failure to employ an architect does not constitute a breach of duty owing to the public, and is no evidence of negligence in the execution of the work." The following passage from 2 Thomp. Neg. § 41, was quoted with approval: "The proprietor usually retains control by a skilled architect, not for the purpose of controlling the contractor in his methods, but for the purpose of assuring himself that the results enumerated in the specifications of the contract are reached by the contractor, step by step, as the work progresses."

In *Burke* v. *Ireland* (1901) 166 N.Y. 305, 39 N E. 914, rev'g (1900) 47 App Div. 428, 62 N.Y. Supp. 453, it was shewn that the defendant employed a competent architect to draw the plans and specifications for a building, which were approved by that department of the city government which had charge of the matter, and there was no ground for affirming that he interfered with the plans, or reserved or exercised any right to change them. The work of constructing the building, including the foundations, he also committed to a competent contractor. But the foreman made the mistake of placing the central column, which supported the upper part of the building, upon an insecure foundation, not constructed in accordance with the specifications, the result being that the building collapsed and the plaintiff's intestate lost his life. The court explained as follows its reasons for denying the liability of the defendant: "If it be true that the owner was bound at his peril to see to it that the foundation of the iron column was laid upon solid ground, then it would be difficult to avoid the conclusion that the result of the accident could be attributed to the omission of the defendant in that respect. But we think that this was an obligation which the owner could devolve upon an independent contractor, and it requires only a fair construction of the contract to shew that it was placed upon the builder, for whose omissions or mistakes the defendant is not responsible. There is no proof in the case from which the jury could find that the accident resulted from any defect in the plan. The death of the plaintiff's intestate was caused by a defective execution of the plan which the contractor agreed to carry out. The central column, which was intended to support the building, was placed upon an unsafe foundation, and this was the direct or proximate cause of the calamity. If the architect, who had general supervision, had insisted upon a careful inspection of every detail of the work and had been present when the concrete was about to be laid upon the disturbed ground outside the old cistern wall, he might have discovered the departure from the terms of the contract in that respect and prevented it. But the architect was not the agent or servant of the owner. He was in the exercise of an independent calling and held the same legal relations to the defendant that the builder did, and for the omissions of either in the execution of the plans, personal negligence cannot be imputed to the defendant."

The view thus taken of the evidence was radically different from that which was adopted by the Supreme Court, which proceeded upon the theory that the architect was the defendant's agent, and that, as one of the two contracts which it was necessary to consider in relation to the incidence of the liability did not require anything further than not to lay the concrete in the trenches until they had been inspected by the architect, while the other contract made no provision with respect to the depth of any excavation required to procure a good bottom, if further excavation was necessary beyond that for which the plans called, the duty of

deducible directly from the legal conception of an independent contractor, as being essentially a person who, ex hypothesi, is entitled to exercise his own discretion with regard to the manner in which the results which he has undertaken to produce shall be achieved. Or it may be put upon the ground, that the employer is entitled to act upon the presumption that a contractor who has been carefully selected will exercise reasonable skill and prudence in executing the stipulated work (*b*).

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determining the depth to which the excavation should extend devolved upon the defendant or his agents. First appeal (1898) 26 App. Div. 487, 50 N.Y. Supp. 369; second appeal (1900) 47 App. Div. 428, 62 N.Y. Supp. 453.

The following passage contains the gist of the opinion delivered on the second appeal: "Behrens [the architect] not only prepared the plans, but he superintended the construction. When a point was reached where it became neeessary to determine what should be the proper depth of the excavation for a secure foundation, such question must be held to have been work within the owner's control, for the performance of which, by the agent selected by him, he was responsible. (*Vogel* v. *New York* (1883) 92 N.Y. 10, 44 Am. Rep. 349.) The primary duty resting upon the defendant Ireland was to secure a sure foundation for his building, and he ought to have known—at least he is chargeable with the knowledge essential for him to perform the duty properly (sic). As he did not contract with any contractor for a specific depth to which the foundation should be carried, and as the architect had no power or authority to change or modify his plans, the duty of determining what should be done on account of the infirmity of the soil was one which devolved directly upon the defendant, Ireland, and the architect in this respect occupied the relation to Ireland of an ordinary agent. For his failure to properly perform his duty in that regard the defendant, Ireland, is chargeable."

On the first appeal the Supreme Court had also laid it down that one who contracts with an independent contractor for the construction of a building upon his property does not guarantee to third persons that the contractor will comply with the building laws, as such laws merely limit the existing rights of the owner to improve his property, and do not confer any new rights. *Burke* v. *Ireland* (1898) 26 App. Div. 487, 50 N.Y. Supp 369. This point was not referred by the Court of Appeals.

A complaint which shows by its averments that the tortious act which was the immediate cause of injury was collateral in its nature, and was committed by a person who bore to the defendant the relation of an independent contractor, cannot be made proof against a demurrer by inserting an allegation that it was the legal duty of the defendant to examine from time to time the condition of the place where the work was being done, and to provide suitable material for making that examination. *Boardman* v. *Creighton* (1901) 95 Me. 154, 49 Atl. 663. Affirming (1899) 93 Me. 17, 44 Atl. 121.

See also *City & Suburban R. Co.* v. *Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643, § 5, note (a), post.

(*b*) The justifiability of this presumption is adverted to by Lord Westbury in the passage quoted in § 3, ante, note (*e*), from his judgment in *Daniel* v. *Metropolitan R. Co.* (1871) L.R. 5, H.L. 45, 61, 40 L.J.C.P.N.S. 121, 24 L.T.N.S. 815, 20 Weekl. Rep. 37.

In *Butler* v. *Hunter* (1862) 7 Hurlst & N. 825, 31 L.J., Exch. N.S. 214, 10 Weekl. Rep. 214, plaintiff's counsel argued in substance, that, where a person employs a tradesman to do work which may be dangerous to another (here the making of an excavation on land adjacent to a house), he is bound to show that he directed all care to be taken, and specifically pointed out in what was the danger which was to be guarded against, or, at all events, to show that he did enough to exempt himself from responsibility. But Pollock, Ch.B., rejected this

On the other hand, it is clear that, in cases of the types discussed in Sub-titles V. and VI., post, what the law virtually declares is that the employer must, at his peril, see that the work is executed with reasonable care; and his liability is sometimes discussed under this aspect (*c*).

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contention, saying: "It must be assumed that directions were given to do the work in the ordinary way, and to take all the proper precautions not to cause any mischief." Wilde, B., also observed: "It is said that the defendant ought to have given orders to do the work in a tradesman-like way, or ought to have pointed out what was requisite. But it seems to me that it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done. I think that, as a matter of fact, if a man gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesman-like way." This case is referred to as an illustration of the general principle embodied in the above quotation. The decision itself has been virtually overruled. See § 52, note (*a*), post.

"When the contract is to do an act in itself lawful, it is presumed that it is to be done in a lawful manner." *Eaton* v. *European & N.A.R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Carter* v. *Berlin Mills Co.* (1876) 58 N.H. 52, 42 Am. Rep. 572.

In *Independence* v. *Slack* (1895) 134 Mo. 66, 34 S.W. 1094, where it was held that land owners who make a contract with another person to provide the materials and construct a sidewalk in front of their premises are not liable for an injury caused by stones and other obstructions negligently left in the street by the contractor, the Court reasoned thus: "We know of no principle of law that imposes a legal obligation upon the owner of property adjacent to a public street to see that no obstructions to travel are placed or suffered to remain thereon, nor is there evidence of a contract with, or license from, the city which placed defendants under any peculiar obligation to keep the street secure while they were improving their property. Defendants were, of course, responsible for what they did themselves or directed others to do, but the contract in question did not necessarily, or, probably, involve the commission of a nuisance, and cannot, therefore, be constructed as a direction by defendants to commit the negligent acts of which complaint is made. They had the right to make the contract, and to believe that the work would be done carefully in all respects, and after they had committed it to Stewart, duty did not require them to interpose, and see that the methods adopted were careful and proper."

(*c*) In *Hole v Sittingborne & S. R. Co.* (1861) 6 Hurlst & N. 488, 31 L. J. Exch. N.S. 81, 3 L.T.N.S. 750, 9 Weekl. Rep. 274, which was decided on the grounds explained in §46, post. Pollock, C. B., in the following passage noticed an alternative conception to which the liability of the defendant might be referred. "I suggested, in the course of the argument that, where a man employs a contractor to build a house, who builds it so as to darken another person's windows, the remedy is not against the builder, but the owner of the house. It may be that the same principle applies to cases where a man is employed by another to do an act which it is the duty of the latter to do. In such cases it is the duty of the owner of the soil to inquire what is in the course of being done—to know what is the plan—to see that the materials are good, and to take care that no mischief ensues. So here it was the duty of the company to see how the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do—what materials he would use, and to have seen that the specification and the materials were such as would ensure the construction of a proper and efficient bridge.

In *Dalton v. Angus* (1881) 6 LR. App. Cas. 829, 50 L.J.Q.B.N.S. 689, 44 L.T. N.S. 844, Week. Rep. 196, Lord Blackburn said in the course of his opinion: "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 the contractor.

The existence of a duty of supervision is occasionally inferred from the terms of some statutory provision which regulates the performance of the work in question (*d*), or from some explicit stipulation in the contract (*e*).

According to Lindley, L. J., in *Hardaker v. Idle Dist. Council* (1896), Q. B. 342, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196, the effect of what was said by Lords Blackburn and Watson in *Hughes* v. *Percival* (1883) L.R. 8 App. Cas. 443, 446, 449, 52 L. 8 J.Q.B.N.S. 719, 49 L.T.N.S. 189, 31 Weekl. Rep. 725, 47 J.P. 772, was that where the work is of an intrinsically dangerous character, the employer's duty is to see that the contractor does his work properly.

For other cases in which the duty of exercising supervision is predicated specifically with respect to work which involved the performance of absolute duties which were incumbent on the employer, see *O'Brien* v. *Board of Land & Works* (1880) 6 Vict. L.R. (L.) 204; 2 Australian Law Times 22; *Williams* v. *Tripp* (1878) 11 R. I. 447; *Logansport* v. *Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166.

(*d*) Where the charter of a city requires the Board of Public Works to take charge of the erection of public buildings it is their duty to see, through their architect or otherwise, that the work on every building of that description is performed according to the plans and specifications adopted by the common council. *Chicago* v. *Dermody* (1871) 61 Ill. 431. The court said: "If those having charge of the construction or repair of streets, bridges, etc., permit obstructions, pits or other dangerous places, to be made in the streets by the contractor without being properly guarded, the city is liable for injury that may ensue, because the work is in charge of the proper city officer, and is being done by the authority of the city. Nor is it an answer in such a case to say the contractor departed from his contract or violated the city ordinances in performing the work, as it is the duty of the officer having charge of the improvement to see that the plans are pursued and the proper precautions taken to secure the safety of the public; and it is negligence on the part of such officers in failing to see that they are adopted. And the same rule must prevail where the city or its officers have charge of the erection of a public building for the use of the city."

It should be noted that, under such circumstances as these, the work is assumed to be under the employer's control, while it is in progress, and the liability which he incurs by reason of a failure to perform the duty of supervision might equally well be referred to the conception that the contractor is in point of law his servant (see § 18, et. seq.), or to the conception that he is constructively, if not actually, directing the operations.

(*e*) *Slater* v. *Mersereau* (1876) 64 N.Y. 138, a referee had found that the waters which flowed into the cellar of the building and injured the plaintiffs came from the roof by reason of the failure of the defendant to direct the sub-contractors to make the necessary cuttings in the wall for the waste pipe which was intended to connect with the sewer, and without which it could not be connected, so that he failed to provide means to carry off the rain water. Discussing the effect of this finding in connection with a clause in the contract with the sub-contractors which provided that they should do all the cutting away for repairing after plumbing, etc., as "they should be directed," the court said: "It necessarily follows from the terms of the contract that the defendant was bound to give such directions as were required to prepare the same, and upon a failure to do so that he should be held responsible for the damages which ensued by reason of his neglect in this respect. According to this condition, the defendant exercised a supervisory control over the progress of the work, and it was part of his duty to see that it was conducted properly, and with the exercise of ordinary care and skill so as to prevent injuries to other parties."

On the ground that it was provided in the contract for the erection of a building, that partitions, etc., were to be taken down or filled up as may be required, and anchored where directed, it was held that the directions were to be

5. Extent of duty of employer to guard against possible accidents.—It is sufficiently manifest, that the virtual abrogation of the doctrine now under discussion would result, if the law were to predicate, in respect to all kinds of work indifferently, the existence of an absolute duty on the employer's part to guard against all accidents, probable as well as improbable, that may happen to the damage of third persons, while that work was being performed by an independent contractor (*a*). If, therefore, recovery is sought on the ground that the employer ought to have adopted certain precautionary measures for the purpose of preventing the injury complained of, the action will fail, unless the plaintiff can at least show that in view of the nature of the work, and the conditions under which it was to be executed the defendant should have foreseen that the actual catastrophe which occurred was likely to happen, if those precautionary measures were omitted. Whether the production of evidence to this effect will entitle him to go to the jury upon the question whether the employer ought to have provided for the protection of the public was a point which elicited different opinions in the case cited below. But it seems to be a reasonable inference from the more recent decisions cited in Sub-title V., post, that this point should be decided in the plaintiff's favour (*b*).

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given by the owners. *Lancaster* v. *Connecticut Mut. L.Ins.Co.* (1887) 92 Mo. 460, 1 Am. St. Rep. 739, 5 S.W. 23.

Compare also the cases cited in § 66, post.

(*a*) In *City & Suburban R.Co.* v. *Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643, where a horse was frightened by the whistle of a steam-engine, used for the purpose of hauling along the defendants' track cars belonging to a contractor, and loaded with materials which were to be used by him for the repair of a turnpike road, the court reasoned as follows: "It would be carrying the obligation of the Turnpike Company beyond that required or authorized by the authorities to hold that its duty to the public required it to see that the servants of White [the contractor] were not thus negligent, although the use of the steam engine was not a nuisance per se, and could be operated so as not likely to do any injury to any one using the road. It would be requiring too much of it to make it take such precautions against accidents when letting out lawful work to an independent contractor. It must be admitted that the work to be done was lawful, and the company had the right to assume that there would not be such negligence as that complained of, which was entirely collateral to and not a probable consequence of the work contracted for. To hold the company to such a strict liability would practically forbid it from having such work done by contractors as it would have to keep its own agents on engines to see that there was no negligence on the part of the contractors or their servants."

(*b*) In *Pearson* v. *Cox* (C.A. 1877) L.R. 2 C.P. Div. 369, 36 L.T.N.S. 495, the defendants were builders and contractors who, after the outside of a house was finished, had removed the outer hoarding and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor, in walking, shook a plank which caused a tool to fall out of a window of the house

An employer cannot be charged with liability on the theory that it is his duty to insert in a contract an affirmative provision to the effect that the contractor shall not be guilty of negligence. "The law always implies that every person who is authorized to do any act which, if it is done improperly, may injure his neighbour, will do that act without negligence, and such an

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and the tool in falling injured the plaintiff, who was passing along the highway. The jury found that the boarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public. Upon this finding it was held that the defendants were entitled to judgment. Commenting upon the doctrine propounded by the plaintiff's council that there was a general duty imposed upon the defendants to guard against accidents, Coleridge, Ch. J., said: "That must mean accidents which could reasonably be foreseen, and there was no evidence that this was such an accident. No doubt the accident has happened, and may happen again, but the falling of a tool in this manner is not such a probable incident in the plastering of the interior of a house as that it could reasonably have been foreseen. If it was so, that would be a ground for holding some one liable; but if any one is liable for not providing some protection, it would be the sub-contractor."

Bramwell, L. J., said: "I am of the same opinion, and for the same reasons. The only ground on which the action could be maintained against the defendant would be that the carrying on of the work in the course of which the accident happened was a nuisance to the highway, unless the passers by were guarded against the results. It may be that when a house is being built there is a probability that tools or other things will fall, and the jury might be justified, either upon the evidence of experts or from knowledge of common life, and without experts being called, in finding that some protection to the public must be afforded. But however that may be, if there was any such duty, it was the duty of the person whose conduct was a nuisance to the highway. I agree that the general builder would be the person who is to guard against general dangers in the course of the building, but this, according to the opinion of the jury, is not such an accident. But even if I assume danger to the public from plastering, I cannot understand upon what ground the defendants are to be made liable. The plasterer, if any person, ought to be made liable; it is he who knows when he is going to begin, and when he is going to leave off, and how the work will be done; and he is the person who ought to provide against the accident. Going, therefore, as far as I can, and assuming that some one ought to have provided against the danger, the last link in the chain fails: it is the plasterer who ought to have provided against it, and not these defendants."

Brett, L. J., said: "The negligence alleged was that the boarding ought to have been kept up or that there ought to have been some protection at the window, but there was no evidence that the tool fell by the negligence of any one—no such question was left to the jury. It seems to have been assumed that the falling of this tool was the result of accident. If there had been any evidence that such an accident might probably happen whilst such work was going on in the interior of a house, then there might have been a question for the jury whether some one ought not to have guarded the public against such an accident. If there had been such evidence, then, with all deference to what has been said, I should have thought it a question whether the builders were not the persons who ought to have put up that protection to the public, as they had control over the whole building. But there was no evidence that any such accident was probable, and no one said it was probable that such things would fall from the window; nor is it a thing the probability of which must be known to all the world, so that the jury must be taken to know it without any evidence. The accident was highly improbable, and a man need not guard against highly improbable accidents."

See also the passage quoted in § 48, post, from the opinion of Lord Watson 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 Weekl. Rep. 729, 47 J.P. 772.

implication is a necessary part of every contract" (*c*). Still less can an employer be held responsible on the ground that the injury was a natural and probable result of his contract, where that instrument expressly provides that the stipulated work shall be carefully done, and the injury complained of would not have occurred had that provision been observed (*d*).

II. WHEN THE PERSON EMPLOYED IS DEEMED TO BE AN INDEPENDENT CONTRACTOR.

6. Independent contractors distinguished from servants and agents. Generally.—The accepted doctrine is that, in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed (*a*). This attribute of the relation supplies, as is apparent from the ensuing sections of this sub-title, the single and universally applicable test by which the servants are distinguished from independent contractors. But there is also high authority for the doctrine, that the possession or non-possession of the right of control may, in some instances, determine whether the person employed was a servant or a-

(*c*) *White* v. *New York* (1897) 15 App. Div. 440, 44 N.Y. Supp. 454, holding a complaint to be demurrable which was based upon the theory that the failure of a city to include in a contract with an independent contractor for the improvement and grading of a street a provision that the contractor should care for and remove all surface water, sewage and drainage which would be interfered with by such grading, rendered it liable for the negligence of such contractor in failing to provide for the removal of surface water and sewage.

In *Ashton* v. *Nolan* (1883) 63 Cal. 269, it was urged that it was the duty of defendant to insert in the contract an express term, to the effect that the work should be so conducted and finished as not to disturb the soil of the adjacent lot, and that in default of such express provision the defendant was liable, because the work was done in accordance with the contract. The court, however, said: "When a contract provides for doing a thing which may be, and generally is, done in a lawful manner and is silent as to the mode of doing it, the contract is to be construed as requiring it to be done in a lawful manner. As the injury was caused by the contractor while doing work which, it must be assumed, could have been done without causing it, and the contractor had agreed so to do it, the injury was done in violation of his contract.

(*d*) *Samuelson* v. *Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N.W. 499.

(*a*) "A servant is a person subject to the command of his master as to the manner in which he shall do his work." *Yewens* v. *Noakes* (1880) L.R. 6 Q. B.

agent (*b*). Assuming that authority to be unimpeachable, it is clear that the exercise or non-exercise of the right by the employer is not an available element for the purposes of differentiation, where it is a question of distinguishing between agents and independent contractors (*c*). In the absence of any judicial

Div. 532, 50 L.J. Q.B.N.S. 132, 44 L.T.N.S. 128, 28 Weekl. Rep. 562, 45 J.P. 8, per Bramwell, L.J.

To the same effect is the following sentence in a letter which the same distinguished judge wrote to Sir Henry Jackson at the time when the English Employers' Liability Act of 1880 was under discussion: "The relation of master and servant exists where the master cannot only order the work, but how it shall be done. When the person to do the work may do as he pleases, then such person is not a servant."

"The test is very much like this, viz., whether the person charged [i.e., with embezzlement] is under the control and bound to obey the orders of another." *Reg.* v. *Negus* (1873) L.R. 2, C.C. 37, 42 L.J., Mag. Cas. N.S. 62, 28 L.T.N.S. 646, 21 Weekl. Rep. 687, 12 Cox C.C. 492, per Lord Blackburn.

"Does not the word 'clerk' or 'servant' imply the existence in some one of a power of control." Cockburn, Ch. J. in *Reg.* v. *May*, (1861) Leigh & C.C.C. 13, 33 L.J. Mag. Cas. N.S. 81, 7 Jur. N.S. 147, 3 L.T.N.S. 680, 9 Weekl. Rep. 256, 8 Cox C.C. 421.

"The relation of master and servant exists, whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, 'not only what shall be done, but how it shall be done.'" *Singer Mfg. Co.* v. *Rahn* (1889) 132 U.S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

"The relation [of master and servant] exists where the employer selects the workman, may remove or discharge him for misconduct, and may order not only what work shall be done, but the mode and manner of performance." *Butler* v. *Townsend* (1891) 126 N.Y. 105, 26 N.E. 1017.

"A master is one who not only prescribes the end, but directs, or any time may direct, the means and methods of doing the work." *Bailey* v. *Troy & B.R. Co.* (1884) 57 Vt. 252, 52 Am. Rep. 129.

See also the definitions in Stephen's Digest Crim. Law. 220; New York Code, § 1034; Cal. Civil Code, § 2009; Dakota Civil Code, § 1157.

(*b*) "It seems to me that the difference between the relations of master and servant, and principal and agent is this: A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done." Bramwell, B., in *Reg.* v. *Walker* (1858) 27 L.J. Mag. Cas. N.S. 208, Dears. & B.C.C. 600, 4 Jur. N.S. 465, 6 Weekl. Rep. 505, 8 Cox C.C. 1. These words are reported only in the Law Journal, but they embody the doctrine applied in the decision itself, and therefore express the opinion of the whole court.

(*c*) The above statement of Bramwell, B., was, it seems, overlooked by Mr. Bowstead, when he expressed the opinion that "the difference between an agent and an independent contractor is, that an agent undertakes to act in the matter of the agency subject to the directions and control of his employer, whereas an independent contractor does not, but contracts to perform certain specified work, or produces certain specified results, the manner and means of performance or production being left to his discretion, except so far as they are specified by the contract." Law of Agency, p. 3, note (*a*); Encyclopædia of the Laws of England, sub voc. Principal and Agent, p. 338. This assertion may be correct as regards some classes of agents, but it is clear that others, such as attorneys at law, factors, brokers, and auctioneers, have quite as much liberty of action in their respective employments as is accorded to independent contractors.

In this connection it is important to observe that, if language is to be construed in its ordinary sense, such agents as those just mentioned would fall within

discussion bearing directly upon the problem thus indicated it is with much diffidence that the writer ventures to suggest that these two classes of employés can be discriminated, if at all, only by considering their position with reference to the character of the work which is normally entrusted to them. An agent is ordinarily appointed to represent his principal in some transaction or transactions arising out of business, trade, or commerce (*d*). Not infrequently the discharge of such functions by an agent may also involve the performance of a considerable amount of manual labour, by himself or others, in dealing with various material substances; but such operations are merely an incidental result of the execution of his agreement (*e*). On the other hand it is clear that operations of this character have formed the subject of the undertaking in the great majority of the cases in which the rights and liabilities arising out of the employment of independent contractors have been discussed. If, therefore, the terms "agent" and "independent contractor" are to be considered as having relation to two entirely separate regions of fact, this circumstance may possibly be taken as the distinctive factor which in any given case will determine the class to which the employe should be assigned.

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the scope of the alternative phraseology by which independent contracters are frequently described—as where they are spoken of as persons who are exercising, pursuing, carrying on, or engaged in an "independent employment." (*Sadler* v. *Henlock* (1855) 4 El. & Bl. 570, 578, 24 L.J.Q.B.N.S. 138, 1 Jur. N.S. 77, 3 Week. Rep. 181, 3 C.L.R. 760; *Carter* v. *Berlin Mills Co.* (1876) 58 N.H. 52, 42 Am. Rep. 572; *Humpton* v. *Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776; *Robinson* v. *Webb* (1875) 11 Bush 464; *Deford* v. *State* (1868) 30 Md. 179; *Fink* v. *Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376; *Pierrepont* v. *Loveless* (1878) 72 N.Y. 211; *Pickens* v. *Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep 55; *Harrison* v. *Collins* (1875) 86 Pa 153, 27 Am. Rep. 699; *Powell* v. *Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W. 691; *Bibb* v. *Norfolk & W.R. Co.* (1891), 87 Va. 711, 14 S.E. 163); or, "a special employment" (*Murray* v. *Currie* (1870) L.R.C.P. 26, 40 L.J.C.P. 26, 23 L.T.N.S. 557, 19 Week. Rep. 104); or, "an independent business" (*Allen* v. *Hayward* (1845) 7 Q.B. 960, 10 Jur. 92, 15 L.J.Q.B.N.S. 99, 4 Eng. Ry. & C. Cas. 104; *Sadler* v. *Henlock* (1855) 4 El. & Bl. 570, 578, 24 L.J.Q.B.N.S. 138, 1 Jur. N.S. 677, 3 Week. Rep. 181, 3 C.L.R. 760; *McCarthy* v. *Second Parish* (1880) 71 Me. 318, 36 Am Rep. 320; *Uppington* v. *New York* (1901) 165 N.Y. 222, 43 L.R.A. 550, 59 N.E. 91; *Carlson* v. *Stocking* (1895) 91 Wis. 432, 65 N.W. 58); or, as being "in the exercise of an independent and distinct employment" (*De Forrest* v. *Wright* (1852), 2 Mich. 368; *Linton* v. *Smith* (1857) 8 Gray, 147); or, as "prosecuting an occupation having some independence" (*Holmes* v. *Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465, 22 So. 403).

(*d*) This particular indicium of the relation is emphasized in definitions of "agent" which are given in II. Kent Com. p. 784; Wharton, Agency, § 1; Mechem, Agency, § 1.

(*e*) Such situations may, and often do, occur in connection with the transactions of auctioneers and factors.

An alternative view for which there is some authority would treat independent contractors as being one particular species of agents (*f*). The method of classification thus indicated is doubtless inadmissible, where it is a question of the scope of a criminal statute, and the doctrine of strict construction is necessarily observed. But, so far as civil actions are concerned, there would seem to be no logical objection to taking as the element which fixes the character of the employment that aspect of an independent contractor's position which exhibits him as a substitute or deputy of the contractee in respect to the performance of the stipulated work. In this point of view an independent contractor will be simply an agent whose employment does not carry with it certain incidents by which it is normally attended, and he may be conceived as being distinguishable from other kinds of agents by the diagnostic mark which is referred to in the last paragraph.

It is impossible, however, to affirm that the very vague criterion thus suggested for purposes of differentiation is one of universal applicability, or that it is habitually recognized or taken into account by the courts. Indeed cases are not wanting in which employers have been held liable on the specific ground that the tort-feasor was a servant, and not an independent contractor, although, so far as can be seen, the facts involved were such that this conclusion might equally well have been reached through the application of the principles of the law of agency (*g*).

7.—Persons acting in the dual capacity of contractor and servant or agent.—In all ordinary transactions the existence of the relation of contractor as between two given persons excludes that of principal and agent, or master and servant. But there is not

(*f*) That a contractor may be said to be "in one sense an agent" of his employe was conceded by Willes, J. in *Murray* v. *Currie* (1870) L.R. 6, C.P. 26, 40 L.J.C.P. 26, 23 L.T.N.S. 557, 19 Week. R. 104.

(*g*) Thus in two instances the question whether the negligence of employés belonging to the class of "travelling agents" should be imputed to their employers was discussed solely with reference to the question, whether they were servants or independent contractors, and recovery was allowed on the ground that the terms of their contract shewed them to be servants, and that their negligence in the management of the teams and vehicles used by them for the purpose of carrying about the commodities which they were selling was therefore imputable to their employers. *Singer Mfg. Co.* v. *Rahn* (1889) 122 U.S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Pickens* v. *Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55. Here it would seem that their representative capacity, as agents, would have justified a similar conclusion, without raising the question, whether they were servants.

necessarily such a repugnance between them that they cannot exist together (*a*). Hence the fact that an employé was a servant as respects one part of the functions discharged by him will not involve the consequence, that the employer must answer for injuries caused by an act of negligence committed by such employé, while he was engaged in work which he had undertaken as an independent contractor (*b*).

(*a*) *Detroit* v. *Corey* (1861) 9 Mich. 165, 80 Am. Dec. 78, where a person was injured by falling into an open sewer left unguarded by contractors. The Court said: "In the case before us, both relations exist, and must necessarily exist from the peculiar character and circumstances of the case. The contractors not only acted for themselves, but at the same time as agents for the city, under the power given it to construct sewers in its streets which are public highways. They had no right to make the excavation they did, except as agents for the city; and had they been proceeded against by indictment for creating a public nuisance, they could not have justified in their own right, but would have had to justify as agents of the city under their contract."

(*b*) A railway company entered into a contract with A. to construct a branch line; who contracted with B. to erect a tubular bridge, a part of the works. B. had a surveyor C. whom he paid by a salary of £250 a year to attend to his general business, and after obtaining the contract for the bridge, contracted with C. to provide the necessary scaffolding, for which he was to receive £40, irrespective of his salary, B. to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and owing to the want of sufficient light to warn the passers by, D. stumbled over the pole and was injured; subsequently to which additional lights were placed on the spot, and B. paid for them: Held, that B. was not liable, and that D.'s remedy lay against C. *Knight* v. *Fox* (1850) 5 Exch. 721, 14 Jur. 963, 20 L. J. Exch. N.S. 9. During the argument of counsel the following remarks were made: Parke, B.—"But as to this contract, in the management of the erection and fitting up the scaffolding, he was not their servant. It is like the case of a gentleman who enters into a particular and distinct contract with his servant to supply him job horses." Alderson, B.—"Suppose this contract had been with a third person, instead of with Cochrane, there would be no doubt, in such case, that the defendants could not be liable for this accident. Then how does the fact of Cochrane being their general servant or surveyor make any difference." The former judge also used this language in his opinion: "The act complained of was not an act done by Cochrane in the character of a servant to the defendants. It may be too much even to say that he was their servant in any point of view, for he acted as a contractor or surveyor for them, at a yearly salary of £250, which he received in lieu of payment for each separate piece of work. Therefore the case, which rests upon the negligence arising out of the construction of the scaffold, is precisely the same as it would have been if the defendants had entered into a contract with some third party to perform that work." The significance of the fact that the lights were placed by the defendants after the accident was thus discussed by Pollock, C. B.: "This case is distinguishable from *Burgess* v. *Gray* (1845) 1 C.B. 578, 14 L.J.C.P.N.S. 184. There, a single matter—an admission by the defendant—which was unexplained by other testimony, was put to the jury; and possibly, if we knew nothing more of these lights than that the defendants paid for them when they were put up after the accident, it might be some slight evidence for the jury of the liability of the defendants. But upon the evidence here, the fact is explained by the circumstances that Cochrane was not to find any of the materials for the bridge, and that he had made a contract that the defendants were to find the materials for it, but that he was to furnish the labour, and was to receive a specific sum for that job; and that this particular contract formed no part of, and had nothing to do with, his general employment by the defendants; and that those lights were so paid for, as forming a part of the materials supplied."

8. Contractors not within purview of statutes relating to servants or agents.—The reports contain a considerable number of decisions which illustrate in one form or another the principle, that independent contractors are not within the purview of statutes which their scope and phraseology show to be applicable only to servants or agents (*a*). But a meaning sufficiently com-

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Defendant's farm superintendent, who was also a member of a hardware firm, directed an employé of the firm to go to the farm, and repair a leak in a distillate tank, one of the appliances of the farm. By reason of the negligence of such employee in lowering a light into the tank an explosion occurred, by which plaintiff's decedent, a farm servant of defendant, was killed. Held, that the hardware firm, notwithstanding the connection of defendent's superintendent therewith, was an independent contractor. *Hedge* v. *Williams* (1901) 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106.

That the employé in question was a contractor for the carpentry-work only on a building, and that, as to the residue of the work, he was merely the superintendent or agent of the defendant, was held in a case where the uncontradicted testimony of the employé himself was to the effect, that the defendant engaged him to put up the entire building, employ all the men, and indorse all their bills; that he engaged to do the carpentry-work at twenty-seven cents on the bill, and employ all the mechanics, etc; that the defendant employed no one about the building; that he gave the employé possession of the ground, which he was to keep until the contract was executed; that the defendant was at the place of work once or twice a day, and gave him directions to keep everything safe; and that he had nothing to do with the mechanics. *Samyn* v. *McCloskey* (1853) 2 Ohio St. 536.

In a New York case it was laid down that, even if it should be regarded as a legitimate inference from the testimony, that the principal contractor was acting as the agent of the employer in negotiating certain sub-contracts, including that which was made with the person whose negligence was the cause of the injury, the mere fact that the principal contractor undertook such functions would not enlarge the liability of the employer for the negligence of those sub-contractors, since it was also shown that, in making the sub-contracts, the employer dealt directly with the sub-contractors themselves. *Wolf* v. *American Tract Soc.* 1898) 25 App. Div. 98, 49 N.Y. Supp. 236.

(*a*) The servants of a contractor are not entitled to sue the principal employer under the provisions of the English Employers' Liability Act. See the cases cited in § 721a of the present writer's treatise on Master and Servant.

This rule also prevails in all the British Colonies which have adopted that Act, except Ontario and British Columbia, where special provisions for the benefit of such servants have been inserted. See the treatise just mentioned.

A similar doctrine has been laid down in Alabama, where a statute closely resembling the English Act is in force. *Harris* v. *McNamara* (1893) 97 Ala. 181, 12 So. 103. It would doubtless be also applied in any other of the American States which have legislated on the same lines. But in Massachusetts, a special provision of the same tenor as those enacted in Ontario and British Columbia is now in force.

A contractor with the Minister of Railways and Canals, as representing the crown, for the construction of a branch of the Intercolonial Railway, is not an "employé" of the Railways and Canals Department of Canada within sec. 109, of the Government Railway Act of 1881, (44 Vic. chap. 25), requiring actions against any officer, employé or servant of the department for anything done by virtue of his employment to be brought within three months after, and upon one month's previous notice in writing. *Kearney* v. *Oakes* (1890) 18 Can. Sup. 148, Ritchie, Ch. J., and Gwynne, J., dissenting. Commenting on the phraseology of the statute Patterson, J., said: "We find the two expressions [i.e., employés and servants' used convertibly; as, e.g., in section 112 'any officer or servant

of, or any person employed by the department;' and in section 121 'any officer or servant of, or person in the employ of the department,' obviously denoting the same persons described in sections 64, 74, 82, 106, and 109, as 'officer, servant or employé' of the department. The word as used in the statute means, in my opinion, 'servant' and nothing more. It is, perhaps, inserted to save the feelings of those servants who do not like to be called servants, or by way of concession to the tendency of the day to understand the word servant as expressive only of a lower or quasi-menial grade. . . . Thus the statute is its own interpreter. The 'employé or servant of the department' is not a contractor like these defendants who agree with Her Majesty to provide materials and labour, and to execute such works as the construction of a branch railway. Section 120 illustrates this. It provides for the 'punishment of every person wilfully obstructing any officer or employé in the execution of his duty,' obviously including under the term 'employé,' persons who might be called servants without fear of resentment on their part—switchmen for example—and proving that words 'employé or servant' are used to denote one class and not two classes of retainers."

A contractor is not within the purview of Maine Rev. Stat. 1857, chap. 51, § 25, which declares a railway company to be "liable for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its road, committed by a person in its employ." *Eaton* v. *European & N.A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430. The court laid stress upon the fact that "contractors" were expressly mentioned in § 25 of the statute, and that the legislature had thus recognized the difference between them and servants. But the decision is also, as it would seem, put upon general grounds.

One who contracts to do the grading of a section of railroad, the entire work to be done by servants and labourers employed by himself, but subject to the approval of the company's chief engineer, and under the direction of its assistant engineer, is an independent contractor, and not an authorized agent or employé of the company, within S. C. Gen. Stat. § 1511, making railroad companies liable in damages for a fire originating within the limits of its right of way, in consequence of the negligence of its authorized agents or employés. *Rogers* v. *Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059

A contractor is not a "servant or overseer" within the meaning of La. Civil Code, 2299. *Peyton* v. *Richards* (1856) 11 La. Ann. 62; *Gallagher* v. *Southwestern Expos tion Asso.* (1876) 28 La. Ann. 943.

A person operating a shingle machine to manufacture shingles by the thousand for the owners or lessees of a mill is a contractor, and not a person in their "employ," in such a sense that they are chargeable with liability for his acts under the Maine statute (Sp. Stat. 1868, chap. 448) "passed to prevent throwing slabs and other refuse into Penobscot River." *State* v. *Emerson* (1881) 72 Me. 455.

Fisherman who under an agreement to fish from their homes, in their own boats, for lobsters during the fishing season, are independent contractors, and not servants. Accordingly they are not within the purview of the Masters and Servants Act of Newfoundland (Consol. Stat. chap. 109), and cannot be prosecuted for the abandonment of their contract, where they have taken up their traps in the middle of the season and refused to proceed with the fishery. *Ex parte Costigan* (1889) Newfoundland Rep. (1884-1896) 414. Referring to the phraseology of the statute, the court said: "Such words as, 'his master consents to receive him back into his service,' 'absent himself from his employer's service without leave' —the forfeiture, for absence, of a 'sum equal to twice the ratable proportion of his wages'—the penalties to which third parties are made liable 'who shall harbour or employ the servant of another after notice,' - and so forth, attesting conclusively to the inapplicability of the statute to such a case as the present."

A person hiring himself to work with his own team of oxen is not within the English statutes which punish laborers who desert their service. *Whelen* v. *Stevens* (1827) 2 Taylor (Ont.) 430.

Under Mansfield Digest, (Ark.) § 1958, providing that if any hireling shall wilfully set on fire any woods, etc., so as to occasion damage to any other person, with the consent or by the command of his employer, the latter shall be liable, the word "hireling" does not refer to independent contractors, but to servants of railroad companies. *St. Louis I. M. & S. R. Co.* v. *Yonley* (1890) 53 Ark. 503, 9 L.R.A. 604, 13 S.W. 333, 14 S.W. 800.

prehensive to embrace contractors has been ascribed to the word "servant," as used in two English Acts defining the responsibility of common carriers (*b*).

9.—Character of contract is tested by the existence or absence of a right of control on the employer's part.—From what has been said in § 6, ante, it is apparent that, except in cases which involve the liabilities arising out of the torts of certain classes of agents, the existence or absence of a right to exercise control over the details of the work in question must be the appropriate and decisive test by which it is to be determined whether the person employed to

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Compare also the cases cited in § 26, post.

That an independent contractor cannot be convicted under the embezzlement statutes has been held in several cases.

A finding that the prisoner was employed in the capacity of "clerk or servant" within the meaning of the statute, 24 & 25 Vict. is not warranted by evidence that the prisoner carried on an independent business, as an accountant and debt collector, that he was employed by the prosecutors to collect certain debts specified in a list given to him and was to pay over to the prosecutors the amounts received, as soon as he should have collected them; that the time and mode of collecting the debts was in his discretion, and he was authorized to sue for them, if necessary, but at his own charge; and that in no case was he to receive from the prosecutors more than five per cent. on the amount collected by him and paid over to the prosecutors. *Reg.* v. *Hall* (1875) 13 Cox C.C. 49, 31 L.T.N.S. 883.

A bare authority to get orders and collect moneys on commision does not constitute a "clerk" or "servant" within the meaning of the New Zealand Larceny Act, 1867. *Reg* v. *Clifford*, 3 New Zealand J.R.N S.S.C. 51.

See also the cases as to drovers cited in § 12, note (b), subd. 15 post.

(*b*) By the 8th section of the Carriers' Act, 11 Geo. 4 & 1 Will. 4, chap. 68, it is provided that nothing in the act shall protect from liability from loss or injury arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ. Every person is a "servant" within the meaning of this proviso who is directly or indirectly employed by the carrier to do what he has contracted to do. Accordingly a carrier has been held responsible for the theft of an article by a man in the employ of a firm with which a sub-contract had been made for the delivery of such goods as the defendant might convey to the city in question. *Machu* v. *London & S. W. R. Co.* (1848) 2 Exch. 415, 5 Eng. Ry. & C. Cas. 302, 17 L.J. Exch. N.S. 271, 12 Jur. 501.

This decision was followed in a later one by which a railway company was held liable for the value of goods which had been obtained through a forged order, while they were lying at one of the company's stations, and misappropriated by a man in the employ of the proprietor of the receiving office at which they had previously been delivered by the plaintiff for transmission to the station. *Stephens* v. *London & S. W. R. Co* (1886) 18 Q.B.D. 121.

A similar conclusion has been arrived at with regard to the meaning of the word "servants" in the Railway and Canal Traffic Act, 1854, s. 7, which enacts that every company within its purview shall be liable for the loss of, or for any injury done to, any house, cattle, etc., occasioned by the neglect or default of such company or its "servants," notwithstanding any notice, condition, or declaration, made and given by such company contrary thereto. In *Doolan* v. *Midland R. Co.* (1877) L.R. 2 App. Cas. 792, 37 L.T.N.S. 317, 25 Weekl. Rep. 882, 3 Asp. Mar. L. Cas. 685, a railway company was held liable under this provision for the negligence of the master and crew of a steamer, with the owners of which the company had contracted for the conveyance of certain cattle.

do that work is or is not an independent contractor (*a*). The qualified expressions occasionally used in the reports might seem to indicate that this test was not considered by some judges to be absolutely paramount (*b*). But it is more than probable that this guarded language is to be ascribed merely to an excess of judicial caution. At all events the weight of authority, as well as the logical inferences to be drawn from the definition of servant, as given in § 6, are decisively in favour of the doctrine, that this test is so entirely conclusive that it prevails against and overrides the

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(*a*) In one case the court expressed its disapproval of a doctrine stated to have been put forward by some of the authorities, viz., that "the existence of actual present control and supervision on the part of the employer is the test" to be applied for the purpose of ascertaining whether this relation to the employee is that of a master. Such a circumstance, it was declared, "is only a circumstance to be considered, although one of much weight." The court then proceeds to state in the following words what it regarded as the correct theory; "To get at the truth we must look further, and see if the person said to be a hired servant and agent is acting at the time for, and in the place of, his master, in accordance with and representing his master's will and not his own. It must be strictly his employer's business that he is doing, and not in any respect his own. If we find this to be the case we may safely conclude, as a general rule, that the relation of master and servant exists, so as to render applicable the rule of law that the employer must indemnify and protect the agent he employees" *Corbin* v. *American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63. The doctrinal position of the court is not very clearly indicated. If it is intended to deny the crucial character of the test supplied by the existence or absence of control, the case is manifestly opposed to the general current of the authorities. The latter part of the quotation seems to suggest that an employé must always be pronounced to be a servant, if it is found that he represented the will of his employers. But, according to the generally received view, this inference should be drawn only when the employer's will is represented as to the means used in performing the stipulated work. See note (*d*), infra.

(*b*) "Independence of control in employing workman and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not." *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91.

"The question in these cases, whether the relation be that of master and servant or not, is determined mainly by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work, or has given it to the contractor." *Forsyth* v. *Hooper* (1865) 11 Allen, 419.

Whether the relation be that of master and servant so as to invoke the rule of respondeat superior, depends "mainly on whether the employer retains direction and control of the work, or has given it to the contractor." *Andrews* v. *Boedicker* (1885) 17 Ill. App. 213.

In one case it is laid down that "the question of control over the work, while not conclusive in all cases upon the question of service, is to be regarded as a test of the greatest importance." *State, Redstrake* v. *Prosecutor Swayze* (1889) 52 N.J.L. 129, 18 Atl. 697.

"Who is an independent contractor? Or, rather, is he an independent contractor, or only an agent or representative of the employer in the particular case? A test which has been proposed, and generally an adequate one, or as good a test put in a few words as can be suggested, is:—Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? If he had, the employer is liable; if not, he is not liable, for the reason that the one doing the act is an independent contractor." *Carrico* v. *West Virginia C. & P.R. Co.* (1894) 39 W.Va. 86, 24 L.R.A. 50, 19 S.E. 571.

effect of any antagonistic evidence which may be introduced. This doctrine is not only asserted in numerous direct statements made by various judges, (*c*) but also supplies the essence of all the manifold forms of statement, by which judges and text writers have undertaken to define more or less formally the meaning of the term independent contractor (*d*).

(*c*) See, for example, the following: "The test is, whether the defendant retained the power of controlling the work." Crompton, J., in *Sadler* v. *Henlock* (1855) 4 El. & Bl. 570, 578, 24 L.J.Q B.N.S. 138, 1 Jur. N.S 677, 3 Week. Rep. 181, 3 C.L.R. 760.

"The test, I think, always is, had the superior personal control or power over the acting or mode of acting of the subordinate?" Per Lord Gifford in *Stevens* v. *Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 535, statement referred to with approval in *Atlantic Transp. Co.* v. *Coneys* (1897) 28 C.C A. 388, 51 U.S. App. 570, 82 Fed. 177.

"The right to control the negligent servant is the test by which it is determined whether the relation of master and servant exists." *Pioneer Fireproof Constr. Co.* v. *Hanson* (1898) 176, Ill. 100, 52 N.E 17.

"In every case the decisive question is, Had the defendant right to control in the given particular the conduct of the person doing the wrong?" Thompson, Neg. p. 909; statement adopted in *Powell* v. *Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W 691.

The test of the character of an employé as an independent contractor or as servant is, "whether Smith was in the exercise of a distinct and independent employment, using his own means and methods for accomplishing his work, and not being under the immediate supervision and control of his employer," *Morgan* v *Smith* (1893) 159 Mass. 570, 35 N E 101.

"The test by which to determine whether the person who negligently causes injury to another was acting as an agent or employé of the person sought to be charged, or as an independent contractor, is, Did the person so sought to be charged have the right to control the conduct of the wrongdoer in the manner of doing the act resulting in such injury?" *Gahagan* v. *Aermotor Co.* (1897) 67 Minn 252, 69 N.W. 914; *Corigan* v. *Elsinger* (1900) 81 Minn. 42, 83. N.W. 492

(*d*) *Language used by judges* —"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as a result of his work." *Powell* v. *Virginia Constr Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W. 691, approved in *Humpton* v. *Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776.

"When the person employed is in the exercise of a distinct and independent employment, and not under the immediate supervision and control of the employer, the relation of master and servant does not exist, and the liability of a master for his servant does not attach." *Linton* v. *Smith* (1857) 8 Gray 147.

One who, as an independent business, undertakes to do specific jobs of work, without submitting himself to control as to the petty details, is an independent contractor. *Carlson* v *Stocking* (1895) 91 Wis 432, 65 N.W 58.

In a leading New York case the contention of the defendant was stated to be "in substance, that when a person is engaged in doing a job or piece of work, under an employment or contract which leaves to him the independent use of his own skill, judgment, means and servants in the execution of it, he is not the agent or servant of the general employer." *Blake* v. *Ferris* (1851) 5 N.Y. 48, 55 Am Dec 304.

"This rule [i.e., respondeat superior], does not apply, and the liability does not exist, where it can be shown that those engaged in executing the work, and by whose carelessness or want of skill the injury was occasioned, are not the servants or subordinates of him for whose use and benefit the work is being performed, but are acting under a contract or employment which leaves the

contractor or employé free to exercise his own judgment as to the means and assistants to be employed in accomplishing the work, without being subject to control in these respects by the party for whom the work is being done." *McCamus* v. *Citizens' Gaslight Co.* (1863) 40 Barb. 380.

In a Maryland case a court, referring to certain decisions said: "It results from them that the rule of respondeat superior does not apply where the party employed to do the work, in the course of which the injury occurs, is a contractor, pursuing an independent employment, and, by the terms of the contract, is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of control and direction, in this respect, of the party for whom the work is being done." *Deford* v. *State* (1868) 30 M.D. 179.

The following passage is extracted from a charge to the jury: "If you find from the proof that the defendant let the whole work of excavating and finishing the vault to Tamlyn, as a contractor, to finish and complete the whole as a job, without reserving any control or direction over him in its construction, or over the construction of the work, or the place where it was being constructed, or the mode of its execution, or the workmen to be employed to do it, then he would be an independent contractor, and the defendant is not liable for his negligence in not providing suitable guards against danger to persons passing on the sidewalk." *Fuller* v *Citizens' Nat. Bank* (1882) 15 Fed. 875.

"To incur the responsibility [on the ground of the relation merely] the master must not only have the power to select the servant or agent, but to direct the mode of executing the work, and to so control him in his acts in the course of the employment as to prevent injury to others." *Robinson* v. *Webb* (1875) 11 Bush, 464.

If the employer "merely prescribes the end and contracts with another to accomplish the end by such means or methods as such other may in his discretion employ, the latter is as to such means and methods not a servant, but a master; and for negligence therein is alone answerable." *Bailey* v. *Troy & B. R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129.

"If, in rendering the service, the person whose negligence caused the injury was in the course of accomplishing a given end for his employer, by means and methods over which the latter has no control, but which were subject to the exclusive control of the person employed, then such person was exercising an independent employment, and the employer is not liable." *Wabash, St. L. & P.R. Co.* v. *Farver* (1887) 111 Ind. 195, 6 Am. Rep. 696, 12 N.E. 296.

"In general, the master is liable in law for the negligence of the servant, through whom, in legal contemplation, he is said to act, while in his employment. When, however, the person employed is engaged under an entire contract, for a gross sum, and in an independent operation, not subject to the discretion or control of his employer, the relation is not regarded as that of master and servant, but is said in modern phrase to be that of contractor and contractee; and the negligence of such contracting party, or of his servant, cannot be charged upon him for whom the work is contracted to be done." *Forsyth* v. *Hooper* (1865) 11 Allen, 419; statement adopted in *McCarrier* v. *Hollister* (1902) 15 S.D. 366, 91 Am. St. Rep. 695, 89 N.W. 862.

"The test is: Which party controls the work while it is progressing? Who has charge of the management and control of the forces, and who controls the movement and location of the material used in the construction? Who hires the workmen, buys the material, arranges the details, directs and superintends the labour, and is responsible for all failures which do not meet the requirements of the contract, or fulfill the specification? Who alone is responsible for results produced by separate and independent management? Who has control of the mode and manner of doing the work, subject only to a provision that it must be equal to a fixed rule, or a certain degree of excellence? When that is determined, liability is fixed." *St. Louis, Ft. S. & W. R. Co.* v. *Willis* (1888) 38 Kan. 330, 16 Pac. 728.

"Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer's design, he is an 'independent contractor,' and in such case the contractor, alone, and not the employer, is liable for damages caused by the contractor's negligence

in the execution of the work." *Smith* v. *Simmons* (1843) 103 Pa. 32, 49 Am. Rep. 113.

The rule is "that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer the latter is not responsible for the negligence or misdoings of the former." *De Forest* v. *Wright* (1852) 2 Mich. 368; adopted in *Pickens* v. *Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55.

"If one renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished, it is an independent employment." *Harrison* v. *Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699.

An independent contractor has also been described as a person who contracts to do a given piece of work "according to his own methods, and without being subject to the control of his employer, except as to the result of his work" (*Humpton* v. *Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776); and as one who is "answerable to his employer, only as to the results of the work, and not in the details of its management, or the incidents of its prosecution" (*St. Louis Ft.S. & W. R. Co.* v. *Willis* (1888) 38 Kan. 330, 16 Pac. 728); and as one who is "left to produce the desired result in his own way" (*Bennett* v. *Truebody* (1885) 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329); and as one who "carries on an independent employment in pursuance of a contract by which he has entire control of the work and the manner of its performance" (*Smith* v. *Simmons* (1883) 103 Pa. 32; 49 Am. Rep. 113; *Smith* v. *Belshaw* (1891) 89 Cal. 427, 26 Pac. 834). Similar phraseology embodying the same antithesis as is indicated by this form of statement is also found in many other cases. See, for example, *Casement* v. *Brown* (1892) 148 U.S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; *Tennessee Coal, Iron & R. Co.* v. *Hayes* (1892) 97 Ala. 201, 12 So. 98; *Jefferson* v. *Jameson & M. Co.* (1897) 165 Ill. 138, 46 N.E. 272; *Boardman* v. *Creighton* (1901) 95 Me. 154, 49 Atl. 663; *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Wood* v. *Watertown* (1890) 58 Hun, 298, 11 N.Y. Supp. 864; *Edmundston* v. *Pittsburgh M. & Y.R. Co.* (1885) 111 Pa. 316, 2 Atl. 404; and *Smith* v. *Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113. As to the meaning of the word "result" in this form of statement, see the extract from the opinion in *Jensen* v. *Barbour* (1895) 15 Mont. 582, 39 Pac. 906, S. 379 note (c), post.

In one case it was laid down that "a contractor is not the agent or servant of his employer, except as to the specific results which he undertakes to accomplish." *Holt* v. *Whatley* (1874) 51 Ala. 569. But this mode of stating the nature of the relation is hardly to be commended.

"While performing his contract and complying with its terms he [i.e. an independent contractor] is not subject to the rule and control of the employer, who cannot interfere save to require the performance as agreed. The relation is one of contract under which the contractor retains some degree of independence, while the labouring man follows the employer's direction, and is not independent in the sense of the independent contractor's independence." *Holmes* v. *Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465, 22 So. 403.

It is error to give an instruction from which the jury may infer that the mere employment and payment of another to perform a given piece of work is the test by which to determine whether the relation of master and servant exists. *Andrews* v. *Boedecker* (1885) 17 Ill. App. 213, where the jury were charged that it was legal and proper for the defendant to employ and pay the negligent person to do the work in question, and that in such case that person would be the servant of the defendant in doing that work.

In one case it was laid down that certain requested instructions to the effect that, if the defendants employed an experienced carpenter to erect the building in question they were not liable, were defective, in not requiring the jury to find that the building was being erected by an independent contract which gave the carpenter exclusive control over the work. *Hearn* v. *Quillen* (1901) 94 Md. 39, 50 Atl. 402.

In a case where the question was, whether the owners of a steamboat were liable for the negligence of the persons operating it, the trial judge was held to have erred in sustaining objections to the introduction of evidence tending to show a transfer of control by such owner. *Gulzoni* v. *Tyler* (1883) 64 Cal. 334, 30 Pac. 981.

Language used by text-writers.—The following definitions by legal authors have received the approval of various American courts:

"Where the contract is for something that may lawfully be done and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control reserved either as respects the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, and the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the person employed by the contractor so as to be responsible to third persons for their negligence." Cooley, Torts, p. 646; quoted in *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663.

"An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 2 Thompson, Neg. 1st ed. § 22, p. 899; 2nd ed. § 622; adopted in *Crenshaw v. Ullman* (1892) 113 Mo. 633, 20 S.W. 1077; *Link v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376.

"One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant." Shearm & Redf. Neg. § 165; adopted in *Foster v. Wadsworth-Howland Co.* (1897) 168 Ill. 514, 48 N.E. 163; *Hale v. Johnson* (1875) 80 Ill. 185; *Harg v. Bousfield* (1896) 65 Minn. 355, 68 N.W. 45; *Pickens v. Dicker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55; *Cunningham v. International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632.

The true test by which to determine whether one who renders services to another does so as a contractor, or not, is to ascertain whether he "renders the services in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as the means by which it is accomplished." Shearm & Redf. Neg. § 164; adopted in *Rome & D.R. Co. v. Chasteen* (1889) 88 Ala. 591, 7 So. 94.

When a person lets out work to another to be done by him, such person to furnish the labor and the contractee reserving no control over the work or workmen, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligent or improper execution of the work by the contractor." Wood on Mast. and S. p. 593; adopted in *Faren v. Sellers* (1887) 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363.

If the principal using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work. The employment is regarded as independent, when the person renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." Mechem, Agency, § 747, quoted with approval in *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S.E. 163.

"An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of the company only as to the result of his work." Elliott, Railroads, § 1063; adopted in *Norfolk & W. R. Co. v. Stevens* (1899) 97 Va. 631, 46 L.R.A. 367, 34 S.E. 525.

"Where a person contracts with another, exercising an independent calling, to do work for him according to the contractor's own methods, and not subject to his control or orders except as to results to be obtained, the former is not liable for the wrongful acts of the contractor or his servants." 14 Am. & Eng. Enc. Law, p. 830; adopted in *Long v. Moon* (1891) 107 Mo. 334, 17 S.W. 810.

10. Same subject continued.—An analysis of the elements embraced in the statements quoted above indicates that the juridical conception of an independent contractor is simply that of a person who, being in the exercise of a distinct and recognized trade, craft, or business, undertakes to do certain work, without submitting himself to the control of the employer, in respect to the details of that work. Considered from one point of view, the situation contemplated when such a person is engaged implies that the employer has nothing to do in respect to the work, except to see that it is done according to the terms of the contract (*a*); or that he has merely a right to see that the contract is performed in pursuance of its terms, conditions, and specifications (*b*). Considered from another point of view, that situation implies that he is to have the independent use of his own skill, judgment, means, and servants in the execution of the work (*c*); or that he is to have the exclusive direction and control of the manner in which the work is to be done (*d*); or that he is to have full control of the work and workmen (*e*); or that the execution of the work is to be left entirely to his discretion (*f*); or that he is to be free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work (*g*); or that he is to be left entirely free to do the work as he pleased (*h*); or that the work is to be done according to his own methods (*i*); or that he is to procure labour and materials in his own way, provided they are such as the contract demands, and use such machinery and appliances as he deems proper, provided they do not unnecessarily injure the subject-matter of the contract, or interfere with work done by others (*j*).

(*a*) *Martin* v. *Tribune Asso.* (1883) 30 Hun. 391.

(*b*) *Scammon* v. *Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

(*c*) *Blake* v. *Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304

(*d*) *Harrison* v. *Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699; *Corbin* v. *American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63.

(*e*) *Allen* v. *Willard* (1868) 57 Pa. 374.

(*f*) *Hexamer* v. *Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755.

(*g*) *Deford* v. *State* (1868) 30 Md. 179.

(*h*) *McCarthy* v. *Second Parish* (1880) 71 Me. 318, 36 Am. Rep. 320.

(*i*) *Wiese* v *Remme* (1897) 140 Mo. 289, 41 S.W. 797.

(*j*) *Hughbanks* v. *Boston Invest. Co.* (1894) 92 Iowa 267, 60 N. W. 640.

Ordinarily, of course, the servants of the person employed are, for the purpose of applying the above-mentioned test, identified with him in considering the effect of the evidence. It may be observed, however, that there is a class of cases in which, although it may be apparent that the person employed was himself an independent contractor, there is still an ulterior question to be settled, viz., whether the men who were engaged in doing the work which was the immediate cause of the injury were, at the time when the injury was received, under his control or under the control of the employer. If the latter should be the situation established by the evidence, the employer is plainly liable, and the independence of the contract ceases to be a differentiating factor (*k*).

Where the employer's agent, acting under a power expressly reserved to "vary, extend, or diminish the quantity of work during its progress," orders the performance of additional work which is connected with the work covered by the contract, the inference is that, while the additional work is in progress, the relations between the parties and the obligations and responsibilities to which they are subject are identical with those which are deducible from the provisions of the contract (*l*).

11. Presumptions entertained as to the character of the contract.—The weight of authority is in favour of the doctrine that, when the inquiry is at that initial stage at which nothing more appears than that the actual tort-feasor was, at the time when the injury was inflicted, in the employment of the party whom it is sought to hold responsible for the injury, the latter, if he relies on that

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(*k*) See a full collection of the authorities in a monograph contributed by the present writer to the Lawyers' Reports Annotated, Vol. 37, pp. 33, especially pp. 69, et seq.

In *Turner* v. *Great Eastern R. Co.* (1875) 33 L.T.N.S. 431, where the plaintiff was injured by the negligent management of moving railway cars, while he was working for a man who had contracted to discharge coal from cars standing on a siding, the discussion was centred wholly upon the question whether the defendant company exercised such a control over the plaintiff and his fellow workman as to make them its own servants ad hanc vicem. Grove, J., in his opinion remarked: "No doubt the cases do not necessarily depend on the term contractor, because the man may stand in different relations to the person with whom he contracts and those whom he employs."

(*l*) *Charlock* v. *Freel* (1891) 125 N.Y. 357, 26 N.E. 262. The court remarked that the additional work, as it came between the completion of the sewer and the repaving of the street, and was designed to make the drainage better, was cognate in its nature to the principal undertaking, and that the effect of its assumption was to continue the contract relations between the parties, with all the obligations and responsibilities which, either expressly or by legal implication, were imposed by that contract.

defense, has the burden of proving that the tort-feasor was an independent contractor (*a*).

On the other hand, though such a doctrine has apparently not been explicitly formulated, it would at least seem to be a reasonable inference from the decisions as a whole that no presumption that the relation of the parties was that of master and servant can be entertained, when the case has been developed to a point at which the nature of the employment, whether general, or with a view to a specific result, the character of the work contracted

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(*a*) 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.S.N.S. 743, 17 Weekl. Rep. 1065, Cockburn, Ch. J., in the course of some remarks which were concurred in by Blackburn, J., said: "I agree that, where a thing is being done upon the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done."

In a New York case it has been laid down that prima facie the person at whose instance and for whose use and benefit work is done is liable for all injuries to third parties resulting from the negligence or unskillfulness of those executing the work; that, unless some evidence is given as to the terms of the contract, "it is no more proper to assume that . . . it gave the contractor an independent employment, than that it stipulated for the work to be done under the immediate supervision and direction of the defendants;" and that, if the defense relied upon is that the relation between the parties was not that of master and servant, "it is always necessary to show the terms of the contract with sufficient particularity to enable the court to determine whether the employment was of this independent character." *McCamus* v. *Citizens' Gaslight Co.* (1863) 40 Barb. 380.

Where it is a question of the effect of a complaint, the relation of master and servant will, as a general rule, be inferred from any allegations which merely show that the persons for whose negligence it is sought to hold the defendant responsible were doing the work in question upon his property, while he had possession and control thereof, that the work was being done with his consent for his benefit, and that it was executed in an unskillful manner. *Dillon* v. *Hunt* (1884) 82 Mo. 150, Aff'g (1881) 11 Mo. App. 246, where however the decision was put upon the ground of the non-delegable quality of the duty of a land owner so to use his property as not to create a nuisance. The reasoning of the Court of Appeals is mentioned with approval in (1891) 105 Mo. 154, 24 Am. St. Rep. 374, 16 S.W. 516, where a new trial was ordered for the reason that there had been error in the admission of evidence.

The doctrine stated in the text is also recognized in *State* v. *Swayze* (1889) 52 N.J.S. 129, 18 Atl. 697 (see § 23, note (a), post); *Perry* v. *Ford* (1885) 17 Mo. App. 212 (see same section).

These authorities outweigh the effect of the remarks of the court in *Harris* v. *McNamara* (1892) 97 Ala. 181, 12 So. 103, to the effect that, as the burden is on the plaintiff to prove that the relation of master and servant existed, no presumptions which do not arise from the evidence can be indulged in his favor.

In an earlier case, *Rome & D. R. Co.* v. *Chasteen* (1889) 88 Ala. 591, 7 So. 94, where an accident was caused by the negligent manner in which the servants of a person engaged in constructing a railway had operated a train, it was the opinion of a portion of the same court that as it was in the power of the defendant to produce and prove a contract, and it had not done so, evidence that the engine and cars belonged to the company, and that the road was being constructed for its benefit, showed prima facie that those employed in the work of construction were the servants of the company, and cast upon it the burden to prove that the person employed had possession of and controlled the road, engine and cars, as a contractor, and not as a servant.

for, and the industrial status of the person engaged, have been disclosed by the testimony (*b*). In fact there is express authority for the rule that, in some states of the evidence, the contrary presumption will prevail and enure to the advantage of the defendant (*c*).

(*b*) That this statement is fully as favourable as the authorities warrant to the party who relies on the theory that, under the given circumstances, the relation was that of master and servant, is abundantly manifest from the cases cited in the ensuing sections.

An instruction is erroneous which would authorize the jury to assume that a man employed to take charge of a stable and train his employer's horses was necessarily a servant. *Arasmith* v. *Temple* (1882) 11 Ill. App. 39 (trainer assaulted a man hired by him). Discussing the question how it is to be ascertained in such cases as the one under review that the employer has not the right of control, the court said: "The contract in terms makes no provision in relation to it. Of necessity, therefore, resort must be had to circumstantial evidence; the parties, the work, and such other facts shown as would naturally lead us, in the light of our general knowledge of men and business, to infer their intention. For example, if the contract disclosed nothing more of what was to be done than that it was to work on a farm, the natural inference from the simple circumstance that nothing more was specified, in the light of common knowledge of the variety of work to be done on a farm, would be that the employé was to be directed from time to time what to do and how to do it. So, if it were to work at plowing, or ditching, or fencing on a certain farm; for there would still be nothing definite in respect to the time, place, amount or style of the work, and as to these the party for whom it was to be done would naturally be expected to direct. If, however, it were to plow a certain field for the next corn planting, to build a certain described fence, to dig and complete a well, as specified, or the like, it would present the case of a contract for a 'specific job,' where the employer might be interested only in the 'result' and quite indifferent to the mode of its accomplishment. Here it might be difficult to form a satisfactory conclusion upon the point in question from this circumstance alone. But the further fact that the job was such as to require for its accomplishment some special knowledge and skill, falling within 'a regular independent employment' or 'distinct calling,' which the employé followed as a business, would raise some probability that it was intended to leave to his judgment, to be exercised on his own responsibility, the means, the manner of using them, and all the details of the work. This probability would be increased by the additional fact that he was to be paid for it a 'gross sum;' and still further, 'if he used his own tools and assistants;' and still further, if the employer neither had nor pretended to have the special knowledge or skill required; and might become a clear belief, if it also appeared that during the progress of the work he did not in fact, though present, give any directions in regard to them. These and other like circumstances appearing in different cases have come to be recognized as indicia of the character of a contractor, and have been gathered up by courts and text writers into definitions to distinguish it from that of a servant. No one, perhaps, is essential to it or conclusive of it, but they all tend to establish the one fact which is decisive, namely, that as to the act in question the employee was not subject to the control and direction of the employer."

In a Michigan case the nature of the employment, and the occupation of the person employed are mentioned, arguendo, among the factors which determine the nature of the relation between the parties to any given contract. *Moore* v. *Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

(*c*) 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 Weekl. Rep. 1065, where a person was injured by a plank which was let fall by a workman engaged in repairing the roof of a railway station, Cockburn, Ch. J., remarked that, if it were necessary to determine

12.—Independence of contract usually inferable where it is for the performance of an entire piece of work at a specified price.—The adoption of the conception of an independent contractor, as it has been explained in §§ 6, 9, ante, may be said to entail, as a necessary consequence, the acceptance of the doctrine that, where the substantial effect of the evidence is that the person employed was engaged in some occupation which might in a reasonable sense be described as distinct, and that he undertook to execute a particular piece of work for a specified price, calculated with reference to the quantity of work actually performed, it is, as a general rule, an inference in point of law, that the employer did not intend to exercise any control over the work while it was in progress, but merely reserved the right to reject the results produced thereby (*a*). The

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the question, whether the workman was the servant of a contractor, the court would have to consider whether the case was properly withdrawn from the jury on the ground that the plaintiff offered no evidence to show that the workman was a servant of the company, and after adverting to the general principle already stated in the text, proceeded thus: "But in the case of work of this description, it seems to me that that principle would not apply, because it is a matter of universal knowledge and experience that in a great city like this persons do not employ their own servants to do repairs to the roofs of their houses or buildings: they employ a builder whose particular business it is to do it. That being a matter of universal practice, and of universal and common knowledge, I think this is a circumstance where the judge ought to take into account in determining whether there is evidence to go to the jury or not; but I do not think it is necessary to decide this case on this particular point."

In order to charge an undertaker with liability for the negligence of the driver of a carriage at a funeral it is not enough to show that the latter was engaged by the former to furnish and drive the carriage. It is also necessary that some specific evidence should be given which tends to show that the employer had the right to control the driver. *Boniface* v. *Relyea* (1868) 6 Robt. 397.

Evidence that a city had a contract with the person who piled lumber on a street for the purchase of the lumber is sufficient to authorize a charge on the law respecting the liability of an owner to third persons from the negligence of an independent contractor, although the terms of the contract do not appear, since, if there is anything in the terms of the contract tending to show the relation of master and servant between the city and such person, the party asserting that such was their relation should offer evidence to prove it. *Evansville* v. *Senheim* (1898) 151 Ind. 61, 41 L.R.A. 734, 51 N.E. 88, Denying Rehearing in 47 N.E. 634, 41 L.R.A. 728, 151 Ind. 42.

(*a*) When a person "enters into contract with competent contractors, doing an independent business, who agree to furnish the necessary materials and labour and make the entire improvement according to specifications prepared in advance, for a lump sum, or its equivalent, they are not the servants or agents" of the contractee, but are independent contractors. *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91.

Under § 1799 of the French Civ. Code (which is in force in Quebec and Mauritius), masons, carpenters, locksmiths, and other workmen, who make contracts by the job on their own account are deemed to be contractors for the kind of work they undertake, and subject to the rules prescribed with regard to that class of employés.

decisions which illustrate this doctrine are collected under convenient headings in the subjoined note (*b*).

(*b*) (1) *Persons engaged in construction or other work on railways.*—In *Steel v. South-Eastern R. Co.* (1855) 16 C.B. 550, there was evidence to shew that the work was being done under the superintendence of one P., the defendants' surveyor, who furnished the plans; but one E., the foreman of one F., a bricklayer, stated that the work was done by him and the men employed by him, under a contract between F. and the company. Upon his cross-examination, the witness said that he had orders, from P. to go on, that P. was the person who told him what to do, but that he was the responsible person to determine in what manner that which P. directed him to do should be carried out. It further appeared, that P. had directed the witness to do the work in a certain manner, and that the injury resulted from the workmen having disobeyed this direction. It was held that the trial judge had properly directed a non-suit on the ground that F. was an independent contractor.

Provisions in a contract, which shew that a construction company was to survey and locate a line, procure the right-of-way, build the roadbed, tracks, bridges, side tracks, etc., and equip the same with engines and cars in accordance with certain specifications, implies a condition of things which necessarily makes the construction company an independent contractor, so far as the provisions of the contract furnish a rule for classification. *St. Louis Ft. S. & W.R. Co.* v. *Willis* (1888) 38 Kan. 330, 16 Pac. 728.

A person who contracts to build the roadbed of a railway ready for the superstructure according to the terms of the agreement, and to deliver it over on a certain date, and who, in doing the work, employs his own hands and teams, and furnishes his own material, implements and tools is prima facie an independent contractor. *McKinley* v. *Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449.

The inference that a railway company intended to reserve the right of controlling the construction trains of a contractor who agreed to lay its track at the rate of a certain number of miles per month, cannot be drawn from a provision that the company is "to furnish all motive power and cars, and operate the construction trains." *Miller* v. *Minnesota & N. W.R. Co.* (1888) 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N.W. 188. The court observed that the word "operate" was, as the general tenor of the contract shewed, not used in the general sense common to all the acts necessary to the use of a railroad by moving trains over it, but in the restricted sense that the necessary force was to be furnished to move the train over the road at such times as directed by the contractors.

A person employed by a railway company to pump water out of an excavation by means of a portable steam engine is an independent contractor, where neither the company, nor any of its employees has the right to operate the engine or to interfere in the manner of its operation, or to direct the owner how or when it shall be operated; and the only right the company has in respect to the matter is to require the owner of the engine to accomplish the end of keeping the water down to a certain level. *Wabash, St. L. & P.R. Co.* v. *Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N.E. 296.

A man who undertakes for a lump sum to repair a wharf belonging to a railway company, and is not controlled or interfered with by his employer while the work is in progress, is an independent contractor. *Brunswick Grocery Co.* v. *Brunswick & W.R. Co.* (1898) 106 Ga. 270, 32 S.E. 92, 71 Am. St. Rep. 249.

So also is a man who undertakes to supply at a stipulated price per cord the wood which a railway company requires for fuel. *Leavitt* v. *Bangor & A.R. Co.* (1897) 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998.

See also the cases cited in §§ 15, 17, post.

(2) *Persons who undertake the construction of entire buildings or specific portions thereof.*—A person with whom a contract is made for the erection of an entire building, and to whom the premises are surrendered for that purpose, is an independent contractor. *Scammon* v. *Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334. The Court said: "Were those contractors the servants of the owners? That they are not seems to us apparent. They were not bound to perform the labour under the direction of the owners, or their agents, but under their contract. It

was not to them that the contractor looked for directions, but to the agreement. They were bound to furnish the materials and labour, and complete the building within a given time, and the owners had no right to control the selection of the materials or direct when the work should be performed, but only to look to their contract for its performance in pursuance to its terms, conditions and specifications."

One having an entire contract to erect a building according to the plans and specifications furnished to him by the owner, who has nothing to do with the work, or employment, or payment or hiring of hands, is an independent contractor. *Crenshaw* v. *Ullman* (1893) 113 Mo. 633, 20 S.W. 1077; *Wiese* v. *Kemme* (1897) 140 Mo. 289, 41 D.M. 797.

One who contracts to build a house, and undertakes to furnish the materials, make the excavation, build the walls of the foundation, put up the building, and complete the work, replacing the plank removed from the sidewalk, etc., within a specified time, and in a specified manner, and for a stipulated compensation, is an independent contractor. *Clark* v. *Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590.

Where a superintendent chosen by a school district to superintend certain improvements in a school-house is only authorized to direct the person employed in respect to the manner in which the work is to be executed, the latter is an independent contractor. *School District* v. *Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627.

The plaintiff and defendant being owners of adjoining lots, the latter built a wall upon his lot, along the boundary line between them; the same being constructed for him by D. and C. under a written contract at a specified price calculated with reference to the quantity of work done. The defendent furnished the materials only, but employed no workmen and exercised no control over them. Held, that the relation of master and servant, or principal and agent, did not exist between the defendent and those by whom the wall was constructed. *Benedict* v. *Martin* (1862) 36 Barb. 288 (error to exclude from the consideration of the jury the question whether the action was not barred on this ground).

One engaged in the construction of a building who employs and pays the laborers himself, without being under the control of the owner of the building, is an independent contractor, though he is to be paid a percentage on the cost of erection. *Whitney & S. Co.* v. *O'Rourke* (1898) 172 Ill. 177, 50 N.E. 242.

A contract couched on the following terms was held to indicate on its face that the employer did not, in any respect, retain control of the work as to the method, time or place of its execution, but only as the result accomplished: "We will pay $3.60 per ton for the erection of the structural iron work, not including stairs, on our order No. 131 for Gluck Brewing Company, you to erect the same in a satisfactory manner, according to plans, to bolt all lintels together as required, and paint all material one coat when not already painted. It is understood that you are not to take the material from the place where it is now piled. You are to make out your pay rolls, and we will pay the same on regular pay days at the office. If you want to discharge a man, we will pay him on presentation of regular discharge slip by you: It is understood that we are to furnish all tools and paints." *Klages* v. *Gillette-Hersog Mfg. Co.* (1902) 86 Minn. 458, 70 N.W. 1116. But from a consideration of all the evidence surrounding the making of the contract the court was of the opinion that it did not conclusively appear that the true relations of the parties were defined by the writing.

The employment is independent, where a landowner agrees with one person for the entire granite material needed for a building, and with another person for the rest of the material and for work necessary to complete the building and structures required, and had nothing to do in respect to the work, except to see that it was done according to the terms of the contract. *Martin* v. *Tribune Asso.* (1883) 30 Hun, 391.

A corporation, owning a lot, entered into a contract for the erection of a building thereon, by the terms of which one Downey agreed to "take entire charge of all the work,...to make all contracts for the various departments of work required,..,to see that the contracts entered into are honestly and faithfully kept," to be "responsible for all loss or damage from accidents during the construction of the building," and to take all proper precautions for the avoidance of such accidents. Through Downey the corporation thereafter made a

contract, containing similar covenants of indemnity, with sub-contractors named Weber for the mason work and scaffolding, and with a large number of other contractors for all the other work upon the building. Discussing the contention that an injury caused by the negligence of one of the workmen was imputable to the tract society, because it was the owner of the premises, the court said: "The evidence shows that it had made contracts with other parties for the entire construction of the building. Downey, by the terms of his contract, was not the agent of the society in the construction of the building, but an independent contractor within the meaning of the authorities, and the society had no control over the details of the work, or over the workmen employed in the building, the erection of which it had surrendered to Downey and the other contractors." *Wolf* v. *American Tract Soc.* (1898) 25 App. Div. 98, 49 N.Y. Supp. 236.

D., being the owner of a city lot, employed R. to draw plans and superintend the erection of a building thereon; R. drew a plan, to which D. assented; he paid R. a commission on the value of the building, R. having no interest other than to have the work done well, D. paid for the materials and the bills for all the workmen upon orders from R. R. employed T., a master bricklayer, and two carpenters; T. employed the journeymen bricklayers and hod carriers. Held, That R. and T. occupied the position of independent contractors. *Deford* v. *State* (1868) 30 Md. 179.

A wife authorized her husband to have a house erected for her on her separate property. The husband let the contract for brickwork to a contractor, for a stated consideration; "said work to be done in a workmanlike manner." He assumed no control over the employés of the contractor of the method of construction. He paid the contractor, and not his employés. Held, that the husband and wife were not liable for injuries received by a boy employed by the contractor to work on the house. *Simonton* v. *Perry* (1901); Tex. Civ. App. 62 S. W. 1090:

A person who contracts to put up and deliver to the owner of a building an elevator, fully completed and in working order, for a specified sum and according to written specifications, is an independent contractor. *Long* v. *Moon* (1891) 107 Mo. 334, 17 S.W. 810.

A contract under which the contractor exercised exclusive control and direction over the digging of the cellar of a house, the erection of the walls around it, together with the passageways into the same, and over the erection of the entire building, creates an independent employment. *Ryan* v. *Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123.

The evidence showed that a firm doing business under the name of H. & M. were contractors engaged in jobs of the same kind as that which they were doing when the accident occurred, that they had undertaken to excavate for the foundations of a building for one R.; that they were to be paid a percentage upon the cost of the labour; that they employed and paid all labours themselves; that they alone exercised supervision of the work; that plaintiff was employed by them as a day labourer about the work at the time he received the injury complained of. It did not appear that, after the making of his agreement with M. & H., R. had any connection whatever with the excavation which was being done, further than to pay them the stipulated price when the work was finished. Held, that R was not liable for the negligence of M. & H. *Hale* v. *Johnson* (1875) 80 Ill. 185.

Plaintiff and defendant occupied buildings which were separated by a passageway about six feet wide, the dividing line of the properties being in the centre of the way. Water ran through the wall of defendant's building into the cellar, and it employed a man to repair the wall. The one so employed sent his workmen, who dug up the ground in the passageway, and left it so piled that, when a storm occurred, water was turned into plaintiff's cellar. In answer to the contention of the defendant, that Sawyer, the person employed, was a contractor, the auditor reported as follows: "I do not find that said Sawyer made any contract with the defendant, to stop the water from running into its cellar, but I find that said Sawyer did the work under a general employment, and was to receive a reasonable compensation therefor." The following sentence also formed part of the report: "It did not appear that the defendant gave any directions about the work done by Grenier, but left the method of doing the work and stopping the leak to his judgment." Commenting upon this report, the court

said: "The language of the auditor, when he says: 'I do not find that said Sawyer made any contract with the defendant to stop the water from running into its cellar,' would seem to mean 'no contract in writing.' But this is not important. There was clearly a verbal contract either to stop the water from running into the cellar or to try to stop it,—and it is immaterial which—for which Sawyer was to have a reasonable compensation. In carrying out this contract, the plaintiff was injured by the negligence of the servants of Sawyer, who were hired by his representative Grenier. The defendant neither hired these servants nor was under any obligation to pay them. It exercised no control over them, nor, so far as appears, had any right to exercise such control. The method and manner of doing the work was left entirely to the skill and judgment of Sawyer, who on the facts found does not appear not to have been an independent contractor." *Dutton* v. *Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N.E. 405.

One under contract with the owner of premises to erect a wall thereon at a specified price per 1,000 brick is not a servant of a corporation, of which the owner is an officer, and which is in possession of the premises and also of the adjoining premises, so as to impose the duty of a master upon it in respect to protecting him from injury from its machinery. *Horton* v. *Vulcan Iron Works Co.* (1897) 13 A. Div. 508, 43 N.Y. Supp. 699.

One employed to do the woodwork on dry kilns under a contract providing that the owner shall furnish the materials, and that the contractor shall employ the labour and superintend the same and erect the buildings according to certain plans, and receive a per diem payment for himself and each of his employees, is an independent contractor. *Emmerson* v. *Fay* (1896) 94 Va. 60, 26 S.E. 386.

An artisan who makes a contract to trim the stone front of a building for a lump sum is an independent contractor. *Matthes* v. *Kerrigan* (1886) 21 Jones & S. 431 plaintiff who was injured by the fall of a scaffold which had been hung by a gang of painters, and which he used by defendant's permission, held not entitled to maintain an action on the theory that he was a servant of the defendant.

Where a carpenter engaged in building a house on his own lot contracts with a firm of brick masons to do all the brickwork, such firm employing the necessary labor, the brick masons are independent contractors. *Richmond* v. *Sitterding* (1903), 9 Va. L. Reg., 41, 43 S. E. 562.

A landowner is not liable for the negligence of a person who agrees to do all the necessary excavation and all the masons' and bricklayers' work required in the construction of a building on his property, and who, under the contract is to have the care of the building and whatsoever belonged thereto during the process and until completon. *Allen* v. *Willard* (1868) 57 Pa. 374.

A man who makes a special contract to put up the iron front of a building for a lump sum which he is to receive when the job is completed is an independent contractor. *Peyton* v *Richards* (1856) 11 La. Ann. 62.

That a mason was an independent contractor has been held to be a proper inference, where the evidence is that the mason was employed in a single transaction at a specified price for the job; that by the terms of the contract he was to accomplish a certain result, the choice of means and methods and details being left wholly to him; that he was employed as a mechanic in a regular business, recognized as a distinct trade, requiring skill and experience; that his duty was to conform himself to the terms of the contract; and he was not subject to the immediate direction and control of his employers. *Lawrence* v. *Shipman* (1873) 39 Conn. 586.

Where a witness in answer to the question: "Was the building erected by the defendant company; was it erected for them?" said: "It was erected for them," it was held that the language, although equivocal, was such that a jury would be warranted in inferring that the persons constructing the building were independent contractors, and that a charge by which they were told that they were "not to presume in the absence of all evidence on the point, that the building was being erected under a contract," was erroneous. *Prairie State Loan & T. Co.* v. *Doig* (1873) 70 Ill. 52.

(3) *Persons engaged to execute repairs or improvements on a building.*—"As a general rule, where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which

if left entirely to his discretion, with no restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is specially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of a master, " " " and the owner is not liable for his acts or the acts of his workmen who are negligent and the cause of injury to another." *Hexamer* v. *Webb* (1886) 101 N. Y. 377, 54 Ann. Rep. 703, 4 N. E. 755.

The following employés have been held to be independent contractors:

A gas-fitter who takes a sub-contract under a person who has contracted to make certain alterations in a building. *Rapson* v. *Cubitt* (1842) 9 Mees & W. 710, Car. & M. 64, 6 Jur. 606, 11 L.J. Exch. N.S. 271.

A plumber employed to execute the entire job of repairing a cistern in a house. *Blake* v. *Woolf* (1898) 2 Q.B. 426.

A man who makes a contract with his employer to furnish all the material, and do all the work, and to complete certain specific alterations and improvements, to the satisfaction of the defendant, for a fixed and a certain sum to be paid to him. *Conners* v. *Hennessey* (1873) 112 Mass. 96.

A plumber, where he is left to exercise his own discretion. *Burns* v. *McDonald* (1894) 57 Mo. App. 599.

A plumber who has a right to send, and does send, a subordinate to do the stipulated work. *Bennett* v. *Trueblood* (1885) 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329.

One who contracts to do the plaster work for a person who has taken a contract to execute certain alterations in a building. *McLean* v. *Russell* (1850) 12 Sc. Sess. Cas., 2nd series, 887, 22 Sc. Jur. 394.

A scaffold builder employed by a painter to construct a scaffold for the use of his servants. *Devlin* v. *Smith* (1882) 89 N.Y. 470, 42 Am. Rep. 311.

See also *Welfare* v. *London B & S.C.R. Co.* (1869) L.R. 4 Q.B. 696, cited in § 11, notes (*a*), (*c*), ante. 38 L.J.Q.B.N.S. 241, 20 L.T.N.S. 743, 17 Weekl. Rep. 1065.

A mere contract to do certain work in repairing a house for a stipulated price, does not create the relation of master and servant so as to relieve the personal representative of the one for whom the work was done from liability for work performed after his death, even though the house is specifically devised and the personal representative has no interest therein. *Russell* v. *Buckhout* (1895) 87 Hun. 46, 68 N.Y., S.R. 150, 34 N.Y. Supp. 271. Dykman, J., dissented on the ground that the contract was dissolved by the death of the contractee, (*Lacy* v. *Getman*, 119 N.Y. 112) and that the administratrix was liable only for the amount due when that death occurred.

(4) *Architects.*—As building operations are ordinarily conducted, the architect acts as the agent and representative of the person for whom the work is being done. See, for example, *Campbell* v. *Lunsford* (1887) 83 Ala. 512, 3 So. 522; *Schwartz* v. *Gilmore* (1867) 45 Ill. 455, 92 Am. Dec. 227; *Slater* v. *Merservau* (1876) 64 N.Y. 138; *Ridgeway* v. *Downing Co* (1900) 109 Ga. 591, 34 S.E. 1028; *School District* v. *Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627. But he is an independent contractor if he merely prepares the plans and specifications for the work, and does not afterwards supervise its execution on behalf of his employer. *Pitcher* v. *Lennon* (1896) 12 App. Div. 356, 42 N.Y. Supp. 156; *Burke* v. *Ireland* (1901) 166 N.Y. 305, 59 N.E. 914. In the judgment of the Supreme Court in the last cited case (see 1898 26 App. Div. 487, 50 N.Y. Supp. 360, (1900) 47 App. Div. 428, 62 N.Y. Supp. 453) the architect was assumed to be the agent of the owner; but it was held that he had exceeded his authority in modifying the plans and specifications without the assent of the owner. Still more is he to be considered to be an independent contractor where he undertakes to execute the entire work as well as to draw up the necessary plans. *Boswell* v. *Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345.

(5) *Persons doing work on bridges.*—That the negligence of a company employed to replace a broken shoe on a city bridge was not imputable to the city was held to be a necessary inference, where the only evidence of any action on the part of the defendant was that one of its alderman, who was a member of its street committee, directed the company to have new and heavier shoes cast and placed under the bridge; and it was not shown that any directions were given

as to the manner in which the work was to be done, as to the persons who should be employed to do it, as to the means to be used in removing the old shoes and replacing them with the new ones, or as to the manner in which the bridge should be supported while this was done. *Wood* v. *Watertown* (1890) 58 Hun. 298, 11 N.Y. Supp. 864. This case was recently cited in *Scanlon* v. *Watertown* (1897) 14 App. Div. 1, 43 N.Y. Supp. 618, as being a correct application of the general rule.

(6) *Persons engaged in other kinds of construction work.*—The independence of the contract is inferable, where the person employed undertakes to perform the work of diverting a creek at a certain price, according to the employer's plans and to the satisfaction of his engineer; to provide machinery and materials, pay wages, give personal attendance, recompense landowners for injuries done by his neglect or mismanagement, and indemnify employés for actions in respect thereof. *Allen* v. *Haywood* (1845) 7 Q.B. 960, 4 Eng. Ry. & C. Cas. 104, 15 L.J.Q.B.N.S. 99, 10 Jur. 92.

A person who agrees to construct a dam by such methods as he may think proper or expedient, is an independent contractor. *Boswell* v. *Laird* (1857) 8 Cal. 469, 68 Am Dec. 345.

One who contracts with a city to excavate a reservoir, and do the preliminary work, using his own men, teams and material, and adopting his own method of doing the work, without interference, or the right to interfere on the part of the city, is an independent contractor. *Groesbeck* v. *Pinson* (1899) 21 Tex. Civ. App. 44, 50 S.W. 620.

(7) *Persons undertaking various kinds of Work on Highways.*—A contractor who has undertaken to excavate the sewer for a city, and, though directed by the city officers to perform it, is doing it with workmen employed by himself, without interference from the city officers as to the manner or details of the work, is an independent contractor. *Charlock* v. *Freel* (1891) 125 N.Y. 357, 26 N.E. 262, affirming (1888) 50 Hun. 395, 3 N.Y. Supp. 226.

A., having obtained a license from the borough authorities to lay a water-pipe in the street, contracted with B., for $25 [a specified sum], to dig a ditch in a borough street and lay the pipe, A. to furnish the pipe and boxing, but to have no further connection with the work. In an action against A. to recover damages for an injury caused by B's. negligence in leaving the ditch unprotected; it was held that B. was an independent contractor. *Smith* v. *Simmons* (1883) 103 Pa. 32, 49 A. Rep. 113.

A person who agrees to provide the materials and construct a sidewalk in front of the premises of an employer, who retains no power to direct the manner or means of doing the work, is an independent contractor. *Independence* v. *Slack* (1895) 134 Mo. 66, 34 S.W. 1094.

That the contract was an independent one was held in a case, where a firm engaged in work of that description, agreed to lay a granite pavement for the defendant. *Schweickhardt* v. *St. Louis* (1876) 2 Mo. App. 571.

A person who undertakes for a specific sum to repair a highway is an independent contractor. *Shute* v. *Princeton Twp.* (1894) 58 Minn. 337, 59 N.W. 1050.

The plaintiff, a stonemason, contracted with the selectmen of a town to widen a certain highway in the town, by removing out of it a ledge of rocks, for which services they stipulated to pay him a certain amount of money. The stones were to be his, except so far as they might be wanted to build and complete a wall by the way-side. A few months afterwards the plaintiff and his men got out a quantity of the stones by blasting. These stones being in his way and obstructing the work, he found it necessary to remove them, for which purpose, as well as to get a job as a mason, he proposed to the defendants who owned a mill close by, to build for them a dam and breakwater, with the stones on hand and such as he might subsequently blast out. To this proposition they assented, and as a compensation agreed to pay him for his own services and the work of his men, by the day, computing their time while getting out, carting and laying the stone. The defendants were to furnish the powder and cement, and a derrick at the place of the dam. While the execution of the plaintiff's contract with the selectmen was in progress, one of his men, by an overcharge, blew a rock of some two tons upon the mill of one S., crushing in the roof, and doing other damage. For this the plaintiff had been sued and compelled to pay damages, and now sought indemnity from the defendants, insisting that he and his workmen were

hired servants and agents of the defendants. But the courts said: "We are not able to see anything to justify such a claim. There was not clearly the relation of master and servant between the plaintiff and the defendants. The defendants had no control or supervision over the plaintiff's work in blasting this ledge of rocks under the contract with the town of Vernon, and they could not have interfered or arrested the progress of the work had they desired to do so. The plaintiff himself had the sole control and oversight of the work, hired his own men, as many as he pleased, set them to work as he pleased, and dismissed them if they did not serve him with fidelity. He was in no degree a hired servant of anybody. He had bound himself to remove the ledge, and to the defendant he had bound himself that the stones should be laid in their dam and breakwater. In getting them out he can order the blasting here or there, one day or the next, in greater or lesser quantities, with powder or otherwise, according to his own judgment and interest, if he but got the road cleared in time, subject to no other man's will or direction. The fact that the plaintiff was to be paid by the day makes no difference, we think, though in a case of doubt this circumstance would have weight. On the whole we see nothing to distinguish this case from the ordinary case of a mechanic or master builder who agrees to furnish materials and build a house, and who is to be paid for his work by the day instead of receiving a gross sum for the job; and such a contractor is in no proper sense a hired servant or agent." *Corbin* v. *American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63.

(8.) *Persons operating mines*—The lessees of a shale-pit had contracted with a separate party to work the shale for them on being paid a contract price per ton on the output delivered at the pit-head. This separate party was to supply necessary furnishings, maintain the machinery and fittings, etc., and pay the wages of the men employed. He was also to be liable for all accidents, and to satisfy himself, before commencing to work, that the shaft and all fittings were safe, and it was specially contracted that he and the lessees were not to interfere with one another's workmen. Held, that the party so agreeing to work the shale was a separate contractor, and that the lessees were not liable for injury sustained in his service by workmen, employed by him—that they were his servants, and could look to him alone for reparation. *Grant* v. *Shaw* (1872) 9 Sc. L.R. 254.

The owners of a gold mine are not liable in a case where a servant in the employ of a person who has taken a contract for the stoking is injured by the negligence of the servants of a person to whom a contract for the trucking and hauling has been let. *Martin* v. *Sunlight Gold Min. Co.* (1896) 17 New South Wales L.R. 364.

One who contracts with a mining company to break down rock and ore for a certain distance to disclose the vein, at a stipulated price per foot, the company to furnish steam drill and keep the drift clear of rock, as the contractor broke it down, was held to be an independent contractor. *Mayhew* v. *Sullivan Min. Co.* (1884) 76 Me. 100.

The inference that an injured person was the servant of the defendants cannot legitimately be drawn from evidence to the effect that his immediate employer had agreed to get ore in the defendant's mine, and deliver it to them upon cars furnished by them at a specific price; that he was to furnish his own labour, tools and other appliances for executing the engagement, and the means and details of its execution were subject to his own exclusive control and management; that he was to select and employ his own assistants, as many as he chose, and pay them such wages as he saw fit to agree to pay; and that with these means the defendants had no concern, and had not reserved any authority or control over them. *Harris* v. *McNamara* (1892) 97 Ala. 181, 12 So. 103 (question was whether the deceased was a servant in such a sense that recovery could be had for his death under the provisions of the Employers' Liability Act of Alabama).

A workman in a mine cannot recover for injuries received by reason of negligence in its operation, where the evidence is undisputed that, at the time of the accident, and for some months prior thereto, the mine was in the exclusive possession and control of an independent contractor; that he employed and paid the workmen; that he had entire charge of and authority over the mine; and that he had received a fixed rate per ton from the owner for the coal taken therefrom, when the same was delivered to him. *Smith* v. *Belshaw* (1891) 89 Cal. 427, 26 Pac. 834.

Such contracts as the above are, it will be observed, virtually leases by which the contractor agrees to do certain work on the demised premises. See § 13, post.

(9) *Persons operating quarries.*—An independent contract is shown to have been entered into, where the complaint alleges that the owner of a limestone quarry permitted the employer of the injured person to operate it under a contract under which the latter was to furnish limestone by the cask. *Boardman* v. *Creighton* (1901) 95 Me. 154, 49 Atl. 663, affirming, (1899) 93 Me. 17, 44 Atl. 121.

(10) *Persons operating mills.*—In *Burbank* v. *Bethel Steam Mill Co.* (1883) 75 Me. 373, 46 Am. Rep. 400, where the plaintiff's barn was destroyed by fire communicated from a mill which, while in the possession of a contractor, was set on fire by the furnace of the steam engine, the court laid it down that, if the steam engine and mill were not in fact a nuisance, when they were delivered by the defendants to be used in the performance of the contract, and the plaintiff's injury was occasioned by the negligence of the contractor in not keeping them in proper repair, the defendant was not liable.

(11.) *Master tradesmen and craftsmen.*—A master rigger, employed by the owner of a sugar refinery to bring certain heavy machinery from a railroad train into a refinery, was held to be an independent contractor, as he had the exclusive direction and control of the manner in which the work was to be done. *Hurrison* v. *Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699.

In another case the question, whether a master rigger, employed to do certain work on a building, who hired his own men and furnished his own tools, and received a specified price per diem for the services of his men and the use of his tools, was an independent contractor or a servant, was not specifically decided, as the defendent was held not to be liable under either theory. *Harkins* v. *Standard Sugar Refinery* (1877) 122 Mass. 400.

On the ground that the evidence showed that the person employed to make repairs on the roof of a church was left entirely free to do the work as he pleased, it has been held that a person carrying on the business of slating roofs, and having a shop of his own and men constantly in his employ to execute the orders received by him, was an independent contractor. *McCarthy* v. *Second Parish* (1880) 71 Me. 318, 36 Am. Rep. 320.

(12.) *Persons who furnish teams and men to do various kinds of work.*—The independence of the contract was not disputed in a case where the evidence was, that the person by whose negligence in hauling timber the plaintiff was injured, was not in the defendant's general service, but was engaged for the particular piece of work in question, and brought his own horse for it. *Dalton* v. *Bachelor* (1857) 1 Foster & F. 15.

Persons who undertake to haul the boats of a coal company on a canal with their own captains, hands, and horses, and are paid a specified price for every ton of coal on the boats, are independent contractors with relation to the company. *Blattenberger* v. *Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309.

Where the owner of a sawmill makes an agreement with the owner of teams, that the latter shall haul to the mill and place on rollways logs taken from a lot, from which they have jointly contracted to cut, saw, and deliver the standing timber, the owner of the teams is an independent contractor in hauling the logs. The court observed that the nature of the relation depended upon the character of the arrangements between the defendant and the party hauling the logs, not upon the character of the agreement between them and the landowner.

That the negligent employee was an independent contractor is a necessary inference, where the contract, as proved, only shows that the defendant agreed with a man engaged in an independent employment, to haul sand for it, and to pay him for such service a stipulated price per load, and that no control over him in reference to the mode and manner he was to execute the work he agreed to perform was reserved in the contract; and there is also testimony submitted to the effect that there was no stipulation with the employee as to how he should dig the sand. *Fink* v. *Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep 376.

(13) *Draymen, truckmen, carters, etc.*—The owner of a team and his drivers occupy the position of independent contractor toward a person whose goods are hauled by the teams under an agreed price per week, and a proportionately less price if both teams work less than a full week, where the owner has the exclusive care, control, and management of the teams, and all details as to route and

speed are left to such owner and his drivers. *Wadsworth Howland Co.* v. *Foster* (1893) 50 Ill. App. 513, Aff'd. in (1897) 168 Ill. 514, 48 N.E. 163.

One who does teaming work for a person who merely directs him what to haul and where to, and leaves all details of the work to the employé, is a contractor, not a servant. *McCarthy* v. *Muir* (1893) 50 Ill. App. 510.

The following also, when they are employed to do work at a certain stipulated price, are regarded as independent contractors, unless there is specific evidence that control was exercised over them.

A licensed public drayman. *De Forrest* v. *Wright* (1852) 2 Mich. 368.

A licensed public carman. *McMullen* v. *Hoyt* (1867) 2 Daly 271.

A truckman. *Riedel* v. *Moran F. Co.* (1894) 103 Mich. 262, 61 N.W. 262; *Kueckel* v. *Ryder* (1900) 54 App. Div. 252, 66 N.Y. Supp. 522, Aff'd. (1902) 170 N.Y. 562, 62 N.E. 1096. In the last cited case it was held to be an inference of law that the contract was an independent one, where a truckman employed by merchants to move paper from the second to the fourth floor of a warehouse not belonging to them (such work requiring skill and judgment and being one which the truckman is competent to perform) was given no instructions by the merchants concerning the manner of performance, and employed other men to assist him, paid them for their labour and sent his bill to the merchants.

The fact that a man engaged by an undertaker to drive a carriage at a funeral was the owner of the carriage and horses which he brought, was held to be conclusive proof that he was not the servant of the undertaker. *Boniface* v. *Relyea* (1868) 6 Robt. 397.

The question whether the tort-feasor was an independent contractor or a servant, is for the jury where there is testimony, on the one hand, that he supplied his own men and horses, and was hired by the hour to do all of defendants' trucking, and, on the other hand, that he was under the control of their foreman and subject to his orders and direction, both as to what to do and how to do it, and that the foreman had authority over his men. *Brophy* v. *Bartlett* (1888) 1 Silv. Ct. App. 575, Rev'g (1885) 37 Hun, 642.

(14) *Keepers of livery stables.*—A jobmaster who lets out horses and carriages is an independent contractor. *Laugher* v. *Pointer* (1826) 5 Barn. & C. 547, 8. Dowl. & R. 550, 4 L.J.Q.B. 309; *Quarman* v. *Burnett* (1840) 6 Mees & W. 499, 9 L. J. Exch. N.S. 308, 4 Jur. 969.

(15) *Drovers.* In one civil action a licensed drover was held to be a person carrying on a distinct employment, and therefore prima facie an independent contractor. *Milligan* v. *Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J.Q.B. N.S. 19.

The same doctrine has also being applied in prosecutions for embezzlement. Thus where a man employed to drive pigs to a certain place appropriated the proceeds and absconded, it was held that he could not be convicted of larceny, on the theory that he had possession of the animals as the servant of the prosecutor, where the evidence was that, while he was paid the expenses of the cattle, and the customary mode of the remuneration of such employees was by the day, he was a drover by trade, and, according to the general usage with regard to drovers, had the liberty to drive the cattle of any other person. *Reg.* v. *Hey* (1849) 2 Car. & K. 985, 1 Den. C. C. 602, Temple & M. 209, 3 Cox C. C. 582, 14 Jur. 154. To the same effect see *R.* v. *Siffidge* (1853) Legge's Rep. (New So. Wales) 793.

In *Hey's* Case Lord Wensleydale doubted whether an earlier case (*Rex* v. *M'Namee* (1832) 1 Moody C. C. 368), in which it had been held that the possession of a drover was the possession of the owner of the cattle driven, although such drover was a "general drover," had been correctly decided—at least if he was paid by the day. Another case, *Rex.* v *Hughes* (1832) 1 Moody C. C. 370, in which it was held by all the judges that a drover who had been employed in a single instance to drive two cows to a purchaser had been properly convicted of embezzlement, was distinguished on the ground that it was a prosecution under the statute 7 and 8, Geo. 4, chap. 29, § 47, which declares embezzlement by "a servant, or person employed in the capacity of a servant," to be felony.

As between the owner of cattle and a man carrying on the business of a drover, the relation of master and servant cannot be inferred from the mere fact that the cattle were delivered to him with a power of sale. *Reg.* v. *Goodbody* (1838) 8 Car. & P. 665.

(16) *Persons who undertake various operations connected with the handling of timber.* (See also subd. (12) of this note.) A person who agrees to cut standing trees into lumber at a specified price per 1,000 feet, and hires and pays the workmen by whose labor the work is carried out, is an independent contractor. *Knowlton* v. *Hoit* (1891) 67 N. H. 155, 30 Atl. 346.

Testimony to the effect that the negligent person was employed to cut down a certain tree for the sum of ten dollars; that he employed men to assist; and that they were under his control and paid by him, does not even tend to show that the relation of master and servant existed between him and his employer. *East St. Louis* v. *Giblin* (1878) 3 Ill. App. 219.

One who agrees to cut timber on another's land, at a certain price, and deliver it at the mouth of a specified river, using the employer's dams in driving the logs, if he chooses, is an independent contractor. *Carter* v. *Berlin Mills Co.* (1876) 58 N. H. 52, 42 Am. Rep. 572.

The relation of master and servant does not exist, where an employer makes a bargain with his employé to cut all the logs the employer had on certain land, and to deliver them to the employer at a place named, the employer having no interest in the running of the logs until they reached the point of delivery, and not rendering any assistance, pecuniary or otherwise, in the cutting or running of the logs. *Moore* v. *Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209; *Easter* v. *Hall* (1895) 12 Wash. 160, 40 Pac. 728.

Defendants, or the firms of which some of them were members, severally, cut and placed on the ice in the R. river saw-logs, to be floated down the river to their respective mills during the high water in the spring. They or their firms, severally, entered into a written contract with S. & D., by which the latter agreed to take the logs, drive them down, and put them in the booms of the respective owners. Other parties also placed logs in the river to be floated down, and employed servants to drive them. In was held that S. & D. were contractors exercising an independent employment. *Pierrepont* v. *Loveless* (1878) 72 N.Y. 211.

Whether a man employed to drive logs on a river was an independent contractor is a question for the jury, where there is evidence tending to prove that he had the full control of the dam and the drive at the time, that he employed all the men and obtained all the supplies, and that the defendants were merely to pay him a compensation for driving their logs. *Carlson* v. *Stocking* (1895) 91 Wis. 432, 65 N.W. 58.

(17) *Persons employed to clear land.* A person who undertakes to clear a certain piece of land at a specified price per acre or for the whole tract is an independent contractor. *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, reversing, but not on this point, 10 New Zealand L.R. 238; *Threlkeld* v. *White* (1890) 8 New Zealand L.R. 513; *Wright* v. *Holbrook* (1872) 52 N.H. 120, 13 Am. Rep. 12.

The relation of employer and independent contractor was held to be inferable, as a matter of law, where the defendant had leased to H. certain lands to work on shares, and agreed to pay the latter a specified sum per acre for clearing so much of the land as he should choose to clear. *Ferguson* v. *Hubbell* (1884) 97 N.Y. 507, 49 Am. Rep. 544. The court said: "He (i.e. the person employed), could perform his contract by carting the wood and brush away from the lot, or by burning it upon the lot. The defendant had no right to interfere in the work. Hammond was to employ his own help, and he could control and direct them, and choose his own time, and the defendant had no right to direct or control him in the manner in which he should do the work. He was, therefore, in no sense the servant of the defendant, so that the doctrine of respondeat superior could apply. The defendant was entitled to the results of his labour, and could enjoy its fruits, but he could not direct the manner in which it should be performed."

(18) *Persons cultivating land on shares.* Such persons are not servants or agents of their landlords. *Duncan* v. *Anderson* (1876) 56 Ga. 398. See also *Ferguson* v. *Hubbell*, cited in subd. (17) of this note.

(19) *Persons engaged in scavenging work.* Persons who undertake to remove in a specified manner the carcasses of all animals that may die within a certain city, but are not under the control of any person or body representing

the city, are independent contractors. *Hilsdorf* v. *St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

Where a certain person contracted with a city to carry all the garbage and refuse collected within it to some point in Lake Michigan, not less than 15 miles from the city and there dump it into the lake, reserving to itself the right to relet the contract in case of "improper or imperfect performance," the person employed was held to be an independent contractor, on the ground that the city had no right to control the mode or manner of doing the work or to fix the precise place where the dumping should be done. *Kuehn* v. *Milwaukee* (1896) 92 Wis. 263, 65 N.W. 1030.

(20) *Railway companies operating cars on private lines.* Where the defendant, a mining company, constructed and kept in repair a switch track over which cars were run by a railroad company to haul coal from the defendant's mine, it was held that the relation of the former company to the latter was that of shipper to carrier, not that of master and servant, and that the former was not liable to one of its employees injured by a train running on the switch track. *Coal Run Coal Co.* v. *Strawn* (1884) 15 Ill. App. 347. The court, after adverting to the fact that the coal company had given permission to this railroad company to carry over its track, so far and for such purposes as it did, whether by contract or mere license, and that none of the witnesses had stated any fact tending to prove that appellant had in law or pretended to exercise any control over or interference with the owner of running and operating its trains, proceeded thus: "It handled only coal cars, and them only so far as it was necessary in order to load them. On the other hand, it fairly appears that as to the manner of operating and managing the train in all its details, in getting these cars to and from the place where they were loaded, the railroad company acted independently, with its own machinery and by its own servants. All of the train hands were in its employ. Downs, its yardmaster, gave the signal to move the train that ran upon the deceased, and its engineer obeyed it, both acting for said company in the performance of its proper independent contract work, which was to carry the coal for the appellant."

(21) *Persons assisting in public entertainments.* A company which contracts with a city to purchase and set off fireworks, for a designated sum to be paid for the entire service, stands in the relation of an independent contractor in erecting a scaffolding necessary to the display of the fireworks. *Heidenwag* v. *Philadelphia* (1895) 168 Pa. 72, 31 Atl. 1063.

A balloonist at a pleasure resort is an independent contractor where his agreement provides that he is to furnish and pay for all the material and appliances used in making the ascents, and in addition thereto is to employ and pay all of the men required to conduct the ascents, and that the owner of the resort is to have no part to perform except to furnish the field, pay the price, and name the hour for the ascension. *Smith* v. *Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56.

(22) *Persons conducting departments in stores.*—A contract by plaintiff to conduct a "department" in defendant's store does not create the relation of employer and employé so as to render the former's absence without the latter's consent a breach, where it treats the plaintiff as the principal of the department, makes him the responsible purchaser of the merchandise purchased for it, leaving the defendant merely a guarantor, charges him with store rent and office expenses and with one half of all losses arising from bad debts, reserves to the defendant, as profits merely, a commission upon net sales and interest upon the goods purchased for the department, and requires him to render accounts to the plaintiff. *Lord* v. *Spielmann* (1898) 29 App. Div. 292, 51 N.Y. Supp. 534.

(23) *Stevedores.*—In several cases it has been laid down, or assumed, that a master-stevedore who agrees, according to the usual practice, to load or unload a ship for a gross sum, and for this purpose to use his own men and appliances is, as matter of law, an independent contractor, where no evidence is introduced which tends to show that he and his men worked under the control and direction of the owner of the the ship. *Linton* v. *Smith* (1857) 8 Gray 147; *Sweeny* v. *Murphy* (1880) 32 La. Ann. 628; *Riley* v. *State Line S. S. Co.* (1877) 29 La. Ann. 791, 29 Am. Rep. 349; *Rankin* v. *Merchants & M. Transp. Co.* (1884) 73 Ga. 230, 54 Am. Rep. 874.

In *Murray* v. *Currie* (1870) L.R. 6 C.P. 26, 40 L.J. C.P.N.S. 26, 23 L.T.N.S.

557, 19 Week. Rep. 104, Bovill, Ch.J., said: "Kennedy, the stevedore, undertook to execute the work of unloading the Sutherland, and for that purpose a steam-winch belonging to the ship was placed at his disposal. The work of unloading was done by Kennedy under a special contract. He was acting on his own behalf, and did not in any sense stand in the relation of servant to the defendant. He had entire control over the work, and employed such persons as he thought proper to act under him." The language of Willes, J., is to the same effect: "I am of the same opinion. It is to be observed that this is not a question arising between ship-owner and charterer. The employment of stevedores has grown out of the duty of the owner to load and unload the ship. This duty used formerly to be executed by the crew; but in dealing with large cargoes, the exigencies of modern commerce have created a necessity for the employment of persons skilled in the particular work of stowing cargo. The stevedores, however, are not the servants of the owner of the ship; but they are persons having a special employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. They are not put in his place to do an act which he intended to do for himself."

In another case a ship being discharged of a cargo of sulphur, which was received into lighters of the plaintiff through the "shoot" referred to, which was erected by the men who actually did the work. The defendants were paid by the merchant for discharging his ship; and the case for the plaintiff was, that it was to be inferred from this fact that the men who did the work and erected the "shoot" were in the employ of the defendants; but Martin, B., held that this was not a legitimate inference, whether of law or fact; and that the above fact was not sufficient evidence to support it, for the work might have been done by the men under some sub-contract. Upon its being shown by the evidence of the stevedore, who was called as a witness, that the work had actually been done on this footing, a nonsuit was directed. *Woodward* v. *Peto* (1862) 3 Fost. & F. 398.

In Pennsylvania, however, the character of the relation between a stevedore and his employer has been held to be one for the jury in two cases, in which the question was whether the crew of the ship and the stevedore's workmen were co-servants. *Hass* v. *Philadelphia & S. Mail S. S. Co.* (1879) 88 Pa. 269, 32 Am. Rep. 462, following *Mullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2. In the first cited of these cases a steamship company made a special contract with a stevedore to unload and load its vessels at New Orleans. Neither the master of the vessel nor his crew had anything to do with the work, which was in the exclusive charge of the stevedore, who employed his own men and used his own machinery and cargo planks. A seaman on one of the company's steamers, while on duty as a night watchman, having stepped on one of these planks, which tilted, he was thrown overboard and seriously injured. He brought suit against the company for damages, which he alleged was occasioned by the negligence of the company's servants. Held, that the questions whether the stevedore was an agent of the company or an independent contractor, and whether the plaintiff was a fellow servant in a common employment with the stevedore and his servants, were properly submitted to the jury.

(24) *Construction and repair of ships.*—That a "lumper" was an independent contractor was held to be a necessary deduction from undisputed evidence that he employed and paid a gang of mechanics, and that by the terms of his agreement he was to erect a specified scaffold, to grave the vessel, put on the felt, and run the metal, and was to receive four cents for every sheet that went on the ship. *Butler* v. *Townsend* (1891) 126 N. Y. 105, 26 N.E. 1017.

(25) *Transfer Agents doing business on railway trains.*—It cannot be said as a matter of law that a member of a firm of transfer agents, permitted by a railroad company to check baggage on its trains, is an employé of the railroad company within the meaning of the Kentucky statute relating to the recovery of damages in case of a fatal accident. *Mefford* v. *Louisville & N. R. Co.* (1892) 14 Ky. L. Rep. 327, 20 S. W. 263.

(26) *Contractors not within purview of statutes relating to servants only.*—This note may be appropriately concluded with a citation of the cases which illustrate the principle, that contractors are neither entitled to the benefits conferred, nor

12 a. Liability arising from the employment of a tug.—(*a*) *English doctrine as to the relation between the owner of a tug and its tow.*—In England the courts have taken the position that "the tug is in the service of the tow," and that "the tow is answerable for the negligence of her servant" (*a*). This doctrine is based on the

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subject to the burdens imposed, by legislation which, upon a reasonable construction of its provisions, must be taken to be applicable only to servants.

A contract to weave certain goods at the house of the weaver is not a contract to serve, within 4 Geo. 4 c. 34, s. 3, so as to give jurisdiction to a magistrate to commit the weaver, for neglecting his work after commencing the same. *Hardy* v. *Ryle* (1829) 4 M. & R. 295; 9 B. & C. 603, (holding that a conviction could not be sustained which was based upon an information charging that the employé had "contracted and agreed" to weave, etc.)

Bayley, J., said: "There is a very plain distinction between becoming the servant of an individual, and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be said to have contracted to serve each of them."

On the ground that an information laid under the same statute showed that the plaintiff and defendant "stood in the situation of contracting parties" for the making of the road in question, it was held that as a charge to the effect that the plaintiff had contracted with B. to build a wall for a certain price, within a certain time, and, having performed part of the work, refused to complete it, was insufficient to sustain a conviction. *Lancaster* v. *Greaves* (1829) 9 B. & C. 628.

In a Canadian case it was held that a medical officer was not within the purview of an Act by which the salaries of "servants" and "employés" were exempted from attachment (37 Vict., ch. 13, § .). *Macfie* v. *Hutchinson* (1870) 12 P.R. Ont. 167. O'Connor and Amour, JJ., were of opinion that, upon the true construction of the statutes under which the defendant was appointed, his duty was to exercise his professional and scientific skill and judgment independently, free from the control and direction of any other person; and that he was therefore not a "servant" nor a clerk, as such a position implies control and direction. They also considered that he was not an "employé," since he was appointed, not employed, to perform the functions of his office. Wilson, C.J., thought that he was embraced within the word "employé," but conceded that he was not a "servant."

A person who agrees to manufacture an indefinite or specified quantity of a certain article, for which he is to be paid according to the amount produced, and who is not bound by his contract to do any part of the work personally, is not within the scope of the English Truck Act. See *Ingram* v. *Barnes* (1857) 7 El. & Bl. 115, affirmed Exch. Ch. 7 El. & Bl. 132; and the other cases cited in § 26, note (*a*), post.

In *Sleeman* v. *Barrett* (1864) 2 Hurlst. & C. 934, 33 L.J. Exch. N.S. 153, 10 Jur. N.S. 476, 9 L.T.N.S. 834, 12 Week. Rep. 411, it was held that this Act was not applicable to a "butty collier," i.e., a man who contracts for the digging of coal by the day, the ton, or the piece, and employs others to assist him.

On the other hand, such a person has been held to be a "servant" of the mine-owner within the meaning of the embezzlement statutes. *Reg.* v. *Thomas* (1853) 6 Cox C.C. 403.

(*a*) *Union S. Co.* v. *Owners of the "Aracan"* (1874) L.R. 6 P.C. 127.

In one case it was argued specifically that the relation of the tug-owner to the tow-owner was that of an independent contractor, and that the principle of the case of *Quarman* v. *Burnett* (1840) 6 M. & W. 499, was therefore applicable, so that the tow-owner and his vessel would not be responsible for the negligence of the tug-owner and his servants. *The Niobe* (1888) L.R. 13 Prob. Div. 55. In rejecting this contention Hannen, P., said: "It appears to me that the authorities clearly establish that the tow has, under the ordinary contract of towage, control over the tug. The tug and tow are engaged in a common undertaking, of which the general management and command belongs to the tow, and in order that she

principle that the "motive power" is in the tug, and the "governing

should efficiently execute this command it is necessary that she should have a good look-out and should not merely allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel. As Dr. Lushington has pointed out, it is essential to the safety of vessels being towed that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow. The pilot, if there be one, takes his station on his tow, and the officers of the tow are usually, as in the present case, of a higher class and better able to direct the navigation than those of the tug. The practice which experience has dictated has received the sanction of many legal decisions, and has been recognised in the House of Lords in *Spaight* v. *Tedcastle*, 6 App. Cas. 217, where Lord Blackburn says that it is the duty of the tug to carry out the directions received from the ship, and of the Privy Council in *The American and The Syria*, L.R. 6 P.C. 127. Although in this latter case it was held from the special circumstances that the command belonged to the tug and not to the tow, I may observe that it is clear from the evidence in this case that it was perfectly well understood by the captains of the tug and tow that the latter had the control of their movements, and that it was the duty of those navigating the tow to keep a look-out and check the tug if it were going wrong. But it was argued, that whatever the relation of the tug and tow may generally be, they were reversed in this case by special circumstances: first, by the contract of towage between the parties. But there is nothing in the contract but a bare agreement to tow. Secondly, by the fact that the towage was at sea with a long scope of hawser, and that this gives rise to different duties on the part of the two vessels to those which exist on a river towage with a shorter scope of cable. I agree that in a towage at sea with a long scope it is more difficult for the tow to communicate with the tug. If it had been shown that the "Flying Serpent" had, by some sudden manœuvre, which those on board the "Niobe" could not control, brought about the collision, I should have held the "Niobe" blameless. Thus, in *The Stormcock*, 4 Asp. Mar. Cas. 410, I held the tug to be responsible, because the tug which was originally steering a safe course so suddenly departed from it that the tow could not check her or follow without striking another vessel. I think that the same result would follow in a river towage in like circumstances. But in the present case the action of the "Flying Serpent" was not sudden, and might have been prevented by those on board the "Niobe," if they had done their duty.

That some at least of the English judges are not entirely satisfied with the doctrine thus established is indicated by the following passage in an opinion delivered by Hannen, P.: "As to the liability of the tow it seems to have been admitted by both the learned Counsel that the tow was responsible for the negligence of the tug. I confess I have been somewhat astonished to find to what extent that principle has been carried by my learned predecessors. But for these decisions, based, according to Dr. Lushington, on considerations of expediency, that there should not be a divided command, I myself should have been inclined to think that the decisions of the American Courts establish a rule more in accordance with my own idea of justice; that is, the particular circumstances should be looked to in each case to see whether the tug or tow, or both, are liable. But I accept the decisions of Dr. Lushington, treating the tug as the agent or servant of the tow." *The Stormcock* (1885) 5 Asp. Mar. Cas. 470.

In *Union S. Co.* v. *Owners of the Aracan*, ubi supra, we find the following explanation of the difference between the English and American doctrines: "It appears that, in the large American rivers and lakes it is usual for a tug, which is spoken of as a public vessel, to take a number of small vessels in tow, some along side of her, some astern. She assigns to each of these vessels its place, and they are under her direction. Under these circumstances, the American courts have held that a vessel towed is not liable for the negligence of the tug, because the 'governing power' is in the tug not in her."

The explanation thus given of the American cases is apparently taken from the opinion in *The Belknap* (1873) 2 Low. Dec. 281; but it will be apparent, from an examination of the American cases cited below, that the doctrine which they embody is not based wholly on the narrow grounds specified in this passage.

power" in the ship towed (*b*). The situation thus contemplated is presumed to exist, unless the evidence discloses conditions different from those which are ordinarily incident to the performance of such contracts (*c*).

The tug and the tow are sometimes said to constitute together one vessel in the intendment of the law (*d*). But this doctrine of identification cannot be invoked for the purpose of enabling the owner of a tow which is in charge of a licensed pilot to escape liability for the negligence of the crew of the tug, on the ground that the employment of the pilot was compulsory. The exemption accorded in cases where the employment is of that character is not applicable to the tug as well as the tow (*e*).

(*b*) *American doctrine.*—In America the owner of a tug is regarded as being, under ordinary circumstances, an independent contractor, whose negligence is not imputable to the owner of the tow (*f*).

(*b*) *The Cleadon*, 14 Moore P. C. 97.

(*c*) Such a case was held to be presented where a steamer had taken in tow another steamer which had been disabled on the high seas, and, so far as appeared, the "governing power" lay wholly with the tug. *Union S. Co.* v. *Owners of the "Aracan"* (1874) L.R. 6 P.C. 127.

(*d*) The *Cleadon*, 14 Moore P.C. 97.

(*e*) "The root of the exemption in the case of compulsory pilotage is that the pilot is not the servant of the owner of the towed ship, but a person forced upon him by the statute; but the relation of the owner of the ship to the tug is very different The tug is his servant voluntarily taken and employed by him for the occasion The law implies, when the tug is employed, a contract between the owner or master of the tug and the owner of the ship to the effect that the tug will obey the directions of the ship-owner and act as his servant; but this contract does not affect third parties, and the principle which exonerates the ship in the case of the pilot does not apply to the tug It has been said, indeed, in various cases, that the tug and the vessel she has in tow are to be regarded as one vessel; but this rule has only been laid down for the purpose of rendering a ship in tow subject to the rules of navigation applicable to steamers; in that sense only can they be treated as one vessel The master of the tug has a separate contract and a separate responsibility from the pilot. In one sentence, it is by the exercise of free will that the ship takes the tug; by compulsion of law that she takes the pilot." The *Mary* (1879) L.R. 5 Prob Div. 14.

Where a ship in charge of a pilot, whose employment is compulsory, is being towed by a steam-tug, and the steam-tug, without waiting for orders from the pilot, suddenly adopts a wrong manœuvre, and so causes the ship to come into collision, the owners of the ship are responsible. The *Sinquasi* (1879) L.R. 5 Prob. Div. 241.

(*f*) In an early Massachusetts case it was held that, as the owner of a steamboat engaged in towing vessels up and down a river, for a certain toll or hire, was following a trade which was as much a public and distinct employment as that of freighting or carrying passengers, the owner of a ship which was being towed was not liable for a collision caused by the negligence of the crew of the steamboat. *Sproul* v. *Hemmingway* (1833) 14 Pick. 1, 25 Am. Dec 350

The relation which a towing company owning a tug employed to tow a canal boat by a charterer of such boat bears to such charterer, is that of an independent contractor, where such company is engaged in the business of towing. *McLoughlin* v. *New York Lighterage & Transp. Co.* (1894) 7 Misc. 119, 27 N.Y. Supp. 248.

In the following passage from the judgment of the Supreme Court of the United States in *Sturgis* v. *Boyer* (1860) 24 How. 110, the non-liability of the owners of the tow is deduced from the fact that the crew are not their servants; but this fact itself is manifestly an inference from the assumed ultimate fact, that the owners of the tug are, under ordinary circumstances, independent contractors. "The only remaining question of any importance is, whether the ship and the steam-tug are both liable for the consequences of the collision; or if not, which of the two ought to be held responsible for the damage sustained by the libellants. Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master and crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided that she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation. Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care, or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute

(*c*) *Liability of Harbour Commissioners.*—The relation which a Board of Harbour Commissioners bear to persons who undertake to furnish tugs for the purpose of towing ships in and out of the harbour which they control is the same as that which an employer ordinarily bears to an independent contractor (*g*).

13. Liability arising out of certain other contracts of an independent nature.—So far as regards the non-liability of the contractee for the torts of the contractor, the juridical situation is essentially the same as that which is exemplified by the situations so far cited, where the relations of the parties are fixed by a contract which is not one of employment, but which contemplates as one of its incidents, the performance of a given piece of work, or the carrying on of certain continuous operations. To this category belong leases of railways, which are demised with a view to their being kept up as going concerns. In all such cases the general rule (see Woodf. L. & T. pp. 793, et seq.), that the lessor is not liable for the torts of his lessee, produces the same results as if the position were considered with direct reference to the fact that the contract is in effect one for the performance of work by a

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the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owner of his own vessel, and they are responsible for his acts in her navigation." *Sturgis* v. *Boyer* (1860) 24 How 110 (123).

This statement of principles was followed, as being correct, in *The Mabey and Cooper* (1871) 14 Wall. 204. See also to the same effect, *The Belknap* (1873) 2 Low. Dec. 281.

These Federal decisions override the effect of an earlier one, *Smith* v. *The Creole* (1853) 2 Wall. Jr. 485, in which the English doctrine was adopted with respect to vessels towed in and out of harbours, and the non-liabity of the owner of the tow was restricted to cases where canal boats or other like vessels are towed by steamers.

(*g*) By an act for improving and maintaining a harbor, commissioners were empowered to build or provide steam tugs for towing vessels into or out of the harbor, and to receive for the use of such vessels such reasonable compensation as they should fix. The commissioners entered into an arrangement with the proprietors of steam vessels to perform this duty for them at certain rates of charge; the commissioners paying them in addition a sum annually, and the vessels being placed under the direction and control of the harbour master. A vessel having sustained damage in consequence of the negligence and want of skill of the master and crew of a tug, while being towed into the harbour, the owner brought an action into the county court against the commissioners, and under the direction of the judge recovered a verdict. The court, on appeal, set aside the verdict; holding that the decision of the judge could not, upon any "inference which could be legitimately drawn from the facts" before him, be correct in point of law. *Cuthbertson* v. *Parsons* (1852) 12 C. B. 304, 16 Jur. 860, 21 L.J.C P N.S. 165.

person not in the service of the contractor (*a*). The same remark is applicable to leases of mines (*b*), of mills (*c*), and of ferries (*d*).

Other cases in which the contract was not one of employment, except in the secondary sense that it involved the performance of some specific kind of work, and in which the contractee was held not to be liable for the torts of the contractor, are those which involve sales of various commodities (*e*).

(*a*) In *Harper* v. *Newport News & M. Valley R. Co.* (1890) 90 Ky. 359, 14 S.W. 349, the lessor company was held not to be liable, where a man was run over owing to negligence of servants of the lessee company. For the rule in cases where the right of recovery depends on the validity of the lease, see § 62, contra.

(*b*) *Samuelson* v. *Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499.

(*c*) It has been held that the lessees of mills in possession and control, and operating them, cannot be held to be "in the employ" of the owner and lessor, nor can the agent of the owner and lessor be held as the "owner" or "occupant" of the mills, under the Maine statute 1868, chap. 448, for throwing slabs and refuse into Penobscot River. *State* v. *Coe* (1881) 72 Me. 456.

(*d*) *Duncan* v. *Magistrates of Aberdeen* (1877) 14 Sc. L. R. 603; *Bowyer* v. *Anderson* (1831) 2 Leigh, 550; *Blackwell* v. *Wiswall* (1855) 24 Barb. 355, (affirmed on appeal, see note at the end of the report); *Norton* v. *Wiswall* (1858) 26 Barb. 618, cited in *Crusselle* v. *Pugh* (1881) 67 Ga. 430, 44 Am. Rep. 724, in support of the general rule that a lessor is not liable to a servant of the lessee for damages resulting from the negligence of the latter, unless some duty remained upon the lessor from a failure to perform which the injury arose.

In *Felton* v. *Deall* (1850) 22 Vt. 170, 54 Am. Dec. 61, the legislature of New York had granted to Deall the right, for a specified time, to maintain and use a ferry across Lake Champlain. Having established the ferry, the licensee entered into a contract with one H., by which he was to keep and manage the ferry, at his own expense of labor, for one year. The expenses of repairs were to be equally borne by the parties, and the receipts of the ferry were to be equally divided between them. H. further agreed, that he would not allow any but a faithful, honest, obliging, and temperate man to attend the ferry, and that he would be responsible for damage occasioned by willful misconduct or neglect in its management. While H. had charge of the ferry under this contract, the boat was upset and the plaintiff and his property injured. It was held that the contract being such as to vest the occupancy and control of the ferry in H., as the tenant rather than the servant of defendant, the defendant was not responsible for his acts.

(*e*) Where a city purchases lumber and the vendor in delivering it wrongfully piles it in the street, such vendor is not the agent of the city, but an independent contractor, for whose negligence the city is not responsible. *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.

The owner of a building is not answerable for the negligent manner in which a coal company having a contract to furnish the owner with all the coal necessary for running his machinery performs its contract in delivering the coal through a scuttle-hole in the sidewalk. *Benjamin* v. *Metropolitan Street R. Co.* (1896) 133 Mo. 274, 34 S. W. 590.

A person who sells and delivers stone for the purpose of repairing a road is a contractor within the meaning of the Statute of Upper Canada, 16 Vict. chap. 190, declaring "contractors" to be liable for leaving materials so as to obstruct a road. *Lennox* v. *Harrison* (1858) 7 U. C. C. P. 496.

Compare with these decisions the ruling, that one engaged in selling and delivering wood to the proprietor of a mill at so much per cord is not an employé of the proprietor so as to put him in the situation of one who takes the risk upon

Reference may also be made in this connection to the rules that a shipowner is not liable for the torts of one who charters his ship on a footing which divests him entirely for the time being of the control of the ship and her crew (*f*); that a bailor is not liable for the torts of the bailee or of the bailees' servants (*g*); and that a licensor who has surrendered to a licensee the possession of a portion of his premises, to be used for a lawful purpose, is not liable for injuries caused by a nuisance which the licensee has created or suffered to exist on the property thus transferred to his control (*h*).

14. Reservation of a limited power of control, effect of. Generally. —To every agreement by which one person undertakes to produce certain concrete results for the benefit of another, there is manifestly attached an implied condition that the latter person shall have the right of refusing to accept the results finally obtained if they do not constitute a satisfactory execution of the agreement As a matter of ultimate analysis, this conception may be regarded as the basis of the well-settled doctrine, that the independence of a contract is not destroyed by the inclusion of provisions which although they entitled the employer to exercise a certain measure of control, go no further than to enable him to secure the proper performance of the work (*a*). In other words, the relation of

himself of negligence in those running the mill. He stands towards the proprietor "precisely as any other man stands who, in consequence of his business wants, had occasion to visit the mill." *Wadsworth* v. *Duke* (1873) 50 Ga 91.

(*f*) *Laugher* v. *Pointer* (1826) 5 Barn. & C. 547, 8 Dowl & R. 550, 4 L.J.K. B. 309, per Littledale, J., arguendo; III. Kent Com. 138; Parsons, Shipping & Adm., chap. VIII, § 2; Abbott, Shipping, p. 58, et seq.

(*g*) New York L. E. & W.R. Co. v. New Jersey Electric R. Co. (Sup.) 60 N. J L. 338, 38 Atl. 828, Aff'd (memo.) in 61 N. J. L. 287, 41 Atl. 1116.
The existence of this rule was assumed in *R.* v. *Gibbs* (1855) Dears C. C. 445.

(*h*) *Gwathney* v. *Little Miami R. Co.* (1861) 12 Ohio St. 92, where a foot-passenger fell through a railway bridge which the public were permitted to use, on a track which a licensee company had built to connect its own system with that of the defendant. Whether the licensee company created the nuisance, and had the sole possession and use of that track thence forward until the occurrence of the injury complained of, was held to be a question of fact which was properly left to be ascertained by the jury from the evidence.

(*a*) "Was there a control or direction of the person in opposition to a mere right to object to the quality or description of the work done? Where this element of personal control is found, then responsibility, either for malfeasance or nonfeasance, for fault or negligence, will attach, not only to a servant or workman (he is always liable), but to him who had the personal control over him, who was his superior in the sense of the maxim [i.e., respondeat superior] On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly

master and servant is not inferable from the reservation of powers which do not "deprive the contractor of his right to do the work according to his own initiative, so long as he does it in accordance with his contract" (*b*).

For the purpose of exemplifying the operation of this rule, it will be convenient in the first place to state in extenso the effect of a few typical contracts which have been discussed by the courts, and afterwards to show in detail the result of the decisions dealing with each one of the specific provisions which are found in these or other contracts (*c*).

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done, but has no power over the person or time of the workman or artisan employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence." *Stephens* v. *Thurso Police Comm'rs.* (1876) 3 Sc. Sess. Cas. 4th series, 542. This statement of principles was quoted with approval in *Saunders* v. *Toronto* (1899) 26 Ont. App. Rep. 265.

If the other provisions of the contract are such as to render the person employed an independent contractor, he will not be converted into a servant by the insertion of stipulations reserving to the employer "the right to change, inspect, and supervise to the extent necessary, to produce the result intended by the contract." *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N. E. 91.

(*b*) A phrase used by Rigby, L.J., in *Hardaker* v. *Idle District Council* [1896] 1 Q.B. 335, 353, 65 L.J.Q.B.N.S. 363, 75 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196.

In a Canadian case, Osler, J.A., expressed the opinion that the legal criterion for determining the question, whether the relation of master and servant existed, was, whether the alleged master had the power of controlling the work which the alleged servant was doing for him "in respect to anything not necessarily involved in the proper doing of the work." *Saunders* v. *Toronto* (1899) 26 Ont. App. 265.

(*c*) 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 Weekl. Rep. 323, 60 J.P. 196, the contract under review, which was one for laying gas-pipes, contained the following clauses, among others:—

(1) "The contractor to execute the whole of the work in the most workmanlike and substantial manner, particular attention being paid to any directions or instructions of the inspector (of the board), which may be given by him from time to time as the work proceeds, and, if any difference of opinion shall arise as to the description, quality or quantity of materials or workmanship, or anything relating to the works, the opinion of the inspector shall be final and binding on all parties concerned."

(2) "The contractor shall give or provide all necessary personal superintendence during the execution of the works, and shall employ competent foremen to superintend the same during their progress, and should any such foremen, or the contractor's workmen, at any time disobey the orders of the inspector, or conduct themselves improperly, or be in his opinion incompetent, the inspector shall have full power to discharge them forthwith."

(3) "The inspector shall have power to stop the works, or any portion thereof, absolutely at any stage, to enlarge, diminish, modify, alter, or vary the works, or any part thereof, and also to alter or vary the description of materials to be used from time to time, and such alterations shall not annul or invalidate the contract, which shall, nevertheless, remain in full force and effect."

(4) "The care of the entire works until their completion shall remain with the contractor, who shall be held responsible for all accidents and damage to

persons or property arising therefrom from any cause whatsoever. . . . The contractor shall, at his own expense, protect all walls, buildings, gas-pipes, water-pipes, or other property which may be laid bear or otherwise interfered with, and make good any such property which may be . . . injured during the progress of the works or in consequence thereof; and shall also make good all damage occasioned by delay or neglect, or carelessness, deficiency in strutting, fencing, watching, or lighting, either to the works or to the buildings or premises adjoining or near thereto, whether such damage or defects be discovered during the progress of the work, or appear or become known after the completion thereof. . . . In case of any claim, action, suit, or proceedings being brought or taken against the local board, or any of their officers or servants, in respect of any loss, damage or injury caused by the works, or consequent thereupon, the contractor, or his sureties, shall fully indemnify them and each of them therefrom."

(5) "Where gas or water-pipes are found in the line of the sewers, care shall be taken that no breakages occur. Where needful the contractors shall place strong timbers across the trench and sling the gas or water pipes to them by wrought iron chains of sufficient strength."

(6) "Where in the opinion of the inspector it is desirable so to do, the contractor shall lower the timbers and slings to or below the level of the adjacent surface and build up concrete walls thereunder; in such cases the contractor will be paid the value of the timbers, slings, concrete and labour, provided he has, as is herein provided, obtained the written certificate of the inspector, or his written order, for such extra works."

By Lindley and Smith, L. L. J., it was held that there was nothing in the provisions of the contract from which the existence of the relation of master and servant could be inferred. Rigby, L. J., dissented as to this point. He considered that, independently of the wide general provisions contained in paragraph (1), (2), (3) and (4) it was made plain by paragraphs (5) and (6) that the defendant's inspector was to have full control over the means adopted for the protection of the gas and water-pipes out of which the accident arose. The difference of opinion thus disclosed is not surprising, for the contract is couched in terms which, to say the least, rendered it very difficult to say that the contractor could act with greater freedom or independence than a hired servant.

In *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 37, a contract for the construction of a sewer, provided that the defendant borough was authorized by its engineer, or such other person or persons, or in such other manner as it may deem proper, to inspect the materials to be furnished and the work to be done under the agreement, and to see that the same corresponded with the specifications. In the specifications were the following provisions: That the work should all be backed in carefully, rammed and packed in and around the sewer, with proper tools, by trusty persons, "approved by the engineer," and no tunneling would be allowed, "except by written permission of the engineer;" that if, in excavating for any sewer or branch thereof, any water pipe, gas pipe, or other obstruction be met with, that "in the judgment of the engineer should be avoided," then the party of the second part, (the contractors) after the same should have been measured by the engineer, should immediately fill such excavation; that the work should be prosecuted at and from as many different points in such part or parts of the avenues or streets on the line of the work as the engineer might "from time to time, during the progress of the work, determine"; that plank foundations should be laid, "when necessary in the opinion of the engineer"; that all work to complete drainage should be done according to the plans, etc., and "in accordance with all the directions of the engineer" of the sewer committee; that, in cases of rock blasting, the blast was to be carefully covered with heavy timber, "according to the ordinances of the court of burgesses relative to rock blasting, which were to be strictly observed"; that certain rock should be excavated with as little blasting as possible, and "under the immediate supervision and direction of the engineer or his assistant"; that, if any person employed by the contractor on the work should appear to the engineer to be incompetent or disorderly, he was to be discharged immediately, "on the requisition of the engineer," and such person was not to be again be employed upon them "without permission of the engineer"; that, if any materials or implements should be brought to the ground which the engineer might "deem to be

of improper description or improper to be used in the work, the same should be removed forthwith." Discussing the effect of this contract, the court said: "These provisions, and others of similar import in the contract and specifications, certainly denote that a high degree of power, to be exercised in the supervision of the work and to insure its performance by the contractor, was reserved by the defendant borough to its agents, acting in its behalf; and, when coupled, as it is, with other provisions providing for the responsibility of the contractor 'for all damages which may happen to neighboring properties, or in any way from neglect,' and that he shall at his own expense, 'shore up, protect and make good, as may be necessary, all buildings, walls, fences or other properties which may be disturbed or injured during the progress of the work'—fairly indicate that an intention existed on the part of the borough to reserve such control as in the judgment of its advisers was inconsistent with such immunity from liability as it is now claimed in its behalf. But on the whole we are inclined to think that the weight of authority upon this question justifies us in holding that the reservation of control, being but partial, and existing in certain respects only, did not prevent the existence of the relation of contractee and independent contractor; that the general control over the work, as to the manner and method of its execution, the oversight and direction of the performance of the actual manual labour, especially in the particulars in the execution of which the plaintiff claimed that the injury to its property was caused, notwithstanding the prescribed limitations, remained in the contractor; that the persons doing the work were his servants, not those of the defendant; and that these considerations relating to general control constitute the true test by which to determine whether the relation be that of employer and contractor or that of master and servant."

The contract in *Harding* v. *Boston* (1895) 163 Mass. 14, 39 N.E. 411, which was also for the construction of a sewer, provided, among other things, that the contractor was "to furnish all the materials except as hereafter specified, and do all the work according to the plans and specifications" set out; that the excavation was to be "made true to the line and grade as given to the contractor," and, if the material was unsuitable for forming the bottom, a further depth was to be excavated, "as directed by the superintendent or inspector in charge;" that only such length of trench was to be opened at once "as directed by the inspector;" that the earth excavated was "to be compactly placed along the trench, so as to be as little annoyance as possible to abutters,... and no obstruction to be placed upon the sidewalks;" that the trenches and banks were to be kept lighted and fenced, as provided in city ordinances; that the contractor was to be "responsible for all damage arising from, or in consequence of, the construction of the sewer;" that all sewers or drains were to be connected with the work, "as directed by the superintendent or inspector;" that the earth was to be removed, and the street cleaned up, as the work proceeded, "to the satisfaction of the inspector;" that certain notice was to be given by the contractor to any railroad corporation before entering on its location, "and every provision for safety required by them, or by the inspector, to be complied with;" that certain notice was also to be given to any street railway corporation, in crossing or in opening trenches beneath its tracks, and the work performed so as to permit the passage of cars, "unless by special direction of the superintendent;" and that the work was to be finished by a date named. The contract also contained the following clauses: "The work to be kept perfectly clean from dirt, brickbats, etc., as built, and the whole done to the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all times." It was held that none of these provisions destroyed the independence of the contract.

In *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91, another contract for the construction of a sewer, provided that "the city engineer" was to "have the right to regulate the excavation," and not "more than 400 feet of trench" was to be opened at one time without his permission, while the commisioner of city works was authorized to "change at his discretion the amount of all the various kinds of work and materials and structures." The contractors were required to observe all the ordinances of the common council in relation to obstructing the streets, and "in all cases of rock blasting, the blast" was "to be carefully covered with heavy timber, according to the ordinances of the common council" relating to the subject, "which ordinances shall

be strictly observed." If any person employed by the contractor should "appear to the engineer to be incompetent or disorderly" he was to be discharged and not employed again without permission. The engineer, with the consent of the commissioner, had power "to vary, extend or diminish the quantity of work during its progress without vitiating the contract." It was also provided that "all explanations and directions necessary to the carrying out and completing satisfactorily the different descriptions of work contemplated and provided for under this contract will be given by said engineer." The city had the right to inspect the work and materials to see that they corresponded with the specifications. Any materials or implements brought upon the ground which the engineer "should deem to be of improper description or improper to be used in the work," were to be removed forthwith. The contractors were to have charge of and be responsible for the entire line of work until its completion and acceptance, and were not to be paid for any part thereof until the whole sewer was finished. The specifications also contained many provisions relating to details of the work that are usually found in municipal contracts for the building of sewers. It was held that there was nothing in the terms of the contract that required the conclusion that the contractor was a servant.

In a case where the relation of a railway company to one who had contracted for the building of the road was in question, the provisions upon which the plaintiff unsuccessfully relied, for the purpose of establishing his contention that the contractor was a mere servant were thus grouped together by the court: The work was to be done "subject to the approval of the chief engineer." The company was to retain regularly in its service an assistant engineer to direct the execution of the work. The contractor was to increase the force, "whenever required by the chief engineer." If he failed to complete the work within the time stipulated, the company might hire hands to complete it at his expense. He was to discharge any employee who should, "in the judgment of the chief engineer, or assistant in charge of the work," be unfaithful, unskillful, or remiss in the performance of the work, or guilty of riotous, disrespectful, or other improper conduct. He was to be responsible for damages as between himself and the company. All trees, logs, bushes, and other perishable material were to be removed to the outer limits of the clearing or burned up. Reviewing these stipulations, the court said: "We suppose, if the contract had not contained the conditions and limitations above, that it could hardly be contended that Hardin was not an independent contractor. Do these conditions destroy and negative that feature? We think not, for the reason that they do not apply to the mode and manner of having the work done, nor do they in any way take said work out of the hands of Hardin [the contractor]. They are nothing more than certain rules under which the work was to be done by Hardin, and intended to guarantee the faithful execution of the specified work. We do not see why one working under specified rules may not be an independent contractor, as without such rules. One contracting to build a house, according to specifications and plans drawn by an architect, and under the inspection of the architect, which is usually the case, would none the less, be an independent contractor, because of the presence and inspection of the architect. The point is, who is doing the work? Is the company doing it by its employés, or is the contractor by his? The company certainly had the right to see that the contractor was doing the work according to the contract, and that he employed skillful and proper laborers, and the regulations above were, as it appears to us, intended to accomplish this end—nothing more." *Rogers* v. *Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059.

In *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461, where the contract contained the following provisions, it was held that the right of direction reserved to the engineer related only to the quantity of work to be done in the construction of the road, or to the condition of the work when completed, and not to the mode or manner of doing the work.

(1) The work of grubbing and clearing, excavation, embankment, is to be done as prescribed in the specifications, and agreeably to the directions, of the said engineer or his assistants.

(2) Clearing. The entire ground on which embankments and excavations are to be made, and such additional width, not exceeding fifty feet on each side, as the engineer may direct, shall be cleared of all trees. The fences on the line of

15. Effect of clauses relating to the supervision of the work.—In applying the rule enunciated in the preceding section the courts have held that provisions of the following tenor may be inserted in a contract without destroying its independent character: That the employer's agent shall have the right of supervising, inspecting, or superintending the work for the purpose of seeing that it is done according to the specifications (*a*); that suitable

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the road which are not removed by the owner shall be cleared off by the contractor and piled up and preserved for the use of the owner, on the direction of the engineer.

(3) Earth work In grading the roadbed increased width shall be made for passing places or side-tracks, "at such places as the engineer may direct."

(4) Excavation will include all cuttings necessary to or connected with the railroad, "and which shall be directed by the engineer." Excavations will be of such width and depth, and with side slopes of such inclination as the engineer may direct."

(5) Earth from roadway excavations is to be hauled into embankments, "as far as the engineer directs," not exceeding two thousand feet. Spoil banks are to be so formed as to slope backward from the roadbed excavation in such manner as the engineer shall direct. Rock excavations will be fourteen feet in width at grade, "with such side slopes as the engineer shall direct."

(6) Embankments for roadbed or for whatsoever purpose incidental to or connected with the construction of the railroad, and which "may be required by the engineer in charge, shall be built at his direction."

(7) The form and dimensions of embankments "shall conform to the stakes and directions of the engineer," and embankments which will be required about masonry shall be built at such time, and in such manner, and of such material, "as the engineer shall direct." Embankments shall be built of such height and width as will, "in the opinion of the engineer," leave them of full size when they shall have become fully settled and compact. Borrowed earth to form embankments will be taken from such place as may be selected by the engineer.

(8) All of the work shall be done in a neat, substantial and workmanlike manner, and in all respects fully completed, "to the satisfaction of the engineer in charge."

(9) The work embraced in the contract "shall be prosecuted with such force as the engineer may deem adequate to its completion within the time specified; "and if at any time the contractor shall refuse or neglect to prosecute the work, with a force sufficient in the opinion of the said engineer to secure its completion within the time specified, the engineer, or such other agent as he may designate, may, on ten days' notice, proceed to take possession of, and use in completing the work, the tools, etc., belonging to the contractor, and employ such number of men as may in his opinion be necessary to insure the completion of the work within the time specified, charging over the expenses so incurred to the contractor, and if the contractor shall fail to prosecute the work with an adequate force, or to comply with the directions of the engineer in regard to the manner of performing it, or in any other way neglect the requirements, of the agreement and specifications, or if he shall do any portion of the work embraced in this contract in an unfaithful and unworkmanlike manner, "the engineer may, at his discretion, declare this contract, or any portion or section embraced in it, forfeited."

(*a*) In one case we find the broad rule laid down that the mere right of the defendent to supervise the work so far as to see whether it was done according to contract does not throw the responsibility, if any, of the contractor on the employer. *Welsh* v. *Lehigh & W. Coal Co.* (1886) Pa. 3 Cent. Rep. 386, 5 Atl. 48.

"It is now an accepted rule that supervision of such work, (i.e. the building a railway) may be retained without interfering with the independent action or liability of contractors who have engaged to perform it or subdivisions of it."

material is to be furnished, and a specified structure erected, subject to the daily approval of the employer's engineer (*b*); that the work is to be "under the supervision and subject to the approval" of the employer or his agent (*c*); that the work is to

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Larson v. *Metropolitan Street R. Co.* (1892) 110 Mo. 234, 16 L.R.A. 330, 34 Am. St. Rep. 439, 19 S.W. 416.

"Although the employer may have had an agent, who supervised the work for the mere purpose of seeing that it was done in conformity to the contract, without interfering as to the particular method in which it was done or the means by which a given result was to be accomplished, that would not be in law a control and direction of the work by her; and she would not be responsible for the manner in which the work was done." *Harrison* v. *Kiser* (1887) 79 Ca. 588, 4 S. E. 320 (language of head-note prepared by the court).

An employer cannot be held liable for the acts of a contract merely because his engineer has a general supervision of the work, where the power of such engineer is "limited to the manner of its accomplishment and the time within which it should be finished, rather than the means to be used." *Edmundson* v. *Pittsburgh M. & T. Co* (1885) 111 Pa. 316, 2 Atl. 404.

A contract is none the less independent because the employer's representative has the right to see that the work is properly done. *Murphy* v. *Ottawa* (1887) 13 Ont. Rep. 334.

In *Reedie* v. *London & N.W.R. Co.* (1849) 4 Exch. 244, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. 65, a provision by which the employer reserved a general power of watching the work was treated as immaterial. In fact it was not even contended by counsel that it changed the relation of the parties to that of master and servant.

To the same effect see the following cases: *St. Louis A. & T. R. Co.* v. *Knott* (1891) 54 Ark. 424, 16 S. W. 9; *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Nevins* v. *Peoria* (1886) 41 Ill. 502, 89 Am. Dec. 392; *Pfau* v. *Williamson* (1872) 63 Ill. 16; *Pioneer Fireproof Constr. Co.* v. *Hansen* (1898) 176 Ill. 100, 52 N. E. 17; *Bayer* v. *Chicago M. & N. R. Co.* (1896) 68 Ill. App. 219; *Cary* v. *Chicago* (1895) 60 Ill. App. 341; *Fitzpatrick* v. *Chicago & W. I. R. Co.* (1889) 31 Ill. App. 649; *Geist* v. *Rothschild* (1900) 90 Ill. App. 324; *New Albany Forge & Rolling Mill* v. *Cooper* (1891) 131 Ind. 303, 30 N. E. 294; *Hughbanks* v. *Boston Invest. Co.* (1894) 92 Iowa 267, 60 N. W. 640; *Harding* v. *Boston* (1895) 163 Mass. 14, 39 N. E. 411; *Gorham* v. *Cross* (1878) 125 Mass. 232, 28 Am. Rep. 254; *Morgan* v. *Smith* (1893) 159 Mass. 570, 35 N. E. 101; *Crenshaw* v. *Ullman* (1892) 113 Mo. 633, 20 S. W. 1077; *McKinley* v. *Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *Uppington* v. *New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Hawke* v. *Brown* (1898) 28 App. Div. 37, 50 N. Y. Supp. 1032; *Jaskoey* v. *Consolidated Gas Co.* (1901) 33 Misc. 790, 67 N.J. Supp. 976; *Gardner* v. *Bennet* (1874) 6 Jones & S. 197; *Clare* v. *National City Bank* (1875) 8 Jones & S. 104; *Reed* v. *Allegheny* (1875) 79 Pa. 300; *Wray* v. *Evans* (1875) 80 Pa. 102; *Welsh* v. *Parish* (1892) 148 Pa. 599, 24 Atl. 86; (1) *Simontom* v. *Perry* (1901) Tex. Civ. App.) 62 S. W. 1090; *Bibb* v. *Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163.

(*b*) *Casement* v. *Brown* (1893) 148 U.S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672. The court said: "This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies, and do whatever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with this contract. . . . They were to see that the thing produced and the result obtained were such as the contract provided for."

(*c*) *Vosbeck* v. *Kellogg* (1899) 78 Minn. 176, 80 N.W. 957; *Eaton* v. *European & N.A.R. Co* (1871) 59 Me. 520, 8 Am. Rep. 430; *Thomas* v. *Altoona & L. Valley Electric R. Co* (1899) 191 Pa. 361, 43 Atl. 215; *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Alabama Midland R. Co.* v. *Martin* (1893) 100 Ala. 511, 14 So. 401.

be "done to the satisfaction" of the employer's representative (*d*); that the employer or his agent is to have the right to reject improper or defective material (*e*).

16. Effect of clauses providing that the work shall be done under the direction of the employer.—Other still more striking illustrations of the extent to which the courts have gone in refusing to infer the existence of the relation of master and servant are to be found in those cases where it is not merely provided that the work shall be done under the general supervision of the employer or his agent, but that whole work, or certain parts thereof, shall be done "under the direction" of the employer or his agent (*a*). The rationale of these cases is, that the question whether the person employed was an independent contractor or a mere servant is not to be determined by the retention of a certain kind or degree of supervision by the employer, but by the contract as a whole—by its spirit and essence, and not by the phraseology of a single sentence or paragraph. If the result of applying this test is to render it reasonably certain that the intention of the parties was to enter into an independent contract, the words above specified will be construed as being one which relates to the results contemplated, and

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(*d*) *Harding* v. *Boston* (1895) 163 Mass. 14, 39 N.E. 411; *Eldred* v. *Mackie* (1901) 178 Mass. 1, 59 N.E. 673; *Powell* v. *Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W. 691; *Smith* v. *Milwaukee Builders' & T. Exchange* (1895) 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N.W. 1041.

The liability of the employer was denied, where the contractor had offered to do the work of excavation for "$645, lump job," and the defendant had accepted the offer in a letter in which, among the other terms given, it was stated that "the excavation was to be done absolutely in accordance with the drawing," and "to the full satisfaction of the architect," and that the lines of the excavation were to be given by their engineer. *Hunt* v. *Vanderbilt* (1894) 115 N.C. 559, 20 S.E. 168.

For other cases in which similar stipulations were involved, see next section, notes (*c*), (*d*).

(*e*) *Hardaker* v. *Idle Dist. Council* (1896) 1 Q.B. 335, 353, 65 L.J.Q.B. N.S. 363, 74 L.T.N S. 69, 44 Week. Rep. 323, 60 J.P. 196, (per Rigby, J., arguendo); *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Fitzpatrick* v. *Chicago & W. I. R. Co.* (1889) 31 Ill. App. 649.

(*a*) That there was at first a disposition on the part of judges to construe such a stipulation to the disadvantage of the employer may perhaps be inferred from some remarks of Lord Denman in *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. Referring to a provision of the contract which required that all such parts of the work as were not specified and described in the contract or plans and specifications should be executed in such manner as the surveyor of the works should direct, he said that this passage appeared to take power from the contractor, and keep it in the hands of the commissioners, or their surveyor. But it was held not to be applicable to the facts under discussion, and its actual effect was not determined.

not to the methods employed (*b*). This principle of interpretation has been deemed to warrant the inference that a contract is none the less independent in its character, because it contains one or other of the following provisions: That the work is to be done "under the direction and to the satisfaction" of the employer's representative (*c*); that the work to be performed "under the immediate direction and superintendence" of the employer's representative, and "to his entire satisfaction, approval, and acceptance" (*d*);

(*b*) For decisions embodying or recognizing this doctrine, see *Foster* v. *Chicago* (1902) 197 Ill. 264, 64 N.E. 322, affirming, (1901) 96 Ill. App. 4; *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461; *Ridgeway* v. *Downing Co* (1900) 109 Ga. 591, 34 S.E. 1028; *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Humpton* v. *Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776; and the cases cited on the following notes.

(*c*) *Kelly* v. *New York* (1854) 11 N.Y. 432; *Slater* v. *Mersereau* (1876) 64 N.Y. 138; *Frassi* v. *McDonald* (1898) 12 Cal. 400, 55 Pac. 139, 772; *Pioneer Fireproof Constr. Co.* v. *Hansen* (1898) 176 Ill. 100, 52 N.E. 17, affirming (1897) 69 Ill. App. 659; *Foster* v. *Chicago* (1902) 197 Ill. 264, 64 N.E. 322; *Indiana Iron Co.* v. *Gray* (1897) 19 Ind. App. 565, 48 N.E. 803; *Ridgeway* v. *Downing Co.* (1900) 109 Ga. 591, 34 S.E. 1028.

Construing a contract which provided that the work was to be done "under the direction of the defendants and their architect, and to their entire satisfaction, approval, and acceptance," the court said: "It is manifest that this direction, approval and acceptance had reference to the time within which it should be performed, with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by either of these contractors. They could not say who should be employed or who discharged. They had the right, under their contracts, to say what should be done, but not how it should be brought about, or who should do it. * * * * * Appellant relied largely upon the use of the word 'discretion,' as employed in the contracts referred to. We do not regard this as in any sense conclusive. When we look at the whole contract, it is apparent that the only direction the architect or the owner could give was to what should be done to accomplish the ends aimed at by the contract. He should not dictate the means or methods to be employed. This is the interpretation which has uniformly been placed upon such contracts." *Humpton* v. *Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776.

A provision in a building contract, that the work shall be performed in accordance with the plans and drawings, and executed under the direction and to the satisfaction of the owner's architect, does not authorize the latter to modify the plans, so as to relieve the contractor from doing the work called for by the contract; and the owner cannot be held liable for injuries to an employé of a sub-contractor from the fall of the building during erection, owing to a change in the specifications by the architect. *Burke* v. *Ireland* (1898) 26 App. Div. 487, 50 N.Y. Supp. 369.

(*d*) *Foster* v. *Chicago* (1901) 96 Ill. App. 4, Affirmed in (1902) 197 Ill. 264, 64 N.E. 322. In an opinion, adopted by the Supreme Court as being a correct statement of principles, the Court of Appeals said: The court said: "The requirement that the time and manner of doing the work must be satisfactory to the city's commissioner of public works does not include the means employed, and is limited by the provisions of the contract. The direction and superintendence provided for do not relieve the contractor of responsibility, nor permit the city to change or modify the terms of the written instrument. The contractor agrees to do all work necessary to fully complete the sewer in the

that certain portions of the work are to be done "as directed" by the inspector or superintendent of the employer, and that the whole work is to be done "subject to the direction" of the superintendent at all times (*e*); that one designated portion of the work is to be done according to the plans, and "in accordance with the directions" of the employer's engineer, and another portion "under the immediate supervision and direction" of such engineer (*f*); that the employer shall have the right of superintending and supervising, by its agents, execution of work under a contract, and of giving directions in relation thereto (*g*); that the employer's agent is to "superintend the work, and give such instructions from time to time during the progress, as the necessities of the work shall demand (*h*); that the employer's engineer may declare the contract forfeited "for non-compliance with his directions in regard to the manner of constructing" the railway in question (*i*); that the work is to be conformed to such further "directions" as shall be given by the employer's agent (*j*); that the materials and work

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manner required by the contract as well as in a manner satisfactory to the city. Provided he reaches a satisfactory result in building such a sewer as the contract calls for, the contractor is not prevented from using his own methods. The specifications require the sides of a trench like that where the caving occurred 'to be effectually supported with suitable planks and timbers by the contractor without expense to the city.' The method of using planks and timbers for such purpose is left to the contractor. The contract does not include the direction, management and control by the city of every detail of the work. The contractor was not required to take his orders, day by day, from the city. He was to be guided by the contract and the specifications constituting a part thereof. He was not a mere servant and employé. He was an independent contractor, the city retaining such supervisory power as it might, from time to time, find it necessary to exercise to insure compliance with the contract and to obtain the result called for thereby."

(*e*) *Harding* v. *Boston* (1895) 163 Mass. 14, 39 N. E. 411.

(*f*) *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl., 32.

(*g*) *Weber* v. *Buffalo R. Co.* (1897) 20 App. Div. 292, 47 N.Y. Supp, 7.

(*h*) *Robinson* v. *Webb* (1875) 11 Bush. 464.

(*i*) *Thomas* v. *Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215. The trial judge, in an opinion adopted as correct by the Supreme court, said: "'Non-compliance with the directions of the engineer' must be construed in connection with other parts of the contract. It evidently means non-compliance with his directions in such matters as under the agreement he had the right to direct. It does not, either expressly or by inference, give him the right to interfere with the means Stark chose to use to accomplish the work. Such right is not reserved in the agreement, and it was not within the contemplation of the parties that the engineer could compel a forfeiture of the agreement by assuming at his will to give directions in matters over which the agreement did not give him jurisdiction."

(*j*) *Pack* v. *New York* (1853) 8 N.Y. 222. The court said: "This clause is nothing more than a stipulation for a change in the specifications of the work as stated in the contract at fixed prices provided therein. It does not, as the court

are to be furnished and done "according to the plan and under the direction and supervision" of the agent appointed by the owner (*k*); that the work shall be done "as described in the specifications and agreeably to the direction from time to time" of the employer's agent (*l*); that the work is to be done "in accordance with the plans and specifications and instructions furnished" by the employer "or such persons as he may appoint" (*m*); that the engineer in charge is to have power to prescribe the order in which the materials are to be placed, and that the work is to be done and materials furnished as directed by him (*n*); that the employer is to have the right of fixing the points to or from which the materials or articles handled by the contractor shall be conveyed, or the points at which such materials or articles are to be placed (*o*); that an

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below held, make Riley [a sub-contractor] the immediate servant of the defendants or give to them any control over him as to the manner or otherwise in which he should conduct the blasting. The defendants may change the grade by new specifications from that provided in the contract, the duty is then imposed upon Foster to make his grade accordingly; but as to the manner in which he shall proceed in his blasting to make the grade, or do the work, he is as perfectly independent of the defendants, as a man ever was while engaged in doing his own work."

(*k*) *Allen* v. *Willard* (1868) 57 Pa. 374.

(*l*) *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461. The court said that, when the whole contract (see § 14, note (*c*), ante), was considered, it was quite clear that "the directions of the engineer or his assistants" thus referred to, were those only which were specially named in the specifications.

(*m*) *Hunt* v. *Pennsylvania R. Co.* (1866) 51 Pa. 475. The court held that the word 'instructions' used in the agreement referred to the kind of structure, design, materials, combinations, and all matters pertaining to the planning of the building to be erected, but that as to the mode of accomplishing the work which the contractor undertook, he was left to his own skill and judgment.

(*n*) *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

(*o*) In *Hughes* v. *Cincinnati & S.R. Co.* (1883) 39 Ohio St. 461, the court, in discussing paragraph (5) of the contract set out in § 14, note (*c*), ante, said: "The power of the engineer to direct, under this clause, is limited to cases where waste earth from an excavation is thrown out over the top slope of the excavation, into spoilbanks, and as to the manner in which such spoilbanks shall be made to slope backwards from the excavation. Conceding that the railway company would be liable for an injury from the mode and manner in which such spoilbanks might be constructed, under the direction, or without the direction of the engineer, it is not claimed that the plaintiff was so injured. In wasting the earth, which resulted in plaintiff's injury, the contractors were acting on their own responsibility without any control or right of control on the part of the engineer, as to the mode or manner of doing the work."

One employed, with his horse and cart, by a city to remove street scrapings, who is free from the control and direction of the city, except that he is directed where to load and where to unload, is not a servant of the city, so as to render it liable for injuries negligently inflicted by him upon a third person, while he is taking a load to the dumping ground. *Saunders* v. *Toronto* (1899) 26 Ont. App. Rep. 265, Rev'g (1898) 29 Ont. Rep. 273.

engineer who is to superintend construction work shall have the right to give directions as to the quantity of work to be done (*p*); that such work shall be conformed by the contractor to the lines and levels given by the employer's engineer (*q*); that the employer's agent shall have the power of fixing the times and places at which such work shall be prosecuted (*r*). The independence of the contract has been affirmed even in cases where it was specifically provided that the directions of the employer should be followed in respect to the manner or method in which the work was done, or the methods by which it was done (*s*).

Where a person enters into an absolute contract with a railway company to draw its cars, and furnishes the horses and drivers, and assumes the entire control, the fact that the company can direct what cars are to be hauled, and to what stations, does not disprove the independence of the contract. *Schular* v. *Hudson River R. Co.* (1862) 38 Barb. 653.

The fact that the owner of a store points out the goods to be carted, and their destination, to a man in the employ of a cartage company which is under contract to do all the cartage of the former at a specified price, does not show that the owner of the store exercised control over the manner in which the goods were to be transferred to the trucks, or over the route by which they were to be taken to their destination. *Riedel* v. *Moran F. Co.* (1894) 103 Mich. 262, 61 N.W. 509. To the same effect see *Wadsworth Howland Co.* v. *Foster* (1893) 50 Ill. App. 513.

Where the contract between a telephone company and one K., provided that K. should furnish "all necessary labour, skill, material, apparatus, supplies, and machinery" to construct and complete the line, that the "telephones and switch board were to be installed, located, and placed as and where directed" by the telephone company, and that the work should be under the supervision of the company and its agent, it was held that K. was an independent contractor at least in respect to stringing the wires on the poles. *Vosbeck* v. *Kellogg* (1899) 78 Minn. 176, 80 N.W. 957.

Where it has been shown, in an action against A. for the negligence of B., that A was working, under a contract, to haul sand at so much a load from B.'s lot, a witness cannot be asked by whose orders A. left off drawing sand from another lot of B., and whether B. could have directed A. to stop hauling from the lot in question. Such evidence had no tendency to show that the employer reserved control over the manner of doing the work. *Fink* v. *Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am Rep. 376. Reviewing (1881) 10 Mo. App. 61.

(*p*) *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

The fact that a sub-contract for the laying of a railway track contains a provision to the effect that the track is to be laid as far as it shall be ordered by the chief engineer of the general contractor does not render the general contractor liable for the negligence of the sub-contractor. *Powell* v. *Virginia Constr. Co.* (1890) 88 Penn. 692, 17 Am. St. Rep. 925, 13 S.W. 691.

(*q*) *Murphy* v. *Ottawa* (1887) 13 Ont Rep. 334; *Harding* v. *Boston* (1895) 163 Mass. 14, 39 N.E. 411. *Hughes* v. *Cincinnati & S. R Co.* (1883) 39 Ohio St 461; *Thomas* v. *Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215; *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

(*r*) *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Erie* v. *Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642 (see next note); *Foster* v. *Chicago* (1902) 197 Ill. 264, 64 N.E. 322, affirming (1901) 96 Ill. App. 4.

(*s*) In *Erie* v. *Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642, the contract contained this provision: "All work to be commenced and carried on at such times, and in

17. Effect of other clauses.—The following provisions, although they are expressive of the fact that the contractor was in some

such places, and in such manner as the engineer shall direct." The trial judge held that this stipulation created the relation of master and servant, this conclusion being based upon the remark made by Strong J. in *Painter* v. *Pittsburgh* (1863) 46 Pa. 213, to the effect that a certain clause there under review only gave the employer the "power to direct the *results* of the work, without any control over the *manner* of performing it, which control, alone, furnishes a ground for holding the master or principal for the act of a servant or agent." The supreme Court, however, said: "The word 'manner,' in the above quotation, is evidently considered as having a meaning so general as to reduce the contractor to the grade of a mere servant or agent. 'Manner' must, in such case, mean the power to control the work, not only as to its character, but also as to the particular means used to accomplish it. This must needs be so, for as we have seen in the case of *Reed* v. *Allegheny* (1875) 79 Pa. 300, a stipulation for general supervision of the work does not reduce the contractor to the grade of an agent, although necessarily, in such case, the engineer must, to some extent, control the manner in which the contract is performed. It is quite obvious that the word 'manner' must be construed with reference to the contract in which it is found. By the agreement under consideration, the work was not only to be done in such manner, but at such times and in such places as the engineer shall direct; if this were the whole of the contract the matter would be of easy solution, but turning to the body of the contract, we find that grant was bound to begin the work on or before the 25th of October, and to finish it by the 25th of December following, so that the engineer's directions as to time must be limited by the periods thus expressed. So as to place; that is fixed between certain points on State street, and whilst the engineer might direct that the work should be done on either side or in the middle of that street, as he might think would best subserve the public welfare, his directions that the work should be done on some other street, or even bevond the points indicated on State street, would be utterly nugatory. Just so with reference to the manner in which the work is to be performed; that is carefully prescribed in the specifications, and within these prescriptions the engineer may direct, but not beyond them. If he does require and direct something that is not found therein, he must then set an arbiter between the contracting parties, and fix the rate of compensation for the work thus required, and that rate becomes part of the contract. This, in itself, exhibits two independent contracting parties who have provided themselves with an arbiter to settle their disputes. It is not thus with mere agents or servants, for they themselves are but parts of the means used by the master to accomplish his design, and that he may choose to alter the theory or plan of the work before it is begun or during its progress is of no moment to them. This contract contemplates the accomplishment of a certain result; the means, so far as they are deemed necessary to give the work its proper character, are carefully specified; the province of the engineer was to see that these means were properly applied, in other words to see that proper materials and methods were used to produce the required result. But in all this the contractor was supreme, for he had but to comply with his contract in delivering to the city a good job according to the terms of that contract."

In *Callahan* v. *Burlington & M. River R. Co.* (1867) 23 Iowa, 562, a contract for the grading of a railway provided that certain perishable materials in the right of way should be removed "as the engineer might direct." The court said: "The clearing of the ground was the work to be done, the end to be attained, and could be done in one of two modes at the option of the defendant. In the exercise of that opinion, burning was chosen as the mode of accomplishing the end. But with the manner of burning, defendant had nothing to do, and over it exercised no control. It could not direct that the combustible materials should be gathered in large or small heaps, or on one side of the roadway or the other, or that the act of burning should be prudently and carefully done, and proper precautions of watchfulness be exercised in order to prevent danger to the property of others, all relating to the manner of doing the work required by the contract to be done."

degree under the control of the employer, have also been held not to be inconsistent with the conclusion that the contract was an independent one: That a person undertaking contraction work in the streets of a city shall comply with the provisions of the municipal ordinances or by-laws relating to such work (*a*); that the employer shall have the power to "modify, alter or vary the works from time to time" (*b*); that the employer's representative is authorized to "change at his discretion the amount of all the various kinds of work and materials and structures" (*c*); that the employer shall have the right, at any time during the progress of the work, "to make any alterations, deviations, or omissions from the contract" (*d*); that without the consent of the employer or his supervising agent the contractor is not to sublet any part of the work (*e*); that, if the contractor shall at any time neglect or refuse to provide a sufficiency of materials and workmen to execute the work properly, the employer may himself furnish such materials and workmen, proceed with the execution of the work, and charge to the contractor the expenses thus incurred (*f*); that the employer shall have the right to demand and procure the discharge of any of the contractor's workmen who may be disobedient, unskilful, negligent, or in any other way unfit to participate in the work (*g*); that the employer shall have a right to object to

(*a*) Such a provision was treated as an immaterial element in *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Harding* v. *Boston* (1895) 163 Mass. 14, 39 N.E. 411 O.

(*b*) *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 Weekl. Rep. 323, 60 J.P. 196.

(*c*) *Uppington* v. *New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91.

(*d*) *Frassi* v. *McDonald* (1898) 122 Cal. 400, 402, 55 Pac. 139, 772.

(*e*) *Robinson* v. *Webb* (1875) 11 Bush. 464; *Cuff* v. *Newark & N.Y.R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205.

(*f*) *Pioneer Fireproof Constr. R. Co.* v. *Hansen* (1898) 176 Ill. 100, 52 N.E. 17; *Wray* v. *Evans* (1875) 80 Pa. 102; *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461; *Thomas* v. *Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215; *Rogers* v. *Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059.

(*g*) *Reedie* v. *London & N.W.R. Co.* (1849) 4 Exch. 254 6 Eng. Ry. & C. Cas. 184, 20 L.J., Exch. N.S. 65 (where Rolfe, B., remarked that, in spite of such a stipulation, the workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskillful, did not make him their servant); *Hardaker* v. *Idle Dist. Council* (1896) 1 Q.B. 335, 35 L.J.Q.B.N.S 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196; *Atlantic Transp. Co.* v. *Coneys* (1897) 28 C.C.A. 388; 51 H.S. App. 570, 82 Fed. 177; *Callan* v. *Bull* (1896) 113 Cal. 593; 45 Pac. 1017; *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495; 23 Atl. 32; *Bayer* v. *Chicago*

the employment of any particular person by the contractor, if there is reason to suppose that such a person would not be suitable (*h*); that the contractor is not to employ as his workmen any persons except those resident in a specified locality (*i*).

18. Reservation of a full power of control, effect of.—Generally.—Since the rationale of the doctrine by which an employer is exempted from liability for the torts of an independent contractor is that, ex hypothesi, the latter is not under the control of the former with respect to the execution of the details of the stipulated work, it is clear that this doctrine is not applicable in cases where, as a matter of fact, the situation thus supposed does not exist. If the employer has reserved the right of exercising control, the person employed is in law regarded as a servant, even though his calling may be for some purposes independent (*a*).

M. & N.R. Co. (1896) 68 Ill. App. 219; *Blumb* v. *Kansas* (1884) 84 Mo. 112, 54 Am. Rep. 87; *McKinley* v. *Chicago S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *Uppington* v. *New York* (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91; *Schular* v. *Hudson River R. Co.* (1862) 38 Barb. 653; *Cuff* v. *Newark & N. Y. R Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205; *Rogers* v. *Florence R. Co.* (1889) 31 S.C. 378, 9 S. E. 1059.

In one case it was remarked that the fact that the discharge is to be accomplished through a request to the immediate employer of the workman, instead of by the direct act of the principal himself, rather repels than creates the inference that the principal possessed the right to discharge. *Harris* v. *McNamara* (1892) 97 Ala. 181, 12 So. 103.

In another case, when commenting upon a provision by which that the contractor was required to dismiss, from his employment, all incompetent or unfaithful persons, the court said: "In this we may observe, that the statement, that the city had a general power over the men employed by the contractor, is too broad, for the contract is, that he shall dismiss, from his employment, incompetent or unfaithful employés. Herein the fact of his superior and independent control over the workmen is recognized: for if the city retained this power, why contract with Grant for the doing of that which it could, at any time, do itself." *Erie* v. *Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642.

(*h*) *Harris* v. *McNamara* (1892) 97 Ala. 181, 12 So. 102.

(*i*) A municipal corporation which requires a person to employ only its own citizens, does not thereby deprive him of the character of independent contractor, so as to render itself liable for the acts of his employés. *Harding* v. *Boston* (1895) 163 Mass. 14, 39 N. E. 411.

(*a*) "Where the employer retains the control and direction over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent." *Cincinnati* v. *Stone* (1855) 5 Ohio St. 38.

"The terms 'independent contractor' and 'servant' as applied to the subject in hand, are somewhat unsatisfactory, but are used for want of better ones. The word 'servant, as used in this connection, is applicable to any relation in which, with reference to the matter out of which the alleged wrong has sprung, the person sought to be charged had the right under the contract of employment to control, in the given particular complained of, the action of the person doing the alleged wrong. In every case the decisive question in determining whether the

doctrine of respondeat superior applies is, had the defendant the right to control in the given particular the conduct of the person doing the wrong. If he had, he is liable. On this question the contract under which the work was done must speak conclusively in every case, reference being had, of course, to surrounding circumstances. If defendant had such control, the mere fact that the agent who did the injury carried on a separate and independent employment will not absolve his principal from liability. If this control existed, it makes no difference whether the person doing the injury was the 'servant' of the defendant, in the popular sense of that word, or a person merely employed to do a specified job or piece of work." *Rait* v. *New England Furniture & Carpet Co.* (1896) 66 Minn. 76, 68 N.W. 729.

In a case where plaintiff's counsel contended that the circumstances brought it within an alleged exception to the general rule, viz., "That the employer is liable where he does not release the entire charge of the work to the contractor, but retains supervision of its construction," the court observed: "This is nothing more than saying that, where the contractor is not an independent contractor, but is under the control of his employer, the employer is liable. In other words, instead of its being an exception to the admitted doctrine above, it seems to be nothing more than stating it in different phraseology. Or rather, while recognizing the doctrine, it states a certain condition where the employé would not be an independent contractor, to wit., where the employer had not released the entire charge of the work to him.' *Rogers* v. *Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059.

"The element essential to the discharge of the contractee from responsibility is that he shall not reserve control over the work." *Farren* v. *Seliers* (1857) 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

"The employer may also make himself liable by retaining the right to direct and control the time and manner of executing the work." *Atlanta & F. R. Co.* v. *Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277.

"If the employé had "the right to control the conduct of the wrongdoer '. . . either as to the time, place or matter of doing the act, he cannot absolve himself from liability for the negligence of the wrongdoer on the ground of independent relation, even though such a wrongdoer was a competent and fit person to do the work, and was acting under a contract to do the specific act, and not as an ordinary employé." *Corrigan* v. *Elsinger* (1900) 81 Minn. 42, 83 N.W. 492.

"It may be regarded as settled that, if the employer keeps control of the mode of the work, his liability for the acts of a contractor and servant is the same." *Reynolds* v. *Braithwaite* (1889) 131 Pa. 416, 18 Atl. 1110.

The employer may be held liable for injuries inflicted, where, although the work has been let to an independent contractor, he has "retained control of the manner of doing it, so that he has the right to give directions as to the steps which shall be taken to produce the result." In that case, as the employer "has control of the acts done by the contractor and may prevent any negligence on his part," he is held to be liable for any negligence which contractor is guilty of, because he has not prevented it. *White* v. *New York* (1897) 15 App. Div. 440, 44 N.Y. Supp. 454.

The following instruction has been given: "If you find that the defendant reserved the control of the place of the excavation, or the control of the person employed, or the right to direct him in the construction of the work, or did control him or direct him in the doing of the work, then he was the mere agent or servant of the defendant, and, it would be, liable for his negligence and carelessness, the same as if the defendant did it itself." *Fuller* v. *Citizens' Nat. Bank* (1882) 15 Fed. 875.

In a recent case before the English Court of Appeal the finding of the trial judge to the effect that the plumber whose negligence caused the injury was not an independent contractor, but that he acted under the supervision of the defendants who retained the control of the work was held to be fatal to the defendants. *Holliday* v. *National Teleph. Co.* [1899] 2 Q. B. 392, 608 L.J.Q.B.N.S. 1016, 81 L.T.N.S. 252, 47 Weekl. Rep. 658.

For other explicit recognition of the doctrine, that, unless the employer relinquishes control over the work, the person employed is his agent or servant, see *Wilson* v. *White* (1883) 71 Ga. 506, 51 Am. Rep. 269; *Edmundson* v. *Pittsburgh M. & Y. & R. Co.* (1885) 111 Pa. 316, 2 Atl. 404; *Morgan* v. *Bowman* (1856) 22

If, in respect to one particular portion of the work the person employed is subjected by the terms of the agreement to the control of the employer, the necessary inference is that the employer acts as a master in exercising the power so reserved (*b*).

The intendment is that the plaintiff is seeking to recover on the ground of the existence of a contract of service, where he alleges in his declaration that the negligent person was working "under the direction" of the defendant (*c*); or "under the superintendence, control, management, and direction" of such defendant (*d*).

19. Independence of contractor when negatived by the specific terms of the contract.—In the note below are collected a large number of cases in which the phraseology used by the parties to the agreement was held to preclude the reference that the person employed was an independent contractor. Upon a comparison of

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Mo. 538; *Veazie v. Penobscot Co.* (1860) 49 Me. 119, and many of the cases cited in the succeeding sections.

In one case it was said to be "an important test of liability, that the employer reserves the power not only to direct what shall be done but how it shall be done." *New Orleans M. & C.R.Co. v. Hanning* (1872) 15 Wall 649, 657, 21 Led. 220, 223. But the authorities show very plainly that this is not merely an "important," but the conclusive test.

(*b*) The reservation by a railway company in a contract for the construction of its road, of the right to designate the points at which crossings shall be put in on public or private roads, the contractors having no right to even close up a road until it has been passed upon by the company's engineer, makes it responsible for injuries to the travelling public from the improper construction of a crossing designated by it in the exercise of its reserved power. *Dublin v Taylor T. & H. R. Co.* (1899) 92 Tex. 535, 50 S.W. 120. The Court remarked: "While it is true that a reservation of control over that part of the work would not alone make the railway company liable as master for the whole work, yet in respect to crossings at intersections of all roads it acted as master in exercising the reserved powers, and will be held responsible for the consequences." By the decision on the former appeal (sub nom. *Taylor B. & H. R. Co. v. Warner* (1895) 88 Tex. 642, 32 S.W. 868) the company's liability was put upon the ground of a breach of a non-delegable duty. See § 57, note (*a*), post. A later appeal before the Court of Civil Appeals is reported in *Taylor B. & H. R. Co. v. Warner* (1900; Tex. Civ. App.) 60 S.W. 442.

(*c*) *Mann v. O'Sullivan* (1899) 126 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375.

(*d*) *Hunt v. Vanderbilt* (1894) 115 N.C. 559, 20 S.C. 168. Discussing the consequence of ascribing this meaning to the complaint, the court said: "This language is so used that it distinctly qualifies and controls any matter alleged in the nature of inducement or explanation, which sometimes, under the very liberal construction of code pleading, is held sufficient to avoid a variance, and it clearly imports that the defendant is sued for the conduct of Britt, as the defendant's servant, and not otherwise. The testimony discloses that Britt was not the servant of the defendant, but an independent contractor, and as the principles of law upon which the defendant may be liable for the conduct of Britt in these distinct capacities are, in some very essential particulars, widely different, and really constitute different causes of action, we have but little hesitation in deciding that the evidence fails to sustain the cause of action set forth in the complaint."

the provisions which have received such a construction with those which are reviewed in §§ 13-16, it seems impossible to avoid the conclusion that there is, in not a few instances, an essential conflict of judicial opinion respecting the extent to which an employer is entitled to retain the power of directing the work without subjecting himself to the duties and liabilities of a master (*a*).

(*a*) (1) *Work on railroads.*—In *New Orleans M.C. & R. Co.* v. *Hanning* (1872) 15 Wall. 649, 21 L. ed. 220, the agreement was that the person employed should furnish the timber, etc., necessary for the rebuilding of the defendant's wharf with such mooring-posts, cluster piles, etc., "as the company, through their engineer, might require;" that the engineer "should supervise and direct the work," and that the work "should be done to his satisfaction;" that the old wharf should be "made as good as new, and the new wharf in the best workmanlike manner." The defendant railway company was held to be liable for the negligence of the person employed, the argument of the court being as follows: "The company do not yield to Carvin [the contractor] the possession or control of the wharf. They may direct the number of mooring-posts, cluster-piles for fenders, rows of piles, slips, and inclines, paying according to the number of square feet covered. They are at liberty to direct such material shall be used and how it shall be laid to make the old wharf as good as new, and to make the new the best workmanship. They are to supervise the work to be done. They are to direct how it shall be done. This includes the power of controlling and managing the entire performance of the work, within the general limits mentioned. . . . Here the general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built was not pointed out. That rebuilt was to be as good as new. The new was to be of the best workmanship. This is quite indefinite and authorizes not only, but requires, a great amount of care and direction of the part of the company. The submission of the whole work to the direction of the company's engineer is evidence, although not conclusive, that the company retain the management and control. The reservation of authority is both comprehensive and minute. The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All the details are to be completed under their orders and according to their direction. The contractor undertakes in general terms to do the work well. The company reserve the power not only to direct what shall be done but how it shall be done. This is an important test of liability." This ruling is not easy to reconcile with the general trend of opinion which is evidenced by the decisions cited in §§ 14-17, ante.

Those decisions are still more distinctly in conflict with an intimation in another case, that a contract by which a railroad company employed a contracting company to do certain blasting at the top of a cut at the end of a tunnel did not of itself show that the contracting company was an independent contractor, as the terms of the contract, (not stated in the report), showed that the railroad company reserved the right to determine the extent of the excavation to be made, and undertook to furnish a locomotive and train crew to transport the material removed. *Louisville & N.R. Co.* v. *Tow* (1901) 23 Ky. L. Rep. 408, 63 S.W. 27.

The defendant railroad company made a contract with one M., by which he was to take entire charge and control of defendant's freight business at the St. Louis station, load and unload cars, switch them back and forwards in the yard, make up freight trains, and do all other yard service necessary in the transaction of defendant's freight business. He was also, when requested, to haul freight from the levee for the defendant; to prepare, execute, and receive all necessary freight bills; to keep all necessary books of account, collect freight money, and generally act as and discharge all the duties of a station agent. To enable him properly to discharge his duties he was to have control over the grounds, yards, and buildings, engines and cars of defendant at the station. Defendant was to

furnish the necessary engines and keep them in repair and supplied with fuel, etc., and to employ the engineers and firemen who were to be under M.'s control and were to be paid by him. For his services M. was to be paid monthly at the rate of fifteen cents for each ton of freight received or delivered and fifty cents for each car hauled from the levee. The contract was to continue for five years. The business was to be done under the control of defendant's superintendent and to his satisfaction, and if not so done defendant could revoke the contract on twenty-four hours' notice. M. performed no service for any other person than defendant. In an action against the defendant for injuries received through the negligence of trainmen in the employ of A., it was held that A. was the servant of defendant, and not an independent contractor. *Speed* v. *Atlantic & P. R. Co.* (1879) 71 Mo. 303.

The independence of a contract is destroyed by a stipulation that the work is to be done "according to the plans and directions of the chief engineer of said company," who is "to be employed and paid by the company." *Veazie* v. *Penobscot Co.* (1865) 49 Me. 119.

Where it was stipulated that in an agreement between a railway company and a contractor, that certain passenger trains operated by the latter were to be "run under the direction of the company, and under their control," the company was held liable for the value of a horse which was run over by a train. *Wyman* v. *Penobscot & K. R. Co.* (1858) 46 Me. 162.

(2) *Construction of buildings.*—In a case where a workman employed by the agent of one M. was injured by a defective appliance the question to be determined was, whether M. was or was not the agent of the defendant, by virtue of a certain contract for the construction of several buildings. This contract contained some provisions which are not common in contracts of agency. It required him to make all contracts for material and labour in his own name, and made him responsible under such contracts, in the first instance, to the persons with whom he should contract. It also authorized the defendant company to retain from sums which should become due for labour and material $40,000, for which M. was to accept capital stock of the company. To that extent, therefore, he might be regarded as having advanced his own money for the payment of labour and material. On the other hand, the agreement recited that the company was about to construct business blocks in Sioux City, and desired to employ M. in their construction, as therein stated. It provided for the letting of contracts for all necessary work and material, excepting the carpentry work and material, to the lowest bidder, subject to the approval of the company, and required M. to furnish the material and labour necessary for the woodwork. He was required to superintend the entire construction of the buildings, and to examine and supervise the material furnished, and to give his exclusive attention to those subjects. He was to furnish to the company with a statement of the actual cost of all work and material, and the company reserved the right to approve all contracts he should enter into, and to make changes in the building. In consideration of the performance of the agreement on his part M. was to receive 10 per cent. of the cost of certain labour and material, "in full for all his services in looking after the execution of said contracts for material and labour and superintending the entire construction of said buildings." The court said: An examination of the entire agreement leads us to the conclusion that, for the purposes of this case, M. must be regarded as an agent of the company. It may be claimed that as to the carpentry work he was an original contractor, but the contract, considered as an entirety, shows that his work, in addition to letting contracts and providing materials, was of a supervisiory character. . . . He was not required to work as a carpenter, but was obliged to furnish material and labour for the woodwork. He was not allowed a separate sum for that labour and material, but the actual cost of it was to be paid by the company, which reserved "the right to determine the prices to be paid for all material and labour for said buildings." The contract gave to the company not only the right to fix prices, but also the right to approve the labour done and material furnished, and Mainland was subject to its direction and control in all things." *Hughbanks* v. *Boston Invest. Co.* (1894) 92 Iowa, 267, 60 N. W. 640.

Commenting upon the words of an instruction (not stated), in a case where the existence of a contract of service was held to have been properly inferred, the court said: "Here, although Daegling was erecting the walls under a contract,

he was, by its terms, to carry forward the work under the control of the superintendent, and 'to remove all improper work or materials upon being directed so to do by the superintendent,' to whose judgment, both as to work and materials, he agreed to submit, and whose acts the owner agreed to recognize. The owner also reserved the right to change his plan, and the architect was declared to be the superintendent for the owner." *Schwartz* v. *Gilmore* (1867) 45 Ill. 455, 92 Am. Dec. 227.

(3) *Demolition of Buildings.*—In a charge to a jury which was held by a Supreme Court to be a correct statement of principles, the trial judge thus commented on a contract which provided in substance that one Elston was to take down the entire building, or so much thereof as the employer might request, and that all of the work was to be done carefully, and under the direction and subject to the approval of the employer: "This contract gives the defendants the right to control and direct the action of Elston. It is not simply a provision that the work must finally meet their approval before they pay him, but it is a provision that, in the first instance, he is to take down just so much of it as they desire, and that he is to do the work of taking down under their direction. There is no other mode of construing it than so to mean that he, by this contract, was subject to their orders as to the time, and manner and mode of doing this work; and that they had the right to step in and say to him, 'You are not doing this as we directed you to do it. We direct you thus and so, and we direct you to do this in the other way.' That seems to me, as far as the contract is concerned, to bring the case within the relation of master and servant, so far as Elston and the defendants are concerned." *Linnehan* v. *Rollins* (1884) 137 Mass. 123, 50 Am. Rep. 287.

A written contract to demolish a building, containing a clause that "the work is to be done according to the direction of the supervising architect, whose decisions on all points shall be final," creates the relation of master and servant. *Faren* v. *Sellers* (1887) 39 La. Ann. 1011, 4 Am. St. Report 256, 3 So. 363 (workman injured). The Court said: "The nature of the work was such that nothing else but the method of doing it required the supervision of the architect . . . If the architect had directed or permitted Lynch to strip the building as actually done by defendants, before removing the spans, Lynch would have been the servants of the defendants, quoad the adoption of this method, and they would have been responsible for any injury resulting therefrom. A fortiori are they responsible when they themselves adopt this method and do this part of the work themselves. . . . It is perfectly clear that the stripping of the building by the removal of the purlines and braces was an essential part of the work covered by the contract; that the time, order and manner of their removal formed important elements in the method to be adopted in effecting the demolition; that the adoption of the particular method here pursued was the direct act of defendants themselves; that it was a vicious, faulty and dangerous method, and if the injury to Faren happened as a direct result or consequence of this fault, defendants cannot shield themselves from responsibility under the doctrine of independent contract."

(4) *Street Improvements.*—A provision in a contract, entered into with a district council for the levelling and paving of a road, to the effect that the contractor shall execute all the works mentioned in the specifications and certain plans, according to such explanatory drawings and instructions as may be furnished to him by the district council's surveyor, gives the district council complete control over the work and the manner of its performance, and it is responsible for personal injuries caused by the negligence of the contractor in performing his contract. *Penny* v. *Wimbledon Urban Dict. Council* [1898] 2 Q.B. 212, 67 L.J.Q.B. N.S. 754, 78 L.T.N.S. 748.

"The city of Cincinnati having given a contract to a person to regrade and repave a street, and provided in the contract for the work to be 'done under the direction' of the city civil engineer, or agent appointed by the city council for the same, who should have 'entire control over the manner of doing and shaping all or any part of the same,' and whose 'directions were to be strictly obeyed,' etc., the contractor carelessly and improperly left piles of stones and materials for the work at a place near or about the gutter of the street, where a nuisance was likely to be created, the results being that, when rain fell, the water was obstructed, and flowed back and spread over the premises and building of the

complainant.—Held, that the city was liable for the damage so caused. *Cincinnati* v. *Stone* (1853) 5 Ohio St. 38.

That a contract for putting in a sewer was an independent one was denied in a case where it contained the following provision: The word "engineer" as herein employed, shall be construed to mean such person, as shall be designated by the city council, whose duty it shall be to superintend the work in all its details, pass upon, and reject such material as may not be in conformity with these specifications, designate when work shall begin, and how it shall be conducted, discharge incompetent, or disobedient employés, and pass upon all questions as to the intent and meaning of these specifications. The engineer subject to approval of the sewer committee, may appoint, and place upon the work such inspectors as he may see fit, fully authorized to act for him in his absence. *Scott* v. *Springfield* (1899) 81 Mo. App. 312.

By an agreement for the construction of a sewer the contractor undertook to perform the work, 'under the direction' of the defendant corporation's street commissioner and a surveyor. In executing the contract, he negligently caused the excavated earth to be piled on the side-walk, over the plaintiff's vault, and the arch of the vault was broken down by the weight of the superincumbent mass, and the plaintiff's property contained in the vault was destroyed. The court was of opinion that the contractor was the agent of the corporation in building the sewer, and that a nonsuit had been erroneously directed. *Delmonico* v. *New York* (1848) 1 Sandf. 222.

In a case where an overflow resulted from an obstruction created by the earth which had been thrown out of a trench dug by a contractor for a pipe sewer, the retention by the defendant municipality of a supervisory control over the work was held to be a necessary inference, where a power had been reserved to make alterations in the manner, extent and plan of the work, as it progressed, and to relet the work in case the terms of the contract were not complied with, and among other reservations of authority and control over the work was the following: "The contractor shall commence the work at such points as the engineer and sewer committee may direct, and shall conform to their directions as to the order of time in which the different parts of the work shall be done, as well as to all the engineer's other instructions as to the mode of doing the same, including the length of street or alley that may be taken up in advance of the back filling." *Denver* v. *Rhodes* (1886) 9 Colo. 554, 568, 13 Pac. 729.

In *Nashville* v. *Brown* (1871) 9 Heisk. 1, 24 Am. Rep. 289, the Court seems to have considered that the fact of its having been provided by a contract for certain street work, that it was to be done "under the direction of the city engineer, and to the satisfaction of the street committee" was an element which in itself showed that the relation created was that of master and servant. But the main ground of the decision was the rule which declares the keeping of a street in a safe condition to be a non-delegable duty. See §§ 58, 59, post.

(5) *Construction of canals.* From provisions of a contract which showed that the city retained a supervisory control over the work and had power to dismiss any person employed by the contractors on the work, and that the dismissions of the board of public works, who represented the city, were final and conclusive in every case that might arise under the contract, the Court drew the inference that there was "dependence" and "serviency" in the contractors. *Chicago* v. *Joney* (1871) 60 Ill. 383 (obstruction created while the canal was being deepened caused an injury to a person using it).

(6) *Laying of pipe lines.* A contractor is not deemed to have full control of the work of excavating a trench for a pipe line across a highway, where the agreement provides that if the work is not done in a manner satisfactory to the superintendent of the contractee, he may put men in the trench at the expense of the contractor to make the necessary change; and also that, if the contractor fails to prosecute the work with due diligence, the contractee may finish the same and charge it to the contractor. *Washington Natural Gas Co.* v. *Wilkinson* (1886 15; Pa.) 1 Cent. Rep. 637, 2 Atl. 338.

Where the contract for laying a line of pipes provided that they "were to be deposited in such continuous lines as might be pointed out, in such manner as not to interfere with the traffic, and to the satisfaction of the officer who might be present," and the plaintiff was injured by falling over a pipe which had been deposited by a carter in such a manner as to project over a crossing, one of the

judges was of opinion that the public board which had made the contract for the distribution of this and other pipes along the highway had retained a discretionary power to indicate by the direction of their officer, the places at which the pipes were to be deposited. *O'Brien* v. *Board of Land & Works* (1880) 6 Vic. L.R. (L.) 204, 2 Australian Law Times 22.

(7) *Work in mines.*—A contract of service is established where the undisputed evidence of the plaintiff's father, who made the contract, is that he hired the plaintiff to work in the mines for the appellant; that the contract between him and the appellant was, that his two sons, including plaintiff, were to cut coal for 42½ cents per ton for all the coal they could dig; that he (the father) was to furnish the tools and powder and stuff; and that the bank boss was to have control of the work. *Drennen* v. *Smith* (1896) 115 Ala. 396, 22 So. 442 (where the question was, whether the plaintiff was entitled to sue, as a servant, under the Employers' Liability Act of Alabama).

Mine owners are responsible for the safety of the mine, not only to the servants directly hired by them, but to the servants of contractors, who have practically no discretion as to the planning of the mine, or the selection of their working ground, and who are employed merely for the purpose of stripping a lode of its ore, the mine-owners reserving the power of determining when and where dangerous rock shall be removed, and of giving directions as to where supporting pillars shall be left, and timbers shall be placed to prop the walls. *Lake Superior Iron Co.* v. *Erickson* (1878) 39 Mich. 492, 33 Am. Rep. 423.

(8) *Scavenging work.*—A man employed by the Police Commissioners of a town to remove rubbish was held to be a servant, not an independent contractor, where the contract contained provisions to the following effect: "(1) That certain specified drains should be swept as often as required by the inspector; (2) that the commissioners should be entitled, as occasion might arise, to require the use of an additional cart or carts; (3) that the contractor should be bound to remove any nuisance upon receiving written orders from the commissioners; (4) that the work should be performed to the entire satisfaction of the commissioners or their inspector; and (5) that the contractor should be under the immediate order of the inspector or, in his absence, of the clerk of the commissioners. *Stephens* v. *Thurso Police Comm'rs* (1876) 3 Sc. Sess. Cas. 4th Series 542 (plaintiff held entitled to recover for injuries caused by stumbling over a heap of rubbish left in a street without a light).

(9) *Work in manufacturing establishments.*—In a case where the question was, whether the jury were justified in finding that the negligent person was the agent or servant of defendants, it appeared by the uncontradicted evidence that one S. took the work of which he had charge by the piece. Defendants paid him a fixed price for a specified amount of work; and he hired the other employés under him, paid them himself, and retained the profits or suffered the losses which were the difference between the fixed contract price which he received and the amount of wages which he paid. He carried on his operations in one room of the defendant's factory. They furnished him the machinery, the power and the material, and the defendant testified on cross-examination, that his superintendent had a right to direct him when things should be done, and how they should be done, and that, if the employé did not obey orders, he could be discharged. The court held that, while the undisputed evidence showed that S. was to some extent a contractor, yet the jury were justified in finding, from the whole evidence, that he was not so far an independent contractor that defendants were exempt from liability for his acts. *Barg* v. *Bousfield* (1896) 65 Minn. 355, 68 N.W. 45.

Whether one who is supervising a department of a factory is a servant of the owner or an independent contractor, is a question for the jury, where he testifies that he was paid by the gross for articles turned out of his department, and paid his subordinate out of the sum thus received, but also states that he was only the foreman for that department, and under the superintendent. *Latorre* v. *Central Stamping Co.* (1896) 9 App. Div. 145, 41 N.Y. Supp. 99.

It is proper to refuse a charge framed on the hypothesis that there was no evidence tending to show that the negligent person was the defendant's servant, where there is testimony to the effect that that person had contracted to bale hulls of cotton seed at a specified price per bale, using the machinery and power of the defendant; that the defendant employed and paid the hands assisting in

the work; that the negligent person was a negro, who had no other occupation, and was irresponsible financially; that he considered himself to be a foreman, and not an independent contractor; and that the company, by its superintendent and other officers, did actually exercise authority and control over him, over the machinery, and over the hands employed by him, to a degree inconsistent with the supposition that his work was under his control. *Wallace* v. *Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S.W. 399, affirming in part and reversing in part (1897) 38 S.W. (Tex. Civ. App.) 1137.

(10) *Sale of commodities.*—The provisions of a contract with a person employed to solicit orders for a commodity, and the reasons for the conclusion arrived at, were thus stated in a decision by the Supreme Court of the United States: "The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled 'Canvasser's Salary and Commission Contract.' The compensation to be paid by the company to Corbett, for selling its machines, consisting of 'a selling commission' on the price of machines sold by him, and a 'collecting commission' on the sums collected of the purchasers, is uniform, and repeatedly spoken of as made for his 'services.' The company may discharge him by terminating his contract at any time, whereas he can terminate it only upon ten day's notice. The company is to furnish him with a waggon; and the horse and harness to be furnished by him are 'to be used exclusively, in canvassing for the sale of said machines and the general prosecution of said business.' But what is more significant, Corbett 'agrees to give his exclusive time and best energies to said business,' and is to forfeit all his commissions under the contract, if while it is in force he sells any machines other than those furnished him by the company; and he further 'agrees to employ himself under the direction of the said Singer Mfg. Co. and under such rules and instructions as it or its manager at Minneapolis shall prescribe.' In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if he saw fit, instruct him what route to take, or even at what speed to drive. The provisions of the contract, that Corbett shall not use the name of the company in any manner, whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment." *Singer Mfg. Co.* v. *Kahn* (1899), 132 U.S. 523, 33 L. ed. 442, 10 Sup. Ct. Rep. 175.

In *Gahagan* v. *Aermotor Co.* (1897) 67 Minn. 252, 69 N.W. 914, the first paragraph of the contract was as follows: "Said sale agent agrees as follows: 1st. To do all the business pertaining to selling aermotors, . . . to receive all goods shipped to him under this agreement, to pay freight and expressage on such goods from Chicago, and to keep them well housed and in good order until sold, free of taxes and all charges to said company, and to be governed by the printed instruction on the back of this contract, which are hereby referred to and made part of this contract, and the instructions of the Aermotor Company." Commenting upon this contract the court said: "Many of its provisions tend to indicate that its object was to constitute Frankson a factor to sell on commission, upon the terms and subject to the conditions and limitations therein specified, but otherwise to leave him to carry on the business in his own way, free from any right of control or direction on the part of the defendant. But the last clause of the first paragraph will not reasonably admit of any other construction than that Frankson was to be governed by any instructions which the defendant might give as to the manner in which the business should be conducted,—in other words, that under this contract of employment the defendant had a right to direct the action of Frankson by any instructions it might give as to the manner in which he should conduct the business, not inconsistent, of course with the express terms of the contract itself. If this was so, then defendant had the right to control and direct his acts as to the manner in which the mills should be advertised, as, for example, setting up samples to attract public attention to them. . . . If the defendant had, under its contract with Frankson, the right to control his action in the matter of setting up sample mills, then it is liable for his negligence. Under the evidence this was a question for the jury." It was accordingly held that damages might be recovered for injuries received by a child who meddled

20. —by the provisions of a statute applicable to the circumstances.—If the contract has been framed with reference to the express provisions of a statute which regulates the manner in which the work in question is to be carried out, those provisions become an implied term of the contract, and if they declare that the contractor is to be under the control of the contractee or his representative, the relation created will be that of master and servant. This situation is illustrated by several cases dealing with contracts in which the clauses of a city charter determine the extent of the supervisory powers reserved (*a*).

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with a sample wind-mill which had been set up in a street, and set in motion by the wind.

The persons whom it was sought to hold liable were wholesale dealers in millinery, and had in their service as a salesman and traveling agent one Wright, who was hired by the year on a salary. Wright's duties required him to stay in the store, or travel, soliciting orders for goods and making collections, as his employers might direct. When in the store, he paid his own board; when travelling his expenses were allowed to him, and paid by his employers. At the time of the transaction in controversy he was travelling in the course of his employment; but he had no particular instructions, nor was he under any orders as to the route or mode of travel he should adopt. Commenting upon this evidence, the court said: "In the present case Wright, in respect to his employment, was at all times subject to the will of his employers, and could not, consistently with his duty to them, refuse to obey their directions in the performance of the service for which he was engaged. It was not necessary that they should, in fact, exercise such control. If they had the authority to the extent indicated, the fact that they chose to leave the details to his discretion would not alter the relation of the parties. We think Wright was a mere servant or agent, and cannot be regarded as a contractor within the meaning of the cases bearing on the subject. . . . His contract of employment did not bind him to produce any given result. His time belonged to his employers, and he was entitled to be paid irrespective of results." *Pickens* v. *Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55 [plaintiff's buggy and horses were injured by the negligence of Wright].

(*a*) The independence of a contract with a city for the building of a sewer was held to be negatived, where the contract was let pursuant to the provisions of a statute, by virtue of which the Board of Public Works had full and complete control of the manner of the performance of the work by the contractor, during the progress thereof, and it was the duty of that board to reserve, in the contract for building the sewer, the right to determine finally all questions as to the proper performance thereof, or the doing of the work therein specified, and in case of imperfect or improper performance, to suspend the work, to order a re-construction thereof, or to re-let the work to some other party. (Wis. Private & Local Laws, 1869, chap 399, §§ 11, 17, chap. 401, § 12.) *Harper* v. *Milwaukee* (1872) 30 Wis. 365 (earth dug from a trench was left in such a position that the water in a drain was obstructed and diverted on to the plaintiff's premises). *Kollock* v. *Madison* (1893) 84 Wis. 458, 54 N.W. 725. In the first cited case the court, not having the contract before it, entertained the presumption that it was made in accordance with the requirements of the statute.

The charter of the City of Seattle which was in force at the time when the contract in question was entered into conferred upon the board of public works the management and control of public streets and alleys of the city; also the superintendence of streets, the making of the improvements therein, and the management, building and repairing of all sewers and connections therewith. It further provided that such improvements as were made by contractors should

21. —by direct evidence that the employer exercised control over the work.—In estimating the proper import of the testimony submitted, the essential question to be determined is, not whether the employer actually exercise control over the details of the work, but whether he had a right to exercise such control (*a*). Clearly,

be made under the *management* of the board of public works. The contract and specifications in the case under consideration contained these provisions, among others: (1) That the improvement should be under the superintendence of the city engineer, and any orders and directions given by him or his duly appointed representative should be respected and immediately and strictly obeyed by the contractor or any overseer of the work; (2) that, whenever the contractor was not present on the work, orders would be given to the superintendent or overseer who might have immediate charge thereof, and should by them be received and strictly obeyed; (3) that, if any person employed on the work should refuse or neglect to obey the directions of the city engineer or board of public works in anything relating to the work, or should appear to be incompetent, disorderly or unfaithful, he should upon the requisition of the engineer, be at once discharged and not again employed upon any part of the work. It was held that, under the provisions of this contract, the persons employed were practically placed to work under the control, direction and management of its engineer, and therefore were not independent contractors within the meaning of the rule which exempts a city or other employer from liability for an injury caused by negligence in the prosecution of the work. *Cooper* v. *Seattle* (1897) 16 Wash. 462, 58 Am. St. Rep. 46, 47 Pac. 887 (water-main burst in consequence of the manner in which an excavation was made around it). To the same effect, see *Smith* v. *Seattle* (1899) 20 Wash. 613, 56 Pac. 389 (grading caused removal of lateral support); *Seattle* v. *Busby* (1880) 2 Wash. Terr. 25, 3 Pac. 180 (similar facts).

The intention of the legislature that the city of St. Paul should "retain that supervisory and directory power over the details of the work and the manner of its performance which is so valuable to the citizen in protecting his person and property against the carelessness of irresponsible contractors," was held to be a necessary inference, for the reason that the charter provided as follows: "The said street commissioners shall have power to order and contract for the making, grading, repairing and cleansing of streets, alleys, public ground, reservoirs, gutters and sewers within their respective wards, and to direct and control the persons employed therein." *St. Paul* v. *Seitz* (1859) 3 Minn. 297, 74 Am. Dec. 753, Gil. 205 (plaintiff fell into an excavation made in the course of the grading of a street).

(*a*) "It is this unlimited right of control, whether actually exercised or not, which, in my opinion, is the condition for inferring the responsibility of a master." *Hardaker* v. *Idle Dist Council* [1896] 1 Q.B. 335, 353, 65 L.J.Q.B.N.S. 363, 74 L.S.N.S. 69, 44 Weekl. Rep. 323, 60 J. P. 196, per Rigby, L.J.

"The tendency of modern decisions is . . . not to regard as an essential or absolute test so much what the owner actually did when the work was being done as what he had a right to do." *Atlantic Transp Co.* v. *Coneys* (1897) 28 C.C.A. 388, 51 U.S. App. 570, 82 Fed. 177, where it was held that a carpenter, engaged in repairing the fittings of a steamer for cattle and freight, is not an independent contractor, where the captain and superintendent have the right to direct the extent and manner of the alterations and repairs, although such right is not often exercised because of the confidence in the ability of such carpenter and his knowledge of what will be required, and separate bills are made out for the separate kinds of work upon each vessel and the materials furnished for each job.

In another case it was laid down that, in order to constitute the employé a servant, "it was not necessary that his employers should, in fact, exercise such control," and that, "if they had the authority to the extent indicated, the fact that they chose to leave the details to his discretion would not alter the relation of the parties." *Pickens* v. *Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55.

however, evidence which shows that the employer did, as a matter of fact, interfere with or give directions regarding the work must necessarily have a material bearing upon the question of his liability. Such evidence is susceptible of two constructions, according to circumstances.

(1) It may be regarded as tending to establish either the general conclusion, that the employer had reserved the right to control all the details of the work, and consequently occupied the position of a master in regard to the person employed. To negative the inference that the person employed was an independent contractor, it is not necessary, in this point of view, that the directions actually given should have embraced every detail in the execution of the work (*b*).

(2) It may be regarded as tending to establish the special conclusion, appropriate only to cases in which the injury was the direct result of the employer's interference or directions, that he was a principal tortfeasor, and responsible as such, whatever may have been the character of the contract, as a whole.

The second of these aspects of the evidence will be considered in § 73, post. That the former aspect is illustrated by most, if not all, of the decisions cited in the note below, would seem to be a reasonable inference from facts involved and the language used in

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In another case it was remarked that, while defendants might not have exercised power of control over the work of the alleged contractor, yet if they retain the right to exercise such power during the progress of the work, then he was their servant, and not their contractor. *Goldman* v. *Meson* (1888) 18 N.Y.S.R. 376, 2 N.Y. Supp. 337.

In a charge by a trial judge, which was approved by the court of review as being a correct statement of principles, the following remarks were made with reference to the evidence which had been introduced as to the actual control which the employers exercised over the work: "That is all proper and competent evidence for you in considering the matter, yet the absolute test is not the exercise of power of control, but the right to exercise power of control. If, for instance, there was nothing in this case but this contract, and there was no question that the parties were acting under it, if that is the view you take of it, and that the injury was occasioned by the negligence of Elston, then, although the trustees should be across the Atlantic, nevertheless, under the instructions I give you, if they retained the power of control and direct the work, they would be liable; because it is the possession of the right of interference, the right of control, that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly." *Linnehan* v. *Rollins* (1884) 137 Mass. 123, 50 Am. Rep. 287.

The same doctrine is explicitly recognized in *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Hawke* v. *Brown* (1898) 28 App. Div. 37, 50 N.Y. Supp. 1032.

(*b*) *Sullivan* v. *Dunham* (1898) 35 App. Div. 342, 54 N.Y. Supp. 962.

the opinions. But in some instances there may be a doubt as to the precise standpoint of the Court (*c*).

(*c*) (1) *Work on railways.*—In one case the court thus commented on the evidence which, in its opinion, negatived the contention of the defendant, that the labourers whose carelessness produced the injury were independent contractors: "The proof shows that these graders were employed directly by the railroad company and were paid by the company at the rate of so much per cubic yard of earth removed, and an agreed price for all stumps removed. The graders were common labourers, and the defendant company seems to have been carrying on the general work of constructing its road within itself, and not, as is often customary, through the instrumentality of an independent contractor for the various branches of its work. Its witness, C R. Knight, who was its engineer, as he says, 'in charge' of the extension of the road to Palatka, undertakes in his evidence to represent these graders as being independent contractors; but he testified that their work was staked out for them by the engineer in sections, and the 'yardage' computed, and that then a 'foreman' let out the sections to those who applied for the grading of them; and that the next duty of the foreman was to accept or reject the work upon its completion, and in case of doubt as to whether the work was well done, he called on the engineer for the levels necessary to determine the doubt as to whether the grader has 'properly and faithfully, and in accordance with his contract, done his work.' He testified further that the foreman had the right to take the work away from them, when for any cause they neglected to perform it within a reasonable time, and to re-let any uncompleted portion paying pro rata for the part performed; and that, whenever the foreman's attention was called to any specific violation of the 'contract,' he had the right to annul the contract or to compel the grader to do the work as he had contracted to do it; and that the foreman pointed out to the grader the 'amount and nature' of the work, directing him as to the width and height of the embankment, and where the earth was to be taken from, etc., etc. In other words, what this witness termed the 'stipulations of the contract' with the graders, were evidently nothing more than directions from the foreman and engineer to the graders as to the mode and manner of doing their work, and if it was not done in accordance with those directions, the grader was forced to comply with them, or else be dismissed without pay for the uncompleted or imperfect work. Under these circumstances we think that these graders, instead of being independent contractors in the sense that would relieve the employer company from responsibility for their negligence, are sunk to the level of ordinary labouring servants to the company who was their master, and that the company was properly held to be reliable for the damage resulting from their negligence in the performance of the work they were put by the company to perform for its use and benefit." *St. Johns & H.R. Co.* v. *Shalley* (1894) 33 Fla. 397, 14 So. 890 (fire negligently started damaged property of adjoining landowner).

In another case where, after a construction company had partially performed its contract for the building of a railroad, the contract was abandoned by the parties in many material respects, and the railroad company by its own officers and servants, took charge of and supervised the work, gave directions as to how the road-bed should be constructed, and assumed general management and control of the enterprise, it was held that the railroad company could not relieve itself of liability for injuries occasioned by negligent or improper construction, but was primarily responsible. *Savannah & W. R' Co.* v. *Phillips* (1892) 90 Ga. 829, 17 S.E. 82 (fireman of construction train injured by defective track).

Evidence that the defendant's representative hired other labourers on a gang besides its foreman, that he had previously discharged and taken back the whole gang, that he refused employment to some men, that he directed men when to go on and stop work, will warrant a jury in finding that the defendant was the master of the foreman and the labourers on the gang. *Daley* v. *Boston & A.R. Co.* (1888) 147 Mass. 102, 16 N.E. 690.

Men who were employed to load coke on the cars of a railway company, and who were paid by the number of cars loaded, and who, as the undisputed evidence showed, did their work under the immediate supervision and control of the

company's superintendent, were held not to be independent contractors. *Holmes* v. *Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465, 22 So. 403 (labourer threw a heavy board down into the street without looking).

One who has made with the owner of a street-car line a contract under which, for a specified amount per month, he is to haul a car over the line once a day each way and to furnish a driver, is a servant of the owner, and not an independent contractor. *Jensen* v. *Barbour* (1895) 15 Mont. 582, 39 Pac. 906 (boy was thrown off the front platform by a jolt and run over). The court based its decision on two grounds: (1) that the reservation of a power of control was indicated by the fact that the defendant's agent was accustomed to give directions for the protection of property, and to warn the driver not to allow boys to ride on the car; and (2) that there was no force in the contention of defendant's counsel, that the person employed represented the will of his employer only as to the result of his work, and not as to the manner of its performance;—or in other words that he contracted to deliver to his employer the result of putting the car over the track once a day by his own methods. In answer to the latter point, the court said: "So it might be argued that one's coachman contracts to produce the result of conveying his master from his house to his office, or wherever he may wish to go, or one's cook contracts to produce the result of placing before his master his daily food. But such is not the sense in which the word 'result' is used in the rule. We think that the word 'result' as so used, means a production or product of some sort, and not a service. One may contract to produce a house, a ship, or a locomotive; and such house, or ship, or locomotive produced is the 'result.' Such 'results' produced are often, and probably generally, by independent contractors. But we do not think that plowing a field, mowing a lawn, driving a carriage, or a horse-car, for one trip or for many trips a day, is a 'result' in the sense that the word is used in the rule. Such acts do not result in a product. They are simply a service."

(2) *Construction of buildings.*—In a case where a person rightfully on the defendant's premises was injured by the collapse of a wall, it appeared that, in order to support the wall during the process of undermining, pieces of timber, denominated "needles," were extended through it, intended to rest upon firm earth on both sides. The negligence as alleged, and as the proof tended to show, consisted in the failure to extend them through sufficiently to enable them to rest on solid ground on the inside of the wall. This work was not provided for in the original contract and the mode of supporting the walls, while being undermined, was directed by the architect, who was employed to superintend the erection of the building. It was held that, as it was proved that the defendant had the ultimate power, as owner, to order how this work should be done, he was liable, although the mode was left to the judgment and direction of the architect. *Campbell* v. *Lunsford* (1887) 83 Ala 572, 3 Am. St. Rep. 758, 3 So. 449.

In a case where the fall of a building on adjacent premises was caused by digging a trench too long and deep alongside the wall, the contractor declared that "the excavation should be carried to such general depth as might be indicated by the engineer;" and that "excavations for the trenches and piers should be made as required from time to time in the progress of the work, and to such an extent as might be indicated by the engineer." There were also statements that the engineer was "in charge of the work," and that men who neglected to obey his orders were to be discharged by the contractors. The Court said: "The very act complained of here is the digging of the trench too long and too deep in the circumstances. The act is charged as negligence. It was ordered by defendant's representative on the spot, acting for the chief engineer who had express power to direct 'by his authorized agents,' as well as personally. The work was done precisely as ordered. Thus it was the exercise of the discretion or judgment vested in the supervising authority, which caused the catastrophe; and for that exercise of judgment defendant must respond." *Larson* v. *Metropolitan Street R. Co.* (1892) 110 Mo. 234, 16 L.R.A 330, 33 Am. St. Rep. 439, 19 S.W. 416.

In a case where the evidence showed that the defendant had contracted to erect a brewery, and that he had let out to one W. the contract for general work, including the hoisting into position of the iron required in the building; that W. employed and discharged his own mechanics and laborers; and that the defendant communicated with him, and not with the men employed by him, the

Court remarked that "nevertheless, there was, upon the one hand, an uncertainty as to the precise limitations of the contract, and, upon the other, a certainty that the defendant was continually on hand, and in control, even though his directions as to how the work should be done were given to W." The conclusion arrived at, therefore, was that W. was not an independent contractor in such a sense as to relieve the defendant of liability for his conduct in the prosecution of that work. *Moffet* v. *Koch* (1901) 106 La. 371, 31 So. 40 (iron truss being placed in a dangerous manner without proper bracing tilted over and fell to the ground).

In a case where the goods of tenants of the a building were injured through the negligent manner in which an employé of the landlord had repaired a gutter over a party wall, the evidence relied upon as showing that the employé was under the control of the defendant, and therefore in "legal contemplation" his servant, comprised the following facts: That the job was a light one, that the defendant had not surrendered the premises while the work was being done, that he had instructed the employé not to do the work when rain was threatened, and that he had ordered the employé to "go ahead" when the latter explained what he thought best to be done. *Mumby* v. *Bowden* (1889) 25 Fla. 455, 6 So. 453.

In *Hart* v. *Ryan* (1889) 3 Silv. Sup. Ct. 415, 6 N.Y. Supp. 921 (removal of lateral support damaged a building), it was held that the trial judge properly refused to hold upon the evidence that the defendants, the principal contractors for the erection of a building, were not liable by reason of their arrangement with one K. as to excavations, the evidence being to this effect: that K. was to be paid by the yard for such excavations as he made; that it was his duty to follow the direction of the defendants from time to time, as to where and when he should dig; that they supervised the work; and that Ryan gave directions to the men there. Under these circumstances, it was considered that, if K. made an excavation that caused the damage upon the plaintiff's land, it was with the knowledge and apparently with the direction of the defendants. Hence, if upon all the evidence, the jury found that the footing-course was erected upon the plaintiff's land, K., as well as the defendants, became trespassers upon the plaintiff's premises.

A landowner who continues to manage and control the work of excavating under the wall of an adjoining building, is liable, notwithstanding a contract with a third person for its performance, for damages resulting from the work. *Dunton* v. *Niles* (1892) 95 Cal. 494, 30 Pac. 762; *Watson Lodge No. 32, I.O.O.F.* v. *Drake* (1895) 16 Ky. L. Rep. 669, 29 S.W. 632.

It was held that one who had contracted to supply a building with an automatic fire extinguisher, and had sublet the making of the tank to responsible and competent builders, was liable to third parties for damages caused by their negligence, where his agent had general supervision of the work, and caused the damage by directing the plaintiff's servant to let water into the tank without ascertaining whether it would hold water. *Butts* v. *J. C Mackey Co.* (1893) 72 Hun. 562, 25 N.Y. Supp. 531. Affirmed in (1895) 147 N.Y. 715 (memo.), 42 N.E. 722.

An employer who is sued for a personal injury received by an employé from the falling of an ice-house cannot escape liability on the ground that he reserved no control over the erection of the building, where the evidence shows that before the contract was let he consulted with the builder and determined the materials to be used and plan of construction, and was around the premises constantly while it was under construction. *Meier* v. *Morgan* (1892) 82 Wis. 289, 33 Am. St Rep. 39, 52 N.W. 17.

In *Camp* v. *Church of St. Louis* (1852) 7 La. Ann. 321, it was held by one half of an evenly divided court that, as the defendant's had retained a "continuous and active control" over the work of erecting a building, the case was not within the purview of § 2739 of the Civil Code of Louisiana, which declares that "the undertaker is responsible for the deeds of the person employed by him." The construction put upon this provision was that, under ordinary circumstances, the undertaker was *alone* responsible.

The inference that a man employed to make an excavation for a cellar, at a specified price, per diem and commissions on the outlay, was a contractor, and not a servant, cannot properly be drawn, where the evidence of the employer himself shows that he was exercising control over him in respect to the manner

in which the earth should be removed, so as to secure the safety of a house on the adjacent lot. *Mound City Paint & Color Co.* v. *Conlon* (1887) 92 Mo. 221, 4 S.W. 922.

The fact that a landlord, when employing a plumber to make some repairs, informs him that a tenant on the premises will show him what to do has no tendency to prove that the defendant reserves the right to direct how the work shall be done. *Burns* v. *McDonald* (1894) 57 Mo. App. 599.

(3) *Work in streets.*—In a recent English case, where the injury was caused by the negligence of H., a master plumber employed by a telephone company to connect the pipes which it was laying in a street for its wires, the evidence was that, according to the usual course of business, H. was sent for, and either came in person or sent one or two men, generally, and did the work as soon as he could. But there was no agreement that he should come at any specified time. On the occasion in question H.'s brother came to do the work alone, as H. was otherwise engaged. The defendant's local manager visited the work several times a day to see that the joints were properly made, and he stated in evidence that, if the work were not satisfactory he could put an end to the contract. A finding by the City of London Court that H. was a servant was held by the Divisional Court not to be justified by the evidence; but the Court of Appeal was of opinion that the finding should be allowed to stand. *Holliday* v. *National Teleph. Co.* (1899) 2 Q.B. 392, 68 L.J.Q.B.N.S. 1016, 81 L.T.N.S. 252, 47, Weekl. Rep. 658, reversing (1899) 1 Q.B. 221, 68 L.J.Q.B.N.S. 302.

(4) *Clearing of land.*—The independence of the contract is negatived where the evidence is, that a person agreed to clear a piece of land at a certain price per a cre, but that the employer watched the progress of the work, gave advice as to the setting of the fire to burn the timber and brushwood, and when he was told that a certain fence which extended to the plaintiff's land might take fire, said that it made no difference. *Johnston* v. *Hastie* (1870) 30 U.C.Q.B. 232.

In a case where one Jewell had made a contract with the defendant for removing trees, the former testified that he was to furnish teams and men for a certain price, and that either he or one Dinkel was to be present and act as foreman under the direction of one Ward, who was the defendant's foreman, and was to do the work pursuant to his direction. Ward was present a part of the time while the work was progressing and pointed out what was to be done. The witness said: "We did not usually do anything that Ward did not first tell us to do." The directions first given by Ward consisted in pointing out the particular piece of work to be done, such as the excavation for the foundation of a barn, and construction of a ditch. For new pieces of work Dinkel and Jewell went to Ward; he directed them to take trees out whole. The defendants, Dinkel and Jewell received pay as foremen at a given price per day, and the men, material and expenses were paid for at cost, and bills rendered therefor with a certain percentage added as profit. On the other hand, the defendant stated, in effect, that he said a good deal to Mr. Ward on the subject of giving directions to Dinkel and Jewell, "as to the manner or method and means of doing this work, before I left; also while I was there before I had made my plans for going." The defendent was present when the work began, but while it was in progress he went away, and subsequently communicated with Ward in reference to the work. The defendant also testified that he gave no directions, either himself or through Ward to Dinkel or Jewell, except in the expansion of the work, and in additional items of work to be done. The court thus commented on this evidence: "If the arrangement was that Dunham was simply to give directions as to the work to be done, and did not give or had no authority to give direction as to the manner in which it should be done, or as to the means to be used in performing it, then he would not be liable for any injury resulting from the method of its performance, as there would be no relation of master and and servant. But the evidence authorized a different inference from this. As we have seen, Dunham said that he did not give directions as to the manner, method and means of doing the work, and Ward carried out this view when he directed that the trees should be taken out whole, and he gave such direction in relation to blasting the particular tree out of which the injury arose. It was not necessary that the directions should embrace every detail in doing the work." *Sullivan* v. *Dunham* (1898) 35 App. Div. 342, N.Y. Supp. 962 (tree which was blasted out whole fell on plaintiff).

(5) *Work in manufacturing establishments.*—A "boss roller" employed to manufacture iron and steel at his own expense, with motive power furnished by the employer, at a certain amount per ton, to be distributed to him and his assistants, who are employed by him and subject to be discharged by him, as well as by his employer, is not an independent contractor, but a foreman only; and therefore the relation of master and servant exists between his employer and his assistants, notwithstanding that their compensation is fixed and paid directly by him, where he has no duty or right to repair the machinery, and the manufacturer exercises some control of the manufacture between the delivery of the material and the acceptance of the product, although the details are left to him. *Indiana Iron Co.* v. *Cray* (1897) 19 Ind. App. 565, 48 N.E. 803.

(6) *Work done with teams.*—One who is engaged in delivering coal for a fuel company, who is paid weekly by the ton, and who owns the team and the running gear of the wagon, the company furnishing the wagon box and his employment being continuous until suspended, is a servant of the company, and not an independent contractor; and the company is liable for injuries from his negligence in replacing the cover of a coal opening so insecurely as to be dangerous to persons passing along a sidewalk. *Waters* v. *Pioneer Fuel Co.* (1892) 52 Minn. 474, 38 Am. St. Rep. 564, 55 N.W. 52. The testimony relied upon by the court was, that he had worked for the company about three months, hauling coal daily, that he had in the meantime rendered service for no one else, that he appeared to be subject to its orders, and that he was treated as one of its teamsters or drivers.

(7) *Unloading of ships.*—In a case where the injury was caused by the negligent manner in which a truck used for hauling lumber from the wharf on which it was being unloaded from a ship to a shed where it was being stored, it was held that the question whether the defendant was liable had properly been left to the jury, where there was evidence going to shew, that the negligent person was employed as an assistant by one of three men who on previous occasions had often been engaged as ordinary dock labourers by the defendant, but had in this instance undertaken to unload the timber and place it on trucks, for a specific compensation, estimated with reference to the amount handled, and the defendant's foreman had admitted, on cross-examination, that, if he had seen that a truck was not properly loaded, he would have spoken to the contractors themselves, or, if none of them had been present, to the men who were loading the truck. Lord Esher said that, when the foreman's evidence came to be looked at, it shewed that, under certain circumstances, he would have interfered with the men engaged by the contractors, if they were doing their work wrongly, and that, taking into consideration this fact, and all the circumstances, under which the dock company carried on its business, it was impossible to say that a jury would not be justified in finding for the plaintiff. *Rich* v. *Surrey Dock Co.* (1891) 8 Times L.R. 116.

That the alleged contractor was a servant, and that he was paid not as a master-workman, but as a foreman of the defendant's, was held to be a justifiable conclusion, where he had testified that he was a "lumper" working at the wharves along the river side, that the terms agreed upon between himself and the defendants were that he should get the barge in question discharged and should be paid at the rate of 1s. 9d. for every ton that was unloaded, he managing everything necessary to perform the work; that he selected, as he liked, the men who were to work under him; but that they were to work as if he were foreman; and that the nature of the employment was such, that he could not dismiss any workman without reference to the defendants. *Charles* v. *Taylor* (1878) L.R. 3 C.P. Div. 492, 38 L.T.N.S. 773, 27 Weekl. Rep. 32, per Brett, L.J.

(8) *Sale of commodities.*—If the control which is the diagnostic mark of the relationship of master and servant was, as a matter of fact, exercised over him—and this is primarily a question for the jury—a commercial traveller, even though he is paid by commission, is a "servant" within the meaning of the embezzlement statutes. *Reg.* v. *Tite* (1861) Leigh & C.C.C. 29, 30 L.J. Mag. Cas. N.S. 142, 7 Jur. N.S. 556, 4 L.T.N.S. 259, 9 Weekl. Rep. 554, 8 Cox C.C. 458. *Rex* v. *Carr* (1811) Russ. & R.C.C. 198. *Reg.* v. *May* (1861) Leigh & C.C.C. 13, 30 L.J. Mag. Cas. N.S. 81, 7 Jur. N.S. 147, 3 L.T.N.S. 680, 9 Weekl. Rep. 256, 8 Cox C.C. 421. *Reg.* v. *Bailey* (1871) 12 Cox C.C. 56, 24 L.T.N.S. 477.

Other cases in which the circumstance that the employer did, in point of fact, interfere and control the employés in the course of their work has been adverted

22. —**by the character of the stipulated work.** — The ground upon which some decisions may be said to have proceeded was that, in view of the humble industrial status of the persons employed, and the simple character of the work to be done, the only admissible inference was that the employers intended to retain the right to give directions in regard to the details of the work. In other words it was considered that, although the persons employed might be exercising an independent calling, in the sense that they held themselves out as being prepared to do certain kinds of work for such parties as might engage them, the relation which they bore to those parties, during the progress of such work as might be undertaken by them, was in law that of a servant (*a*). The

to as a cumulative element supporting the conclusion that they were mere servants, are *Serandat* v. *Saisse* (1866) L.R. 1 P.C. 152, 35 L.J.P.C.N.S. 17, 12 Jur. N.S. 301, 14 Weekl. Rep. 487 (see §. 22, post); *Wallace* v. *Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S.W. 399.

(*a*) In *Sadler* v. *Henlock* (1855) 4 El. & Bl. 570, 3 C.L.R. 760, 1 Jur. N.S. 677, 24 L.J.Q.B.N.S. 138, 3 Weekl. Rep. 181, the defendant directed a man named Pearson to cleanse out a drain on his land. Pearson was not otherwise in the employment of the defendant; he was a common labourer who had originally made the drain. Pearson executed the work with his own hands, and charged the defendant five shillings for the job, which the defendant paid. The defendant was not shewn to have interferred with the work, or to have seen the way in which it was executed, or to have given any specific directions. Pearson, in clearing out the drain, took up the part of the highway under which the drain passed. After completing the work, he replaced the soil of the highway, but imperfectly, and with insufficient materials; and, in consequence, it gave way, while a horse belonging to the plaintiff, and on which plaintiff was riding at the time, was passing over it; and the horse, by falling into the hole thus made, was injured. Upon this evidence it was held that Pearson was a servant for whose negligence the defendant was responsible. Lord Campbell, Ch. J. said: "Had Pearson been the domestic servant of the defendant, and the defendant had said to him, 'go and clean out the drain,' no doubt Pearson, by doing the work negligently, would have made the defendant liable. Then what difference can it make that Pearson was an independent labourer, to be paid for the job? The defendant might have said, 'fill up the hole in the road, but not as you are, now doing it, lest, when a horse goes over the place, he may be injured.' Pearson was therefore the defendant's servant; and, if so, cadit quæstio."

Coleridge, J., said: "If the work had been done by his own hand he would have been responsible. So he would if it had been done by his servant or by a common labourer whom he had employed. On what ground? Because the party doing the act would have been employed by him. Instead of this, he employs a person who seems to have been usually employed in such works. Such person is just as much his servant, for this purpose, as a domestic servant."

Wightman, J., said: "Really the question is, whether Pearson is to be considered as the defendant's servant, or as a contractor exercising an independent employment. The whole evidence shows that the former is the correct view. Pearson was not a person exercising an independent business, but an ordinary labourer, chosen by the defendant in preference to any other, but not exercising an independent employment."

Crompton, J., said: "The real question is, whether the defendant and Pearson stood to each other in the relation of master and servant. I decide, not on the ground that Pearson did not employ the hands of another: for, if he was the defendant's servant, the defendant would be liable for the wrong doing of the

person whom the servant employed; though it is true that such employment may sometimes be a test as to whether the employer was a servant or an independent contractor. The test here is, whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstances of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee." The last mentioned judge also remarked during the argument of counsel (p. 575): "Is not this rather a case where the employer maintains a control over the person whom he employs? A contractor chooses the mode in which the work is done, and the persons who do it. I thought the principle of the cases, which are cases of difficulty, was that the contractor had this power of choice."

In *Rait* v. *New England Furniture & Carpet Co.* (1896) 66 Minn. 76, 68 N.W. 729, the court, inclined strongly to the view that this decision would have justified it in holding, as a matter of law, that a person whose general occupation was that of carpenter and builder, and who was employed by a house owner to stop a leak in the roof of the house, and while engaged on the job, threw down some ice and snow on a passerby, was a mere servant. But it was declared to be at least, a question for the jury to say whether the defendant surrendered all control over the actions of the employé as to the manner of removing the ice and snow from the roof of the building. The construction thus put upon the English case is of very dubious correctness, when it is considered that the work there involved did not require any special skill, as in the case before the court. Upon the facts the Minnesota ruling is inconsistent with another English case, *Welfare* v. *London, B. & S.C.R. Co.* (1869) L.R. 4 Q.B. 696, 38 L.J.Q.B.N.S. 241, 20 L.T.N.S. 743, 17 Weekl. Rep. 1065, cited in the following section, but is sustained by some of the American cases there referred to.

In *Tucker* v. *Axbridge Highway Board* (1889) 53 J.P. 87 where a trap was capsized by striking against a heap of stones which had been left beside a road by a man who had been employed to repair it, the defendant was held liable on the general ground, as it would seem, that, "if a person does merely menial work, then he is clearly a servant."

In a New Zealand case it was remarked, arguendo. "There is yet another point of distinction which has been referred to in several of the cases or is, perhaps, here applicable; the employment of an ordinary labourer to do ordinary labourer's work by the piece, and the employment of persons skilled in a particular business." *Threlkeld* v. *White* (C.A. 1890) 8 New Zealand L.R. 513.

In *Sérandat* v. *Saïsse* (1866) L.R. 1 P.C. 152, 35 L. J P.C.N S. 17, 12 Jur. N.S. 301, 14 Weekl. Rep. 487, the respondent brought an action for injuries caused by a fire kindled on the appellant's land by labourers employed by him to clear the ground for agricultural purposes, which fire was so carelessly made, that sparks and other burning particles were carried over and scattered upon the respondent's premises. The respondent grounded his claim for damage on the article 1384 of the Code Napoleon (the prevailing law of Mauritius where the action was brought), which is in these words: "les maîtres et commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés." The respondent contended that the appellant and the men he employed stood in the relation of Commettant and Préposé within the meaning of this article. From an examination of the authorities the conclusion was arrived at, that, subject to the qualification mentioned in the following sentence, the word "Préposé" in the article means substantially a person who stands in the same relation to "Commettant" as "Domestique" does to "Maître" i. e., a person whom the "Commettant" has entrusted to perform certain things on his behalf. It was observed, however, that the French lawyers, in their interpretations of the article, had qualified this construction by the doctrine, that in order to make the Commettant responsible for the negligence of the Préposé, the latter must be acting "sous les ordres, sous la direction, et la surveillance du Commettant." The evidence showed that there were two bands of Indian labourers employed, and that the work was to be paid for at a certain price per acre, but left it doubtful whether the appellant was to pay the price to the head men of each band, or to them and the Indians in their respective bands. On this evidence the contention of the appellant, that he had severed himself from the execution of the work, and parted with all superintendence and control over the persons by whom it was performed, was

rejected by the Privy Council, on grounds explained in the following extract from the judgment: "Having regard to the nature of the work, and the condition of the men employed, it appears to us unreasonable to infer that the appellant had parted with the power of correcting, as the work went on, the mode in which it was to be performed, and of dictating what kind of brushwood and other growth was to be removed, and what was to be left standing, and how the weeds and brushwood which had been got up were to be dealt with, and where they were to be deposited; in other words, we think the evidence does not shew that the general control, direction, and surveillance of the operations was relinquished by the appellant by reason of the agreement he had made with the Indians. It may be observed that these men do not at all answer the description given by Sirey ('Codes Annotés,' Vol. I. p. 655) of 'ouvriers d'une profession reconnue et determinée;' they were ordinary labourers characterized by the Court below as 'a set of idle, careless semi-barbarians.' The view we have thus taken of the relation established by the agreement between them and their employer is corroborated by the evidence, which shows that in point of fact the appellant did interfere and control the men in the course of the work. For example, it was said by Joondine. 'Mr. Sérendat told me not to put fire in the place where I was working;' . . . 'he told me to put fire in another place which he pointed.' Again, Beesapa says, 'The previous day Mr. Sérendat had come and told Joondine to leave that portion of ground which is fifty dollars, and go and work in the interior of the field.' And the appellant's answer states that he had given orders some five or six days before to burn some weeds, but that he also gave orders that the fire should be carefully extinguished. Looking, then, at the whole case, we are of opinion that the appellant and the Indian whose negligence caused the fire stood in the relation of 'Commettant' and 'Préposé.' And, as it has not been disputed that the negligent act was done by the 'Préposé' in the course of his employment, it follows that the responsibility of the appellant is made out."

A man employed by the defendant to cleanse out at certain intervals the contents of his ash-pit deposited them on one occasion in the street, preparatory to their being removed, and the plaintiff's vehicle was upset by the heap. The jury found that the contract was an entire one to remove the rubbish altogether, and not merely to take it to the street. It was held error to enter judgment for the defendant on this finding. Blackburne, J., remarked that the nature of the subject matter in such cases makes all the difference, and that, when regard was had to the act done in the house occupied by the defendant, and under his wife's directions, it appeared to have been but the ordinary act of a servant. *McKeon* v. *Bolton* (1851) 1 Ir. C.L. Rep. 377, 3 Ir. Jur. O.S. 288.

Where a city was constructing a waterpipe trench, and a labourer employed under the direction of the city's inspector and superintendent was assigned to the excavation of a 12-foot section of the trench, but he had no authority or discretion as to his work, it was held that he was not, therefore, an independent contractor but a servant, and that the city was bound to provide for his safety against caving of the banks while performing the work. *Ft. Wayne* v. *Christie* (1900) 156 Ind. 172, 5 N.E. 385.

Where a landowner who is about to rebuild a house which has been destroyed by fire, contracts directly with a labourer to make the excavation for the foundation for a specified price, instead of letting out the whole work to one person, it is error to give an instruction which would exclude from the consideration of the jury the possibility that the labourer was hired as a servant. *Stevenson* v. *Wallace* (1876) 2 Gratt 77.

In holding that a labourer engaged for 50 cents to drive an animal is a servant to the owner of the animal, and not an independent contractor court reasoned as follows: "There is nothing in the nature of the employment or in the contract to indicate that Simon [the labourer] was not subject to the control, supervision and direction of Blase, had he seen fit to exercise such control over Simon's movements. Nor is there anything whatever in the testimony to prove that Simon exercised a 'distinct calling,' as did the coloured teamster, Stevenson, in *Pink* v. *Missouri Furnace Co.* (1884), 82 Mo. 276, 52 Am. Rep. 376; and the licensed drover described in an English case cited by appellant [*Milligan* v. *Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J. Q.B.N.S. 19]. Simon was doing any sort of ordinary work at that time.

authorities do not show distinctly the rationale of the presumption thus entertained. Essentially it may perhaps be said to reflect merely the understanding of the courts as to the terms upon which work is ordinarily contracted for under the circumstances indicated. It must be admitted, however, that it is not easy to adopt this explanation to three Scotch cases in which the employer was held liable. But these decisions seem to be inconsistent with the English and American authorities reviewed in § 12, ante (*b*).

To constitute an independent contractor, so as to relieve his employer from liability for his conduct, it must at least appear that the work to be performed was committed exclusively to the discretion of the contractor. The independence of the contractor may appear by the nature of the work sometimes, and at other times by the terms of the contract, or by the calling of the contractor. The nature of the work in question in this case, no less than the agreement itself, totally fails to establish a foundation for holding Simon to be an independent contractor in the matter of driving the cow to defendant's place of business. The fact that the work was to be paid for in one price is not decisive of the question." *O'Neill* v. *Blase* (1902) 94 Mo. App. 648, 68 S.W. 764.

A porter who was occasionally employed by a butter-factor to leave parcels at the house of purchasers, and was paid by the persons to whom the parcels are delivered was also held to be a "servant" of such factor within the meaning of the embezzlement statutes, and not a person following an independent employment. *Reg.* v. *Lynch* (1854) 6 C.C. 445.

In a New York case the court remarked, arguendo, : "Undoubtedly, one cannot shield himself under the doctrine of independent contractors by simply employing another person, and giving him a general authority to procure others to assist in work which requires no care or skill or experience, but which is merely such as might be done by any person with sufficient physical strength." *Kueckel* v. *Ryder* (1900) 54 App. Div. 252, 66 N.Y. Supp. 522.

(*b*) In a case where the plaintiff the proprietor of a mineral stratum which was damaged by fire which spread from the place where ironstone was being calcined, it was shown that the lessee of the ironstone workings had employed contractors to calcine it at so much per ton, payable at the end of every fortnight. Those contractors employed and paid all the workmen, the lessee having no direct managment in the calcining operations. The jury were charged by Lord President Boyle that, in point of law, the lessee was responsible for the acts of these contractors, as they were in no different position from any other labourers hired by a master to work by the piece. *Rankin* v. *Dixon* (1847) 9 Sc. Sess. Cas. 2nd Ser. 1048.

In a later case, arising out of the same occurrence, the stipulations of the contract are set forth more in greater detail. The contractor agreed to employ the necessary number of miners to pay them their wages—to furnish various implements necessary for the workings, etc. After the first two months the output was to be not less than 100 tons of calcined stone weekly, and a failure to perform this stipulation entitled the contractee to terminate the contract by giving a written notice of one month. The working was to be carried on regularly and fairly, and agreeably to the instructions of the contractee or his overseer. The contractor, after the first month, had the right to abandon the job upon giving one month's notice. It was held that, as between the lessee of the ironstone and his landlord, the contractor was to be regarded as a mere servant of the lessee. Lord Colonsay seems to have based his decision mainly upon the fact that, under the contract, the lessee had a control over the calcining operations. In the course of the opinion, he said: "This is a case of injury done to a neighbouring property by a person who held a mixed character—at least whose trade had not yet assumed such an independent character as entitles us to hold that the defenders can get rid of the responsibility which attaches to them by employing such a person as Watson and his gangers, instead of

23. —by the fact that the employment was general.—According to the Supreme Court of Massachusetts, the intention of the employer to retain the right of exercising control, and consequently to create the relation of master and servant, should always be inferred, where it is shown that the employment was general, and not based on a contract to do a certain piece of work, on certain specified terms, in a particular manner, and for a stipulated price (*a*). A similar view is perhaps indicated by several cases

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labourers paid directly by themselves." The two other judges relied upon the existence of a non-delegable duty (see § 66, post). *Nisbet* v. *Dixon* (1852) 14 Sc. Sess. Cas. 2nd series, 973.

In another case all the judges were of opinion that a master slater, engaged to put up a chimney-can and top, was not an independent contractor, although he had workmen in his employ and was to be paid not by day's wages, but at the ordinary rates chargeable for the work to be done. *Cleghorn* v. *Taylor* (1856) 18 Sc. Sess. Cas. 2nd series, 664.

(*a*) *Brackett* v. *Lubke* (1862) 4 Allen 138, 81 Am. Dec. 694, where it was held that the lessee of a building, who had employed a carpenter to repair an awning which extended from the building over a public way, was liable for an injury received by a passer-by in consequence of the carpenter's carelessness. The Court said: "This seems to us a very clear case. The defendants are liable, because it appears that the negligent act which caused the injury was done by a person who sustained towards them the relation of servant. There was no contract to do a certain specified job or piece of work in a particular way for a stipulated sum. It is the ordinary case where a person was employed to perform a service for a reasonable compensation. The defendants retained the power of controlling the work. They might have directed both the time and manner of doing it. If it was unsafe to make the repairs or alteration at an hour when the street was frequented by passers, it was competent for the defendants to require the person employed to desist from work until this danger ceased or was diminished. If the means adopted to gain access to the awning were unsuitable, the defendants might have directed that another mode should be used. In short, if the work was in any respect conducted in a careless or negligent manner, the defendants had full power to change the manner of doing it, or to stop it, and to discharge the person employed from their service. The mere fact that the work was done by one who carried on a separate and independent employment does not absolve the defendant from liability. If such were the rule, a party would be exempt from responsibility even for the negligent acts of his domestic servants, such as his cook, coachman or gardener. . . . If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner, and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer and given to the contractor. But, on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient."

In *Dane* v. *Cochrane Chemical Co.* (1895) 164 Mass. 453, 41 N.E. 678, J., the negligent employé, received his orders for the carpentry work to be done, usually from one of the defendant's superintendents. He hired the men to be employed in doing the work, superintended, paid, and discharged them. The defendant paid J. $2.50 a day for his work, and twenty-five cents a day for each man employed by him, in addition to the amount of the wages which he agreed to pay the man. So far as appeared, J. furnished the tools and the defendant

decided in other jurisdictions, but the precise grounds of the conclusions arrived at are not clearly defined. In two instances it may reasonably be supposed that the courts were, in some degree at least, influenced by the fact that the employment was not only general, but for an indefinite period (*b*).

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the materials required to do the work. J. drew money from time to time from the defendant on account of what was due to him, and at the end of each month the accounts between him and the defendant were usually settled. J. paid his workmen every Saturday, but their names never appeared on the pay roll of the defendant; they never were paid by the defendant, and the defendant kept no account with them. Apparently J. kept workmen in his employ whom he used in performing work for other persons as well as for the defendant. It was held to be competent for the jury to infer, from this testimony, that the defendant was liable for the negligence of J. The court said: "When there are no specifications in advance of what is to be done, and no round price agreed upon, and a carpenter is employed to make repairs and alterations to the satisfaction of his employer, to be paid according to the amount of the work done by the carpenter and the men he employs, it would seem to be a reasonable inference that the employer retains the right to direct the manner in which the carpenter should do the work."

(*b*) In a criminal case it was held that a jury would be justified in finding that a person who, upon his representing to the prosecutor that he had a little spare time which he would like to occupy in collecting debts, was engaged to do such work was a "servant" within the meaning of the statute 7 & 8 Geo. 4. *Reg.* v. *Hughes* (1836) 2 Cox C. C. 104.

In another case it was held that, where the owner of a stone quarry hired a man to quarry, break, and pile up stone therein, at $1 per perch, the employé to furnish the gunpowder and tools, the employer was liable to an adjoining proprietor for injury to a building by one of the blasts, although ordinary care was exercised in the manner in which the quarry was worked. *Tiffin* v. *McCormack* (1878) 34 Ohio St. 638, 32 Am. Rep. 408. The court said: "We are of the opinion that the true relation between the city, as proprietor of the stone quarry, and Ardner, was that of master and servant, instead of employer and independent contractor within the principle of the rule above stated. There was no 'job' or defined quantity of work contracted for. The services of Ardner were subject to be determined at the pleasure of either party. The compensation was to be measured by the quantity of labour performed. It appears to us to have been an ordinary contract for work and labour, which creates, between the employer and employed, the relation of master and servant, within the meaning of the law in regard to that subject. It is true that the service, namely, the quarrying of stone in the employer's quarry, was to be done by the use of powder and tools furnished by the employé; but this condition in the contract did not affect the legal relation between the parties. It was significant only as a matter affecting the rate of compensation. And it is also true, that the city 'had no other or further control over Ardner in said work.' Whether this language means that the city exercised no other or further control, or that the city contracted with Ardner that it would not exercise any other or further control over the work, makes no difference. If it were a mere failure to exercise control, it was the fault of the city. If it was part of the contract with the servant, that no other or further control should be exercised by the city, it is enough to say that a master cannot exonerate himself from responsibility to third persons, which the law imposes upon him, for injury resulting from the misconduct of his servant, by contracting with the servant that he will not exercise any control over him, and will not, therefore, be responsible for any injury that he may wrongfully inflict."

A part of the machinery in the defendant's mill was a "slasher," the sole use of which was to cut slabs and other material belonging to the defendant into proper lengths for shingles, lath and pickets, which when cut, were to belong to the defendants. The defendent kept this machine in running order, defrayed the

expense of oiling and repairing it, and furnished the necessary power and light; but he contracted with B. to do the manual work needed for the operation of the machine, giving him no authority to use it upon other material of his own, or for anybody other than the defendant. For doing this manual work, the defendant agreed to pay him a price measured by the product. While nominally B. was to employ and pay for such assistance as he needed, the wages of the helpers were paid by the defendant and deducted from the amount which otherwise should have been due to B. The conclusion of the court was that, upon the facts stated, B. was not an independent contractor, but a servant of the defendant, put in charge of a particular machine upon the terms stated, to operate it for the defendant, and that whatever duty there was to notify an inexperienced person engaged to work on or about it, of the dangers incident to the employment, remained a duty of the defendant. *Nyback* v. *Champagne Lumber Co.* (1901) 48 C.C.A. 632, 109 Fed. 732.

Where a man who had agreed to trim certain shade trees in front of a house, and to receive the wood as compensation for the work, cut off a limb in such a manner that it fell on and bent down a telephone wire stretching across the street, and the wire, while in that position damaged the top of a buggy, the court held that there was nothing in the case to suggest, in the remotest degree, that the man whom the defendant employed was in the exercise of an independent employment. It was observed that the circumstance that he was to cut the trees for the wood instead of for cash, indicated merely the mode of his payment, and threw no new light upon the nature of his employment. If anything, the presumption arising from this mode of payment militated against the notion of an independent employment in respect to which the employer had surrendered all control, as the parts of the tree to be cut must have been at the election of the employer; otherwise the workman might take the whole tree as his compensation for trimming it. The court summed up its view as follows: "The facts agreed upon present in the clearest manner, prima facie, a case of employment as master and servant. If the employer seeks to avail himself of the protection afforded him by the less intimate relation of employer and contractor, it is incumbent upon him, by proof, to establish the facts essential to the applicability of the rule of law he invokes." *State* v. *Swayze* (1889) 52 N.J.L. 129, 18 Atl. 697.

If a house owner employs a blacksmith to adjust and secure the cover over a coal-hole, the blacksmith, being subject to the direction and control of his employer and liable to be dismissed at any time, is not an independent contractor for whose negligence the owner would not be liable. *Dickson* v. *Hollister* (1889) 123 Pa. 421, 10 Am. St. Rep. 533, 160 Atl. 484.

The existence of the relation of master and servant was held to be inferable, where a person who had made a contract to put down a sidewalk executed a written document by which he agreed to furnish another person, at the place where the work was to be done, the rough stone which, for a stipulated price, he was to cut, dress, haul, and set in the sidewalk. *Schweickhardt v. St. Louis* (1876) 2 Mo. App. 571.

In *Perry* v. *Ford* (1885) 17 Mo. App. 212, where the plaintiff fell into a privy vault which, while under repair, had been left without guards or lights, the only direct evidence as to the contract made by defendant for the repairing certain water closets was the testimony of the defendant himself, who said: "I gave the contract to repair this closet to Mr. Cotter, and when he got ready to repair it, I went with him into the saloon and told Mr. Alms I was now ready to repair this closet." It was shown that the employés of Cotter, a plumber, did the actual work of repairing, and that the defendant was frequently present while the work was being done. It was argued by counsel for defendant that the mere bare statement that defendant gave the contract for the work to Cotter, raised a presumption that the relation between them was that of contractee and contractor, and not that of master and servant. This contention did not prevail. The court said: "Every contract made by the owner of a building for repairs therein does not create the relation of contractee and contractor between the owner and the person contracted with. . . . If in this case the defendant could have directed the time and manner of doing the work; if it had been unsafe to do the work at a certain time or in a certain manner, and the defendant could have required Cotter to desist, or could have altered the manner of doing the work. . . . . The mere fact that Cotter followed a certain trade or profession, or carried on a

But there is a considerable weight of authority against the acceptance of the doctrine thus relied upon, in so far as it is put forward as one which, irrespective of the nature of the stipulated work and the industrial status of the person employed, furnishes an adequate and decisive test of the character of the contract (*c*). So far as Massachusetts is concerned, it would almost seem permissible to infer from the reasoning of a recent decision that the original doctrine, as above stated, no longer prevails in that state, or that it has at least been somewhat modified (*d*).

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separate and distinct employment does not change the rule. . . . It cannot then be presumed that Cotter was a contractor, and not a servant, from the mere general statement by defendant, that he had given the contract to Cotter. But if the defendant wants to relieve himself of liability as master in this case by reason of the relation of contractor, the defendant must prove the existence of that relation. If the defendant wishes to escape liability because by the terms of the contract his liability has been imposed upon Cotter, he must prove the terms of the contract. From the evidence in this case the terms of the contract do not appear and we cannot say that Cotter was not defendant's servant. The presumption is that Cotter was such servant. The evidence does not tend to rebut that presumption."

See also the Illinois cases cited in § (*b*) post.

(*c*) In *Welfare* v. *London, B. & S. C. R. Co.* (1869) L.R. 4, Q.B. 696, 38 L.J.Q.B.N.S. 241, 20 L.T.N.S. 743, 17 Weekl. Rep. 1065, Cockburn, Ch. J., in discussing the liability of the defendant company for injuries alleged to have been caused by a workman employed to repair the roof of one of its stations, said: "If it were necessary to determine that question, we should have to consider whether the case was improperly withdrawn from the jury on the ground that the plaintiff offered no evidence to show that this person was the servant of the company. I agree that, where a thing is being done upon the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done; but in the case of work of this description it seems to me that the principle would not apply, because it is a matter of universal knowledge and experience that in a great city like this persons do not employ their own servants to do repairs to the roofs of their houses or buildings; they employ a builder whose particular business is to do it. This being a matter of universal practice and of universal and common knowledge, I think this is a circumstance which the judge ought to take into account in determining whether there is evidence to go to the jury or not; but I do not think it is necessary to decide this case on this particular point."

In the same case Blackburn, J., observed: "I quite agree with what my lord has said with reference to the normal state of things, that people who are employed to repair roofs are independent tradesmen, and not mere servants; and the onus of proving that this man was the servant of the company was on the plaintiff, and he is not presumed to be so; it must be proved, because it is an exceptional case."

In New York it has been laid down that, where a mechanic is employed by the owner of a building to make repairs, "without any specific arrangement as to conditions," his employment is independent. *Hexamer* v. *Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755.

(*d*) See *Dutton* v. *Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N.E. 405. The court held that the contract was an independent one, although the report of the auditor stated that the employment was general. See § 11, note (*b*), subd. (*a*), ante.

24. —from the partition of the work among several contractors.— In a Pennsylvania case where the plaintiff, while passing along a street, fell into an unguarded excavation which had been made in the course of building operations, the court approved a charge of the trial judge to the effect that, where the work is split up in different contracts, and the owner undertakes to supply one of the contractors with materials to be used in the execution of his contract, and no provision is made for the supervision of the work or the erection and maintenance of guards around it, it is justifiable to draw the inference that the owner retained the supervision, and that his duty to protect the public has not been devolved on others (*a*). In the argument of the court it is taken for granted that, under such circumstances as those involved, an employé may by an express stipulation devolve upon a contractor the duty of protecting the public—a doctrine which had been established in Pennsylvania by an earlier ruling (*b*), but which is discredited by the weight of authority. See § 51 post. In most jurisdictions, therefore, the special consideration upon which the court relied would have no force, as the employer would have been held liable on the simple ground that a non-delegable duty had not been fulfilled, and irrespective of the question whether the work had be undertaken by one or several contractors. The present writer has found only one other case in which it has been intimated that the partition of the work among two or more contractors may be a sufficient reason for charging a principal with liability for their negligence (*c*). Such a limitation of the general doctrine seems to be quite arbitrary and irrational, and there are not wanting decisions in which it has been ignored or repudiated (*d*).

(*a*) *Homan* v. *Stanley* (1870) 66 Pa. 464, 5 Am. Rep. 389.

(*b*) *Allen* v. *Willard* (1868) 57 Pa. 374, where a principal contractor was sued for an injury caused by the negligence of a sub-contractor in leaving unguarded an excavation under a footpath. It was laid down that, although the defendant would not have been liable, if he had committed to the sub-contractor the entire control of the work of making the excavation, he should be held responsible for the reason that the evidence was insufficient to establish the conclusion, that the control of the work had been thus transferred.

(*c*) *McCleary* v. *Kent* (1854) 3 Duer, 27, where the remark was made, arguendo, with reference to the liability of a contractor for the negligence of sub-contractors.

(*d*) In *Treadwell* v. *New York* (1861) 1 Daly, 128, it was held that a person who employs two independent contractors to execute different portions of the

25. Nature of contract determined with reference to the degree of skill required for the work.—The fact that the work to be done was such as required special skill for its proper performance is frequently referred to in cases where the contract was held to be independent (*a*). This circumstance may be regarded as one of those which has some tendency to shew that the relation between the employer and the person employed was not that of master and servant (*b*). But no case has been found in which it has been credited with a distinctly differentiating significance; and there are many instances in which it has been wholly disregarded. See especially §§ 22, 23, ante.

26. —the existence or absence of an obligation to perform the work in person.—A natural deduction from the ordinary conception of an independent contractor, viz., that he is essentially an employé who merely agrees to produce certain specified results by any means which he may think proper to select, is that, unless restricted by some express stipulation, he will always be entitled to use the labour of others in executing the work which he has undertaken. It follows, therefore, that, if the terms of the contract are such as to indicate that the person employed may, if he so desires, perform the stipulated work by deputy, it will usually be inferred that he is not engaged as a servant (*a*). That this was

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work of constructing a building is not liable to one of them for injuries caused by the negligence of the other.

In *Martin* v. *Tribune Asso.* (1883) 30 Hun, 391, the defendant was held not to be liable for the negligence of one of several mechanics who had been employed to do different parts of the work of constructing a building.

In *Potter* v. *Seymour* (1859) 4 Bosw. 140, Hoffman, J., remarked: "When we once arrive at the principle that employment, control, and supervision, or the right to such, over the person whose neglect was the immediate cause of the injury, is to test all these cases, the logical result seems inevitable, that such rule is as applicable to contracts for distinct portions of a building, as to a contract for the whole."

(*a*) See for example, *Murray* v. *Currie* (1870) L.R. 6 C.P. 24, 40 L.J.C.P.N.S. 26, 23 L.T.N.S. 557, 19 Weekl. Rep. 104; *Hexamer* v. *Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755; *Kueckel* v. *Ryder* (1900) 54 App. Div. 252, 66 N.Y. Supp. 522; *Lawrence* v. *Shipman* (1873) 39 Conn. 586; *Morgan* v. *Bowman* (1856), 22 Mo. 538.

(*b*) In *Threlkeld* v. *White* (1890) 8 New Zealand L.R. 513, it is referred to as an evidential factor of this quality.

(*a*) This rule is illustrated by the decisions which exclude from the scope of statutes specifically applicable to masters and servants all agreements under which the person employed is not obliged to perform the work himself. Thus it has been held that a person to whom a Government contract for road-work, which is to be done according to certain specifications, and paid for at so much per chain, had been sublet, was not a servant within the purview of the Masters and Servants Act of New South Wales. *Ex parte Rathbone* (1892) 13 New So. Wales, L.R. 56.

the effect of the contract may perhaps be concluded in most instances, if the person employed did, as a matter of fact, execute the work by the hands of another (*b*).

On the other hand, as the principle of the maxim, Delegatus non potest delegare, is understood to apply in its full force to a servant, it is perhaps permissible to lay down the doctrine that, if it should appear, either from the nature of the employment, or the terms of the agreement, that the person employed is expected to do the work with his own hands, the appropriate inference will usually be that he is engaged as a servant. But there is very little judicial authority upon this specific point (*c*).

27. —the reservation of a right to terminate the contract of employment.—The existence of the right of controlling an employé in respect to the details of the work normally implies that the employer has also the right to discharge him. Hence it is laid down that the relation of master and servant will not be inferred in a case, where it appears that the power of discharge was not an

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So, also, it has been held that the corresponding statute in Victoria is not applicable to an employé whose position is defined by the acceptance of his offer to paint a certain number of railway trucks to the satisfaction of the owner. Under such an agreement there is nothing to prevent the contracting party from getting the work done by deputy. *McElroy* v. *Australian Forge & Engineering Co.* (1899) 24 Vict. L. Rep. 953.

It is not irrelevant to mention in this connection that, in construing the English Truck Act (1 & 2 William 4, chap. 57), the Courts have held a person is or is not a "labourer" or an "artificer" within the scope of its provisions, according as he is or is not bound to execute in person the work which he has undertaken to do, the theory being that these terms are intended to apply only to persons who are actually and personally engaged to perform the work. *Riley* v. *Warden* (1848) 2 Exch. 59, 18 L.J. Exch. N.S. 120; *Bowers* v. *Lovekin* (1856) 6 El. & Bl. 584, 25 L.J.Q.B.N.S. 371, 2 Jur. N S. 1187, 4 Weekl. Rep. 600; *Ingram* v. *Barnes* (1857) 7 El. & Bl. 115, 26 L.J.Q.B.N.S. 319, 3 Jur. N.S. 861, 5 Weekl. Rep. 726; *Floyd* v. *Weaver* (1852) 16 Jur. 289, 21 L.J.Q.B.N.S. 151; *Sharman* v. *Sanders* (1853) 13 C.B. 166, 3 Car. & K. 298, 22 L.J.P.C.N.S 86, 17 Jur. 9 N.S. 765, 1 Weekl. Rep. 152; *Sleeman* v. *Barrett* (1864) 2 Hurlst & C. 934, 33 L.J. Exch. N.S. 153, 10 Jur. N.S. 476, 9 L.T.N.S. 834, 12 Weekl. Rep. 411. See the present writer's treatise on Master and Servant, pp. 2063, 2064.

(*b*) The somewhat guarded remark of Crompton, J., in a leading case, was, that the fact of another person having having been engaged by the negligent employé to carry out the stipulated work "may sometimes be a test as to whether the employer was a servant or an independent contractor." *Sadler* v. *Henlock* (1855) 4 El. & Bl. 570, 3 C.L.R. 760, 1 Jur. N.S. 677, 24 L.J.Q.B.N.S. 138, 3 Weekl. Rep. 181.

(*c*) In *Sadler* v. *Henlock* (1855) 4 El. & Bl. 570, 3 C.L.R. 760, 1 Jur. N.S. 677, 24 L.J.Q.B.N.S. 138, 3 Weekl. Rep. 181, while one of the counsel was arguing that the workman was not the personal agent of the defendant and that he might have employed a third person to do the work, Lord Campbell interposed the remark: "I doubt that: if I select a person in whom I place confidence, can he employ another?"

incident of the contract of employment (*a*). The converse of this rule, however, holds only to a limited extent. According to the authorities, the conclusion that the person employed was not an independent contractor is indicated by evidence that he was liable to dismissal at any time, and the case is for the jury whenever such evidence has been introduced, and the rest of the testimony is either of an ambiguous quality, or has itself a tendency to establish the same conclusion (*b*). That a similar significance is

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(*a*) *Pioneer Fireproof Constr. Co.* v. *Hansen* (1898) 176.111 100, 52 N E. 17.

(*b*) In a case where the plaintiff was injured by the fall of a shoot which had been negligently fastened by a coservant, it was held that a jury could not have properly found that the immediate employer of the injured person was an independent contractor, where the evidence was, that certain shipowners had arranged to have the goods arriving in a ship delivered through their agents, a firm which was one of the defendants in the action ; that these agents had made a contract with one, J., who had been a foreman on the dock quay, and who himself worked on the quay ; that this contract provided that the agents might at any moment stop J. from going on with the work ; and that, after the accident, the agents, in a letter to the plaintiff, had referred to J. as their "foreman." The court seems to have considered the nonsuit proper even without reference to the last mentioned detail. *Oldfield* v. *Furness* (C.A. 1893) 58 J.P. 102, 9 Times L.R. 515.

The fact that the employé was liable to be discharged was emphasized in *Bernauer* v. *Hartman Steel Co.* (1889) 33 Ill. App. 491.

A. received an injury by falling at night from the highway into an unfenced and unlighted sewer, which was being constructed under a written contract between B. and certain local commissioners. A clause in the contract prohibited sub-letting without the engineer's consent. B. contracted by parol with N., a competent workman, to do the excavation and brickwork, and the watching, lighting, and fencing, at an ascertained price per yard, while he supplied the bricks, and carted away the surplus earth. B.'s name was on the carts, and also on a temporary office near the works. He did not interfere during the progress of the work, but admitted that he should have dismissed N., if dissatisfied with the execution of the work. The clerk of the works was in the employment of the commissioners. Held, that there was evidence of B.'s liability. *Blake* v. *Thirst* (1863) 2 Hurlst & C 20, 32 L J. Exch. N.S. 189, 11 Weekl. Rep. 1034, 8 L. T.N.S. 251. Martin, B., said : "The view which I take of this case does not rest upon the authority of *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 Weekl. Rep. 274. I think the relation of master and servant clearly existed between the defendant and Neave, within the principle established by the more recent decisions."

Bramwell, B., said : "The evidence, I think, showed that the defendant had a right to control the way in which the work was to be executed. Suppose the defendant had made two contracts with different persons ; with one, that he should dig the excavation ; with the other, that he should light and watch it. It could not, I apprehend, be then contended that he would not be himself responsible. I think he is no less responsible here, though there is but one contract with a single individual."

The defendants' testimony tended to show that there prevailed in their factory a so-called 'contract' system, and S. was one of the contractors employed by them. He worked under agreements with the defendants to make seat-frames at an agreed price per piece, the work being done by him in their factory. They furnished him with the stock in the rough, with the machinery, the power, and the room to work in, and kept the machinery in repair. He worked for no one else ; there was no fixed term to his employment ; and it was liable to be ended at any time, at their instance. It was held that although the jury

to be attached to a clause in a written contract by which the employer reserves the power of revoking it at short notice, if the work should not be done satisfactorily, may perhaps be inferred from a case already cited in another connection (*b*). But it is well settled that, if the remaining provisions of a contract shew that it is an independent one, the mere fact that the employer has reserved the right to cancel, annul, or revoke it, or to suspend, or re-let the work, if there is some specific ground for dissatisfaction, will not cast upon him the responsibities of a master (*c*).

28. —the surrender or retention of the control of the premises on which the stipulated work was done.—(*a*) *Control surrendered.*— With respect to that large class of cases in which the stipulated

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should find that S. agreed with the plaintiff as to his wages, there was testimony in the case which required the submission of the question to the jury, whether Swain was a contractor or servant. *Goldman* v. *Mason* (1888) 18 N.Y.S.R. 376, 2 N.Y. Supp. 337.

(*b*) *Speed* v. *Atlantic & P. R. Co.* (1879) 71 Mo. 303. See § 19 ante.

(*c*) Provisions which have been held not to negative the conclusion that the person employed is an independent contractor are the following:

That the employer's engineer may declare the contract forfeited "for non-compliance with his directions in regard to the manner" of doing the work. *Thomas* v. *Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 48 Atl. 215; that, in the event of the works being delayed, the architect supervising the work, as the representative of the employer, shall have the right to employ another person to carry out the contract. *Robinson* v. *Webb* (1875) 11 Bush, 464; that in case of improper or imperfect performance," the contract may be re-let. *Kuehn* v. *Milwaukee* (1896) 92 Wis. 263, 65 N.W. 1030; *Pioneer Fireproof Constr. Co.* v. *Hansen* (1898) 176, 111-100, 52 N.E. 17, Affirming (1897) 69 111 App. 659; that if, at any time, the contractors are not employing men, tools, implements and machinery, in kind and quantity, to the entire satisfaction of the chief engineer of the company, and necessary, in his opinion, to prosecute the work with due diligence and expedition, . . . the employer shall have the right to declare the contract annulled, after serving notice upon the contractor. *Burmeister* v. *New York Elev. R. Co.* (1881) 15 Jones & S. 264; that, if the work is not done by a sub-contractor to the satisfaction of the principal employer's engineer, the contract is to be forfeited on two days' notice. *Wray* v. *Evans* (1875) 80 Pa. 102. In this case the court said: "As long as Davis [the sub-contractor] continued to progress with the work, in a manner satisfactory to the engineer of the gas company, Wray had no more power over the work than an entire stranger. Had he volunteered advice as to the care necessary to preserve the public from danger, it would have been to no purpose, as he had no power to enforce it. The matter was out of his hands; he could not assume the control of the work until the sub-contract should be forfeited by non-performance."

See also *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461, where clause (9) of the contract, as set out in § 14 note (*c*), was held not to negative the independence of the contract.

In *Hilsdorf* v. *St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352, a provision reserving a power to annul the contract was also treated as immaterial.

In *Blumb* v. *Kansas City* (1884) 84 Mo. 112, 54 Am. Rep. 87, the court rejected the contention that a conditional clause of this description was to be construed in such a sense, that the defendant might be declared liable, as a matter of law, if its agent should be notified that the contractor's men were doing a part of the work in a negligent manner.

work is to be done on the premises of the contractee, it may be laid down, as a general rule, that, whenever it is understood, or expressly provided, that the possession and control of those premises is to be surrendered to the contractor, while the work is in progress, the independence of the contract should be inferred, as a matter of law, unless there is some specific evidence which points to the opposite conclusion (*a*). In order that the employer may

(*a*) Two of the classes of cases in which the rule of respondeat superior is not applicable are thus specified in a Michigan case: (1) Where a contract is made with another in respect of services upon property, when no power of direction or supervision is reserved by the principal, but the entire discretion as to the mode of execution of the contract, together with control of the property, is confided to the employé. (2) In case of a like contract, the contract prescribing the mode of its execution, when possession of the property is surrendered to the employé to enable him to execute the contract. *Moore* v. *Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

In a Georgia case the court laid it down that the owners "relieved themselves of all responsibility in the matter by making an absolute surrender for the time being of their possession of the building, and placing it under the complete control of independent contractors." *Butler* v. *Lewman* (1902) 115 Ga. 752, 4, 2 S.E. 98.

"The employment of the contractor is, in its nature, just as independent of the will of the owner, as the ordinary conduct of the tenant; and when the contract is for the construction of an entire building, the ground upon which the building is to be erected, is just as truly in the occupation of the contractor, as the ground covered by a lease is in the occupation of the tenant. The possession, as necessary to the prosecution of the work to which the contract relates, is just as certainly vested in the contractor, by force of his contract, as the possession of demised premises is vested in the tenant, by force of his lease. It is said that the owner, whenever he may please, in the mere exercise of his own will, may remove the contractor from the possession, but if this power belongs to him as owner—which we neither affirm nor deny—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; and until it is exercised, the possession of the contractor is the possession of the owner, only in the same sense in which the possession of a tenant is, in judgment of law that of his landlord. In each case, the possession is derived from the owner, and is held in subjection to his paramount title, but in both, the possession, so long as it continues, is exclusive. In our opinion, therefore, there is no reason whatever for holding that the responsibility of the owner for injuries to third persons during the continuance of this possession is greater in the one case than in the other." *Gilbert* v. *Beach* (1855) 4 Duer, 423.

In *Rome & D.R. Co.* v. *Chasteen* (1889) 88 Ala. 591, 7 So. 94, the court was equally divided in opinion upon the question, whether undisputed evidence to the effect that the tortfeasor was engaged in building the road, and was in possession of, and using the engine and cars, for the transportation of rails and cross ties and of freight and passengers, and that he employed and paid the workmen, was prima facie sufficient to show that the tortfeasor was independent contractor.

Where a company operated a coal mine, and for convenience in shipping laid and kept in repair a railroad track from its shaft to the railroad, a distance of three quarters of a mile, the product of the mine being carried by said railroad company in trains operated by its own employés, the court, after laying it down that the relation of the mining company to the railroad company was that of shipper to carrier, said: "If there is a single circumstance which for a moment might seem to distinguish it, as shown in this case, from its purest form, it is that the shipper provided a portion of the carrier's facilities for the performance of its proper work, and a very important portion, namely, a railroad track for the short distance mentioned. This circumstance, however, does not so distinguish

escape liability on the ground of his having surrendered possession of his premises, it is merely necessary to show that the possession given was such as would enable the contractor to carry out the contract. He is not required to prove that the possession was exclusive (*b*). But testimony to the effect that a person employed

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it even in appearance; for the shipper surrendered this track to the carrier for the time and purpose required, and the latter then had it as fully and exclusively as if it had been its own." *Coal Run Coal Co.* v. *Strawn* (1884) 15 Ill. App. 347.

The defendants sold at public auction the building materials of a house then standing. By the terms of sale the building materials became the property of the purchaser who contracted under a penalty to pull them down and cart them away within two months, leaving the site cleared to the satisfaction of the vendor. One B. became the purchaser for the sum of £10. In pulling down the house he negligently caused injury to the adjoining house by throwing bricks and rubbish on to it, and omitting to prop it up while the work was in progress. By Stowell, Ch.J., and Cowen, J., it was held that the contract was essentially one of sale which transferred to B. for the time being the ownership of the house, and that, while he was engaged in the demolition and removal of the building, he, and he alone, had all the responsibilities incident to ownership. By Stephen, J., it was considered that the essential effect of the contract was that the contractor agreed to pull down the house and take away the materials, and that the sale and purchase of the materials was simply an incident in the contract, and the method of paying for the work done. The conclusion at which he arrived, therefore, was that the defendants were liable, for the reason that the contract was one likely to be dangerous to the adjacent owner. *Byrnes* v. *Western* (1896) 17 New So. Wales L.R. 80.

In a case where the masonry and wood work of a building was let to contractors, but in respect to the remainder of the work, including the making of the excavations for cellars, areas and coal vaults, there was no evidence tending to show that it was performed under the direction or control of any one except the owner himself, and there was neither any stipulation giving the contractors the occupancy, possession, or control of the premises, nor any other evidence on the record which tended to show that they had, or were entitled to have, such occupancy, possession, or control, it was held that a requested instruction to the following effect was abstract, and had therefore been properly refused: "If the jury find from the evidence that the defendants had let the work of constructing the building and area in question to contractors, who were to do all the work and furnish all the material on their own credit, with their own means, and that the defendants, while the work was in progress, had no possession or occupancy of the premises, and had no control of the mode or manner in which said contractors should do the work, other than to accept or reject the work as being in compliance or non-compliance with the contract, then the defendants are not responsible for any injury resulting to the plaintiff in consequence of the negligence of said contractors or any of their employés in not guarding the said area with proper protections or coverings." *Hanner* v. *Whalen* (1892) 49 Ohio St. 69, 14 L.R.A. 820, 29 N.E. 1049.

In *Scammon* v. *Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334 (§ 12, note subd. (2), ante), and *Jefferson* v. *Jameson & M. Co.* (1897) 165 Ill. 138, 46 N.E. 272, Rev'g (1895) 60 Ill. App. 587, the fact that the defendant had surrendered the possession of the premises was specified among the elements which negatived his liability.

(*b*) *Mohr* v. *McKenzie* (1895) 60 Ill. App. 575; *Geist* v. *Rothschild* (1900) 90 Ill. App. 324.

In a case where the owner of a building employed a contractor to make an excavation in the sidewalk in front of it, the jury were instructed that the mere fact that the owner remained in the possession of the building itself did not establish the fact of his control of the place where the excavation was made. *Fuller* v. *Citizens' Nat. Bank* (1882) 15 Fed. 875.

to erect a building was given possession of the premises in question will be disregarded, if it appears from the rest of the facts established that he was acting as the employer's superintendent, and merely occupied the premises as mechanics usually do when making improvements (*c*).

(*b*) *Control retained.*—It is clear that the torts of the person employed cannot be imputed to the employer on the mere ground that, while the work was in progress, the latter retained with respect to his premises that ultimate right of control which is an inseparable incident of proprietorship (*d*). This doctrine, indeed, is taken for granted in a large number of the cases cited in § 12, ante. It is equally clear, that the employer's reservation of a right to go on to the premises to see that the work is done according to the plans and specifications, does not change the relation of the parties. Under such circumstances the person employed still remains in possession of the premises, and continues

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It is error to charge the jury, that, in forming an opinion as to whether the employé was a servant or an independent contractor they should inquire, whether the contract "gave exclusive use and right to the contractor over the place," and how long this exclusive use and right were to continue. *Conlin* v. *Charleston* (1868) 15 Rich. L. 201.

Discussing the contention that the right reserved by a railroad company to run its trains over the bridge during its construction by a contractor destroyed the independence of the employment, the Court remarked that this amounted to the assertion of the doctrine, that a railroad company or private individual cannot, in the one case, build its road or other structures, or repair either, and in the other, the owner of property cannot build a house thereon, or repair one, by the intervention of an independent contractor, without the entire surrender of the possession and use of the property to such contractor; and that, if such surrender be not made, then the employer is liable for any injury to another resulting from the negligent or tortious act of any agent or servant of the contractor. "The recognition of any such principle," it was declared, "would not only lead to the most absurd results, but would be to foster gross injustice and oppression. In every such case the question is, not whether the owner or proprietor retained any use of the property during the erection of the work, but who had the efficient control of the work contracted to be done. Such control, in cases like the present, is necessarily with the contractor: and, were it otherwise, independent employment would be degraded, its liability in a great measure destroyed, and the general efficiency of railroad service correspondingly impaired. Hence the books teem with decided cases in which the defendants were held not liable for torts committed on their premises by contractors, or their agents or servants, although there had not been an entire surrender of the possession of the premises to the contractor." *Bibb* v. *Norfork & W.R. Co.* (1891) 87 Va. 711, 14 S.E. 163.

(*c*) *Samym* v. *McCloskv* (1853) 2 Ohio St. 536. The Court said: "Dignifying a mere license thus to occupy, by calling it a surrender of possession, will not serve to avoid responsibility."

(*d*) That the contract is not the less an independent one, because the employer has that power of interference which is derived from "that reversionary right which is necessarily reserved to every owner of land" was remarked, arguendo, in *Schweickhardt* v. *St. Louis* (1876) 2 Mo. App. 571.

Compare also the remarks of the Court in *Gilbert* v. *Beach*, note (*a*), supra.

to perform the work under his contract, and not under the directions of the employer (*e*). But the precise significance of evidence that the employer retained over his premises those powers of control which are ordinarily associated with actual possession is a point which is left by the authorities in some obscurity. In Illinois the doctrine seems to have been adopted that this situation is incompatible with any other conclusion than that the person employed was a servant (*f*). The more correct theory, however, would seem to be, that such evidence constitutes at the very most an element to be considered by the jury. There is no such intimate or invariable connection between the power of controlling the details of the work and the power of controlling the premises on which the work is done, that the exercise of the latter power necessarily implies the exercise of the former power also. It seems certain at all events that, in cases where only a portion of the premises is affected by the performance of the work, the fact that the employer retained control over them is inconclusive, if not wholly immaterial (*g*).

(*e*) *Pfau* v. *Williamson* (1872) 63 Ill. 16.

(*f*) Where the landlord of a leased building employed a carpenter to put in three or four skylights for which he was to be paid so much a piece, and the goods of a tenant were injured through his negligence in removing the roof, and allowing the rain to get through, the court said that, while doing the work, the carpenter could only be regarded as the servant of the landlord. The fact that the carpenter testified he had the entire control of the work, could not make any difference, as there was no such surrender of the entire possession of the premises to the workmen as could relieve the landlord of responsibility. *Glickauf* v. *Maurer* (1874) 75 Ill. 289, 20 Am. Rep. 238.

Where the goods of a tenant were injured by the negligence of the servant of a person employed by the landlord to make some changes in the plumbing, the court said that, as the terms of the employment were not given, it must be assumed that no special terms were agreed on, and stated its conclusion as follows: The negligent person "was employed generally to do the required work, and was for that purpose the agent or servant of his employer. Possession or control of the building or plumbing or any part of it was not given to him. His employer had the right to control and direct the entire work and might have discharged Ruh [the plumber] from the employment if he refused to obey her instructions." *Bernauer* v. *Hartman Steel Co.* (1889) 33 Ill. App. 491.

It will be observed that, in both the cases cited the facts are analogous to those presented by the decisions collected in § 23, ante, and that the decisions might have been based upon the doctrine there applied.

(*g*) In *Boomer* v. *Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 172, 57 N.E. 1004, the employer was held not to be liable for the negligence of the servants of a contractor for the repair of his chimneys, although he had retained the right of control over the premises.

In *Mumby* v. *Bowden* (1889) 25 Fla. 454, 6 So. 453, the court proceeded on the theory that, in order to relieve the employer of liability, it must appear that the contractor had control of the work as well as of the premises.

In a case where the plaintiff fell over cleats which had been negligently nailed to a staircase, it was held that the fact that the owner of the building

29. —the footing on which the compensation of the employé is calculated.—The remuneration of a servant is ordinarily calculated with reference to the period during which he has been in the employment of his master, while an agreement with an independent contractor commonly provides that he is to be paid a definite sum upon the completion of the entire work, or that he is to receive a certain compensation measured by the quantity of work actually done by him (*a*). It is well settled, however, that these different methods of payment, although they are usually the concomitants of the relations thus specified, are not so closely and essentially connected therewith, that the character of the contract can be inferred as a matter of law from the adoption of one or other method in the given instance (*b*). On the one hand

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retained possession thereof, together with the use of the stairway after it was in a condition to be used, was immaterial. *Louthan* v. *Hewes* (1902) 138 Cal. 116, 70 Pac. 1065.

(*a*) The following are a few of the many cases which might be cited for the purpose of showing that payment for the whole work by a specific sum is one of the ordinary incidents of an independent contract *Harris* v. *McNamara* (1892) 97 Ala 181, 12 So. 103; *Lawrence* v. *Shipman* (1873) 39 Conn. 586; *Brunswick Grocery Co.* v. *Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249; 32 S.E. 92; *Peyton* v. *Richards* (1856) 11 La. Ann. 62; *Conners* v. *Hennessey* (1873) 112 Mass. 96; *Long* v. *Moon* (1891) 107 Mo. 334, 17 S.W. 810; *Clark* v. *Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590; *Smith* v. *Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113.

Examples of cases in which the contract was held to be independent and in which the work was to be paid for by the piece are the following: *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; *Shaw* v. *West Calder Oil Co.* (Sc. Ct. of Sess. 1871) 9 Sc. L.R. 254; *Smith* v. *Belshaw* (1891) 98 Cal. 427, 26 Pac. 834; *Mayhew* v. *Sullivan Min. Co.* (1884) 76 Me. 100; *Leavitt* v. *Bangor & A. R. Co.* (1897) 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998; *Fink* v. *Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376; *Knowlton* v. *Hoit* (1892) 67 N.H. 155, 30 Atl. 346; *Ferguson* v. *Hubbell* (1884) 97 N.Y. 507, 49 Am. Rep. 544; *Benedict* v. *Martin* (1862) 36 Barb. 288; *Blattenburger* v. *Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309.

As elements tending to show the independence of the contract, the facts that no provision was made as to the payment for the services rendered, and that the compensation is dependent upon the value thereof, were mentioned in *Hexamer* v. *Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755.

A not uncommon footing on which the compensation of an independent contractor is computed is that of a percentage on the cost of the labour. See, for example, *Hale* v. *Johnson* (1875) 80 Ill. 185; *Whitney & S. Co.* v. *O'Rourke* (1898) 172 Ill. 177, 50 N.E. 242.

(*b*) "The tendency of modern decisions is not to regard as essential or controlling the mere incidentals of the contract, such as the mode and manner of payment." *Atlantic Transp. Co.* v. *Coneys* (1897) 28 C.C.A. 388, 51 U.S. App. 570, 82 Fed. 177.

"In the books diverse rules for pronouncing upon this question [i.e. whether or not an employé was a servant] have been stated, but I must say not always with definiteness and perspicuity. Some lay it down that the manner of paying for the work or the thing done, whether by the day or job, is the rule; but this is not so; that is a circumstance to be considered, but not the criterion." *Corbin* v. *American Mills* (1858) 27 Conn. 274, 71 Am. Dec. 63

therefore, it has been laid down in numerous cases that, where it is apparent from the remainder of the evidence that the person employed was subject to the employer's control in respect to the means by which the work was to be accomplished, the fact that his compensation was to be determined with reference to the amount of work which he might actually accomplish will be treated as immaterial. In other words, an employé is none the less a servant because he is to be paid by the piece or job, and not by wages or salary (*c*).

That the mode of payment is a circumstance in determining whether one is an independent contractor or a servant of another, but is not decisive, was declared in *Indiana Iron Co.* v. *Cray* (1897) 19 Ind. App. 565, 48 N.E. 803.

An instruction based on the theory that the mode of payment is a decisive circumstance was held erroneous in *New Orleans & N. E. R. Co.* v. *Reese* (1884) 61 Miss. 581, where the statement disapproved was to the effect that a contract with a railroad company to complete an abandoned construction job, the agreement being that the contractor was to be paid what the labour and material to be furnished by him should cost, and ten per cent. additional, as compensation, made the contractor servant of the company so as to render it liable for his trespass in taking trees from the land of a third party.

In *Shea* v. *Reems* (1884) 36 La. Ann. 966, where it was laid down that the Louisiana Code ordinarily infers the power of control and discharge from the payment of wages, this was declared to be the common law rule also. This statement is, we think, too sweeping. The most that can be said, having a due regard to the general trend of the authorities, is that the payment of wages is a circumstance from which a jury would be justified in inferring the relation of master and servant, if there should be no antagonistic evidence pointing decisively to the opposite conclusion.

(*c*) "No distinction can be drawn from the circumstance of a man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee." *Sadler* v. *Henlock* (1855) 4 El. & Bl. 570, 3 C.L.R. 760, 1 Jur. N.S. 677, 24 L.J.Q.B N.S. 138, 3 Weekl. Rep. 181.

To the same effect, see *Tennessee Coal, Iron & R. Co.* v. *Hayes* (1897) 97 Ala. 201, 12 So. 98; *Drennen* v. *Smith* (1896) 115 Ala. 396, 22 So. 442; *Harris* v. *MacNamara* (1892) 97 Ala. 181, 12 So. 103; *St. Clair Nail Co.* v. *Smith* (1890) 43 Ill. App. 105; *Holmes* v. *Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465; 22 So. 403; *Waters* v. *Pioneer Fuel Co.* (1892) 52 Minn. 474, 38 Am. St. Rep. 564, 55 N.W. 52; *Whitson* v. *Ames* (1897) 68 Minn. 23, 70 N.W. 793 (case should have been submitted to the jury, as there was some evidence of the exercise of control); *O'Neill* v. *Blase* (1902) 94 Mo. App. 648, 68 S.W. 764; *Rummell* v. *Dilworth P. & Co.* (1885) 111 Pa. 343, 2 Atl. 355, 363; *Huff* v. *Watkins* (1880) 15 S.C. 85, 40 Am. Rep. 680; *Richey* v. *DuPre* (1883) 20 S.C. 6; *Dagenais* v. *Houle* (1897) Rap. Jud. Quebec 11 C.S. 225.

In cases arising under the embezzlement statutes, the fact that a person employed to solicit orders for a commodity is paid by commission does not negative the inference that he is a servant. *Rex* v. *Carr* (1811) Russ & R.C.C. 198; *Reg.* v *May* (1861) Leigh & C.C.C. 13, 30 L.J. Mag. Cas. N.S. 81, 7 Jur. N.S. 147, 3 L.T.N.S. 680, 9 Weekl. Rep. 256, 8 Cox C.C. 421; *Reg.* v. *Tite* (1861) Leigh & C.C.C. 29, 30 L.J. Mag. Cas. N.S. 142, 7 Jur. N.S. 556, 4 L.T.N.S. 259, 9 Weekl. Rep. 554, 8 Cox C.C. 458; *Reg.* v. *Bailey* (1871) 12 Cox C.C. 56, 24 L.T. N.S. 477; *Singer Mfg. Co.* v *Rahn* (1889) 132 U.S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

The existence of independent sub-contracts with the persons who performed various distinct kinds of work for the principal contractor will not be inferred

On the other hand, it is equally well settled that the fact of its being provided by the agreement that the person employed is to be paid for his services with reference to the period during which the work should continue, although it may carry some weight in doubtful cases, is an indecisive element in cases where the evidence, as a whole, points clearly to the conclusion that he was an independent contractor (*d*). Nor has the fact that there was no express stipulation as to the amount to be paid for the work any tendency to show that a contract was not an independent one (*e*).

30. —the pecuniary circumstances of the person employed.—In one case the fact that the alleged contractor was financially irresponsible was specifically mentioned among the elements which tended to negative the conclusion that he was an independent contractor (*a*). That this fact is one which may properly be considered as having a distinct bearing upon the nature of the relation between the parties is a doctrine which may be said to receive a certain amount of indirect support from those decisions also in which, (see § 22, ante) the existence of a contract of hiring and service was inferred from the character of the work and the industrial status of the workman; for in all of them it may reasonably be assumed that the pecuniary resources of the person employed were extremely limited.

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from the mere fact that they were paid by the piece. *Allen* v. *Willard* (1868) 57 Pa. 374.

The mere fact that a coal miner is paid a certain amount for each ton of coal taken out by him does not constitute him an independent contractor in such a sense that he is exempt from the provisions of this Act. *Outrine Hewitt Coal Co.* v. *Gregory* (1903) 28 Vict. L.R. 586.

(*d*) *Corbin* v. *American Mills* (1858) 27 Conn. 274, 71 Am. Dec. 63; *Geer* v. *Darrow* (1891) 61 Conn. 220, 23 Atl. 1087; *Wadsworth Howland Co.* v. *Foster* (1893) 50 Ill. App. 513, Affirmed in (1897) 168 Ill. 514, 48 N.E. 163; *Morgan* v. *Smith* (1893) 159 Mass. 570, 35 N.E. 101; *Harkins* v. *Standard Sugar Refinery* (1877) 122 Mass. 400; *Hexamer* v. *Webb* (1866) 101 N.Y. 377, 54 Am. Rep. 703, N.E. 755; *Butler* v. *Townsend* (1891) 126 N.Y. 105, 26 N.E. 1017; *Larrow* v. *Clute* (1891) 37 N.Y.S.R. 859, 14 N.Y. Supp. 616; *Heidenweg* v. *Philadelphia* (1895) 168 Pa. 72, 31 Atl. 1063; *Harrison* v. *Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699; *Groesbeck* v. *Pinson* (1899) 21 Tex. Civ. App. 44, 50 S.W. 620; *Bibb* v. *Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S.E. 163; *Emmerson* v. *Fay* (1896) 94 Va. 60, 26 S.E. 386; *Fuller* v. *Citizens' Nat. Bank* (1882) 15 Fed. 875 (in charge to jury).

In a prosecution under the embezzlement statutes the fact that men following the same occupation (drover) as the prisoner were customarily paid by the day does not prove that he was a servant. *Reg.* v. *Hey* (1849) 2 Car. & K. 985, Temple & M. 209, 1 Den. C.C. 602, 3 Cox C.C. 582, 14 Jur. 154.

(*e*) *Bennett* v. *Truebody* (1885) 66 Cal. 609, 56 Am. Rep. 117, 6 Pac. 329. See however cases cited in § 23, ante.

(*a*) *Wallace* v. *Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S.W. 399

31. —a provision in the contract that the employer shall be indemnified for all losses caused by the negligence of the person employed.—It is well settled that the fact of the contractor's having undertaken, as between himself and the employer, to be responsible for injuries occasioned by any tortious conduct on the part of himself and his servants does not in any way affect or qualify the position of third parties in regard to the recovery of damages from the employer. Such a stipulation enures to the benefit of the employer alone, and confers no right of action upon any one else (*a*). It does not improve the position of the plaintiff in cases where the tortious conduct was held to be merely collateral (*b*); nor does it enable the employer to escape liability, if the circumstances are otherwise such that the plaintiff is entitled to recover, as where a non-delegable duty was violated by the contractor (*c*), or where a nuisance originally created by the contractor was continued by the employer (*d*); or where the contractor was so far under the control of the employer that he was in point of law a servant (*e*).

32. —the use of the contractor's appliances by the employer.—The fact that an agent of the employer uses, for the purpose of executing a part of a work of construction which is in progress, a defective appliance belonging to a contractor who is engaged on another part of the same work will not render the employer liable for an injury caused by its condition or the manner of its operation, at a time when it is being used by, and is under the control of the contractor himself (*a*).

(*a*) *French* v. *Vix* (1894) 143 N.Y. 90, 37 N.E. 612; *Wolf* v. *American Tract Soc.* (1898) 25 App. Div. 98, 49 N.Y. Supp. 236.

(*b*) *McCafferty* v. *Spuyten Duyvil & P.M.R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267; *Erie* v. *Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642; *Wray* v. *Evans* (1875) 80 Pa. 102; *Rogers* v. *Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059.

A railroad corporation is not liable for injuries to buildings in the vicinity of its road caused by blasting done by those who have contracted to grade the road, or persons in their employ, although under the contract the corporation reserves the right to retain in its hands sums sufficient to pay all damages that are not adjusted within thirty days from the time they are inflicted. Such a case is not within the provisions of Rev. Stat. chap. 51, § 22 (relating to the condemnation of lands). *Tibbetts* v. *Knox & L. R. Co.* (1873) 62 Me. 437.

(*c*) *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, per Blackburn, J.; *Norwalk Gaslight Co.* v. *Norwalk* (1893) 63 Conn. 495, 28 Atl. 32. See § 50, post.

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

(*e*) *Cooper* v. *Seattle* (1897) 16 Wash. 462, 47 Pac. 887 58 Am. St. Rep. 46.

(*a*) *Hughbanks* v. *Boston Investment Co.* (1894) 92 Iowa, 267, 60 N.W. 640.

33. —the fact that the employer is to furnish the appliances or materials for the work.—A contract for a work of construction not infrequently provides that the appliances or the materials required for the execution of the work are to be furnished by the employer. Such a stipulation is not sufficient of itself to show that the employé is a servant (*a*).

As to the rule that the employer cannot be held responsible on the ground that, while they were being used by the contractor, the appliances or materials furnished became the means or agency by which the injury in suit was inflicted, see § 39, notes (*f*), (*g*) post.

34. —the fact that the stipulated work constituted part of the employer's regular operations.—It has been laid down that, in determining the question, whether a person who undertook the performance of a specific job for a certain price should be regarded as a mere servant, it does not matter what kind of work was the subject of the contract, or whether it was or was not a portion of the regular work which the party contracting for it was carrying on, or some piece of work incidentally connected with it as necessary or convenient. The court added that such an agreement is to be distinguished for a mere arrangement for the compensation of personal services by the piece instead of by the day (*a*). The statement here made is opposed to the weight of authority, so far as it asserts the immateriality of the nature of the work to which the contract relates (see § 22, ante), but is otherwise unobjectionable.

35. —a provision prohibiting the use of the employer's name.—A provision in the contract with the person employed, that he shall not use the name of his employer in any manner whereby the public or any individual may be led to believe that such employer is responsible for his actions, does not in any degree relieve the employer of liability for his negligence, if, as a matter of fact, the other provisions of the contract show that he is a servant, and not an independent contractor (*a*).

(*a*) *Fuller* v. *Citizens' Nat. Bank* (1882) 15 Fed. 8[illegible] (in charge to jury).

(*a*) *Mayhew* v. *Sullivan Min. Co.* (1884) 76 Me. 100 (contract to break down rock in a mine at a certain price per foot).

(*a*) *Singer Mfg. Co.* v. *Rahn* (1889) 132 U.S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

36. —the fact that the contractor was a director of an employing company.—In an action brought by an injured servant, it was held by the Superior Court of the City of New York that, where a railway company employs one of its directors to construct the floor of a building by day's work, and paid him a commission on the actual cost of the work, he is, as regards the performance of such works, a mere contractor, and that notice to him of any defect in the instrumentalities is not notice to the company (*a*). The rule thus adopted is doubtless a proper one in any case in which the injured party was chargeable with knowledge of the actual relations between the company and the director. But under the general principles of the law of agency, it seems clear that a person who is employed by a director to assist in doing work which is for the benefit of the company has a right to assume that the director is acting as the representative for the company. Such is the doctrine of the Supreme Court of Kansas (*b*). In the case cited it was remarked that possibly a different rule might obtain in regard to parties who had no contractual relations with the work. This point does not seem to have ever been judicially discussed; but it is not easy to see any satisfactory ground upon which such a distinction could be based. A stranger, it would seem, is not less entitled than a servant to the benefit of the presumption that, as regards any matter which falls within the scope of his powers, a general agent really occupies that position.

37. —the virtual identity of an employing and contracting company.—One of the grounds on which a recent decision in favour of the plaintiff was based was, that the injury had been caused by the negligence of a construction company which had been organized for the express purpose of carrying out the work in question, and that this company and the one from which damages were claimed were controlled and managed by the same persons (*a*). There is

(*a*) *Dillon* v. *Sixth Ave R. Co.* (1882) 16 Jones & S. 283.

(*b*) *Solomon F. Co.* v. *Jones* (1883) 30 Kan. 601, 2 Pac. 657 (work was undertaken by the president of the company).

(*a*) *Chicago Economic Fuel Gas Co.* v. *Myers* (1897) 168 Ill. 139, 48 N.E. 66. Affirming (1896) 64 Ill. App. 270 (injury caused by an explosion of gas while being conveyed through carelessly constructed pipes). The evidence relied upon by the Court, as sustaining its conclusion, was that all the officers and employés of the construction company who testified in the case, were either at the same time connected in some way with the defendant company, or passed alternately from the service of one to the service of the other; that the natural gas which caused the explosion was let into the pipes by the order of the person

apparently no other instance of the application of such a doctrine. But its justice and reasonableness are so manifest, and its supplies such a simple and direct method of preventing the avoidance of liability by the subterfuge of creating "dummy" corporations, that the present writer has no hesitation in expressing the hope that it will meet with general acceptance.

38. Provinces of court and jury.—If the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court, as a matter of law (*a*). It has, however, been held that this rule is not applicable, where the nature of the relation between the employer and the person employed depends upon the meaning of a written instrument collaterally introduced in evidence, and the effect of that instrument depends, not merely upon its construction, but upon intrinsic facts and circumstances. The inferences of fact to be drawn from the instrument, must, in such a case, be left to the jury (*b*).

If no written contract has been executed, the character of the relation between the parties is a question for the jury, where the evidence with respect to the essential and determinative facts is conflicting (*c*), or is such that different deductions may reasonably be drawn from it (*d*). On the other hand, the effect of the contract

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who acted as president of both companies; and that he was unable to state whether he gave such order as the president of the gas company, or as the supervising engineer of the construction company. It was considered to be just as legitimate to suppose, that he gave the order in the former of these capacities, as that he gave it in the latter capacity.

(*a*) *Linnehan* v. *Rollins* (1884) 137 Mass 123, 50 Am. Rep. 287; *Scott* v. *Springfield* (1899) 81 Mo. App. 312; *Pioneer Fireproof Constr. Co.* v. *Hansen* (1898) 176 Ill. 100, 52 N.E. 17; *Foster* v. *Chicago* (1902) 197 Ill. 264, 64 N.E. 322. Affirming (1900) 96 Ill. App. 4; *Mayhew* v. *Sullivan Min. Co.* (1884) 76 Me. 100; *Potter* v. *Seymour* (1859) 4 Bosw. 140; *Rogers* v. *Florence C. Co.* (1889) 31 S.C. 379, 9 S.E. 1059.

The general rule of evidence thus applied is, that the construction of all written documents belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have ascertained as facts by the jury. Taylor, Ev. § 43; Greenl., Ev. § 277.

(*b*) *McNamee* v. *Hunt* (1898) 30 C.C.A. 653, 59 U.S. App. 9, 87 Fed. 298.

(*c*) *Forsyth* v. *Hooper* (1865) 11 Allen 419

(*d*) *Goldman* v. *Mason* (1888) 18 N.Y.S.R. 376, 2 N.Y. Supp. 337; *Kellogg* v. *Payne* (1866) 21 Iowa, 575; *Rome & D.R.Co.* v. *Chasteen* (1889) 88 Ala. 591, 7 So. 94; *Carlson* v. *Stocking* (1895) 91 Wis. 432, 65 N.W. 58 (see § 12, note, , subd. 16); *Latorrs* v. *Central Stamping Co.* (1896) 9 App. Div. 145, 41 N.Y. Supp. 99 (see § 19, note (*a*), subd. (9); *Daley* v. *Boston & A.R. Co.* (1888) 147 Mass. 107, 16 N.E. 690 (see § 21, note (*c*), subd. (1); *Dane* v. *Cochrane Chemical Co.* (1895)

is to be determined by the court, where its terms are established by undisputed or clearly preponderating evidence, from which only a single inference can fairly be drawn (*e*).

III. FOR WHAT TORTS OF CONTRACTORS THE EMPLOYER IS NOT BOUND TO ANSWER.

39. Generally.—If it is conceded or established that the tort-feasor was an independent contractor in the sense explained in the foregoing sections, the non-liability of the employer becomes an inference in point of law, if the only reasonable deduction from the circumstances as shewn is, that the injury in question resulted approximately and solely from the negligent manner in which the stipulated work was performed, or from a wrongful act which was neither a necessary, nor a probable incident of that work (*a*). The

164 Mass. 453, 41 N.E. 678 (see § 23, note (*a*)); *Wallace* v. *Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S.W. 399 (see § 19, note (*a*), subd. 9); *Sullivan* v. *Dunham* (1898) 35 App. Div. 342, 54 N.Y. Supp. 962 (see § 21, note (*c*), subd. 4), *Prairie State Loan & T. Co.* v. *Doig* (1873) 70 Ill. 52 (see § 12, note (*b*), subd. 2); *Brophy* v. *Bartlett* (1888) 1 Silv. Ct. App. 575 (see § 12, note (*b*), subd. 13).

In a case where a piece of the scaffolding used by masons fell on a passer-by, it was held that a witness should not be permitted to testify that "he hired the men to work for" certain persons; that he "had no control of anything." His testimony should be confined to a narrative of what happened in the making of his contracts, and the conduct of the work, and from this the jury are to draw their conclusions. *Alexander* v. *Mandeville* (1889) 33 Ill. App. 589.

(*e*) This principle is explicitly enounced in *Drennen* v. *Smith* (1896) 115 Ala. 396, 22 So. 442, and is taken for granted in many of the cases cited in §§ 12, 18, 21.

In *Deford* v. *State* (1868) 30 Md. 179, it was laid down that, where there is no written contract, the terms and manner of the employment are matters for the jury, and that it is for the court to declare, in view of the facts established, what was the relation between the parties.

In *Emmerson* v. *Fay* (1896) 94 Va. 60, 26 S.E. 386, it was laid down broadly that what constitutes an independent employment is a question of law, to be decided upon the facts, as proved.

(*a*) "Where the act is in itself a nuisance, the party who employs another to do it is responsible for all the consequences, for there the maxim 'qui facit per alium facit per se' applies; but where the mischief arises, not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, unless the relatron of master and servant exists." *Butler* v. *Hunter* (1862) 7 Hurlst. & N. 82, 631 L.J. Exch. N.S. 214, 10 Weekl. Rep. 214, per Pollock, C.B.

"The true distinction between cases of master and servant and cases of employer and independent contractor seems to be this, that, where the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called 'collateral negligence,' meaning thereby negligence other than the imperfect or improper performance of the work which the contractor is employed to do." Rigby, L.J., in *Hardaker* v. *Idle Dist. Council* (1896) 1 Q.B. 352, 65 L.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196.

When the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an unskillful or improper person as the contractor. *Cuff* v. *Newark & N. Y. R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205.

term commonly used for the purpose of describing tortious conduct of this character is "collateral" (*b*). Another word which conveys

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"For negligences of the contractor, not done under the contract but in violation of it, the employer is in general not liable." *Lawrence* v. *Shipman* (1873) 39 Conn. 586.

In a case where a contractor had omitted to close an opening over an area, the court said: "We are, for these reasons, of the opinion that the true rule in cases of this character is, if the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable, but if it is from the negligence of the contractor or his servants, that he should alone be responsible." *Scammon* v. *Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

The employer is not liable where the injury was caused by "the manner in which the contractor managed the details of the work." *Hauser* v. *Metropolitan Street R. Co.* 27 Misc. 538, 58 N.Y. Supp. 286.

The conception of an injury which was the result of the manner in which the contract was performed is also explicitly adverted to in *Shute* v. *Princeton Twp.* (1894) 58 Minn. 337, 59 N.W. 1050.

Other forms of words which may be used to express of the same general conception are suggested by the following phrases:

"A wrongful act of commission by a contractor beyond the scope of his employment." *Gray* v. *Pullen* (1864) 5 Best & S. 970, 984, 34 L.J.Q.B.N.S. 265, 11 L.T.N.S. 569, 13 Weekl. Rep. 57, per Erle, Ch. J.

A "wrongful act unnecessarily done" by the contractor in the performance of his work. *Upton* v. *Townend* (1855) 17 C.B. 30, 71, 25 L.J.C.P.N.S. 44, 1 Jur. N.S. 1089, 4 Weekl. Rep. 56, per Willes, J.

Acts which were "unnecessary to the accomplishment of the work, and in no way connected with its proper performance." *Scammon* v. *Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334; or which "did not necessarily occur as an incident to the prosecution of the work." *Scammon* v. *Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334; or which did "not necessarily arise" out of the work contracted for. *Chicago City R. Co.* v. *Hennessy* (1884) 16 Ill. App. 153.

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

In a case where the evidence is susceptible of the construction that the person employed was exercising an independent employment under the contract, it is error to refuse a charge to the effect that, if the accident was the result of the negligence of that person or of his servants, the employer is not liable. *Potter* v. *Seymour* (1859) 4 Bosw. 140.

(*b*) "Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default." *Mersey Docks & Harbour Board* v. *Gibbs* (1864) L.R. 1 H.L. 93, 11 H.L. Cas. 686, 35 L.J. Exch. N.S. 225, 12 Jur. N.S. 571, 14 L.T.N.S. 677, 14 Weekl. Rep. 872, per Blackburn, J.

In a later case the same judge (then a member of the House of Lords), observed "Ever since *Quarman* v. *Burnett* (1840) 6 Mees and W. 499, 9 L.J. Exch. N.S. 308, 4 Jur. 969, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants." *Dalton* v. *Angus* (1881) L.R. 6 App. Cas. 740, 50 L.J.Q.B.N.S. 689, 44 L.T. & S. 844, 30 Weekl. Rep. 196.

The same word is also used in the following cases, *Hole* v. *Sittingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 30 L. J. Exch. N.S. 81, 3 L. T & S. 750, 9 Weekl Rep. 274; *Butler* v. *Hunter* (1862) 7 Hurlst. & N. 826, 31 L. J. Exch. N.S. 214, 10 Weekl. Rep. 214; *Hardaker* v. *Idle Dist. Council* (1896) 1 Q.B. 352, 65 L. J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196; *Birmingham* v. *McCary* (1887) 84 Ala. 469, 4 So. 630; *Frasti* v. *McDonald* (1898) 122 Cal. 400, 55 Pac. 139, 772; *Davie* v. *Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395; *Sanford* v. *Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67.

a similar meaning, but which is found less frequently in the reports, is "casual" (*c*). Occasionally those two epithets are combined in the same statement (*d*).

In some instances the language used is indicative of the conception, that no causal connection between the letting of the contract, and the injury can be said to exist, where that injury resulted solely from the tortious act of the contractor (*e*). To establish such a connection it is not enough to show that the employer supplied one or more of the instrumentalities which were necessary for the execution of the stipulated work. It does not follow that, because those instrumentalities were capable of being so used as to constitute a nuisance, or of being used in an improper, negligent, or mischievous manner, an injury of which it is an efficient cause must therefore be regarded as a natural consequence of the permission to use it. The extent of the authority conferred by the employer is, to execute the contract by a proper and reasonable use of any means and appliances which he furnishes (*f*). Nor can the liability of an employer for the

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(*c*) *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 Weekl. Rep. 323, 60 J.P. 196; *Smith* v. *Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56; *Wilson* v. *White* (1883) 71 Ga. 506, 51 Am. Rep. 269.

(*d*) See, for example, *Holliday* v. *National Teleph. Co.* [1899] 2 Q.B. 392, 400, 68 L.J.Q.B.N.S. 1016.

(*e*) Thus we find it laid down that the employer is not liable, where the execution of the work did not entail the injury in question as a "natural or necessary" consequence. *O'Rourke* v. *Hart* (1860) 7 Bosw. 511, (1862) 9 Bosw. 30; as a "natural result"; *Knowlton* v. *Hoit* (1891) 67 N.H. 155, 30 Atl. 346; *Carter* v. *Berlin Mills Co.* (1876) 58 N.H. 52, 42 Am. Rep. 572; *Fuller* v. *Grand Rapids* (1895) 105 Mich. 529, 63 N.W. 530; as a "probable" consequence; *Smith* v. *Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56; or as a "necessary consequence"; *Moore* v. *Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 299.

(*f*) The fact that the materials for paving a highway were brought to the required spot by the principal contractor for the work will not render him liable for the negligence of a sub-contractor in leaving a portion of those materials in such a position as to obstruct the highway *Overton* v. *Freeman* (1852) 11 C.B. 867, 3 Car. & K. 52, 21 L.J.C.P.N.S. 52, 16 Jur. 65, citing *Knight* v. *Fox* (1850) 4 Exch. 721, 20 L.J. Exch. N.S. 9, 14 Jur. 963.

In *Learitt* v. *Bangor & A. R. Co.* (1897) 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998, where the plaintiff's mill was burnt by fire communicated from the stove of a cooking car occupied by a man who had contracted to supply cordwood to a railway company, it was sought to charge the company with liability on the ground that, inasmuch as it had, for the purpose of enabling the contractor to do his work conveniently, placed this and other cars on a siding close to the mill, the mischief complained of was not the negligent act of the contractor or his servants, but the direct result from using an appliance located by defendant;—that the proximu causa was the location of the car,

careless management of an appliance be inferred from the mere fact that there was an understanding between him and the contractor that such appliance was to be used (*g*).

A complaint is demurrable if the facts declared upon show that the injury for which damages are sought was caused by the negligent manner in which the contractor executed the work in question, unless some allegation also discloses that there was a misfeasance or malfeasance on the part of the employer, which caused the contractor to do the work negligently, and that the origin of the injury complained of can therefore be traced to the action of the former in setting in motion the immediately efficient cause of the wrong (*h*).

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the use of which naturally would and did cause the damage. This contention was rejected by the court, which said: "The act of locating the car, and of using it with fire, must be distinguished. The former was the act of the defendant. The latter, of the contractor. The car itself was harmless, and its location, when unused, threatened no injury to plaintiff. The use might create mischief. The thing unused was harmless. . . . True, there might be cases where the land-owner would be liable if the use was contrived by him for the purpose of mischief, with intent of aviding liability; but there is no element of that sort here. The car was located without intent to injure. The liability for its imprudent use then rested upon its owner, who was tenant. There is no principle of law that can be invoked to charge the defendant. It did not create or maintain a nuisance, nor a condition that directly caused the mischief. That was perhaps caused from the misuse, by another, of the conditions created by defendant, for whose acts defendant is in no way responsible. . . . The act complained of in the case at bar was locating a car upon the employer's land, an act not dangerous to any one. Its use might, or might not be. A dangerous use was not contracted for."

To the same general effect, see *Carter* v. *Berlin Mills Co.* (1876) 58 N.H. 52, 42 Am. Rep. 572 (plaintiff's land was flooded owing to the improper use of defendant's dam by a logging contractor).

The fact that certain appliances or materials were furnished by the employer is treated as immaterial in the following cases among others. *Murray* v. *Currie* (1870) L.R. 6 C.P. 24, 40 L.J.C.P.N.S. 26, 23 L.J.N.S. 557, 19 Weekl. Rep. 104; *Corbin* v. *American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63; *Miller* v. *Minnesota & N.W.R. Co.* (1888) 76 Iowa 655, 14 Am. St. Rep. 258, 188; *Mayhew* v. *Sullivan Min. Co.* (1884) 76 Me. 100; *Harris* v. *McNamara* (1892) 97 Ala. 181, 12 So. 103; *Deford* v. *State* (1868) 30 Md. 179; *Benedict* v. *Martin* (1862) 36 Barb. 288; *Smith* v. *Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113; *Emmerson* v. *Fay* (1896) 94 Va. 60, 26 S.E. 386.

(*g*) In *Bailey* v. *Troy & B. R Co.* (1884) 57 Vt. 252, 52 Am. Rep. 129, where the plaintiff's horse was frightened by a steam-shovel and ran away, the court disapproved of an instruction contravening the principle stated in the text, saying: "If the shovel became a nuisance merely because it was negligently operated, and such operation was controlled by Munson [the contractor], he is the author of the nuisance, and answerable for the consequences; and the understanding between the parties that the shovel should be used in the work, does not change the liability to the defendant. This understanding calls for the proper, not negligent, use of the shovel."

(*h*) *White* v. *New York* (1897) 15 App. Div. 440, 44 N.Y. Supp. 454, where one of the allegations of the complaint set up that the cause of the in-

In the following sections the cases in which various kinds of collateral negligence are involved, have been arranged in such a manner as to facilitate comparison and contrast with those in which recovery has been allowed on one or other of the various grounds discussed in the succeeding subtitles of this monograph. It is deserving of notice that, in not a few instances, the result of determining the rights of the parties with reference to different principles has been the rendition of conflicting decisions with regard to virtually identical facts.

40. Negligence not productive of permanently dangerous conditions.—In the subjoined notes are collected the decisions which illustrate the circumstances under which actions have been held not to be maintainable for the consequences of negligent acts which are sporadic in their nature and of brief duration (*a*).

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juries complained of was the neglect of a contractor for the grading of a street to see that the surface water, sewage and drainage, whenever it should accumulate, through being impeded by reason of the grading of Ninth avenue, should have a sufficient outlet and be discharged and carried off.

A demurrer should be sustained to a declaration which alleges substantially that the plaintiff's intestate B. was employed as workman by one W. who had contracted with the defendant to dig lime rock for him by the cask in a certain quarry; that it then and there became the legal duty of the defendant, while B. was at work for the said W., to see that the walls of said quarry were examined from time to time in order to ascertain if any loose rock was likely to fall upon the said B.; that the defendant negligently permitted the said W. to excavate rock in the walls of the quarry in such a manner as to render the walls on one side thereof unsafe for the said B. to work therein; that the death of the said B. was caused by the negligence of the defendant in not providing suitable appliances for the purpose of ascertaining the condition of the quarry, as aforesaid, and in permitting the dangerous condition of the quarry to exist while the said B. was lawfully at work therein. *Boardman* v. *Creighton* (1901) 95 Me. 154, 49 Atl. 633.

(*a*) (1) *Work on Railways.*—The liability of the defendant company has been denied under the following circumstances:

Where the injury resulted from the negligent management of a train, used and controlled by contractors on a portion of the road not yet turned over to the company. *Scarborough* v. *Alabama M. R. Co.* (1891) 94 Ala. 497, 10 So. 316 (contractors injured by a collision); *Rome & D. R. Co.* v. *Chasteen* (1889) 88 Ala. 591, 17 So. 94 (brakeman injured in attempting to couple cars); *Miller* v. *Minnesota & N.W.R. Co.* (1888) 76 Iowa 655, 14 Am. St. Rep. 258, 39 N.W. 188 (contractor's servant injured as a result of maintaining too high a speed on an unsafe track); *St. Louis, Ft. S. & W. R. Co.* v. *Willis* (1888) 38 Kan. 330, 16 Pac. 728 (brakeman on a train operated by a construction company on a line, injured by defects in the rolling stock); *Hitte* v. *Republican Valley R. Co.* (1886) 19 Neb. 620, 28 N.W. 284 (stranger was run over; *Houston & G. N. R. Co.* v. *Van Bayless* (1876) 1 Tex. App. Civ. Cas. (White & W.) 248 (mule run over), cited in *Houston & G.N.R. Co.* v. *Meador* (1879) 5 Tex. 77; *Meyer* v. *Midland P.R. Co.* (1873) 2 Neb. 319 (similar accident); *Cunningham* v. *International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632 (injury to passenger whose reception on the train was a violation of the express prohibition of the railway company); *Union P.R. Co.* v.

Hause (1871) 1 Wyo. 27 (in this case the plaintiff was conveyed in the coboose on a regular ticket issued by the contractor's employés).

In cases of this class it is error to give a charge to the jury, which bases the responsibility of the defendant upon the isolated fact that the contractor was transporting freight and passengers for reward on a finished portion of the line. This fact would be insufficient to warrant the inference thus drawn from it, if it should be shewn, either (1) that the contractor was operating that particular section of the road, as a means of furthering the construction of the unfinished portion, or (2) that, although the contractor might have been transporting freight and passengers under an arrangement which did not avail to exempt the company from liability for his negligence, while he was rendering that service, yet he exercised at the same time, in respect to the work of construction, an independent occupation, and was not the agent of the company while discharging the functions incident to that position. *Rome & D. R. Co.* v. *Chasteen* (1882) 88 Ala. 591, 7 So. 94.

Recovery has also been denied under the following circumstances:

Where an iron awning rail which was being moved for the purpose of obtaining more space for a street railway was let fall on a passer-by. *O'Rourke* v. *Hart* (1860) 7 Bosw. 511, (1862) 9 Bosw. 301.

Where workmen dropped a chain from the structure of an elevated railway on to the street below. *Burmeister* v. *New York Elev. R. Co.* (1881) 15 Jones & S. 264.

Where a horse was frightened by the operation of a portable steam engine used by a contractor to pump water. *Wabash, St. L. & P. R. Co.* v. *Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N.E. 296.

Where a plank which formed a temporary crossing was turned up by the negligence of contractor's servant in driving against it, and injured a person who had stepped on it. *Thomas* v. *Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215.

Where a railway car which was being drawn by horses collided with a waggon. *Schular* v. *Hudson River R Co.* (1862) 38 Barb. 653.

A railroad company, as warehouseman, is not liable for the destruction of goods by fire communicated from a pile-driving engine which was operated by a contractor engaged in repairing the company's wharf. *Brunswick Grocery Co.* v. *Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249, 32 S.E. 92.

(2) *Work on Buildings.*—The employer was held not to be responsible where the servant of a contractor or a sub-contractor caused injury to a person on the adjacent street or rightfully on the premises, by letting fall a tool, (*Pearson* v. *Cox* (1877), L.R. 2 C.P. Div. 369, 36 L.T.N.S. 495; *Fitzpatrick* v. *Chicago & W.I.R. Co.* (1888) 31 Ill. App. 649); or a brick, (*Boomer* v. *Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 172, 57 N.E. 1004; *Gardner* v. *Bennett* (1874) 6 Jones & S. 197; *Wolf* v. *American Tract Soc.* (1898) 25 App. Div. 98, 49 N.Y. Supp. 236; *Neumeister* v. *Eggers* (1899) 29 App. Div. 385, 51 N.Y. Supp. 481; *Smith* v. *Milwaukee Builders' & T. Exchange* (1895) 91 Wis. 363, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N.W. 1041); or a coil of rope, (*Geist* v. *Rothschild* (1900) 90 Ill. App. 324); or a plank, (*Long* v. *Moon* (1891) 107 Mo. 334, 17 S.W. 810).

The right to maintain an action was also denied, where a person walking along the street was injured by the negligence of a servant of a contractor who threw a piece of lime into a mortar bed in the street. *Strauss* v. *Louisville* (1900) 108 Ky. 155, 55 S.W. 1075.

And where the servant of one of the contractors engaged upon a building was injured by the negligence of another contractor's servant who dropped a tool down the elevator well. *Jehle* v. *Ellicott Square Co.* (1898) 31 App. Div. 337, 52 N.Y. Supp. 366.

And where a tenant sought to recover from his landlord damages for his son's death, caused by his inhaling sooty vapor which filled the room by reason of the acts of servants of a contractor engaged in repairing the chimney. *O'Connor* v. *Schnepel* (1895) 12 Misc. 356, 53 N.Y. Supp. 562.

And where the servant of one who had contracted to lay an upper floor in

a building pushed his foot through the ceiling of the room underneath, and so caused a large piece of plaster to fall on the occupant of that room. *Fitzgerald* v. *Timoney* (1895) 13 Misc. 327, 34 N.Y. Supp. 460.

A jury is properly charged that one for whom a brick wall is being erected is not liable for damage sustained by the adjoining owner by the dropping of brick and mortar on his premises, if such occurrences were not necessarily involved in the building of the wall, but were due to the negligence of the contractor or his servants. *Pye* v. *Faxon* (1892) 156 Mass. 471, 31 N.E. 640.

(3) *Work on Highways.*—A city is not liable for injuries resulting from the fact that a horse was frightened by the whistle of a steam-roller used by a contractor, and became uncontrollable. *Cary* v. *Chicago* (1895) 60 Ill. App. 341

(4) *Work Involving the Handling of Heavy Articles.*—Liability for the negligence of draymen, etc., has been denied under the following circumstances:

Where a person passing by was struck by a barrel which was being rolled along a skid to a truck. *McMullen* v. *Hoyt* (1867) 2 Daly 271.

Where a hogshead was thrown from a truck injured plaintiff, a man sent with the horse. *Brophy* v. *Bartlett* (1888) 1 Silv. Ch. App. 575, Reversing (1885) 37 Hun. 642.

Where a barrel of salt which was being delivered at the vendee's store rolled against and injured a person passing on the footpath. *DeForrest* v. *Wright* (1852) 2 Mich. 368.

Where the injury was caused by a truckman's negligence in rolling barrels out of his employer's store. *Riedel* v. *Moran F. Co.* (1894) 103 Mich. 262, 61 N.W. 509.

Where a carpenter employed upon the lower floor of a warehouse was injured through the negligence of a truckman or his employés in allowing a mass of paper to slip from the sling in which it was being raised. *Kueckel* v. *Ryder* (1900) 54 App. Div. 252, 66 N.Y. Supp. 522.

(5) *Management of Teams.*—The principal employer is not liable where the injury was caused by the negligent manner in which a waggon belonging to a contractor engaged in doing certain hauling and delivery work was driven by his servant. *Foster* v. *Wadsworth-Howland Co.* (1897) 168 Ill. 514, 48 N.E. 163, Affirming (1896) 68 Ill. App. 600.

(6) *Management of Vessels.*—The owner of a ship which, through the negligence of a steamboat by which it is being towed, is brought into collusion with another vessel is not liable for the resulting injuries. *Sproul* v. *Hemmingway* (1833) 14 Pick. 1, 25 Am. Dec. 350. (See, however, § 12a, ante).

A coal company is not liable where a contractor for the haulage of its boats on a canal so negligently operates one of them as to bring it into collision with a boat belonging to a third person. *Blattenberger* v. *Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309.

(7) *Entertainments at Public Resorts.*—The proprietor of a public resort who employs an independent contractor to make a balloon ascent to attract visitors is not liable for injury to a visitor by a pole which falls because of the negligence of the balloonist, while he is endeavouring by means of a new and unfamiliar appliance to raise the pole for use in inflating the balloon. *Smith* v. *Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56. The court assigns three distinct grounds for its decision, viz.: (1) That the negligence complained of was collateral to, and not a probable consequence of the work in hand; (2) that a new method not known to the defendant, was employed; and (3) that they were no concealed dangers against which he was bound to warn visitors.

(8) *Loading or Unloading of Ships.*—A shipowner is not liable for the death of a stevedore's servant caused by the excessive rapidity with which his fellow servants passed along a gang plank a barrel which he was handling. *Rankin* v. *Merchants & M. Transp. Co.* (1884) 73 Ga. 229, 54 Am. Rep. 874.

40a. Same as subject continued. — Blasting operations. — One group of cases under this head, viz., those which relate to injuries caused by blasting operations it will be desirable to notice separately, for the reason that, as will be shown in later sections, the doctrine that the employer is exempt from liability under such circumstances is not accepted by all the authorities. The courts which apply that doctrine may be said to start from the fundamental principle that "one who in the reasonable use of his land blasts rocks thereon with due and proper care, is not liable for the inevitable damage caused thereby to the neighboring property" (*a*). If full effect be given to this principle, it is clear that cases in which a contract is entered into for the performance of work by means of blasting must stand outside the category of those in which the employer is held responsible on the ground that he contracted for work which "would necessarily produce the injuries complained of" (*b*), or which is "dangerous in itself" (*c*), or which was "intrinsically dangerous" (*d*). See the two following subtitles, especially §§ 46, 52. In this point of view, therefore, if an injury results from the negligent manner in which such work is performed by the contractor, his negligence is merely collateral, and not such as will affect the employer with liability (*e*).

(*a*) *Booth* v. *Rome, W. & O. Terminal R. Co.* (1893) 140 N.Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N.E. 592; *French* v. *Vix* (1894) 143 N.Y. 90, 37 N.E. 612.

(*b*) *McCafferty* v. *Spuyten Duyvil & P. M. R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267.

(*c*) *French* v. *Vix* (1893) 2 Misc. 312, 21 N.Y. Supp. 1016, Affirmed in (1894) 143 N.Y. 90, 37 N.E. 612.

(*d*) *Schnurr* v. *Huntington County* (1899) 22 Ind. App. 188, 53 N.E. 425.

(*e*) Recovery was denied in under the following circumstances:

Where plaintiff's house was struck by a stone a result of the negligent manner in which contractor for the grading of a street carried on the blasting operations. *Kelly* v. *New York* (1854) 11 N.Y. 432; *Pack* v. *New York* (1853) 8 N.Y. 222. (In *Storrs* v. *Utica* (1858) 17 N.Y. 104, 72 Am. Dec. 437, Comstock, J., doubted whether the second of these cases had been correctly decided upon the facts).

And where a similar injury resulted from the negligence of a contractor engaged in excavating the foundation of a house. *French* v. *Vix* (1894) 143 N.Y. 90, 37 N.E. 612, Affirming (1893) 2 Misc. 312, 21 N.Y. Supp. 1016; *Roemer* v. *Striker* (1894) 143 N.Y. 134, 36 N.E. 808 (holding that no error had been committed in allowing the defendant to give in evidence a written contract between himself and another, whereby the latter agreed to make the excavation).

And where the servants of a contractor for the construction of a railway did their work in such a manner as, by an overcharge, to cast rocks against and into the plaintiff's house near the line. *McCafferty* v. *Spuyten Duyvil & P. M. R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267. In the case last cited the

court said: "The injuries were not occasioned in consequence of the omission of any duty which was incumbent on the defendant. It had let the contract, so far as appears, to a competent person, and had provided, in the contract, that he should be responsible for any damage occasioned by blasting. The defendant did not authorize or permit a nuisance upon its premises. If it had, it would have been liable for any damage occasioned by the nuisance. Hence, if the defendant can be held liable in this case it must be upon the naked ground that it is responsible for the careless acts of the sub-contractor's servants over whom it had no control. There is no authority in this State for imposing such a liability under such a state of facts." In this case Dwight, C., delivered a very elaborate and able dissenting opinion from which some extracts have been quoted in another section, (46, note(*g*), post), and the decision was expressly disapproved in *Weatherbee* v. *Partridge* (1899) 175 Mass. 185, 78 Am. St. Rep. 486, 55 N.E. 894 (see § 52, note(*k*), post.

On the ground that the "work contracted for was lawful and necessary for the improvement and use of the defendant's property," the negligence of a contractor or his employé in blasting out a ledge of rock which extended close up to the wall of a building on adjoining property was held not to be chargeable to his employer, who engaged him to excavate the lot preparatory to building thereon. *Berg* v. *Parsons* (1898) 156 N.Y. 109, 41 L.R.A. 391, 66 Am. St. Rep. 542, 50 N.E. 957, Reversing (1895) 90 Hun. 267, 35 N.Y. Supp. 780. Gray, J. (with whom agreed Bartlett and Haight, JJ.), dissented on the ground that there was evidence justifying the conclusion that the employer was culpable in engaging an incompetent contractor.

Where a team, which was standing in a street crossing the one in which the sewer was being constructed, was frightened by the noise of a blast fired by the contractors in the prosecution of the work of constructing a sewer, and the plaintiff, while attempting to control them, was injured it was held that the defendant municipality was not liable. *Herrington* v. *Lansingburgh* (1888) 110 N.Y. 145, 6 Am. St. Rep. 348, 17 N.E. 728. The court said: "If there was any culpable carelessness which caused the injury to the plaintiff, it was that of the contractors. They had entire control of the work and the manner of its performance. They could choose their own time for firing the blasts and select their own agents and instrumentalities. They could make the charges of powder large or small, and they could, in some degree, smother the blasts so as to prevent falling rocks and much of the noise of the explosion: or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given the notice; but the duty to give it did not devolve upon the village."

Recovery was denied in a case where the plaintiff was injured by a rock thrown out by a blast set off while the foundation for a house was being excavated by a contractor. *Hunt* v. *Vanderbilt* (1894) 115 N.C. 559, 20 S.E. 168.

A city is not liable for a death caused by a stone which was thrown up by a blast set off during the progress of the operations incident to the excavation of a water-works trench by a contractor. *Logansport* v. *Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166.

A city which, as licensor, permits the board of public commissioners to construct a sewer from the courthouse to a sewer of the city, is not liable for damage sustained by the negligent and careless manner in which the contractor blasted rock. *Schnurr* v. *Huntington County* (1899) 22 Ind. App. 188, 53 N.E. 425.

A passer-by who is struck by a stone thrown up by a blast set off by a contractor engaged in constructing a sewer for a city cannot recover damages from the city. *Blumb* v. *Kansas City* (1884) 84 Mo. 112, 54 Am. Rep. 87, holding that the case relating to the duty of a city to keep its streets in a safe condition for public travel, were not applicable as precedents.

For other cases in which the plaintiff was held not to be entitled to recover for injuries due to blasting, see *Tibbetts* v. *Knox & L. R. Co.* (1873)

41. Negligence productive of dangerous conditions of a more or less permanent character.—The cases cited below illustrate the circumstances under which the courts decline to hold employés responsible for injuries resulting from conditions which create a continuous and more or less permanent situation which may at any moment eventuate in disaster (*a*).

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62 Me. 437; *Edmundson* v. *Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

The Supreme Court of New York has held that a preliminary injunction will not issue at the instance of a tenant, to restrain his landlord from blasting in an adjoining piece of land, where it appears that he personally has not been concerned in the blasting, but has employed an independent contractor to accomplish a certain result, not in itself wrongful, reserving to himself no control over the manner in which it shall be done. *Hill* v. *Schneider* (1897) 13 App. Div. 299, 43 N.Y. Supp. 1. The decision was put upon the ground that it did not appear that the defendant was proceeding to do something which might injure the petitioner pendent lite.

It has been held that art. 16, § 8, of the Pennsylvania Constitution of 1874, is merely intended to impose upon corporations having the power of property and cannot be so construed as to render a railway corporation which is entitled to exercise that power responsible for damages caused by the negligence of a contractor in blasting rocks so as to throw them on property adjacent to the right of way. *Edmundson* v. *Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

(*a*) (1) *Work on Railways.*—Recovery has been denied under the following circumstances:

Where a labourer was injured by the derailment of a construction train, resulting from defects in the track and in the rolling stock. *St. Louis, Ft. S. & W. R. Co.* v. *Willis* (1888) 38 Kan. 330, 16 Pac. 728 (case turned largely on the question whether the particular section of the road on which the accident occurred had been turned over to the company, so as to bring the construction train under its control).

Where a bridge gave way under a train, while it was being constructed, and killed a servant of the contractor for its construction. *Bibb* v. *Norfolk & W. R Co.* (1891) 87 Va. 711, 14 S.E. 163.

Where the servant of contractors for the construction of a railway was injured through breathing the exhalations from a poisonous mixture which they had applied to some timber to prevent its decaying. *West* v. *St. Louis, Y. & T. H. R. Co.* (1872) 63 Ill. 545.

Where, owing to the negligence of a contractor in constructing defective stock-gaps, and throwing down fences, cattle strayed on to land adjacent to the track. *Alabama Midland R. Co.* v. *Martin* (1893) 100 Ala. 511, 14 So. 401.

Where a conductor of a street car was thrown against a pile of stones negligently left near the track by a contractor engaged to repair the pavement between the rails. *North Chicago Street R. Co.* v. *Dudgeon* (1896) 69 Ill. App. 57.

Where a horse sank through the earth between the pavement and a bridge laid over an excavation made in a street on which a railway was being constructed. *Hauser* v. *Metropolitan Street R. Co.* (1899) 27 Misc. 538, 58 N.Y. Supp. 286.

Where a horse struck his foot against some rails which had deposited on a street, preparatory to their being used. *Fulton County Street R. Co.* v. *McConnell* (1891) 87 Ga. 756, 13 S.E. 828.

Where a horse was frightened by the flapping of canvas suspended under a trestle as a protection against the dropping of paint on the street, the accident being due to the negligence of the servants of a contractor employed to

paint the trestle, in hanging the canvas so that it became loose. *McCann* v. *Kings County Elev. R. Co.* (1892) 46 N.Y.S.R. 327, 19 N.Y. Supp. 668.

Where workmen employed by a bricklayer contravened the orders of a railway company's engineer by excavating a road in such a manner as to cut into a drain, the result being that the water escaped on to the premises of an adjoining landowner. *Steel* v. *South Eastern R. Co.* (1855) 16 C.B. 550.

Where a young child was drowned in a pool of water formed by a heavy storm on the defendant's right of way, in a corner between one of its own embankments and one belonging to an intersecting line, the premises being still in possession of an independent contractor under an uncompleted contract. *Charlebois* v. *Gogebic & M. River R. Co.* (1892) 91 Mich. 59, 51 N.W. 812.

Where a contractor deposited wasted earth on land outside the right of way. *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

Where a contractor's workmen left down certain bars leading into plaintiff's field. *Clark* v. *Vermont & C. R. Co.* (1854) 28 Vt. 103.

Where a wire stretched on a street during the construction of a railway caused injury to a person passing along the street. *Sanford* v. *Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67.

In a very elaborately argued case the declaration alleged that the defendant had made a deep cut while its road was in process of construction, and had deposited the earth taken therefrom in such a manner as to dam up a small stream and form a pond near the plaintiff's house; that the defendant had also stationed near the house a camp of convicts whom it was using in the construction of the road, and permitted the filth accumulating in the sinks of the camp to flow therefrom and be deposited near the house; by reason of which the house became infected with noxious scents, malaria, and other substances injurious to health. The defence was that if the acts so alleged were done at all, they were done by an independent contractor. The argument of plaintiff's counsel was that the building of a railroad necessarily results in a nuisance, unless certain precautions are taken to prevent it; that the low places by which the surrounding lands are drained and from which the water is carried off must be filled up, and unless certain precautions are taken to provide an escape for the water, a nuisance necessarily results; and that the railroad company cannot escape liability by having the work done by an independent contractor. The court thus disposed of this argument: "If the premises of counsel are true, the conclusion might also be true; but if a railroad is built properly, we do not think any nuisance will result from the building. The company, under its charter, had authority of law to do this work; and when it contracted with the construction company, it was of course implied that the latter would do the work in a proper and lawful manner. 'A person employing another to do a lawful act is presumed, in the absence of evidence to the contrary, to have employed him to do it in a lawful and reasonable manner; and therefore, unless the parties stand in the relation of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the work is done.' 1 Redf. Railways, 6th ed. 542. Moreover, the evidence shows that, in the very place where this nuisance is said to have occurred, the railroad company had provided means which, if used, would have prevented the nuisance. The superintendent directed that a waste-way should be placed there, but the contractor put in a pipe which the defendant claims was one of the causes of the nuisance, (1) by being too small to carry off the water in proper time, and (2) because it was not put upon the bed of the stream, but several inches above the bed, thereby causing the water to pond near the plaintiff's house. Nor would the other things which it is claimed caused the nuisance, to wit, the throwing up of the fresh dirt, the convict camp and the hog and horse lot, render the railroad company liable. It had lawful authority for excavating the hills and filling the bottoms in order to make its road-bed. And the placing of the convict camp and the hog and horse lot near the plaintiff's house was the act of the construction company, over which, it appears from the record, the railroad company had no power or control. So it will be seen that the work committed to the construction company was not wrongful per se, nor did it necessarily result in a

nuisance, and therefore does not fall within the first exception to the general rule." *Atlanta & F. R. Co.* v. *Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277.

A street railway company is not liable for injuries received by a child which was drawn into a machine used for the manufacture of concrete by one who had contracted for the building of the road. *Chicago City R. Co.* v. *Hennessy* (1884) 16 Ill. App. 153. The court said: "The accident arose from the prosecution of work by the contractor purely collateral to the construction of the road. The company contracted with Holmes to build a designated cable system, with certain specified materials to be furnished by him, among which were engines, wire, concrete, etc. How or where the contractor should procure such materials, was a matter with which the company had no concern. The contract did not provide how or where the concrete should be procured or mixed, much less that it should be mixed in a machine like the one which caused the injury; nor was Holmes the agent of the company in procuring and using the machine. The making of the concrete upon the street and the use of the machine, was the idea and device of Holmes for his own convenience and benefit. The company could not interfere or control as to where he should procure or manufacture his materials, and he might manufacture them in the public street if the municipal authorities did not object. The use of the machine was not one of the natural contingencies which the company were required to anticipate, nor which it could have provided against. Its use was only subsidiary to the performance, by the contractor, of his undertaking."

A railway company is not liable for injuries resulting from the fact that a derrick furnished to a contractor for the purpose of unloading railway iron was permitted by him to get into a defective and dangerous condition. *King* v. *New York C. & H. R. R. Co.* (1876) 66 N.Y. 181, 23 Am. Rep. 37.

A railway company is not liable for the negligence of a servant of a contractor for the construction of a portion of its road in leaving on a highway one of a number of large stones which were to be used for the abutments of a bridge. *Pawlet* v. *Rutland & W. R. Co.* (1855) 28 Vt. 298.

In a case where a member of a train crew on a line built by a lumber company for its own use was injured as a result of certain logs slipping off of a car, and there was evidence tending to show that the loading was done by a contractor, it was held error to refuse to submit to the jury the question whether the accident was wholly caused by negligent loading. *Haley* v. *Jump River Lumber Co.* (1892) 81 Wis. 412, 51 N.W. 321, 956.

The assumption in all the cases above cited is that the acts of negligence were not done in the exercise of the charter powers of the company. See § 62, post.

(2) *Construction of Bridges.*—A municipality is not liable for injuries caused by the collapse of a bridge, while it is under construction. *Wood* v. *Watertown* (1890) 58 Hun. 298, 11 N.Y. Supp. 864.

(2) *Construction of Embankment and Dams.*—The employer is not liable, where a contractor for the work of diverting a creek erected on an embankment so defectively that it could not resist the action of the water which it was intended to confine. *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.

On the ground that the work of dredging out a canal for a city was done by an independent contractor, the city was held not to be liable to one for the flooding of his fields thereby from the building of a dam without construction of a by-pass to carry off water, though the city had an inspector of the work, who located the dam. *White* v. *Philadelphia* (1902) 201 Pa. 512, 51 Atl. 332.

A person who has employed a competent architect to erect a dam is not responsible for injuries caused by its bursting while the work is in progress. *Boswell* v. *Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345.

(3) *Construction of Telegraph and Telephone Lines.*—The principal employer is not liable where a child's hand is caught in a pulley used by a contractor for stringing telephone wires. *Vosbeck* v. *Kellogg* (1899) 78 Minn. 176, 80 N.W. 957.

No recovery can be had, where the plaintiff was injured by falling into a hole dug in a public street by a railroad company engaged, as an independent contractor, in erecting a line of poles and wire for the defendant company. *Hackett* v. *Western U. Teleg. Co.* (1891) 80 Wis. 187, 49 N.W. 822.

(4) *Laying of Pipe Lines.*—A gas company is not liable for injuries due to an explosion of gas consequent upon the negligence of a contractor's servant, who in the course of the work of laying its pipes undermined a pipe belonging to another company, and thus caused it to break. *Chartiers Valley Gas Co.* v. *Lynch* (1887) 118 Pa. 362, 12 Atl. 435; *Chartiers Valley Gas Co.* v. *Waters* (1888) 123 Pa. 220, 16 Atl. 423. Commenting on a charge of the trial judge which seemed to imply that because the pipe of the other company was necessarily undermined, and this result was therefore contemplated by the contract, the employer was liable, for the reason that there was a necessary interference with the rights of others, the court pointed out that there was no necessary interference with the rights of others unless negligence existed. Both companies had their rights, and they were perfectly consistent with each other. In some jurisdictions it may be that this case would have been referred to the doctrine discussed in Subtitle V., post.

(5) *Construction of Buildings.*—Persons contracting for the erection of buildings have been held not responsible under the following circumstances:

Where an excavation for a party-wall was so carelessly made that it collapsed. *Lawrence* v. *Shipman* (1873) 39 Conn. 586.

Where the excavation for a house is so negligently made as to injure a building on the adjacent premises. *Aston* v. *Nolan* (1883) 63 Cal. 269; *Crenshaw* v. *Ullman* (1893) 113 Mo. 633, 20 S.W. 1077; *Harrison* v. *Kiser* (1887) 79 Ga. 588, 4 S.E. 320. (See, however, § 52, as to this class of cases).

Where a floor fell in consequence of its being overloaded. *Dillon* v. *Sixth Ave. R. Co.* (1882) 16 Jones & S. 283, Affirmed in (1884) 97 N.Y. 627.

Where the servant of a contractor was injured by reason of the weakness of the floor of a building which was under construction. *Humpton* v. *Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776.

Where a wall fell on the servant of a person who had taken a sub-contract for excavation work. *Hale* v. *Johnson* (1875) 80 Ill. 185.

Where a roof fell while it was being constructed. *Hearn* v. *Quillen* (1901) 94 Md. 39, 50 Atl. 402.

Where a wall fell on a workman while it was being erected. *Gallagher* v. *Southwestern Exposition Asso.* (1876) 28 La. Ann. 943; *Treadwell* v. *New York* (1861) 1 Laly 128.

Where a building fell, owing to the defective manner in which it had been constructed. *Braidwood* v. *Bonnington Sugar Ref. Co.* (1866) 2 Sc. L.R. 152.

Where the iron columns and entablatures in a new building fell, owing to their not being sufficiently propped. *Peyton* v. *Richards* (1856) 11 La. Ann. 62.

Where plaintiff's property was injured by the fall of a derrick used in the construction of a building. *Prairie State, etc., Co.* v. *Doig* (1873) 70 Ill. 52.

Where a wall was so defectively built that it was blown down, before it was completed. *Benedict* v. *Martin* (1862) 36 Barb. 288.

A landlord was held not to be liable in an action for damages brought by the parents of a child who fell into a privy vault which a contractor had dug on demised property and left uninclosed for several months. *Wiese* v. *Remme* (1897) 140 Mo. 289, 41 S.W. 797.

Where the cap blows out of the end of a steam supply pipe which is being put in by one contractor and injures the servant of another contractor, the owner of the building is not liable, if the accident is due to poor material, defective workmanship, or bad management. *Jones* v. *Philadelphia Traction Co.* (1898) 185 Pa. 75, 39 Atl. 889.

A servant of the owner of a building under construction cannot maintain an action, where he received an injury by reason of the negligence of the employés of contractors for the masonry of a building in overloading one of the upper floors with brick and stone. *McEnanny* v. *Kyle* (1887) 14 Daly 268.

Nor where he was injured by falling down an elevator well left open and unguarded by the contractor's servants. *Conway* v. *Furst* (1895) 57 N.J.L. 645, 32 Atl. 380.

Nor where he was injured by the fall of a heavy post, the accident being due to the negligent construction of the building. *Mickee* v. *Walter A. Wood Mowing & Reaping Mach. Co.* (1894) 77 Hun. 559, 28 N.Y. Supp. 918, first appeal (1893) 70 Hun. 456, 24 N.Y. Supp. 501.

A man in the employ of one who has taken a contract for the mason work on a building cannot recover damages from the principal employer for injuries caused by defects in a scaffold which had been erected for the use of one of the carpenters, where it is shown that the employer refused to provide a scaffold, and the contractor was told that the scaffold already set up was not to be used unless it was strengthened. *Larock* v. *Ogdensburg & L. C. R. Co.* (1882) 26 Hun. 382.

(6) *Repairing or Reconstruction of Buildings.*—The rule applicable to buildings which are being reconstructed or repaired is in no way different from that which prevails with respect to buildings under construction. Hence, while the owner of a building contracts with a builder to re-arrange a building according to certain plans, and, while he was in possession, plaintiff, in the employ of a company doing some electric work in the building, falls through a hole in the floor which is concealed by rubbish, the owner is responsible for the resulting injury. *Hogan* v. *Arbuckle* (1902) 73 App. Div. 591, 77 N.Y. Supp. 22, following *Murphy* v. *Altman* (1898) 28 App. Div. 472, 51 N.Y. Supp. 106.

Nor is he liable where his house, while it is being raised up for an addition beneath, falls upon the house of the adjoining owner. *Conners* v. *Hennessey* (1873) 112 Mass. 96.

Nor where an employé of an independent contractor engaged in tearing down a building was injured by the sudden collapse of the building owing to the contractor's having over-weighted one of the floors with brick. *Cullom* v. *McKelvey* (1898) 26 App. Div. 46, 49 N.Y. Supp. 669.

Nor where one of the employer's tenants, while passing through the hall, struck his foot against a piece of plank which had been laid down to protect some tiling just put in by the contractor. *Mahon* v. *Burns* (1894) 9 Misc. 223, 29 N.Y. Supp. 682, Affirmed in (1895) 13 Misc. 19, 34 N.Y. Supp. 91.

Nor where the injury was caused by the negligence of the servant of a contractor for the re-construction of a staircase in nailing cleats on to the steps in such a manner as to cause the plaintiff to fall. *Louthan* v. *Hewes* (1902) 138 Cal. 116, 70 Pac. 1065.

Nor where the injury was caused by the negligence of the servants of a plumber, who while engaged in repairing waterpipes negligently left open a trap door. *Bennett* v. *Truebody* (1885) 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329; *Burns* v. *McDonald* (1894) 57 Mo. App. 599.

Nor where the injury resulted from leaving an opening in a temporary plank sidewalk laid down while excavations were being made underneath. *Frassi* v. *McDonald* (1898) 122 Cal. 402, 59 Pac. 139, 742.

Nor where the workmen of a person employed to repair the wall of a house dug up the ground, and left it so piled that, when a storm occurred, water was turned into the cellar of the adjoining house. *Dutton* v. *Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N.E. 405.

Nor where a ladder was so placed by workmen engaged in repairing a roof, that it was blown down by the wind. *McCarthy* v. *Second Parish* (1880) 71 Me. 318, 36 Am. Rep. 320.

Nor where a gas-fitter by neglecting to turn off the gas caused an explosion. *Rapson* v. *Cubitt* (1842) 9 Mees. & W. 710, 6 Jur. 606, Car. & M. 64, 11 L.J. Exch. N.S. 271.

Nor where a drainpipe burst owing to the negligence of the contractor's servants and damaged a tenant's goods. *Jefferson* v. *Jameson & M. Co.* (1897) 165 Ill. 138, 46 N.E. 272, Reversing (1895) 60 Ill. App. 587.

Nor where a cistern in a house was caused to overflow through the negligence of a plumber. *Blake* v. *Woolf* [1898] 2 Q.B. 426, 67 L.J.Q.B.N.S. 813.

Where the owner of a building which has been damaged by fire turns it over to an independent contractor to be repaired, he is not liable for injuries received by the servant of a sub-contractor who, in groping about to find a door leading to a staircase opens by mistake a door leading to an elevator shaft, and fell down it. Under such circumstances the injured person does not enter the building under an implied invitation from the owner, and the latter cannot be held liable on the ground of the confusing arrangement of the interior. *Butler* v. *Lewman* (1902) 115 Ga. 752, 42 S.E. 98 (construing Ga. Civil Code, §§ 3818, 3818).

There was held to be no evidence of liability on the part of the defendant, the owner of a house, where the workmen of the contractor in pulling down the front wall of the house removed a brest-summer which was inserted in the party-wall between the defendant's and plaintiff's houses, without taking any precautions by shoring or otherwise, the result being that the front wall of the plaintiff's house fell. *Butler* v. *Hunter* (1862) 7 Hurlst. & N. 826, 31 L.J. Exch. N.S. 214, 10 Week'. Rep. 214. Wilde, B., considered that the "the absence of a shoring is like the absence of a proper hoarding, or any of the ordinary precautions which belong to the careful taking down of a wall." This decision, however, was disapproved by Lord Blackburn 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 Weekl. Rep. 196, and in *Hughes* v *Percival* (1883) L.R. 8 App. Cas. 443, 446, 447, 52 L.J.Q.B.N.S. 719 49 L.T.N.S. 189 31 Weekl. Rep. 725, 47 J.P. 722. See § 52, post.

(7) *Demolition of Buildings.*—The owner of a building having no actual knowledge of the condition of its walls, or how the work of removing one of such walls is being done, is not liable for the death of a woman and child on an adjoining lot, caused by the fall of such wall consequent upon an independent contractor's negligence in removing the roof from the building without properly supporting the wall. *Engel* v. *Eureka Club* (1893) 137 N.Y. 100 33 Am. St. Rep. 692, 32 N.E. 1052, Rev'g. (1892) 45 N.Y.S.R. 940, 18 N.Y. Supp. 945, which was a reiteration of the judgment in (1891) 59 Hun. 593, 14 N.Y. Supp. 184. The court said: "It is the general duty of the owner of premises to keep the walls of his building in a safe condition, so that they will not endanger his neighbour by falling, and if he negligently omits its performance and his neighbour is injured, the injure is actionable. (*Mullens* v. *St. John* 57 N.Y. 567, 15 Am. Rep. 530.) But the evidence is undisputed that the wall was safe and would not have fallen if it had been left as it was when the contract was made, supported by the roof. It was not a menace in its existing condition. It became dangerous only in consequence of the manner in which the contractor proceeded to take it down. It would probably have been less liable to fall, although deprived of the support of the roof, if the wall had been in perfect repair when the contractor entered upon the work. But we perceive no causal connection between the neglect to repair and the injury to the plaintiff's estate. The sole cause in a legal sense was the negligence of the contractor in omitting to do what he was bound to do. The performance of his duty would have prevented the injury."

For a case which conflicts with this decision, see s. 52, subd. (10), post.

A tenant whose premises are exposed and goods injured as a result of the manner in which a man contracting with the landlord for the removal of the adjoining house cannot recover damages from the landlord. *Rotter* v. *Goerlitz* (1890) 16 Daly 484, 12 N.Y. Supp. 210.

(8) *Work Performed on Streets and Highways.*—The defendants were employed by A. to pave a district. They contracted with B. to pave one of the streets. B's workmen, in the course of paving the street, left some stones at night, in such a position as to constitute a public nuisance, and the plaintiff injured by falling over these stones. No personal interference of the defendants with, or sanction of the work of laying down the stones was proved. Held, that the defendants were not liable. *Overton* v. *Freeman* (1852), 11 C.B. 867, 16 Jur. 65, 21 L.J.C.P. N.S. 52, 3 Car. & K. 52. Maule, J., said: "I apprehend, that, if the defendant had been present and directed or sanctioned the doing of the act complained of, they would have been responsible for it.

But here they are sought to be charged simply on the ground that they had contracted with the parish authorities to do the work, in the performance of which by their sub-contractor the negligence happened which has given rise to the plaintiff"s misfortune." Creswell, J., said: "The defendants not having personally interfered or given any directions as to the performance of the work, but merely having contracted with a third person to do it, cannot be held responsible for an unauthorized and unlawful act of such third person in the course of it. It is quite true, as was said in *Bush* v. *Steinman* (1799) 1 Bosw. & P. 404, that the original contractor might be liable equally with the subcontractor, if he in any manner directed or countenanced the doing of the act complained of. But there is no pretense for so charging the defendant here; they contracted with Warren to lay down the kerbstone in a particular way, not to so place the stones, and so negligently leave them, as to occasion injury to the plaintiff. If the act contracted to be done would itself have been a public nuisance, of course the defendants would have been responsible." Williams, J., said: "The plaintiff's counsel has rested his argument upon a broad and intelligible ground, viz., that the act complained of is a public nuisance. Some of the cases, it is true, would seem to justify that distinction; but it seems to me that we cannot give any weight to it without overruling *Knight* v. *Fox* (1850) 5 Exch. 721, 20 L.J. Exch. N.S. 9, 14 Jur. 963."

The defendants employed A. for a sum of money to fill in the earth over a drain constructed for them across a highway, from their house to a common sewer, the defendants finding the carts, if necessary, to remove the surplus earth, which were to be filled by A. A. filled in the earth, but left it so heaped above the level of the road, that, there being neither light nor signal, the plaintiff by night drove his carriage against it, and sustained injury therefrom. The only evidence of interference or control on the part of the defendant was, that one of them, a few days before the accident, and when the work was incomplete, had seen the earth heaped over a part of the drain as it afterwards remained. Held, that there was no evidence of their liability, inasmuch as the wrong complained of was a public nuisance by A., which the defendants, (whether A. was their servant or only a contractor), had not authorized him to commit, having merely directed generally the doing of an act which might have been done without committing a public nuisance. *Peachey* v. *Rowland* (1853) 13 C.B. 182, 17 Jur. 764, 22 L.J.C.P.N.S. 81. "Unless you can show," said Maule, J., "that the work was so done that the defendants might have been indicted for obstructing a public highway, they are not liable in this action. I am satisfied that the decision in *Overton* v. *Freeman* (1852) 11 C.B. 867, 16 Jur. 65 212, J.C.P.N.S. 52, 3 Car. L. 52, was right, though I was afterwards less satisfied with the reason which I gave. . . . The true result of the evidence here was, that the defendants had nothing whatever to do with the wrongful act complained of. They employed somebody to do something, which might be done either in a proper or improper manner; and he did it in a negligent and improper manner, and injury resulted to the plaintiff. That is the substance of the evidence. The question is, whether the evidence fairly justified a verdict for the defendants. We have no right to look with extreme scrupulosity in cases of this sort, to see if there is not some gain of evidence the other way. If the whole evidence taken together is not such as to warrant a jury in finding for the plaintiff, practically speaking there is no evidence. I am of opinion, that, if the jury had upon this evidence found that the defendants did the wrong complained of their verdict would have been set aside as not being warranted by the evidence. There was in truth no evidence for the practical purpose in hand."

A house owner is not liable for injuries received by a passer-by who, owing to the negligence of a contractor employed to repair a footpath, falls into the area underneath the footpath. *Du Pratt* v. *Lick* (1869) 38 Cal. 691 (intrinsic danger of work not discussed).

A house owner is not liable, where a contractor employed to put down a stone sidewalk falls into an unguarded excavation made in the course of the operation. *Schuerickhardt* v. *St. Louis* (1876) 2 Mo. App. 571. The possibility of the plaintiff's being entitled to recover on the ground of the intrinsic danger of the work was not discussed. See § 51, post.

An abutting landlord cannot be held liable on the ground of the work's necessarily or probably involving danger for injuries caused by an obstruction left in the street by one who had contracted to lay a sidewalk for him. *Independence* v. *Slack* (1895) 134 Mo. 66, 34 S.W. 1904.

A city is not liable for injuries received by the servant of a contractor, as a result of the defective shoring of the sides of a trench excavated for a sewer. *Foster* v. *Chicago* (1902, 197 Ill. 264, 64 N.E. 322, affirming (1901) 96 Ill. App. 4.

A servant of a contractor cannot recover from the employer for injuries caused by the collapse of the sides of a ditch dug for laying a pipe-line. *Vincennes Water Supply Co.* v. *White* (1890), 124 Ind. 376 24 N.E. 747.

In a case where the plaintiff's intestate was struck and killed by a fragment of rock thrown up by a blast set off during the progress of the work of excavating a trench for a pipe-line, it was held to be error to charge the jury on the theory, that the construction of waterworks was a nuisance, and that it was therefore the duty of the city to impose on the contractor stipulations requiring him to take necessary precautions, or to abate the danger, if its attention was afterwards called to the dangerous conditions. *Logansport* v. *Dick* (1880) 70 Inu. 65, 36 Am. Rep. 166.

In a leading New York case the defendant who had received a license from the authorities to construct a public street at their own expense were held not to be liable for an injury received by one who drove at night into an open sewer which had been left unguarded and unlighted. *Blake* v. *Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304. In *Storrs* v. *Utica* (1858) 17 N.Y. 104, 72 Am. Dec. 437, Comstock, J., distinguishes this case from those in which the liability of a municipal corporation for the defective condition of a street is in question, but takes occasion to express a doubt whether the decision was correct in view of the facts. See § 51(a) post. There would certainly seem to be good ground for contending that the position of a licensee of a municipality under such circumstances cannot be either more or less favorable than that of the municipality itself. But the decision is in line with several of those cited below.

Where W. contracted with the P. Gas Co. to dig a trench, the work to be under the supervision of the company's engineer, and W. sublet the work to D., and in consequence of D's negligence in not guarding the excavation a foot-passenger was injured, it was held that D. was alone liable. *Wray* v. *Evans* (1875) 80 Pa. 103, approved in *Edmundson* v. *Pittsburgh* M. & Y.R Co. (1885) 111 Pa. 316, 2 Atl. 404.

So, also the principal employer was held not to be responsible where the plaintiff had fallen into an open trench which had been dug in a street by permission of the authorities, and left unprotected by the contractor. *Smith* v. *Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113. (It should be noticed that the trench in this case, having been opened under a license did not constitute a nuisance). In a later case arising out of the same accident the municipality which had granted the license was held not liable, and the general rule was laid down, that such a corporation, when it grants to one a license for a purpose proper and lawful, is not liable to one injured by reason of the misuse or abuse of that license, whether the same be by an independent contractor for the work from the licensee, or by the licensee himself. *Susquehanna Depot* v. *Simmons* (1886) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434. The court said: "It is settled that the defendant had the right to grant the license to dig the ditch complained of; in this it did nothing unlawful. How then, is it responsible for the negligent act of Florence? It certainly cannot be contended that its responsibility would be greater in a case such as this, than if Florence [the contractor] had been acting under a contract with the borough instead of Dr. Smith] the principal employer]. Yet under such a contract it would not have been liable. His employment was independent of the control and direction of the person with whom he had contracted. He was in the lawful possession of the street in which the water pipe were to be laid, and, as was said in *Erie* v. *Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642, the borough could not fill up the trench which he dug, or erect barriers which he might not tear down if they obstructed his work. . . . If, as was said in *Smith* v. *Simmons*, the excava-

tion had been per se a nuisance, the case would be different, for in that event the public authorities would have been bound to abate it as soon as they had knowledge of the obstruction, but not being a nuisance, but lawful, the borough cannot be held for an accident happening thereby, and Florence alone must be regarded as responsible for the injuries resulting to the plaintiff from his neglect."

Liability has been denied, where a horse was injured by stepping into a trench which was being dug in an alley to connect defendant's drain with a private sewer belonging to his neighbour. *Zimmerman* v. *Baur* (1894) 11 Ind. App. 607, 39 N.E. 295

And where a fireman in employ of 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 municipal corporation which has employed a contractor to execute the various kinds of work mentioned in the following paragraphs is not liable under the circumstances there indicated.

Where the grading of a street was done so carelessly as to cause the surface water and sewage to back up and accumulate on the plaintiff's premises. *White* v. *New York* (1897) 15 App. Div. 440, 44 N.Y. Supp. 454.

Where a pile-driver hammer was left in such a position as to frighten a horse which was being driven on a highway under repair, the consequence being that the driver was injured. *Howarth* v. *McGugan* (1893) 23 Ont. Rep. 396.

Where a foot-passenger stepped into a hole left open near the curbing while sewer was being constructed. *Charlock* v. *Freel* (1891) 125 N.Y. 357, 26 N.E. 262, affirming (1888) 50 Hun. 395, 3 N.Y. Supp. 226.

A Highway Board instructed its surveyor to employ one S., a contractor, to repair a road. In the course of the work, with which the board did not interfere, the servants of S. left stones on the highway at night, without placing a light to shew where they were, and a traveller drove his gig against the obstruction and was injured. *Reid* v. *Darlington Highway Board* (Q.B.D. 1877) 41 581. In the very brief judgment delivered for the court by Lush, J., it was held that there was no evidence of negligence on the part of the board or its surveyors. The precise rationale of this decision is not clear from the report, which merely mentions that plaintiff's counsel argued that the contractor's men were servants of the Board—a contention manifestly untenable. Neither the court nor the counsel averted to the possibility of maintaining an action on the ground that the duty of the Board to keep the highway safe for travel was primary and non-delegable. (See §§ 58, 59, post.

In a Newfoundland case, where the court's conclusion was that there was no statutable obligation on the part of the Board of Works to keep a certain road in repair, the Board was held not liable for any injury to a person who drove against a heap of gravel which had been left in the road through the negligence of one who had contracted for its repair. *Duchemine* v. *Board of Works* (1880) Newfoundland Rep. (1874)-1884) 236. This decision is in conflict with the American cases cited in s. 51, post.

In Pennsylvania a municipality has been held not to be liable for an injury received by a person who fell into an open and unguarded sewer. *Painter* v. *Pittsburgh* (1863) 46 Pa. 213; *Erie* v. *Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642; nor where the injury was received by a person who turned aside to avoid a pile of earth on a pavement, and fell into a trench dug for the purpose of laying a curbstone. *Eby* v. *Lebanon County* (1895) 166 Pa. 632, 31 Atl. 332. See also *Susquehanna Depot* v. *Simmons* (1886) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434, as stated supra. These decisions are in conflict both with those reviewed in § 51, and with those reviewed in §§ 58-60, post, and contrary to the weight of authority.

(9) *Work Done on Premises Adjacent to Streets and Highways, and Affecting the Safety Thereof.*—Where a proprietor of a house contracted with a builder to execute certain repairs, and the builder made a sub-contract for the plaster work, it was held that neither the proprietor nor the principal contractor was liable for injuries caused by the upsetting of a vehicle which resulted from the negligence of the sub-contractor in leaving a heap of lime in the street,

without any fence or protection, outside the space which had been duly set apart, fenced in, and lighted by the principal contractor, in accordance with the provisions of a Police Act. *McLean* v. *Russell* (1850) 12 Sc. Sess. Cas. 2nd Series, 887, 22 Sc. Jur. 394. Lord Fullerton said: "Here there was nothing hazardous; and if a party employed to perform the very safe operation of plastering a house, executed it in a dangerous manner, he only is blameable." Noticing the contention that there was a constructive culpa in employing careless persons, Lord Mackenzie said: "It is perfectly vain to say that any such blame can attach to a man who employs responsible tradesmen to execute harmless repairs on his house, or in these persons contracting with another to do part of the work."

Abutting land owners have also been held not to be liable under the following circumstances:

Where a firm of masons employed to do the brick-work on a building created an obstruction in the adjacent street, while the work is in progress. *Richmond* v. *Sitterding* (1903) 9 Va. Law Reg. 41, 43 S.E. 562.

Where the plaintiff was injured by driving into a pile of planks left unlighted on a road leading to a bridge over a canal. *Weber* v. *Buffalo R. Co.* (1897) 20 App. Div. 292, 47 N.Y. Supp. 7.

Where a wagon was overturned by a bank of earth left on a road during the progress of excavation work. *Lancaster Ave. Impro. Co.* v. *Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

Where a person using a street was injured by an unguarded and unlighted heap of material deposited in a street by a sub-contractor for the construction of a building. *Aldritt* v. *Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N.W. 741 (principal contractor was defendant).

Where lumber purchased by a city was negligently piled in the street by the vendors. *Evansville* v. *Senenn* (1898) 151 Ind. 42, 41 L.R.A. 728, 734, 68 Am. St. Rep. 218, 47 N.E. 634, 51 N.E. 88.

Where a person employed to haul logs left some of them on a highway, thereby creating a dangerous obstruction. *Manchester* v. *Warren* (1893) 67 N.H. 482, 32 Atl. 763.

It has also been held that no action was maintainable under the following circumstances:

Where a piece of timber fell on a passer-by, while it was being hoisted by a derrick extending over the footway. *Vanderpool* v. *Husson* (1858) 28 Barb. 196 (such a derrick declared not to be a nuisance).

Where a derrick used for setting a marble front on a building fell on a passer-by. *Potter* v. *Seymour* (1859) 4 Bosw. 140.

Where the iron front of a building fell upon and killed a slave. *Peyton* v. *Richards* (1856) 11 La. Ann. 62.

Where the cornice and a portion of the front wall of a building in course of erection fell on a passer-by. *Deford* v. *State* (1868) 30 Md. 179.

Where a fence built around an excavation in the sidewalk was blown down and struck a passer-by. *Martin* v. *Tribune Asso.* (1883) 30 Hun. 391. The court said: "The structure being lawful, all the acts necessary to be done in completing it were collateral to the undertaking. If the fence was insufficient, or if the contractor went beyond the permit in obstructing the street, these acts are to be chargeable to the persons who did them.

Where a piece of scaffolding used by a mechanic in making repairs on a building was blown down by the wind and injured a passer-by. *Hexamer* v. *Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755.

Where the injury was caused by falling upon a ridge of ice formed upon the defendant's sidewalk by the negligence of the employés of a contractor engaged in pumping water from his cellar. *Larow* v. *Clute* (1891) 60 Hun. 580, 14 N.Y. Supp. 616.

Where a person walking into a coal hole left open in the pavement. *Harrison* v. *Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699.

Where an excavation in the footway in front of a landowner's premises was not properly guarded. *Fuller* v. *Citizen's Nat. Bank* (1882) 15 Fed. 875; *Ryan* v. *Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123 (see § 51 (a) post) (answer

alleging that the defendant's lot and appurtenances were, at the time of the injury, in the exclusive possession of the contractor, held to be sufficient); *Allen* v. *Willard* (1868) 57 Pa. 374.

Where a person fell into the opening made by removing, under a license from the civil authorities, a grating over an area. *Scammon* v. *Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334. The decision last cited was disapproved by the Supreme Court of the United States in *Chicago* v. *Robbins* (1862) 2 Black, 418, 17 L. ed. 297 (1866) 4 Wall. 657, 18 L. ed. 427. But in another case involving very similar circumstances the Illinois court arrived at the same conclusion and stated its position as follows: "While the contractor is in possession of that part of the premises upon which the excavation is to be made with the exclusive control of the work, it becomes an incident to his undertaking to so do the work as to be reasonably safe for passers-by, observing due care for themselves, and that duty, it is declared, includes the erection and maintenance of suitable safe-guards about all excavations, at all dangerous. Under circumstances where it becomes obligatory upon the contractor to provide safe-guards around such excavations, the owner of the premises is not responsible for his failure or neglect of duty in that regard. Nor does it change the rule, the owner may have some work to perform about the building, where it is wholly disconnected with that which causes the injury." *Kipperley* v. *Ramsden* (1876) 83 Ill. 354.

Where the owner of premises, having occasion to construct an improvement in his cellar, which is required by the Board of Health, employs a contractor who is bound to do all work and furnish all materials, the employer is not liable for injuries to a pedestrian from colliding with a barrel placed over an open coal hole in the sidewalk, and kept there by the contractor to supply necessary ventilation for the prosecution of the work. *Maltbie* v. *Bolting* (N.Y. Super. Ct. 1893) 6 Misc. 339, 26 N.Y. Supp. 903.

The foregoing cases which relates to dangerous conditions in footpaths are more or less in conflict with those cited in § 51, post, and would doubtless have been differently decided in some jurisdictions.

Unless the obligation to place a hoarding in front of a building under erection is imposed by a statute applicable to the locality in which the work is being executed, the owner of the building is not liable for injuries resulting from the fact that the contractor by whom it was being erected omitted to put up the boarding. *Crawford* v. *Peel* (1887) Ir. L.R. 20 C.L. 332. In this case Murphy, J., was of opinion that, even if a breach of a statutory obligation had been proved, the owner's liability did not extend beyond the penalty imposed. The effect of applying the doctrine thus invoked would of course have been to render immaterial the question whether the work was being done by an independent contractor or not. But the view taken by the learned judge seems to be in conflict with the rule established by the cases cited in §§ 799, 800, of the present writer's treatise on Master and Servant.

A contractor for the erection of a building is not liable for the penalty imposed by a city ordinance which forbids any person to place, leave, or deposit in the street any material, except such as is permitted by ordinance or resolution, if it appears that the ordinance was infringed by his sub-contractor, and there was no necessity for putting the material in the street. *Buffalo* v. *Clement* (1892) 19 N.Y. Supp. 846.

(10) *Scavenging Work.*—The defendant city had made a contract with a party for the removal of the carcases of any animal which might die or be killed within the city limits. On one occasion after a large number of mules had been destroyed by a fire, the mayor, in order to obviate the nuisance which would have resulted from conveying the carcases through the streets to the reduction works of the contractor, arranged with the contractor's servant to have them thrown into the Missouri River. The servant took a road to the river bank where it happened to be convenient of access, and threw the carcases into the river at a place where it had temporarily overflowed and concealed a quarry belonging to the plaintiff. The current did not catch them, and they sank into the quarry, the result being that the plaintiff could not reopen it. For the injury so caused the city was held not to be liable. *Hilsdorf* v. *St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

(11) *Work in Harbours.*—In an action against Commissioners appointed by a local Act (5 & 6 Vict. chap. 111) Commissioners were appointed for improving a harbour, and with the sanction of the Ballast Board, empowered to exhibit lights or sea-marks for the guidance of ships navigating that harbour, it was held that the contractor employed to execute the work was guilty of negligence in not obtaining, through the Commissioner, the sanction of the Ballast Board to set up lights on the end of piles driven during the progress of the operations, and that the Commissioners were not liable for damage sustained by a vessel owing to the want of such lights. *Gilbert* v. *Halpin* (Ct. of Exch. 1858), 3 Ir. Jur. N.S. 300, Pigot, C.B., dissenting. This decision was put on the broad ground that it was the duty of the contractor either to apprise the employé that the work had reached the stage at which it was necessary to have lights to prevent accidents, or to put the lights out himself. The inference drawn was that, as the contractor had not performed this duty, he was the only culpable party against whom the injured person could proceed. This case was decided before the evolution of the doctrine discussed in subtle V., and at the present day the conclusion of the court with regard to the same facts would possibly be different.

(12) *Excavation Work.*—A landlord is not liable, where a sub-contractor so carelessly executed a contract for the removal of certain earth and rock from the defendant's vacant lot, that a stable belonging to an adjacent landlord was injured. *King* v. *Livermore* (1876) 9 Hum. 298, affirmed in (1877) 71 N.Y. 605.

A person employing a contractor to haul sand from one designated spot to another is not liable for his negligence in so digging the sand as to form a dangerous bank which caved in and injured a young child. *Flink* v. *Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376.

(13) *Work involving the use of fire for the destruction of timber.*—A landowner is not liable where a person employed to clear land set fire to some of the brushwood, and the fire spread to the premises of an adjoining landlord. *Ferguson* v. *Hubbell* (1884) 97 N.Y. 507, 49 Am. Rep. 544.

In several cases it has been held that a railway company is not liable for injuries caused by fire which spreads to adjoining land from the timber or brushwood which a contractor is burning on its right of way. *Woodhill* v. *Great Western R. Co.* (1855) 4 U.C.C.P. 449; *Rogers* v. *Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059; *Callahan* v. *Burlington & M. River R. Co.* (1867) 23 Iowa 562.

In one case it was laid down that a railway company cannot, under such circumstances, be held liable, as a matter of law, and that the propriety of imputing such liability depends upon whether, under the given circumstances, the burning of brush would be obviously dangerous to such landowners, or whether the circumstances were such that the operation created no danger except in so far as it might arise from the careless manner in which the work should be done. *St. Louis I. M. & S. R. Co.* v. *Yonley* (1890) 53 Ark. 503, 9 L.R.A. 604, 13 S.W. 333, 14 S.W. 800.

No action is maintainable against a railway company, where a sub-contractor cuts a road through the plaintiff's premises, outside the right of way, and sets fires which, through their negligence, spread and burn the plaintiff's timber. *Eaton* v. *European & N.A.R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

A municipality is not liable where fire spreads from timber which was being burnt on a road by a contractor. *Carroll* v. *Plympton* (1860) 9 U.C. C.P. 345.

A town which enters into a contract with an individual for the repair of a highway, including the destruction by fire of brush which has theretofore been cut and piled, is not liable for damages caused by the negligence of said contractor when burning the brush. *Shute* v. *Princeton Twp.* (1894) 58 Minn. 337, 59 N.W. 1050.

For cases in which the defendant was held liable under similar circumstances, for the reason that the work was intrinsically dangerous, see § 52, post.

From an examination of Sub-title V., post, it is abundantly evident that, in many instances, the decisions there cited cannot be reconciled upon the facts with those which are reviewed in this

(14) *Work in mines.*—The owner or lessee of a mine who has made a contract for its operation by another person upon such a footing that the latter is put in full control of the work, and charged with the duty of seeing that the appliances which are used are kept in safe condition, is not liable to a servant of the contractor who is injured by the breaking of the rope by which the cage was lowered and hoisted. *Shaw* v. *West Calder Oil Co.* (1872) 9 Sc. L.R. 254; *Lendeberg* v. *Brotherton Iron Min. Co.* (1889) 75 Mich. 84, 42 N.W. 675.

Liability has also been denied under the following circumstances:

Where the roof of a drift, being left unsupported, fell on a labourer in the employ of a person operating the mine under contract. *Smith* v. *Belshaw* (1891) 89 Cal. 427, 26 Pac. 834; *Samuelson* v. *Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N.W 499.

Where the mouth of a pass leading from one of the levels in a mine to a lower level was left uncovered and unlighted owing to the negligence of a person operating the mine under a contract. *Martin* v. *Sunlight Gold Min. Co.* (1896) 17 New So. Wales L.R. 364.

Where the servant of a contractor engaged in sinking an air-shaft is injured by an explosion of gas. *Welsh* v. *Lehigh & W. Coal Co.* (1886 Pa.) 5 Atl. 48; *Welsh* v. *Parrish* (1892) 148 Pa. 599, 24 Atl. 86.

(15) *Handling of timber.*—Liability has been denied in a case where a pile of lumber was so negligently erected by a contractor that it toppled over and fell into an adjoining lot, thereby causing the death of a man. *Andrews* v. *Boedecker* (1885) 17 Ill. App. 213.

The employer of a man who has contracted to deliver logs at a designated point on a river or elsewhere is not liable, where they are so negligently driven that they lodge and form a jam against a bridge, the result being that it was carried away. *Pierrepont* v. [illegible]*eless* (1878) 72 N.Y. 211; *Road Disp. No. 4* v. *Pelton* (1901) 129 Mich. 31, 87 N.W. 1029; nor where owing to an unreasonable use of the employer's dam, the lands of the third person are overflowed. *Carter* v. *Berlin Mills Co.* (1876) 58 N.H 52 42 Am. Rep. 572; nor where the logs are jammed so as to create an obstruction in a navigable river.. *Moore* v. *Sanborne* (1853) 2 Mich. 519, [illegible] Am. Dec. 209 (nuisance held not to be a necessary consequence of the work contracted for); nor where a boom of logs which is to be towed across an inlet of the sea is insecurely fastened, and being set adrifting by a storm is driven against the piles supporting a house. *Easter* v. *Hall* (1895) 12 Wash. 160, 40 Pac. 728.

(16) *Operating of ferries.*—A municipality is not liable, where the lessee of its ferry neglects to see that the wire rope by which it is operated is kept in safe condition. *Duncan* v. *Magistrate of Aberdeen* (Ct. of Sess. 1877) 14 Sc. L.R. 603.

(17) *Loading or unloading of ships.*—The lessee of a dock is not liable for injuries caused by the fall of a shoot which has been negligently set by a stevedore's sub-contractor. *Woodward* v. *Peto* (1862) 3 Fost. & F. 389.

A shipowner is not liable for the injuries received by a servant of a stevedore through the negligence of his fellow servants in failing to replace a grating over a hatchway. *Dwyer* v. *National S. S. Co.* (1880) 17 Blatchf. 472, 4 Fed. 493; or in exposing a trimming hatch by the removal of dunnage. *The F. Babcock* (1887) 31 Fed. 418.

In the absence of notice, actual or constructive of the defect, a shipowner is not liable for injuries received by the servant of a stevedore, as the result of the fact that an iron wheel belonging to the hoisting apparatus had become weakened, owing to wear and tear, and the want of oiling. *Riley* v. *State Line S. S. Co.* (1877) 29 La. Ann. 791, 29 Am. Rep. 349.

section. This remark is more especially applicable to the cases in which the injury was caused by an unguarded excavation or an obstruction on or near a highway; but the essential antagonism alluded to is also noticeable in other connections, as where the plaintiff was suing for an injury to a building caused by making an excavation near it, or for damages caused to his premises by a fire which spread after being lighted for the purpose of clearing the land of a contiguous proprietor. The inconsistency thus disclosed is, it would seem, due principally, if not entirely, to the logical difficulty which is discussed in § 49, post.

42. Acts constituting a trespass.—The effect of the cases in which the employer was held not to be liable for the reason that the acts of wilful trespass from which the injuries result were collateral to the performance of the contract is stated in the subjoined note (*a*).

(*a*) Railway company have been held not liable under the following circumstances:

Where the servants of a contractor for the construction of its road threw down the fences of an abutting landowner. *Clark* v. *Hannibal & St. J. C. R. Co.* (1865) 36 Mo. 203; *McKinley* v. *Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *St. Louis, A. & T. R. Co.* v. *Knott* (1891) 54 Ark. 424, 16 S. W. 9; *Chicago, R. I. & P. R. Co.* v. *Ferguson* (1893) 3 Colo. App. 414, 33 Pac. 684.

Where wasted earth which had been taken from an excavation was deposited on land outside the right of way. *Hughes* v. *Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

Where a sub-contractor on a railway committed a trespass in procuring timber on land not belonging to the company. *Parker* v. *Waycross & F. R. Co.* (1888) 81 Ga. 387, 8 S.E. 871.

Where, without being authorized by the company, a sub-contractor on a railway hauls earth for an embankment from land which lies outside the right of way, and has been condemned. *Waltemeyer* v. *Wisconsin, I. & N. R. Co.* (1887) 71 Iowa 626, 33 N. W. 140 (disapproving of an instruction by which the jury were told that the defendant was responsible for whatever injury was directly committed by anyone who, while acting in his interest in building the road, took such ground as was reasonably necessary to be used for its right of way, although it had not been condemned for that purpose; *Kerr* v. *Atlantic & N. W. R Co.* (1895) 25 Can. S.C. 197. In the latter case plaintiff's counsel contended that, as the company had agreed in one clause of its contract to provide the contractor with the necessary land for borrow-pits, it had made itself responsible for his acts, even though such acts should constitute trespass upon the property of others. It was held, however, that, upon a proper construction of the contract, this stipulation must be taken to refer to places at which the contractor had borrowed by the consent of the company's engineer, and such consent being requisite under another clause of the contract. The trespass in question was, therefore, an independent tortious act for which the company could not upon any principle of the law be made responsible.

A municipality is not liable where the contractor for the grading of a street deposited earth or other materials on the land of an abutting owner. *Fuller* v. *Grand Rapids* (1895) 105 Mich. 529, 63 N.W. 530; *Reed* v. *Allegheny* (1875) 79 Pa. 300.

A similar decision has been rendered in a case where the materials deposited were taken from a sewer. *Harding* v. *Boston* (1895) 163 Mass. 14, 39 N.E. 441.

One who employs an independent contractor to cut standing trees on the land of a third person into lumber is not liable for damages caused to an adjoining owner by felling trees upon his fence and land. *Knowlton* v. *Hoit* (1891) 67 N.H. 155, 30 Alt. 346.

The owner of a lot is not liable for unauthorized acts of trespass committed by an independent contractor employed to build a house thereon. *Davison* v. *Shanahan* (1892) 93 Mich. 486, 53 N.W. 624 (nature of trespass not stated).

In a case where the workman of one who had contracted with the defendant, to erect a building carried away some bricks and other materials belonging to the buildings of a person who owned the adjacent land, it was held error to instruct the jury that, "if the jury should be of opinion that the workmen, whilst they were on the land by the defendant's permission, had from want of due care injured the plaintiff's property, or had carried away the plaintiff's materials, the defendant would be liable for those acts." *Gayford* v. *Nicholls* (1854) 9 Exch. 702, C.L.R. 1066, 23 L.J. Exch. N.S. 205, 2 Weekl. Rep. 453.

[The Second Part of this Monograph, §§ 43-76, will deal with the circumstances under which employers are not exempt from liability for the torts of independent contractors, and will be published early in 1905.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Davies, J., Chambers.] EX PARTE SMITHERMAN. [June 23.

Criminal Code, s. 955 sub-s. 7. — Term of imprisonment where not otherwise directed, commencement of—County Court Judge's Criminal Court, Halifax—Jurisdiction as regards place—Not a limited one—Form of conviction—Statement in, of place where offence committed—Copy of sentence, requirements as to, under R.S. Can. c. 182, s. 42.

A motion for the discharge of a prisoner serving a term of imprisonment at Dorchester penitentiary was based upon alleged defects in the warrant of commitment signed by the clerk of the County Court Judge's Criminal Court at Halifax, returned by the warden of the penitentiary as his authority.

The defects relied upon were: (1.) That the warrant did not contain any allegation of the place where the prisoner committed the offence for which he was convicted and imprisoned. (2.) That no time was stated in the warrant of commitment from which the imprisonment was to run.

Held, 1, dismissing the motion for the prisoner's discharge. Under the provisions of the Criminal Code, s. 955 sub-s. 7, the term of imprisonment in pursuance of any sentence, unless otherwise directed in the sentence, commences on and from the day of the passing of the sentence, which day the commitment shewed to have been May 6, 1904.

2. The Court of the County Court Judge, exercising criminal jurisdiction under the provisions of the Code, part 54, for the speedy trial of indictable offences, being declared to be a court of record, and the jurisdiction of the Court being made by s. 640, as regards place, co-extensive with the province, such jurisdiction was not a limited one, and the rule stated by Paley (5th ed. p. 204), with regard to inferior Courts, would not necessarily apply.

3. Even if the place where the offence was committed was absent from the body of the record of conviction, it was covered by that named in the margin, viz., the County of Halifax.

Semble, that the "copy of the sentence" required to be delivered to the warden of the penitentiary (R.S.C. c. 182, s. 42.) need not contain all the averments essential to the validity of an indictment or conviction.

Held, that the document certified by the warden in the present case as his authority was sufficient.

Longley, Atty. Gen., for the Crown. *J.J. Power* for the prisoner.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.] RAY *v.* PORT ARTHUR. [June 6.

Appeal—Extension of time—Failure to give security on time.

After judgment was given, declaring the plaintiff entitled to the value of certain bonds, which the defendant had failed to deliver over, such value to be determined by a reference to the local master, and after a long interval, without anything having been done under the reference, it was transferred to the Master-in-Ordinary, and after the finding of the master, and appeals and cross appeals therefrom, the plaintiff for the first time claimed interest on such value from the date of the breach, and moved to have the judgment amended so as to include such interest, which was disallowed, whereupon the plaintiff gave notice of appeal to the Court of Appeal, but did not furnish the necessary security until after the time for appealing had elapsed, the court, under the circumstances, refused to extend the time for the allowance of the security, and the setting down of appeal.

J.R. Roaf, for the motion. *J.H. Moss*, contra.

From Falconbridge, C.J.K.B.] [June 29.

TABB *v.* GRAND TRUNK R.W. CO.

Railways — Negligence — Failure to fence — Contributory negligence — Infant.

A street ran to the north and to the south from the defendants' tracks in the city of Hamilton but did not cross them. With the tacit acquiescence of the defendants, however, foot passengers were in the habit of crossing the tracks from one part of the street to the other, and for convenience in doing so part of the fence between the tracks and each part of the street had been removed. A boy of nine, intending to cross from one part of the street to the other, walked through the opening in the fence to one of the tracks. While he was standing and playing upon this track, waiting for a train on another track to pass he was struck by a train running at a speed of about forty miles an hour and was killed.

Held, that there was a clear neglect of a statutory duty by the defendants in permitting the tracks to remain unfenced and at the same time running at such a high rate of speed; that it was for the jury to say whether upon all the facts the deceased had displayed such reasonable care as was to have been expected from one of his tender years, and that their verdict in favour of the child's father could not be interfered with. Judgment of FALCONBRIDGE, C.J., affirmed.

Riddell, K.C., and *Rose*, for the appellants. *D'Arcy Tate*, for the respondent.

From Drainage Referee.] [June 29.

TOWNSHIP OF CHATHAM *v.* TOWNSHIP OF DOVER.

Drainage—Cost of repairs—Varying apportionment.

Upon certain repairs to a drainage work becoming necessary one of the townships interested directed their engineer to make a report, and he assessed the cost against the different townships in the proportions in which the original cost had been assessed, no proceedings having been taken under ss. 69 or 72 of the Drainage Act to vary the assessment.

Held, that this was the proper mode of apportionment, and that, notwithstanding the wide wording of s. 71 of the Act, the Drainage Referee had no power to vary an apportionment made under such circumstances. Judgment of the Drainage Referee reversed.

Wilson, K.C., for appellants. *J.S. Fraser*, for respondents.

From Teetzel, J.] IN RE STRATHY WIRE FENCE CO. [June 29.

Company—Winding up—Discretion—Assignment for the benefit of creditors.

When an assignment for the benefit of its creditors has been made by a company, a creditor of the company is not entitled as of course to a winding up order. A discretion to grant or refuse the order exists notwithstanding the making of the assignment.

Wakefield Rattan Co. v. *Hamilton Whip Co.* (1893) 24 O.R. 107, and *Re Maple Leaf Dairy Co.* (1901) 2 O.L.R. 590, approved. *Re William Lamb Manufacturing Co.* (1900) 32 O.R. 243, considered.

Where an assignment for the benefit of its creditors had been made by a company, and its assets had been sold with the approval of the great majority of its creditors and shareholders, an application to wind up the company made by a creditor and shareholder who had taken part in all the proceedings, and had himself tried to purchase the assets, was refused. Judgment of TEETZEL, J., affirmed.

Aylesworth, K.C., *O'Neail* and *C.A. Moss*, for appellants. *Watson*, K.C., for respondents.

Full Court.] [June 30.

CORPORATION OF WATERLOO *v.* CORPORATION OF BERLIN.

Municipal corporations—Extending drain into adjoining municipality—Terms and conditions—Award of arbitrators—Municipal Act.

Appeal from the judgment of TEETZEL, J., setting aside the following award made by arbitrators under ss. 554, 555, of the Municipal Act, 3 Edw. VII. c. 19:—"That the town of Berlin may enter upon, take and use any land in the adjacent municipality of the township of Waterloo, in any way necessary . . . for . . . providing an outlet for the main outfall sewer of Berlin . . . into or through the said township of Waterloo . . . but subject always to the compensation to persons who

may suffer injury therefrom." Application had previously been made to the municipality of Waterloo to consent, but it had refused to do so. No by-law had ever been passed by the municipality of Berlin defining the lands to be taken or affected, or the route of the proposed sewer into, or through Waterloo:—

Held, Moss, C.J.O., and MACLENNAN, J.A., dissenting, that the award was bad, not only because there was in it a total lack of any terms or conditions imposed upon Berlin such as the statute contemplates; but also because there had been no proper commencement of the proceedings upon which to base an award. The whole scope and trend of the legislation is clearly based upon this, that as a first step, a by-law defining the course in the contiguous municipality of the proposed sewer, and the lands and roads to be affected, shall be passed by the municipality seeking the extension, and notice thereof given to the contiguous municipality. Waterloo should certainly have had an opportunity, before the award was made, of suggesting and having considered such reasonable terms and conditions as were necessary to protect the inhabitants of that township, but no such opportunity was given. Appeal dismissed.

Aylesworth, K.C., *C. A. Moss*, and *Clement*, K.C., for plaintiffs. *Du Vernet*, for defendants.

Osler, J.A.] TABB *v.* GRAND TRUNK R.W. Co. [July 27.

Court of appeal—Practice—Motion to extend time for allowance for security —Jurisdiction of single judge.

A Judge of the Court of Appeal has no jurisdiction to extend the time for the allowance of the security proposed to be given upon an appeal intended to be brought from the judgment of that Court to the Supreme Court, in a case where no such appeal can be brought without leave; although it be impossible to move for such leave, owing to the fact that neither Court sits in vacation. But the power of the full Court of Appeal or of the Supreme Court to grant leave, or to allow the appeal, under the provisions of 60 Vict. c. 24 (O.), does not depend upon a single Judge making such an order.

Rose, for the motion. *D'Arcy Tate*, contra.

HIGH COURT OF JUSTICE.

MacMahon, J.] RITCHIE *v.* CENTRAL ONTARIO R.W. Co. [March 7.

Railways—Receiver—Authority to construct portion of line—Objection of bondholders—Order for sale of road.

The Court will not grant to the receiver and manager of a railway, authority to proceed with the construction of a small portion of the incomplete part of the line railway, where it is questionable whether such con-

struction will be of any real benefit to the undertaking, and in the face of the opposition of those of the bondholders whose interest is largely in excess of those desiring it, and in the face of a judgment directing a sale of the road.

Walter Barwick, K.C., and *J. H. Moss*, for the motion. *T. P. Galt*, for Weddell, and *Blackstock*, contra.

Falconbridge, C.J., Street, J., Britton, J.] [May 9.

CROSSETT *v.* HAYCOCK.

Dower—Bar—Infant wife—Purchaser for value—Consideration—Married Woman's Real Estate Act.

A purchaser for value is one who obtains a property for a valuable, as distinguished from a merely good, consideration; and where there is no question of bona fides involved, the question of the adequacy of the consideration cannot be inquired into.

Where a son, who had left his father's farm, returned upon his father's request and promise of remuneration, and helped the father to work the farm, and remained with him working in that way upon a further request and promise of a conveyance, and the father afterwards married a girl under 15, and then conveyed a part of the farm to the son; the wife, who was still under 15, joining to bar her dower:—

Held, that the consideration, having become executed by the son having done his part, was a substantial and valuable consideration sufficient to make the son a purchaser for value, within the meaning of s. 5 of the Married Woman's Real Estate Act, R.S.O. 1897 c. 165; and therefore, the wife having been found to have known what she was doing when she executed the release of dower, was not entitled to dower out of the land conveyed to the son.

Judgment of MEREDITH, C.J.C.P., (6 O.L.R. 259,) affirmed.

Sinclair, for plaintiff. *Mahon*, for defendant.

Street, J.] RE FLEMING. [May 11

Will—Construction—Gift to members of class—Substitution—Ascertainment.

The testator directed that the residue of his estate should be divided equally among the children of his named brothers and sisters, share and share alike, "so that each nephew and niece shall receive the same amount; and in the event of any of my said nephews or nieces predeceasing me or dying before the time for distribution arrives, leaving children, . . that the share which would have gone to such nephew or niece, if alive, shall be distributed equally among his or her children." The will was dated the 5th May, 1902, and the testator died on the 9th of February, 1903. One of the testator's sisters named in his will, and who survived him, had a daughter who died in 1886, leaving a son.

Held, that this son was not entitled to a share of the residue. *Christopherson* v. *Naylor*, 1 Mer. 320, followed. *In re Potter's Trust*, L.R. 8 Eq. 52, not followed.

A nephew of the testator, a son of one of the named brothers, was living at the date of the will, but died before the testator, leaving a daughter, who was held entitled to a share.

Kilmer, for executors. *Harcourt*, for infant claimants. *G. F. Macdonnell*, for the nephews and nieces.

Falconbridge, C.J., Street, J., Britton, J.] [May 25

HOCKLEY *v.* GRAND TRUNK R.W. Co.

Staying proceedings—Postponing trial—New trial—Appeal to Supreme Court of Canada—Special circumstances.

The Court has power, in its discretion, to stay the second trial of an action pending an appeal to the Supreme Court of Canada from the order directing a second trial, but the discretion should only be exercised where special circumstances are shewn by the applicant.

No special circumstances being shewn, the decisions of the Master in Chambers, 7 O.L.R. 186, and of a Judge on appeal, refusing to stay the trial of these actions, were affirmed.

Riddell, K.C., for defendants. *McCullough*, for plaintiffs.

Falconbridge, C.J., Street, J., Britton, J.] [May 25.

SELLARS *v.* VILLAGE OF DUTTON.

Municipal corporations—Local boards of health—Action—Parties—Corporations.

Local boards of health constituted under ss. 48 and 49 of the Public Health Act, R.S.O. 1897 c. 248, are not corporations, and cannot be used by any corporate name. BRITTON, J., dissenting. Judgment of BOYD, C., affirmed.

McLaws and *Nesbitt*, for the plaintiff. *St. Clair Leitch*, for defendants.

Divisional Court.] BURTON *v.* LONDON STREET RAILWAY Co. [May 25.

Contract—Place of delivery—F.O.B.—Receipt of goods—Notice of price—Estoppel.

The plaintiffs, while expressly stipulating against any obligation to deliver, offered to sell to defendants 20 cars of Pittsburg slack at $1.25 at mine, which they would ship all rail, if defendants wished, and if plaintiffs would procure the necessary cars. The defendants telegraphed, giving an order at the price named, "F.O.B. mine," adding "Route it G.T.R., London." On the same day the plaintiff wrote accepting the order, and

stating that they would ship as soon as railroad equipment could be furnished, that an all rail rate of $2.10 to London had been quoted them, and they would ask the carriers to put the same through at once. Subsequently, and before any shipment had been made, it was arranged between plaintiffs and defendants that No. 8 Pittsburg slack could be substituted for Pittsburg slack, and at the same "delivered price." Invoices sent with the coal showed that the mine price stood at $1.65, but, notwithstanding, the defendants accepted the coal, and made no protest until making their first payment.

Held, that the place of delivery was to be at London at the price of $3.35; and, even if the defendants could claim to have been misled by the correspondence, they were estopped by dealing with the coal when the invoices were received from showing the contrary.

Betts, for appellants. *Dromgole*, for respondents.

Divisional Court.] HUNTER *v.* CORPORATION OF TORONTO. [May 25.

Municipal corporations—Local improvements—Apportionment of part of cost between the city and railway companies—Court of Revision—Appeal from to County Judge—Prohibition.

By s. 41 of the R.S.O. 1897 c. 226, and s. 75 of the R.S.O. 1897, c. 224, an appeal lies to the County Judge, not only from a decision of the Court of Revision, but also from the refusal to decide an appeal; and by s. 6 of 62 Vic. (2) c. 27, the appeal in such case may be at the instance of the Municipal Corporation or of the Assessment Commissioner or Assistant Assessment Commissioner

After a petition had been presented to a City Council for the construction, as a local improvement, of certain bridges over the tracks of certain railways where they crossed one of the streets, and asking that a proportionate part of the cost should be imposed on the railways and on the city generally, and after lengthened proceedure in which the validity of by-laws passed for the carrying out of the said work were questioned, a by-law was passed, purporting to be made in pursuance of a petition of ratepayers under s. 664 of the Municipal Act, whereby the matter of the assessment for the cost of the said work was referred to the City Engineer. Thereafter the City Engineer made his report, and a reference thereof was then made to the Court of Revision, whereupon such Court determined that such assessment was invalid and refused either to confirm it or to make any assessments under it.

Held, that the County Judge could probably entertain an appeal from the Court of Revision at the instance of the city and the Assistant Assessment Commissioner; and an application for prohibition was therefore refused.

H. M. Mowat, K.C., and *C. A. Moss*, for applicants. *Fullerton*, K.C., and *Chisholm*, for City of Toronto and Assessment Commissioner.

Divisional Court.] WATEROUS *v.* LIVINGSTONE. [May 25.

Mortgage—Collateral security for notes—Release of liability on notes—Discharge of mortgage—Rights of second mortgagee—Principal and surety.

A mortgage made by a wife to the plaintiffs, to which the husband was a party, but without joining in the covenants was given as collateral security for the payment of certain notes made by the husband and wife to secure the husband's indebtedness. Further liabilities were incurred by the husband and payments made on account, and subsequently the whole indebtedness was adjusted, the plaintiffs taking the notes of the husband alone maturing at several future dates, in substitution of the original notes which the plaintiffs agreed to cancel and deliver up.

Held, that the effect of what took place was to extinguish the liability on the notes secured by the mortgage, and therefore the mortgage itself given as collateral security therefor, that this enured to the benefit of the holders of a second mortgage also given by the husband and wife, and that the rights so acquired were not affected by an agreement subsequently entered into between the wife and the plaintiffs, that the plaintiff's mortgage should be considered as still subsisting.

Brewster, K.C., for the plaintiffs, appellants. *Hellmuth*, K.C. and *Dromgole*, for the defendants, respondents.

Divisional Court.] WILKES *v.* HOME LIFE INSURANCE CO. [May 26.

Divisional Court—Jurisdiction—Proof of contract—Lease—Company—Prohibition.

In an action for breach of contract brought in a Divisional Court, in order to give the judge jurisdiction to determine the action on the merits, the fact of the making of the contract, and its breach within the jurisdiction, must first be established.

After a valid lease of certain premises held by a company had been duly put an end to, and the key delivered up to the landlord, the company's agent, without any authority from the company, verbally agreed with the landlord for the renewal thereof, for a year at an increased rent, and received the key. The company, however, refused to agree to the lease, and the key was handed back to the landlord, and no actual occupation of the premises was ever taken by the company.

Held, that no contract was proved, of which a breach had arisen within the jurisdiction of the Court, and prohibition was therefore properly granted.

W. T. Henderson, for plaintiff. *R. W. Eyre*, for defendants.

Britton, J.] IN RE ATLAS LOAN CO. [May 30.

Company—Winding-up—Creditors—Shareholders contributing to reserve fund.

By s. 17, sub-s. 6, of the Loan Corporation Act, R.S.O. 1897 c. 205, "it shall be lawful for any such corporation to constitute and maintain a reserve fund out of the earnings or other income of the corporation not required for the present liabilities of the corporation."

By a by-law of the above named company it was provided that "a reserve fund shall be maintained consisting of the sums already not apart and forming such fund, together with such sums as may be contributed and added thereto, or as the directors shall, from time to time, deduct or refrain from the undivided profit, and together with the profits and increase of such sum." An amount equal to 26 per cent. of the amount of the capital stock of the company having been previously set apart as a reserve fund, the shareholders of the company were, in 1901, invited by the directors to make it up to 100 per cent. by contributions to the reserve fund. No further by-law was passed, and many of the shareholders paid to the company sums which were credited to the reserve fund, and upon which they received interest at dividend rates.

Held, that in the winding-up of the company the creditors who had so contributed were not entitled to rank as creditors upon the assets of the company in respect of the sums so contributed.

Ruling of the Master in Ordinary reversed.

Hellmuth, K.C.. for depositors. *Douglas*, K.C., and *Rowell*, K.C., for debenture holders. *J. A. Robinson*, for claimants. *Holman*, K.C., for liquidator.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J.] WHELAN *v.* PROVINCIAL MEDICAL BOARD. [July 29.

Medical Act R.S. (1900) c. 103—Registration under—Provincial Medical Board—Power to require examination as condition of registration.

The Medical Act, R.S. (1900) c. 103, after providing for the appointment of a board to be known as the Provincial Medical Board, confers upon the Board the following among other powers, viz. (sec. 12, sub-s. b.) to "regulate the study of medicine by making rules not inconsistent with this chapter in respect to preliminary qualifications, the course of study to be followed, professional examinations, and the nature of the evidence to be produced before the Board with respect thereto."

Plaintiff who held a diploma from the University of Baltimore, applied to the Provincial Medical Board for registration entitling him to practice the profession of medicine in the province of Nova Scotia. The institution from which plaintiff held his diploma, not being one recognized by the Board, the Board declined unless plaintiff passed a prescribed examination. Plaintiff declined, and applied for a writ of mandamus to compel registration.

Held, that the words of s. 12, sub-s. b. have reference not only to students of medicine in the province of Nova Scotia, but to the course of study pursued by those who, under diplomas obtained abroad, seek registration at the hands of the Board, and that the term "professional examination" extends to the examination called for in the case of a party like the plaintiff, holding a diploma from a college not recognized by the Board.

Held, further, that plaintiff, seeking the benefit of registration, and having regard to the objects of the statute, it was not unreasonable that he should be required to submit to the conditions which the statute imposed, the most material of which was the passing of an examination, which, in a case like the present, the Board was entitled to exact.

O'Connor, for plaintiff. *Chisholm*, for defendant.

Province of Manitoba.

KING'S BENCH.

Richards, J.] GUAY v. CANADIAN NORTHERN R. W. Co. [June 1.

Railway—Negligence—Passenger alighting from train where no platform—Obligation to inform conductor of physical condition.

The plaintiff's claim was for damages for an injury received in jumping from the step of a passenger car of the defendants' railway to the ground, 36 inches below, there being no platform at the point. Accompanied by her husband and brother-in-law, she was travelling on a train going west from Winnipeg to Eustace, their destination. They were in the rear one of two passenger cars in front of which was a baggage car. When the train stopped the baggage car was opposite the short platform, but the rear passenger car was wholly behind it, and it was doubtful whether the front passenger car was not also wholly behind it. Plaintiff and her companions went to the front platform of the car, her companions jumped to the ground, which sloped slightly downwards from the track, and was slippery with snow or ice, and the conductor in charge of the train, who was standing on the ground, put up his hand to assist the plaintiff to alight. She took his hand and jumped from the lowest step to the ground. The train began to move off either as she jumped, or just before, or just after. The plaintiff was at the time two months advanced in pregnancy, and immediately after jumping she felt great pain, which lasted about fifteen minutes. During the next six days she was very unwell, and at the end of that period had a miscarriage, from which she suffered great weakness for a considerable time. About nine months after she had another miscarriage after seven months of pregnancy, and at the time of the trial was not as strong and well as before the trip to Eustace:—

Held, that having a platform at the station, the defendants were bound to bring the passenger cars up to it to permit the plaintiff to step down on it in alighting, or to provide some other safe means for passengers to alight.

There was evidence that the company's rule was that, after discharging what had to be put out of the baggage car, the train should be pulled up and stopped again when the passenger cars reached the platform. This rule was not usually complied with, and the plaintiff was not told of the rule, or asked to wait. The conductor's act was an invitation to get off when she did; and, not knowing that there was a platform at the station, she naturally supposed that her only way of alighting was to act on that invitation. *Robson* v. *N.E. Ry. Co.* 2 Q.B.D. 85, followed. *Lortie* v. *Quebec Central Railway Co.*, 22 S.C.R. 336, and *Currie* v. *C.P.R.* 17 O.R. 65, distinguished.

Held, 1. Plaintiff was not bound to disclose her pregnancy to the conductor, so that he might know that special care was necessary in aiding her to alight. *McGuiney* v. *C.P.R.*, 7 M.R. 151, distinguished on the ground that it was a weak and diseased limb the plaintiff in that case had, and on other grounds.

2. That the illness and first miscarriage and subsequent weakness suffered by the plaintiff had been directly caused by her being obliged to jump down as she did, and that she was entitled to recover damages therefor, but that the defendants were not responsible for the second miscarriage or the weakness that followed it.

Verdict for $200 damages, with certificate for King's Bench costs, and to prevent set-off of costs.

Dubuc, for plaintiffs. *Laird*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court] GUILBAULT *v.* BROTHIER. [April 29.

Action involving indecent matter—Striking out—Objectionable causes of action—Form of judgment—Dismissal of action—Res judicata—Practice.

On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by plaintiff while engaged in

prostitution, and that the action involved the taking on an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that "this Court doth of its own motion, and without adjudicating as between the plaintiff and defendants on the matter in dispute between them, order that this action be and the same is hereby dismissed out of this Court with costs."

Held, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim; and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection.

Judgment of IRVING, J., set aside.

Bird and *Brydone-Jack*, for appellant. *Martin*, K.C., for respondents.

North-West Territories.

SUPREME COURT.

Scott, J.] LEADLEY *v.* GAETZ. [Nov. 21, 1903.

Discovery of documents—Non compliance—Application to dismiss action—Failure to endorse notice on order—Rule 330.

Rule 330 requires that on every judgment or order requiring any person to do an act there shall be endorsed a memorandum in the words or to the effect following, namely, "if you the within named A. B. neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order.)"

Held, that this rule applies to orders for discovery of documents and where a copy of such an order served was not endorsed as provided, an application to dismiss the action for non compliance with the order was refused.

Crawford, for plaintiffs. *Beck*, K.C., for defendant.

Scott, J.] EGGLESTON *v.* C. P. R. Co. [Jan. 28.

Discovery—Officer of corporation—Railway company—Station agent—Section foreman—Chief clerk in office of general superintendent.

A station agent in the employment of a railway company is an officer thereof within the meaning of Rule 201 and may be examined for discovery under the provisions of that rule.

But a section foreman is not such an officer nor is the chief clerk in the office of a general superintendent.

McDonald, for plaintiff. *Newell*, for defendant.