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LIABILITY OF A MASTER, APART FROM CONTRACT, FOR TORTIOUS ACTS DONE BY A SERVANT WHILE IN CONTROL OF VEHICLES AND HORSES.

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1. Introductory.—In the present article it is proposed to review the decisions which bear upon the extent of a master's liability for injuries which persons to whom he does not owe any special duty arising out of contract sustain by reason of the tortious acts of servants employed to perform work by means of, or with reference to, vehicles or riding-horses. The liability of common carriers and other bailees will not be considered.

The cases thus chosen for discussion are particularly interesting and important, not only because they carry us back to a very early period in the history of the general principle, Respondeat superior, but also because the element of a local deviation which many of them involve has given rise to some extremely perplexing and difficult questions which have produced a notable conflict of judicial opinion.

2. Liability predicated in the ground of the personal fault of the master.—In cases where a vehicle or riding horse used by a servant for the purpose of performing his appointed work inflicts injury upon a third person, it is clear that, irrespective of whether the evidence is or is not such as to shew a right of recovery against the master under the principle, Respondeat superior, liability may be imputed to him, if it appears that he himself was guilty of a breach of duty in respect of the aggrieved party, and that his default was a proximate cause of the injury complained of. The cases which illustrate the situation are divisible into the following classes:

(1) Those in which the injury was caused by an incompetent servant, of whose incompetency the master had notice, either actual or constructive, before the injury was inflicted.[1] In

[1]In *Wanstall* v. *Pooley* (Q.B. 1841) the substance of which is stated in a note to 6 Cl. & Fin. 910, it was held that the employment of a tipsy man by the defendant's agent was an act of negligence, rendering the defendant liable for injuries caused by the man's leaving a truck on the roadway.

In *McGahie* v. *McClennen* (1903) 86 App. Div. 263, N.Y. Supp. 692, where the evidence justified the inferences that the driver of a team of horses negligently lost control of them, or that he was not competent to drive them, and that the owner was aware of that fact, a finding that the owner was negligent was held to be warrantable.

In *D. H. Ewing & Sons* v. *Callahan* (1907: Ky.) 105 S.W. 978, evidence that the servant was about 18 years of age, had been in defendant's employ but a few months, was without previous experience in street driving, and usually drove recklessly, was sufficient to warrant an instruction which predicated liability on the master's part if the servant was incompetent, and known by the master, either actually or constructively, to be so.

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

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

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

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

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

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

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

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

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

inflicted the injury was neither a function with which the servant was entrusted by the terms of the contract of hiring, nor a function which, either on the ground of an emergency or for some other special reason, he was impliedly authorized to assume at the time when the injury was inflicted.[1]

[1] In *Beard* v. *London Gen. Omnibus Co.* (1900) 2 Q.B. (C.A.) 530, 83 L.T.N.S. 362, an omnibus, belonging to the defendant company, was left by its regular driver in charge of the conductor at the end of one of its journeys. The conductor, for the purpose it was alleged of turning the omnibus round, in readiness to start on its return journey, drove it through an adjoining street, and in so doing negligently ran down and injured the plaintiff. The plaintiff brought an action against the proprietors of the omnibus, and at the trial gave no evidence as to the conductor's authority to drive, or as to the existence of an emergency. *Held*, by A. L. Smith and Romer, L.JJ., that the plaintiff had not discharged himself from the burden cast upon him of shewing that the injury was due to the negligence of a servant of the defendants acting within the scope of his employment, and that the defendants were entitled to judgment. *Held*, by Vaughan Williams, L.J., that in general, if, in the absence of the driver of an omnibus, an accident occurs while the conductor is driving, it would be for the proprietor to shew that the act was unauthorized, but that the facts of the particular case negatived the giving of authority, and that the defendants were entitled to retain the judgment. Smith, L.J., said: "I agree that on a plaintiff giving evidence that the driver of an omnibus of the defendants was guilty of negilgence, there would be a prima facie case that the omnibus was being driven by an authorized servant of the company within the scope of his employment. But that is not this case, for it was expressly opened to the jury as a case in which the omnibus was not being driven by the driver who was employed to drive it, but by the conductor. When a case is so opened that negatives the presumption that the omnibus was being driven by the authorized agent of the company, because prima facie it is not the duty of the conductor to drive any more than it is the duty of the driver to take fares. My brother Romer, in the course of the argument, put the illustration of an omnibus being driven by a stranger to the defendants. In such a case it would be impossible to say that the proof that the omnibus was being driven by a stranger would raise any case against the company. The plaintiff must in such a case go on to shew that the stranger was driving with the consent or approval of the company, or on such emergency that their consent must be implied. There was no evidence on either of these points as regards the conductor; and therefore Lawrence, J., came to the conclusion—and, in my opinion, rightly—that the plaintiff had not made out a prima facie case." Romer, L.J., said: "I agree that the plaintiff's appeal fails. If one sees in the streets of London an omnibus admittedly belonging to the defendant company driven in the

(2) The other situation occurs where it is shown that the

ordinary way by a person who appears to be a driver, the presumption is that he is authorized by the company. That presumption may be removed. In this case it was rebutted by the plaintiff's evidence, for it proved that the de facto driver was not the person authorized to drive, but a person authorized and employed to act as conductor. In such a case the onus of shewing some special authority given to the conductor to do the act which he did lies upon the plaintiff. No such authority was shewn, and no case of necessity to do the acts which the conductor did was suggested, nor do the facts lead to any presumption that a case of necessity had arisen." Vaughan Williams, L.J., said: "I think this case is somewhat on the border line. I agree, that, if on the plaintiff's evidence it was clear that the conductor was doing something outside his functions, the judgment was rightly entered for the defendants; but I do not think one has any right to assume, without any evidence being given as to what are the functions of a driver and a conductor, that it is necessarily beyond the functions of a conductor, to take charge of an omnibus in the absence of the driver. It seems to me that the company send out their omnibus in charge of a driver and a conductor, and though they have different functions to perform, it is not inconsistent with that fact that it may be within the scope of the authority of one of them temporarily to perform the duties of the other in his absence. If the evidence of the plaintiff had shewn that one journey had come to an end and another commenced, and that between these points of time the conductor had turned the omnibus round, I should have thought that there was a case for the jury, and that it would be for the defendants to shew that the act was outside the scope of the authority of the conductor to take charge during the absence of the driver. I have, however, looked through the evidence, and I find that the omnibus was not merely being turned round, but was in a side street, and was coming downhill at the rate of eight miles an hour; and it does seem on the evidence as if the conductor was not merely performing some temporary duty during the absence of the driver, and that the driver may possibly have done that which he had no right to do—that is, delegate his authority to the conductor. I think very strongly that it would be unfortunate that it should go forth to the public that, whenever a conductor is found exercising some function of the driver, no case can be made against the omnibus proprietor unless the plaintiff is in a position to call evidence to account for the temporary absence of the driver. It seems to me to be a sounder view that, where a driver and a conductor are sent out in charge of an omnibus, and complaint is made of some act done by the conductor, it should be left to the jury to say whether that act so complained of was within the authority given to the conductor. It is all very well to say that one knows that the authority given to a driver is to drive, and that given to the conductor is to conduct, but it is incorrect that one is entitled to deal with the case on that hypothesis. I cannot myself say whether at

injury was sustained while the complainant was riding upon

the end of one journey and the beginning of the next the conductor has any duty with reference to the horses, or what that duty, if any, may be. I have considered it right to express by view that, in the absence of the driver when the omnibus is out taking passengers, primâ facie it is the duty of the conductor to take charge of the omnibus in the absence of the driver, and, if what he does is apparently consistent with that duty, it would be for the defendants to prove that in fact what he was doing was beyond his functions."

In *Wilson* v. *Owens* (1885) 16 L.R. Ir. 225 (decision affirmed by Court of Appeal), the defendant was the proprietor of a hotel and shop in the town of C., and kept a pony and chaise for his own personal use, They were not used for the purpose of the defendant's business. The accident in question occurred during a temporary absence of the defendant, who had left a servant, E., in charge of the shop only, with the authority to sell goods, and generally to see that things went right in his absence. The defendant gave E. no authority to drive. Another servant named M. was in charge of the yard and it was his duty to drive when the defendant required. The housekeeper had charge of the house. While the defendant was so absent, one of his relatives, Q., who admittedly had no authority to act as his agent, called at the house, and, when leaving, was by his request driven by E. in the pony chaise to the neighbouring railway station. When E. was so driving the pony and chaise the accident took place. *Held*, that there was no evidence proper to be submitted to the jury that E. was at the time of the accident acting in the course of his employment as the defendant's servant. Andrews, J., said: "In considering whether there was any evidence fit to go to the jury upon the question above referred to, the whole of the evidence affecting it must be considered. Egan's evidence, on cross-examination, that he was left in charge when the defendant was away, and that he was there in the defendant's place when he was away (which are probably the strongest statements in the entire evidence in the plaintiff's favour), cannot, as was conceded, be taken without some qualification, and must be taken in connection with his evidence that he never drove the defendant's trap; with the admitted absence of any express authority to him from the defendant to drive it; with the evidence of Thomas Quinn, that it was he who ordered out the trap, and said that Egan could drive (which order on the defendant's uncontradicted evidence, Quinn had no authority to give); with the undisputed fact that the person whose business it was to drive the pony was M'Nally, and not Egan; and with the defendant's evidence that Egan was the man he looked to to see that, when he was away, things would go on as before."

In *Martin* v. *Ward* (1887) 14 Sc. Sess. Cas. 4th Ser. 814, a salesman in a shop having borrowed a van from a friend who came with it to drive it, placed on it, with his master's knowledge and consent, certain articles which he had been directed to remove to another shop. The driver having

the vehicle or horse in pursuance of an invitation given by the

become intoxicated, the salesman took the reins himself, and by his carelessness knocked down two children who were crossing a street. *Held* (diss., Lord Craighill), that the shopkeeper was not responsible for the injury, because the salesman was acting outside his duty in undertaking to drive the van. Lord Rutherford Clark said: "If Ward, senior, had hired a van and the services of a vanman to remove bottles, and if in the course of doing so the vanman had run down a person on the street and injured him, I do not think that Ward would have been responsible. He would not have been in any way to blame for the accident. I think that was his true position. He allowed his son to take the use of the van when under the charge of the owner of the van. In other words, he allowed his son to employ Newton & Blair to remove the bottles in their van. He never understood or agreed that his son was to drive. . . . No doubt Ward, junior, came in the end to be the driver, and was the driver at the time of the accident. But the reason was that the person who ought to have been driving became drunk. In consequence Ward junior seems to have thought it best to take the reins, and perhaps he was right enough to do so. But I do not think that makes Ward senior liable for the driving of the van. The son is the father's servant, but only in the shop. He was not his father's servant when driving the van, for he had no authority from his father to drive it. He was then acting for Newton in consequence of Newton's incapacity:" Lord Craighill thought that the defendant should be held liable on the ground that he had knowledge of the employment of the van on his business, and had left to the son's discretion the arrangements as to the removal. There seems to be much plausibility in this view of the situation. It is possible that the defendant might also have been treated as liable on the ground that, under the circumstances, it was in a reasonable sense necessary that some one should take the place of the intoxicated driver, and that his son, acting in his interests and for the protection of his property, was impliedly authorized to engage a substitute or to become the required substitute himself. But this aspect of the evidence was not brought to the attention of the Court.

In *Reaume* v. *Newcomb* (1900) 124 Mich. 137, 82 N.W. 137, defendants, dry-goods merchants, employed boys to drive their delivery wagons; the horses and wagons being in the care of the owner of a boarding stable. The employment of the boys lasted only from the time they received their horses and wagons at the stable until they delivered them back again in the possession of the stable keeper. One of the boys, after he had completed his deliveries, rode one of the horses, at the instance of the stable keeper, for the purpose of exercising him, and, while so riding the horse, collided with plaintiff on his bicycle. *Held*, that, as the boy was not in the employ of defendants at the time of the accident, they were not liable. The Court said: "Pierce alone was responsible for the boy's act in riding the horse. Defendants did not authorize or permit him to employ the drivers for any such purpose. Hundreds and thousands of men are em-

servant, and that such an invitation was not within the scope

ployed to work a portion of the day for one employer, and are at liberty to work the balance of the time for others or for themselves. If this boy had been permitted by Pierce to take the horse and wagon on business for himself or for Pierce outside of the delivery hours, defendants would not be liable for any negligence of the boy, because it would be without the scope of the authority of either Pierce or Wescott. That the act to be done by the boy might possibly result, or was intended to result, in benefit to defendants, is not the test of authority. The act must be within the scope of his employment, in order to render his employer liable."

In *Peterson* v. *Hubbell* (1896) 12 App. Div. 372, 42 N.Y. Supp. 554, the regular driver of an express wagon not being present at a time when that wagon was to be driven to a railway station, a clerk in the office of the express company undertook to drive the wagon to its destination, and in so doing ran over the plaintiff. The clerk had never been regularly employed as driver, but had, on numerous occasions, driven the company's wagons on regular trips for the delivery of freight at the station. *Held*, that in the absence of any prohibitive rule of the company, or of any proof upon the part of the defendant that its officers and agents were ignorant of such action on the part of the clerk, there was sufficient evidence of the implied authority of the clerk to drive the wagon to justify the court in refusing to dismiss the complaint upon the ground that the person driving the wagon was not a servant of the company acting within the scope of his authority.

In *McEnroe* v. *Taylor* (1907) 107 N.Y. Supp. 565, 56 Misc. Rep. 680, where plaintiff was injured by defendant's automobile, operated by defendant's chauffeur, defendant testified that the chauffeur was acting without his authority, and against his express commands. *Held*, that the failure of defendant, at the time he was served with the summons and complaint, to deny that the chauffeur was acting at the time of the accident as his employé and in the performance of duties for him, could not be considerd as proof that the agent had authority. An instruction to the opposite effect was held to be erroneous.

In *Brenner* v. *Ford* (1906) 116 La. 500, 40 So. 894, it was held that the plaintiff could not recover for the death of a minor child who had been run over by a vehicle which a man employed by the defendant, not as a driver, but as a groom and stableman, had, in disobedience of positive order given at the time when he was hired, and reiterated on several subsequent occasions, taken out for his own pleasure. The court thus discussed the respective contentions of the parties: "The defendant denies that this act of the negro was in disobedience of orders or instructions which were given to him as to the performance of duties which had devolved upon him in the discharge of his existing duties which left his acts to be tested and passed on as if such orders had not been given. He urges that the attempt of the plaintiffs to place matters on that footing is without justification and warrant; that the orders and instructions

of his authority.[2]

not to drive the horse was one of the original limitations which had been placed by himself upon the authority which he conferred upon the servant, and one of the conditions of his employment; that by disobeying such instructions, he could not extend and bring inside the sphere of his duties the thing which was prohibited, and which marked the scope and fixed the extent of the servant's employment. Defendant insists that when the terms of the employment had been fixed, and by the same Weeden had been expressly prohibited (*ab initio*) from driving the horse, it could not be pretended, (when he undertook afterwards to drive her), that he was doing so on the master's business, or for his interest. On the contrary, it must be conclusively presumed that he was driving the horse for his own pleasure. Plaintiff's claim that the defendant having told the servant not to drive the horse, and then told him to exercise her without limiting him to any specific method of exercising her only by leading or riding, necessarily left the servant under the belief that he was to exercise her by driving as the only appropriate or expedient way in which she could be exercised at all or the only way the horse was accustomed to be used. We do not think the testimony justifies the taking of this position. Weeden was prohibited from the beginning from driving the animal, and that prohibition was never removed. On the contrary it was continuously reiterated. Weeden could not possibly have made any mistake on that subject. Even had he made a mistake, it was one not justified by the facts." It is not apparent why the defendant should have taken his stand upon the disputable ground of the servant's scope of authority, when he might, in view of the facts, have resorted to the defence that the servant had taken the vehicle out for his own pleasure. See § 10, *post*.

In *Dalrymple* v. *McGill* (1813) Hume's Sc. Sess. Cas. 387, the master was held not to be liable for the act of a servant who, without orders, took a horse of his neighbour, and rode it so hard, that the horse was permanently injured.

[2]In *Bowler* v. *O'Connell* (1894) 27 L.R.A. 173, 44 Am. St. Rep. 359, 162 Mass 319, 38 N.E. 498, the defendants were held not to be liable for injuries resulting to a child from the kick of a horse on which he had been invited to ride by one a teamster who was leading it to a water-tub. The court said: "There was nothing to shew that it was any part of their business, or that it was their habit or custom, to furnish horses or colts to ride, or to allow boys to ride upon them, or that they in any way ever authorized or permitted Frank to do this. Under this state of things, we are unable to see how the invitation by Frank to the plaintiff to ride upon the colt, although given while Frank was engaged in his employment, can be considered to be an act done in the course of such employment, or for the purpose of doing the business of his masters. The true test of liability on the part of the defendants is this. Was the invitation given in the course of doing their work, or for the purpose of

4. Injury inflicted on a journey undertaken in the course of the servant's duties, and prosecuted without any deviation.—Where it appears that the vehicle or horse which caused the injury in question was owned by the defendant, that its management was a

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accomplishing it? Was this act done for the purpose, or as a means, of doing what Frank was employed to do? If not, then in respect to that act he was not in the course of the defendants' business. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master. And under this rule, in view of the testimony, the defendants were not responsible for the consequences of Frank's invitation to the plaintiff to ride upon the colt.

In *Driscoll* v. *Scanlon* (1896) 165 Mass. 348, 43 N.E. 100, it was held that the driver of a dump cart was not within the scope of his employment in inviting a boy nine years old to ride upon the cart, either for pleasure or to drive his horse, so as to make his employer liable for injuries to the boy by falling off and being run over while the driver was asleep. The court said: "It was argued that we might look only to the later moment when the plaintiff was under the wheels, that it did not matter how he got there, and that the defendant was liable for running over the plaintiff, if he would have been in case his cart had run over a third person when his driver was asleep. But it does make all the difference in the world how the plaintiff got under the wheels. The defendant was not bound to expect or look out for people falling from his cart, where they had no business to be, and persons who got into it took the risk of what might happen as against him. The driver's slumber was so intimately connected with the unauthorized act that it is impossible to separate the two. The driver would not have been asleep and the plaintiff would not have fallen but for the driver's unauthorized act, and if the plaintiff had not been driving. The plaintiff does not stand in the same position as if he had been run over when crossing the road."

In *Marquis* v. *Robidoux* (1900) Rap. Jud. Que. 19 C.S. 361, a boy, 10 years old, after having been ejected, with other boys, from defendant's delivery wagon, secretly re-entered the wagon without the driver's knowledge, and, after having been observed by him, had been tacitly permitted to remain because he was unwilling to leave him in the public road far from his father's home. The boy was injured by a collision between the wagon and a railroad train without any negligence on the part of the driver. *Held*, that the defendant was not liable for this injury as the driver was not within the scope of his duties in permitting the boy to remain in the wagon.

For other cases of a similar type in which the master's liability was denied, see *Schulwitz* v. *Delta Lumber Co.* (1901) 126 Mich. 559, 85 N.W. 1075; *Mahler* v. *Stott* (1902) 129 Mich. 614, 89 N.W. 340; *Foster-Herbert Cut Stone Co.* v. *Pugh* (1906), 91 S.W. 199, 115 Tenn. 688.

function of the tortfeasor under the terms of his contract, and that, at the time when the injury was inflicted, he was using it at a place to which he was authorized to take it, his negligence will or will not be imputable to his master, according as the particular act from which the injury resulted was one which was incidental to his appointed work, or one which was done with a view to the attainment of some personal advantage or to the gratification of some personal desire or feeling.

For cases illustrating this rule see the following notes.

In the Nisi Prius case, *Lamb* v. *Palk* (1840) 9 C. & P. 629 (E.C.L.R. vol. 38), a van was standing at the door of A., from which A.'s goods were unloading, and A.'s gig was standing behind the van: B.'s coachman, who was driving B.'s carriage, came up, and, as there was not room for the carriage to pass, the coachman got off his box, and laid hold of the van horse's head: this caused the van to move, with the result that a packing-case fell out of the van upon the shafts of the gig, and broke them. It was ruled by Gurney, B., after consultation with some other members of the Court of Exchequer, that B. was not liable for this, as the coachman was not acting in the employ of B. at the time the accident occurred. In *Page* v. *Defries* (1866), 7B. & S. 137, the court without giving any specific reason overruled this decision.

In *Schaefer* v. *Osterbrink* (1886) 67 Wis. 495. it was held to be competent for the plaintiff to prove that, prior to the accident, the tortfeasor had been in the habit of driving his team to church and elsewhere, and also to show the extent and character of the driving, as bearing upon the nature of his service and the scope of his authority.

In *Collard* v. *Beach* (1903) 81 App. Div. 582, 81 N.Y. Supp. 619, where the plaintiff's horse was frightened by the management of an automobile owned by the defendant, it appeared that immediately before the accident the defendant, accompanied by his son and his coachman, had gone to the railway station in the automobile and had there left it; that, at the time when the accident occurred, the defendant's son and coachman were occupying it; and that the son was guiding and controlling it. It was a disputed question whether the defendant on leaving the machine had committed the custody thereof to his son or to his coachman. *Held*, that the following instruction was a proper one: "If the jury find either that the defendant left the automobile in charge of his son to take it home, or in charge of his son and coachman together to take it home, or in charge of the coachman alone, and the coachman neglected his duty in that regard and allowed the son to run the machine, and by the negligence of the son the accident occurred, without contributory negligence on the plaintiff's part, then in either case the defendant is responsible.

In *Louisville Water Co.* v. *Phillips* (1905) 89 S.W. 700, 28 Ky. L. Rep. 557 (No. off. rep.) defendant merely attempted to disprove the contention

This criterion has been applied under the following circumstances:—where the plaintiff's injury was caused by the faulty driving of the defendant's vehicle;[2] where

that decedant was killed by its servants, without giving any evidence to show that, if the killing was done by its servants, it was not done when engaged in its business, and plaintiff proved that defendants' inspector was the person who drove over decedant, and that the vehicle was the vehicle of defendant, and it was shewn that the inspector's vehicle was never used, except in the service of the company. *Held*, that a prima facie case authorizing a recovery was established, and that an instruction that, if decedant was killed by the inspector, who was pursuing his own ends exclusively, defendant was not responsible, was properly refused.

[2]In *Jones* v. *Hart* (1699) 2 Salk, 441 (apparently the same as an anonymous case reported in 1 Ld. Raym. 739), Holt, C.J., thus stated the effect of two earlier decisions which were not cited by name: "The servant of A. with his cart ran against another cart, wherein was a pipe or sack, and overturned the cart, and spoiled the sack. An action lay against A. So, where a carter's servant run his cart over a boy; it was held, the boy should have his action against the master, for the damage he sustained by his negligence."

In *Young* v. *South Boston Ice Co.* (1890) 150 Mass. 527, where the driver of a delivery wagon passed over to the wrong side of the highway for the purpose of passing a stationary vehicle and ran into the plaintiff's carriage, the trial judge refused to instruct the jury, as requested by the defendant, that if there was sufficient space to drive said ice-cart to the right and avoid a collision, and it was not necessary for the defendant's servant to drive said ice-cart across said middle of the travelled part of the highway in order to transact his master's business, such act of the servant, if the injury complained of was thereby inflicted, was not one for which the defendant could be held responsible. *Held*, that the defendant had no ground of exception. The court said: "If all the facts were proved according to the assumption in the defendant's request, we think they were not necessarily inconsistent with the plaintiff's theory. Upon the question raised, the jury might consider all the evidence, and it was competent for them to find that, at the time of the collision, the driver drove against the plaintiff's carriage in trying to do the defendant's business, and that he was acting within the general scope of his employment. The request for instructions was rightly refused."

In *Wolfe* v. *Mersereau* (1855) 4 Duer, 473, the ground upon which a motion for a new trial was made was that the trial judge had given a charge to the effect "that, if there was no negligence on the part of the plaintiff in regard to his wagon being where it was, and, if the defendants' servant ran against that wagon to save himself from greater peril, the defendant was liable, even if the act was a prudent one in order to stop the horses." The court said: "Although the instructive impulse of self-pre-

a coachman, finding that his master's carriage was en-

servation prompted the act as security against a greater personal peril, it became, at the moment, an act of duty, if not of necessity. But the act was made necessary by previous negligence for which the master is liable, and which may properly be regarded as the cause of the injury."

The case of *Michel* v. *Alstree* (1677) 2 Lev. 172, 3 Kel. 650, Ventr. 295, where the plaintiff was injured by a pair of intractable horses which the defendant's servant was training in a city square, may possibly be cited as an authority relevant to the situation specified in the text. But the defendant there seems to have been held liable on the ground of his personal negligence in ordering the servant to take the animals to such a place for the purpose of breaking them in, rather than on the ground of the principle, Respondeat Superior. See the comments of the court in *Parsons* v. *Winchell* (1850) 5 Cust. 592.

In *Barlow* v. *Emmert* (1872) 10 Kan. 358, a declaration which averred in substance that the owners of a stage-coach started the horses at a gallop, and that the driver cracked his whip very loud, and often, at the same "yelling, whooping, screaming, and swearing," and so frightened the plaintiff's team that it ran away, was held to state a good cause of action.

For cases in which the liability of the employé was affirmed, but which did not involve any special point that calls for particular mention. (Unless otherwise stated the injury was one caused by the negligence of the driver of a horse-drawn vehicle). See the following:

Brucker v. *Fromont* (1790) 6 T.R. 659; *North* v. *Smith* (1861) 10 C.B. N.S. 572, 4 L.T.N.S. 407 (groom applied spur to a horse and caused it to kick so as to injure plaintiff); *Springett* v. *Ball* (1865) 4 Fost. & T. 472; *Pike* v. *London Gen. Omnibus Co.* (1891) 8 Times L.R. 164 (doctrine of imputed negligence not a bar to the action); *Perkins* v. *Stead* (1906) 23 Times L.R. 433 (automobile); *Robinson* v. *Huber* (1906) 63 Atl. 873 (rule laid down in charge to jury); *Livingston* v. *Bauchens* (1889) 34 Ill. App. 544 (servant was permitted to use master's horse and carriage in collecting rents); *Dinsmoor* v. *Wolber* (1899) 85 Ill. App. 152; *Brudi* v. *Luhrman* (1901) Ind. App. 59 N.E. 409; *Johnson* v. *Small* (1844) 5 B. Mon. (Ky.) 25; *Ewing* v. *Callahan* (1907 Ky.) 105 S.W. 387, 973; *Shea* v. *Reems* (1884) 36 La Ann. 966 (peddler driving to his employer's store to get goods); *Loyacano* v. *Jurgens* (1896) 50 La. Ann. 441, 23 So. 717; *Costa* v. *Yoachim* (1900) 28 So. 992, 104 La 170; *Parsons* v. *Winchell* (1850) 5 Cush. 592, 52 Am. Dec. 745; *Kimball* v. *Cushman* (1869) 103 Mass. 194, 4 Am. Rep. 528; *Huff* v. *Ford* (1878) 126 Mass. 24, 30 Am. Rep. 645; *Phelps* v. *Wait* (1864) 30 N.Y. 78; *Smith* v. *Consumers' Ice Co.* (1885) 52 N.Y. Super. Ct. 430; *Clarke* v. *Koehler* (1887) 46 Hun., 536; *Stewart* v. *Baruch* (1905) 103 App. Div. 577, 93 N.Y. Supp. 161 (plaintiff run over by automobile); *Pickens* v. *Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55; *Eckert* v. *St. Louis Transfer Co.* (1876) 2 Mo. App. 36; *Rochester* v. *Bull* (1907) 58 S.E. 766, 78 S.C. 249 (plain-

tangled with that of the plaintiff, struck the plaintiff's horse

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tiff's horse was frightened by automobile and ran away); *Anderson* v. *Brownlee* (1822) 1 Sc. Sess. Cas. 1st Ser. 442 [474]; *Fraser* v. *Dunlop* (1822), 1 Sc. Sess. Cas. 1st Ser. 243 [258]; *Baird* v. *Hamilton* (1826) 4 Sc. Sess. Cas. 1st Ser. 797 (790). *McLaren* v. *Rae*, (1827) 4 Mur. (Sc.) 381.

For cases in which the rule of Respondeat Superior was assumed, and the right of recovery turned upon the question of negligence vel non, see *Crofts* v. *Waterhouse* (1825) 3 Bing. 319, 11 Moore, 133; *North* v. *Smith* (1861) 4 L.T. 407; *Aston* v. *Heaven* (1797) 2 Exp. 533; *Christie* v. *Griggs* (1809) 2 Camp. 79; *Jackson* v. *Tollett* (1817) 2 Stark. 37; *Christian* v. *Irwin* (1883) 125 Ill. 619; *Cooke Brewing Co.* v. *Ryan* (1906) 79 N.E. 132, 223, Ill. 382, affirming 125 Ill. App. 597; *Eaton* v. *Crips* (1895), 62 N.W. 687; *Mattingly* v. *Montgomery* (1907) 68 Atl. 205, 106, Md. 461; *Shaw* v. *Hollenbach* (1900): Ky.), 55 S.W. 686; *American Strawboard Co.* v. *Smith* (1901) 94 Md. 19, 50 Atl. 414; *Moebus* v. *Herrmann* (1888) 108 N.Y. 349; *Coulter* v. *American Merchants Union Exp. Co.* (1871), 5 Lans. 67; *Moriarty* v. *Zepp* (1891), 42 N.Y., S.R. 824; *Harpell* v. *Curtis* (1850) 1 E.D. Smith, 78; *McCahill* v. *Kipp*, (1854) 2 E. D. Smith, 413; *Canton* v. *Simpson*, 2 App. Div. 561, 38 N.Y. Supp. 13; *Berman* v. *Schultz*, 81 N.Y. Supp. 647, 40 Mese. 212, 84 N.Y. Supp. 292, (child started an automobile left in the street, and was injured); *Steinacker* v. *Hills Bros. Co.* (1904) 87 N.Y.S. 33, 91 App. Div. 521; *Titus* v. *Tangeman* (1906) 101 N.Y.S. 1000, 116 App. Div. 487 (automobile); *Wissler* v. *Walsh* (1895) 165 Pa. 352, 30 Atl. 981; *McCloskey* v. *Chautauqua Lake I. C.* (1896) 174 Pa. 34, 34 Atl. 287; *Prinz* v. *Lucas* (1905) 60 Atl. 309, 210 Pa. 620; *Hyman* v. *Tilton* (1904) 57 Atl. 1124, 208 Pa. 641, (boy who had climbed on to loaded dray was struck at by the driver's whip and fell off); *Lownds* v. *Robinson* (1876) 2 R. & C. Nov. Sc. 364.

For cases which turned upon the question whether the negligence of the driver was the proximate cause of the injury, see *Landy* v. *Swift* (1908) 159 Fed. 271, (foot-passenger while crossing a street fell on attempting to get out of the way of an approaching vehicle); *McDonald* v. *Snelling* (1867) 14 Allen, 290, 92 Am. Dec. 768, (defendant liable where his servant negligently drove a sleigh against another sleigh, thereby causing the horse to run away and injure the plaintiff, who was in a third sleigh); *Post* v. *Olmsted* (1896) 66 N.W. 928, 47 Neb. 893; *Taylor* v. *Long Island R.C.* (1897) 16 App. Div. 1, 44 N.Y. Supp. 820, (train struck wagon negligently driven across track, and threw some of the contents against a person near the track).

For a case in which the plaintiff was held to be precluded from recovering for the damage caused to his mowing machine, on the ground that, although the negligence of the defendant may have been in part the cause of the team's having run away, that event was also a result of the negligence of the plaintiff's servant in leaving the tea unhitched

with his whip, thereby causing them to move forward and overturn the plaintiff's carriage;[3] where the master's horses were left unfastened and unattended on a public road and ran away;[4]

and unattended in the highway, see *Page* v. *Hodge* (1885) 63 N.H. 610, 4 Atl. 805.

[3] *Croft* v. *Alison* (1821) 4 B. & Ald. 590. At the trial, it was left to the jury to determine, whether the carriages had become entangled from the moving of the horses of the plaintiffs, which, previously to the accident, were standing still and without a driver, and the judge directed them to find for the defendant, in case they thought so, and were of opinion that the whipping by the defendant's coachman was for the purpose of extricating himself from that situation. But he directed them to find for the plaintiffs, in case they were of opinion, that the entangling arose originally from the fault of the defendant's coachman. The jury found a verdict for the plaintiffs. A motion for a new trial having been made, the court laid down the law as follows: "The distinction is this; if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment. The case, therefore, has been properly left to the jury."

[4] *Pierce* v. *Conners* (1894) 20 Colo. 178, 37 Pac. 721.

See also the following cases in which the master was held liable in spite of a deviation by the servant: *Whatman* v. *Pearson* (1868) L.R. 3 C.P. 422, 37 L.J.C.P. 156, 18 L.T.N.S. 290, 16 Week. Rep. 649; *Ritchie* v. *Waller* (1893) 63 Conn. 155, 27 L.R.A. 361, 38 Am. St. Rep. 361, 28 Atl. 29; *Loomis* v. *Hollister* (1903) 75 Conn. 718, 55 Atl. 561; *Williams* v. *Koehler* (1899) 41 App. Div. 426.

In an action for injuries caused by a runaway team, evidence of a servant's long-continued and notorious habit of leaving his horse unhitched in the street was held to be admissible, as tending to shew that it was done with the master's knowledge and permission, and also that it was done within the scope of his employment. *Schulte* v. *Holliday* (1884) 54 Mich. 73. It is apprehended, however, that such evidence was wholly superfluous under the given circumstances, as, even apart from it, the driver might have been properly found to have been acting within the scope of his employment.

If the servant's omission in this respect constituted a breach of a duty imposed by a statute or a municipal ordinance, the master's liability will, under the doctrine accepted in most jurisdictions with regard to defaults of that description, will be inferred, as a matter of law.

the right of recovery being in one case affirmed, although the servant had left the horse in order to accomplish a purpose entirely personal;[5] where the driver of a truck left it in the street at night, instead of complying with the directions he had

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See *Healy* v. *Johnson* (1905): Iowa.) 103 N.W. 92. The fact that the master had provided the servant with the means of securing the horse, and that the running was the result of the servant's having disobeyed the master's instructions to use those means, was held to be no defense to the action.

[5] *Hayes* v. *Wilkins* (1907) (194 Mass. 223) 80 N.E. 449. Discussing the facts, the court said: "He was on the way to the defendant's stable, after having completed the regular work for the day by delivering some merchandise at a freight house. While the route that he took was not the shortest, it was but little longer than the other, and the jury might have found that he chose it because the other was blocked by teams, and that therefore he was within the scope of his employment up to the time when he left the horse. He went into a pool room to get some tobacco, and this movement, treated as an independent act, was not for the master's benefit, nor within the scope of his employment as a servant. But his custody of the horse, up to the time that he left him, was in the performance of the defendant's business, and any negligence in for the consequences of which the defendant is liable. While he had the horse in custody for his master, and was charged with the duty of continuing this custody as a servant, he negligently omitted to continue it, and as a consequence the horse ran away. His purpose on going into the pool room is immaterial. His negligence occurred while he was directly engaged in his master's business, by the mere omission of that which he should have done in the business. If the attempt were to charge the master for negligence in the performance of the act of going to buy tobacco, the case would be different. If the driver had carelessly injured property in the pool room the defendant would not be liable, because his going into the pool room, considered as a positive act, was not within the scope of his employment. But the omission and failure to continue the proper custody of his horse when he had him in custody for the master, was an omission to perform his duty as a servant while he was acting for his master. This omission, quite apart from the purpose which accompanied it, was a direct and proximate cause of the plaintiff's injury. The case is different from *McCarthy* v. *Timmins*, 178 Mass. 378. 59 N.E. 1038, 86 Am. St. Rep. 490, (see § 6, note 1, post), in which the driver, for his own purposes, had driven the team away from the streets on which he should have driven it for his master, and had ceased to act within the scope of his employment before the negligent omission that caused the accident."

received to place it in a certain yard;[6] where sacks of bran which the driver of a delivery wagon had temporarily deposited by the roadside frightened a passing horse.[7]

[6] *Powell* v. *Deveney* (1849) 3 Cush. 300. There the shafts of the truck left in the street were thrown against the plaintiff by another truck, not belonging to the defendant. The court said: "The servant was rightfully in possession of the truck and being thus rightfully in possession and about his master's business, the master must be responsible for his neglect in improperly leaving the truck in the street. The defendant can no more be exempted from liability, because his servant disobeyed his orders in not placing his truck on the lot provided for it, than a master can be exempted from liability, for damage done by his servant in driving carelessly against a carriage, when he has been ordered to drive carefully, and to avoid coming in contact with any carriage. The servant being about the business of his master, the master must be responsible for his acts, and cannot exempt himself by any order he may give the servant."

[7] In *Phelon* v. *Stiles* (1876) 43 Conn. 426, (verdict for plaintiff sustained). There the driver, after having laid down the sacks had gone up a side road to deliver a quantity of flour, intending to take the bran on his return, his object being to save an unnecessary transportation of the bran, and thus to finish the delivery sooner and get time to attend to some private business of his own. Discussing the contention of the defendant that the servant's acts were done on his own account, the court said: "But what business of his own was he then doing? He was not then attending to private business in going to Hartford. That was to be undertaken later in the day. He left the bags to expedite the delivery. Did it make the business his own because he despatched it more speedily than it would naturally have been done? He was sent by the defendant to deliver the flour and bran. Did he do anything else than deliver them? His whole object in leaving the bran by the side of the road was to gain time. Suppose he had driven the horse with such speed as amounted to carelessness in order to gain time, and had injured a person by so doing, would he be transacting his own business while driving so rapidly, so that the defendant would not be liable? Suppose he had left the bran out of consideration for his horse, and the same result had followed, would the defendant be excused? He was under the necessity of taking the bran to Mr. King's, or of leaving it by the side of the road until his return; suppose he had taken the latter course without any special object in view, would it make any difference in the case? We think all that can be said of the matter is, that Babcock performed the defendant's business in delivering the bran in a shorter time than he would have done, had he not intended to go to Hartford later in the day; and certainly the rapidity with which the business was trans-

If the given injury was inflicted while the servant was engaged in the performance of his duties, the mere fact that the particular conduct which caused it was incidental to the pursuit of some secondary object which concerned only the servant himself or a third person will not absolve the master from responsibility. Under such circumstances liability may still be imputed, if it appears that, at the time when the accident occurred the secondary object of the servant was being pursued concurrently and simultaneously with the discharge of his appointed functions.[8]

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acted cannot operate to excuse the defendant." Referring to a further contention on the part of the defendant, that "the bags, left as they were by the side of the road, became a public nuisance, and that he could not be liable for a public offence committed by his servant, the court observed that the servant "did not intend to create a nuisance. The case does not find that he intended any harm. All that can be said is, that he negligently left them while performing the business of the defendant, and for such negligence the defendant is of course liable. We think there is nothing in this claim." But the theory apparently here entertained by the court, that the master's liability is necessarily and invariably negatived, if it appears that the servant's misconduct amounted to a crime, is clearly untenable.

[8] In *Gracey v. Belfast Tramway Co.* (1901) 2 Ir. Rep. 322, two servants of the defendant company, having taken two horses out of its stables to ride them to a neighbouring forge to be shod, raced the animals furiously along the public road, and frightened the plaintiff's horse, the consequence being that the plaintiff was thrown out of her trap and injured. Held, that the defendant was liable for the negligence of its servants. Palles, C.B., observed: "If we eliminate what has been called 'the purpose of running a race,' admittedly they (the master) would be liable. In such a case, the act of bringing the horses to the forge would undoubtedly have been one in the course of their employment. No doubt in that case the sole purpose for which the act would have been done would have been a purpose of the masters. But the ground of the masters' liability in such a case would not have been based on any such subtlety as that of a single purpose, as distinguished from several purposes, but because the servants would have been doing their masters' business: *Story* v. *Ashton*, 10 B. & S. 340. The act would have been done for the master. What, then, is the effect of the servants being actuated by the second purpose; that of riding a race? This second purpose was consistent with the first. Although each servant urged the horse he was riding to go faster than the other horse, both were riding

A mere passenger in a vehicle is not entitled to maintain an action to recover for damage done to it through the negligence of a servant in respect of the management of another vehicle belonging to or hired by his master. But in the case where this rule was laid down it was held that persons who had hired the damaged vehicle for the day, and also appointed the driver and furnished the horses, might for the purpose of the action be considered as the owners and proprietors of the vehicle.[9]

5. Liability as affected by the servant's deviation from a prescribed route. Generally[1].—If the journey during which the injury in question was inflicted was commenced in the course of the servant's employment, the mere circumstance that the act which caused the injury was done at a place where he would not have been if he had been following the route prescribed by his master is not sufficient to preclude the aggrieved party from recovering.

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to the forge to have the horses shod. The act, then, which caused the injury was an act for the benefit of the masters, but also, I will assume, for the purpose of the servants. So far as the act was for the benefit of the masters, the act of the servant was, in law, that of the masters; and I cannot see that it ceased to be the masters' act because, for another purpose, it was an act of the servants. The act of going was the masters' act; but for their own purpose the servants performed that act more rapidly than they would otherwise have done—that is, in a negligent manner. In other words, whilst, by reason of the continuance of the master's purpose the act retains the quality of that of the masters, the servants' own purpose qualifies the manner of doing it, and renders such manner negligent. But this is the very state of facts in which a master is responsible. If the second purpose had been that of a third party; as, for instance, if a third party had asked the servant to carry a parcel for him to the forge, surely its effect could not have been to make the continuing purpose of taking the horses to the forge any less the purpose of the defendants."

[9] *Croft* v. *Alison* (1821) 4 B. & Ald. 590.

[1] In *Joel* v. *Morrison* (1833) 6 C. & P. 501, a portion of the remarks made by Parke, B., in directing the jury were as follows: "If the servant, being on the master's business took a detour to call upon a friend, the master will be responsible. . . . If he was going out of his way, against his master's implied commands, when driving on his master's

This doctrine is merely an application of the general principle that a tortious act done in the course of the servant's employment, is none the less imputable to his master because it was done in violation of the master's orders.

6. Same subject. Effect of servant's deviation from a prescribed route for his own purposes.—From the conclusions arrived at. and the language used, in several cases, it seems scarcely possible to draw any other deduction than that the courts by which they were decided were proceeding upon the broad ground that, the master's non-liability should be inferred as a matter of law, whenever it appears that the given deviation was made for the purpose of doing something which had no connection with the servant's duties. In this point of view, the relationship of mas-

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business, he will make his master liable." Cited with approval by Bovill, C.J., in *Whatman* v. *Pearson* (1868) L.R. 3 C.P. 422.

In *Mitchell* v. *Crasweller* (1853) 13 C.B. 237, Jervis, C.J., observed: "No doubt a master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him."

In *Storey* v. *Ashton* (1869) L.R. 4 Q.B. 476, Cockburn, C.J., said: "I am very far from saying, if the servant, when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability."

In *Long* v. *Nute* (1907) 123 Mo. App. 204, 100 S.W. 511, it was laid down that the presumption which is entertained that a person employed for the purpose of operating a vehicle is, while operating it, acting within the scope of his authority about his employer's business, is not changed by the fact that he was making a detour when the injury was inflicted. In that case the accident occurred while a chauffeur was by the order of defendant's wife bringing an automobile from a garage to his house.

The rule in the text has been recognized in *Geraty* v. *National Ice Co.* (1897) 16 App. Div. 174, 44 N.Y. Supp. 659, (affirmed without opinion in 160 N.Y. 658); *McCarthy* v. *Timmins* (1901) 178 Mass. 378.

In *Mitchell* v. *Crasweller* (1853) 13 C.B. 237, 17 Jur., N.S. 716, 22 L.J., C.P. 100, the defendants' carman, having finished the business of the day, returned to their shop in W. Street, with their horse and car, and obtained the key of the stable, which was close at hand; but, instead of going there at once, and putting up the horse, as it was his duty to do, he, without his masters' knowledge or consent, drove a fellow-workman

ter and servant is presumed to be temporarily suspended from moment that the deviation is commenced, and the object of the

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to E. Square; and, on his way back, ran over and injured the plaintiff and his wife. *Held*, that the defendants were not responsible for the consequences of the unauthorized act of the carman. Jervis, C.J., said: "I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be in the employ of his master at the time of committing the grievance." Maule, J., said: "At the time of the accident, he was not going a roundabout way to the stable, or, as one of the cases expresses it, making a detour. He was not engaged in the business of his employers. But, in violation of his duty, so far from doing what he was employed to do, he did something totally inconsistent with his duty, a thing having no connection whatever with employer's service. The servant only is liable, and not the employers. All the cases are reconcilable with that. The master is liable even though the servant, in the performance of his duty, is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But, where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it." Creswell, J., said: "No doubt, if a servant, in executing the orders, express or implied, of his master, does it in a negligent, improper, and roundabout manner, the master may be liable. But, here, the man was doing something which he knew to be contrary to his duty, and a violation of the trust reposed in him. The expression used by him at the time he started upon the unauthorized journey, showed that he was aware that he was doing that which was inconsistent with his duty. I think it would be a great hardship upon the employers to hold them to be responsible under such circumstances."

This case was followed in *Sheridan* v. *Charlick* 1872) 4 Daly. (N.Y.) 338, where the facts were quite similar.

In *Storey* v. *Ashton* (1869) L.R. 4 Q.B. 476, 10 B. & S. 337, 38 L.J. Q.B. 223, 17 Week. Rep. 727, a wine merchant sent his clerk with his horse and cart under the care of his carman to deliver wine and bring back empty bottles. On their return, when within a quarter of a mile from his master's stable, the carman, at the request of the clerk and for his business, drove the horse and cart in another direction, and when two miles from the stable injured a person by negligent driving. *Held*, that the master was not liable, as the act of the servant was not done in the course of his employment, but on a new and an independent journey. Cockburn, C.J., said: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. *I am very*

deviation is the only question of fact with regard to what it is necessary or proper to obtain the finding of a jury.

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far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment. It is true that in *Mitchell* v. *Crasweller*, 13 C.B. 237; 22 L.J. (C.P.) 100, the servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going a great deal too far to say that under such circumstances the master was liable." Mellor, J., said: "Here, though the carman started on his master's business, and had delivered the wine and collected the empty bottles when he had got within a quarter of a mile of the defendant's office, he proceeded in a directly opposite direction, and as soon as he started in that direction he was doing nothing for his master; on the contrary every step he drove was away from his duty." Lush, J., said: "Here the employment was to deliver the wine, and carry the empty bottles home; and if he had been merely going a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-account, and could not in any way be said to be carrying out his master's servant's account, and could not in any way be said to be carrying out his master's employment." It is worthy of observation that, in the case as reported in 10 B. & S. the italicized sentence, supra, in the judgment of Cockburn, C.J., is given as follows: "I am far from saying that if the servant, while on his master's business, made a deviation from it for his own purpose he might not be liable." In the Law Journal the corresponding passage is given as follows: "I think that, if a driver, while acting on his master's business, were to make a slight deviation in order to carry some business of his own into effect, in such a case master might be liable, and that the question would be one of degree as regards the extent of the deviation." The words concerning the servant's own business which are inserted in these two versions obviously modify in a very important manner the language of the Law Reports. If the official version is correct, it will amount merely to a recognition of the doctrine stated in the preceding section, and, as this seems to be clearly the meaning of the remark of Lush, J., as to the effect of "going a roundabout way home," it would not be unreasonable to infer that this was the state of facts adverted to by the Chief Justice. On the other hand, if the words are correctly set out in the Law Journal, they can hardly be construed in any other sense than as the expression of the view that a court is not justified in setting aside a verdict in favour

The theory apparently adopted in other cases is that a plaintiff's right to recover is not necessarily excluded

of the aggrieved party unless the deviation was very considerable in point of space. The variations are a striking commentary upon the loose manner in which many English cases have been reported even in very recent times.

In *Hatch* v. *London & N.W.R. Co.* (1899: C.A.) 15 Times L.R. 246, an action was brought by a widow to recover damages for the death of her husband owing to the alleged negligence of the defendants' carman in leaving his horse and van without proper control, so that the horse ran away and ran over and killed the plaintiff's husband, it appeared that the van which caused the accident left a railway station at 11 a.m. in charge of a carman and a boy to deliver goods. His last parcel was delivered at about 12 o'clock. From there he drove to his own house for the purpose of getting some money to enable him to buy his dinner. While he was in his own house the horse and van were left in charge of the boy under a railway arch, and the horse ran away, and ran over the plaintiff's husband. It was proved that the carman's instructions were that, after having finished the delivery of the goods he was to go back to the railway station, and that the route taken by him was two and a half miles out of his way. There was evidence that the carman would have had to go with the van to a market in another part of the city at about 3 p.m. to collect goods. It was proved that the defendants' carmen frequently went back to the railway station for dinner, but that it was not necessary for them to do so, provided that they entered in the time-sheet where they had dinner. A printed notice giving directions to carmen was put in evidence to the effect that under no circumstances were carmen allowed to stop at coffee shops or publichouses to get their meals. The trial judge ruled that there was no evidence that the carman was acting within the scope of his employment when the accident happened, and directed judgment to be entered for the defendants. The Court of Appeal dismissed an application for a new trial. A. L. Smith said that at first he thought that the van was sent out on a job which would not be finished until the van had gone to the market in the afternoon. He was now satisfied, however, by the evidence that the job upon which the van was sent out in the morning was to go to the places specified, and then to return to the station. He agreed with the trial judge, that the evidence was all one way, and that the journey of the carman to his own house was a separate one undertaken by him for his own purposes, and not for the business of his employers. The evidence shewed that the intended journey to the market was a separate job and a separate journey. There was no evidence, therefore, to go to the jury. Justice Collins, L.J., concurred, remarking that these questions were generally for the jury, but there might be cases in which the act complained of was beyond all doubt outside the scope of the servant's employment. The carman here had done all he had to do when he delivered the goods. If the accident had

by the fact that the purpose of the deviation was the accomplishment of something which concerned only the servant as a third

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happened while he was returning to the station, he would have been acting within the scope of his employment. But here the carman was not returning to the station, but went two-and-a-half miles in another direction upon his own account in order to get some money for his dinner. What he did was entirely outside any possible view of the scope of his employment.

In *McCarty* v. *Timmins* (1901) 178 Mass. 378, 59 N.E. 1038, the driver of a carriage was ordered to take it to the stable and started to do so, but before reaching the stable left his course, and went in the opposite direction, for the sole purpose of getting a drink. *Held*, that his master was, in point of law, not liable for injuries caused by the running away of the team, which he negligently left unattended in the street outside the saloon. The court said: "Scott had been employed to drive the team in the carriage of passengers, and that work was ended for the day. He was then directed to go to the stables, and there can be no doubt that so long as he drove the team with that end in view, and for that purpose and for no purpose of his own, he was engaged in his master's business, even if he made a detour contrary to the direction of his master. We are not disposed to lay much stress on the fact that he went down Boylston Street rather than Commonwealth Avenue, but when he reached Massachusetts Avenue it is plain that his only purpose in turning southward instead of northward, and going seven hundred and fifty-eight feet to Dundee Street, was not only to deviate from the regular way of reaching the stable but was for a purpose of his own, namely, to get a drink. He was upon no errand of his master, and this journey was not for the purpose of getting to the stables even by a circuitous route, or, to use the language of Hoar, J., in *Howe* v. *Newmarch*, 12 Allen, 49, 57, he was doing an act wholly for a purpose of his own, disregarding the object for which he was employed and not intending by his act to execute it, and not within the scope of his employment. In such case the defendant should not be held answerable."

In *Perlstein* v. *American Exp. Co.* (1901) 177 Mass. 530, 52 L.R.A. 959, 59 N.E. 194, an action against an express company, for an injury alleged to have been caused by the negligence of the driver of one of its wagons, it was held that the defendant might shew where each of its drivers was authorized to go on the day of the accident, for the purpose of proving that no driver of the defendant had a right to drive his wagon on that day on the street where the accident occurred, and that such driver, if there, was not acting within the scope of his employment. The court said: "If the routes prescribed for the defendants' servants were such that at this time none of them could be driving through the part of Harrison Avenue without, for the time, abandoning the service in which he was engaged and going off for some purpose of his own, the defendant would not be liable, even if the team which is said to have caused the

party. Under this theory the effect of the evidence as a whole is primarily a question for the jury, and its findings are con-

collision was one of its teams, and was driven by a person who was regularly employed in its service. The question for the jury was not whether the defendant owned the team, but whether the person who was driving it negligently was then acting for the defendant in doing the work which he was directed to do. If the servant was not then acting in the course of his employment, but was off 'on a frolic of his own,' the master would not be liable."

In *Cavanagh* v. *Dinsmore* (1878) 12 Hun. 465, the driver of a truck belonging to defendant, after having delivered some merchandise at his office had been directed to take the truck to the stable in C. street and put it up. While on his way to the stable he met another of defendant's drivers, and, at his request and as a personal favour to him, drove to H. street, about one mile distant, and took a trunk, belonging to the other driver to deliver it in F. street. The accident occurred while he was going to the latter place. *Held*, that the complaint had been properly dismissed. The court said: "The departure of the driver from the ordinary route to the stables for the purpose of doing a favour to his co-servant, as stated in the evidence, was clearly an unauthorized deviation and not within the scope of his duty. He cannot be said, within the authorities, to have been acting in the service of the defendants while engaged in going for the trunk and valise of his co-servant and in taking them to their destination. The act was not only without the authority, but without the knowledge or consent of the defendant or of any superior officer of the driver. It is well settled that the master is not liable for injuries sustained by the negligence of his servant while engaged in an unauthorized act, beyond the scope and duty of his employment, for his own or another's purposes, although the servant is using the implements or property of the master in such unauthorized act."

In *Stone* v. *Hills* (1877) 45 Conn. 47, 29 Am. Rep. 635, H. sent his servant and team to deliver a load of paper to T., four miles distant, directing his to return thence by a particular route, getting a load of wood on his way. When he arrived, T. requested him to go on with the paper to a station four miles farther, and there get some freight, pay the freight bill, and bring the freight to him. The servant, having driven to the station, left his horses unhitched, and they ran away and injured the property of S. *Held*, that the servant was not to be regarded as at the time in the employment of H., and that H. was not liable. The court said: "In the case before us the servant left the employers' premises under precise instructions as to the place to which their team was to be driven and as to the merchandize to be transported; and under instructions equally precise as to the route to be taken in returning and as to what he should bring home. These therefore covered the entire period of his contemplated absence; nothing was left to his option or discretion; nothing to chance; and in fact the deviation was not occasioned or even suggested

clusive, unless the circumstances are such that only a single inference can reasonably be drawn from them.[2] The essence of the

by any unforeseen event in connection with the employers' business; the record shews no obligation, express or implied, upon them to deliver the paper elsewhere than in North Glastonbury, nor that the journey thence to Hartford, even if successfuly accomplished, would have been for their advantage or profit; it was not connected with, did not grow out of, did not contribute to, the successful completion of their business. When therefore the servant accepted instructions from Taylor and became a carrier of merchandise for him to and from a railroad station in an adjoining town, he temporarily threw off his employers' authority, abandoned their business and left their service."

In *Patterson* v. *Kates* (1907) 152 Fed. 481, defendant's automobile broke down while he, on a journey from A. to P., and was left in charge of his driver, with directions to repair it and bring it on to P. While waiting for the ferry at a river he consented to convey a third person to a place about a mile back on the road, and while making this trip negligently ran the machine into a vehicle, a horse and buggy on the highway, by which plaintiffs were injured. *Held*, that the defendant was not liable as "the driver had temporarily abandoned his employment, and had gone off upon an expedition of his own, for a purpose in no way connected with his duty, but on the contrary opposed thereto."

In *Wills* v. *Belle Ewart Ice Co.* (1905) 12 Ont. L.R. 526, the driver of the defendants' ice-wagon, after delivering their ice along his prescribed route, instead of returning to the company's barns, got drunk, and some hours after he was due to return, and while driving out of his homeward course ran over plaintiff. *Held*, by Boyd, Ch., that the defendants were not liable.

In *Johnson* v. *Pritchard* (1887) 8 New So. Wales, L.R. 6, the defendant, a contractor engaged upon certain works, kept a horse and buggy for his private convenience, and not for use in the course of his employment. While he was temporarily absent, his manager, whom he left in charge of the works, used the vehicle without the contractor's knowledge or consent. One evening after calling at the works, he was on his way home, and meeting a friend drove with him to a public house. While they were in the house, the horse bolted and injured the plaintiff. *Held* (1), that the horse and buggy had not been entrusted to the manager in pursuance of the defendant's business, or for the execution of the defendant's orders; and (2) that assuming that they had been so entrusted, the defendant was not liable, for the reason that, when the accident occurred, the manager was not acting in the course of defendant's employment, but was pursuing his own private ends.

[2]In *Sleath* v. *Wilson* (1839) 9 C. & P. 607, S.C. sub. nom. *Sleath* v. *Wilson*, 2 M & Rob. 181, where a servant who had been sent to put up his master's horses at certain stables, made a detour for the purpose of

position thus taken is that the quality of the deviation is "always

delivering a parcel of his own, and, while making that detour, drove over the plaintiff. Erskine, J., thus directed the jury: "It is quite clear, that, if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not intrusted the servant with the carriage. But, whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended, that, if the master directs his servant to drive slowly, and servant disobeys his orders, and drives fast, and through his negligence occasions injury, the master will not be liable. But that is not the law; the master in such a case will be liable; and the ground is, that he has put it in the servant's power to mismanage the carriage, by intrusting him with it. And in this case I am of opinion that the servant was acting in the course of his employment, and till he had deposited the carriage in the Red Lion stables, in Castle Street, Leicester Square, the defendant was liable for any injury which might be committed through his negligence." (As reported in 9 C. & P. 607.)

This statement of the law has approved in the following cases, among others; *Mitchell* v. *Crassweller* (1853) 13 C.B. 237; *Phil. & Read. R.R. Co.* v. *Derby* (1852) 14 How. U.S. 486; *Quinn* v. *Power* (1882) 87 N.Y. 535. But in *Storey* v. *Ashton* (1869) L.R. 4 Q.B. 476, (note 1, supra) the judges declined to adopt the unqualified proposition of Erskine, J., that, "whenever the servant has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it." It was considered that this proposition held good only in respect of acts done in the course of the servant's employment. This criticism was clearly well founded. But, with all deference, it may be suggested that the circumstance of the learned judge's having wrongly explained the rationale of a master's liability for the negligence of a driver, does not entirely nullify the value of his ruling as a precedent. The essence of that ruling was simply, that the driver was to be regarded as being engaged in the appointed duty until the horses should have been lodged in the stables, and that his master could not escape liability on the mere ground of his having not having performed that duty in the manner prescribed. This is one possible view regarding the legal effect of such circumstances as those under consideration, and its adoption does not necessarily involve, or depend upon the acceptance of the erroneous notion which was disapproved.

In *Whatman* v. *Pearson* (1868) 37 L.J.C.P. 156, L.R. 3 C.P. 422, 18 L.T.N.S. 290, 16 Week. Rep. 640, the defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts. The men so employed were allowed an hour for dinner, but were not permitted to go home to dine or leave their horses and carts. One of the men went home about a quarter of a mile out of the direct line

of his work to his dinner, and left his horse unattended in the street before his door. The horse ran away and damaged certain railings belonging to the plaintiff. *Held*, that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was. Bovill, C.J., said: "In the present case, the servant had charge of the horse and cart, and it was through his negligence and want of care, whilst acting in the course of his employment, that the accident occurred. The jury were quite at liberty to come to the conclusion they did; and I cannot doubt its accuracy." Byles, J., said: "When the defendant's servant left the horse at his own door without any person in charge of it, he was clearly acting within the general scope of his authority to conduct the horse and cart during the day." Keating, J., said: "Mr. Chambers's contention in substance is that there was such an amount of deviation by the defendant's servant from the line of his duty, that he ceased to be acting in the course of the employment of his master. It is always, however, a question of degree."

In *Williams* v. *Koehler* (1899) 41 App. Div. 426, 58 N.Y. Supp. 863, it appeared that the driver of one of defendant's trucks, when returning to the brewery with a load of empty kegs, deviated a couple of blocks from his direct route in order to visit a friend; that in his absence, the horses, which he had left unattended in the street, started, but after going a few yards were stopped by a stranger, who, in attempting to drive them back to the place where the driver had left them, drove the truck against a push cart, standing in the street, and overturned it, precipitating the plaintiff, who was standing on the sidewalk, against a coal box. *Held*, that the driver's deviation from the direct route to the brewery did not relieve the defendant from liability for his negligence in leaving the horses unattended in the street. The court said: "The duty of the driver's employment required him to drive the truck back to the brewery. Though he deviated from his direct road, still the conduct and management of the team on the course he took were none the less services in the course of his employment. At most his acts constituted misconduct in his employment, not an abandonment of it. The case is not at all similar to one where the servant takes his master's team for a purpose unauthorized and solely his own. In such a case the driver would not be acting in the service of his master. But here the driver did not take the truck as a vehicle or means of transporting himself the two blocks he went out of his way, but intending to go to see his friend and at the same time intending to return the truck to the brewery, as was his duty, he drove the truck over the route adopted for the very purpose of continuing his service, in taking charge of the team and truck, and not for his own purposes."

In *Lovejoy* v. *Campbell* (1902) 16 S.D. 231, 92 N.W. 24, a servant, employed to drive a water tank for a threshing machine, deviated, at the request of a fellow servant from his usual course to obtain oil to be used on the threshing machine. One of his horses, while standing near a tree

gnawed it so that it died. *Held*, that the deviation was not such as would authorize the court to determine as a matter of law, that the servant was not engaged in his master's business at the time when the injury was inflicted. The court said: "Evidently Suhling was not acting in obedience to the express orders and directions of his employer when he left the latter's team standing in front of the plaintiff's residence to get oil sent for by a person, who is not shewn to have been authorized by Campbell to send for it on his behalf. But was he not then in the execution of his master's business, within the scope of his employment? Whether the act of a servant for which it is sought in a particular case to hold the master responsible, was done in the execution of the master's business within the scope of the employment, or not, must, from the nature of things, in most cases, be a question of fact for the jury. Where, as in the present case, the question of the master's responsibility turns principally upon the extent of the servant's deviation from the strict course of his employment or duty, it has generally been held to be one of fact, and not of law."

In *Riordan* v. *Gas Consumers' Ass'n.* (1907) 4 Cal. App. 639, 88 Pac. 809, a corporation hired a horse and buggy from a livery stable for the use of its superintendent about the city in the discharge of his duties. The superintendent's regular hours of employment did not include one hour after 12 o'clock each day, and this hour was at his own disposal. He was told by the livery stable keeper that the horse might run away unless hitched when standing. The superintendent drove to his home in order to take lunch, and, while the horse was there, between 12 and 1 o'clock, it ran away, as the superintendent was about to feed him, owing to his negligence in failing to hitch it. *Held*, that the corporation was liable for injuries caused to a person in the street from the runaway. The court said: "The defendant took the exclusive charge of the horse from the time it left the stable until it was returned at night. The stable keepers had intrusted the defendant with its care and safekeeping. They had instructed defendant's servants to be careful with the horse, and not to take the bridle off when feeding it. It was, therefore, the duty of defendant to take such care of the horse as a reasonably prudent person would do under similar circumstances. It being the duty of defendant to care for the horse, that duty could only be performed by some person in defendant's employ. It was the duty of defendant to take care of the horse, during the noon hour. Fagan could have delegated this duty to any one in the employ of defendant, or perhaps he could have left the horse in the stable during the noon hour, but he did not do either, but took charge of the horse himself. He, being the superintendent of defendant, took upon himself the care of the horse during the noon hour. If he had employed Arnold, or any other person, to take charge of the horse during such hour, and the negligent act had been done by such person, the defendant would be responsible. It is none the less so because done by the superintendent. It was the duty of Fagan, in the line of this employment, to care for the horse and feed it. He was the superintendent

of defendant during the noon hour as well as during business hours. He could not depart from his employment. He had not gone off on an independent mission of his own, but in feeding the horse was in the performance of a duty in the line of his employment. To hold otherwise would be to hold that, if the acts had occurred in precisely the same manner they did a minute before 12 o'clock, or a minute after 1 o'clock, the defendant would be liable, but would not be liable between 12 o'clock m. and 1 o'clock p.m."

In *Chicago Consol. Bottling Co.* v. *McGinnis* (1899) 86 Ill. App. 38, a verdict for the plaintiff was sustained, where a servant who had driven a few blocks out of his proper route to see his wife injured a boy just as he was starting again from the house to resume his duties. On the first appeal (1893) 51 Ill. App. 325, the court argued thus: "The act of so leaving it (i.e., the wagon) was performed while the wagon was diverted from the business of the appellant, and used to promote the pleasure of the driver. If we assume that, notwithstanding his departure from his route, injuries inflicted by him while driving, resulting from his manner of driving, would have charged the appellant, as being within the scope of the employment of the driver or his discretion as to route, no such assumption can be made as to the act of abandoning temporarily the service of the appellant and leaving the property of the appellant without care." The distinction thus taken between injuries caused by the manner of driving and those which result from leaving a team unattended is not countenanced by any other case, so far as the writer is aware, and seems to be quite illogical. It is also impliedly discredited by some of the decisions above cited.

In *Weber* v. *Lockman* (Neb. 1903) 60 L.R.A. 313, 92 N.W. 591, a servant, on horseback, drove the cattle of his master to a pasture, and, instead of returning at once, waited until nightfall, and paid a visit to some friends. While he was returning home, his horse ran away and ran over plaintiff. *Held*, that the master might properly be found liable for the resulting injuries. The court said: "The boy was a minor, riding his father's horse. It was his duty, after having executed his mission, to return the animal to his father's stables. Whatever negligence there was in departing from the direct route, or in delaying his return until after nightfall, or in the management of the horse at the time of the accident, was committed in the performance of this duty and service. And, besides, it does not appear that his departure from the direct route was in itself negligent, or that his visit to the young people in any way contributed to an accident which did not occur until after the visits had ended and he had resumed his homeward journey, and thus returned to the strict line of his employment. If the fact of delay until after nightfall contributed to the mishap, it was that mere fact, and not the occasion for it, which did so. If it was negligent for the boy to ride after dark, it is immaterial what induced him to incur the risk."

In *Rahn* v. *Singer Mfg. Co.* (1885) 26 Fed. 912 (affirmed (1889) 132 U.S. 518, but the only point discussed was whether the tortfeasor was

a question of degree."[3] In cases where the deviation is slight and not unusual, the court may and often will, as matter of law, determine that the servant was still executing his master's business.[4] So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions."[5] The essential matter to be determined is whether the servant's departure from his master's instructions is to be taken as indicating merely disobedient or unfaithful conduct in

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a servant), it was left to the jury to say whether the servant was acting in the scope of his employment, but the precise facts involved are not shewn by the report.

[3]Keating, J., in *Whatman* v. *Pearson*, note 2, supra.

[4]Theoretically this statement may be correct; but the writer has not found any decision which can with certainty be said to sustain it. The lack of direct authority is readily accounted for by the fact that all the judicial declarations which have been made regarding the right of plaintiffs to recover have been merely expressions of opinion as to the propriety of verdicts under the given circumstances. In *Sleath* v. *Wilson*, note 2, supra, Erskine, J., may possibly have intended it to affirm the right of action, as a matter of law. But in considering the effect of his ruling it is advisable to bear in mind the warning of the Privy Council, that "summaries composed by the reporters of trials at Nisi Prius may not always convey the exact ruling of the presiding judge. It is difficult also to determine whether the words quoted in the reports represent words of advice on absolute direction." *Clouston* v. *Corry* (1906) A.C. 122.

[5]*Ritchie* v. *Waller* (1893) 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29. See § 8, note 1, *post*. The court did not attempt to furnish any examples of deviations which fall within the contrasted categories adverted to as presenting situations in which a court may determine the question of liability as a matter of law. Nor apparently has the meaning of those words been illustrated by any decision rendered with reference to the doctrine now under discussion. The cases cited in note 1, *supra*, are clearly of no significance for this purpose, if their true rationale has been correctly explained by the author.

respect of the master's affairs, or a total abandonment of those affairs.[6]

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[6]In *Loomis* v. *Hollister* (1903) 75 Con., 718, 55 Atl. 561, the servant was employed to deliver ice over a specific and defined route covering several miles, and drive back to the stables. While returning to the stables, he drove out of the prescribed route to the extent of about half a mile to get his letters at the post office. The team being left unfastened and unattended while he was in the office, started for the stables, and ran against the wagon of plaintiff, injuring her. *Held*, that the trial judge had correctly instructed the jury that for all acts done by a servant in the execution of his master's business within the scope of the employment, and for acts warranted by the authority conferred on him, the master was liable, while for other acts the servant alone was responsible; that a mere departure by the servant from the strict course of duty, though for a purpose of his own, was not of itself such a departure from the master's business as to relieve him from liability, but that where there was a total departure, so that the servant might be said to be on a frolic of his own, the master would not be liable, and that the jury, in determining whether there was such a deviation as would relieve defendant, should consider all the circumstances of the case.. The court rejected the contention of counsel that the part of the instruction referring to a "frolic" was erroneous, as leading the jury to believe that the judge meant that no deviation on business of the servant could become a total departure unless that business was of a hilarious nature. The following remarks were made: "Where a servant's employment includes the daily or occasional driving, use and management of his master's horses and wagon for the purposes of that employment, and the servant, while thus employed, is guilty of negligence in the management of the team, whether by reason of reckless driving or of recklessly leaving the horses unhitched and unattended, that negligence is done in the execution of his master's business, within the scope of his employment; and this is true although the master may have forbidden such negligent acts, and although the immediate occasion of the negligence is the accomplishment of some purpose purely personal to the servant, as the overtaking of some one he wishes to speak with on his own business, or stopping to enter a house on an errand of his own, or disobedience of orders as to the precise route he shall follow; that is to say; the servant may be engaged in the execution of his master's business within the scope of his employment, although, in conducting that business, he is negligent, disobedient and unfaithful. On the other hand, if the servant takes his master's team without authority and goes off on an errand of his own, he is not engaged in his master's business and the master is not liable for his negligence. Likewise, when the servant has taken his master's team in pursuance of his employment and, abandoning the purpose for which he started, goes off on some business of his own, he may

7. Same subject. General remarks as to the conflict of doctrine.— If the effect of the two groups of cases reviewed in the preceding section, and the footing upon which they were decided, have been correctly explained by the writer, it is obvious that they must be regarded as reflecting an essential difference of opinion, not only with respect to the absolute evidential significance of the element of a deviation for a purpose disconnected from the servant's duties, but also with respect to the appropriate provinces of courts and juries in determining the import of that element.

The rationale of one group seems to be, broadly speaking, the conception that it should be presumed, not in point of law, but as a matter of fact, that from the moment when a servant has, for the purpose of accomplishing an extraneous purpose, begun to make a deviation along a route upon which he has no duties to discharge, he ceases to be in the employment of his master even in respect of the function of managing the vehicle or horse intrusted to him. The effect of this conception is that whatever acts the servant may do in respect of that function, after the deviation has been commenced, are so far as regards the master's liability, placed upon the same footing as acts of a like description, when performed in the course of a journey undertaken ab initio for the accomplishment of objects which have no connection with his ordinary work. See § 10, *post*. In fact the notion explicitly relied upon in the English cases in which the right of recovery was denied was that the deviations were of such a character that they constituted "separate" or "independent" journeys.[1]

With regard to the decisions in the other group it would appear that they must in the final analysis be explained upon the

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thus take his master's team into his own possession without authority, for the transaction of his own business, and in such case his acts are not in the execution of his master's business and his master is not liable for his negligence." The court observed that these propositions might be regarded as statements of law. See also the language of Erskine, J., in *Sleath* v. *Wilson*, note 2, supra.

[1] See preceding section, note 1.

theory that, except in those instances where the evidence is clearly indicative of a different conclusion, a jury is warranted in inferring that, in spite of the deviation, the servant's duty in regard to such management still subsisted and continued to be performed on the master's behalf. Under this theory it is assumed to be ordinarily a possible inference from the circumstances, that the servant was performing his contractual functions concurrently with extraneous acts, and the master's liability is regarded as being predicable on the same ground as in cases where a journey is professedly undertaken, ab initio, partly in the interest of the master, and partly for purposes which do not concern his business. See § 11, *post*. This notion of the simultaneous pursuit of two objects emerges distinctly in the language used in some of the cases.[2] Logically that notion would seem to be unexceptionable, and if it were accepted as the criterion of the right of recovery in every instance, the somewhat unsatisfactory consequences which may often result from treating the master's liability as a question determinable, not with reference to the essential quality of the servant's act, but with reference to the locality where it was done would be largely obviated.

Having regard to the facts presented in the English cases,

[2]In *Gracey* v. *Belfast Tr. Co.* (1901) 2 Ir. Rep. 322, Palles, C.B., expressed the opinion that the apparently conflicting decisions in *Whatman* v. *Pearson*, and *Storey* v. *Ashton* (see preceding section), were to be distinguished on the ground that, in the former case, the master's business had not been completed, as it had been in the latter. Accordingly in the one case the performance of the servant's duties continued in spite of the deviation, while in the other the servant was using the vehicle solely for his own purposes. The manifest objection to the explanation, as applied to the *facts* in *Storey* v. *Ashton*, is that, while the servant was returning to his master's premises with certain articles which it was his duty to bring back. His work, therefore, was *not* completed. But the comment of the learned judge is pertinent in the present connection.

For other cases in which the continuity of the servant's duty in respect of the management of the vehicle entrusted to him is also clearly adverted to, see *Williams* v. *Koehler* (1899) 41 App. Div. 426, 58 N.Y. Supp. 863; *Chicago Consol. Bottling Co.* v. *McGinnis* (1899) 86 Ill. App. 38.

they apparently cannot be reconciled upon any other footing than that of predicating a distinction between a deviation made while the work appointed to be performed by means of the vehicle is still in progress, and a journey undertaken after that work has been completed, but before the vehicle has been restored to the repository where it is kept when not in use.[3] In order to support such a distinction is must also be assumed that there is an essential difference between work done by means of a vehicle and work done with relation to the instrumentality itself. But this hypothesis would seem to be in the highest degree forced and arbitrary. The American decisions cannot be harmonized even upon this basis.

8. Deviation as an element in cases where the servant is not required to follow a definite route.—Where a servant is ordered to go with a vehicle or riding-horse to a certain place, and, after having performed the work appointed for him at that place, to return to his master's premises, the understanding is that he is to go and return by the most direct route. If he diverges from that route, the question whether his master shall be held responsible for his negligence during the journey is determinable upon the same footing as in the class of cases discussed in the preceding section.[1]

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[1]The importance ascribed by some English judges to this distinction is indicated by the circumstance that, in *Heath* v. *London & N.W.R. Co.*, note 1, supra, it was plainly intimated by A. L. Smith, L.J., that the defendants' non-liability could not properly have been determined as a matter of law if it had been satisfactorily shown that the work assigned to the servant would not have been fully performed, until he should have made a trip to the market specified.

[1]In *Ritchie* v. *Waller* (1893) 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29 (verdict for plaintiff sustained), the fact that a servant sent by the master with the latter's team and wagon to a certain place to procure a load of manure had deviated from the most direct course home for the purpose of seeing about the repair of his own shoes was held not of itself sufficient to shew that he had so far departed from the execution of the master's business as to relieve the master from liability for his negligent management of the team. One of the findings was that the servant drove around to the shoemaker's shop and there

An essentially different situation is presented where the occupation of the servant is of such a character that he may reasonably be assumed to be invested with a more or less complete discretion with regard to the lines which he shall follow while he is engaged in the discharge of his duties. Under such circumstances it would seem to be a proper, if not necessary deduction that a deviation can never, in any proper sense of the word,

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left his team and went into the shop, and that "his purpose and object in so doing was to see the shoemaker about soling or mending his shoes." The court observed that the question whether the phrase "in so doing" referred to the entire conduct of the servant from the time he left the brewery till the horses ran away, or only to his act in leaving them and going into the shoemaker's shop, was not free from doubt; but it was assumed, in accordance with the claim of the defendant, that this phrase referred to the entire conduct. Another finding was that the servant "was in the service of the defendant at the time of the accident." The court remarked that this might mean simply that at the time of the accident his term of service had not expired, and that he had not been discharged, or it might mean that in making the detour he was, and continued to be, in the execution of the master's business, within the scope of his employment. For the purpose of the discussion it was assumed that the former meaning was the correct one. Having settled these preliminary points, and formulated the rule stated in the text respecting the circumstances under which the liability of a master may be a question for the court or the jury, the court proceeded thus: "In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business to relieve him of responsibility." . . . "In making the detour Blackwell was still in charge of his master's team, though on a roundabout way home, carting manure to his master's farm. That was his main purpose and object throughout the entire transaction. In the language of the case last cited [*Quinn* v. *Power*, 87 N.Y. 535], even if the motive was some purpose of his own, he was still about his usual employment, although pursuing it in a way and manner to subserve such purpose also. Applying these principles to the case at bar, the question for the court below was whether or not Blackwell, for the time being, totally departed from the master's business and set out upon a separate journey and business of his own. If the rule of law were that any deviation by the servant 'to carry some business of his own into effect,' was of itself such a departure the above question would be one of law. But this, as we have seen, is not the rule of law. To decide the question in a case like the present, the trier must take into account, not only the mere fact of deviation, but its extent and nature relatively to time and place and cir-

be predicable in respect of his presence at any particular point within the area covered by his contract, and that the only ground upon which the master can escape liability for his negligence is that the tortious act in question had no relation to his employment. With this conception the few cases which bear upon the subject are quite consistent, but they do not lay down any general rule in the terms suggested,[2]

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cumstances, and all the other detailed facts which form a part of and truly characterize the deviation, including often the real intent and purpose of the servant in making it. Without spending more time upon this point, we think the above question is one of fact in the ordinary sense, and that the case at bar clearly falls within the class of cases where such question is strictly one of fact to be decided by the trier. As such we think the court below decided it. . . . If, however, we should hold the question raised upon this point to be one of law, we have no hesitation in saying that the court below reached the correct conclusion on the facts found. In either point of view then there is no error."

In *Krzikowsky* v. *Sperring* (1903) 107 Ill. App. 493, where a servant was sent to purchase and bring home material for the master's business, and was given no specific directions as to route, the fact that he deviates one block from the direct route in returning was held not to constitute such a "turning away from the master's service" as would absolve the master from liability. The court said: "It is not shewn what was the ordinary route, if, in fact, there was an ordinary route, for appellant's driver. For anything that appears, Randolph street may have been as expeditious and satisfactory a route as Lake street. The character or desirability of the street is not determined by the purpose or intention of appellant's son. The proof shews that the son was in the employment of his father, and that he had been to purchase material for his father, and was, pursuant to his father's order, driving his father's horse and wagon, so that at the time of the accident he was in fact in his employment and had not yet carried out the intention, which he says he entertained, of departing from the work of his employment, and in fact did subsequently go directly from the place of the accident to his father's shop."

[2]In *Venables* v. *Smith* (1877) L.R. 2 Q.B. Div. 279, 46 L.J.Q.B. 470, 36 L.T.N.S. 509, 25 Week. Rep. 584, the arrangement between the proprietor and the driver of a cab was that the horse and cab were intrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 16s. for the cab; all that he made above that sum was his perquisite for his labour, and any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when the plaintiff was run over by the cab

9. Liability as to acts done by the servant after having accomplished the extraneous purpose of his deviation.—There is adequate authority for the proposition that any acts of negligence of which a servant

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the driver was on his way back with the cab to the stables of the proprietor, intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's a little way off and purchased some snuff, and on his way back to the stables the accident happened. A verdict against the proprietor was sustained. Cockburn, C.J., said: "It is contended that the liability of the master only exists with respect to acts done by the driver within the scope of his employment, and that the driver here was not acting within the scope of his employment. To determine whether the driver was so acting or not it is necessary to consider what the terms were upon which the cab was intrusted to the driver. If the employment of the cab by the driver at the time when the mischief was done was wrongful, in the sense that it was beyond the scope of the bailment, then the master would not be responsible; because it is with regard to the employment of the cab within the scope of such bailment that the relation of master and servant is created by the statutes for the protection of the public. But it appears that the cab was intrusted to the driver to use entirely at his discretion, provided that he used it properly and returned it to the proprietor's stables when the day's work was over, paying the sum agreed upon between them for the hire of it. I cannot see that the driver did anything wrongful, or contrary to the terms of the bailment as between himself and the proprietor, in using the vehicle for the purpose of going to the tobacconist to get snuff." Mellor, J., said: "With regard to the question whether the driver was acting within the scope of his employment, it seems to me that by the terms of the arrangement between the proprietor and the driver the fullest discretion was vested in the latter as to how he should earn money. He was to return the cab when he had done with it, but he was not bound to return at any particular moment, or to take any particular route. We must look at the matter from a reasonable point of view. If the driver were to take the cab on an independent journey, altogether out of the scope of the purposes for which it was intrusted to him, no doubt the proprietor could not be rendered responsible for acts done by him in the course of such journey, but I do not think the driver was in this case going on any such independent journey so as to relieve the master."

In *Mulvehill* v. *Bates* (1884) 31 Minn. 364, 47 Am. Rep. 796, it was shewn that a horse and express wagon were intrusted, generally, to the servant, with authority to secure such business as he could, make his own contracts, and drive wherever it might be necessary to go, in order either to receive or deliver any articles which he might be employed to transport. Having delivered a trunk he got a load of poles for himself, and while carrying them home on the wagon negligently ran over and in-

may be guilty in managing a vehicle or horse after the personal or other extraneous affairs which constituted the object of his deviation have been disposed of, and he has begun to return to his master's premises or to the point of his departure from the prescribed route, are to be regarded as being within the scope of his employment.[1]

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jured the plaintiff's child. *Held*, that the defendant was liable. The court argued thus: "Had some one employed him to transport a load of poles, it seems to us that there would have been no doubt but that, in going for them and in conveying them to their destination he would have been acting within the scope of his employment, for that was just the kind of business he was employed to perform, as much as in transporting trunks or any other kind of property. The fact that it was his own property which he was carrying on this occasion seems to us immaterial. If he had any articles which he himself desired conveyed by an express, there was no reason why he might not transport them in his master's wagon as well as that of third parties, being liable of course, if he did so, to account to his employer for the usual price for such services, the same as if performed for some one else. He was intrusted generally, with the wagon to hunt up just such work wherever he could find it, and with authority to carry articles for whomsoever he saw fit. Whether he accounted to the master for the value of the time occupied in transporting his own property is immaterial, that being a matter entirely between themselves." Commenting upon the contention of the defendant's counsel that the case was controlled by those cases, in which it has been held, that where the driver of the master's vehicle turns wholly aside from the master's employment and engages in an independent journey, wholly foreign to his employment, and for a purpose exclusively his own, the master is not liable for his acts, the court said: 'This class of cases is clearly distinguishable from the present. There the servant had specific orders as to the mode of dealing with the vehicle, and was obliged to attend to the specific errand on which he was sent and then return to his master. If, under these circumstances, he employed the vehicle on some purpose wholly independent of his orders, of course he was not within the scope of his employment, and the master is not liable. But here the wagon was intrusted genrally, to the driver, to be used entirely at his discretion. . . . In this case, if the driver had taken the wagon on an independent journey of his own, altogether out of the scope of the purposes for which it was intrusted to him, and an injury had then occurred, the defendant would probably not have been liable. But such was not the fact. The trip in which the servant was using the wagon was within the scope of the purposes for which it was intrusted to him."

[1]This doctrine was distinctly recognized by Collins, L.J., in *Hatch* v. *London & N.W.R. Co.* § 6, note 1, supra.

10. Injury inflicted in the course of a journey made exclusively for the servant's own purposes.—It is fully settled that a master can-

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In *Hepenstal* v. *Merritt* (1895) 25 Can. S.C. 150, affirming 33 N.B. 91, where it was held that a teamster in starting out to finish his work after going to his home for a meal was engaged in the performance of his duties as fully as if he had returned to the employer's store and made a fresh start. The court professed to follow *Whatman* v. *Pearson*, § 6, note 2, *supra*. But there the element of a resumption of duty was not involved.

In *Geraty* v. *National Ice Co.* (1897) 18 App. Div. 174, 44 N.Y. Supp. 659, affirmed (without opinion) 160 N.Y. 658, the servants of an ice company engaged in carrying ice from one storehouse to another had deviated from the direct route, and stopped for a time to dispose of part of the ice for their own purposes, it was held that the company might properly be found liable for an injury caused by the fall of a cake of ice after they had started again to carry the ice to the storehouse. The defendant requested the judge to charge that, if the jury believed that the servants were unloading ice from the truck at the time of the accident, outside of any duty on their part to the defendant, they must find for the defendant; and also that, if they believed that for the purpose of unloading ice or making a delivery at any place other than the one appointed by the master, they went to the place of the accident, and while there so conducted themselves that the accident happened, the defendant was not responsible for such acts. The judge refused to charge in accordance with these requests, and several others, involving similar propositions. But he instructed the jury that, if this accident happened while the driver was actually handling ice and taking it out of the wagon at that particular point, the plaintiff could not recover, because there was no evidence of any negligent handling at that time. Discussing the contention of the defendant that it was entitled to a more particular charge upon this subject, the court said: "It is the rule, no doubt, that a master is not necessarily relieved from responsibility for an injury resulting from the negligence of his servant simply because the servant is at the time acting in disobedience to the master's order. The question in every case is whether the act he was doing was one in prosecution of his master's business, not whether it was done in accordance with his instructions. If the act was one which continued until the termination, would have resulted in carrying out the object for which the servant had been employed, the master would be liable for whatever negligence might take place during its performance, although the servant in doing it was not obeying the instructions of the master, or, although he had deviated from the route prescribed by the master for the purpose of doing some act of his own, but yet with the intention at the same time of pursuing his master's business. (*Quinn* v. *Power*, 87 N.Y. 535.) The rule, as laid down by the latest cases in the English courts, is that a master is responsible for an injury resulting from the negligence of his servant while driving his

not be held responsible for an injury resulting from his servant's negligence in the course of a distinct and separate jour-

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cart, provided the servant is at the time engaged in his master's business, even though the accident happens in a place to which his master's business did not call him. But if the journey upon which the servant starts be wholly for his own purposes and without the knowledge and consent of the master, the latter will not be liable. . . . In this particular case, so long as Sweeney and McQuade were engaged in taking this ice to the Grand Central Station, they were engaged in the prosecution of the master's business, and it was liable for their acts. The liability ceased if at all, only when they were not engaged in taking the ice to the place where they were directed to take it. According to the evidence of the defendants' witness they stopped near the corner of Forty-third street and Third avenue for the purpose of unloading some of this ice. Up to that time they had been proceeding in the business in which they were engaged. While they stood there unloading the ice, if they did do so, they were undoubtedly not engaged in the master's business and were acting in their own behalf, and at that time it is quite clear that the master was not liable for the unloading in which they were engaged. The jury were so instructed by the court. They were told that if the accident happened while these men were unloading the ice the defendant was not responsible. It is true that the reason given by the court was not the one insisted upon by the defendant, but that was a matter of no importance. The material fact was that, if the jury found that the accident was caused by unloading the ice, that was the end of the liability so far as the defendant was concerned, and if the defendant had the benefit of that instruction, it had no right to complain with regard to the reasons which were given for it. But the request for a charge on the part of the defendant went further than that. It was that, if the accident happened at that place, the defendant was not responsible, without regard to the question whether Sweeney was unloading ice or not. This request, we think, went too far. There could have been but two ways, under the testimony, in which this accident occurred. One was by the slipping of the ice from the tongs while it was unloading, and the other was because it slipped off of the wagon after Sweeney had started on his way to the Grand Central Station. The defendant was sufficiently protected by the charge, if the jury found that the accident was caused in the way first mentioned. We think that the defendant was not entitled to be relieved from liability if the accident happened after Sweeney had taken his place upon the wagon and resumed his course toward the Grand Central Station, and the accident was caused by the slipping of the ice off from the wagon. At that time Sweeney, whatever may have been his object in deviating from the direct route, was again proceeding to deliver the ice. He had accomplished whatever purpose he intended to accomplish by the deviation, and had resumed the execution of the work which the defendant

ney, undertaken, without the master's authority, for the amusement of the servant himself, or for the purpose of transacting some business in which only the servant himself, or a fellow-servant, or a third person, was concerned.[1] Liability cannot be

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had intrusted him to do. The essential conditions at that time were the same as they would have been had he gone on the direct route. At the time when Sweeney resumed his journey, at the corner of Third avenue and Forty-third street, the load was in the same defective condition as it was when he started, and there was the same reason to anticipate that an accident would happen as there was when he left the yard in the first place. No act of Sweeney's occurring during the deviation had operated in the slightest degree to increase the danger of harm from the negligent loading, and, therefore, when he again assumed to go on his master's business after the deviation, there had been no increase of danger arising from his negligent act by reason of which the probability of accident had been enhanced. The original defect, and that alone, was then, as before, the thing to be feared, and for all practical purposes the same conditions existed that existed when Sweeney had started from the yard. The ice was defectively loaded, and he was proceeding with it to the place where it was to be unloaded. If there had been a suspension of liability, that suspension had come to an end because he had assumed again the prosecution of his master's business."

In *Patterson* v. *Kates* (1907) 152 Fed. 481, the negligent act for which the master was held liable was done while the servant was returning to the place from which he has diverged; but this element was not specifically adverted to, and the decision was rendered independently of it.

In *Sleath* v. *Wilson* (1839) 9 C. & P. 607, the injury for which the master was held liable was inflicted after the purpose of the deviation had been accomplished. But this aspect of the evidence was not referred to by Erskine, J., in his summing up. See § 3, note 2, ante.

In *Weber* v. *Lockman* (Neb.: 1903) 60 L.R.A. 313, 92 N.W. 591, the circumstance that the injury was inflicted after the servant had finished attending to his personal affairs, and was on his way back to his master's premises, was adverted to. But the court obviously considered the action to be maintainable irrespective of this factor. See § 6, note 2.

[1]The direction of Parke, B., to the jury in *Joel* v. *Morrison*, was as follows: "If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

imputed to the master on the ground that, while such a journey

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In *Fiske* v. *Enders* (1900) 73 Conn. 338, 47 Atl. 681, the defendant was held not to be liable for the negligence of her coachman in running down the plaintiff while he was driving her horses into an adjoining city, solely for his own pleasure, and not for exercise, which they did not then need; the evidence being that he had general instructions to exercise them only when it should be necessary, and, when exercising them, to drive them only in the country, and that he had no authority to use them for his own pleasure.

In *Bard* v. *Yohn* (1856) 26 Pa. St. 482, a horse which the son of the defendant, who was also his servant, had without, so far as appeared, the defendant's consent, borrowed to take himself and some other persons to a fair in an adjoining village was hitched by too long a chain, and springing back kicked the plaintiff. *Held*, that the defendant was not liable. That a farmer was held not to be liable for the negligence of his servant in the care of a horse which he had borrowed to take himself and some other persons to a fair in an adjoining village.

In *Maddox* v. *Brown* (1880) 71 Me. 432, 36 Am. Rep. 336, the defendant's wagon and horses were taken, without his knowledge or assent, by a son who was in his employ as a servant and driven to a neighbouring village, for the purpose of depositing money received by him as treasurer of a Sunday school, and left the team unfastened in the street. *Held*, that the father was not liable for injuries caused by the horses running away.

In *Way* v. *Powers* (1884) 57 Vt. 135, the jury found that the defendant, J. P., was the owner of two horses, and the defendant, A. P., his son and hired man, drove them as often as he had occasion for private driving, without special permission of his father. On the day in question A. P., who was expecting a friend to make him a visit at his father's home, took one of said horses and a wagon, without the permission of his father, and drove them to the depot at W. to meet his friend. His father did not know he had gone until he had been absent some time; but expected and was willing he should take the team to bring his friend from the depot, when he should need it for that purpose. A. P., after arriving at the depot fastened his horse, which finally broke and ran into the team of the plaintiff. *Held*, that no recovery could be had against the father, for the reason that A. P. was not in his employment, nor acting upon his business at the time of the accident. No license to take the horse could be inferred from the fact that he had used him upon his own business upon previous occasions without leave.

In *Fish* v. *Coolidge*, (1900) 47 App. Div. 159, 62 N.Y. Supp. 238, where the plaintiff was struck and injured, owing to the negligence of a teamster employed by defendant, the evidence shewed that, at the time of the accident, the teamster was driving solely for his own pleasure; and defendant testified that the driver had no authority to exercise the horse on Sunday. *Held*, that there was not sufficient evidence to go to the jury

was in progress, the servant performed some acts of a descrip-

on the question whether the driver was at the time of the accident acting within the scope of his employment, and a nonsuit was warranted.

In *Thorp* v. *Minor* (1891) 109 N.C. 152, 13 S.E. 702, the owner of a horse, having rented a warehouse to a certain firm, left the horse with them and used the horse in common with them. A clerk of the firm obtained the horse from the firm without the knowledge of the owner, to drive to a picnic, the firm telling him to send the horse back if he had opportunity. This he did through a boy not in the employ of the firm or the owner of the horse. The boy left the horse standing in the street, and it ran away, and killed plaintiff's horse. Held, that the firm were not liable, because the boy was not in their employ, and the clerk, in respect of the use of the horse, was not acting in the scope of his employment. The court said: "The mere request to the clerk to send the horse back would not have made the firm responsible for the pay of the person who brought the horse back if he charged for such service, and, of course, would not, therefore have made them responsible for his negligence. Whether the clerk borrowed or hired the horse, it was an implied part of the hiring or borrowing that he should return the horse and, if he chose to send him back by another, such other, was his servant, and not the servant of the firm. If the clerk had driven the horse back himself, the firm would not have been responsible for his negligence, nor can they be made liable because he chose to send him back by a substitute."

In *Evans* v. *A. L. Dyke Automobile Supply Co.* (1907) 121 Mo. App. 266, 101 S.W. 1132, plaintiff, who was the owner of an automobile which he desired to sell, was about to deliver it to defendant for sale on commission, when defendant's servant L., directed plaintiff's servant to retain the machine until the succeeding day, which was Sunday, in order that L., might shew it to a prospective buyer; defendant's garage being closed on Sunday. This was agreed to, and on Sunday L. took the machine and, while using it on a pleasure trip of his own, it was struck by an electric car and destroyed. *Held*, that L., while so using the machine, was not acting in the course of defendant's business, and that the latter was therefore not responsible for the loss of the machine.

In *Stewart* v. *Baruch* (1905), 103 App. Div. 577, 93 N.Y. Supp. 161, where the plaintiff had been run down by defendant's automobile, which his chauffeur had taken in violation of orders to certain races, the doctrine laid down with a view to a new trial was that a chauffeur is not acting within the scope of his employment, when, in violation of the instructions of his employer, he takes out the employer's automobile for his own pleasure. The same doctrine was also applied in *Sarver* v. *Mitchell* (1907) 35 Pa. Super. Ct. 69.

That defendant was not liable for injuries resulting from the negligent driving of his motor car by his minor son, where the son at the time was engaged in delivering presents on his own account, and had taken the car out without defendant's knowledge or consent, was held in *Maher* v.

tion similar to those which he might have had occasion to per-

Benedict (1908) 108 N.Y.S. 228, 123 App. Div. 579. The court said: "Liability cannot be cast upon the defendant because he owned the car, or because he permitted his son to drive the car whenever he wished to do so, or because the driver was his son."

In *Slater* v. *Advance Thresher Co.*, 107 N.W. 133, 97 Minn. 305, 5 L.R.A.N.S. 598, defendant was a Michigan corporation engaged in the manufacture and sale of farm implements. Gregory was its general manager for the Northwest, with headquarters at Minneapolis, this state, and Nichols was its general agent for the state of North Dakota, and resided at Fargo, in that state. Defendant furnished its agent at Fargo an automobile to facilitate in the performance of the duties of his agency, which he used whenever necessary. After business hours on the day of the injury complained of in this action, the two agents, Gregory and Nichols, took the automobile so furnished Nichols by the defendant, and started for Moorehead, in Minnesota, across the river from Fargo, on a mission purely personal to themselves and wholly independent from the affairs and business of defendant. While so engaged a team of horses belonging to plaintiff became frightened by the manner in which the agents operated the automobile, ran away, injuring the plaintiffs and damaging his buggy. *Held*, that the defendant was not liable, the case being governed by the rule that "the master is not liable for injuries occasioned to a third person by the negligence of his servant while the latter is engaged in some act beyond the scope of his employment, for his own or the purposes of another, although he may be using the instrumentalities furnished by the master with which to perform his duties as servant." The lower court was directed to enter judgment for the defendant, *non obstante veredicto*.

In *Clark* v. *Buckmobile Co.*, 107 App. Div. 120, 94 N.Y. Supp. 771, the general manager of an automobile company took a day off from business, and went to another city on his own affairs, where at the request of a co-employee, he purchased for him some goods, which he charged to the company, as a means of paying for them. On his return he telephoned for another employee to come to the station for him with an automobile, and, on the way from the station, plaintiff was injured, owing to the negligence of the manager and the other employee in the management of the machine. A verdict for the plaintiff was set aside. The court said: "These two men were in charge of the machine when the accident occurred. Davis was running it, and Birdsall was giving more or less directions with reference to its movements. Neither of them was engaged in defendant's business, however. They did not represent the defendant, and it was not and is not liable for any negligence they were guilty of, which caused plaintiff's injuries. Suppose they had taken a day off, for pleasure and had borrowed or leased the machine from the defendant to enable them to enjoy their outing; would the defendant be liable for any injuries resulting from their negligence in operating the machine while they were out

form in the ordinary course of his employment.[2]

upon the road? Suppose after business hours, any day, they had borrowed or leased the machine from the defendant to enjoy a few hours' run across the country for their own pleasure; would the defendant be liable for any injuries caused by their negligent operating of the machine while they were out? It is quite apparent that in the cases suggested, no liability of the defendant would result. The reason is, that in order to establish liability, the persons must not only be generally employés of the defendant, but must be employed in the defendant's business, and not merely in their own recreation and pleasure, at the time the injuries are caused. This defendant is a corporation, and not an individual, and its agents cannot render it liable by merely helping themselves to its machine and using it outside its business, and purely for their own private purposes, whether of business or pleasure." The contention that the manager in charging to the company the price of the clothes' purchased by him was engaged in its business was rejected.

In *Reynolds* v. *Buck*, 127 Iowa, 601, 103 N.W. 946, the defendant was a dealer in agricultural implements, automobiles, etc., and had decorated an automobile belonging to him for use by his daughter in a parade. After the parade, defendant directed that the automobile, which stood in front of the store, be taken inside. His son, who was in his employ as a clerk, took the machine and invited a lady to take a ride with him. While the son was operating the machine for that purpose, plaintiff's horse was frightened thereby and he was injured. Held, that the defendant was not liable. The court said: "The direct evidence all shews that his use of the electric automobile was solely for the pleasure and convenience of the young lady and himself (defendant's son), and that it was in no way or sense connected with his employment or with the defendant's business." It was held that defendant was not liable.

In *Quigley* v. *Thomson* (1905) 211 Pa. 107, 60 Atl. 506, an action against the owner of an automobile, it was held that, where the chauffeur of the defendant was called as a witness by the plaintiff to shew that he was in the employ of the defendant, and to identify the car, it was competent for the defendant on cross-examination to develop by the witness the fact, which qualified his testimony, that at the time of the accident he was using the machine in the prosecution of his own business and not in the business of his employer, and that in so doing he was acting contrary to the orders of his employer.

[2] In *Raynor* v. *Mitchell* (1877) L.R. 2 C.P.D. 357, 25 Week. Rep. 633, a carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out his master's horse and cart, and on his way home negligently ran against a cab and damaged it. The course of the employment of the carman was, that, with the horse and cart, he took out beer to his master's customers, who was a brewer, and in returning to the brewery he called for empty casks

It has been argued in some cases that an automobile should be regarded as an instrumentality which falls within the scope of the general doctrine by which an absolute liability in respect of injuries caused by certain abnormally dangerous things is imposed upon the parties who own or control them, irrespective

wherever they would be likely to be collected, for which he received from his master a gratuity of 1*d.* each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public house which his master supplied, and for which he afterwards received the customary 1*d.* Held, that the carman had not re-entered upon his ordinary duties at the time of the accident, and therefore the master was not liable. Coleridge, C.J. said: "The sole question is whether, having started out on a journey for his own purposes in the way described, did the fact that, in returning home, the servant took up some empty casks constitute a re-entering upon his ordinary duties, as the learned judge phrases it; or, in other words, did it convert the journey into a journey made in the ordinary course of his employment, so as to make his master responsible for his negligence? In substance and good sense I think it did not. I cannot, therefore, agree with the conclusion of the learned judge, that, at the time the damage complained of was done, the man was engaged in his master's employment. I think the judgment should be reversed." Lindley, J., said: "The question is whether, upon that distinct statement (i.e. by the trial judge) of the servant's employment, the master is responsible for an accident happening in the manner stated? I think he is not. Treating it either as a question purely of fact or as a mixed question of law and fact, when did the man enter upon the course of his employment? If the accident had happened whilst the servant was returning home not having collected the empties, it is plain that the defendant would not have been liable; the man clearly could not then have been said to have been in his master's employ. Does it alter the case, that, while going back, he picks up a cask or two? The inference I draw from the facts found in the case is, that the servant was engaged, as well on his return as on his outward journey, upon his own private business; and that that journey cannot by the mere fact of the man making a pretence of duty by stopping on his way be converted into a journey made in the course of his employment."

In *Lotz* v. *Hanlon* (1907) Pa., 66 Atl. 525, 10 L.R.A.N.S. 202, it was held that a verdict for the defendant had been properly directed where the only evidence adduced by the plaintiff, who had been run down by a automobile, was that the vehicle belonged to the defendant, and that, at the time of the accident, it was being driven by a man regularly employed by the defendant as a chauffeur; while on the other hand the testimony of the defendant shewed it had been taken from his garage without his permission, in pursuance of an arrangement made by the chauffeur to give some friends of his a drive. Discussing the

of whether they were, at the time when the injury was inflicted, under the charge of those parties themselves or their agents or servants.[3]

This contention, however, has been rejected.[4]

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evidential significance of the fact that the chauffeur intended to procure, during the excursion some spark plugs for use in connection with the automobile, the court said: "It is clear that this purpose was simply incidental to the evening's trip, and was suggested by consideration of the driver's own convenience. The main purpose of the drive was for the pleasure and enjoyment of the driver and his selected friends. The persons invited by him resided quite a distance from each other, and in assembling them the driver, at the start, was obliged to go a considerable distance in the opposite direction from where the supply store was. It was after all were in the machine that the accident happened, but it was while he was at a point further from the supply store than was his starting point. But had it happend while on the direct route to the store, even though the obtaining of sparks was the main purpose of the drive, this would not have made it an errand on the master's business, without some evidence that it was taken with the knowledge and approval of the master. There was not a particle of evidence in the case that the use of the machine for such purpose had ever been allowed by the master. The most that appeared was that the driver had been allowed on some occasions to purchase the necessary supplies for the machine at this store on the master's credit; but none that he had ever used the machine in going to the store to get them, or that he ever employed it in any way except as ordered by the master in connection with each particular occasion. So far as appears, the use of the machine by the driver on the evening when the accident occurred was wholly unlicensed, was for his own convenience and pleasure, and therefore entirely apart from his master's business."

In *Carl Corper B. & M. Co.* v. *Huggins* (1901) 96 Ill. App. 144, a servant engaged to solicit customers for its beer, used a conveyance of his in performing this service. On the day that plaintiff was injured, the servant had obtained a release from work until the next day. He was requested by a bookkeeper of the defendant to get beer stamps, and bring them with him the next morning. Having purchased the stamps he went to a saloon, where he remained until he became intoxicated, and on his way home ran against plaintiff. Held, that these facts are insufficient to shew that such employé, at the time of the collision, was so far engaged in defendant's employment as to make the latter liable for his negligent act.

[3] *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, 37 L.J. Exch. 161, aff'g L.R. 1 Exch. 265.

[4] *Slater* v. *Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R.A.N.S. 598, 107, N.W. 133, followed in *Jones* v. *Hoge* (1907), 14 L.R.A.N.S. 216, 92 Pac. 933.

11. Injury inflicted on a journey undertaken partly on behalf of the master, and partly for the servant's own purposes.— Where a servant receives permission to use his master's vehicle or horse on a journey which he desires to make for his own purposes, and at the same time agrees to perfor during the journey some act on behalf of the master, the responsibility of the master for the negligence of the servant in respect of the management of the vehicle or horse during the journey is ordinarily a matter to be determined by the jury upon a consideration of the whole evidence.[1]

12. Liability of a master in respect of injuries wilfully inflicted.— Under the common law procedure damages for personal injury wilfully inflicted by a servant cannot be recoverd from his master, this doctrine being the necessary consequence of two techni-

[1] In *Cormick* v. *Digby*, (1876) 9 Ir. R. C.L. 557, a herd got leave from his master to go for the day to a neighbouring town to transact business of his own, and borrowed his master's horse and tax-cart for the purpose. He afterwards proposed, and the master assented, that he should bring home some meat from the town for the master. He drove the horse and tax-cart so negligently that he injured the plaintiff. *Held*, upon the evidence, it could not be held as a matter of law, that the master was responsible for the negligence of the servant. Palles, C.B., said: "Either of two inferences can be drawn from these facts, viz. (1st), that the services of Conlan as herd were dispensed with for the day, upon the terms of his bringing the meat from Mullingar, or (2nd), that by the arrangement the scope of his employment as herd was, for this day extended, so as to include the act of carrying the meat, although his other services were not required for the day. In the one case, the obligation to bring the meat would have been independent of the service; in the other the scope of the employment would be extended so as to include the act. If the jury adopted the first view, the act in question would not have been the act of Conlan as servant of the defendant; if they arrived at the second conclusion the contrary result would follow, and the defendant would be liable. In my opinion, it was for the jury to determine, as an inference of fact, the true effect to be attributed to the new arrangement as affecting the previous employment of Conlan."

In *Haywood* v. *Hamm* (1904) 77 Conn. 158, 58 Atl. 158, testimony given by the defendant, that on the day in question his son was in charge of the horse which caused the injury, and was using it to attend to some of his business and probably some of his fathers' also, was held to be prima facie proof of his agency.

cal rules of pleading, viz., that an action in the case cannot be maintained in respect of such an injury,[1] and that an action of trespass lies only against the tortfeasor himself, or a person by whose orders or with whose assent the tort was committed.[2] This doctrine has several times been applied with reference to claims based on the misconduct of drivers.[2] In some jurisdictions it survived for a while the abolition of the old forms of action.[3] But, speaking

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[1] *Savignac* v. *Roome* (1795) 6 T.R. 125.

[2] *Morley* v. *Gaisford* (1795) 2 H. Bl. 442 (master not liable in trespass for a tort not done at his command); *McManus* v. *Crickett* (1800) 1 East, 106 (master not liable for the act of a servant who wilfully drove his carriage against that of another party without his direction or assent); *McLaughlin* v. *Pryor* (1842) 4 M. & G. 48 (master liable in trespass, as the evidence shewed that the tort was done with his assent); *Triller* v. *Voght* (1851) 13 Ill. 277 (master not liable for wilful tort unless he expressly commanded it).

In *Wright* v. *Wilcox* (1838) 19 Wend. 343, the plaintiff's son, a young lad, had taken hold of the side of the defendant's wagon for the purpose of getting on to it, as the driver had been invited to do. The driver was cautioned by a by-stander that, if he did not stop his team, he would kill the boy. He paid no attention to this warning, but whipped his horses into a trot, the consequence being that the boy fell and was run over. A verdict for the plaintiff was reversed on the ground that the jury had been wrongly instructed that the defendant was answerable whether the injury was wilful or only attributable to negligence. The court laid it down categorically that "the dividing line is the wilfulness of the act." But this doctrine no longer prevails in New York. See cases cited in note 3, infra.

[3] In *Metcalf* v. *Baker* (1874) 57 N.Y. 662, the referee found that defendant's servant "violently, negligently and carelessly" drove the baker's wagon of defendant against the plaintiff's carriage, etc., "with great force and violence," throwing plaintiff upon the pavement. Defendant's counsel claimed that the finding was to the effect that the act of the servant was wilful, and therefore defendant was not liable. *Held*, that the finding did not import a wilful act, but simply negligence; that the words "with great force and violence" and "violently" were used only to express the rapidity of driving and the effect of the concussion. This case in its earlier stages is reported in *Metcalf* v. *Baker* (1871) 2 Jones & S. 10, aff'd 52 N.Y. 649 (memo.).

Having regard to the extremely narrow ground upon which the liability of the defendant was affirmed in the above case, it seems reasonable

generally, it may be said that, except in the states and countries where those forms are still preserved, the

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to infer that the court must have proceeded upon the assumption that the plaintiff could not have recovered if the act in question had been specifically found to be "wilful." That this position, however, if it was in point of fact adopted, was soon afterwards abandoned is apparent from *Cohen* v. *Dry Dock, E.B. & B. R. Co.* (1877) 69 N.Y. 170, aff'g (1876) 8 Jones & S. 368, plaintiff, while travelling in a buggy along a street in the city of New York, was stopped by a blockade of vehicles just as he had crossed defendant's track. The rear of his buggy was so near the track that a car could not pass without hitting it. A car came up, the driver of which, after waiting a moment or two, ordered plaintiff to 'get off the track.' Plaintiff was unable to move either way, and so notified the driver, who replied with an oath that he was late, and that, if plaintiff did not get off he would put him off. Immediately afterwards he drove on, striking and upsetting plaintiff's buggy, and injuring him. *Held*, that the evidence did not authorize a finding as matter of law, that the act of the driver was with a view to injure plaintiff, and that therefore a dismissal of the complaint was error. The court said: "If he acted recklessly (and that is the most that can be said here), the defendant was responsible for his acts. He was not seeking to accomplish his own ends. He was seeking to make his trip on time, and for that purpose, and not for any purpose of his own, sought to remove plaintiff's buggy from the track. It cannot be said to be clear, upon the facts proved, that the act of the driver was done with a view to injure the plaintiff, and not with a view to his master's service. He may have supposed that the plaintiff would get off from the track in time, or that he could crowd him off without injury. The evidence should at least have been submitted to the jury. They were the proper judges of the motives and purposes of the driver, and of the character and quality of his acts."

The reasoning of the court and the decision in the case last cited, is manifestly based upon the assumption that there is an essential distinction so far as the employer's liability is concerned, between wilful acts which are and which are not done in the course of the servant's employment. That distinction is reflected still more clearly in *Mott* v. *Consumers Ice Co.* (1878) 73 N.Y. 543. An action brought for injuries caused by the act of a servant in driving his master's wagon against plaintiff's carriage had been dismissed by the trial judge on the ground that, as the plaintiff's witness had testified that the servant had driven purposely, it was apparent that the injury was occasioned by a wilful and malicious act. The Court of Appeal granted a new trial, holding that the language thus used by the witness was a mere expression of opinion, and that the quality of the driver's act was a question for the jury. The following remarks were made: "The rule recognized in all the recent cases, and which does not materially conflict with any of the older deci-

right of recovery is determined with reference to the broad principle, that the wilful acts of a servant are imputable, or

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sions, although it may qualify some of the intimations and casual expressions or illustrations of the judges, is that for the acts of the servant within the general scope of his employment while engaged in his master's business and done with a view to the furtherance of that business and the master's interests, the master will be responsible whether the act be done negligently, wantonly, or even wilfully. The acts for which the master will not be liable are such as were not done in the course of the service and were not such as the servant intended and believed for the interest of the master. There are intimations in several cases of authority that for the wilful acts of the servant the master is not responsible. But these intimations are subject to the material modification that the acts designated 'wilful' are not done in the cause of the service and were not such as the servant intended and believed to be for the interest of the master. In such case the employer would not be excused from liability, by reason of the quality of the act."

In *Curley* v. *Electric Vehicle Co.* (1902) 68 App. Div. 18, 74 N.Y. Supp. 35, the cab-drivers who frequented a certain stand in New York, the line of which extended along A. street to the corner of B. street, which intersected it at right angles, and then down the latter street, were accustomed, upon their arrival, to place their cabs at the end of the line in B. street. Just as the driver of a hansom-cab belonging to the plaintiff reached the stand on the day in question, the rear cab in the line on A. street was driven away; and observing this he waited for a few moments to see whether the line would close up. At that time one of the defendant's electric cabs occupied the head of the line on B. street, a position which some of the drivers preferred. The plaintiff's driver, after waiting several minutes, saw no indication of any intention on the part of the defendant's driver to take the vacant position, and drove across the street and occupied it himself. He stopped the hansom, with the horse's head about three feet from the cab in front. Thereupon the defendant's driver mounted his cab and came around on A., and told the plaintiff's driver that that was his place and to move out or back up. The plaintiff's driver made no effort to comply with his request and held the place. The defendant's driver then cut in ahead of plaintiff's vehicle and backed into his horse, knocking or crowding the horse onto the sidewalk and inflicting substantial injuries. *Held*, that the jury would have been justified in finding that defendant's driver was acting in the course of his employment and for the purpose of furthering his master's business, and that the defendant would be liable whether the injury was wilfully or negligently inflicted.

In *Dealy* v. *Coble* (1906) 112 App. Div. 296, 98 N.Y. Supp. 452, where the driver of the defendant's sleigh struck and injured a boy who had jumped on the runner a verdict for the plaintiff was held to be proper,

not imputable to his master, according as they are or are not within the scope of his employment. The decisions collected in the note below will shew how that principle has been applied in cases of the type now under discussion.[4]

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upon evidence which tended to shew that the tortious act was done by the driver in attempting to put the boy off the vehicle, that he used more force than was necessary; and that the boy, after having jumped off to avoid the first blow aimed at him, had continued to run along holding the back of the sleigh with his hands, with the evident purpose of getting on the runner again.

In *Cleveland* v. *Newsom* (1880), 45 Mich. 62, it was held that the trial judge had correctly instructed the jury that, if the servant had "wantonly, wilfully, and intentionally" run over the plaintiff, he would not have been within the scope of his employment. This ruling would seem to be a categorical recognition of the doctrine referred to in the text. In *Wood* v. *Detroit City R. Co.* (1884) 52 Mich 402, 18 N.W. 124, the same court, in the course of its opinion, remarked that if the gravamen of the action had not been negligence, the facts were such as might have rendered it necessary to determine whether the defendant was responsible under cases like *Wright* v. *Wilcox*, supra. This remark would seem to evince some inclination to abandon the doctrine applied in the earlier case. But the position of the court still remained uncertain, when it was reviewing the facts in *Vernon* v. *Cromwell* (1895) 104 Mich. 62, 62 N.W. 175. There it refused to declare that, if the evidence had conclusively established the fact that the servants in question had been "voluntarily running" the horses which came into collision with the plaintiff's carriage, the defendant would not have been responsible. The latest decision by this court which bears upon the subject, *Canton* v. *Grinnell* (1904) 138 Mich. 590, 101 N.W. 811, proceeded upon the assumption that the defendant would be liable for an assault committed by his truckman, if within the scope of their employment. The position thus taken may, perhaps be regarded as indicating a definitive abandonment that wilful and negligent acts stand upon a different footing.

In *Limpus* v. *London General Omnibus Co.* (1862: Exch. Ch.) 1 H. & C. 526, 9 Jur. N.S. 333, 11 W.R. 149, 32 L.J. Exch. 34, 7 L.T.N.S. 641, a driver of an omnibus while driving his master's omnibus, on one of its trips from A. to B., in regular course, at a point in the road, wilfully and on purpose, and contrary to the express orders of his master, wrongfully and illegally endeavoured to hinder and obstruct the passage along the road of another omnibus belonging to a rival proprietor, by drawing his omnibus across the road. Martin, B., directed the jury, that "if they believed that the real truth of the matter was that the defendant's driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that

13. Liability considered with reference to the element of ownership.—(*a*) *Vehicle or horse owned by master.*—It is always

state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant; that, if the act of the defendants' driver, in driving as he did across the road to obstruct the plaintiff's omnibus, although reckless driving on his part, was nevertheless as an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers and so to interfere with the trade and business of the other omnibus, the defendants were responsible, that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the driver not to obstruct another were immaterial; but that if the true character of the driver's act was that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible." These directions were held to be correct, and a verdict for the plaintiff was sustained. Crompton, J., said: "It appears by the evidence of the driver that he was driving the defendants' omnibus in an improper way, for, without intending to touch the horses of the plaintiff's omnibus he drove so near to it, for the purpose of keeping it from passing him, that he caused the accident. It is not necessary to say what would have been the case if the driver had used the omnibus so as to block up the road; as it is, I cannot see that the direction of my brother Martin was necessarily wrong. If the matter had come before us on a motion for a new trial, it may be that I should have agreed with my brother Wightman, for the question might have been presented in such a way as to bring it more clearly before the jury, and it is possible that some expressions of the learned judge, may have led them to a wrong conclusion. But the question now is, whether any of the exceptions shew that the learned judge was wrong in point of law. Throughout his summing up he left it to the jury to say whether the injury resulted from an act done by the driver in the course of the service and for his master's purposes. That is the true criterion." Willes, J., after expressing his approval of the statement of Martin, B., with regard to the immateriality of the fact that the defendants' driver had been specially instructed not to obstruct any other driver, proceeded thus: "But there is another construction to be put upon the act of the servant in driving across the other omnibus; he wanted to get before it. That was an act done in the course of his employment. He was employed not only to drive the omnibus, which alone would not support this summing up, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did, is not inconsistent with his employment, when explained by his desire to get before the other omni-

competent to shew that the defendant was the owner

bus." Byles, J. said: "The direction amounts to this, that if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant." Blackburn, J., said: "It is admitted that a master is responsible for the illegal act of his servant, even if wilful, provided it was within the scope of the servant's employment, and in the execution of the service for which he was engaged. That the learned judge told the jury, and perfectly accurate, but that alone would not be enough to guide them in coming to a correct conclusion. . . . . No doubt what Mr. Mellish said is correct; it is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses. But, in this case, I think the direction given to the jury was a sufficient guide to enable them to say whether the particular act was done in the course of the employment. The learned judge goes on to say that the instructions given to the defendants' servant were immaterial if he did not pursue them (upon which all are agreed); and at the end of his direction he points out that, if the jury were of opinion 'that the true character of the act of the defendants' servant was that it was an act of his own and in order to effect a purpose of his own, the defendants were not responsible.' That meets the case which I have already alluded to. If the jury should come to the conclusion that he did the act, not to further his master's interest or in the course of his employment, but from private spite, and with the intention of injuring his enemy, the defendants were not responsible. That removes all objections, and meets the suggestion that the jury may have been misled by the previous part of the summing up."

In *Howe* v. *Newmarch* (1866) 12 Allen, 49, the plaintiff's evidence tended to shew that, when he was about twelve feet away from a baker's wagon which was standing on the sidewalk along which he was passing, the driver suddenly ran out of a house, threw his basket upon the wagon, and jumped to get on the seat, and that the horse immediately started and struck the plaintiff as he was trying to escape. It was held that the court had erroneously refused an instruction, that "if at the time of the injury the defendants' servant was engaged in the business of the defendant, and within the scope of his duty, as such servant, and he drove the horse over the plaintiff and did him an injury; the defendant is responsible, whether the act was done wilfully or negligently."

In *Brown* v. *Boston I. Co.* (1901) 178 Mass. 644, 59 N.E. 644, where children who had broken an ice axe belonging to defendant while the driver of defendants' ice-wagon was absent, were injured by the punishment

of the vehicle or horse which the actual tortfeasor was managing

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inflicted on them by him when he returned, defendant was held not to be liable. The court said: "The ground on which the plaintiffs contend that the defendant is liable for Sprague's acts in beating them with the handle of the ice-axe is that, from what Sprague said at the time, the jury were warranted in finding that he punished them in whole or in part for the purpose of making it easier for him to deliver ice from the defendant's ice cart in the future, without an assistant and with slight care of the tools, and therefore the case is brought within *Howe* v. *Newmarch*, 12 Allen, 49. But in this case Sprague's attack on the boys was an act of punishment inflicted for a past injury to his master's property, and not in doing an act which he had to do if he performed the duty owed by him to his master. It is not within the scope of the authority of a servant, to whose custody his master's property has been confided, to undertake to secure it from future injury by committing the illegal act of inflicting personal chastisement on persons who have done damage to it in the past."

In *Chicago City R. Co.* v. *Mook* (1891) 44 Ill. App. 7, it was held that, the act of the driver of a street car in slapping with his lines at a boy who was running along the street opposite and near to the car platform was not within the scope of his employment.

In *Dinsmoor* v. *Wolber* (1899) 85 Ill. App. 152, where the servant of a farmer drove his master's wagon on the wrong side of the road and brought it into collision with another vehicle, the master was held to be liable irrespective of whether the tortious act was wilful or merely negligent.

In *Eckert* v *St. Louis Transfer Co.* (1876) 2 Mo. App. 36, where a verdict in favour of a person who had been run over by defendant's wagon, the court explicitly rejected the doctrine that a master is not liable for the wilful act of his servant.

In *Schaefer* v. *Osterbrink* (1886) 67 Wis. 495, 58 Am. Rep. 875, a servant had driven his master's sleigh against the plaintiff's, an exception was taken to the refusal of the court to submit to the jury the question whether the servant's conduct was wilful and to instruct them, that, if it was wilful the plaintiff could not recover as against the master. Defendant's counsel relied upon the argument that the rule under which a carrier is liable for injuries caused to a passenger by the wilful acts of his servant, was not applicable to a case like the one under review. Discussing this contention, the court said: "Two teams upon a public highway, each with a sleigh or vehicle, coming in close proximity to each other, the driver of each most certainly owes a duty to those riding with the other. That duty is created by law, and requires each driver to proceed with care and circumspection and with reference to the shifting situation of the other. When such driver is a servant acting within the course and scope of his employment, then such duty rests upon the master as well as the servant. *Limpus* v. *L. G. O. Co.* 32 Law J. Exch. (N.S.) 34. The employer in such case, being

at the time of the accident in question.[1] If it appears not only that he was such owner, but also, that the tortfeasor was hired to discharge the function of management, a primâ facie presumption arises that he was acting within the scope of his employment when the injury was inflicted.[2] But evidence of the defendant's ownership is not of

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responsible for the performance of such duty by his delegated agency, can no more escape liability for such failure when it occurs through his agent's gross negligence or wilful misconduct, than he can when it is by reason of his agent's want of ordinary care. Such being the law in this state, the refusal to submit or instruct as thus requested was not error, because the jury were expressly charged, in effect, that in no event could they allow Louis any punitory or exemplary damages, nor anything more than compensatory damages. This entirely eliminated from the case the question of wilful misconduct."

In *McKay* v. *Irvine* (1882) 11 Biss. 168, a Nisi Prius case, the jury were instructed that the owner of a race horse is liable for the act of his jockey in intentionally fouling another horse in a race.

In *Hawes* v. *Knowles* (1874) 114 Mass. 518, 19 Am. Rep. 383, it was held that, where the injurious act of a servant who, in the course of his employment, drives against the carriage of another person is wanton as well as heedless, his conduct will enhance the damages against the master.

[1] In *Sibley* v. *Nason* (1907) 196 Mass. 125, 81 N.E. 887 (plaintiff while rightfully on the running board of an electric car was struck by the hub of the wheel of a wagon).

[2] In *Beard* v. *London Gen. Omnibus Co.* (1900) 2 Q.B. (C.A.) 530, 83 L.T.N.S. 362, Romer L.J., remarked: "If an omnibus belonging to the defendant company is being driven along a London street by a driver who appears to be authorized to do so, I think there is a presumption that he was authorized to drive."

In *Rumpf* v. *Fresh Food & Ice Co.* (1907) 7 New So. Wales, St. Rep. 260, 24 W.N. 50, it was proved that a boy by whose negligence in riding a horse the plaintiff was injured, was in the employ of the defendant; that the horse he rode belonged to the defendant; that he was carrying an empty milk-can; and that the defendant was carrying on business as a milkman. *Held*, sufficient evidence to throw on the defendant the onus of proving, if they could, that the boy was not at the time of the accident acting in the course of his employment.

In *Curley* v. *Electric Vehicle Co.* (1902) 68 App. Div. 18, 74 N.Y. Supp. 35, a primâ facie case was held to have been made out, where the testimony shewed that the driver of the electric cab which collided with plaintiff's horse had upon his hat a plate with the words, "Electric Vehicle" and a number; that the same words were upon a plate upon the

itself sufficient to create that presumption.[3] Such evidence is equally consistent with the inference of a bailment, gratuitous, or otherwise,[4] or with the inference that the instrumentality

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cab; and that the drivers in the employ of the defendant from the time it began business, until the month of June before the accident, wore a similar inscription upon their hats.

The doctrine stated in the text was also affirmed in *Stewart* v. *Baruch* (1905) 93 N.Y. Supp. 161, 103 App. Div. 577. But there it was held that the weight of evidence shewed that the chauffeur of an automobile was using it for his own purposes.

A different doctrine was applied in *Sarver* v. *Mitchell* (1907) 35 Pa. Super. Ct. 69, where, in an action against the owner of an automobile for causing the death of a child while the automobile was in charge of the owner's chauffeur, it was held that evidence of the ownership of the machine was not sufficient in itself to charge the defendant with liability, but that the plaintiff must go further, and shew that the machine was being used in the course of the master's business.

[3]In *Baird* v. *Hamilton* 1 Sc. Sess. Cas. 797, the following remarks were made by Lord Glenlee: "There is something founded in our statute which views the mere connection of dominion as inferring a liability for injury done by anything which is our property. I do not justify the feeling, but it is a natural one, and we see it exemplified in the doctrine of deodand; and there is a great deal in the simple ground that the damage was done by the defender's horse and cart, when no one was looking after them; nor is it a sufficient defence for the party to say, "I hired a servant to attend to it. The master is liable for the carelessness of his servant. It is essential, however, that the damage should arise from the way and manner of doing the master's work. For suppose a servant takes offence at another man, and horsewhips him, though at the time he is conducting his master's cart, yet the damage is not inflicted in the doing of it—he is acting for himself, and the master is not liable. But in this case the injury was done by the defender's horse and cart, and by the negligence of his servant."

[4]*Powell* v. *McGlynn* (1902) 2 Ir. R. (C.A.) 154, 194, 224. In that case, where the plaintiff was knocked down and injured by a runaway pony attached to a trap, which had been driven by M., but was left standing by him in the street when it took fright, the pony and trap were the property of B. *Held*, by the Court of Appeal, that there was no evidence to support the finding in favour of the plaintiff, that no presumption of the relationship of master and servant arose from the fact of M. driving B.'s pony and trap; that the offer to pay expenses was made on the basis of B. having lent the pony and trap to M., and could not be treated as an admission of liability on another hypothesis; that the evidence offered being at least equally consistent with a state of facts on which B. would

was being used without the knowledge or consent of the owner.[5]

not be liable, he was entitled to a nonsuit or a direction in his favour. Fitzgibbon, L.J., says: "No doubt, ownership of the thing which does the mischief often supplies prima facie evidence sufficient to make the owner responsible for the damage. If we refer, for example, to the barge c... omnibus cases, the person in charge was manifestly acting as the servant of someone, and presumably the owner. In such cases it is more frequently a question of the identity of the master, than of the existence of the relation of master and servant between the negligent person and somebody else. Here a runaway pony did the mischief; the pony belonged to Bradlaw; the use of the pony and trap had been given by Bradlaw to McGlynn; and the injury occurred while McGlynn was in charge. But nothing further was proved."

In *Braverman* v. *Hart* (1907) 105 N.Y. Supp. 107, it was held that the owner of an automobile was not liable for an injury caused by the negligence of a person not under his control or direction, to whom he had delivered the machine under an agreement that he was to use it for hire, and pay the purchase price out of the money derived from its use.

In *Shields* v. *Edinburgh & G.R. Co.* (1856) 18 Sc Sess. Cas. 2nd Ser. 1199, the defendant was held not to be liable for injuries inflicted by the defendants' van and horse while they were being driven by the servant of an independent contractor.

[5]In *Lewis* v. *Amorous* (1907) 3 Ga. App. 50, 59 S.E. 338, where the declaration in an action for the death of a child who had been run over by an automobile alleged that the defendant "permitted one, P., to take and run it," a demurrer was held to have been properly sustained. The effect of the deision so far as the substantive rights of the plaintiff were concerned was stated as follows: "The owner or keeper of an automobile will not be held liable for a negligent homicide committed therewith in a public street by a person old enough to be discreet and responsible in the eyes of the law, who took the machine, without the knowledge of the former, from a shop or garage where it had been left, although the person who thus took and drove the machine was inexperienced in its operation and unlicensed to run it, notwithstanding the leaving of the automobile at the shop or garage furnished the opportunity whereby such person got possession of it.

In *Doran* v. *Thomson* (1907) 74 N.J.L. 445, 66 Atl. 897, the court thus discussed the sufficiency of the declaration: "The first and third counts plainly disclose no cause of action. They are apparently based upon the erroneous assumption that, because the defendant loaned his motor vehicle to some one over whom he had no direction or control at the time of the accident, he shall be held liable for the mere loaning. But no such liability rests upon him. . . . These counts contain no allegation that the vehicle was used at the time in the owner's business; nor is there any allegation therein that the vehicle was under the control or management of the defendant, or that the person driving it was under

(*b*) *Vehicle owned by servant or third person.*— If the rest of the evidence is susceptible of the construction that the tortious act complained of was within the scope of the servant's employment, the mere fact that the vehicle or horse which he was managing when the injury was inflicted belonged to himself or a third person will not prevent the aggrieved party from recovering. The action is deemed to be maintainable, according as his use of those instrumentalities was or was not authorized, expressly or impliedly, by the master.[s]

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the control of the defendant, or that the relationship of master and servant existed between the defendant and the driver. The second count, however, although loosely drawn, we think may stand. It alleges that the defendant did negligently direct, consent, and allow the motor vehicle to be operated by a member of his family, and that, while such person was operating the same for the defendant, the accident was caused by the carelessness, negligence and incompetency of the person so operating the same. It in effect avers the relationship of master and servant, and that the accident was caused by the negligence of the servant while operating the motor vehicle for the master."

[s]In *Patten* v. *Rea* (1857) 2 C.B.N.S. 606, 26 L.J.C.P. 235, 3 Jur. N.S. 892, 40 Eng. L. & Eq. 329, where the general manager of a horse-dealer drove his own gig against plaintiff's horse, while he was on his way to collect a debt due to his master and afterwards to consult a doctor, the question whether the defendant was liable was held to have been properly submitted to the jury, although the vehicle belonged to the servant himself and there was no evidence of any express command from the servant himself to use it on the given occasion. Cockburn, C.J., was of opinion that any significance which might otherwise have been attached to these elements was overcome by that part of the evidence which shewed that the vehicle and horse were kept by the defendant free of charge to the servant, and ordinarily used by him in the performance of journeys about his master's business, and that the master was cognizant of the course which his servant was pursuing at the time, and did not dissent. Having regard to these circumstances and the nature of the business, the employé must be assumed to have had authority to exercise his discretion as to the mode of performing his duty to his master. Williams, J., adverting to the exception taken, that the trial judge had misdirected the jury in not leaving to them the question whether the horse and gig driven by the manager were used by him on his master's business, at the instance and express request of the defendant, observed: "It clearly is not necessary in cases of this sort that there should be any express request; the jury may imply a request or assent from the general nature of the ser-

14. Liability as affected by special statutes.—With reference to an English statute which enacts that a magistrate may, in summary proceedings, inflict a penalty upon the driver of a hackney carriage or a metropolitan stage carriage, and also provides that compensation may be awarded, either against the driver's employer or the driver himself, to the party

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vant's duty and employment. There was ample evidence of such implied request or assent here."

In *Turcotte* v. *Ryan* (1907) 39 Can. Sup. 8, affirming Que. Rep. 15 K.B. 472, where T., an employé of D., while in discharge of the duties of his employment, driving his own horse attached to a vehicle belonging to his employer, who also owned the harness, negligently caused injuries to C., which resulted in his death, it was held that the master and servant were jointly and severally responsible in damages. In the lower court the ground upon which the master's liability was disputed by counsel was that the master could not exercise any supervision over the work. This ground was clearly untenable if the tortfeasor was to be regarded as standing in the relation of servant to the defendant, for the purposes of the journey in question. It was, however, a point open to argument whether he was not simply a bailee in respect of the vehicle, and the rationale of the dissenting judgment of Lacoste, C.J., in the lower court, was that this was really his position. But in view of the fact that he was driving in the discharge of the duties which he had been engaged to perform, such a conclusion could, it is apprehended, only have been justified by clear and specific evidence that he had ceased for the time being to be a servant. Such evidence is not disclosed by the report.

In *Goodman* v. *Kennell* (1827) 3 Car. & P. 167, 1 Moore & P. 241, a person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left for the jury to say, whether or not the horse was taken by the servant with the implied consent or authority of the defendant. The following statement made by Parke, J., to the jury must be taken with the qualifications indicated by the footing upon which the case was thus submitted to them: "I cannot bring myself to the length of supposing that, if a man sends his servant on an errand, without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is responsible for that act." A new trial was moved for, but refused.

In *Wilson* v. *Pennsylvania R. Co.* (1899: N.J.L.) where damages were claimed for injuries sustained in a collision with a wagon belonging to an express company, driven by a person employed by a railway company to carry the mail-bags, which had previously been carried on foot or in a push cart, it was held that a nonsuit was proper as there was no evid-

aggrieved by the misconduct, it has been held that the acceptance of compensation by that party precludes him from afterwards maintaining an action for damages, even though he may not have understood the legal effect of the acceptance, and the compensation is not adequate to the damage done.[1]

It has been held that the Massachusetts enactment (Rev. Stat. ch. 51, § 3) which imposes a penalty upon any person who violates the rules prescribed for the regulation of traffic in highways, and also provides that he shall be liable for all damages sustained by reason of his offence, does not operate so as to preclude the injured party from maintaining a common law action against the master of the tortfeasor.[2]

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ence that the company furnished the wagon or authorized or even knew of its use.

In *Shelton* v. *Toronto* (1887) 13 Ont. 139, a servant who had been dispatched to procure a wrench for the purpose of shutting off the water from a street hydrant which had burst, had, without the knowledge or consent of defendants, wrongfully taken possession of a horse and buggy belonging to defendants' city commissioner, and therewith ran down the plaintiff. *Held*, that defendants were not liable.

[1] *Wright* v. *London General Omnibus Company* (1877) 46 L.J., Q.B. Div. 429; 25 W.R. 647; 2 L.R., Q.B. Div. 271 (Act of 6 & 7 Vict. ch. 86, § 28). Cockburn, C.J., said: "The argument most relied on for the plaintiff was that he was not a complaining party, and that the compensation was awarded to him contrary to his wishes, and, consequently, the award does not bind him. It is true that the plaintiff did not originally ask for the exercise of the jurisdiction given by the section, but in the course of an inquiry upon a complaint made by other parties, the magistrate expresses his intention of awarding compensation, and asks if £10 will be sufficient. The plaintiff answers that it will not; but, nevertheless, when the magistrate proceeds to award this amount to him, he takes it. It seems to me that by taking the £10 he consented to the exercise of the jurisdiction, and was bound by it."

[2] *Reynolds* v. *Hanrahan* (1868) 100 Mass. 313. The court distinguished the earlier case, *Goodhue* v. *Dix* (1854) 2 Gray, 181, where it had been laid down, in action brought *under the statute* that the master was not liable for the damages specified therein, there being nothing in the facts submitted which shewed that he was in any way implicated in the conduct of his servant.

C. B. LABATT.

REVIEW OF CURRENT ENGLISH CASES.

HUSBAND AND WIFE—CRUELTY—WILFUL OR RECKLESS COMMUNICATION OF DISEASE BY HUSBAND—EVIDENCE.

In *Browning* v. *Browning* (1911) P. 161, a divorce case, it was held by Evans, P.P.D., that where a wife alleged cruelty by her husband in communicating to her a venereal disease, it is sufficient for her to prove the fact that she was so infected, and that the burden is then on the husband of shewing that the disease was communicated in such circumstances as not to amount to legal cruelty.

PROBATE—FOREIGN TESTATOR—ENGLISH AND GERMAN WILLS—SEPARATE EXECUTORS—LIMITED GRANT TO PERSONS ENTITLED TO GENERAL GRANT.

Re Brentano (1911) P. 172. In this case a testator domiciled abroad made two wills, one of his property in England, and the other of his property in Germany, and named separate executors of each will. On application for probate by the executors of the will of the English property, Evans, P.P.D., held that the usual rule of not making a limited grant to persons entitled to a general grant, might be departed from, and he made a grant to the English executors limited to the property in England and a cæterorum grant to the German executors.

WILL—PROBATE—EXECUTOR NEXT OF KIN—ACTION BY EXECUTOR TO REVOKE PROBATE—ESTOPPEL—LACHES.

Williams v. *Evans* (1911) P. 175. In this case a testator who died in November, 1908, left a will appointing his widow and the plaintiff, his next of kin, his executors. The widow took probate of the will in January, 1909, and died the same day. The plaintiff did not join the widow in the application for probate, believing that the will was invalid on the ground that the testator was of unsound mind. In March, 1909, he consulted his solicitors as to contesting the will, and was advised that in their view it was too late to impeach it, and that in any event he would not be prejudiced in proceedings to impeach the will by taking probate. Accordingly, in May, 1909, he took out double probate of the alleged will, having at the time knowledge of all

the facts on which he now claimed to set the will aside. He acted as executor and intermeddled with the estate, and the question of law was, whether on these facts, either on the ground of estoppel or laches, he was debarred from contesting the validity of the will. Horridge, J., decided that the taking of probate did not constitute an estoppel, and that there was no rule of the Probate Court which prevented a person who takes out probate from afterwards impeaching the will; and that there had not been such laches on the part of the plaintiff as to make it inequitable for him to contest the validity of the will.

PRACTICE—DISCOVERY—INQUIRY AS TO MATERIAL FACTS.

Nash v. *Layton* (1911) 2 Ch. 71. This action was brought to enforce a charge given for money loaned. The defence was, that the plaintiff was a money-lender and had not complied with the Money Lenders' Act in making the loan for which the charge was given. The defendant claimed to examine the plaintiff for discovery, as to other loans made by the plaintiff within a reasonable time before the loan to the defendant, and on what security, and at what rates they were made, and generally into the circumstances and terms of such loans. Joyce, J., held this was inadmissible, but the majority of the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J.) overruled his decision, Moulton, L.J., dissenting.

SOLICITOR—LIEN—TRUST DEED—COSTS INCURRED PRIOR TO TRUST DEED—DEBENTURE HOLDER.

In re Dee, Wright v. *Dee* (1911) 2 Ch. 85. In this case a company having determined to issue debentures to be secured by a trust deed, the person proposed as trustee appointed a solicitor to act for him in connection with the trust (the company being represented by another solicitor), and under this retainer the solicitor investigated the title of the trust property, and approved of the trust deed on behalf of the trustee. An order having been made for taxation of the solicitor's costs, he claimed to be entitled as against both the trustee and the debenture holders to a lien on the trust deed for all costs properly incurred in relation to the trust, notwithstanding they were incurred prior to the execution of the deed. The taxing Master gave effect to this claim, and his decision was affirmed by Eady, J., whose decision was also affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.).

DECLARATORY JUDGMENT—RULE 289—(ONT. JUD. ACT, S. 57(5)).

In *Burghes* v. *Attorney-General* (1911) 2 Chy. 139 the court (Warrington, J.) made a declaratory judgment, declaring that certain forms issued by the Revenue Commissioners requiring the plaintiff to make certain returns, were unauthorized, and that the plaintiff was not bound to comply therewith.

EXECUTOR—PLEDGE BY EXECUTOR OF CHATTELS OF TESTATOR—PLEDGEE.

Solomon v. *Attenborough* (1911) 2 Ch. 159. This was an action brought by the trustees of the will of Moses Solomon to recover a quantity of plate belonging to the estate of their testator which had been pledged with the defendants in the following circumstances. The testator died in 1878, and by his will appointed two executors, and gave certain pecuniary legacies, and his residuary estate to his executors upon trust for sale and distribution as therein mentioned. In 1892 one of the executors without the knowledge of his co-executor, pledged the plate in question with the defendants as security for an advance which he misappropriated. At the time of the pledge all the debts and legacies had been paid, but the residuary estate had not been completely distributed. It was contended by the plaintiffs that the pledge in such circumstances was unauthorized and invalid, because it was claimed that the debts and legacies having been paid the executors held the residue as trustees; but Joyce, J., held that, notwithstanding the lapse of time, the executor had the legal right to pledge the goods in question, and that the defendants were entitled to hold them subject to redemption.

POWER OF APPOINTMENT BY DEED OR WILL—EXERCISE OF POWER BY WILL IN FAVOUR OF ALL OBJECTS EQUALLY—SUBSEQUENT APPOINTMENT BY DEED TO TWO OF SEVERAL OBJECTS—ADEMPTION—DOUBLE PORTIONS.

In re Peel, Biddulph v. *Peel* (1911) 2 Ch. 165. In this case a testator having under his marriage settlement a power of appointment by deed or will in favour of his children, by his will dated in 1869 appointed equally in favour of all of the children. Subsequently, by deeds made in 1897 and 1901, he appointed a seventh share to each of two of the children. He died in 1910, and the question arose as to the right of the appointees under

the will and deeds, and Joyce, J., held that the rule against double portions applied, and that therefore the children to whom appointments had been made by deed, were not entitled also to any share under the appointment made by the will.

BAILMENT—BAILEE—CLAIM BY THIRD PARTY TO GOODS BAILED—DUTY OF BAILEE—NOTICE OF CLAIM TO BAILOR—NOTICE TO BAILOR OF CLAIM OF THIRD PARTY—ORDER OF MAGISTRATE FOR DELIVERY OF GOODS—HUSBAND AND WIFE.

Ranson v. *Platt* (1911) 2 K.B. 291. In this case the Court of Appeal have failed to agree with the decision of the Divisional Court (1911) 1 K.B. 499 (noted ante, p. 259). It may be remembered goods were bailed to the defendant by the plaintiff, a married woman, living apart from her husband, who subsequently claimed them. The bailee having refused to deliver the goods to the husband was summoned before a magistrate at the instance of the husband, he informed the magistrate that the goods had been left with him by the wife, but though having ample time to notify the wife of the claim and knowing her address he failed to do so, and the magistrate, without requiring the wife to be notified, made an order for the delivery of the goods to the husband. The defendant relied on this order as a protection against the claim of the plaintiff, and the Divisional Court so held; but the Court of Appeal (Williams, Moulton and Farwell, L.JJ.) came to the conclusion on the evidence that the application to the magistrate was a mere matter of arrangement between the husband and the defendant, and that it was the duty of the defendant, in the circumstances, to have notified the wife of her husband's claim to the goods, and not having done so, the order of the magistrate was no protection against her claim. Primâ facie Williams, L.J., admits that if the defendant had acted under the compulsion of the order it would have been a protection, but he concludes on the evidence that he did not really do so, because he was not bound by the order to deliver up the goods until paid his charges for warehousing them, and the husband not being able to pay them, he agreed with him that he, the defendant, should buy some of them and pay himself out of the proceeds, and in this respect also he did not act under the compulsion of the order, but by arrangement with the husband.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

JOHNSTON *v.* THE KING. [May 8.

Petition of right—Contract—Powers of Commissioners of the Transcontinental Railway—Liability of Crown—Construction of statute—3 Edw. VII. *c.* 71.

The National Transcontinental Railway Act, 3 Edw. VII. c. 71 (D.), does not confer powers upon the Commissioners of the Transcontinental Railway in respect to the inspection and valuation of lands required for the purposes of the "Eastern Division" of the railway; consequently, a petition of right will not lie for the recovery of remuneration for services of that nature.

Judgment appealed from (13 Ex. C.R. 155) affirmed, IDINGTON, J., dissenting.

M. G. MacNeil, for appellant. *Newcombe*, K.C., for respondent.

Ont.] [May 15.

CITY OF WOODSTOCK *v.* COUNTY OF OXFORD.

Municipal corporation—City and county—Separation—Agreement as to assets—Subsequent discovery of funds not included—Action for city's share.

In 1901 the town of Woodstock was incorporated as a city, and in February, 1902, the city and the county of Oxford entered into an agreement, ratified by their respective by-laws, purporting to settle all questions between them arising out of the erection of the town into a city. This agreement was acted upon until December, 1907, when the city, claiming to have discovered the existence of a fund of $37,000, collected from the ratepayers of the several municipalities composing the county, which had not been considered in the settlement, brought action for its share of said fund, but did not ask for rescission or modification of the agreement.

Held, affirming the judgment of the Court of Appeal (22 Ont. L.R. 151) that in the absence of fraud or mutual mistake the agreement was a bar to such action.

Watson, K.C., for appellant. *Bicknell*, K.C., and *S. G. McKay*, for respondent.

Ont.] [May 15.

LAIDLAW *v.* VAUGHAN-RHYS.

Timber license—Crown lands in British Columbia—Real estate—Personalty—Contract—Sale—Exchange—Consideration—Payment in joint stock shares—Vendor's lien—Evidence—Onus of proof—Pleading and practice.

A sale of rights under licenses to cut timber on provincial Crown lands in British Columbia is a contract for the sale of interests in real estate, and the timber berths are subject to a vendor's lien for the unpaid purchase-money.

The doctrine of a vendor's lien for unpaid purchase-money is applicable to every sale of personal property over which a court of equity assumes jurisdiction. *In re Stuckley* (1906) 1 Ch. 67, followed.

In order to protect himself against the enforcement of a vendor's lien, a defendant relying on the equitable defence of purchase for value without notice is bound to allege in his pleadings and to prove that he became purchaser of the property in question for valuable consideration and without notice of the lien. *In re Nisbett and Potts' Contract* (1905) 1 Ch. 391, (1906) 1 Ch. 386, followed. *Whitchorn Brothers* v. *Davison* (1911) 1 K.B. 463, distinguished.

Appeal dismissed with costs.

Nesbitt, K.C., and *Coutlee*, K.C., for appellart. *Travers Lewis*, K.C., for respondent.

(Leave to appeal to the Privy Council was refused on the 29th of July, 1911.)

Alta.] [May 15.

ALBERTA RY. & IRRIGATION CO. *v.* THE KING.

Irrigation—Obstruction of highways—Bridges—Construction of statutes.

The North-West Irrigation Act, 1898 (61 Vict. c. 35), provided by s. 11(*b*), that companies incorporated for the construction and operation of works contemplated by that statute should

submit their scheme of works to the Commissioner of Public Works of the North-West Territories, and apply to him for permission to construct and operate the works across road allowances and surveyed public highways which might be affected by them; by s. 16, that his approval of the scheme and permission for construction across the road allowances and highways should be obtained previous to the authorization of the works by the Minister of the Interior, and by s. 37, that, during, construction and operation of the works, they should "keep open for safe and convenient travel all public highways theretofore travelled as such, when they are crossed by such works," and construct and maintain bridges over such works. The Commissioner had the control of all matters affecting changes in or obstructions to road allowances and public highways vested in the local government, "including the crossing of such allowances or public highways by irrigation ditches, canals or other works." On the approval of the scheme of works in question, the Commissioner granted permission for their construction and maintenance across the road allowances and public highways shewn in the memorial of the appellants subject to "the provisions of s. 37 of the said North-West Irrigation Act, and without any special conditions imposed.

Held, reversing the judgment appealed from (3 Alta. L.R. 70), the CHIEF JUSTICE and IDINGTON, J., dissenting, that the absolute statutory duty imposed upon the appellant company by s. 37 of the North-West Irrigation Act, 1898, related solely to public highways which were publicly travelled as such previous to the construction of the irrigation works by the company; that, as no further obligation was imposed at the time permission for the construction of the works was granted, by the officer in whom the power of specifying further conditions was vested the company was under no obligation to erect bridges across their works at points where they crossed road allowances or public highways which have become publicly travelled as such since the construction of the works.

Per DAVIES and DUFF, J.—In the construction of modern statutes conferring compulsory powers, including powers to interrupt the exercise of public rights, questions as to what conditions, obligations or liabilities are attached to or arise out of the existence of such powers are primarily questions of the meaning of the language used or of the proper inferences respecting the legislative intention touching such conditions, obligations

and liabilities to be drawn from a consideration of the subject-matter, the nature of the provisions as a whole and the character of the objects of the legislation as disclosed thereby.

Appeal allowed with costs.

Ewart, K.C., and *E. F. Haffner*, for appellants. *Woods*, K.C., for respondent.

Ont.] [June 1.

CROWN LIFE INS. CO. *v.* SKINNER.

Appeal—Final judgment—Action for commissions—Judgment for plaintiff—Reference—Further directions and costs reserved.

In an action against an insurance company by the executrix of an agent for commissions on policies and renewals alleged to have been earned by testator the trial judge gave judgment for the plaintiff, ordered an account to be taken and reserved further directions and costs. His judgment was sustained by the Court of Appeal.

Held, FITZPATRICK, C.J., dissenting, that the judgment of the Court of Appeal was not a final judgment for which an appeal would lie to the Supreme Court of Canada.

G. F. Henderson, K.C., for plaintiff. *Mowat*, K.C., contra.

N.B.] [June 1.

FRANCIS KERR CO. *v.* SEELY.

Lease—Water lots—Status of lessee—Injunction.

S. is a lessee under lease from the city of St. John of a water lot in the harbour and the F. K. Co. are lessees of the next lot to the south, and there are other lots to the south between that of S. and the foreshore of the harbour. By his lease S. has a right of access to and from his lot on the east and west sides.

Held, reversing the judgment appealed against (40 N.B. Rep. 8), IDINGTON, J., dissenting, that S. was not a riparian owner and had no rights in respect of his lot other than those given him by his lease. Hence, he could not restrain the adjoining lessee from erecting a wharf on his own lot which would cut off access to that of S. from the south a right of access not provided for in his lease.

Appeal allowed with costs.

Hazen, K.C., and *Baxter*, K.C., for appellant. *Teed*, K.C., and *Wilson*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Teetzel, J.] [July 21.

PARSONS *v.* CITY OF LONDON.

Municipal corporation—Trustee for ratepayers—Sale of municipal property—Under value—Breach of trust—Injunction.

Motion by plaintiff to continue an injunction restraining the defendants from carrying out the sale and purchase of some municipal property in the city of London. By Geo. V. c. 95, s. 10, the corporation of the city of London was authorized to sell at such price and on such terms as the council might deem expedient the City Hall, and the police station, or either of them, and the lands on which they are situated.

Held, 1. A municipal corporation is a trustee for all ratepayers and amenable to a like jurisdiction of the court as is exercised over trustees generally, and the plaintiff being a ratepayer and therefore a cestui que trust could maintain an action in his own name, on behalf of himself and other ratepayers, to restrain the corporation from carrying out a sale which would, in this case, have been a breach of trust. The strictness with which the conduct of private trustees is watched by the courts should apply in all its force to the action of a municipal corporation in its dealings as a trustee.

2. It was the duty of the council in dealing with corporation property to be careful not to sell without taking steps to insure competition, so as to obtain the best possible price. In this case no such care had been exercised and there was a primâ facie case of improvident sale and therefore a breach of trust.

Injunction continued till trial, with costs.

Rowell, K.C., and *C. Jarvis*, for plaintiff. *T. G. Meredith*, K.C., for the city of London. *J. B. McKillop*, for the Royal Bank of Canada.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Hon. Louis Philippe Brodeur, K.C., to be a puisne judge of the Supreme Court of Canada in the room of Hon. Desirè Girouard, deceased. (August 11.)

Flotsam and Jetsam.

LAWLESSNESS.—The following is an extract from a paper published in the United States. The recital of this awful tragedy needs no comment. It is not merely as the writer says, an evidence of the strength of racial sentiment, but what is of more importance, it is an illustration of that spirit of lawlessness, which civilization fails to subdue, and which is on the increase: "The *Chicago Record-Herald* publishes a special despatch from the scene of the burning in Pennsylvania of a negro which asserts that the 400 men who perpetrated this awful tragedy were level-headed men, determined and cool, whose nerves had not been wrought to a pitch by liquor or excitement. The incident illustrates in a remarkable way the strength of the racial sentiment which still exists in the United States, even so far north as Pennsylvania. The crime was perhaps the most brutal of the many which have been carried out against the members of a race whose forefathers were imported into the United States against their will. The *Record-Herald* despatch further says that 'a feature of the burning was that there were almost as many women in the crowd as there were men.' Yet the crime for which the negro was thus inhumanly put to death was not an offence against women. He had shot a policeman. Himself wounded, the negro had been removed to a hospital, where he was strapped to his cot to present escape. A policeman was in charge of him. The 'orderly' mob marched into the hospital, placed a hand over the eyes of the policeman, picked up the cot, negro and bedclothing, marched three-quarters of a mile with him through the streets of the town to an open lot, set fire to the cot, with its wounded occupant still strapped thereto, piled fenceboards about the burning mass, reducing the negro to a crisp, and left for their homes."