

## Louisiana Law Review

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Volume 4 | Number 1  
November 1941

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### Repository Citation

Robert Neuner, *Respondeat Superior In The Light Of Comparative Law*, 4 La. L. Rev. (1941)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol4/iss1/13>

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# Respondeat Superior In The Light Of Comparative Law

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The law, in adjusting conflicts of interests, must necessarily make use of concepts. These are the tools with which it works in its endeavor to produce desired social results. Like a craftsman, the lawyer must be concerned about the efficiency of his technique; he must be on the alert to determine whether the concepts he uses are the most effective for his purpose. One available test is to assemble the tools familiar to him and compare them with those employed in other legal systems. Such a comparative study does not, of course, proceed upon the assumption that a foreign system is better than our own, for we can profit from its mistakes as well as its virtues.

Not all fields of law lend themselves equally well to a comparative investigation of this kind. Such a study can be undertaken with profit only if at least three basic conditions are present. First, there must exist a similarity in the economic and social situations prevailing in the countries whose legal systems are being compared. Second, there must be a fundamental agreement in general policy on the questions in issue. Third, there must exist a difference in the legal techniques employed in enforcing a common policy.

The purpose of the present study is to place side by side the several competing techniques employed by the United States, England, France, Germany, Austria, and Czechoslovakia in dealing with the liability of a master for the torts of his servants. In this manner we shall seek to ascertain which set of techniques more properly fulfills the function assigned to it. This subject generally satisfies the above mentioned conditions, but there are exceptions. As to certain problems, for example those relating to double employment, the techniques employed by the various systems are so similar that the comparison cannot be useful. Hence,

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we are compelled to limit our inquiry to some of the more basic questions which arise.

Another reason sometimes makes it advisable either to omit a comparative consideration of a legal problem or to treat it only lightly in passing. A judgment upon the practicability of a particular piece of legal technique can be pronounced only after the rule or concept has been applied persistently by the courts in many and varied situations. It often happens that a problem forms the subject of repeated litigation in one particular jurisdiction, while in another jurisdiction the same problem appears to be unknown. If this difference cannot be explained by reference to the nature of the rules applied, the comparative method must be abandoned, for a rule that is relatively untested in litigation cannot be compared satisfactorily with another rule whose practicability is known.

#### I. LIABILITY FOR NEGLIGENCE OR ABSOLUTE RESPONSIBILITY

Both the common law and the French law are in accord on the principle that the liability of an employer for the wrongful acts of his employees is in no way dependent on any fault of the employer.<sup>1</sup> In marked contrast to this position German law has imposed a more limited liability upon the employer by connecting his liability with his personal fault; the master is liable only when he has engaged a servant whom he knew or should have known was unfit, or when he did not properly supervise the servant's activities.

On closer analysis, however, the distinction is not as sharp as was indicated above. There are a few indications in the common law which suggest that the basis of the employer's liability is his fault. Persons employed to perform service for others are commonly classified at common law either as servants or as independent contractors. The distinction between these two classes of persons is drawn by determining whether or not the employer is in a position to control the conduct of the employee. This control test suggests perhaps that personal fault on the part of the employer is the basis of vicarious liability; for if it is assumed to be true that only a person who is under the employer's control is a servant, then it may be inferred that the employer is responsible for negligent use of his right of control. Although this in-

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1. Smith, *Tort and Absolute Liability—Suggested Changes in Classification* (1917) 30 Harv. L. Rev. 241, 325; Steffen, *Independent Contractor and the Good Life* (1935) 2 U. of Chi. L. Rev. 501, 507.

ference has never been drawn by the courts, nevertheless the very existence of the control test is a factor which suggests considerations of negligence. When the element of control is lacking and the employee is for that reason designated an independent contractor, the notion of fault becomes even more conspicuous. This is illustrated by the well known principle that an employer is liable for the torts of an independent contractor entrusted with a dangerous enterprise if the employer has failed to take "the necessary precautionary measures." Under these circumstances it is not superfluous to compare the concepts and techniques of the two systems; for their basic assumptions, although divergent in abstract outline, have probably much in common. The comparison with the German system will show how the principle of fault, of which there are only traces in the common law, works if extended its full measure.<sup>2</sup>

In order properly to understand the large volume of German cases, it is well to begin by examining the basic rules as they are set out in the code. The code distinguishes three situations. First, there is the situation involving a contractual relationship between the employer and the injured third party. This is dealt with by Section 278. The master is liable if one of his servants violates a duty arising from the contract, even though he, the master, is guilty of no personal fault. Second, there are the cases where a tort was committed by the representative of a juristic person (corporate body) who, unlike other agents and servants, derives his power from the articles of the constitution itself. Under Section 31 of the code the corporate body or juristic person is unconditionally liable for the torts of its constitutional representatives. Third, there remain all the other instances where the servant commits a wrongful act, and which are covered by Section 831. Here the master against whom suit is brought may assert as an affirmative defense that he exercised care in the selection of the servant and, if supervision was necessary, that he reasonably performed his duty of supervision. In all the cases that fall under this third classification the master has the affirmative burden of proving the facts that constitute his defense. There are few cases where the master does not undertake this proof, and most disputes consequently turn on the issue of his negli-

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2. A general discussion of this problem took place in the meetings of the seventeenth and eighteenth "Deutschen Juristentag," 1884 and 1886. See, in addition, Heinsheimer, *Die Haftung des Schuldners für seine Erfüllungsgehilfen* (Austria, 1914) 40 *Grünhuts Zeitschrift* 121. The origin of the German system is attributed to Rudolf Von Jhering.

gence. Therefore, notwithstanding some theoretical dispute as to the basis of employer's liability,<sup>3</sup> the initial statement that the German law bases the employer's liability upon his fault is fully justified with the exceptions mentioned.

What structure did the Supreme Court erect upon these foundations? In the first place there is a noticeable tendency to expand the application of Section 278, which makes the employer unconditionally liable if a contractual relationship exists. This, in turn, results in a corresponding restriction of the area embraced by Section 831, which would permit the employer to prove that he exercised care in the selection and supervision of his employee. The expansion of Section 278 was achieved by adopting the position that the contract with the injured persons engenders collateral duties in addition to the obligation expressly undertaken by the promisor—an idea which had been developed by the Romans in their *bonae-fidei* contracts.<sup>4</sup> Collateral duties of this sort have been found in numerous contractual situations. For example, the courts have imposed a duty to protect the lessee or the customer of a restaurant against dangers. They have likewise held that there is a duty to instruct the buyer of an article as to its safe and proper use, and that a bank must give correct advice on investments when the main duty is to keep bonds and shares.

The application of this idea in the interpretation of contracts has produced various desirable consequences. The most conspicuous result is the severe restriction which is effected in the operation of Section 831. As soon as the plaintiff is able to show that a contractual duty has been violated, the defendant can no longer set up the defense that the servant who caused the breach was carefully selected and supervised. This is apparently the precise result which the Supreme Court wished to reach.<sup>5</sup>

Section 31 of the code, providing that the corporate body is

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3. The legal literature reveals a division of opinion as to the correct interpretation. See Deetz, *Der Haftungsgrund bei den unerlaubten Handlungen des BGB. insbesondere bei § 831* (Germany, 1920) 64 *Gruchots Beiträge* 167; Jovy, *Der Begriff der Bestellung im § 831 des Bürgerlichen Genetzbuchs* (Germany, 1912) 37 *Archiv für bürgerliches Recht* 123.

4. The leading case is *Reichsgericht*, Dec. 1911, *RGZ.* 78, 239. In accord with this interpretation: Riezler, *Haftung für Schädigung durch Sachen nach französischem und englischem Recht* (Germany, 1931) 5 *Rabels Zeitschrift* 570; Weigert, *Ausservert ragliche Haftung von Grossbetrichen für Angestellte* (1925) 1.

5. Over the protest of some writers, see Schneider, *Der Begriff des Erfüllungsgelhilfen nach § 278 BGB.* (Germany, 1908) 53 *Jherings Jahrbücher* 6 et seq.

unconditionally liable only for the wrongful acts of its "constitutional representatives," did not easily lend itself to expansion. The Supreme Court applied itself laboriously to the task of finding a definition of the "constitutional representative," but it did not arrive at any clear and satisfactory solution. The result of a long judicial development is that only a few of the persons who act on behalf of a corporate body are regarded as members of this restricted group of representatives. In this respect the field of liability was not expanded. As to the question under what conditions the agent's tort makes the corporate body liable, the Supreme Court has applied the general doctrine, to be discussed below, that a connection with the employment is sufficient. The phenomenon which is of interest here is the creation of a rule that a corporate body acts wrongfully if it entrusts to an ordinary agent certain tasks (which ones does not become clear) that properly should be entrusted only to a constitutional representative.<sup>6</sup> So it is said that a municipality is not allowed to transfer the care for the safety of its highways entirely to an ordinary agent, however capable he might be. A certain amount of supervision must be exercised by a constitutional representative. It appears harsh to criticise an organization for entrusting a given task to an ordinary agent instead of to a constitutional representative, if both are equally capable. Consequently, it would seem that what has been regarded as wrong is the possibility of evading responsibility by this kind of organization; for had the corporate body been allowed to entrust an ordinary agent with the specific task, it could have escaped liability by proving care in selection and supervision under Section 831. The application of this section itself must have been felt as leading to an unjust result.

The above process of restricting the sphere within which Section 831 should be applied was accompanied by a gradual modification of the meaning of this section itself. The tendency here also has been toward the imposition of stricter liability. The Supreme Court has imposed a standard of care in the selection of servants which has been increasingly higher and higher. If all employers were to comply with these requirements as judicially defined, a servant who once committed a tort would find it

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6. Reichsgericht, March 24, 1904, JW. (1904) 232; Feb. 8, 1904, Gruch. Beitrage 48 (1904) 601; Nov. 28, 1913, Warn. (1914) 50; April 1, 1931, JW. (1932) 2076; Oct. 10, 1932, JW. (1932) 3702; Dec. 19, 1935, JW. (1936) 915; March 14, 1937, JW. (1939) 1683; March 9, 1938, RGZ. 157, 228. The same principle was applied to a single person in Reichsgericht, April 29, 1926, RGZ. 113, 293.

extremely difficult to secure other employment.<sup>7</sup> An unexpected consequence of this continual raising of the standard of care was the unfair advantage which was gained by large enterprises over small employers. The larger businesses, through their efficient bureaus of appointment or personnel, are capable of substantiating the defense of a careful selection with facts, while the little employer, who acts in a more haphazard way, is rarely in a position to do this. The resulting preference of the large employers has been criticized by legal writers,<sup>8</sup> and even by the Supreme Court.<sup>9</sup> In order to reestablish some equality of treatment, the court developed several propositions, the most important of which is the principle that enterprises are liable for defects of organization.<sup>10</sup> It is interesting to notice that the cases here seem to deal almost exclusively with corporations. Under this rule the victim of an employee's tort may recover damages from the corporate employer if he can show that the latter was not so organized as to assure a steady supervision and control of his employees and to prevent potentially dangerous situations.

This rule is only a single instance of a broader, newly-created principle which, though framed to cover all employers, again affects large enterprises most. Section 831 makes the employer liable for negligent supervision only where he must superintend the work of his employees but does not itself impose any duty of supervision under its commonly accepted interpretation. Here too the Supreme Court has spoken; it has held that no one employing servants can escape the duty of providing at least a certain amount of supervision.<sup>11</sup> But it remains not clear how far this supervision must go. This kind of liability is liability for the employer's own negligence, based on Section 823, not liability for

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7. Brodmann, *Die Haftung des Schuldners nach § 278 BGB., insbesondere die Haftung des Versicherungsnehmers* (Germany, 1911) 58 *Jherings Jahrbucher* 187, 193.

8. Jovy, *supra* note 3, at 123; Mataja, *Das Recht des Schadensersatzes* (Leipzig, 1888) 43; Ruth, *Archiv für civilistische Praxis* (1926) 126, 354; Weigert, *op. cit. supra* note 4, at 8; Wilburg, *Haftung für Gehilfen* (Austria, 1930) 48 *Zentralblatt für die juristische Praxis* 744.

9. Reichsgericht, Dec. 19, 1935, *JW.* (1936) 915.

10. Reichsgericht, June 2, 1913, *Warn.* (1913) 430; April 20, 1914, *JW.* (1914) 759; March 3, 1922, *RGZ.* 104, 141; Feb. 25, 1931, *JW.* (1931) 2236; June 6, 1935, *S.A.* 90, 165; Jan. 12, 1938, *JW.* (1938) 1651.

11. Innumerable decisions predicate this rule, e.g., Reichsgericht, Sept. 23, 1909, *JW.* (1909) 659; Jan. 20, 1912, *Warn.* (1912) 177; May 31, 1912, *JW.* (1912) 864; Dec. 9, 1929, *JW.* (1930) 2927; Jan. 16, 1930, *JW.* (1930) 3213; Nov. 23, 1931, *JW.* (1932) 794; Jan. 12, 1933, *JW.* (1933) 830. The duty of supervision is sometimes but not always deduced from the dangerous nature of the work entrusted. The same result can be and is reached by assuming non-delegable duties.

the servant's torts as in the cases of Section 831. From this legal construction follow important differences in pleading and proof, which we may leave aside here.<sup>12</sup>

Halfway between the liability for the servant's torts under Section 831 and the just mentioned liability for the master's negligence in supervision is the formula often repeated by the Supreme Court that only a carefully supervised servant is a carefully selected one.<sup>13</sup>

Several conclusions can be drawn from the German experience. In the first place, a court, when faced with the facts of a concrete case, usually looks with disfavor upon the defense that the employer was not guilty of negligence or other personal fault. Only this can satisfactorily explain the restrictions in both scope and content which Section 831 of the German Civil Code underwent in practice. A reading of the many hundreds of German decisions that deal with the master's liability leads to the further conclusion that a legal rule which makes the master's liability depend upon his own negligence introduces an element of unreality and uncertainty into the law beyond all tolerable limits. It is unrealistic to require a degree of care in selection and control which as a practical matter cannot be exercised. The servant often has a technical knowledge which the master does not possess; an effective supervision would involve an intolerable expense, and finally changes in the social position of the economically dependent classes make impossible many forms of interference which formerly may have been practical.

If the degree of care in supervision exacted by the courts is in fact illusory, still less can there be any certainty in the application of such an illusory concept. How can the courts work out standards of care in selection and supervision which will furnish employers a dependable guide for future conduct? The German Supreme Court has not been able to do it. The obvious conclu-

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12. The Reichsgericht could have avoided much of its circuitous reasoning if it had required care in the selection of the wrong-doing servant [see Deetz, *supra* note 3, at 186; Enneccerus-Lehmann, *Lehrbuch des bürgerlichen Rechts* (11 ed. 1930) 758; Greiff, *Planck's Commentaries*, § 831, n. 2a; Weigert, *op. cit.* *supra* note 4, at 28], but it declares that the master is excused if he has established that he exercised care in the selection of the highest employee. Oct. 13, 1904, RGZ. 59, 203; Feb. 8, 1906, JW. (1906) 196; March 30, 1908, Warn. (1908) 369; April 20, 1914, JW. (1914) 759.

13. Reichsgericht, Dec. 4, 1924, JW. (1930) 2927; Dec. 11, 1929, Warn. (1930) 60; Jan. 16, 1930, JW. (1930) 3213.



sion is that a system of law which bases the employer's liability upon his own negligence does not recommend itself.<sup>14</sup>

## II. THE INFLUENCE OF EXISTING CONTRACTUAL RELATIONS

The prevailing opinion among judges and legal writers in the common law countries appears to be that the master's liability must be judged by the ordinary rules of respondeat superior even if the harmful act of the servant results in a violation of a contractual duty owed by the master to the injured person. In contrast to this position we have observed that the German Civil Code draws a distinction in this respect. Section 278 expressly states that the master is responsible for the faults of persons whom he employs in the performance of his contract and gives him no possibility of exculpation as in other tort cases proper. In France, too, some of the legal writers have emphasized the necessity for such a distinction.<sup>15</sup> The question whether this distinction has its root in some more fundamental principle of contract law is not merely an academic one. An indiscriminate application of the ordinary rules of respondeat superior in contract cases will of necessity divert the judges' attention from other points which, in the making of a fair adjustment of the conflicting interests, should be taken into consideration.

The following pages will be devoted to showing that with respect to the doctrine of respondeat superior a different treatment of contract cases and tort cases is not only desirable but is unavoidable, and that such difference in treatment is actually practiced everywhere, including the common law jurisdictions.

Very often we find the assertion that with respect to contractual relations the master is liable not only for the wrongs of the servant but also for those of independent contractors whom he has employed.<sup>16</sup> Such a statement, however, is mislead-

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14. Accord: Seavey, *Harvard Legal Essays* (1934) 449. The master is, of course, liable if he is guilty of negligence in selection and supervision. See Laski, *The Basis of Vicarious Liability* (1916) 26 *Yale L. J.* 105.

15. Becqué, *De la Responsabilité du fait d'autrui en Matière Contractuelle* (France, 1914) 13 *Revue Trimestrielle* 252; 1 H. Mazeaud et L. Mazeaud, *Traité Théorique et Pratique de la Responsabilité Civile* (3 ed. 1938) 964, n° 965; 1 Savatier, *Traité de la Responsabilité Civile* (1939) 205, n° 159. But see Esmein, *Le Fondement de la Responsabilité contractuelle* (France, 1933) 32 *Revue Trimestrielle* 627 et seq.

16. *Maryland Dredging & Constructing Co. v. Maryland*, 262 *Fed.* 14 (C.C.A. 4th, 1919); *Atlanta & F. R.R. v. Kimberly*, 87 *Ga.* 161, 166, 13 *S.E.* 277, 278 (1891); *Radel v. Borchers*, 147 *Ky.* 506, 508, 145 *S.W.* 155, 156 (1912); *Schutte v. United Electric Co. of N. J.*, 68 *N.J. Law* 435, 437, 53 *Atl.* 204, 205 (1902). A fortiori the employer is liable if the "independent contractor" was held out as a servant. *Augusta Friedman's Shop, Inc. v. Yeates*, 216 *Ala.*

ing. It suggests that the employer who is under a contractual obligation is *always* responsible for harmful conduct of his servants and independent contractors, and further, that he is responsible for them only. Neither of these extremes actually prevails in practice. The real question is broader, and can be stated as follows: If one has promised a certain performance, is he responsible in damages when his default was caused by the act or omission of another person, or is he excused? The interference of certain persons with the promised performance will excuse the promisor, while that of others will not. For example, a department store is not excused if a burglar steals the goods out of the delivery truck; on the other hand, the same store may be excused if an enemy airplane has wrecked the ship in which the goods were being transported. The problem is where to draw the line between those persons for whose interference the promisor is liable and others (called third persons by the French)<sup>17</sup> for whose conduct he should not be held responsible. On this point generalizations are impossible; the question can be answered only by construing each contract.<sup>18</sup> Only for particular types of agreements can rules of interpretation be developed. In fact, such rules are constantly applied, even though they are not always recognized as such.<sup>19</sup>

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434, 113 So. 299 (1927); *Hannon v. Siegel-Cooper Co.*, 167 N.Y. 244, 60 N.E. 597 (1901); Cour d'appel de Poitiers, Dec. 12, 1904, Sirey 1906.2.157; Reichsgericht, July 3, 1936, J.W. (1936) 3111.

17. Ferrara, *Responsabilità Contrattuale per Fatto Altrui* (Italy, 1903) 70 *Archivio giuridico* 510; Soarec, *La Responsabilité Contractuelle pour Autrui* (1932) 22, 110. It is interesting to notice that 6 Williston, *Treatise on the Law of Contracts* (rev. ed. 1938) 5421, § 1936, uses the same term to convey the same idea.

18. The German Supreme Court, probably for the reason stated in the text at page 4 is very much inclined to regard third persons as "Erfüllungsgehilfen" for whom the promisor is liable. Reichsgericht, Dec. 21, 1920, RGZ. 101, 152; Dec. 9, 1921, RGZ. 103, 180; Feb. 3, 1922, RGZ. 39, 104; June 5, 1922, RGZ. 32, 105; Sept. 21, 1923, RGZ. 108, 221. But cf. Jan. 4, 1921, RGZ. 101, 157 and Jan. 9, 1908, Warn. (1908) 131 (the railroad is not responsible for the tort of an official of the mail). See further Heck, *Grundriss des Schuldrechts* (Tübingen, 1929) 84; Leonhard, 17th *Deutscher Juristentag*, 340.

19. The lessee of a boat may be responsible for the tug master's fault: *Smith v. Bouker*, 49 Fed. 954 (C.C.A. 2d, 1891); a railroad for the fault of another railroad whose tracks it is using under a license: *Brady v. Chicago & G. W. Ry.*, 114 Fed. 100 (C.C.A. 8th, 1902). Interesting situations are the cases where a bank or a forwarding firm was entrusted to present an instrument, to take over merchandise, to forward merchandise or money and uses another firm. See, e.g., Supreme Court of Czechoslovakia, Oct. 21, 1924, Vazny 4283; June 8, 1927, Vazny 7129. A fuel dealer who had promised to deliver coal at a residence is responsible for damage done to the house by the carrier whom he had charged with the delivery. Supreme Court of Czechoslovakia, March 12, 1919, Vazny 90. A promisor who had undertaken to dye cloth was held liable for the theft of an employee of a subcontractor in *Oberster Gerichtshof*

The rules with respect to warranties of quality in sales contracts are in fact rules which impose responsibility for the acts of other persons. Generally, in determining the liability of the seller for defects, it is not relevant whether the defect was caused by the seller himself, by one of his employees, or by some third person from whom he acquired the goods.

A reasonable interpretation of other types of contracts makes it necessary to expand still further the orbit of persons for whose actions the obligor under a contract may be held liable. The courts of the civil law countries have not hesitated to hold a lessee or bailee responsible for damages caused to the premises by family members and even guests.<sup>20</sup> On the other hand, there are

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Wien, Nov. 19, 1919, SZ. 7, 221. In the early years of the code the legal literature tried to limit the promisor's liability to acts of servants in the proper sense of the word. See, e.g., Brodmann, *supra* note 7, at 190, 226, 232.

20. Ch. req., Jan. 24, 1883, Dalloz 1883.1.153; Cour de Paris, May 20, 1925, Dalloz 1925.1.503 (servants); Ch. civ., Dec. 13, 1927, Dalloz 1928.1.94 (mistress of the lessee); Reichsgericht, Jan. 2, 1923, RGZ. 106, 133 (movers of the lessee). *Contra*: Bogle v. Weber, 189 Ill. App. 184 (1914); Supreme Court of Czechoslovakia, April 23, 1924, Vazny 3753; Supreme Court of Austria, Jan. 31, 1899, GIUnF. 492; Nov. 10, 1920, SZ. 2, 319.

And conversely the lessor was held liable to the lessee for harm caused by a plumber working in the house: Reichsgericht, June 3, 1921, RGZ. 102, 231. Oberster Gerichtshof Wien, Sept. 25, 1934 (Austria, 1935) 53 Zentralblatt für die juristische Praxis 59. *Contra*: Lawrence v. Shipman, 39 Conn. 586 (1873) (mason work); Ch. req., June 17, 1890, Sirey 1890.1.321; Ch. civ., July 20, 1932, Dalloz 1932.1.507 (harm caused by another lessee). Cf. Comments (1940) 102 Deutsche Justiz 1071 and (1941) 11 Deutsches Recht 178 upon the decision Kammergericht Oct. 2, 1940.

It is interesting to compare these decisions with the common law cases dealing with the problem of whether or not a bailee is liable for conversions, destructions and other harms caused by his servants. There is a conflict of opinion here. See, on the one side, *Merchants Nat. Bank v. Carhart*, 95 Ga. 394, 22 S.E. 628 (1895); *Renfroe v. Fouche*, 26 Ga. App. 340, 106 S.E. 303 (1921); *Rhodes v. Warsawsky*, 242 Ill. App. 101 (1926); *Forster v. Essex Bank*, 17 Mass. 479 (1821); *Holmes v. First National Bank*, 101 N.J. Law 401, 128 Atl. 150 (1925); *Weissburg v. People's State Bank of New Kensington*, 284 Pa. 260, 131 Atl. 181 (1925); *Firestone Tire and Rubber Co. v. Pacific Transfer Co.*, 120 Wash. 665, 208 Pac. 55, 26 A.L.R. 217 (1922); *Fireman's Fund Ins. Co. v. Schreiber*, 150 Wis. 42, 135 N.W. 507 (1912); *Finucane v. Small*, 1 *Espinasse* 315 (1795); *Giblin v. McMullen*, 5 Moore (N.S.) 434, 16 Eng. Reprint 578 (P.C. 1868); *Sanderson v. Collins* [1904] L.R. 1 K.B. 628. With the above cases compare the opposing view adopted in *Preston v. Prather*, 137 U.S. 604, 11 S.Ct. 162, 34 L.Ed. 788 (1891); *Maynard v. James*, 109 Conn. 365, 146 Atl. 614 (1929); *Evans v. Williams*, 232 Ill. App. 439 (1924); *Miller v. Viola State Bank*, 121 Kan. 193, 246 Pac. 517 (1926); *Bowles v. Payne*, 251 S.W. 101 (Mo. App. 1923); *Corbett v. Smeraldo*, 91 N.J. Law 29, 102 Atl. 889 (1918); *National Liberty Ins. Co. of America v. Sturtevant-Jones Co.*, 116 Ohio St. 299, 156 N.E. 446 (1927); *City Savings Bank & Trust Co. v. Pluchelt*, 37 Ohio App. 423, 175 N.E. 213 (1931); *The Coupé Co. v. Maddick*, L.R. 2 Q.B. 413 (1891). Other cases are collected in Notes (1922) 26 A.L.R. 223, (1927) 52 *id.* 711, (1931) 45 Harv. L. Rev. 342, 345. Many of the cases can be distinguished upon two grounds: (1) whether or not the bailment was gratuitous; (2) whether the servant acted intentionally or negligently. The liability of the tenant for harm done to the premises by third persons is liability for waste. The results reached are often

situations where the obligor is not responsible even for the actions of his servants in the narrow sense of the word, as where he only undertook to put the services of his servant at the disposal of another. In the light of the foregoing, we can properly conclude that the usual statement to the effect that in contractual relations the promisor is responsible for actions of servants and independent contractors is at once too narrow and too broad.<sup>21</sup>

A plaintiff who institutes suit relying upon the rules of respondeat superior begins by alleging that a tort was committed by a designated person and then asserts that the defendant is liable because he is the master of the tortfeasor.<sup>22</sup> Are these same allegations necessary where the plaintiff bases his suit on the violation of a contractual duty? An affirmative answer seems to be commonly assumed; certainly such is the indication of Section 278 of the German Civil Code, which imposes liability in contractual situations for the *fault* of the servant.<sup>23</sup> Nevertheless, observation of the way in which contract cases are handled by the courts and an analysis of the logical consequences of this theory both lead to the contrary conclusion. If a large enterprise is sued for breach of contract, the question as to which member of the enterprise caused the breach is practically never raised. Still less debated is the question whether a particular member of the enterprise acted wrongfully. The reason is clear: In order to state a cause of action the plaintiff need only allege non-performance of the obligation imposed by the contract; he is not required to name the individual member of the defendant firm who caused the breach.<sup>24</sup>

Quite different is the situation in tort cases. Here, in theory

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different from those of the civil law jurisdictions, because at common law a lease is regarded as an estate. But the stipulations found in the usual contracts of short term leases tend to assimilate the legal relations to those in the civil law countries.

21. The distinction between contractual and delictual responsibility sometimes has curious consequences; so the liability of a railroad for an accident happening in the station may depend upon whether or not the injured had already bought the ticket. Reichsgericht, Feb. 5, 1915, Warn. (1915) 174; Feb. 9, 1933, JW. (1933) 1390.

22. How far the notion of "tort" must be qualified in these cases will be discussed later, *infra* p. 12 et seq.

23. German legal writers have rarely noticed the fundamental difficulty. But see Kress, *Lehrbuch des allgemeinen Schuldrechts* (1929) 338; A. Nussbaum, *Haftung für Hilfspersonen* (1898) 83. Practically all authors, however, discuss one question connected with it, namely what degree of care is required of the servant.

24. See *Pollard v. Coulter*, 238 Ala. 377, 191 So. 231 (1939). But cf. *Axon v. Kansas City Public Service Co.*, 142 S.W. (2d) 342 (Mo. App. 1940).

at least, the injured person must name the culprit who has committed the tort. But we must concede that this principle is no longer observed in such cases as *McPherson v. Buick Motor Company*,<sup>25</sup> where it is sought to hold a large enterprise liable for bringing a dangerous article into the flow of commerce. Furthermore, sometimes it is certain that a servant of the defendant has committed a tort, but the plaintiff is not in a position to know his name; as, for example, where an unknown driver of a large bus company is responsible for a collision. In such a case the German courts have dispensed with the requirement of naming the tortfeasor.<sup>26</sup>

In contract cases, if recovery rested upon the theory that the conduct of the servant was wrongful, several logical corollaries might be expected to follow. The plaintiff should be required to prove that the act of the servant falls under one of the familiar types of delictual wrongs, such as assault, trespass, or negligence. It would further appear that the employer should be permitted to set up all the defenses available to the servant tortfeasor. From this it would follow that two standards of wrongfulness would be applied at the same time: The act of the servant would have to be wrongful as a violation of the contractual duty owed by the master to the promisee, and the same act must also be wrongful as a violation of the servant's duty not to commit torts.<sup>27</sup>

Some examples will illustrate the difficulty of this double standard: A buyer receives watered milk from the seller. Must the buyer show not only that the seller violated his duty to furnish good milk, but also that an employee put water in the milk and that this act was a tort against the buyer? What kind of a tort would it be, if the employee had acted out of spite against his master?<sup>28</sup> Or another example from the good old times<sup>29</sup>—the engineer let the train stand for a night in the station. Is the passenger who claims damages for delay in transportation compelled to prove that the engineer committed a tort against him? Here again it would be difficult though not impossible for an ingenious

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25. 217 N.Y. 382, 111 N.E. 1050 (1916). See further, e.g., *Bagre v. Daggett Chocolate Co.*, 126 Conn. 659, 13 A. (2d) 757 (1940) (basing the decision upon *res ipsa loquitur*).

26. Reichsgericht, July 1, 1909, Warn. (1909) 490; March 14, 1910, Warn. (1910) 193; Nov. 23, 1910, S.A. 66, 348; Dec. 1, 1913, Warn. (1914) 78.

27. Cases where such a double inquiry was undertaken are rare. See, e.g., *OLG. Hamm*, Nov. 26, 1932, JW. (1933) 2015; Reichsgericht, March 31, 1936, JW. (1936) 2394 (bone splinters in a dish).

28. *Stranahan Co. v. Coit*, 55 Ohio St. 398, 45 N.E. 634 (1896).

29. *Weed v. The Panama R.R.*, 17 N.Y. 362 (1858).

interpretation to qualify the conduct of the engineer as a tort against the passenger. The same difficulty will be met if an employed salesman has sold an article under the price which the employer had promised another competitor to maintain.<sup>30</sup> How is it possible to qualify the act of the salesman as a tort against the competitor, if he did not owe him any duty? True, the American courts<sup>31</sup> as well as the German ones<sup>32</sup> have developed a rule that the violation of a contractual duty may constitute at the same time a tort against third persons injured thereby.<sup>33</sup> But it would be a strangely circuitous way of reasoning to say that the promisee has to allege the breach of the contract existing between master and servant, to conclude from that breach that the servant has committed a tort and then to derive from the servant's liability that of the master.<sup>34</sup> Under this theory too the plaintiff has to allege and prove the breach of a contract, but strangely enough instead of the breach of the contract *he* has concluded the breach of the contract existing between master and servant.

Further, if in contract cases the master were liable for the tort of the servant and not for the violation of his own contractual duty, he could assert as a defense that the servant was insane, et cetera, and hence not responsible.<sup>35</sup> It is doubtful whether this kind of defense is available to the master in tort cases; that it is excluded in contract cases seems to be certain.<sup>36</sup>

If the common rules of respondeat superior were applicable in contract cases, we would expect to find in these cases the corollary proposition that the master is liable for such harmful acts

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30. This example is used by Siber in Planck's Commentaries, note 2b to § 278 for a different argument. The case of Greyhound Corp. v. Commercial Casualty Ins. Co., 259 App. Div. 317, 19 N.Y.S. (2d) 239 (1940) is another authority for the proposition that the agent causing the breach of a contract must not have committed a tort.

31. *Casement v. Brown*, 148 U.S. 615, 13 S.Ct. 672, 37 L.Ed. 582 (1893).

32. Reichsgericht, JW. (1903) Beilage No. 21; Nov. 12, 1910, Warn. (1911) 32; Dec. 2, 1910, JW. (1911) 182; June 22, 1912, Warn. (1912) 420; Oct. 21, 1937, RGZ. 156, 193; Oct. 21, 1937, JW. (1938) 176. Cf. Bandmann, JW. (1939) 604.

33. Kessler, *Die Fahrlässigkeit im nordamerikanischen Deliktsrecht* (1932) 104. But under a widely accepted doctrine an agent is liable only in the case of misfeasance, not of non-feasance. See, e.g., *Ryan v. Standard Oil Co. of Indiana*, 144 S.W. (2d) 170, 172 (Mo. App. 1940).

34. See, e.g., *Aldrich v. Boston & Worcester R.R.*, 100 Mass. 31 (1868). Stored goods were burned in a warehouse. Would it be of any importance that one of the employees owed the owners of the warehouse the duty to save the goods and consequently that he was guilty of negligence in not saving them?

35. This is indeed the opinion of Wilburg, *supra* note 8, at 664, and Ferrara, *supra* note 17, at 518. The correct view has been expressed by Becqué, *supra* note 15, at 304.

36. Consequently the master can be held liable although the servant has been absolved. *Pollard v. Coulter*, 238 Ala. 421, 191 So. 231 (1939).

of the servant only as were committed within the scope of his employment.<sup>37</sup> However, the master has been held for acts of his servant which could not be included in even the broadest definition of the term, "within the scope of his employment."<sup>38</sup> It is the prevailing opinion that a promisor who owes a special duty of protection as, for example, a carrier or restaurant keeper, is liable for an assault by one of his servants even if it is committed out of purely personal motives.<sup>39</sup>

It is not premature to conclude that the rules of respondeat superior are not applicable in contract cases, but are replaced by other principles governing the responsibility of the contractual obligor for breach of contract. Thus, there immediately arises the problem of distinguishing contract cases from simple tort cases. Up to the present the term "contractual duty" has been employed in the narrowest sense of the word. But it is possible and even probable that in this connection the import of the term has to be enlarged.<sup>40</sup> It may be necessary to include pre-contractual obligations<sup>41</sup> and certain other definite duties which the law imposes irrespective of the consent of the parties, such as the duties owed by a guardian to his ward.<sup>42</sup>

On the basis of the experience of the civil law courts it might be expected that the field of application of the contract rules governing the liability for dependent persons will be expanded in

37. Pollock, *The Law of Torts* (13 ed. 1929) 90. Contra: Ferrara, *supra* note 17, at 521; Soarec, *op. cit.* *supra* note 17, at 24.

38. Schmidt v. New Orleans R.R., 116 La. 311, 40 So. 714 (1906); Pratt v. Martin, 183 Ark. 365, 35 S.W. (2d) 1004 (1931); Bryant v. Rich, 106 Mass. 180 (1870); Vannah v. Hart Private Hospital, 228 Mass. 132, 117 N.E. 328 (1917); Dwinelle v. New York Cent. & H. R.R., 120 N.Y. 117, 24 N.E. 319 (1890); National Liberty Ins. Co. of America v. Sturtevant-Jones Co., 116 Ohio St. 299, 156 N.E. 446 (1927); Craker v. The Chicago & N.W. R.R., 36 Wis. 657 (1875). See further the interesting dissent of Justice Seawell in Robinson v. Sears, Roebuck & Co., 216 N.E. 322, 324, 4 S.E. (2d) 889, 890 (1939).

39. Cf. *infra* note 43.

40. Ferrara, *supra* note 17, at 407.

41. The Reichsgericht assumes that the master is liable for the breach of precontractual duties by the servant. Reichsgericht, Jan. 12, 1915, JW. (1915) 240; Oct. 19, 1921, RGZ. 103, 47; July 12, 1923, RGZ. 107, 240; June 23, 1926, RGZ. 114, 155; Feb. 19, 1931, RGZ. 131, 343. Contra: 1 H. Mazeaud et L. Mazeaud, *op. cit.* *supra* note 15, at 967. Why should a contract not have "after effects"? A negative answer is implied in *Central Ry. v. Peacock*, 69 Md. 257, 14 Atl. 709 (1888); *Palmer v. Winston-Salem Ry. & Electric Co.*, 131 N.C. 250, 42 S.E. 604 (1902). A somewhat similar extension is to be seen in the rule that the liability of a carrier is not dependent upon the contract but upon the receiving of the injured for carriage. *Foulkes v. The Metropolitan District Ry.*, L.R. 5 C.P. 157, 164 (1880); *Harris v. Perry & Co.* (1903) 2 K.B. 219. As to merchandise see *Hayn, Roman & Co. v. Culliford*, L.R. 4 C.P. 182 (1879).

42. Or the duty which the trustee in bankruptcy owes the bankrupt: Reichsgericht, Sept. 7, 1936, RGZ. 152, 125; or the duty that an association owes its members: Reichsgericht, Feb. 28, 1927, JW. (1938) 1329.

still other ways. Contracts will be construed as creating collateral duties toward both the promisee himself<sup>43</sup> and third persons.<sup>44</sup>

43. Examples: The duty of the employer to furnish a reasonably safe working place [*Dieters v. St. Paul Gaslight Co.*, 86 Minn. 474, 91 N.W. 15 (1902)]. If in many cases, e.g., in *Pantzar v. The Tilly Foster Mining Co.*, 99 N.Y. 368, 2 N.E. 24 (1885) and *Wilsons Clyde Coal Co. v. English* [1938] A.C. 57, this duty has been regarded as non-delegable, the reason seems to be that it was founded upon a contract. The same position has been taken by *Reichsarbeitsgericht*, June 5, 1940, JW. (1940) 1788. Similarly a stevedore company has to transport its workers safely to the working place: *Maryland Dredging Contracting Co. v. Maryland*, 262 Fed. 11 (C.C.A. 4th, 1919), where again the duty was regarded as non-delegable.

See the following cases with respect to the duty of the carrier to bring passengers safely to the place of destination and to protect them: *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637, 7 S.Ct. 1039, 30 L.Ed. 1049 (1887); *Lafitte v. New Orleans City and Lake R.R.*, 43 La. Ann. 34, 8 So. 701 (1890); *Seawell v. Carolina Cent. R.R.*, 133 N.C. 515, 45 S.E. 850 (1903) (mob violence). But cf. *Readhead v. The Midland Ry.*, L.R. 4 Q.B. 379 (1869); Ch. req. June 28, 1916, *Sirey* 1922.1.325n; Ch. civ. May 10, 1921, July 25, 1922; Ch. req. July 31, 1922, *Sirey* 1922.1.324. The word absolute liability must be accepted with caution. See *New Orleans and Northeastern R.R. v. Jopes*, 142 U.S. 18, 12 S.Ct. 109, 35 L.Ed. 919 (1891).

Duties of the restaurant keeper and hotel owner to protect customers: *Curran v. Olson*, 88 Minn. 307, 92 N.W. 1124 (1903); *Stott v. Churchill*, 15 Misc. 80, 36 N.Y. Supp. 476 (1895), affirmed 157 N.Y. 692, 51 N.E. 104 (1898); *Beilke v. Carroll*, 51 Wash. 395, 98 Pac. 1119 (1909); *Maclenan v. Segar* [1917] 2 K.B. 325; *Campbell v. Shelbourne Hotel* [1939] 2 K.B. 534. If such a duty exists it cannot matter whether the employee committing the assault indulged in private vengeance or tried to enforce the payment as was assumed in *Johnson v. Monson*, 183 Cal. 149, 190 Pac. 635 (1920); *Bergman v. Hendrickson*, 106 Wis. 434, 82 N.W. 304 (1900). If in the "hot foot" cases some courts [e.g., *Peter Anderson & Co. v. Diaz*, 77 Ark. 606, 92 S.W. 861 (1906); *Sullivan v. Crowley*, 155 Mass. 188, 29 N.E. (2d) 769 (1940)] denied the liability of the barkeeper, they apparently disregarded this duty of protection.

The duty of a department store to protect customers: *Rumetsch v. Wanamaker*, 216 N.Y. 379, 110 N.E. 760 (1915) (duty to inspect the elevator non-delegable); *Reichsgericht*, Dec. 7, 1911, RGZ. 78, 239. Contra: *Smothers v. Welch & Co.*, 310 Mo. 144, 274 S.W. 678 (1925); *McKeighan v. Kline's Inc.*, 339 Mo. 523, 98 S.W. (2d) 555 (1936).

Duty of the entrepreneur of a theatre, show, or race to protect spectators: *Francis v. Cockrell*, L.R. 5 Q.B. 184, 501 (1870); *Welsh & Wife v. Canterbury and Paragon Ltd.* [1894] T.L.R. 878, qualified in *Cox v. Coulson* [1916] 2 K.B. 177 and *Hall v. Brooklands Auto Racing Club* [1933] 1 K.B. 205; *Grand Morgan Theatre Co. v. Kearney*, 40 F.(2d) 235 (C.C.A. 8th, 1930); *Lawson v. Clawson*, 177 Md. 833, 9 A.(2d) 755 (1939); *Canney v. Rochester Agricultural & Mfg. Ass'n*, 76 N.H. 60, 79 Atl. 517 (1911) (no contractual relations); *Richmond & M.R.R. v. Moore's Adm'r*, 94 Va. 493, 27 S.E. 70 (1897); *Handley v. Anacortes Ice Co.*, 5 Wash.(2d) 384, 105 P.(2d) 505 (1940). But see *Wiersma v. City of Long Beach*, 41 Cal. App.(2d) 8, 106 P.(2d) 45 (1940); *Cour d'appel de Riom*, Nov. 20, 1931, *Sirey* 1932.2.113. This reasoning would justify the result reached by the *Tribunal correctionnel de Mantes*, June 15, 1933, *Sirey* 1933.2.233; *Reichsgericht*, Sept. 27, 1904, RGZ. 22, 59; *Reichsgericht*, March 4, 1930, RGZ. 127, 313. Under this point of view it would not be necessary to inquire whether the driver of the racing motorcycle acted negligently, as the *Reichsgericht* did in this decision under the above criticized wording of Section 278 of the German Civil Code.

Duty of a waterwork towards customers invited to its premises: *Munich v. City of Durham*, 181 N.C. 188, 106 S.E. 665 (1921).

The telegraph company does not owe to its customers the duty to write their dispatches: *Western Union Telegraph Co. v. Foster*, 65 Tex. 220 (1885).



One last remark is necessary: When it is said that the rules of respondeat superior are not applicable in contract cases, we do not mean that the injured party cannot rely upon these rules even if he is able to allege facts which call for their application;<sup>45</sup> but rather that he can invoke other and broader principles if he is able to allege the breach of a contractual duty, and that he can so forestall the usual defenses implicit in the doctrine of respondeat superior.

### III. THE NATURE OF THE SERVANT'S ACT

In *Schubert v. Schubert Wagon Company*<sup>46</sup> a wife who was injured through the negligence of her husband was allowed to recover from the latter's employer, although she could not have maintained suit successfully against the husband himself. This is rightly regarded as a leading case in the common law; and it appears to be a signpost for future development. It points toward the abolition of the principle that the husband is not liable to his wife in tort. This principle has apparently been regarded with

Duty of protection of a hospital towards the customers: *Vannah v. Hart Private Hospital*, 228 Mass. 132, 117 N.E. 328 (1917).

That different types of contracts entail different kinds of collateral duties has been clearly pointed out in *Brady v. Chicago & G.W. Ry.*, 114 Fed. 100, 103, 104 (C.C.A. 8th, 1902). As to the interpretation of forwarding contracts, see *Reichsgericht*, Feb. 2, 1918, RGZ. 94, 97, Dec. 6, 1924, RGZ. 109, 288; Dec. 10, 1924, RGZ. 109, 299. For the interpretation of contracts concluded with brokers, see *Reichsgericht*, March 2, 1912, RGZ. 78, 310. In *Haskell v. Boston Dist. Messenger Co.*, 190 Mass. 189, 76 N.E. 215 (1906), the court's interpretation of the contract was that it did not entail an obligation to carry goods but merely to place a messenger at the promisee's disposal.

44. The German and French courts are far more inclined than the courts of the common law countries to assume obligations for the benefit of third persons. They assume that a lessor contracts not only for himself but also for members of his family: *Reichsgericht*, Feb. 21, 1921, Warn.(1921) 114; *Cour d'appel de Lyon*, Oct. 3, 1938, *Sirey* 1938.2.149. Contra: *Eberle v. Productive Building & Loan Association of Newark*, 119 N.J. Law 393, 196 Atl. 666 (1938); *Velthuysen v. Hoboken Land & Improvement Co.*, 17 N.J. Misc. 376, 9 A.(2d) 634 (1939); *Monahan v. Baime*, 16 A.(2d) 337 (N.J. 1940) (withdrawn by order of court); *Cavalier v. Pope* [1906]A.C. 428; *Fairman v. Perpetual Investment Building Society* [1923] A.C. 74. It may be regretted that the rule of *Miller v. Hancock* [1893] 2 Q.B. 177 has not been further developed. The following cases afford further instances where contractual obligations toward third persons were assumed: *Reichsgericht*, Nov. 26, 1936, JW. (1937) 737; *Radel Co. v. Borches*, 147 Ky. 506, 145 S.W. 155 (1912). The case *Sciolaro v. Asch*, 198 N.Y. 77, 91 N.E. 263 (1910) could be explained by such an assumption, but it construes an invitation. The case *Griffen v. Manice*, 166 N.Y. 188, 59 N.E. 925 (1901) shows that it may be necessary for the third person to base his action on tort. An extreme case is *Oberster. Gerichtshof Wien*, March 8, 1932, SZ. 14, 214. See further 2 *Savatier*, op. cit. supra note 15, at 120, n° 540.

45. We still less mean that the contract theory can explain all cases where the standard of liability was raised above that of the rules of respondeat superior. Cf. Note (1931) 45 Harv. L. Rev. 342, 346.

46. 249 N.Y. 253, 164 N.E. 42 (1928).

great disfavor by the courts.<sup>47</sup> To abandon it outright would have involved too abrupt a departure from tradition, but to restrict its application was possible and this was done in the *Schubert* case. The rationale of the case, however, indicates only that a third person—the employer, the insurer, the husband's creditors or his heirs—should not profit from the fact that the husband is immune to suit by the wife. The position that the husband himself should not be required to pay damages to his wife, since he must support her anyway, may still be regarded as reasonable.

Under the principle of the *Schubert* case the employer is liable even though the servant himself is free from responsibility. Although it is true that the question whether the master may have recourse against the husband remained open in that decision, it may be assumed that this procedure either was legally excluded or was economically impractical; otherwise the wife would not have instituted suit against the employer. Can we regard the *Schubert* case as the first step toward a broader principle under which the master might be held for acts of the servant, although the servant himself is immune to liability? A reference to the German law suggests that such a development is possible, and probably even desirable. Section 831 of the German Civil Code has been interpreted to mean that the master is liable in all cases where the servant has committed what would be, except for some personal disability, a tort. The result is reached by a highly technical distinction between "objective" and "subjective" factors, which need not be considered here.<sup>48</sup> For present purposes it suffices to say that the master is liable if the servant has violated

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47. Liability of husband's employer denied: *Maine v. James Maine & Son*, 198 Iowa 1278, 201 N.W. 20 (1924); *Sacknoff v. Sacknoff*, 131 Me. 280, 161 Atl. 669 (1932); *Riegger v. Bruton Brewing Co.*, 178 Md. 518, 16 A.(2d) 99 (1940); *Riser v. Riser*, 240 Mich. 402, 215 N.W. 290 (1927); *Emerson v. Western Seed & Irrigation Co.*, 116 Neb. 180, 216 N.W. 297 (1927); *Raines v. Mercer*, 165 Tenn. 415, 55 S.W. (2d) 263 (1932). Affirmed: *Webster v. Snyder*, 103 Fla. 1131, 138 So. 755 (1932); *Broadus v. Wilkenson*, 281 Ky. 601, 136 S.W. (2d) 1052 (1940); *McLaurin v. McLaurin Furniture Co.*, 166 Miss. 180, 146 So. 377 (1933); *Rosenblum v. Rosenblum*, 231 Mo. App. 276, 96 S.W.(2d) 1082 (1936); *Hudson v. Gas Consumers' Ass'n*, 123 N.J. Law 252, 8 A.(2d) 337 (1939), noted in (1939) 88 U. of Pa. L. Rev. 365; *Schubert v. Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); *Koontz v. Messer*, 320 Pa. 487, 181 Atl. 792 (1935); *Poulin v. Graham*, 108 Vt. 307, 147 Atl. 698 (1929). Liability of the father's employer affirmed: *MiLady Cleaners v. McDaniel*, 235 Ala. 469, 179 So. 908, 116 A.L.R. 639 (1938); *Chase v. New Haven Waste Material Corp.*, 111 Conn. 377, 150 Atl. 107 (1930); *Le Sage v. Le Sage*, 224 Wis. 57, 271 N.W. 369 (1937). Denied: *Myers v. Tranquillity Irr. Dist.*, 26 Cal. App.(2d) 385, 79 P.(2d) 419 (1938); *Meece v. Holland Furnace Co.*, 269 Ill. App. 164 (1933). For other cases, see Note (1938) 116 A.L.R. 646.

48. The inherent difficulties are shown by *Deetz*, supra note 3, at 172 et seq.

a duty and caused harm thereby, but is not responsible himself because of some subjective reason, such as insanity. The language of the code, though suggesting this interpretation, does not require it; consequently, it may safely be said that it appeared to the Supreme Court more reasonable and just. These same considerations would operate in common law jurisdictions to effect an extension of the principle of the *Schubert* case. Of course, the requirement that the servant must have committed a wrongful act is not to be abandoned lest the liability of the master is to be expanded indefinitely. But the question remains, which of the specific defenses available to the servant shall be denied to the master? The defense arising out of the husband-wife relationship certainly appears to fall within this group. Whether other defenses, such as insanity,<sup>49</sup> will be added is a question whose answer depends largely upon the creative instinct of the courts. Further prediction is not possible at this time.

#### IV. SERVANTS AND OTHER EMPLOYEES

In modern society the division of labor has progressed to the point where everybody makes extensive use of the services of countless other persons. We all have numerous employees in this sense of the word; but, of course it does not follow that we are responsible for the torts of all the persons whose services accrue beneficially to us. In all legal systems it thus becomes necessary to define the term "servant" in order to ascertain the employees for whose conduct the employer is liable.<sup>50</sup> But in none has a clear notion of "servant" been worked out and accepted; indeed, it is difficult to find even a consistent policy which has been followed in definition. Several reasons may have caused this confusion. One reason, of course, is the social lag that too often exists between the state of the law and the new social and economic conditions to which law must be applied. The traditional textbook titles referring to the master's liability for the acts of his servants still betray the social conditions and prevailing ideas out of which the rules of respondeat superior first emerged—even the term respondeat superior is revealing in this connection. The domestic servant, the farmhand, the groom, the journeyman—these were the persons for whose empty purses the chest of the

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49. In *New Orleans and Northeastern Ry. v. Jopes*, 142 U.S. 18, 12 S.Ct. 109, 35 L.Ed. 919 (1891), the defense of self defense of the servant was allowed in a contract case. In *Davis v. Merrill*, 133 Va. 69, 112 S.E. 628 (1922), the liability of the master was affirmed although the servant was insane.

50. Cf. *Steffen*, supra note 1, at 528.

master was substituted.<sup>51</sup> This, at the time, did not seem unjust to the master, for the relationship between master and servant was so close and the dependence of the servant so thorough that it was safe to conclude that whenever the servant was at fault, the master probably was at fault also. At the present time the imposition of absolute liability on the employer is still thought to be socially desirable, although the exercise in fact of personal supervision by the master is a thing which is disappearing with the civilization that engendered it. It follows that the rationale behind our present concept of liability of the master for the torts of the servant deserves to be newly examined and redefined.<sup>52</sup>

Despite the general confusion, there is, on some points at least, substantial agreement between all legal systems. The feature that is supposed to distinguish the master-servant relationship in legal contemplation is the right and possibility of the master's control over the conduct of the servant. But reality does not correspond to the words.<sup>53</sup> There are many cases where the liability of the master has remained unquestioned despite the fact that all idea of control by the master was pure fiction. The employer is liable for the acts of managing directors and higher employees,<sup>54</sup> as well as for the conduct of workmen who exercise special skills and are possessed of technical knowledge far beyond the master's reach of understanding.<sup>55</sup> A different treatment is found only in the case of a few specialists—such as doctors and nurses,<sup>56</sup> attorneys,<sup>57</sup>

51. Wigmore, *Responsibility for Tortious Acts*, 3 *Select Essays in Anglo-American History* (1909) 520 et seq.

52. For a discussion of the difficulties which have arisen under the German Civil Code, see Jovy, *supra* note 3, at 84; *Kommentar der Reichsgerichtsräte*, § 831, n. 2.

53. Accord: Steffen, *supra* note 1, at 507.

54. *Metzler v. Layton*, 373 Ill. 88, 25 N.E.(2d) 60 (1939) (office manager). The act of conversion committed by a managing director is the act of the bank: *Marietta Trust & Banking Co. v. Faw*, 31 Ga. App. 507, 121 S.E. 277 (1924); *Grenada Bank v. Moore*, 131 Miss. 339, 95 So. 449 (1923); *Citizens Bank of Coldwater v. Callicott*, 178 Miss. 747, 174 So. 78 (1937). But the Ch. crim., Feb. 26, 1937, *Sirey* 1938.1.145, denied the responsibility for the torts of a director because there was no control. Contra: *Conseil d'Etat*, Nov. 22, 1907, *Sirey* 1910.3.15. Cf. *White's Lumber & Supply Co. v. Collins*, 186 Miss. 659, 191 So. 105 (1939). 1 *Savatier*, *op. cit. supra* note 15, at 398 (against the view of the text); *Seavey*, *op. cit. supra* note 14, at 451.

55. See, e.g., *Reichsgericht*, Feb. 22, 1937, *JW.* (1937) 1964; 6 *Planiol-Ripert-Esmein, Traité de Droit Civil Français* (1930) 873, n° 646.

56. *Pearl v. West End St. Ry.*, 176 Mass. 177, 57 N.E. 339 (1900). It is difficult to reconcile the case of *Hillyer v. The Governors of St. Bartholomew's Hospital* [1909] 2 K.B. 820 with the case of *County Council of the Parts of Lindsey v. Marshall* [1937] A.C. 97 except by assuming that the latter case is a contract case. *Reichsgericht*, Jan. 4, 1912, *JW.* (1912) 338 (as to matters requiring professional training). *Cour d'appel de Bordeaux*, July 31, 1878, *Sirey* 1879.2.15; Feb. 6, 1900, *Dalloz* 1900.2.470; *Tribunal civil de la Seine*, June 6, 1906, *Sirey* 1907.2.22; *Tribunal civil de Marseille*, Feb. 10, 1938, *Sirey*

police officers, and officers of the court.<sup>58</sup> The reason for the ex-

1938.2.52 (not if the tort is not connected with the exercise of medical technique). *Contra*: Cour d'appel de Paris, Feb. 24, 1893, Sirey 1893.2.72; Cour d'appel de Bourges, April 14, 1902, Sirey 1902.2.208; Cour d'appel de Lyon, Dec. 19, 1903, Sirey 1904.2.112; Cour d'appel de Pau, June 30, 1931, Sirey 1913.2.277. The contradiction can be in part explained away by assuming that the basis of the latter group of cases was the violation of a contractual obligation. According to Reichsgericht, Aug. 2, 1935, JW. (1935) 3540, nurses are to be treated as ordinary employees.

The argument if sound at all ought to be applied in contract cases also. But here usually the problem is put in another way: Did the promisor (in most cases a hospital) promise medical care or to put at the promisee's disposal doctors and nurses? Hardly a better instance for the proposition that the interpretation of contracts is a matter of value judgments can be found; for even if the hospital owner had expressly promised medical care, which he usually does not, one could object that nobody can promise so highly personal a performance of another. The tendency of the courts to adopt the first interpretation can be explained only by the desire to give the injured a defendant who is financially responsible and who can easily be brought before court. The possibility of this double interpretation is seen everywhere, but nowhere is a method for finding the right one indicated. *Hall v. Lees* [1904] 2 K.B. 602, 611; *Evans v. Mayor & C. of Liverpool* [1906] 1 K.B. 160, 166; *Farwell, J., in Hillyer v. The Governors of St. Bartholomew's Hospital* [1909] 2 K.B. 820, 827; Reichsgericht, June 30, 1936, JW. (1936) 3182.

Examples of the first interpretation: *Welch v. Frisbie Memorial Hospital*, 2 A.(2d) 761 (N.H. 1939); *Hannon v. Siegel-Cooper Co.*, 52 App. Div. 624, 65 N.Y. Supp. 1135 (1900), affirmed 167 N.Y. 244, 60 N.E. 597 (1901) (department store); *Giusti v. C. H. Weston Co.*, 108 P.(2d) 1010 (Ore. App. 1941); Cour d'appel de Dijon, March 18, 1903, Sirey 1906.2.17; Reichsgericht, Oct. 30, 1906, RGZ. 64, 231, almost constantly followed by the Supreme Court. Oberster Gerichtshof Wien, April 30, 1937 (Austria, 1937) 55 Zentralblatt für die juristische Praxis 571.

Examples of the second interpretation: *York v. Chicago M. & St. P. Ry.*, 98 Iowa 544, 67 N.W. 574 (1896); *Schloendorff v. Society of N.Y. Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914); *Phillips v. Buffalo General Hospital*, 239 N.Y. 188, 146 N.E. 199 (1924) (orderly); *Marshall v. Lindsey County Council* [1935] 1 K.B. 516 (but liability was affirmed on other grounds); *Strangeways-Lesmer v. Clayton* [1936] 2 K.B. 11 (nurse); Oberster Gerichtshof Wien, Dec. 19, 1930, SZ. 12, 709; Oct. 29, 1930, SZ. 12, 840.

Steamship companies are supposed not to promise medical care but only to put doctors at the passenger's disposal: *O'Brien v. Cunnard S.S. Co.*, 154 Mass. 272, 23 N.E. 266 (1891); *Allan v. State S.S. Co.*, 132 N.Y. 91, 30 N.E. 482 (1892).

Most of the American cases in point are concerned with another problem: How far are charitable institutions responsible? See Zollmann, *Damage Liability of Charitable Institutions* (1921) 19 Mich. L. Rev. 395.

Is a doctor responsible for the faults of another doctor who represents him during his vacation? No: *Myers v. Holborn*, 56 N.J. Law 193, 33 Atl. 389 (1895). Yes: Cour d'appel de Paris, June 26, 1919, Sirey 1922.2.113. The company is liable for a fraudulent representation of the company doctor: *Woodburn v. Handard Forgings Corp.*, 112 F.(2d) 271 (C.C.A. 7th, 1940).

57. Reichsgericht, Oct. 29, 1937, RGZ. 156, 208 (contract case); *Marsh v. Joseph* [1897] 1 Ch. 213; *Slingsby v. District Bank* [1932] 1 K.B. 544. These decisions are not based on the argument of the text. Oberster Gerichtshof Wien, Sept. 30, 1903, GIUnF. 2447.

58. Police officers placed at the disposal of a private enterprise or the sponsor of a show: *St. Louis I.M. & S. R.R. v. Hackett*, 58 Ark. 381, 24 S.W. 881 (1894) (making a distinction as to whether the sheriff wanted to discharge his public or his private duties); *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313, 20 Atl. 188 (1890); *Kirkpatrick v. Alan Wood Steel Co.*, 338 Pa. 126, 12 A. (2d) 22 (1940).

Teachers have been regarded as servants. *Smith v. Martin* and the Cor-

ception here seems to be that the courts wish to vest these professions with a special independence. The employer who is aware that he is liable for the conduct of the employee will likely be impelled to regulate, and hence to interfere with, the latter's activities. The undesirability of this interference in the case of professional conduct has impressed the courts so much that they have eliminated one of its sources.

Since the older idea of responsibility for persons under control no longer explains satisfactorily the bulk of decided cases, a new interpretation must be sought. Under the common law and the French law, which hold the employer regardless of his personal fault, the function of the doctrine of respondeat superior is to make the employer bear certain risks.<sup>59</sup> They are shifted from the injured person to the employer.<sup>60</sup> According to Douglas<sup>61</sup> and Savatier,<sup>62</sup> who seem to have arrived at the most plausible explanation, the liability for the acts of servants is a part of the price one has to pay for participating in economic life in the role of an entrepreneur.<sup>63</sup> This interpretation explains why the housewife—the typical consumer—is not responsible for the acts of the plumber<sup>64</sup> whom she has called in for repair work, while, on the

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poration of Kingston-upon-Hull [1911] 2 K.B. 775; Ch. civ., Oct. 25, 1886, Sirey 1887.1.4571 (asking whether the order to which the teacher belonged had the right to give instructions).

As to non-commissioned officers and privates put at the disposal of associations sponsoring military training, see Ch. req. Aug. 6, 1907, Sirey 1908.1.281; Cour d'appel d'Amiens, May 29, 1935, Sirey 1935.2.239.

If the responsibility for architects and building engineers has been denied, the reason seems to be that they were independent contractors. See *Burke v. Ireland*, 166 N.Y. 305, 59 N.E. 914 (1901). Contra: *Grote v. The Chester and Holyhead Ry.*, 2 Ex. 251, 154 Eng. Reprint 485 (1848); *Claffy v. Chicago Dock & Canal Co.*, 249 Ill. 210, 94 N.E. 551 (1911). Cf. 6 *Planiol-Ripert-Esmein, Traité pratique de Droit Civil Français* (1930) 875, n° 648.

59. The *theorie du risque* has been discussed with particular thoroughness in France. Colin et Capitant, 2 *Cours Elementaire de Droit Civil Français* (8 ed. 1934) and 1 H. Mazeaud et L. Mazeaud, *op. cit. supra* note 15, at 937, n° 932 et seq., deny that the responsibility for the servants can be regarded as an application of this theory.

60. *Smith, Frolic and Detour* (1923) 23 *Col. L. Rev.* 444, 456.

61. *Douglas, Vicarious Liability and Administration of Risk* (1929) 38 *Yale L. J.* 584, 595, 720, 722.

62. The difference between Douglas and Savatier lies in the fact that the latter distinguishes the servant and the entrepreneur by the legal nature of the contract with the employer.

63. A similar view has been expressed already by Rümelin, *Schadensersatz ohne Verschulden* (1910) 27, 29. The older German literature is equally replete with attempts to justify the liability for servants in general.

64. Or other craftsmen, for example: *Lawrence v. Shipman*, 39 *Conn.* 586 (1873); Ch. crim., June 28, 1934, Sirey 1934.1.317 (mechanic who has to repair an automobile); *Reichsgericht*, Nov. 13, 1909, JW. (1910) 11 (building contractor); *Reichsgericht*, June 13, 1910, JW. (1910) 747 (roof repair); *Reichsgericht*, Feb. 14, 1931, JW. (1932) 1210; *Reichsgericht*, Dec. 17, 1935, JW. (1936)

other hand, the operator of a factory is liable for the misconduct of the plumber employed on the factory pay roll. On this analysis the entrepreneur is liable for all persons, except other entrepreneurs, whom he employs; the consumer is liable only for servants in the popular sense of the word. For the old rule, of course, retains not only its legal validity but its social and economic *raison d'être* so long as this kind of relationship still exists.<sup>65</sup>

The uncertainty of the entrepreneur test is not a valid objection so long as the other tests are no less uncertain. Being quite as bad in that respect the control test has the additional disadvantage of failing to jibe with the actual results of the cases. Whether the entrepreneur test is one which is workable can be determined only after it has been applied to typical situations as they are brought before the courts. Insofar as we can judge from the cases, the application of the test would not prove to be extremely difficult. Of course there will be numerous borderline situations, such as that of the salesman,<sup>66</sup> who seems to be an entrepreneur only if he works for different firms,<sup>67</sup> or the cases of sharecroppers,<sup>68</sup> insurance agents,<sup>69</sup> and lessees of filling stations.<sup>70</sup> It must be admitted that other doubtful situations are certain to arise; this, however, is a defect which the entrepreneur theory

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644; Supreme Court of Czechoslovakia, June 18, 1930, Vazny 10003 (mason); March 8, 1935, Vazny 14237 (farmer engaging a man with a steam thresher); Nov. 18, 1924, Vazny 4376 (farmer engaging a man with a steam plough). Most of these cases may be explained by the assumption that the tortfeasor was an entrepreneur.

65. Smith, *supra* note 60, at 459, thinks it is unjustifiable.

66. Regarded as servant: *Nichols v. G. L. Hight Motor Co.*, 63 Ga. App. 155, 10 S.E. (2d) 439 (1940); *Lewis v. National Cash Register Co.*, 84 N.J. Law 598, 87 Atl. 345 (1913); *Dishman v. Whitney*, 121 Wash. 157, 209 Pac. 12 (1922). Contra: *Barton v. Studebaker Corp.*, 46 Cal. App. 707, 189 Pac. 1025 (1920); *Lee v. Nanny*, 38 Cal. App. (2d) 90, 100 P. (2d) 832 (1940); *Meece v. Holland Furnace Co.*, 269 Ill. 164 (1933); *Pickens v. Diecker*, 21 Ohio St. 212 (1871); *Griffith v. Electrolux Corp.*, 176 Va. 378, 11 S.E. (2d) 644 (1940); Ch. req., May 3, 1933, *Sirey* 1933.1.208. In the case, Ch. civ., June 16, 1936, *Sirey* 1936.1.321, the agent seems to have had an independent enterprise. A dealer charged to sell one's automobile is, of course, not a servant. Ch. crim., Jan. 9, 1931, *Dalloz* 1931.1.171.

It is surprising that in *Samson v. Aitchison* [1912] A.C. 844 the prospective buyer of a motor car and her son were regarded as "servants."

A messenger boy is, of course, a servant: *Postal Telegraph Cable Co. v. Murell*, 180 Ky. 52, 201 S.W. 462 (1918).

67. *Savatieur*, *op. cit. supra* note 15, at 395, n<sup>o</sup> 301; or if he had only an opportunity to sell for the "master," as in the case of *Houdek v. Gloyd*, 152 Kan. 789, 107 P. (2d) 751 (1940). The owner of a state-wide sales organization with its own employees is, of course, not a servant: *R. E. Cox Dry Goods Co. v. Kellog*, 145 S.W. (2d) 675 (Tex. Civ. App. 1940).

68. *Powers v. Whelass*, 193 S.C. 364, 9 S.E. (2d) 129 (1940).

69. *Chatelain v. Thackeray*, 98 Utah 525, 100 P. (2d) 191 (1940).

70. *Donovan v. Standard Oil Corporation of Louisiana*, 197 So. 320 (La. App. 1940); *Horan v. Richfield Oil Corp.*, 105 P. (2d) 514 (Ariz. App. 1940).

shares with all its competitors. The fact remains that the proponents of this test have indicated a way which leads to results that are rationally understandable, even though they cannot always be predicted definitely in advance.

The entrepreneur test has the further advantage of lending itself to an economic interpretation. That legal devices which are used to conceal the economic situation<sup>71</sup> must be disregarded is a principle which is applied in many fields of the law, e. g., in workmen's compensation cases, or if the entire stock of a company is owned by one person or another company. As a test referring to the economic situation the entrepreneur test has ipso facto embraced this principle.<sup>72</sup>

One class of cases where the application of the entrepreneur test would probably be very difficult is at least partly covered by special rules, namely the fraud of agents, i. e., persons entrusted with legal transactions.<sup>73</sup> One agrees that the responsibility is not dependent upon the agent's position as servant or not.<sup>74</sup> The inquiry is shifted to another problem: How far does the authority given to the agent cover deceits committed in the transaction, and

71. Different methods of concealing economic dependence have been shown by Steffen, *supra* note 1, at 519 et seq. See further *Monetti v. Standard Oil Co.*, 195 So. 89 (La. App. 1940). The qualification which the parties themselves give to their relations should be reviewed more skeptically than was done in *Clark v. Lynch*, 139 S.W. (2d) 294 (Tex. Civ. App. 1940), or in *Mabry v. Swift & Co.*, 145 S.W. (2d) 163 (Mo. App. 1940). The correct point of view has been expressed in *Arkansas Fuel Oil Co. v. Scaletta*, 200 Ark. 645, 654, 140 S.W. (2d) 684, 689 (1940).

72. Similar considerations may be the true reasons behind the decisions in *Ch. req.*, Aug. 1, 1866, *Dalloz* 1867.1.26; March 4, 1903, *Sirey* 1903.1.471. A typical situation where the courts would go behind a fictitious legal independence is that of taxi drivers: *Cour de Paris*, July 3, 1923, *Dalloz* 1924.2.48. *Ch. crim.*, Jan. 23, 1931, *Sirey* 1931.1.354. *Contra: McColligan v. Pennsylvania R.R.*, 214 Pa. 229, 63 Atl. 792 (1906). In London the situation is covered by statute: *King v. London Improved Cab Co.*, L.R. 23 Q.B. 281 (1889); *Bygraves v. Dicker* [1923] 2 K.B. 585. As to New York, see *Cargill v. Duffy*, 123 Fed. 721 (S.D. N.Y. 1903).

73. *Ralston Purina Co. v. Novak*, 111 F. (2d) 631 (C.C.A. 8th, 1940).

74. *Haskell v. Starbird*, 152 Mass. 117, 142 N.E. 695 (1890); *Swire v. Francis*, 3 App. Cas. 106 (1877); *Kettlewell v. Refuge Assurance Co.* [1908] 1 K.B. 545, 552; A.L.I. *Restatement of the Law of Agency* (1933) § 256 et seq. Subscriptions to shares have been treated differently: *Houldsworth v. City of Glasgow Bank*, L.R. 5 App. Cas. 317 (1880); *Addie v. The Western Bank of Scotland*, L.R. 1 Sc. & D. App. Cas. 145 (1868); *Lynde v. Anglo-Italian Hemp Spinning Co.* [1896] 1 Ch. 178.

But liability for an agent's malicious prosecution has been made to depend upon whether he was merely agent or independent contractor in *Wanlik v. Franklin Auto Supply Co.*, 10 A. (2d) 349 (R.I. 1940).

Examples of German cases in point: *Reichsgericht*, June 11, 1909, RGZ. 71, 217; June 7, 1910, RGZ. 73, 434; March 25, 1918, RGZ. 92, 345. See further 1 *Savatier*, *op. cit. supra* note 15, at 399, n° 302.



above that, can a fraud consisting in the false assertion of authority create the pretended but non-existing authority?<sup>75</sup>

#### V. LIABILITY FOR INDEPENDENT CONTRACTORS

The courts constantly increase the number of situations in which employers are held responsible for the torts of independent contractors employed by them. Does this disclose a trend toward a general principle of responsibility for all employees?<sup>76</sup> If it were, any effort to define the "servant" would be futile. The answer to this question must be based upon a correct interpretation of the cases in which liability is imposed upon the employer for the wrongs of independent contractors. These cases should not be regarded solely as expressions of a tendency toward the imposition of unlimited responsibility. It is equally possible that they represent situations wherein special interests have demanded special regulations. Here again the comparative method may prove helpful. If it can be shown that under other legal systems similar situations have been met by the imposition of unusually strict liability, we may be justified in assuming that it is the conflict of particular interests that has demanded the exceptional liability.

The first group of decisions imposing responsibility for the acts or omissions of the independent contractor are cases where an occupier of land is sued for injuries inflicted upon a person or thing on adjoining land.<sup>77</sup> The civil law has evolved special rules

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75. The problem is clearly stated by Oertmann in his note to Reichsgericht, Sept. 23, 1933, JW. (1933) 2513. There is a very large number of French cases which turn around this question. Cour de Paris, May 19, 1848, Sirey 1848.2.299; Ch. req., April 9, 1873, Sirey 1873.1.464; Ch. civ., July 28, 1886, Sirey 1890.1.526; Ch. req., July 30, 1895, Sirey 1896.1.288; Feb. 1, 1897, Sirey 1898.1.323; Ch. civ., Dec. 21, 1898, Sirey 1902.1.67; Ch. req., Oct. 21, 1901, Dalloz 1902.1.457; Oct. 23, 1905, Sirey 1907.1.188; Aug. 7, 1906, Sirey 1907.1.88; Ch. crim., March 3, 1923, Sirey 1923.1.400; Ch. civ., Dec. 15, 1926, Sirey 1927.1.51.

The English courts are inclined to deny the principal's liability: Marsh v. Joseph [1897] 1 Ch. 213; Whitechurch v. Cavanagh [1902] A.C. 117; Ruben v. Great Fingall Consolidated [1906] A.C. 439; Kreditbank Cassel G.M.B.H. v. Schenkers, Ltd. [1927] 1 K.B. 826.

Not so the American courts: Fifth Ave. Bank of N.Y. v. Forty-Second St. and Grand St. Ferry R.R., 137 N.Y. 231, 33 N.E. 378 (1893); Citizen's State Bank v. Security Bank of Tyndall, 54 S.D. 233, 222 N.W. 932 (1929).

As to the relations with the ultra vires theory, see The British Mutual Banking Co. v. The Charnwood Forest Ry., L.R. 18 Q.B.D. 714 (1887); Goodhart, Corporate Liability and the Doctrine of Ultra Vires (1926) 2 Camb. L. J. 350; Warren, Torts by Corporations in Ultra Vires Undertakings (1925) 2 Camb. L. J. 180 et seq. The Reichsgericht decided the problem in Dec. 22, 1931, RGZ. 134, 375.

76. That is the opinion of Seavey, op. cit. supra note 14, at 456 and Harper, A Treatise on the Law of Torts (1933) 646.

77. The arguments used by the courts vary. See Hudgins v. Hann, 240

for this type of situation—the rules of neighborly relations.<sup>78</sup> Broadly stated, there is imposed upon the owner of land a number of special duties toward his neighbors. He is not allowed to send over smoke to annoy them, nor can he endanger their lives or property through his excavations or constructions. At civil law these duties are treated differently from other duties. The differences, however, are of no interest here with one exception: When an adjoining landowner is sued for disturbances, injunctive relief is appropriate in German law, and he cannot escape liability by claiming that an independent contractor caused the harm. It should be added that some cases involving the civil law conception of “neighborly duties” would be decided at common law under the doctrine of private nuisance, where again according to common opinion liability for the acts of the independent contractor exists. The positive law here only confirms what common sense suggests. One cannot make such use of his land as will work an unreasonable injury upon his neighbor. The demands thus imposed upon him by the law are not met if he simply places the dangerous or obnoxious task in the hands of an independent contractor. We have seen that the special nature of a contractual relationship imposes new responsibility for the conduct of employed persons. Similarly, the special nature of the neighbor relationship results in the imposition of special duties.

The neighbor is not the only person to whom the landowner<sup>79</sup> owes special duties. Invitees, licensees, and even trespassers are entitled to certain precautionary measures that cannot be delegated to a third person. Here again it is interesting to notice not only that similar results have been reached under different legal

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Fed. 387 (C.C.A. 5th, 1917); *Hammond Ranch Corp. v. Dodson*, 199 Ark. 846, 136 S.W. (2d) 484 (1940); *Bonaparte v. Wiseman*, 89 Md. 12, 42 Atl. 918 (1899); *Hanrahan v. Mayor and City Council of Baltimore*, 114 Md. 517, 80 Atl. 312 (1911); *Pye v. Faxon*, 156 Mass. 471, 31 N.E. 640 (1892); *Cork v. Blossom*, 162 Mass. 330, 38 N.E. 495 (1894); *Cabot v. Kingman*, 166 Mass. 403, 44 N.E. 344 (1896); *Ainsworth v. Lakin*, 180 Mass. 397, 62 N.E. 746 (1902); *Pannella v. Reilly*, 304 Mass. 172, 23 N.E. (2d) 87 (1939); *Covington & Cincinnati Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N.E. 618 (1899); *Bower v. Peate*, L.R. 1 Q.B. 321 (1876); *Dalton v. Angus*, 6 App. Cas. 740 (1881); *Hughes v. Percival*, 8 App. Cas. 443 (1883), which restricts—I think unfortunately—the sound principle of *Dalton v. Angus*, *supra*.

78. In France developed by courts and legal authors: Colin et Capitant, *Cours Elementaire de Droit Civil* (7 ed. 1931) 767; 3 Planiol-Ripert-Picard, *Traité Pratique de Droit Civil Français* (1926) 436, n° 460 et seq. Liability for disturbances caused by a lessee has been denied in Ch. req., June 12, 1855, Sirey 1855.1.710; Jan. 19, 1898, Sirey 1898.1.264.

79. As to occupier of ships, see *Marney v. Scott* [1899] 1 Q.B. 986; *Hillen and Pettigrew v. I.C.I. Ltd.* [1936] A.C. 65, affirming *Hillen v. I.C.I.* [1934] 1 K.B. 455 on different grounds.

systems, but that similar reasoning has been employed. The common law principles<sup>80</sup> find their counterpart in the rule developed by the German Supreme Court that the opening of premises to the public (*Verkehrseröffnung*) imposes the obligation to keep them in a safe condition.<sup>81</sup> There are differences between the licensees and invitees but both have the principle: The fact that the harm was inflicted by an independent contractor is not sufficient to excuse the occupier.<sup>82</sup> Under German law the occupier is liable unless he himself took every step which might reasonably be required to prevent the harm. A duty of personal supervision is imposed upon him if he entrusted the care for the safety of the premises to other persons. If this duty has been violated, he consequently is responsible for his own fault. The torts of the independent contractor are not ipso facto imputed to him. The situation with respect to the common law jurisdictions is not entirely clear. Some of the decisions suggest principles similar to those adopted in Germany;<sup>83</sup> others seem to assume that the master is absolutely liable for the faults of the contractor. This latter solution probably harmonizes better with the notion that the master is absolutely liable for the torts of the servant. It also avoids the difficulties of the negligence test which we have already observed.

The similarity which the above type of situation bears to the cases involving contractual relations is obvious. Although there is no contract, express or implied,<sup>84</sup> between the invitor and the invitee or the public, there is at least conduct giving rise to certain expectations upon which others are entitled to rely. This similarity of the situation justifies the similarity in legal treatment. Neither the promisor nor the invitor can escape liability by delegating his duties to a third person. In both cases the complaint is organized in the same way—starting with an allegation of a breach of duty rather than a tort of an employee. This leaves

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80. *Roby v. Keller*, 114 F. (2d) 790 (C.C.A. 4th, 1940); *Curtis v. Kiley*, 153 Mass. 123, 26 N.E. 421 (1891); *Sciolaro v. Asch*, 198 N.Y. 77, 91 N.E. 263 (1910); *Richmond and M. R.R. v. Mooer*, 94 Va. 493, 27 S.E. 70 (1897); *Indermauer v. Dames*, L.R. 1 C.P. 274 (1866); *Norman v. Great Western Railway* [1915] 1 K.B. 584; *Fairman v. Perpetual Investment Building Society* [1923] A.C. 74.

81. E.g., *Reichsgericht*, Jan. 6, 1939, *Deutsches Recht* (1939) 374.

82. *Reichsgericht*, Sept. 16, 1919, *Warn.* (1919) 265.

83. For example, *F. W. Woolworth Co. v. Carriker*, 107 F. (2d) 689 (C.C.A. 8th, 1939) stating that the occupier is liable only if he had actual or constructive notice of the dangerous situation. The same argument is made use of in innumerable German decisions.

84. In *Indermauer v. Dames*, L.R. 1 C.P. 274, 287 (1866) the distinction between invitation and contract is clearly drawn. Cf. *Pollock*, op. cit. supra note 37, at 534.

to the defendant the task of exculpating himself from liability, if he can.

Another typical situation where the intervention of an independent contractor is not a defense of the landowner arises when a passerby is injured by an object falling from a building.<sup>85</sup> The Romans created the rules of the *cautio damni infecti* and of the *actio de effusis et de ejectis*. Developing these the civil law countries manifested a tendency to impose stricter liability in the above type of situation than would follow from the application of general tort principles. The degrees of responsibility have varied and still vary.<sup>86</sup> Although the German Civil Code<sup>87</sup> does not go so far as some common law jurisdictions, at least this much becomes apparent: Here again is a special situation where extraordinary care is required, and because of the fact that the responsibility of the landowner is stricter than in other situations, it includes acts of independent contractors also.

It is not difficult to understand why the law regards the situation we have described as a special one requiring stricter liability. The falling of objects from a building adjoining a public way is a thing of very frequent occurrence. This fact impels the courts to seek a sure and efficacious remedy for the injured person. The result can be best accomplished by imposing upon the owner of the building a non-delegable responsibility. At the same time one avoids the difficulty of having to discover who was the negligent person. The occupier of the building is a person who may be easily ascertained and he himself must either assume the burden of excusing himself or take recourse against the individual responsible for the injury. The policy consideration which justifies this stricter form of liability is very much similar to that which in other situations led to the introduction of the *res ipsa loquitur* doctrine.

We have already observed that the danger to a passerby of

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85. *Deford v. Maryland*, 30 Md. 179 (1868) (nuisance doctrine); *Rait v. New England Furniture & Carpet Co.*, 66 Minn. 76, 68 N.W. 729 (1896) (control doctrine); *Privitt v. Jewett*, 225 S.W. 127 (Mo. 1920) (based on the dangerous enterprise doctrine); *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 1041 (1895) (city ordinance); *Cour d'appel d'Amiens*, Feb. 24, 1869, *Sirey* 1869.2.67. But in many cases liability was denied. *Chute v. Mooser*, 77 Kan. 706, 95 Pac. 398 (1903); *Boomer v. Wilbur*, 176 Mass. 482, 57 N.E. 1004 (1900); *Davis v. John L. Whiting & Son Co.*, 201 Mass. 91, 87 N.E. 199 (1909); *Douglas v. Holyoke Mach. Co.*, 233 Mass. 573, 124 N.E. 478 (1919); *Hexamer v. Webb*, 101 N.Y. 377, 4 N.E. 755 (1886); *Doerr v. Rand's Adm'r*, 16 A. (2d) 377 (Pa. 1940); *Noble v. Harrison* [1926] 2 K.B. 332 (falling branch).

86. See, e.g., *Oberster Gerichtshof Wien*, Nov. 3, 1914, *GIUnF*. 7098.

87. *German Civil Code*, §§ 836, 837, 838, 908.

being struck by objects falling from buildings that adjoin the public way is an ever-present peril. Consequently, liability for the independent contractor in this case can be regarded as a special aspect of the dangerous instrumentality doctrine.<sup>88</sup> Although there is little agreement among courts and writers with respect to the details of this doctrine, the fundamental principle is clear: He who causes a dangerous enterprise to be undertaken or a dangerous instrumentality to be used is responsible if an accident happens in the undertaking or use.<sup>89</sup> In such case the fact that an independent contractor was placed in charge is no excuse. The rule can be deducted either from the absolute nature of the liability imposed or from the proposition that anyone who creates such dangers even indirectly is himself obliged to take measures of precaution. Modern economic life is built upon the use of dangerous instrumentalities, but he who has the immediate advantage of their use should be required to bear the cost of the injuries inflicted thereby. It follows that any further development of this theme should be directed toward defining the different

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88. The following cases are typical situations which have been regarded as dangerous enterprises: Excavations on a public road: *City of Birmingham v. McCrary*, 84 Ala. 469, 4 So. 630 (1888); *McCarrier v. Hollister*, 15 S.D. 366, 89 N.W. 862 (1902). Contra: *Kepperly v. Ramsden*, 83 Ill. 354 (1876). Blasting: *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32 (1893); *City of Joliet v. William Harwood*, 86 Ill. 110 (1877); *Wetherbee v. Partridge*, 175 Mass. 185, 55 N.E. 894 (1900); *Freebury v. Chicago N. & P.S. R.R.*, 77 Wash. 464, 137 Pac. 1044 (1914). Contra: *Tibbets v. Knox & Lincoln R.R.*, 62 Me. 437 (1873); *Blumb v. Kansas City*, 84 Mo. 112 (1884); *Berg v. Parsons*, 156 N.Y. Supp. 109, 50 N.E. 957 (1898). Window cleaning: *Jacob Doll & Sons v. Ribetti*, 203 Fed. 593 (C.C.A. 3rd, 1913). But not painting of shutters: *Davis v. John L. Whiting & Son Co.*, 201 Mass. 91, 87 N.E. 199 (1909). Burning of brush: *Black v. Christchurch Finance Co.* [1894] A.C. 48. Repair of an elevator without interruption of service: *Besner v. Central Trust Co. of New York*, 230 N.Y. 357, 130 N.E. 577 (1921). Fumigating: *Ferguson v. Ashkenazy*, 29 N.E. (2d) 828 (Mass. App. 1940) (could be explained as a contract case). But not the use of a highly volatile stuff which caused an explosion: *Jennings v. Vincent's Adm'x*, 284 Ky. 614, 145 S.W. (2d) 537 (1940). *United States v. Standard Oil Co. of N.J.*, 258 Fed. 697 (D.C. Md. 1919) is probably an ordinary negligence case. A motor car is not a dangerous instrumentality: *Marion Machine Foundry & Supply Co. v. Duncan*, 101 P. (2d) 813 (Okla. 1940). Surprisingly, fireworks are not always regarded as dangerous enterprises: *Reisman v. Public Service Corp.*, 82 N.J. Law 464, 81 Atl. 838 (1911). Contra: *Sroka v. Halliday*, 39 R.I. 119, 97 Atl. 965 (1916). The Reichsgericht too denied the absolute liability of the employer of a firework firm April 26, 1913, RGZ. 82, 206, but in Oct. 8, 1914, J.W. (1915) 27, it assumed a non-delegable duty to supervise the firework.

Other cases are collected in Note (1921) 23 A.L.R. 1084, 1102 et seq. Cf. *Kimber v. Gas Light and Coke Co.* [1918] 1 K.B. 439; *Brooke v. Bool* [1928] 2 K.B. 458; *Reichsgericht*, April 11, 1935, RGZ. 147, 353 (high tension network not imposing absolute liability).

89. It ought to be sufficient that the use of the dangerous instrumentality was foreseeable: *Cuff v. Newark & N.Y. R.R.*, 35 N.J. Law 17 (1870) (based on nuisance doctrine). But compare *Winniford v. MacLeod*, 68 Ore. 301, 136 Pac. 25 (1913).

types of dangerous instrumentalities whose use imposes greater responsibility. A tendency to expand this class of instrumentalities is clearly observable. The countries of central Europe have gone particularly far. They have introduced a type of liability more or less absolute upon the use of railroads, motor cars, and aircraft. It is noteworthy that even farther extensions have been advocated by some writers.<sup>90</sup>

The statement that in a given instance the duty to take measures of precaution is not delegable<sup>91</sup> adds little to understanding of the law. It is only another and more cumbersome way of stating that the employer is liable for the acts of the independent contractor. For it is impossible to deduct from the content of the duty alone that it is a non-delegable one. Although there are some statutes and city ordinances which expressly allow or forbid one person to shift to another the performance of a given obligation, more often the prohibition against delegation is discovered through a process of judicial interpretation.<sup>92</sup> In such cases it is fair to assume that the courts were motivated by a judgment of values, and the technical question of whether or not delegation is permissible was answered in the way that led to the desired result. The problem, then, is to discover the factor that weighs most heavily in the court's scheme of values. Is it the general idea that everybody should be liable for the acts of employed persons—even independent contractors—; or is it a more limited principle,

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90. Ehrenzweig, *System des Osterreichischen Allgemeinen Privatrechts* (Wien 1920) II, 1, 625. Contra: *Oberster Gerichtshof Wien*, Oct. 24, 1933 (Austria, 1934) 63 *Juristische Blätter* 237.

91. See the cases collected in Note (1921) 23 *A.L.R.* 984.

92. The interpretation of statutes and ordinances in this respect is often very free. See, e.g., *Barris v. American Chicle Co.*, 33 *F. Supp.* 104 (E.D. N.Y. 1940); *Wilson and Brother v. White*, 71 *Ga.* 506 (1883); *Spence v. Schultz*, 103 *Cal.* 208, 37 *Pac.* 220 (1894); *Smith v. Milwaukee Builders' and Traders' Exchange*, 92 *Wis.* 171, 64 *N.W.* 1041 (1895). For other cases see Note (1921) 23 *A.L.R.* 984, 989; *Reichsgericht, JW.* (1902) *Beilage No. 75*; *Jan. 23, 1905, JW.* (1905) 144; *Jan. 11, 1930, JW.* (1930) 3213. The case of April 13, 1908, *Warn.* (1908) 363 shows that the interpretation may turn on the question of who is the addressee of the ordinance.

*Lochgelly Iron & Coal Co. v. M'Mullan* [1934] *A.C.* 1 is another example of an almost arbitrary interpretation of a statutory provision as introducing a non-delegable duty. The same spirit induced the House of Lords in *Wilsons & Clyde Coal Co. v. English* [1938] *A.C.* 57 to regard the duty to provide a safe working system as a non-delegable one. The result could be much easier justified by the assumption of contractual duties. The Czechoslovakian Supreme Court qualified the duty to sand a sidewalk as a non-delegable one. *Feb. 2, 1932, Vazny* 12318; *Sept. 24, 1932, Vazny* 11928; *Feb. 22, 1921, Vazny* 934. The same appears to be true of Supreme Court of Austria, *Dec. 1, 1931* (Austria 1932), 61 *Juristische Blätter* 86. The older decisions appear contra. *Oberster Gerichtshof Wien* *Sept. 30, 1903, GIUnF.* 2446; *Nov. 14, 1911, GIUnF.* 6211; *June 9, 1914, GIUnF.* 6958.

that the nature of the particular situation requires the imposition of stricter liability? This question, of course, can never be answered with the same certainty as a mathematical problem. Comparative law, however, may again facilitate the choice between the above two possibilities. If it should happen that several legal systems make the duty of care a non-delegable one in similar situations, the inference is warranted that the nature of the interests involved required the exception.

The latter inference finds ample support in the cases. In practically every instance where a non-delegable duty was found, the special interests involved justified the imposition of strict liability. In this connection the duties created by contract, invitation, and the use of dangerous instrumentalities must be mentioned again, for very often the result in these cases was supported by the assumption that a non-delegable duty was involved. By far the majority of the remaining cases dealing with non-delegable duties were concerned with accidents on public highways.<sup>93</sup> A typical case is the improperly guarded or unlighted excavation. Here again it is interesting to observe that in the same situation the German courts similarly impose strict responsibility, on the

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93. *Burgess v. Gray*, 1 C.B. 578, 135 Eng. Reprint 667 (1845); *Ellis v. The Sheffield Gas Consumers Co.*, 2 El. & Bl. 767, 118 Eng. Reprint 955 (1853); *Gray v. Pullen*, 5 B. & S. 970, 122 Eng. Reprint 1091 (1864); *Holliday v. National Telephone Co.* [1899] 2 Q.B. 392; *City of Birmingham v. McCrary*, 84 Ala. 469, 4 So. 630 (1888); *Thomas v. Harrington*, 72 N.H. 45, 54 Atl. 285 (1903) and most of the cases cited in note 88. Other cases are found in Note (1916) 18 A.L.R. 801, 846. *Woodman v. Metropolitan R.R.*, 149 Mass. 335, 340, 21 N.E. 482, 483 (1899) is interesting because Holmes' language suggests the rule that the employer is liable in spite of his personal diligence. Sometimes a distinction is made between a direct violation and collateral negligence. *Water Co. v. Ware*, 83 U.S. 566, 21 L.Ed. 485 (1872); *Penny v. The Wimbledon Urban District Council* [1899] 2 Q.B. 72.

It need not be added that there are many cases where the liability of the employer was denied for one reason or another, e.g., because the contractor was in exclusive possession of the work. *Kepperly v. Ramsden*, 83 Ill. 354 (1876).

Another typical situation is the cellar hole case: The occupier of a house allows the cellar flap on the sidewalk to be open for the delivery of goods. A passer-by falls into the hole. Is the owner liable although the seller is an independent contractor? *French v. Boston Coal Co.*, 195 Mass. 334, 81 N.E. 265 (1901); *Ray v. Manhattan Light, Heat & Power Co.*, 92 Minn. 101, 99 N.W. 732 (1904); *Pickard v. Smith*, 10 C.B. (N.S.) 470 (1861); *Daniel v. Rickett, Cockerell Co. Ltd. and Raymond* [1938] 2 K.B. 322. The seller is not liable if the carrier is an independent contractor. *Wilson v. Hodgson's Kingston Brewery Co.* [1915] 85 L.J. 270. As to the German viewpoint, see *Reichsgericht*, Sept. 16, 1932, JW. (1932) 3702. As to the French point of view, see *Cour de Paris*, Jan. 30, 1864, Sirey 1864.2.3.

As to the obstruction of waterways, see *Hole v. The Sittingbourne and Sheerness Ry.*, 6 H. & N. 488, 158 Eng. Reprint 201 (1861); *Brownlow v. The Metropolitan Board of Works*, 13 C.B. (N.S.) 768, 143 Eng. Reprint 303 (1863); *The Snark* [1899] P. 74.

assumption that he who must care for the safety of the public highway is responsible for its use; this duty is one which cannot be discharged merely by entrusting the work to an independent contractor, however reliable.<sup>94</sup> The German Supreme Court imposes liability only for personal negligence,<sup>95</sup> thus always precipitating a complicated and hopeless debate on the issue of negligence. Whether the common law imposes in these situations absolute liability or requires only personal measures of precaution is not clear. The language of the decisions suggests the latter, but actual discussions of the negligence of the defendant seem to be rare.

In another direction the decisions under the common law go further than those of Germany.<sup>96</sup> The common law courts are inclined to hold not only the municipality upon whom the duty to care for the highway is incumbent, but also everyone who carries out construction work on a highway or who uses the highway in connection with work on his adjoining premises.

A common principle is easily discernable in spite of minor differences in the approach of the two systems. The traffic on the roads requires special protection. Somebody (usually the municipality) must "guarantee" the safety of the highways. This means of course an exceptionally high degree of responsibility. In addition to this primary liability, those persons who caused an unusual interference with the safety of traffic are held for accidents which they indirectly caused. This liability is so broad that it embraces responsibility for the acts of independent contractors.

Most if not all of the cases where liability for the acts of the independent contractor has been assumed have been instances involving special interests which justified a requirement of very

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94. Reichsgericht, March 16, 1905, JW. (1905) 284; June 8, 1905, JW. (1905) 486; June 11, 1908, Warn. (1908) 503; Jan. 26, 1911, Warn. (1911) 193; June 22, 1912, Warn. (1912) 420; April 7, 1930, RGZ. 128, 149; March 14, 1937, JW. (1939) 1638. The Reichsgericht too qualifies these duties as non-delegable. It assumes that the municipality has to care for the safety of its highways—a rule which has been applied in most of the American jurisdictions too for a long time. A few examples, two very early ones and two very recent ones, are enough: *Omaha v. Jensen*, 35 Neb. 68, 52 N.W. 833 (1892); *Storrs v. Utica*, 17 N.Y. 104 (1858); *Brooks v. Birmingham*, 239 Ala. 172, 194 So. 525 (1940); *Barsom v. City of Reedley*, 38 Cal. App. (2d) 413, 101 P. (2d) 743 (1940). Cf. *Conseil d'Etat*, May 23, 1930, Dalloz 1930.3.49. The same rule obtained in Austria, *Oberster Gerichtshof Wien*, June 24, 1930 (Austria, 1930) 48 *Zentralblatt für die juristische Praxis* 867; Nov. 14, 1933 (Austria, 1933) 52 *id.* 369.

95. See, e.g., Reichsgericht, Nov. 20, 1902, RGZ. 53; June 11, 1931, JW. (1931) 3325; OLG. Celle, Oct. 21, 1933, JW. (1933) 2920.

96. And those of Austria, see *Oberster Gerichtshof Wien*, Feb. 24, 1914, GIUnF 6817.



high care, or even absolute liability. As a result of this stricter responsibility the distinction between servant and independent contractor becomes irrelevant. In the absence of any such special interests, however, the distinction is probably one which should be preserved.

#### VI. FAMILY MEMBERS AS SERVANTS

In seeking to designate those persons for whose torts the employer is liable, we encounter considerable difficulty when we come to members of the family. It is undoubted that a family member, like any other person, can assume the duties of a servant and thus bring into play the usual rules with respect to the master's liability.<sup>97</sup> But is a father liable for the torts of a son, for example, who is not acting in the course of the former's business? According to the principles we have discussed he would not be. Nevertheless some French and English decisions have held a person liable for the torts of his relatives and friends.<sup>98</sup> This result is reached by applying the control theory and inferring from the right to control a relationship analagous to that of master and servant.<sup>99</sup> This so-called right of control, however, is a fiction. It is never exercised and often is simply nonexistent. It is believed that behind these decisions there is a more deep-rooted and pervasive explanation. This becomes clearer with the discovery that

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97. Reichsgericht, Dec. 12, 1918, Warn. (1919) 55 (son); Oct. 12, 1936, RGZ. 152, 222 (wife of a farmer); Cour de Paris, Dec. 6, 1917, Dalloz 1919.2.43 (wife working in a bar); Ch. civ., Jan. 28, 1935, Sirey 1935.1.141 (son of a farmer). In France it is generally denied that the wife as such is the servant of the husband. Ch. req., July 8, 1872, Sirey 1872.1.259; Cour d'appel de Nancy, Nov. 8, 1902, Sirey 1902.2.240; Ch. crim., Dec. 15, 1911, Sirey 1914.1.54. Cf. Barber v. Pigden [1937] 1 K.B. 664. The husband administering the wife's estate is not her servant. Cour d'appel d'Agen, June 22, 1911, Dalloz 1912.2.228.

98. In civil law countries the liability for minor children is covered by special provisions. Art. 1384, French Civil Code; German Civil Code, § 832. Article 2318 of the Louisiana Civil Code of 1870 seems to impose absolute liability on the parents, but this interpretation is doubtful. See Note (1932) 7 Tulane L. Rev. 119.

99. Ch. crim., July 11, 1913, Dalloz 1918.1.62 (friend); Dec. 14, 1928, Dalloz 1929.1.37 (brother-in-law); Cour de Paris, March 14, 1930, Dalloz 1930.2.115 (son); Ch. req., May 1930, Dalloz 1930.1.137 (friend); Ch. civ., April 17, 1931, Sirey 1931.1.252 (father as master of the driving son although not having a driver's license himself); Ch. req., April 18, 1932, Dalloz 1932.2.282; Pratt v. Patrick [1924] 1 K.B. 488 (friend); Parker v. Miller [1926] 42 T.L.R. 408 (the absent friend as master). But if a car had been lent for a longer period the owner was no longer regarded as master. Cour de Paris, July 25, 1931, Dalloz 1932.2.101; Ch. civ., March 17, 1937, Sirey 1937.1.212; Daniels v. Vaux [1938] 2 K.B. 203. In *Le Sage v. Le Sage*, 224 Wis. 57, 271 N.W. 369 (1937), the brother was regarded as agent of his sister. The decision in *Fallon v. Swackhamer*, 226 N.Y. 444, 123 N.E. 737 (1919) raises the question whether the brother-in-law who is allowed to drive pursues aims of his own or of the lender. The case itself shows the futility of the distinction.

nearly all these cases deal with automobile accidents.<sup>100</sup> They appear to exemplify again the general tendency to impose liability upon the owner of a dangerous instrumentality—the automobile. The result is achieved indirectly by means of extending farther the notion of “servant.”<sup>101</sup> If this explanation is sound,<sup>102</sup> the decisions referred to above do not present a serious argument against the distinction between servants and other persons.

#### VII. THE CONNECTION BETWEEN EMPLOYMENT AND TORT

Under all legal systems the master is not liable for the torts committed by a servant unless the latter's wrong bears a relationship of some sort to his employment. It would hardly be contended, for example, that an employer should be held for injuries inflicted in an affray which takes place over domestic difficulties in the employee's own residence. The function of the concept “within the scope of employment” is to separate such cases from others where the employer is responsible. That this function must be fulfilled, and through the means of a concept of some sort, is beyond question. But the concept employed may be well adapted to its purpose or not. The latter is the case if the concept when applied to the factual situations which are brought before the court gives rise to considerable doubt and uncertainty. If we are to judge from the enormous amount of litigation arising out of the question whether a servant's tort was committed “within the scope of his employment,” we are tempted to conclude that the device adopted by the common law judges is not a happy one. Doubts grow stronger as we observe that civil law jurisdictions have been able to solve this same problem with much less litigation, although the task is the same, and similar notions are in use. Under the French law the master is liable for the torts of the servant committed “in the functions for which he was employed,”<sup>103</sup> and under the German code he is responsible for harmful acts

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100. See the cases cited in the preceding footnote.

101. Burdick, *The Law of Torts* (4 ed. 1926) 190. Another device used in order to hold the owner in this type of case is the family car doctrine. In Germany where a liability statute exists, the courts took another view. *Kammergericht*, Sept. 29, 1933. *JW.* (1933) 112 (the son-in-law driving the car of the mother-in-law is not her servant). Cf. *Reichsgericht*, March 12, 1934, *JW.* (1934) 1642 (the son giving his father a ride is not his servant); *Reichsgericht*, Oct. 22, 1934, *JW.* (1935) 35 (he who rides with another paying part of the expenses and directing the route is not a “master”).

102. But see *Katz v. Reissman Rotham Corp.*, 261 App. Div. 862, 24 N.Y. S. (2d) 807 (1941) (workman's compensation case).

103. Art. 1384, French Civil Code. Article 2320 of the Louisiana Civil Code uses the clause “in the exercise of the functions in which they are employed.”

done "in the performance of the servant's work."<sup>104</sup> It is interesting to speculate as to why the common law courts have encountered so much more difficulty in the application of the notion "within the scope of employment" than have the German and French courts in the application of their corresponding notions. The only explanation the writer can offer is that different methods of interpretation have been adopted under the several systems. From the very beginning the French and German courts have given their concepts a very broad meaning and left their application to the lower courts which have to decide the questions of fact. The German Supreme Court does not require more than that there be a connection between the servant's tort and the work incumbent upon him,<sup>105</sup> while the French Supreme Court has gone still further and stated that the master is liable even for torts committed *à l'occasion du travail*.<sup>106</sup> Under so broad a definition only a few situations, such as, for example, the "smoker cases"<sup>107</sup> and some of the cases involving an agent's fraud, have

104. German Civil Code, § 831. Section 31 of the German Civil Code uses similar language with respect to the torts of the constitutional representative of a corporate body.

105. Reichsgericht, May 29, 1906, RGZ. 63, 341 (contract case); April 25, 1910, JW. (1910) 652; March 20, 1916, Warn. (1916) 199; March 14, 1937, JW. (1939) 1638. Whether this connection exists has to be decided upon the facts of the particular case, Reichsgericht, April 30, 1924, JW. (1924) 1714.

106. Ch. req., Jan. 30, 1935, Sirey 1935.1.144. For example, joke played by one worker upon another: Ch. crim., Feb. 5, 1915, Dalloz 1919.1.8. Cf. the contrary decision in *Western Railway of Alabama v. Milligan*, 239 Ala. 172, 33 So. 438 (1902). Railroad engineer committing a customs duty defraudation: Cour d'appel de Lyon, July 1, 1872, Sirey 1873.2.42; Ch. crim., March 22, 1907, Sirey 1907.1.473. Janitor accomplice to the seduction of a girl living in the house: Cour de Paris, Oct. 8, 1856, Sirey 1857.2.446. The truck driver interrupts his journey and shoots pheasants: Ch. crim., Nov. 23, 1928, Sirey 1931.1.153. A chauffeur commits rape: Tribunal correctionnel de Lille, March 15, 1930, Sirey 1931.2.86. Causing a fire: Ch. req., Dec. 12, 1893, Sirey 1896.1.91; Cour d'appel d'Aix, March 13, 1914, Sirey 1914.2.177. Valet blowing horn: Ch. crim., Aug. 30, 1860, Sirey 1860.1.1013. The driver of a bus company diverts customers from a hotel: July 29, 1856, Sirey 1857.2.298. Most of these decisions state that it is a question of fact whether the servant acted within the scope of his employment. See, in addition, Ch. crim., July 25, 1918, Sirey 1922.1.90. Common opinion in Germany denies the master's liability for torts committed *bei Gelegenheit* of the employment. See Kress, *Lehrbuch des allgemeinen Schuldrechts* (1929) 336. Contra: Oberster Gerichtshof, Wien Aug. 8, 1910, GlUnF. 1529.

107. An employee smokes and causes a fire; liability of the master denied: *Lindley v. McKay*, 146 S.W. (2d) 545 (Ark. 1941); *Feeney v. Standard Oil Co.*, 58 Cal. App. 587, 209 Pac. 85 (1922); *Williams v. Jones*, 3 H. & C. 602, 159 Eng. Reprint 668 (1865); Reichsgericht, Nov. 5, 1915, RGZ. 87, 276 (a contract case, must be regarded as overruled; already the earlier decision of Feb. 20, 1914, RGZ. 84, 222 appears to be inconsistent with it). Liability affirmed: *Irving C. Palmer v. Keene Forestry Ass'n*, 80 N.H. 43, 112 Atl. 798 (1921); *Keyser Canning v. Klots Throwing Co.*, 94 W.Va. 346, 118 S.E. 521 (1923); Ch. crim., Dec. 13, 1856, Sirey 1857.1.442; Cour d'appel de Bordeaux, June 28, 1920, Sirey 1921.2.27; *Jefferson v. Derbyshire Farmers Ltd.* [1921] 2 K.B. 281; Supreme Court of Czechoslovakia, May 24, 1928, *Vazny* 8080.

remained really doubtful.<sup>108</sup> In contrast to this approach the common law courts have attempted to work out a variety of tests to ascertain whether a tort was or was not committed "within the scope of employment;" but the experience of more than a century has proved all these tests unsatisfactory. The earlier ones were gradually abandoned after it was discovered that they led to unjust results when applied to later cases. The present state of the common law is very near to that of the civil law,<sup>109</sup> but the old theories are still pressed into frequent service, sometimes with unfair results.

It is not necessary, of course, that the master had authorized<sup>110</sup> the servant to do the particular act complained of.<sup>111</sup> Never-

108. Examples where French courts denied the connection between work and tort: A maid servant uses a stamp which had already been used (Tribunal correctionnel de Vannes, Jan. 7, 1931, Sirey 1932.2.96); a worker commits indecent acts against a male apprentice (Tribunal civil de St. Etienne, Jan. 31, 1923, Dalloz 1923.2.158); a man servant shoots out of the window (Cour d'appel de Douai, Feb. 14, 1894, Dalloz 1895.2.381); a workman deposits a bomb in another's yard, the bomb being made out of material stolen in the factory (Ch. crim., Dec. 15, 1894, Sirey 1895.1.151); a railroad employee tries out the truck of a customer in the railroad yard during working hours (Ch. civ., May 24, 1927, Sirey 1927.1.309); row between workers (Cour d'appel de Douai, Feb. 24, 1902 and Jan. 12, 1903, Sirey 1904.2.298); the housemaid gives spoiled wine to a beggar (Ch. req., June 5, 1861, Sirey 1862.1.151); acts of private vengeance (Cour d'appel de Paris, May 19, 1874, Sirey 1875.2.36). Cf. Ch. req., Dec. 20, 1904, Sirey 1905.1.173; Oct. 29, 1917, Sirey 1918.1.199.

109. Cf. Smith, *supra* note 60, at 718.

110. This statement or the corresponding one that the master is liable even if he has forbidden the tortious act is found in innumerable cases. Seymour v. Greenwood, 6 H. & N. 359, 364, 158 Eng. Reprint 148, 151 (1861) [but see Seymour v. Greenwood, 7 H. & N. 355, 358, 158 Eng. Reprint 511, 512 (1861)]; Limpus v. London General Omnibus Co., 1 H. & C. 526, 541, 543, 158 Eng. Reprint 993, 999, 1000 (1862); Barwick v. English Joint Stock Bank, L.R. 2 Ex. 259, 266 (1867); Swire v. Francis, 3 App. Cas. 106, 113 (1877); Goh Choon Seng v. Lee Kim Soo [1925] A.C. 550 (but see the important restrictions in the opinion of Lord Phillimore at 554); The Philadelphia and Reading Co. v. Derby, 55 U.S. 468, 487, 14 L.Ed. 502, 510 (1852); Orr v. William J. Burns International Detective Agency, 337 Pa. 587, 12 A. (2d) 25 (1940); Smith v. Yellow Cab Co., 173 Wis. 33, 180 N.W. 125 (1920).

Similar statements are made by the French courts. Ch. crim., June 11, 1836, Sirey 1837.1.452; Ch. civ., May 11, 1846, Sirey 1846.1.364; Ch. crim., Dec. 3, 1846, Sirey 1847.1.302.

But many cases require that the agent have some sort of authority. Washington Gas Light Co. v. Lamsden, 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543 (1898); Dolan v. Hubinger, 109 Iowa 408, 80 N.W. 514 (1899); Strader's Adm'r's v. President and Directors of Lexington Hydraulic & Mfg. Co., 146 Ky. 580, 142 S.W. 1073 (1912); Craig's Adm'r v. Kentucky Utilities Co., 183 Ky. 274, 209 S.W. 33 (1919); Tarver v. J. W. Sanders Cotton Mill, 187 Miss. 111, 192 So. 17 (1939); Muller v. Hillenbrand, 227 N.Y. 448, 125 N.E. 808 (1920); Marlowe v. Bland, 154 N.C. 140, 69 S.E. 752 (1910); Edwards v. The London & North Western Ry, L.R. 5 C.P. 445 (1870); Lord Bolingbroke v. The Local Board of Swindon New Town, L.R. 9 C.P. 575 (1874); Bank of New South Wales v. Owston, L.R. 4 App. Cas. 270 (1879); Beard v. London General Omnibus Co. [1900] 2 Q.B. 530; Hanson v. Waller [1901] 1 Q.B. 390; The Corporation of Glasgow v. Lorimer [1911] A.C. 209; Radley v. London County

theless some courts still require that the act be a part of the duties assigned to the servant.<sup>112</sup> Thus, if a railroad employee has ejected a passenger with unnecessary force, there may arise the question of whether this employee was charged with the admis-

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Council [1913] 109 L.T.R. 162. In cases of arrest by a railroad employee the American courts are less inclined than the English to inquire into the authority of the agent or railroad. *Krulevitz v. Eastern R.R.*, 140 Mass. 573, 5 N.E. 500 (1886); *Kelley v. Durham Traction Co.*, 132 N.C. 368, 43 S.E. 923 (1903). The English doctrine [*Poulton v. The London & S.W. Ry.*, L.R. 2 Q.B. 534 (1867); *Ormiston v. Great Western Ry.* [1917] 1 K.B. 598]. A rule that the master cannot authorize an arrest which he himself cannot lawfully make has been adopted in New York [*Mali v. Lord*, 39 N.Y. 381 (1868); *Homeyer v. Yaverbaum*, 197 App. Div. 184, 188 N.Y. Supp. 849 (1927)].

In some cases the master's liability for a servant's assault or illegal imprisonment was denied because the servant had no authority to punish a past aggression as opposed to authority to protect the master's goods against actual attack. *Brown v. Boston Ice Co.*, 178 Mass. 108, 59 N.E. 644 (1901); *Girvin v. New York Cent. & H. R.R.*, 166 N.Y. 289, 59 N.E. 921 (1901); *Daniel v. Atlantic Coast Line R.R.*, 136 N.C. 517, 48 S.E. 816 (1904); *Allen v. The London and S.W. Ry.*, L.R. 6 Q.B. 65 (1870); *Abrahams v. Deakin* [1891] 1 Q.B. 516.

It is, of course, possible to find reasons for distinguishing the two groups of cases, e.g., the particular nature of the tort committed by the servant (unlawful arrest, slander).

111. If the chauffeur or railroad employee violating his instructions gives a hiker a ride and causes an accident, justice seems to require that the master should not be held; the result can be reached in different ways. It has been contended, for example, that the chauffeur acted outside his employment [*Houston C.A. & N. Ry. v. Bolling*, 59 Ark. 395, 27 S.W. 492 (1894); *Keating v. Michigan Cent. R.R.*, 97 Mich. 154, 56 N.W. 346 (1893); *Schulwitz v. Delta Lumber Co.*, 126 Mich. 559, 85 N.W. 1075 (1901)]. This, however, is less convincing than the approach adopted by the French courts which have held that the hiker does not have a claim if he knew that the chauffeur violated his duties [Ch. crim., Dec. 12, 1903, *Dalloz* 1904.1.70; June 22, 1933, *Dalloz* 1933.1.5; Cour d'appel de Dijon, June 6, 1933, *Sirey* 1933.2.213] but he has a claim if he did not know it [Ch. req., April 3, 1933, *Sirey* 1933.1.190]. In Germany the situation is discussed under the head of *Gefälligkeitsfahrt*; in many American jurisdictions "guest statutes" cover the case.

112. For that reason the master's liability for a traffic accident was denied if not the chauffeur but another employee was driving. *Seaboyer v. Davis*, 244 Mass. 122, 138 N.E. 538 (1923); *Esposito v. American Ry.*, 194 App. Div. 347, 185 N.Y. Supp. 353 (1920). Contra: *Engelhard v. Farrant & Co.* and *T. J. Lipton* [1897] 1 Q.B. 240; *Beard v. London General Omnibus Co.* [1900] 2 Q.B. 530. In *Crippin v. Sunshine Transp. Co.*, 260 App. Div. 52, 20 N.Y.S. (2d) 750 (1940) the master's liability was denied because, against instructions, the driver allowed a third person to drive.

The Reichsgericht too applied this argument when it denied the liability of a railroad sued for the loss of goods stolen by a switchman, on the ground that he was not in charge of handling the goods. Reichsgericht, June 16, 1926, S.A. 80, 319. Cf. March 2, 1922, RGZ. 104, 141 (fraud of an agent). Better: Reichsarbeitsgericht, March 21, 1936, JW. (1936) 2424; Ch. Crim., Nov. 24, 1899, *Sirey* 1902.1.296.

Someone hires a coach and driver; the driver steals the bailee's goods carried in the coach. Reichsgericht, Dec. 4, 1919, JW. (1920) 284 and *Cheshire v. Bailey* [1905] 1 K.B. 237 both deny the liability of the master (bailor). The result is puzzling. The master is not responsible if the driver stole the goods, but he is responsible if another stole them as a result of the driver's neglect. *Abraham v. Bullock*, 86 L.T.R. 796 (1902).

sion of passengers;<sup>113</sup> or if a department store employee has caused the arrest of a customer suspected of theft, it may be asked whether he was a private detective, charged with the duty of watching the public, or an ordinary salesman.<sup>114</sup> There is little doubt that such distinctions are universally regarded as unreasonable. It should be sufficient that the ejection or the arrest were connected with the work entrusted to the servant, and is clear that such a connection existed in the above cases.

It appears further that the distinction cannot be drawn entirely along lines of the servant's intent. The principal is liable for the frauds of the agent despite the fact that the latter may have wished to reap the fruits of his wrong.<sup>115</sup> In such cases it is sufficient that the agent purports to act for the principal and that his employment afforded him the opportunity for his fraud.<sup>116</sup> On the other hand, the servant's motive may well exclude liability by the master in a case such as has already been suggested where death or injury resulted from a domestic difficulty.<sup>117</sup> It seems to follow that the motive of the servant may be the determining factor if the act resulting in injury is not by its nature connected with the work entrusted to the servant. But if an objective connection between the tort and the nature of the work entrusted exists the motive of the servant can hardly be relevant; e. g., if a higher employee reproaches a lower one of having stolen goods of the common employer, the employer should be held even if the higher employee had a personal grudge against the lower one.<sup>118</sup>

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113. *Farber v. Missouri Pac. Ry.*, 116 Mo. 81, 22 S.W. 631 (1893); *Haehl v. Wabash Ry.*, 119 Mo. 325, 24 S.W. 737 (1893) (it was asked whether the watchman had the duty of keeping trespassers from the railroad bridge). The better view was taken in *Dorsey v. Kansas City P. & G. Ry.*, 104 La. 478, 29 So. 177 (1901); *Cook v. Southern Ry.*, 128 N.C. 333, 38 S.E. 925 (1901).

114. The better view was taken in *Staples v. Schmid*, 18 R.I. 224, 26 Atl. 193 (1893).

115. *Gleason v. Seaboard Air Line Railway*, 278 U.S. 349, 49 S.Ct. 161, 73 L.Ed. 415 (1929).

116. Apparent authority is sufficient. *Slingsby v. Westminster Bank* [1932] 1 K.B. 544, 560, affirming *Slingsby v. Westminster Bank* [1931] 2 K.B. 266, 109 L.J. 757. A further condition is that the victim had the intention to deal with the agent as agent and not personally. *Lloyd v. Grace Smith & Co.* [1912] A.C. 716; Ch. civ., June 16, 1884, Dalloz 1885.1.213; Cour d'appel d'Angers, Jan. 15, 1890, Dalloz 1890.2.111; Ch. req., Oct. 30, 1911, Sirey 1912.1.131; Dec. 4, 1912, Sirey 1913.1.132; Cour d'appel de Paris, Jan. 12, 1926, Dalloz 1926.2.59; Ch. req., March 28, 1933, Sirey 1933.1.247.

117. An illuminating case is *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 54 N.E. 471 (1899).

118. In slander cases the courts have been reluctant to qualify the slander as committed within the scope of employment. See *Waters-Pierce Oil Co. v. Bridwell*, 103 Ark. 345, 147 S.W. 64 (1912); *Keller v. Safeway Stores*, 111 Mont. 28, 108 P. (2d) 605 (1940); *Hypes v. Southern Ry.*, 82 S.C. 315, 64 S.E. 395 (1909) on the one side and *Washington Gas Light Co. v. Lamsden*, 172 U.S.

More important, however, than the question how far the motive of the servant has to be taken into account is the question how far juries are willing to believe the allegedly personal motives. Common sense cannot believe that the cashier causing the arrest of a person whom he suspected of having passed him false money to be put into the employer's cash register wanted to vindicate the public interest,<sup>119</sup> or that the watchman on duty shot an intruder because he wanted to find out for himself who was on the premises.<sup>120</sup>

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534, 19 S.Ct. 296, 43 L.Ed. 543 (1898); *Vowles v. Yakish*, 191 Iowa 368, 179 N.W. 117 (1920); *Courtney v. American Ry. Express Co.*, 120 S.C. 511, 113 S.E. 332 (1922) on the other. For other cases, see Notes (1920) 13 A.L.R. 1142, (1922) 24 id. 133, 137, (1921) 70 U. of Pa. L. Rev. 133. In some jurisdictions there is a special rule restricting the responsibility of corporations for the slanders of their employees. As to partnerships, see *Markely v. Snow*, 207 Pa. 447, 56 Atl. 999 (1904). Cf. *Cour d'appel de Paris*, June 16, 1896, *Sirey* 1896.2.208. (In the presence of a prospective lessee a janitor slanders the owner of another house who also has apartments for rent.) There are other examples in which it is difficult to understand why the court denied that the tort was committed within the employment and where a court of the continent would probably not have hesitated to hold the employer: *McDermott v. American Brewing Co.*, 105 La. 124, 29 So. 498 (1901) (assault in order to enforce payment); *Valley v. Clay*, 151 La. 710, 92 So. 308 (1922) (assault of a chauffeur whom another automobilist had reproached); *Everingham v. Chicago B. & Q. R.R.*, 148 Iowa 662, 127 N.W. 1009 (1910) (assault of a switchman on the occasion of an argument over the use of the track); *Crelly v. Missouri & Kansas Telephone Co.*, 84 Kan. 19, 113 Pac. 386 (1911) (the manager forces an employee to sign a voucher); *Holler v. P. Sanford Ross*, 68 N.J. Law 324, 53 Atl. 472 (1902) (watchman shooting while on duty); *Joseph Rand, Ltd. v. Craig* [1919] Ch. 1 (carters depositing rubbish). But see *Cornford v. Carlton Bank* [1899] 1 Q.B. 392.

Assaults committed by employees during a dispute over goods or prices, et cetera, are usually rightly held to be within the scope of employment. *Dilli v. Johnson*, 107 F. (2d) 669 (App. D.C. 1939); *J. M. High Co. v. Holler*, 42 Ga. App. 653, 157 S.E. 209 (1931); *Schwartz v. Nunnally Co.*, 60 Ga. App. 858, 5 S.E. (2d) 91 (1939); *Central Motor Co. v. Gallo*, 94 S.W. (2d) 821 (Tex. Civ. App. 1936). Contra: *National Life & Accident Ins. Co. v. Ringo*, 137 S.W. (2d) 828 (Tex. Civ. App. 1940). For a case of illegal intrusion upon premises, see *Axman v. Washington Gas Light Co.*, 28 App. D.C. 150 (1912).

If an employee plays a trick or joke upon a third person, the employer seems to be liable if it was done with a dangerous instrumentality entrusted for the purpose of the employment. *Texas & P. Ry. v. Scoville*, 62 Fed. 730 (C.C.A. 5th, 1894); *Alseyer v. Minneapolis & St. L. R.R.*, 115 Iowa 338, 88 N.W. 841 (1902); *Berry v. Boston Elevated Ry.*, 180 Mass. 536, 74 N.E. 933 (1905); *Cobb v. Columbia & G. R.R.*, 37 S.C. 194, 15 S.E. 878 (1892). But see *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 29 Pac. 234 (1892). See especially the "torpedo cases," *Pittsburgh C. & St. L. Ry. v. Shields*, 47 Ohio St. 387, 24 N.E. 658 (1890); *Euting v. Chicago & N.W. Ry.*, 116 Wis. 13, 92 N.W. 358 (1902). Contra: *Sullivan v. Louisville & N. R.R.*, 115 Ky. 447, 74 S.W. 171 (1903).

119. This was the question in *Mulligan v. New York & R. B. Ry.*, 129 N.Y. 506, 29 N.E. 952 (1892). Cf. *Lafitte v. New Orleans and Lake R.R.*, 43 La. Ann. 34, 8 So. 701 (1891) (contract case); *Palmeri v. Manhattan Ry.*, 133 N.Y. 261, 30 N.E. 1001 (1892); *Daniel v. Atlantic Coast Line R.R.*, 136 N.C. 517, 48 S.E. 816 (1904).

120. This is what the watchman, as witness, told the jury in *Holler v. P. Sanford Ross*, 68 N.J. Law 324, 53 Atl. 472 (1902).

It is not difficult to understand why the effort to establish criteria distinguishing acts within the scope of employment from those outside it has been unsuccessful. The different criteria proposed did not refer to easily distinguishable facts, but to notions which are quite as fluid as the notion of scope of employment itself, furtherance of the master's business, compact of duties, et cetera. One uncertain notion has been supplanted by other notions of equal uncertainty. However the notion may be defined, the decision is based upon value judgments which it seems impossible to make more specific, but which, at the same time, appear to have a solid base in common sense. Consequently it is very reasonable to let the jury decide this question upon the peculiarity of the factual situation.<sup>121</sup> In France and Germany with their different court systems the same consideration leads to a different but nevertheless analogous rule: The Supreme Court will generally not interfere with the decision of the lower court insofar as it affirms or denies the connection between tort and employment.

Upon looking back on the typical situations which have been adjudicated, we are left with the impression that the application of the phrase "within the scope of employment" would not have met with unusual difficulties had it not been elaborated upon. Most of the trouble can be attributed to the courts' insistence upon making further definitions. Had they simply required some sort of connection between the injurious act and the servant's duties, the problem might have been relatively simple.<sup>122</sup> One typical situation, however, presents an obstacle in the way of this easy solution—the well known cases of frolic and detour of chauffeurs and truck drivers.<sup>123</sup> On few other questions has so much effort been expended with such unsatisfactory results. Even conceding that the tests used in this type of case lead to certain and predictable results, we are left with the impression that their

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121. The assertion of A.L.I., Restatement of the Law of Agency (1933) § 228 that it is a question of fact is open to question. Contra: Baty, *Vicarious Liability* (1916) 135. The correct approach has been given by Bohlen, *Studies in the Law of Torts* (1926) 601.

122. Contra: Note (1940) 19 *Ore. L. Rev.* 184. The problem of defining "injuries arising out of and in the course of employment" which must be solved in workmen's compensation cases is a similar but not identical one because a workman has probably to be insured against more dangers than a third person. An analogy has been drawn in *Knight Iron & Metal Co. v. Ardis*, 240 Ala. 305, 199 So. 717 (1940).

123. Leading case: *Joel v. Morison*, 6 Car. & P. 501, 172 Eng. Reprint 1338 (1834). The large number of cases have so often been discussed that it is not necessary to mention them again. See Note (1939) 122 A.L.R. 863.



use has given rise to distinctions which cannot meet the approval of our sense of justice.<sup>124</sup> One wonders, for example, if it should matter a great deal whether an accident attributable to the carelessness of a "frolicking" chauffeur happened to take place ten feet before the car returned to its proper route, or later, on the way from or to the working place, in the allotted area of work or not, et cetera. The simple test requiring merely some sort of connection between the accident and the employment seems also to encounter difficulties in some of these situations as where the servant has stolen the car.<sup>125</sup> The ordinary rules of respondeat superior, however defined, do not lead to satisfactory results in this type of case. The reason is again that special interests involved require special regulation. The general use of automobiles requires the imposition of special rules of liability upon their owners. When proper rules in this respect have been adopted, the problem of whether or not the chauffeur causing the accident was on a frolic or a detour will disappear; the owner of the automobile will be liable in either case.<sup>126</sup> The trend of the law is in this direction. In some states there has been created either by statute<sup>127</sup> or judicial legislation<sup>128</sup> a presumption that the chauffeur acted within the scope of his employment; other statutory rules have a similar effect in practice.<sup>129</sup> The civil law jurisdictions have rules imposing liability upon the owner or other person in possession of a motor car, regardless of his own negligence. Under a system of absolute liability of the motor car

124. See, e.g., *Holdsworth v. Pennsylvania Power & Light Co.*, 337 Pa. 235, 10 A. (2d) 412 (1940).

125. The German Supreme Court holds that an accident caused during a frolic (*Schwarzfahrt*) is not committed within the scope of the employment. *Reichsgericht*, Nov. 10, 1927, RGZ. 119, 58; April 4, 1932, RGZ. 36, 15. The problem has little practical importance as the case is covered by the liability statute. The French Supreme Court, Ch. crim., Dec. 12, 1903, *Dalloz* 1904.1.70; March 23, 1907, *Dalloz* 1908.1.351; Ch. req., Nov. 17, 1919, *Dalloz* 1920.1.156. The Austrian Supreme Court, Nov. 11, 1903, *GlUnF.* 2486, and the Czechoslovakian Supreme Court, Feb. 11, 1928, *Vazny* 7780 take the opposite view. But see Ch. req., Feb. 26, 1918, *Sirey* 1918.1.119.

126. Ch. civ., Dec. 18, 1933, *Sirey* 1934.1.107.

127. Conn. Gen. Stat. (Supp. 1935) § 1661c.

128. See, for example, *Standard Coffee Co. v. Trippet*, 108 F. (2d) 161 (C.C.A. 5th, 1939); *Barmore v. Vicksburg, S. & P. Ry.*, 85 Miss. 426, 38 So. 210 (1905) (railroad tricycle); *Gordon v. Bleeck Automobile Co.*, 233 S.W. 265 (Mo. 1921); *Ursch v. Heier*, 201 Mo. App. 129, 241 S.W. 439 (1922); *Broadus v. Long*, 135 Tex. 353, 138 S.W. (2d) 1057 (1940). Contra: *Hartnett v. Gryzmish*, 218 Mass. 258, 105 N.E. 988 (1914). A still broader presumption has been adopted in California: *Robinson v. George*, 100 Cal. Dec. 293, 105 P. (2d) 914 (1940).

129. Conn. Gen. Stat. (1930) § 1627, Conn. Gen. Stat. (Supp. 1935) § 1658c; D.C. Code (Supp. 1939) tit. 6, § 2556; New York Vehicle and Traffic Law § 559; *Psota v. Long Island R.R.*, 246 N.Y. 388, 159 N.E. 180 (1927).

owners,<sup>130</sup> the owner is responsible if the accident happened while the car was entrusted to another person and then, of course, it will make no difference whether the driver was or was not acting within the scope of his employment.

It is true that the development of special rules on the liability of motor car owners will generate new problems of application.<sup>131</sup> Who, for example, should be held primarily liable—the owner, the lessee, the thief? A group of new questions is certain to arise with the erection of a novel principle. But an immense advantage would be gained if the problems arising from the use of automobiles could be dealt with upon a direct evaluation of the particular interests and dangers involved in their use. If a forthright solution were available, it would no longer be necessary to apply the rules of respondeat superior to situations which were not foreseen when the doctrine was formulated and to which they cannot be applied except by means of a tenuous manipulation.

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130. A compilation is to be found in Institut International de Rome pour l'Unification du Droit Privé, *Responsabilité Civile des Automobilistes* (1935).

131. See Note (1931) 45 Harv. L. Rev. 171, 173 (liability for bailee) as to the problem of constitutionality. See *Daugherty v. Thomas*, 174 Mich. 371, 140 N.W. 615 (1913). For an analysis of the problem, see Columbia University Council for Research in the Social Sciences, Report by the Committee to Study Compensation for Automobile Accidents, Philadelphia (1932) 132 et seq.