policy: Samuel *v.* Oliver (Ill.), 22 N. E. Rep. 499; Sampson *v.* Shaw, 101 Mass. 145.

An agreement by which one guarantees to another that cattle to be sold by the latter shall bring so much a head, binding himself to pay the difference if they bring less, while the owner agrees to pay the difference to the guarantor in case they bring more, is a wager on the price of the cattle, and a note given for such difference is void: Bank *v.* Carroll, 89 Iowa, 11; S. C., 45 N. W. Rep. 304.

R. D. S.

DEPARTMENT OF TORTS.

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DICKSON *v.* WALDRON.[1] SUPREME COURT OF INDIANA.

The manager of a theatre is responsible for the acts of a special police who was appointed for the theatre, at the special request of the manager, by the Board of Metropolitan Police Commissioners, and who was employed and paid solely by such manager: 34 N. E. Rep. 506, affirmed.

The manager is liable for an assault and battery on an offensive patron by the special police, when acting as doorkeeper, since such act was within the scope of his employment in his master's business: 34 N. E. Rep. 506, affirmed.

LIABILITY OF A THEATRE MANAGER FOR ASSAULT COMMITTED BY A SPECIAL POLICEMAN.

The liability of a master for an assault and battery committed by his servant is based on the common law principle "*Qui facit per aluim facit per se*," the theory being that the master in selecting his servants must do so with prudence and caution, and must select persons capable of fulfilling the duties

[1] Reported in 35 N. E. Rep. 1, Nov. 24, 1893.

he will exact under penalty of his personal responsibility for their torts.

This theory has been greatly modified in modern jurisprudence, until to-day the true criterion of the master's liability is embodied in the answer to the question, "Is the act complained of within the scope of the servant's authority?" If so, the master is liable; otherwise, not.

The test, as laid down by Cooley, is "not the motive of the servant, but whether that which he did was something which his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name:" Torts, 536. The great difficulty in applying this principle lies in defining what acts properly fall within the scope of the servant's employment. In the case of Ware *v.* Barataria, 15 La. 169, it was held that where an agent lost sight of the object for which he was employed and committed a wrong, thereby causing damage, the principal was no more answerable for it than any stranger, the agent in such case acting of his own will, and not in the course of his employment, or under any implied authority of his principal. The duty of defendant's servant in this case was to open and close certain river locks and collect tolls, and the offence complained of by plaintiff was an assault and battery received by him from defendant's servant under pretext of said plaintiff not having paid his toll. This ruling was followed in the subsequent case of Block *v.* Bannerman, 10 La. Ann. 1, where the owner of a vessel was held liable for the tortious acts of the master, committed whilst in his service and within the scope of his authority.

The principle is true even if the tort be committed in disobedience to the master's orders: R. R. Co. *v.* Derby, 14 How. 468. In a comparatively recent case, the Supreme Court of Louisiana decided that plaintiff could not recover damages against the master for a wanton and unprovoked assault inflicted on him by defendant's servant, the plaintiff being a passenger on a train to which a Pullman Palace Car was attached, of which defendant's servant was porter, and having entered the palace car to ask permission to wash his hands. The court held that the assault was something which the ser-

vant's employment did not contemplate, and was not, therefore, within its scope: Williams *v.* Palace Car Co., 40 La. Ann. 87.

In the case of Turner *v.* Western, etc., R. R. Co., 72 Ga. 292, it was held that where one was lawfully in the cab of the freight train of a railroad treating for his passage, as had frequently been done, and was still being done at times of trial by other persons on the same train, as to an injury inflicted upon him he stands within the reason and spirit of the authorities in reference to like injuries done to passengers.

"The general doctrine with reference to master and servant, employer and employee, is, that when the employee committing the injury is not at the time executing the employer's business or not acting within the scope of his employment the employer is not responsible:" Pryor, C. J., in Winnegar's Admr. *v.* R. R. Co., 85 Ky. 547.

In McKinley *v.* The C. & N. W. R. R. Co., 44 Iowa, 314, an action was brought to recover damages for an assault by defendant's brakeman on plaintiff while latter was attempting to enter a passenger car at Howard Junction, Wisconsin, on March 22, 1872. Seevers, C. J., delivering the opinion, said: "If we were left to determine the question upon principle, whether an employer should be held liable for the wilful or criminal acts of the employee done in the course of his employment, we should have very little or no hesitation in affirming such liability, and this because the employer has placed the employee in a position to do wrong, and it being done in the course of his employment, the intent with which it was done should not affect the liability of the employer whether the intent of the employee is good or ill. So long as he acts within the scope of his employment the employer should be bound. The decided weight and number of the authorities are in accord with this view. We need only refer to some of them without stopping to discuss or review them." See Turner *v.* North Branch R. R. Co., 4 Cal. 494; G. Western R. R. Co. *v.* Miller, 19 Mich. 305; Finney *v.* R. R. Co., 10 Wis. 395; Brooks *v.* Penna. Cent. R. R. Co., 57 Pa. 339; St. Louis, etc., R. R. Co. *v.* Dalby, 19 Ill. 353; R. R. Co. *v.* Wetmore, 19 Ohio, 110; Isaacs *v.* R. R. Co., 47 N. Y. 122;

Goddard *v.* Grand Trunk R. R. Co., 57 Mich. 212; Rich *v.* Bryant, 106 Mass. 180; Cracker *v.* C. & N. W. R. R. Co., 36 Wis. 657.

"A railroad corporation is liable to the same extent as an individual would be for an injury done by its servant in the course of his employment: Moore *v.* R. R. Co., 4 Gray, 465; Hewett *v.* Swift, 3 Allen, 420; Holmes *v.* Wakefield, 12 Allen, 580. If the act of the servant is within the general scope of his employment, the master is equally liable whether the act is wilful or merely negligent: Howe *v.* Newmarch, 12 Allen, 49. Or even if it is contrary to an expressed order of the master: R. R. Co. *v.* Derby, 14 How. 468. . . . We deem it unnecessary to cite further authorities on this point. The principle lying at the foundation of the doctrine is as old as the common law, and is embodied in the maxim *qui facit per aluim facit per se*, and is as applicable to corporations as to individuals. Doubtless, if a servant or agent commit a tort out of the scope of his agency or employment and not connected with it, the principle would not be liable therefor unless he previously authorized or subsequently ratified the act:" Ramsden *v.* R. R. Co., 104 Mass. 117. Where a servant in the employment of his master does an act which he is not employed to do the master is not responsible: Towanda Coal Co. *v.* Heeman, 86 Pa. 418. A master is liable for the results of the wilful conduct of his servant if within the scope of his authority, or for acts done by his command or with his assent: R. R. Co. *v.* Wilt, 4 Whart. 142; Yerger et ux. *v.* Warren, 7 Casey, 319; R. R. Co. *v.* McLain, 91 Pa. 442; Ry. Co. *v.* Donahue, 70 Pa. 119; Higgins *v.* Turnpike Co., 46 N. Y. 23.

A corporation is liable for the wilful acts and torts of its servants done to the injury of others, within the general scope of their employment: Terre Haute, etc., R. R. Co. *v.* Jackson, 81 Ind. 19; Jeffersonville, etc., R. R. Co. *v.* Rogers, 38 Ind. 116; Express Co. *v.* Patterson, 73 Ind. 430; Wabash Ry. Co. *v.* Savage, 110 Ind. 156; Ry. Co. *v.* Anthony, 43 Ind. 183.

The act of the agent within the general scope of his employment is the act of the master, and if wrongful the master is liable, although the act be unnecessary to the per-

formance of the master's service and was not intended for that purpose. The liability of the master does not depend upon the necessity of the act, or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent: Indianapolis, etc., Ry. Co. *v.* Anthony, 43 Ind. 183.

In Noblesville, etc., *v.* Gause, 76 Ind. 142, it is said: "Counsel have cited cases declaring the familiar rule that a master is responsible for the acts of the servant, only when the latter is acting within the scope of his employment; but this was an unnecessary work, for the general rule is too well settled and understood to need support from adjudged cases."

If a servant does a wrongful act without the authority, and not for the purpose of executing the orders or doing the work of his master, the latter is not responsible therefor; but if the act be done in the execution of the authority given by the master and for the purpose of performing what he has directed, he is responsible whether the wrong done be occasioned by negligence or by a wanton and reckless purpose to accomplish his business in an unlawful manner: Howe *v.* Newmarch, 12 Allen, 49.

By the civil law the liability was confined to the person standing in the relation of *paterfamilias* to the wrongdoer: Dig. lib. 9, tit. 3. But by the English law the liability is more extensive.

In McManus *v.* Crickett, 1 East. 106, Lord Kenyon, C. J., after quoting Chief Justice Holt in Middleton *v.* Fowler, Salk. 282, to the effect, "that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him," says: "Now, when a servant quits sight of the object for which he is employed, and without having in view his master's order, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act." See Turberville *v.* Stamp, 1 Ld. Ray, 264.

A master, however, is *not responsible* for the wrongful act of his servant unless that act be done in the execution of the

authority given by his master. *Beyond the scope of his employment* he is as much a stranger to his master as any third person, and therefore his act cannot be regarded as the act of his master: Lamb *v.* Palk, 9 C. & P. 629; Garth *v.* Howard, 8 Bing. 451; Wilson *v.* Rankin, 34 L. J., Q. B., 62; McGowan *v.* Dyer, L. R., 8 Q. B. 141.

A master is liable for injury caused by the wanton and violent conduct of his servant in the performance of an act within the course of his employment: Seymour *v.* Greenwood, 7 H. & H. 356; Croft *v.* Alison, 4 B. & Ald. 590; Limpus *v.* Omnibus Co., 1 H. & C. 526; and such act only binds when done by the authority or consent of the master: Ward *v.* Evans, 2 Salk. 441; Lyons *v.* Martin, 8 Ad. & E. 512; Gregory *v.* Pipe, 9 B. & C. 591.

In Drew *v.* Peer, 93 Pa. 234, Thayer, P. J., instructed the jury that "the defendant is responsible for any loss or damage suffered by himself in consequence of the misconduct of the defendant's agents. It did not require an express direction to her agents to commit this injury to make her responsible." The instruction was affirmed by the Supreme Court, the facts in this case being almost identical with those of Dickson *v.* Waldron.

The following quotations are taken from the celebrated Doctor Fraser's work on the Scottish law of Master and Servant, as illustrative of the question in that country:—

"*Quasi* delicts have been defined by the Roman jurist, *facta illicita sola culpa sine dolo admissa.* They are acts which arise from carelessness, negligence, rashness, or want of skill, by which injury has been sustained, without any criminal intention on the part of the doer.

"If a servant does a wrongful act without the authority, and not for the purpose of executing the orders or doing the work of the master, the latter is not responsible in damages therefor; but if the act be done in the execution of the authority given by the master, and for the purpose of performing what he has directed, he is responsible whether the wrong done be occasioned by negligence, or by a wanton and reckless purpose to accomplish his business in an unlawful manner.

"The liability of the master for the servant's *quasi* delicts rests partly on the same principle with his liability for his servant's contracts:—viz., that expressed in the maxim, *qui facit per alium facit per se*,—partly on views of expediency, and partly also on the following grounds: The master is presumed to select the servant from a knowledge of, or at least a belief in his skill, steadiness, and care. He places him in a position in which he acquires a relation to the public which he would not otherwise hold,—a position entailing responsibilities which, but for their being thus delegated to another, the master would have to discharge for himself. Also, he entrusts him with the charge of property often calling for carefulness in its management, to avoid accident to others; and thus puts it in his power, by carelessness or rashness, to inflict injury on others to an extent that would not otherwise exist. For these and similar reasons the laws of most countries have sanctioned a departure, where the relation of master and servant exists, from the general principle, *cupla tenet suos auctores*. Page 150.

"First, it may be observed that the master is of course liable to answer for any injury caused by the servant in the direct execution of his express orders. With regard to this class of cases there is no difficulty; the connection between the wrong and the authority from which the act flowed is immediate, and sufficiently obvious.

"But, secondly, it falls to be remarked that, to make the master liable, no such immediate connection between his command and the act out of which the injury results is requisite. It is sufficient, in order to entail such responsibility on the master, that the servant was at the time acting under the general mandate implied in his contract of service—that he was doing his master's work, or even that he was at the time employed in an operation which might fairly be held to fall within the scope and sphere of his duties as servant, even though the master may have been utterly ignorant that his servant was engaged in that particular duty at the time.

"Two well marked exceptions to, or rather limitations of the rule, are to be noticed as now well settled by a series of decisions.

"The first of these is, that the rule only applies where the injury caused by the servant, for which it is sought to make the master answerable, arises out of something done by him while acting strictly within the scope and limits of his employment while discharging the duties for which he has been engaged under his contract with his master. The reason of this exception is, that the master's liability, having its origin in implied mandate, can have no place where the limits of that mandate are exceeded.

"The second exception is, that the rule applies only where the relation of master and servant exists in a strict and proper sense between the offending party and him whom it is sought to make responsible for the act. Where this is not the case, there is no room for applying the maxim, *respondeat superior*." Page 151.

"The rule which is now established is, to quote the words of Willes, J., in Barwick *v.* The English Joint Stock Bank—an action against a bank for fraudulent misrepresentation on the part of its manager—'that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved:'" Macdonell, Master and Servt. 258.

"A master is liable for the wrongful act of his servant, to the injury of a third person, where the servant is engaged at the time in doing his master's business, and is acting within the general scope of his authority, although he is reckless in the performance of his duty, or through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty, and inflicts unnecessary and unjustifiable injury:" Wood, Mast. and Servt. (2d Ed.) 589.

A master is liable for the act of his servant done in the course of his employment: Helyear *v.* Hawke, 5 Esq. 72.

As to the servant's tort and negligence, the universal rule is, that the master is responsible in damages to third persons for the act of his servant occasioning an injury, whether the act is of omission or commission, in conformity to or in

disobedience of the master's order, by negligence, fraud, deceit, or even wilful misconduct so long as it was in the course of the employment: Browne, Dom. Rel. 136.

The master is not liable for a wrongful, wilful, and unlawful, act of his servant toward a third person, although the servant professes to be acting in the master's employment, if the act is entirely independent and outside of and having no proper connection with the employment: Browne, Dom. Rel. 138.

A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servants if those acts are done in the course of his employment in his master's service. The maxims applicable to such cases being *respondeat superior* and *qui facit per alium, facit per se:* Smith, Master and Servant, 322.

This rule is universal in its application and whether the act be negligent, fraudulent or deceitful, or even an act of positive malfeasance or misconduct, if done in the course of his employment, the master is responsible *civiliter* to third persons: Story, on Agency, 452; Paley, on Agency, 294; Pothier, on Oblig. (Evans) 456.

In conclusion, I will cite the following rule laid down by the eminent Judge Cooley, cited with approval by the Supreme Court of Louisiana in the case of Williams *v.* Palace Car Co., *supra:* "It will readily occur to every mind that the master cannot, in reason, be held responsible generally for whatever wrongful conduct a servant may be guilty of. A liability so extensive would make him guarantor of the servant's good conduct, and would put him under a responsibility, which prudent men would hesitate to assume."

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