# THE LAW OF MASTER AND SERVANT

BY

W. A. HOLDSWORTH,

*OF GRAY'S INN, BARRISTER-AT-LAW.*

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# THE LAW

OF

# MASTER AND SERVANT;

INCLUDING THAT OF

## TRADES UNIONS AND COMBINATIONS.

BY

W. A. HOLDSWORTH,

OF GRAY'S INN, BARRISTER-AT-LAW.



LONDON:
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# PREFACE.

It is unnecessary to say anything to show the important place which the Law of master and servant fills in the jurisprudence of every-day life. It may be said that, in the sense in which these terms are employed by lawyers, every one is either a master or a servant, while a large number of persons are both the one and the other. A knowledge of the general principles which govern their relations in a legal point of view, is, therefore, of almost universal interest; while occasions are constantly arising in which practical information as to the rights and duties of employer and employed is useful, or even necessary. It is the object of the present work to afford this information in a popular, and at the same time, an accurate manner. Although the space at our command is necessarily limited, we trust that we shall be found not to have omitted any important branch of the subject, or any point which frequently occurs in the ordinary course of affairs. We have endeavoured to impart to the work a thoroughly practical character; and while making it comprehensive in scope, have sought to give prominence to those topics which are of chief importance to the classes who habitually act without legal assistance, and to those points upon which a

moderate amount of information may render such assistance unnecessary. The law on this subject is, in the main, independent of positive enactments. But there are some statutes, such as the "Masters and Servants' Act," which have an important bearing, if not on the rights and duties of the parties, yet upon the remedies by which they may be enforced. To these it will be found that we have devoted special attention. The law of trades' unions and combinations, not merely so far as it depends upon recent Acts of Parliament, but as it is governed by the common law, is treated in a detail proportionate to its importance. And although we have not found it possible to give even an abstract of the various Acts of Parliament which affect the relations of master and servant in particular trades and occupations, we have, by means of a careful and, we believe, accurate list of such Acts, enabled any one to refer readily to those in which he may be immediately interested. Although we cannot anticipate that we have altogether escaped errors of omission or commission, we venture to indulge a hope that the work will be found a useful compendium of the branch of law to which it relates.

4, Brick Court, Temple,
*April*, 1873.

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# THE LAW

OF

# MASTER AND SERVANT.

## CHAPTER I.

WHO MAY BE MASTERS OR SERVANTS—RIGHTS AND LIABILITIES OF;—

Adults.—Married women living with, or separate from, their Husbands.—Infants.—Partners.—Lunatics.—Bankrupts.—Corporations.

THE terms Master and Servant* have a much wider application in legal than in popular use. In the latter case they are generally confined to persons between whom there is a wide difference in social rank, and whose relations involve, in a marked degree, superiority on the one hand, and inferiority on the other. But in the former they are nearly, if not

* Whenever we use the masculine gender in referring either to master or servant, it must be understood, unless the context is inconsistent with such a construction, that what we say is equally true of women as of men—of "mistresses" as well as "masters"—of "female" as well as "male" servants.

quite, synonymous with employer and employed. They include all persons between whom any contract exists for the render of service, or the fulfilment of duties on the one hand, and the payment of stipulated hire, wage, salary, or reward on the other, during a determinate or stated period or term, or until the expiration of a fixed notice to be given by either party. The manager of a railway, the head clerk in a large mercantile establishment, the tutor or governess in a gentleman's family, are in point of law as much servants as the domestics in a household—that is to say, the relations between themselves and their employers are governed by the same principles which regulate the connection between cooks or footmen and their masters. In all instances that relation is one of contract, arising out of either an express or an implied mutual engagement, binding one party to employ and remunerate, and the other to serve (as we have already said) for some determinate term or period, or until the expiration of a given notice.

As a general rule, every person of the full age of twenty-one years, and not under any legal disability, is capable of becoming either a master or a servant. In order, however, that an agreement may be binding on the employer, the servant must, at the time he enters into it, be free from any engagement which is incompatible with the discharge of his duties; or, at all events, he must take care to inform the person who proposes to employ him, of any such prior call upon his time or labour. If he do not, although the contract will be

binding upon him (for no man can take advantage of his own wrong), the master may repudiate it as soon as he discovers that his servant has duties inconsistent with the discharge of those which he owes to himself.*

This general rule is, however, subject to some qualifications and modifications, and these, together with cases of infants, will form the subject of this chapter.

### MARRIED WOMEN.

The rights or liabilities of a married woman, either as a master or a servant—either as employer or employed, are of so much importance, particularly in regard to the hire of domestics, that they require careful and special consideration:—

#### I. *As the Master or Employer.*

A married woman is, *at law*, incapable of entering, on her own account, into a valid contract of hiring or service. To this rule there are, indeed, but two exceptions. When the husband has been sentenced to penal servitude, then, so long as he is undergoing his sentence, the wife is considered a *feme sole* (or single woman); may in all respects contract, sue, and be sued, like any other single woman; and may, amongst

* It has been held that militiamen and volunteers are incapable of entering into a valid contract of hiring and service, unless at the time they did so they informed their master or he knew of their liability to be called on to serve, and agreed in such case to dispense with their personal services.

other things, engage herself as a servant, or hire others to be her servants, in all respects as if the marital tie did not exist. The same consequences follow from a decree of the Divorce Court, judicially separating the husband and wife; subject, however, in this case, to a condition which we shall notice further on (p. 8). And although a married woman cannot enter into a valid contract of hiring or service *at law*, and cannot be sued upon any such pretended contract, either *at law* or in *equity*, by any servant whom she has engaged, she may, nevertheless, it is apprehended, in some circumstances, when she is possessed of separate estate, either in virtue of a settlement, or of the Married Women's Property Act, 1870, be made answerable, by a suit in *equity*, for work actually done, and wages actually earned. If, indeed, she were living with her husband, she would not be liable to such a suit, unless she distinctly pledged her own credit, because, under ordinary circumstances, and if nothing be said upon the subject, a wife is taken to act in all matters relating to the conduct of her household as the agent of her husband. But if she did thus pledge her own personal credit, or if she were living apart from her husband, then her separate estate might, as we have already said, be made liable, by a suit in the Court of Chancery.

The power of a wife while living with her husband to hire domestic servants, or, indeed, to enter into any contract on his behalf, is derived either from an express authority given to her by him, or from the implied authority which she possesses as his agent in

the management of his household. The instances in which a wife acts by the express authority of her husband require no comment. The more usual case is when she acts on the general authority which she possesses in domestic matters. When the husband and wife are residing together, it is presumed that she has authority to hire such servants as are in accordance with her condition and the style in which she lives; and unless this presumption is rebutted, he will be liable to pay their wages. But although this presumption holds good in nearly every instance, it may be rebutted if the husband can show that he forbade his wife to hire any servants at all, or any servants of a particular class, or any specified individual. For instance, suppose a wife were to take it into her head to engage a footman in spite of her husband's wishes or directions, he would not be compelled to accept the man's services. In order, however, to exonerate himself from liability, he must repudiate the engagement as soon as it comes to his knowledge. For if, after he does know of the engagement, he allows the man to do work under it, he will then be considered to have ratified or assented to it, and will only be able to get rid of the servant by regular notice, paying him his wages in the meantime.* In

* In order to ratify or assent to the engagement of a servant, the husband must, of course, be aware of it; and it might therefore be that if, during the absence from home of the husband, the wife were to engage servants whom he had forbidden her to employ, or had exceeded the limit of wages he had authorized her to pay, he would be entitled on his return to disavow the contract, and to tell the

point of law, a husband who had directed his wife not to pay more than a certain amount of wages, would perhaps be held entitled to repudiate any contract into which she had entered, if he disavowed any bargain she had made as soon as it came to his knowledge. But this is by no means certain even in point of law, because it might well be argued that by authorizing her to engage servants of a particular kind, he had held her out to the world as his agent for the purpose of making arrangements with them; amongst which, of course, the settlement of their wages is the most essential. At all events, the husband would undoubtedly be liable to pay the wages to which the wife had agreed, if he allowed the servant to enter his service and do work for him. If he did not authorize his wife to make any arrangements she chose, he ought to ascertain for himself what terms

servant to leave (without paying him any wages), although actual service had been rendered under the engagement. The courts would, however, lean so strongly against such conduct on his part, that domestic servants engaged by a lady whose husband happens to be absent from home are practically quite safe in entering her service. It must, however, be recollected that the presumption of her authority only extends to domestic servants. It does not apply, for instance, to the case of a governess, who will, therefore, run considerable risk in accepting an engagement from a lady whose husband is absent from home, without having good evidence that she was authorized to bind him by this particular contract. Of course, if the family is one of respectability, no difficulty is likely to arise. If, however, there is any doubt on that point, care must be taken not only to place the wife's authority beyond doubt, but to secure the means of proving it; or a written guarantee must be obtained from some responsible person.

she had agreed to, and signify his dissent to the servant, before the latter had acted upon the supposed contract. In the absence of any expression of such dissent, he would be held to have ratified the contract, and would be liable upon it.

All that we have said above as to the power of a wife *residing with her husband* to hire household servants, and to bind him by the contracts she makes with them, is equally true of a woman with whom a man cohabits, and whom he allows to assume his name and figure before the world as his wife. The man who passes as the husband has, in the latter case, the same liabilities as the real husband in the former.

We have now to consider what are the powers of the wife or the rights of the servant, when the husband and wife are separated and do not live together.

We have already seen that if a husband has been sentenced to penal servitude, his wife will, during the period he is undergoing his sentence, be regarded as a *feme sole*. As such, she can contract in her own name, and will be liable on any agreements she may enter into. A servant engaged by a woman in this unfortunate position must therefore look entirely to her, for he will have no remedy against the husband at any future time.

If a decree of judicial separation between husband and wife has been pronounced by the Divorce Court, then, so long as the separation continues, the wife is considered a *feme sole*, for the purpose of contracting

and of suing and of being sued, and the husband will not be liable for any contracts or engagements she may enter into, so long as he pays the alimony ordered by the Divorce Court.* On the other hand, in this case, the servant will be entitled to sue the wife just as if she were a single woman; and, of course, if she has property, that will be enough.

But when husband and wife are living apart, and no sentence of judicial separation has been pronounced, it is necessary for a servant to exercise great caution before entering the service of the wife, because, whether she has power to pledge her husband's credit depends altogther on the circumstances under which they are living apart; and in order to support an action against the husband, the servant will have to prove affirmatively that the separation took place under such circumstances as gave the wife an implied authority to bind him. In order to see as clearly as possible how this matter stands, it will be convenient to take separately the cases under which a husband will or will not be liable for his wife's debts, including servants' wages:—

1. *When the separation is by mutual consent; is the issue of a quarrel in which both are to blame; or is the consequence of the husband's misconduct.*—In these cases the wife will be entitled to pledge her husband's credit,

* If he does not pay the alimony ordered by the court, he will then be liable for necessaries supplied to the wife's use, and amongst these necessaries a servant may, and indeed will, be included when [redacted] in life of the wife is such as to require one.

and to make him responsible for necessaries of life, according to her station as his wife and to his means. A servant might, and probably would be, considered a necessary to a lady of any position in society; but of course a good deal would depend upon the manner in which she was living, whether in lodgings, with or without attendance, with members of her family, in her own house, &c. It must, at the same time, be borne in mind that if the husband consents to the wife living apart from him on condition that she accepts a certain allowance, then, if this allowance is paid (however inadequate it may be), she cannot pledge his credit. Further, in all cases of voluntary separation between husband and wife, unaccompanied by adultery or cruelty on the part of the former, the husband may put an end to his liability for necessaries, including service, supplied to the wife, by requiring her to return to him. If, on the other hand, by cruelty or adultery on his part, a husband has rendered it morally impossible for the wife to continue to live with him, she will not, after having left him, be bound to return on his invitation, nor will his liability for necessaries supplied to her be determined by his request that she will return to the conjugal home.

2. *When the separation is occasioned by the misconduct of the wife, or by her quitting her husband without justification and without his consent.*—When the wife is guilty of adultery, and either elopes from her husband, or is expelled by him from his house on that account, nay, even when she is guilty of this offence,

after she has been compelled by his cruelty to leave him, and after he has refused to receive her back, he is not liable for any debts she may contract, although he may not have warned persons not to trust her, and although he may himself have committed adultery.

It is clear that, this being the state of the law, any one who enters the service of a married woman living apart from her husband, incurs great risk of not being paid. It is always difficult, and often quite impossible, to ascertain the circumstances under which the separation took place, and upon which the liability of the husband depends; and it must not be forgotten that at law, if the husband is not liable, no one is liable, since, although the property of a married woman settled to her separate use, may be amenable to her debts by a suit in Chancery, she cannot be reached either by an action in one of the superior courts of common law, or by a suit in a county court.* In order to be safe, the servant of such a person should insist upon his or her wages being paid in advance, or upon their payment being guaranteed *in writing* by some one whose solvency is above suspicion, or who, at any rate, is liable to be sued.

### II. *As the Servant or Person employed.*

Until very recently, wages earned by the wife belonged

* There is one exception to this rule. In the City of London, a married woman may carry on business on her own account, as a "sole trader" (*i.e.* on her own account); and, if her husband does not interfere in the business, she may sue and be sued in the coun' courts just as if she were a single woman.

to the husband. He alone could sue for them, or give a valid receipt for them. They were his, and not hers, in every sense; and any one who paid her (except with the express sanction of the husband) might be made to pay them over again to him. That state of the law was, however, altered by the "Married Women's Property Act," sec. 1, which provides that "the wages and earnings of any married woman, acquired or gained by her after the passing of this Act, in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property." The effect of this enactment is that, if a married woman acts as a servant, or does work, a master or employer who pays her wages to herself will run no risk of having to pay them over again to her husband. Nor is that the only operation of the Act so far as it affects the relation of master and servant. She may, by virtue of its provisions, sue for wages which she has actually earned. The Act does not, however, enable a married woman to sue in her own name for a wrongful refusal to accept her services, or for wrongful dismissal, or any other breach of con-

tract, nor, on the other hand, does it render her liable to be sued for improperly leaving her service or employment, or for any other breach of contract on her part.

### INFANTS.

If an infant, that is to say a person under twenty-one years of age, engages a servant, the engagement will, or will not, be valid, according to circumstances. It will hold good to this extent, that the infant master or mistress will be bound to pay reasonable wages, if he or she is in such a position of life that a servant may be considered a "necessary." * But an infant cannot bind himself to the payment of any particular sum for necessaries, or to give any particular price for them. The law permits those who minister to his necessities to receive only a reasonable price, and does not leave the determination of the amount to the infant, but entrusts it to the arbitrament of a jury. The consequence is that, even if a servant is a "necessary" to an infant, such servant may not be able to recover the wages which the infant has engaged to pay. If the point be disputed, it will be for a jury to award such compensation as they may deem reasonable for services rendered, quite apart from any contract or engagement. At the same time, it may be taken as reasonably certain that, if they come to the conclusion that a servant was necessary to an infant, they would give

* A servant will be considered a necessary if it is customary for infants in the rank of life and of the wealth of the infant sought to be charged to have such attendance.

effect to any bargain he had made which was not clearly extravagant or unreasonable. Still, looking to the uncertainty, both on this point and as to whether a servant would in any particular case be held a "necessary," it is clearly not desirable to enter the service of an infant without having a guarantee (which must be in writing) for the fulfilment of the terms of the engagement from some person of full age.

An infant may make a legally binding contract of apprenticeship; but here again he will only be held to his bargain if the terms are fair and reasonable. He may also, subject to the same qualification, bind himself by a contract of service, provided that it is advantageous for him to enter into such an arrangement. But it must be observed that he cannot be sued for breaking a contract, either of apprenticeship or ordinary service.* On the other hand, infants, whether apprentices or servants, will, like adults, be amenable to punishment if they desert their employment, under certain statutes, to which we shall call attention in a subsequent part of this work. (See Chapter XIV., p. 135.)

As a general rule, an infant must sue for any wrong done to him by a guardian or next friend. But by the first County Courts Act (9 & 10 Vict. c. 95, sec. 64) it is provided, "That it shall be lawful for any person, under the age of twenty-one years, to prosecute any suit, in any court holden under that Act, for any sum

* A father or friend is generally party to an indenture of apprenticeship, because an action will not lie against an infant apprentice for not serving.

of money, not greater than £50, which may be due to him for wages or piecework, or for work as a servant, in the same manner as if he were of full age."*

### LUNATICS.

If a party—whether as master or servant—to a contract of service was, at the time he entered into the engagement, a lunatic or a person of unsound mind, and any imposition appears to have been practised upon him, or any advantage taken of the infirmity by the other contracting party, the contract will be void, as having been procured by fraud; but if the contract is a fair and honest contract, and bears no symptom of the infirmity of mind of the party sought to be charged thereon, the courts will enforce it like any other contract. At any rate, there can be no doubt that a lunatic will be held liable to pay for any services *which have been* rendered to him, provided they were such as might reasonably be considered *necessary* for a person in his station of life.

### PARTNERS.

Every partner in a firm has, generally speaking, authority to hire and discharge such servants as may be necessary for the purpose of carrying on the business of the firm. If, therefore, one partner engages a servant, it is clear that the firm will be bound to receive him into their service and to pay him his wages, until

* The City of London Small Debts Act contains a similar clause.

they can get rid of him by a regular notice. And although a notice given by one partner without the assent, or contrary to the wishes of the rest, would entitle the servant to quit their employment, it would seem that it would not be binding upon him if he was told by another partner to remain, and chose to do so.

### CORPORATIONS.

All contracts of importance entered into by Corporations must, with some exceptions, which are not material to our present purpose, be made under the common seal of the body corporate, and in the corporate name. In accordance with this rule, the superior officers of municipal corporations, railway companies and other incorporated bodies, must be appointed under the common seal, unless there is a clause in any special Act of Parliament applying to the body dispensing with that formality. If they are not appointed in this manner when it is necessary that they should be, they will not be able to recover any salary which may be due to them, or to maintain an action for wrongful dismissal. On the other hand, a corporation may transact trifling matters of business and enter into such ordinary contracts as are of constant recurrence, and the making of which forms part of its customary and usual functions, without the employment of its common seal. An appointment of a cook, bailiff, butler, stoker, engine-driver, clerk, &c., will therefore be perfectly valid if made either in writing or by word of mouth, by an officer duly authorized for the purpose.

In many cases the special acts of railway companies and other corporations expressly empower the directors to appoint servants, workmen, &c., without using the corporate seal. In that case it must be observed that the power thus given will only extend to the appointment of *ordinary* servants, and that any contract for extraordinary services will still require to be under seal.

### BANKRUPTS.

Although the property of a bankrupt passes to his assignees, he may sue for and recover wages for work done or services rendered by him to a master or employer after adjudication, and previous to his discharge. Persons in the employment of a bankrupt at the time of his bankruptcy are entitled to claim any arrears that may be due to them, in preference to his other creditors, to an extent not exceeding four months' wages or salary, and not exceeding £50 in amount in the case of clerks or servants, and not exceeding two months' wages in the case of labourers or workmen. "And when at the time of the presentation of a petition for an adjudication (in bankruptcy), any person is apprenticed or is an articled clerk to the bankrupt, the order of adjudication shall, if either the bankrupt or the clerk give notice in writing to the trustee to that effect, be a complete discharge of the indentures of apprenticeship, or articles of agreement; and if any money has been paid by or on behalf of such apprentice or clerk to the bankrupt as a fee, the trustee may, on

the application of the apprentice or clerk, or of some person on his behalf, pay such sum as such trustee, subject to an appeal to the Court, thinks reasonable, out of the bankrupt's property, to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the bankrupt under the indentures or articles before the commencement of the bankruptcy, and to the other circumstances of the case. When it appears expedient to a trustee, he may on the application of an apprentice or articled clerk to the bankrupt, or any person acting on behalf of such apprentice or articled clerk, instead of acting under the provisions of this section, transfer the indentures of apprenticeship or articles of agreement to some other person." *

* 32 & 33 Vict. sec. 33.

## CHAPTER II.

### OF THE CONTRACT OF HIRING, AND ITS CONSTRUCTION.

When there is such a Contract, and when not.—How Servants may be Hired.—The effect of the Statute of Frauds.—Term of Hiring: weekly, monthly, or yearly.—Notice.—The operation of custom upon Contracts of Hiring or Service.—Construction of Contracts in writing.—Servant or Partner.—Servant or Tenant.—Servant or Apprentice.—Agreement by a Servant not to carry on his Master's business.

BEFORE we discuss the mode of entering into a contract of hiring and service, its construction or effect, it is desirable to dispose of the case in which, although there has been service, there has in the eye of the law been no hiring, and therefore no contract—no right to remuneration.

As a general rule, when one person enters the service of another, or does work for him at his request, or with his assent, then, in the absence of any positive stipulation to the contrary, or of any circumstances tending to show that it was meant the work should be done gratuitously, it will be presumed that the workman or servant is to be paid a reasonable sum for his work or service. But a contract to pay wages or other remuneration will not be presumed *where* good offices are rendered to each other by near

relations, or where work is done by poor persons who have been taken to live with their richer relations, or by paupers who have been received into a house or relieved by way of charity. In such cases, any work they may do, or services they may render, will be considered as a mere return for the kindness bestowed upon them.

If services are rendered in expectation of a legacy, and not upon an understanding that they are to be paid for, there is no obligation to pay.

The services of barristers and physicians are, by the custom of their professions, honorary, and their fees are gratuitous; they, therefore, cannot maintain actions for them.

A servant may, usually, be hired either by word of mouth, or by writing not under seal, or by a deed.

But by the Statute of Frauds* certain contracts of hiring or service, or rather contracts for a certain time, must be in writing. At any rate, they cannot be enforced unless they are. The 4th section of that act provides that "no action shall be brought upon any agreement that is not to be performed† within one year from the making thereof, unless the agreement upon which such action be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him therewith lawfully authorized."

* 29 Car. 2, c. 3.

† The word "performed" means a complete and not a mere partial performance.

The effect of this provision is, that no contract to employ on the one hand, or to serve on the other, for a longer period than a twelvemonth from the date on which the contract is made will be valid unless it is reduced into writing. For instance, if A and B were on the 31st December to agree verbally that A would employ B, and that B would serve A for a year from the following day, this agreement would be invalid. No action would lie against A for refusing to employ B, nor against B for refusing to enter the service of A. If, indeed, A did enter the service of B, he would be entitled to wages in respect to services actually performed, but these wages would not in a strictly legal sense be determined by the void agreement. In law, the workman or servant would only be entitled to recover what his services were worth, irrespective of such void agreement; but no doubt the court would, in nearly all cases, assess their value at the sum therein stated. The agreement would, however, be both legally and practically invalid as to any terms which it might contain as to notice, or to the conditions of the service, and these points would be regulated by any custom which might exist in reference to that particular kind of employment.

The clause of the Statute of Frauds which we have cited above not only applies to agreements in which an engagement of a year or more, to commence at a future day, is distinctly stipulated for, but also to agreements for any hiring which is in law regarded as *a yearly one.* What engagements come within this

category will be the subject of consideration hereafter;* but, for the present, it may suffice to say, that in the absence of circumstances leading to a contrary conclusion, the engagement of a domestic servant, a clerk, the editor of a newspaper, a tutor or governess, &c., is considered a yearly one, while the engagement of a labourer or workman is not. And it must be borne in mind that the fact that an engagement may be put an end to within the year by notice on either side (as in the case of a domestic servant) will not take it out of the operation of the statute. It is sufficient to bring an engagement within the terms of its provisions if, in the absence of notice, it will last for a year from the date of its commencement. On the other hand, the fact that it may last longer than a year by mutual consent, as in the case of a servant hiring for one year from the time of making the contract, and so on from year to year, so long as the parties shall respectively please, has been held not to bring an engagement within the statute. So also a contract to serve for an indefinite period, subject to be put an end to at any time upon a reasonable notice, is not within the statute, though it may extend beyond the year.

The practical result of the law on this point is that, if either a master or a servant wishes (1) to make sure that the other party will fulfil a contract for a yearly engagement, to commence on a future day, or (2) in case of non-fulfilment to obtain a right to bring an action for damages for breach of contract, he must

* See *post*, p. 24.

insist on having a written memorandum of the agreement. It is not necessary that this should be drawn up in any technical form, or in what may be called legal language. It is sufficient if it clearly expresses the intention of the parties; and the requirements of the law will even be complied with by a letter from one party offering terms, and by a reply from the other accepting them. Two things, however, are necessary. (*a*) In the first place, the consideration must appear either expressly or by necessary implication. (*b*) In the second, the obligation to serve and to employ must be recognized by, and equally binding on both parties. In order, that is to say, to constitute a valid contract of hiring and service, there must be either an express or an implied mutual engagement binding one party to employ and remunerate, and the other to serve, for some determinate period, or until either should give the other a certain notice. If the employer merely agrees to pay so long as the servant continues to serve, leaving it optional either with the servant to serve, or with the employer to employ, there is no contract of hiring and service; but if the servant binds himself to serve for some determinate term, and the employer expressly or impliedly covenants or promises to retain the servant in his service for the term, there is a contract of hiring and service. It is not, however, necessary that there should be an *express* statement that the one party engages to employ, and the other to serve, for a certain period; but it will be sufficient if such an agreement can be collected from the terms of the

writing. Thus, whenever one party agrees to serve for a particular period, and the other agrees to pay him a salary or wages for the service during the term, there is an implied covenant on the part of the latter to retain the servant in his service during the term, provided the latter serves faithfully, and is guilty of no misconduct warranting a dismissal.

It will be observed that the clause we have cited from the Statute of Frauds requires the agreement in writing (when the contract of service is not to be performed within a twelvemonth), to be signed *by the party to be charged therewith*, or *some other person thereunto* by him lawfully *authorized.*" If, therefore, the agreement is only signed by one party, an action for its breach can be brought against him, although it is not signed by the other.* It will be sufficient if the agreement be signed by an agent of the party to be charged.†

A memorandum or agreement "for the hire of any labourer, artificer, manufacturer, or menial servant," does not require a stamp; but it will be noticed that

* The signature need not be at the end, in the usual way, although, of course, it always ought to be. It has been held that if a man writes his name in the first person, as "I, James Smith, agree," or in the third person, as "W. Thompson agrees," this is a sufficient signature. Still, this is highly irregular, and ought never to be depended upon.

† It is not necessary that the agent should have been appointed in writing. If he was so as a matter of fact (which may be proved either by written or oral evidence), that will be enough; indeed, a subsequent adoption of the act of the agent is equivalent to a previous authority, and will be equally binding upon the principal.

this exemption does not extend to contracts relating to the employment of other persons who do not come under any of these denominations, such as clerks, governesses, tutors, reporters, or editors of newspapers, &c. Whenever it is necessary, or is thought expedient, to reduce to writing any contract for the hiring of such persons, a sixpenny stamp must be affixed to the document.

Assuming that there is a contract of hiring and service, the next question is as to its term or duration. Of course, when there is an express stipulation on this point, either in writing or by word of mouth, there can be no difficulty. The engagement will then be yearly, monthly, weekly, or otherwise, according to the agreement. And in like manner, if a period of notice be expressly mentioned, that must be observed on both sides.

When, however, nothing is said or written as to the terms of the engagement, the hiring will in point of law be considered one for a year. This rule is applicable to all contracts of hiring and service, whatever be the nature of the service. It applies alike to farm servants, to domestic servants, to clerks, tutors, governesses, the assistants of professional men, all classes of journalists, &c.

But then it must be borne in mind that this rule is not inflexible, and that its application in any given case may be prevented in two ways.

(1.) In the first place, although nothing may have been said or written expressly defining the terms of

the hiring, the agreement may contain terms which do by implication show that a yearly engagement was not intended, but only one for a week, a month, &c., or one determinable upon the happening of some contingency, or the giving of a certain notice on the one side or the other. If either party, for instance, is at liberty to determine the service at any time, the hiring cannot be considered a yearly hiring. Or if the master have not the entire control of the servant during the year, although he pay the servant yearly wages. Or if the servant is at liberty, when not engaged for his master, to work for other people. So if the agreement be to do work by the job,* or if any portion of the year, however short, is *excepted* during which the servant is not under his master's control, the hiring cannot be considered one for a year.

If there be anything in the contract of hiring to show that it was intended to be for a year—as when there is an agreement to pay so much a week *all the year round*—the mere fact that wages are payable weekly will not prevent the engagement being construed as a yearly engagement. But when there is no stipulation or circumstance from which a yearly engagement can be inferred—when the only fact in the case is an employment at so much a week—then it will be inferred that the engagement was a weekly one. It is hardly

* Payment by piecework is not inconsistent with a yearly hiring; but, in the absence of any stipulations showing that the hiring was intended to be yearly, the fact that the payment is to be made in this way will be strong proof that the hiring was not yearly.

necessary to say that this is the case almost invariably in regard to the employment of mechanics and other manual labourers.

(2.) In the second place, the rule will not apply when, from the existence of some well-known custom, either in the locality or in the particular trade, business, or occupation, the parties must be considered to have contracted in reference to it, and thus to have excluded the application of the general rule.

Evidence of such a custom may be given in all cases; but there is at least one custom of the kind so well established and notorious, that it is quite unnecessary to offer any proof of it. In the case of domestic and menial servants, it is now well established that, in the absence of any express agreement to the contrary, their engagements may be terminated *at any time* by either the master or the servant giving a month's warning, or by the master paying, or the servant forfeiting, a month's wages. When an engagement is so terminated, the servant will be entitled to be paid wages proportionate to the time which he or she may have served. But although the servant may leave the service of his master at any time by merely intimating an intention to do so, and offering to forfeit a month's wages, it must not be supposed that if he simply walks out of the house and quits the service, without giving any intimation of his intention, or offering to pay or forfeit a month's wages, he can then make any claim for such wages as may be due to him. *He will* then be in the position of a person who has

wrongfully left his employment, or, in other words, has broken his contract, and by so doing he will not only forfeit whatever may be due to him; but, supposing that nothing, or less than a month's wages, is due to him, he will be liable to be sued by his master for a month's wages (or for the balance between a month's wages and the sums due to him on leaving), as damages for the breach of contract.

There can be no doubt that cooks, scullions, housemaids, butlers, coachmen, grooms, gardeners, nursemaids, ladies'-maids, valets, and the like, are domestic servants; but it is impossible to lay down any general rule which may in all cases serve as a test of who is or is not a domestic or menial servant. Still, no practical difficulty can well arise from this, since it may be safely stated that all who are in a popular are also in a legal sense domestic servants. It may, however, be useful to add, that it has been decided that governesses and tutors do not come within this category. In the absence of any special agreement, their engagement is a yearly one; but, in the absence of any definite stipulation, it would generally be held terminable by three months' notice. It is almost unnecessary to add, that in these and all similar cases a definite arrangement should be made at the outset in respect to the term of service and the period of notice. Not only so, but the terms should be reduced to writing. In no other way can either the employer or employed protect themselves against the risk or even the probability of litigation.

In many trades and occupations there are customs

with respect to the term of hiring and service, and to the term of notice; and when no agreement inconsistent with such a custom exists, then, as we have already intimated, the engagement will be understood as being subject to the custom. Proof of the custom must, of course, be given to the satisfaction of the court. Thus evidence has been allowed to be given of a custom enabling an employer to dismiss a commercial traveller at three months' notice; of a master in the woollen trade to dismiss an agent at one month's notice; and of various customs with respect to the dismissal of persons employed in the newspaper trade.* Proof might, in the same way, be given of customs regulating the term of engagement, and of notice for workmen or labourers in different employments.

There is one other point in connection with this part of the subject which it is necessary to bear in mind. Assuming that an engagement is a yearly one, but subject to, say, three months' notice, it is sometimes supposed that this necessarily implies that the notice must be given so as to terminate at the end of one, two, three, or more years from the date of the original hiring. But this is not necessarily so. Unless there is

* We do not give these cases in detail, because some of them are not of recent date, and it may well be that the custom has changed since they were decided; indeed, in some instances, we know that this is so. It would, therefore, only mislead if we were to cite them as establishing that there is at present a particular custom in the trade referred to. All for which they are really authorities is, that, supposing a custom to be proved, it will, in the absence of any specific agreement, govern the engagement.

a distinct stipulation that the notice shall only be given so as to terminate at the time we have mentioned, it would probably be held that a three months' notice might be given at any time. Of course, much would depend on the precise terms of the agreement; but if it is desired that neither master nor servant should have power to give any other notice than one terminating at the end of a current year of the engagement, care should be taken to say so in the most explicit manner.

Whenever a contract is reduced to writing, it behoves both parties to bestow their most careful consideration of its terms, and to make sure that it carries out their intention, for it is a fundamental rule of our common law that oral evidence cannot be given to add to, subtract from, or alter or vary any description of written contract. Oral testimony in aid of insufficient written evidence of a contract is, however, admissible *when the contract is not required to be in writing by the Statute of Frauds.** If a written document, for example, amount to a mere admission or acknowledgment of certain facts, forming a link only in the chain of evidence by which a contract is sought to be established, it may be given in evidence concurrently with, and may be aided and supported by, oral testimony. Thus, in the case of a contract for work and services, if the names of the contracting parties are not mentioned, or the price to be paid for the work is not

* It will be recollected (see *ante*, p. 19) that a contract of hiring and service, to endure for more than a year from the date of its signature, *is* required to be in writing by the Statute of Frauds.

specified, or the quantity not named, and the writing consequently does not amount to a contract, oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction is admissible. Moreover, if the parties have used technical terms and words of an unintelligible nature to the ordinary reader, but having a clear, distinct, and definite meaning among mechanics, merchants, &c., evidence of such meaning may be given in aid of the interpretation of the contract, and to give the words their known and proper signification. Customary rights and incidents universall attaching to the subject-matter of the contract, in the place and neighbourhood where the contract is made, are impliedly annexed to the written language and terms of the contract, unless the custom is particularly and expressly excluded. And, in like manner, the known and received usages of particular trades, professions, occupations, and the established course of dealing in them, are considered to be tacitly annexed to the terms of every contract (including one of hiring and service) relating to such trades, &c., if there be no words expressly controlling or excluding the ordinary operation of the usage, and parol evidence of such customs and usages may consequently be brought in aid of the written instrument. Thus, where a workman is hired for a year, to work at a particular trade, under a written agreement, which says nothing as to any period of absence to be allowed to the workman, oral evidence may be given to show that it is the custom of the

particular trade for the workmen employed in it to take certain holidays, and to absent themselves on such occasions from their work without the permission of their master. So, if an agreement for the hire of a domestic servant were silent on the point of notice, the custom as to a month's wages or a month's warning might be incorporated with it; and in one case, parol evidence was allowed to be given to show that, according to the theatrical custom, an engagement for a certain number of years only implied an undertaking to pay the wages of an actress during the "seasons" of those years. It must, however, be distinctly understood that evidence as to custom is only receivable when the contract is silent on the point. No evidence of custom is receivable to contradict or modify any stipulation reduced to writing. But evidence of custom or usage is always admissible to determine the meaning of words used in an agreement, if, by the custom or usage of a particular trade or occupation, those words have acquired, in respect to the subject-matter of the contract, a peculiar sense and meaning different from their popular use. Thus, the word "thousand" in certain trades means 1,200, or, which comes to the same thing, a "hundred" is equivalent to six score. When such is the case, and workmen are paid by the "thousand" or "hundred," the language of the contract will be construed by reference to the custom, if this be not expressly excluded. But then it must be borne in mind that the custom and usage must be general

and universal, and not merely the practice or course of dealing of a particular firm or house of trade.

After an agreement *which does not come under the Statute of Frauds* has been reduced into writing, it is competent to the parties, at any time before its breach, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to modify, add to, or subtract from, or vary or qualify the terms, and thus to make a new contract, formed partly of the written agreement and partly by the subsequent verbal terms engrafted upon it. An agreement *which does come under the Statute of Frauds* can only be varied or rescinded by another agreement or memorandum in writing, signed by the party against whom such variation or rescission is sought to be enforced. It follows from this that a contract or agreement of hiring and service, to be performed within a twelvemonth from the time it was entered into, may be varied or rescinded by a subsequent verbal agreement; but that such a contract, when *not* to be completely performed within the twelvemonth, can only be rescinded or varied by a subsequent agreement in writing.

Persons in trade, in order to stimulate the zeal and activity of their more important employés, often agree to remunerate them, either wholly or partially, by a percentage of profits, either in addition to or in lieu of salary. The remuneration of servants in this mode, however advantageous in some respects, was formerly open to the great objection that, unless extreme care

was taken in drawing up the agreement, a servant who became entitled to a share of profits became also a partner in the business. This objection was, however, removed by a statute passed in 1865, which enacted that "no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking *shall of itself* render such servant or agent responsible as a partner therein, nor give him the rights of a partner." A servant, therefore, does not now become a partner merely because he is paid by a percentage on profits. But, although a master is relieved from danger on this score, there is another point on which he ought to be very careful. If he holds out his servant to the world, or suffers his servant to hold himself out to the world as his partner, he will be liable *to third persons* for the acts of his servant, exactly in the same way and to the same extent as if a partnership existed between them. On the other hand, if a servant falsely holds himself out to the world as a partner, his master may immediately dismiss him; and it is only right that he should possess this power, for although no doubt the mere fact of a servant stating that he was a partner would not be sufficient to make the master responsible to third persons, circumstances might easily occur which would give some apparent warrant to the servant's statement, and raise a presumption, stronger or weaker as the case might be, that the master had sanctioned the pretentions, and had so far become a party to the representations, of the servant, as to incur

responsibility in regard to third persons who had given credit to and acted upon them.

A question sometimes arises whether a person is an apprentice or a servant, and this may be important in regard to the exercise of the power of dismissal by the master. No definite rule can be given for its decision, which will turn upon the construction of the contract between the parties regarded as a whole. All that can safely be said is that, where the instruction of the person employed, and his acquisition of skill or knowledge in any business or trade, appear to be the main objects of the arrangement, then, although work is—indeed it always is—to be done in such cases for the master, the contract will be deemed one of apprenticeship. If, however, the chief object of the agreement seems to be to secure a certain amount of work for the employer, and the instruction of the employé is merely secondary, the insertion of a condition that the one shall teach and the other shall learn will not by itself prevent the contract from being treated as one of hiring and service.

A servant occupying premises belonging to his master, and receiving less wages on that account—as, for instance, where a groom or coachman has rooms over a stable—is not considered a tenant in respect of such premises. His occupation is the occupation of his master, and he may be turned out of his rooms or house by the same notice which would terminate his *service.* If, on the other hand, a servant pays *rent,* he *will be a tenant,* and cannot be ejected without such

a notice as may be required under the law of landlord and tenant.

Professional men, manufacturers, and tradesmen frequently insist on the clerks, apprentices, or other servants whom they employ, entering into an agreement that they will not, on leaving their service, carry on a similar trade or business within a certain defined distance from their premises. Such an agreement is perfectly legal, and can be enforced either in a court of law or equity, provided that the limit of distance is a reasonable one. It is obviously only right that the master should be protected against unfair competition which his servant might obtain the means of instituting by treacherously currying favour with his customers, in defiance of good faith and duty. But, on the other hand, an agreement that the servant shall not carry on his former master's trade at all, or that he shall not do so except at a distance unduly and unnecessarily remote from the seat of the original business, will be void, as being in restraint of trade. It is for the court, in each instance, to say whether the agreement is or is not reasonable; and in coming to their conclusion they will be guided solely by the consideration whether the restriction imposed upon the servant is or is not—having regard to the nature of the business—more than is sufficient to protect the master against improper and illegitimate interference with his business by one lately in his employment, and therefore, to a certain extent, *in his confidence*. Whatever restraint is larger than

necessary for such protection can be of no benefit to either party; it is, therefore, regarded as oppressive, and if oppressive, it is in the eye of the law unreasonable and illegal.

It is impossible to lay down any abstract rule by which it may be possible to discriminate between legal and illegal agreements of the kind we are discussing. A few cases which we select from a standard work on this branch of law will, however, serve to show how far contracts of this kind have been held good. In *Mallan* v. *May*,* it was agreed by deed that the defendant should become assistant to the plaintiffs in their business of surgeon-dentists, for four years, that the plaintiffs should instruct him in the business, and that, after the expiration of the term, the defendant should not carry on the business in London or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. The agreement, so far as related to not carrying on the business in London, was held valid, but the remainder of the restriction was held unreasonable and void.

In *Chesman* v. *Nainby*,† where the plaintiff, who was a linendraper, on taking the defendant's wife before marriage into her service, made her enter into a bond not to carry on the business of a linendraper within half a mile of the plaintiff's house, the bond was held good.

In *Colmer* v. *Clark*,‡ the defendant, in consideration

* 11 M. & W. 653. † 2 Lord Raymond, 1456.

‡ 7 Mod. 230.

that the plaintiff, who was a tallyman, would take him into his family and instruct him in the trade, with a provision of meat, &c., and an allowance of £20 wages a year, promised to serve the plaintiff for five years, and not to exercise the trade himself for seven years within the city and liberty of Westminster, and bills of mortality. The agreement was held good.

Again, in *Davis* v. *Mason*,* where the defendant, in consideration of the plaintiff's taking him into his service as assistant in the business of a surgeon, &c., agreed with the plaintiff not to exercise the business on his own account within the distance of ten miles from Thetford, where the plaintiff resided for fourteen years, the agreement was held good; and a similar decision was pronounced in a later case, where the distance within which a surgeon or apothecary's assistant agreed not to practice was seven miles.

If an agreement in partial restraint of trade, of the kind we are now discussing, be in other respects valid, it will not be rendered void by the fact that it is to last for the whole life of the party entering into it; but, on the other hand, if the agreement be unreasonable in point of distance, it will be invalid, for however short a time it may purport to last.

If agreements of this kind are entered into by deed, it is not necessary that any consideration should appear in the instrument; but if a deed is not employed, then the instrument must show the consideration for which

* 5 T. R. 118.

a person agrees not to carry on his trade or business within the prescribed limits.

An agreement by a clerk or servant that, so long as he is in a particular employment, he will not endeavour to do business on his own account with the customers of his master or employer, wherever they may reside, will be valid.

If an agreement not to carry on business within a certain distance, or not to solicit business from the customers of a master or employer, be broken, the master or employer may either bring an action in a court of law for the breach of the contract, or he may apply to a court of equity for an injunction to restrain the other party from doing the act complained of. It must be observed that the equitable jurisdiction of the county courts does not extend to the granting of an injunction in a case of this kind.

# CHAPTER III.

## OF THE DUTIES OF THE SERVANT TO THE MASTER.

Duty to enter Service, and serve stipulated time.—What Duties bound to perform.—Obedience.—Diligence.—Care of Master's Property.—Liability of Servants to Master for Negligence, or for injury to a third person.—Duty of Servant to account to Master.—Payments by Servants to Master.—Servants committing any breach of their contracts with their employers, may be sued for damages, or proceeded against under Masters and Servants Act.

THE first duty of a person who has engaged himself to another by a valid contract is of course to enter upon his term of service or employment at the stipulated time; and if he do not the master or employer may bring an action against him either in a superior or a county court. Having entered the service or employment, his next duty is to serve for the period prescribed by the contract, or until the expiration of a notice lawfully given; and if he do not do this, then also, unless he has a legal justification for his conduct, he will be liable to an action. While in the service or employment he will, of course, be bound not only to the performance of any special duties he may have undertaken, but also to those which are attached by usage and custom to his occupation. A person who is employed *in one capacity* is of course not liable to be called upon

to serve in another; and if he is required to do so, he may lawfully refuse without rendering himself liable to dismissal. Thus, a footman or a nursemaid cannot be required to act as cook, nor can a cook be called upon to attend to the children or wait at table. And in like manner, a man engaged as a bricklayer cannot be required to act as a hodman. In all these cases, if any question arises as to whether anything which a servant is called upon to do is or is not within the scope of his engagement or his duties, the decision will (in the absence of any express contract) depend upon what is the custom of the particular trade or occupation. He must do what is customary, he cannot be compelled to do more. In addition to these duties, there are, however, some which are implied by law from the relation of master and servant, and are binding upon all "servants," using that word in the larger and general sense we attributed to it at the outset of this work. Thus, every servant must obey all his master's lawful commands,* and is bound to be honest

* But, although a servant impliedly undertakes to obey the just and reasonable commands of his master, and to be careful, diligent, and industrious in the performance of his work, he is not bound to fulfil the unjust and unreasonable commands of a harsh taskmaster, nor (as we have already said) to perform work not fairly coming within the scope of his employment. Again, unless he knowingly engages in a hazardous occupation, he is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself. Of course, whether his apprehensions were or were not reasonable would *be a question for the court*, in case the master discharged him, and he *brought an action for* wrongful dismissal.

and diligent in his employ. If he fail in any of these respects, his master may not only dismiss him at any time, but may, if he thinks fit, proceed against him for breach of contract.

It is the duty of every servant to take due and proper care of his master's property entrusted to him, and if in discharging this duty he assaults (with no more than necessary violence) a person wrongfully removing it without legal process, he will be justified in doing so.* If the property of the master is lost or injured through the *negligence* of the servant, the latter will be liable to an action, which may be brought, according to circumstances, in a superior or county court. He is not, however, liable for mere *accidents*. Thus, there can be no doubt that a domestic servant may be required to make compensation for breakages which occur through his or her negligence. But it is seldom worth the while of the master to insist upon a right which he can, in general, only vindicate by bringing an action. If, indeed, he has taken the precaution to make an agreement with the servant that the latter shall consent to a fair deduction from wages on account of breakages, then he may stop such a sum as he deems right. If, however, the servant did not admit the alleged negligence, or disputed the assessment of damages,

* A servant may also take into custody any person who steals or feloniously receives his master's property, and may, further, justify an assault committed in defence of his master's person.

but, on the contrary, brought an action for the wages withheld, the master would be compelled to justify his conduct on both points to the satisfaction of a judge or jury. In very few cases can it be worth his while to incur the risk and annoyance of such a proceeding. In the absence of such an agreement as we have mentioned, it must be clearly understood that a master cannot take the law into his own hands, and make a deduction from the servant's wages. The compensation which the servant is bound to make is, in that case, in the nature of damages, and is not a debt; and that being so, in accordance with well-established legal principles, it is not the subject of a *set-off*, but must be recovered in an action. No doubt the master may refuse to pay the wages, take the risk of the servant suing him for them, and then if an action is brought, bring a cross action for the damages. By taking the latter step immediately he is served with a county-court summons on behalf of his servant, he would easily secure the two actions being brought on together. In that case the servant would recover the wages which were due, and the master would recover the damages to which he was entitled. Execution could, however, only be taken out by that party who obtained judgment for the larger sum, and for so much only as should remain after deducting the smaller sum. In that way, no doubt, the master might eventually set off the *damages against* the wages; but when the costs

come to be taken into consideration, he would most likely find that, in a pecuniary point of view, he was the reverse of a gainer.

A servant who undertakes any office of skill impliedly represents himself to be possessed of the skill requisite for the due discharge of the functions of his office, and if he does not possess the skill, or possessing it he fails to exercise it, he is responsible for a breach of contract and of the implied duties of his situation. Thus, if a gardener prunes and trains his master's trees so unskilfully as to injure or destroy them, he is liable to an action for the loss or damage he has occasioned; and the same may be said if a coachman injures or destroys his master's carriages or horses by gross ignorance and want of skill in driving. A servant while engaged in the service of a tradesman, impliedly promises to serve faithfully, and to do no act, knowingly and wilfully, which may injure his trade or undermine his business. He must, therefore, not attempt to draw away his master's customers, but there is no law which prevents him from soliciting prospective custom from them at some future period, when he hopes to be able to set up in business for himself.

A servant who induces an apprentice to leave his master's service, is liable to an action for so doing.

If a servant, in the course of his employment, commits any fraud, or does any other wrongful or negligent act whereby a third person is injured, then if *that person* brings an action and recovers damages

against the master,* the latter may, in turn, bring an action against the servant, and may recover from him the damages, &c., which he was, by the servant's default, compelled to pay to the plaintiff in the first action. Suppose, for instance, the manager of a large manufacturing concern were to make a fraudulent misrepresentation on the sale of goods, and the employer were cast in damages in an action at the suit of his customer, those damages and the costs *might* be recovered from the manager by the employer in a subsequent action.† In like manner, a master *might* recover from his coachman the damages which he had been compelled to pay in respect of a person's having been run over in consequence of such coachman's negligent driving.

If a servant receives money or goods from, for, or on account of his master, he must, as a rule, keep them for him, or give them up, or account for them to him, and to him alone. Unless under certain exceptional circumstances, which will be mentioned in a subsequent

* See Chapter IX., as to the liabilities of a master to third persons for the acts of his servants.

† We say *might* be, because it is not certain that they would be. No doubt, if the second jury took the same view as the first with respect to the fact of the fraudulent misrepresentation having been made, they would accept the verdict of such jury, with the costs incident to the trial, as the measure of the damages which the master had sustained. But it would be quite open to the manager again to raise before the second jury the question whether he had made a fraudulent misrepresentation at all; and if the second jury, differing from the first, came to the conclusion that he had not, they would, of *course, find in his* favour, and the master would recover no damages, *and would be cast* in the costs of the second action.

chapter,* the servant cannot refuse to do so on the ground that they belong to a third person.

If a servant, in breach of his duty, wrongfully pawns his master's property, the pawnbroker, or whoever else has taken them in pledge, must, on demand, give it up to the master, without requiring repayment of his advance.

Where a servant is in the habit of receiving money for the use of his master, and by the established course of dealing, pays it over to his master from time to time, without any written vouchers passing between them, the presumption of law is that all sums so received by the servant are regularly paid over to the master. Therefore, when there has been such a course of dealing, in an action by the master against the servant for money had and received, it is not enough for the master to prove that sums have been received by the servant to his use, but he must prove, by positive evidence, that the servant has not duly accounted to him.†

A servant who commits any breach of the contract of service into which he has entered with his master, or who injures his master's property, either carelessly or maliciously, may be sued for damages either in a superior or county court. He may, also, in some cases, be proceeded against before the magistrates by summons under the Masters and Servants Act, 1870 (see *post*, Chapter XIV., p. 135).

* See Chapter X., p. 111.

† *Treatise on the Law* of Master and Servant, by G. M. Smith.

## CHAPTER IV.

### OF THE DUTIES OF THE MASTER TO THE SERVANT.

Duty to receive and employ Servant.—Remedy of Servant in case of Master's refusal.—Duty to provide food, lodging, &c.—Not Duty of Master to provide medical attendance.—When Master must indemnify Servant.—Liability of Master for injuries sustained by Servants in course of their employment.—When Master is or is not liable to Servant for negligence of fellow-servant.

THE first duty of a master is to receive into his service any one with whom he has entered into a valid contract of hiring. We have in a previous chapter explained what contracts are binding (see *ante*, Chapter II., p 18).

If the master refuses to fulfil his contract by permitting the servant to enter upon his duties and earn his wages, he will, unless he has a good reason for refusing, be liable to an action for damages at the suit of the servant.* And the servant need not even postpone bringing his action until the arrival of the day fixed for his entering upon the service, if the

* It is almost unnecessary to say that, in order to maintain such an action, there must be a binding contract between the parties. No action, for instance, can be brought on a verbal contract where the *Statute of Frauds* (see *ante*, p. 19) requires the contract to be in *writing*.

master has before that day unequivocally declared that he will not permit him to do so. As soon as the master has announced his intention to break his contract, the servant's right of action accrues, and he may at once enforce it, without waiting to see whether the master will change his mind, or without giving him an opportunity of doing so.*

It is, however, the opinion of a learned writer on this branch of law, that "in such case, if the servant do not act upon the master's announced renunciation of the contract, and before the day arrives for the commencement of the service becomes, either by the act of God, *vis major*, or his own misconduct or misfortune, incompetent or unable to perform his part of it, the master would be at liberty to avail himself of those circumstances to rescind the contract, and could not afterwards be sued for it." If that opinion be well founded, and we think it is warranted by the authorities cited in its support, it is evidently the interest of the servant to commence his action immediately the master has announced that he will not fulfil the contract.

* In giving judgment in the case of *Hochster* v. *De la Tour*, 2 E. & B., in which this point was decided, Lord Campbell, C.J., said: "The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for compensation in damages by the man he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be *prejudicial to the* wrongdoer.

to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person, whereby the life of such person shall be endangered, or the health of such person shall have been, or shall be likely to be, *permanently injured,* such master or mistress shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to be imprisoned with or without hard labour in the common gaol or house of correction for any term not exceeding three years."*

A master is not legally bound to provide medical attendance, medicine, &c., even for a domestic servant, in case of illness.† But, as we have already stated, he is bound to supply such a servant with board and lodging during illness (assuming that the servant is not permanently disabled), until the engagement is terminated by a proper notice; and it is doubtful whether, under the obligation to furnish necessary food, he would not be compelled to supply such food and drinks as are necessary to the servant in his invalid condition. For instance, suppose a servant be ill, although the master might not be obliged to pay for the doctor's attendance,

* It will be observed from the words of the clause which we have italicized that, in order to support an indictment under it, the master must be under a legal obligation to provide food, clothing, and lodging; that he must not merely omit to fulfil the duty, but must *wilfully* neglect to do so; and, lastly, that *permanent* injury to health must result. As we have already said, a legal obligation to provide food and shelter exists with reference to every domestic servant, unless there is an express agreement that the servant shall supply himself *with food or lodging.*

† *But a master is* bound to make this provision for an apprentice.

or for the medicine prescribed, it is possible that he would be held liable to furnish broth, or jelly, or wine, if these things should be ordered as food necessary to the servant.

If the master will not pay for the medical attendance, and the servant cannot, it is the duty of the poor-law authorities to provide such attendance, as in the case of any other pauper. If they neglect to do so they may be proceeded against, either by action or indictment.

Although the master is not bound to call in a doctor and pay for his attendance on the servant, still, if he does employ a professional man, he must pay him. If, therefore, the master sends for a medical man to his servant when ill, he must, if he desires to avoid liability, take care to inform him in the plainest terms that it is to the servant he must look for payment. If he does not, a judge of a county court, or a jury, will most likely come to the conclusion that by his conduct he held himself out as the employer, and gave the doctor a right to look to him for payment. Of course, if the servant himself calls in the medical man in his own name, and without any intervention on the part of the master, no difficulty can arise. The doctor will then have no right to charge any one but the person by, or in whose name, his services were required; and even if he should say, probably truly enough, that he "looked to" the master, that will not help him, unless he can show that *something was done* or said by the master to warrant the

expectation that he would pay; whether he has or has not done so is a question not of law, but of fact, to be decided by evidence. Of course, if it can be shown by an examination of the medical man's books that he gave credit to the master or the servant, that will not be evidence to charge the party against whom the entry is made, but it will be the best possible evidence to discharge the other party, since it will show conclusively that at the time the transaction took place the doctor did not himself believe the latter to be liable.

A wife living with her husband and managing his house may, and probably would in most cases, be held to have authority to bind him in the engagement of a medical man to attend on a sick servant; and he would therefore be made liable for any promise of payment, either express or implied, that she may have given, or for any conduct on her part which justified a medical man in looking to the master, rather than to the servant, for his remuneration.

A master must indemnify a servant against the consequences of any act which the servant does in obedience to the master's orders, provided that such act was not *necessarily* unlawful, or that if it belonged to the category of acts which may or may not be lawful according to circumstances, the servant was led either by the words or acts of the master to believe it lawful.

For instance, no servant is bound to commit a crime at the bidding of his master; and if he does, he cannot sue the latter for damages in respect of any loss or punishment he may, in consequence, sustain. But

if, in obedience to his master, he were to stop up a footpath, or to arrest a person on a charge of felony—acts which are perfectly lawful, supposing that there was no right of way along the path, or that a felony had really been committed—then, if he did not know that he was committing a wrong, he would be entitled to claim an indemnity from his master if proceedings were successfully taken against him. If, however, the servant knew that he was acting illegally in obeying his master's orders, he would not be entitled to compensation for any loss or inconvenience he might sustain; for it is a settled rule of law that one wrongdoer cannot sue another for contribution.

It is almost unnecessary to add that the master is not bound to indemnify a servant against the consequences of acts done by the servant against his orders, although they may have been done in his interest.

A master is bound to take as much but not more care of his servants than he may be reasonably expected to do of himself, and he is not responsible for an accident which happens to the servant in the course of his service, unless he knows the service to be dangerous, and the servant does not. A servant, as between himself and his master, impliedly undertakes to run all the ordinary risks of the service. The law on this point may be illustrated by a well-known case.* A butcher ordered his servant to go in a van loaded with goods. In consequence of the van being in bad

* *Priestley* v. *Fowler*, 3 M. & W. 1.

repair and overloaded, it broke down on the journey, and the servant was injured. Lord Abinger, in delivering the judgment of the court, stated the law to be, "that the mere relation of master and servant could not imply an obligation on the part of the master to take more care of the servant than he might reasonably be expected to take of himself; that he was bound to provide for the safety of the servant in the course of his employment to the best of his information, judgment, and belief. The servant was not bound to risk his safety in the service of his master,* and might, if he thought fit, decline any service in which he reasonably apprehended injury to himself; and in most cases in which danger was to be apprehended he was just as likely to be acquainted with the possibility and extent of it as his master."

A master is not liable to a servant for injuries sustained by the latter through the negligence of a fellow-servant, provided that such fellow-servant was reasonably competent for the work in which he was engaged, or rather that the master had reasonable

* This must be understood as limited to the ordinary cases in which a servant does not distinctly and avowedly undertake a hazardous employment. Of course, if he engage voluntarily in an occupation notoriously attended with risk, he must fulfil that like any other contract; and, if he refuses to do so, he will be liable to dismissal, and to be proceeded against for breach of contract. At the same time, even in this case, he must be taken to contract to run only the ordinary risks of such an employment, and not such as may arise *from the bad* or careless management of the master, his neglect of *proper precautions*, or his failure to provide the requisite appliances *for carrying on the* business with as much safety as its nature admits.

grounds for believing him to be so. The principle on which this rule rests, and the limitations by which its application is governed, are clearly explained in the leading case on the subject, *Hutchinson* v. *the York, Newcastle, and Berwick Railway Company*, 5 Exchequer, 343. In giving judgment Alderson, B., said: "The principle is that a servant, when he engages to serve a master, undertakes as between himself and his master to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both.* It may, however, be proper, with reference to this point, to add, that we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, when the servant injured was not at the time of the injury acting in the service of his master.† In such a case

* A master is not held to warrant to one servant the competency of his fellow-servants. It will be sufficient if he does his best to get competent servants. Per Jervis, C.J., in *Tarrant* v. *Webb*, 18 C. B. 797.

† For instance, suppose a master sent out a van in charge of two servants, one of whom was injured by an accident arising from the careless driving of the other. In that case the master would not be liable to pay the injured servant any damages, provided that the driver (although he may have been careless on this occasion) was reasonably competent for his work. On the other hand, supposing that while one servant of a common master was walking along the street, not being at the time on his master's business, a van driven by another servant should run over him. In that case the servant injured would have just as much right as any stranger to bring an *action against* the owner of the van, although he happened also to be

the servant injured is substantially a stranger, and entitled to all the privileges he could have had if he had not been a servant. Though we have said that a master is not responsible generally to one servant for any injury caused to him by the negligence of a fellow-servant while engaged in one common service, yet that must be taken with the qualification that the master shall have taken care not to expose his servant to unreasonable risk. The servant, when he engages to run the risk of his service, including those arising from the negligence of his fellow-servant, has a right to understand that the master has taken reasonable care to protect him from risk by associating him only with persons of ordinary skill and care."*

We have already intimated that the non-responsibility of the master for injuries done to one servant by the carelessness of another is confined to cases in which the two are engaged in a *common* occupation. "It is necessary in each particular case," said Lord Chelmsford, in

his own master. As to the case of a servant, while acting in his master's service, being injured by the carelessness of another servant not engaged with him in a common occupation, see *post*, p. 58.

* It should be remarked that, although a master will be responsible to a servant for an accident occurring through the incompetence of fellow-servants if the incompetence was first made manifest by the accident, he would probably not be held responsible if it had previously come to the knowledge of the servant injured that his fellow-servants were incompetent, and he had nevertheless continued to work with them. When a man finds that the fellow-servants with whom he is required to work are so incompetent as to endanger his safety, he ought at once to throw up his situation, unless his master will employ more competent hands; and in such a case he will be justified *in leaving without giving* notice.

delivering judgment in the *Bartonshill Company* v. *Maguire,* 3 M'Q. 37; "to ascertain whether the servants are fellow-labourers in the same work, because although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. When servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence in the course of his peculiar work is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him. There may be some nicety and difficulty in particular cases in deciding whether a common employment exists, *but, in general, by keeping in view what the servant must have known or* expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at."

It is difficult, indeed impossible, to lay down abstract rules beforehand as to what is or is not a "common employment." Each case must depend on its own merits. But our readers will at any rate derive material assistance—the best we can give them—from the remarks of the judges in two cases which bear directly on the point. In the *Bartonshill Coal Company* v. *Reid,** Lord Cranworth said, "It is not necessary for this purpose that the workman causing and the work-

* 3 M'Q. 295.

man sustaining the injury should both be engaged in performing the same or similar acts. The driver and the guard of a stage-coach, the steersman and the rowers of a boat, the workman who draws the red hot iron from the forge and those who hammer it into shape, the engineman who conducts a train and the man who regulates the switches or the signals, are all engaged in common work. And so, in this case, the man who lets the miners down into the mine in order that they may work the coal, and afterwards brings them up together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing directly to the common object of their common employer in bringing the coal to the surface."

On the other hand, it was said by the Lord Ordinary, in *M'Naughten* v. *the Caledonian Railway Company*,* that "It may be that the two persons, viz., the wrong-doer and the injured, though both at the time servants of one master, are engaged in different operations and in distinct departments of work. A dairymaid is bringing home milk from the farm and is carelessly driven over by the coachman. A painter or slater is engaged at his work on the top of a high ladder placed against the side of a country house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder and upsets it. A clerk in a shipping company's office is sent on board a ship belonging to *the company*, with a message to the captain, and he

* 28 *Law Times*, 376.

meets with injury by falling through a hatchway, which the mate has carelessly left unfastened, although apparently closed. A ploughman is at work on a piece of ground held by a railway company and adjacent to a railway, and is, while in the employment of the company, killed by an engine which, through the rashness or carelessness of the engine-driver, leaps from the line of rails into the field. In such and similar cases it could hardly be contended that the rule laid down in *Priestley* v. *Fowler* (*i.e.*, the rule as to a master not being liable to one servant for the carelessness of a fellow-servant) would apply."

A person who volunteers to assist a servant in his work is in the same position as the servant as to the right of action against the master.

Although a master is not liable to one servant for the negligence of a fellow-servant (except under the circumstances we have mentioned), he will be responsible for any accident which occurs to a servant through his (the master's) own personal negligence or interference.*

Where an injury happens to a servant while in the actual use of an instrument, engine, or machine, of the nature of which he is as much aware as his master, and the use of which is the proximate cause of the injury, he cannot recover against his master unless the injury

* This principle may be illustrated by a case in which a master builder, who directed a labourer to make a scaffold out of wood which he knew to be unsound, was held to be liable for damages to one of his workmen whose leg was broken in consequence of the scaffold *giving way*.

arose through the personal negligence of the master. And it is no evidence of personal negligence on the part of the master that he has in use in his work an engine or machine which is less safe than some other which is in general use.

A master is, however, bound to exercise due care in having his machinery and tackle in a proper condition, so as to protect his workmen against unnecessary risks.* And if a master orders a servant to use machinery, tackle, or implements which are known by the master, but are not known by the servant, to be unsound or unsafe, the master would in that case be liable to indemnify the servant against the result of using such insecure apparatus. But where the cause of danger or mischief is known equally to the servant and to the master, the servant cannot then bring an action should an accident occur. He went to work with his eyes open, and he must take the consequences of his own temerity if he chose to work with a machine or tackle of the insecure condition of which he was fully aware.†

* As an illustration of this rule, we may cite the following case, where a workman (employed by a railway contractor) whose duty it was to uncouple the waggons, on stepping on the break for that purpose, it slipped down with him, in consequence of there being no block on it, which it was the duty of the contractor to have seen attached, and the workman was injured, the master was held liable, as the machinery was insufficient, *Gray* v. *Brassey*, 15 Sec. Ser. 135.

† It was, however, held by the late Mr. Justice Willes, in *Holmes* v. *Worthington*, 2 F. and F. 533, that when a servant, knowing of a defect in machinery which he has to work in his master's employ, *complains of it to him*, but continues in the use of it, in the reasonable *expectation of its* being repaired, and an accident happens

Mr. Manley Smith, in his work on this subject,* also suggests that "where a master employs boys and girls, or inexperienced workmen, and directs them to act under the superintendence and obey the orders of a deputy, whom he puts in his place, it may be that they are not, within the meaning of the rule, employed in a common work. They are acting in obedience to the express commands of their employer, and if he by the carelessness of his deputy exposes them to improper risks, it may be that he is liable for the consequences."

We have spoken thus far of the duties and liabilities of the master under the common law. But more extensive duties and liabilities fall upon him under the statute law in certain cases. Various acts of parliament have from time to time been passed for the protection of particular classes of workmen; and whenever any such act imposes upon the master a duty for the protection of the servant, the servant can bring an action against the master for any breach of the statutory regulations whereby he has sustained injury.†

In a subsequent chapter we shall notice succinctly some of the more important enactments of this class. (See *post*, Chapter XIX., p. 177.)

through its defective condition, he is not precluded from recovering against his master.

* The Law of Master and Servant, p. 156.

† This right is not taken away by the imposition of penalties by the statute for the benefit of the injured person.

## CHAPTER V.

### OF WAGES.

When Wages are payable.—How their Amount or Rate is ascertained.—When Servant is entitled to extra Wages for extra Work.—Must be paid in Money in certain Trades.—Stoppages from Wages.—Receipts for, and Presumption of Payment of.—Death of Master or Servant.—Recovery of Wages.—Cannot be attached.

THE mere fact that one person has done work or service for another, does not necessarily imply an obligation to pay wages. The work or service may, especially in the case of near relatives, have been rendered gratuitously; or it may be, that in the case of domestic or other servants living in their master's house, their board, lodging, &c., are an adequate payment. To entitle a person to recover wages there must be a contract that he should receive them.

At the same time it does not follow from this that it is necessary to prove an express contract, either verbally or in writing, in order to entitle a servant to recover wages. A contract to that effect may be implied from the circumstances of the case, and as a general rule it is almost certain that a jury or a county-court judge would imply a contract to pay wages whenever they had before them evidence that one person, not

a near relative, had at the request or with the assent of another done work or performed services for him.*

There is indeed a case which sometimes occurs, and which it is desirable therefore to notice. It may, by the express agreement of the parties—no court would ever imply such an agreement unless it were clearly proved—be left to the master to say whether any and what wages should be paid. Should such an agreement be clearly made out, no action could be maintained by the servant against the master unless the latter had, after the performance of the work, expressly promised to pay something. If, on the other hand, it be plain from the agreement between the parties that it was their intention that the servant was to be paid, but the *amount* of the remuneration was to be left to the master, then if he should decline to pay anything, the servant may bring an action against him either in the superior or county court, and it will be for the jury in the one case and the judge in the other to award him a reasonable compensation. It will be observed that, in the case just mentioned, the court will only have jurisdiction should the master refuse to allow *anything;* if he offers *something,* however trifling, the servant will be obliged to accept it. It may, however, be that the agreement is

* Of course, we are now speaking of cases in which one party acted as the servant or subordinate of the other. Where that was not the case, and the parties appeared to have been friends, a question might arise whether what was done was more than one of those good offices that one friend renders to another without any idea of remuneration.

merely that the servant shall receive wages, but that while nothing is said as to their amount, it is not provided that they shall be in the discretion of the master. In that case the servant may claim and insist upon the fair market value of his services.

It is hardly necessary to say that it is most undesirable to leave a matter of this kind in any doubt. Both in the interest of the master and of the servant, the rate of the wages should be fixed beforehand, so that the one may know what he has to pay, and the other what he has to receive. In that case, if the wages are not paid, the servant, on bringing his action for them in the supreme or county court, will simply have to prove the bargain, his own service under it, and the non-payment of the stipulated wages.

If the amount of the wages to be paid to a workman or other servant is to be ascertained by a certificate given by a third person, then the servant can recover no wages from his master until that third person has certified what is to be paid. If, however, the certificate be wrongfully or fraudulently withheld, he may bring an action against the third party or the wrong thus inflicted upon him, and in that action he will most likely recover as damages a sum equal to that whereof he proves himself to have been defrauded in the shape of wages by the withholding of the certificate.

When a servant is engaged to do work of a certain kind, he is not, as we have already said, bound to do *work of a* wholly different kind. If he is called upon *to do so, he may* therefore demand extra wages for the

extra work, or, if they are refused, he may, without rendering himself liable to dismissal, refuse to perform the additional duties which are sought to be thrust upon him. On the other hand, if a servant be called upon to do more work than he expected *of the same kind* as that for which he was engaged, he cannot demand additional remuneration, unless there was an express agreement that he should do so much work, or labour for so many hours, &c., and no more; or unless his master had distinctly promised to give him extra remuneration for his extra work. He must do the additional work, or so much as he can, or his master may dismiss him. Of course, in saying this, we do not mean that he is bound to work beyond his strength, or in excess of the hours of labour usual in his occupation; but within those limits he must do his best, and for work so done he cannot demand more than the wages or salary stipulated when he entered the service.

An action for wages must of course be brought against the person by *or* on whose behalf the servant was hired. This distinction must be carefully marked, because engagements are often made by agents on behalf of principals. In all such cases, although the engagement is made by the agent, it is the principal who must be sued. It is in virtue of this rule that an action must be brought against the wife, not the husband, for the wages of any servant whom she has engaged when acting on his behalf or as the head *of his household*. And, as it is a case which often

occurs, it may be well to mention that, if a contract (whether of hiring and service or any other kind) is made by one partner on behalf of a firm, all the partners not only may but ought to be sued.

By the Truck Act (as to which, see Chapter XIX., *post*, p. 177) the payment of wages in certain trades in goods, or otherwise than in the current coin of the realm, is prohibited. This act does not extend to domestic servants or agricultural labourers.

A master may of course at the weekly, monthly, or quarterly settlement, deduct from the wages which would otherwise have been then due to the servant any sums which he may in the meantime have advanced to the servant, or paid for him *at his request*.* But, as we have already seen, in the absence of any agreement to the effect, a master cannot make a stoppage from wages in order to cover any loss or damage he may have incurred through the servant's negligence or misconduct; he must pay the wages and bring a cross action for the negligence.† It would, we need hardly say, be otherwise if there was an agreement that the master should deduct these damages from the wages; but, of course, unless it was expressly stipulated that he should decide not only whether there had or had not been negligence, but as to the amount of the damage thus inflicted upon him, the servant could dispute his

* If the master chooses to pay money for what he deems the benefit of the servant, but without any request, either express or implied, on the part of the latter, he cannot deduct the amount thus paid from the wages.

† See this point more fully treated, *ante*, p. 41.

decision on either or both points, in an action for the amount of the wages which the master withheld from him.

Masters and employers often—perhaps, in the case of domestic servants, generally—omit to take receipts for the wages they pay. The consequence, as might be expected, is that the wages are often claimed a second time, and that the master has no other evidence than his own testimony to prove the payment. Such claims are not actually barred by the Statute of Limitations until six years have elapsed, and we need hardly say they are generally made much within that period. If, however, a servant have left a considerable time without claiming wages, the presumption is that all his wages have been paid. And if it is usual in the case of particular classes of servants and workmen to pay the wages weekly or monthly, and many weeks or months have elapsed without any claim or demand on the part of the servant, there is a *primâ facie* presumption of payment.

"By the death of the master the servant is discharged, and the sureties to a bond for the faithful service of the servant are released. And it seems that, where there is no custom upon the subject which can be imported into the contract, and the service is under an entire contract for a year's service and a year's pay, if the master dies in the middle of the year, the servant is not legally entitled to any wages for a broken period of service. Where, however, there is a *custom applicable* to persons in the situation in which

the servant was—as there is with regard to domestic servants, who are generally considered entitled to wages for the time they serve, although they do not continue in the service during the whole year—the servant would probably be held entitled to recover wages for the period of actual service." *

The executors or administrators of their deceased master are the persons to whom servants must look after his death for the payment of wages earned during his life.

As to the payment of the servant's wages in case of his master's bankruptcy, see *ante*, page 16.

If a servant dies between two of the usual days on which his wages are payable, his representatives can recover nothing for the period which has elapsed since the last pay day, unless there be a custom to the contrary in the particular occupation in which the servant was engaged. Such a custom exists in the case of domestic

* Smith's Law of Master and Servant, p. 126. The result of the law thus laid down is that, except in the case of domestic servants, and others to whom the same custom applies, a servant (using that word in the largest sense) would not, on the death of the master or employer, be able to recover any wages or salary for the time that may have elapsed since the last usual day of payment. For instance, supposing the engagement was a yearly one, but the salary was payable quarterly, then the servant could recover from the executors so much salary as might be due up to the last pay-day; but he could recover nothing for the broken time between then and the day of the master's or employer's death. The right of domestic servants to recover a *pro rata* portion of their wages, calculated up to the day of the master's death, is, we believe, beyond question, notwithstanding *the somewhat hesitating* language of the learned author we have *quoted.*

servants, whose legal representatives can therefore claim their wages down to the day of their death.

A master whose servant leaves him and goes into the army or navy must, under the Mutiny Act, pay him his wages up to the time of his leaving the service. But, as a general rule, when a servant whose wages are due periodically refuses to perform his part of the contract, and serve his master in the manner contracted for, or so conducts himself that the master is justified in discharging him without notice, he is not entitled to *any* wages for that portion of time during which he has served since the last periodical payment of wages. This rule is of universal application, whether wages are payable weekly, monthly, quarterly, or even yearly; and it extends to all classes of servants, although (as we have already mentioned) it is sometimes thought that domestic servants constitute an exception.*

A servant can recover in the county court any wages not exceeding £50 that may be due to him; but if he claims more than £20, his master may cause the action to be removed into one of the superior courts;† that is to say, he may cause the action in the county court to be stayed, leaving the servant to bring another in a superior court.

* See further on this point, *ante*, p. 26.

† In order to do this, he must give security, to be approved by the registrar of the county court, for the amount claimed, and the costs of trial in one of the superior courts of common law, not exceeding in the whole the sum of £150. This rule is, of course, not confined to actions between masters and servants. It applies to all actions on contracts.

Under the 33 & 34 Vict., c. 30, s. 1, the judges of the county courts are prevented from "attaching" the wages of "any servant, labourer, or workman," to answer a judgment. That is to say, supposing a judgment be obtained against such a person, they cannot require the master to pay a certain proportion of his wages to the judgment creditor, handing over only the balance to the servant.

# CHAPTER VI.

## THE DISCHARGE OF SERVANTS.

Grounds on which Master may dismiss Servant.—Disobedience.—Misconduct.—Negligence.—Incompetence.—Permanent Disability.—Master need not assign Cause for Dismissal.—Claim to Wages in Case of Dismissal.—Damages.

WHEN we speak of the right of the master to discharge a servant, we mean the right of the former to discharge the latter without waiting for the expiration of the term contemplated in the contract of hiring, or without giving the notice stipulated for in that contract, or required by some custom either of a general nature, or one applicable only to the particular trade or occupation, or in the particular locality.

When the master possesses this right of instantly discharging his servant, he may, if the latter refuses to quit his premises, eject him by force. We do not, however, recommend him to act personally in the matter. It is much the better course to invoke the assistance and intervention of a police-constable.

"It is," says Mr. Manley Smith, in his able work on this subject, "difficult to lay down any general rule as to what causes will justify the discharge of a ser-

vant which shall comprise and be applicable to all cases; since whether or not a servant in any particular case was rightfully discharged must, of course, often depend upon the nature of the services which he was engaged to perform, and the nature of his engagement. It is conceived, however, that, according to the decisions on the subject, the discharge of a servant may be justified for the following causes:—

"1. Wilful disobedience of any lawful order of his master. 2. Gross moral misconduct, whether pecuniary or otherwise. 3. Habitual negligence in business, or conduct calculated seriously to injure his master's business. 4. Incompetence, or permanent disability from illness."

It will be convenient to deal separately with the cases which fall under each of these rules:—

1. *Wilful disobedience of any lawful order of the master.* If a servant be ordered by his master to go and do a particular thing which the master has a right to command,* then if the servant refuses or wilfully omits to do what he is told, he may be immediately dismissed. Also if general directions are given to a servant for the performance of his duties, as if he is ordered always to do a particular thing in a particular way, then if he repeatedly disobeys or fails to obey those orders he may be dismissed. But a mere occasional, casual, and negligent failure of duty in respect to a general order will not justify the immediate dismissal of a ser-

* See, as to what a master may lawfully command or require, *Chapter III., ante*, p. 39.

vant; at all events, until he has been expressly informed that this consequence will follow his next failure of duty.* If, for instance, a domestic servant were told that she must get up at six o'clock on a particular morning, and she refused to do so, she might be discharged at once; but if a general order were given to her always to get up at that hour, a mere casual and negligent failure to do so in one or two instances would not justify her discharge unless she had previous notice that disobedience would entail dismissal.

The following cases, in which the courts have held that a master may dismiss a servant, will serve as illustrations of the general principle we are now discussing:—Refusing to work during the customary hours of labour; refusing to conform to the hour of dinner; refusing to work at dinner time; refusing to work during harvest time without beer; and (in the case of a domestic servant) absence from the master's dwelling-house for a night to visit a sick mother against the will of the master, after leave of absence had been asked for and refused. "It is also apprehended," says Mr. Addison, in his work on Contracts, and although there is no express decision on the point, we are entirely disposed to agree

* This is a generally correct statement of the law; but it is subject to one exception, which it is desirable to point out. If a man is engaged in a service in which the punctual performance of his duties is necessary to the health or the safety of others, a single act of negligence would, we apprehend, warrant his dismissal. It could not, for instance, be contended that a railway company were bound to retain in their service a signalman who had, even in a single instance, and even although no injury ensued, failed to observe the rules of the company with regard to the signalling of trains.

with him, "that the entertaining of guests at the master's expense, without his knowledge, and without any express or implied permission to do so, would be a good ground of dismissal."

On the other hand, the following instances of misconduct, and disobedience of orders have been held *not* to constitute a sufficient ground of dismissal, and dissolution of the contract of hiring and service, without notice:—Temporary absence without leave, producing no serious inconvenience to the employer; occasional insolence of manners and sullenness; occasional disobedience in matters of trifling moment, such as neglecting to come on one or two occasions when the bell rang, stopping at one hotel when ordered to stop at another, temporary absence on customary holidays, or for the purpose of having a severe hurt attended to, or for the purpose of procuring another situation, such absence being warranted by custom.

2. *Gross moral misconduct.* If a servant robs his master, embezzles his property, or falsifies his accounts, he may be forthwith dismissed.

Unchastity while in the house or family of the master will be sufficient to justify the dismissal of a female servant or governess; and the same may be said with respect to immoral conduct, *in the house,* on the part of a man servant, tutor, or even a clerk, lodged and boarded in his master's family.*

* But the fact of a male servant having been the father of a bastard child before the master hired him, or being guilty of immorality *out of his master's* house, does not justify his dismissal.

3. *Habitual negligence, or conduct calculated to inflict a serious injury on the master's business.* Under this head it has been held that the dismissal of a servant was justified in the following cases:—A servant who was frequently absent, when his master wanted him, and often slept out at night; a foreman to a silk manufacturer, for advising and assisting an apprentice to leave their service; a clerk to a public company, for inserting in the minute book a protest against a resolution of the directors; a journeyman carpenter, for poaching on the premises of a gentleman for whom his master was working;* a manager of a company, for accepting a bill of exchange in blank; an apothecary's assistant, for being drunk and employing the shop-boy to make up medicines; a clerk for appropriating money entrusted to him for "business purposes" to the payment of his own salary; an agent who received money when he was forbidden to do so.

On the other hand, it has been held that a schoolmaster is not justified in dismissing an usher who did not return until two days after the expiration of

* The ground on which this case was based was, that if a gentleman engages a tradesman who has several workmen under him, he has a right to expect that such workmen will conduct themselves well. If they do not, he will not again employ the same tradesman, and thus the latter will lose his business. The principle of this case will, of course, apply to all the acts done by a servant which, though not directly injurious to the master, are indirectly so, inasmuch as they tend to offend his customers, and thus destroy his connection.

the vacation, it not appearing that any injury was occasioned to the master by his temporary absence.

4. *Incompetence or permanent disability from illness.* "When a servant of any sort is engaged on account of his skill, or peculiar ability to perform certain duties and turns out perfectly unskilful, and incompetent to discharge the duties for which he was hired, the master will be justified in rescinding the contract and discharging the servant."* It will be observed that to warrant a dismissal on this ground, the servant must be utterly incompetent, or so far incompetent that to employ him would be a loss instead of a gain to the master. A servant who is merely less skilful than he represented himself, or than he was supposed to be, cannot be got rid of in this summary way.

The temporary illness of a servant engaged for a term, whether yearly, monthly, or weekly, will not warrant a master in dismissing him or in making any deduction from his wages. He must continue to pay until he has given a regular notice, and that notice has expired. But, on the other hand, if a servant is *permanently* disabled (say by paralysis or sudden loss of sight) from work, the master may forthwith rescind the contract and dismiss him.

It is admitted that if a good ground for discharging a servant exists, and is known to the master, he may act upon it without communicating it to the servant; nor will the dismissal be illegal because an insufficient

* Smith on Master and Servant, p. 84.

ground was assigned to the servant, if a sufficient ground actually existed at the time. Indeed, a master is not bound to tell a servant why he is dismissed. It is, however, always better to do so, not only because the *bonâ fides* of the master's conduct is thus placed in a better light if an action for wrongful dismissal be subsequently brought against him, but because it is very probable that the servant, not having yet had time to concoct a probable falsehood, will either admit the charge (assuming it to be well founded), or will meet it in a manner, or by statements and excuses, which may be afterwards usefully given in evidence against him. It very often happens that the plausible defence which a servant concocts after he has had time to think the matter over and to take advice, is shattered either by proving, or compelling him to admit in cross-examination, the statements which he made when the matter was first broached to him.

Although it is clear that a master may defend himself against an action for wrongful dismissal on the part of the servant, by alleging any ground of complaint of which he was aware at the time of the discharge (and that whether he did or did not assign it to the servant at the time, or even if he assigned another and a totally different one), it is very doubtful whether the master can justify himself by assigning a reason which existed, but which he *did not know of* at the time of the servant's dismissal. There are authorities on both sides, but no direct decision; and

under these circumstances we cannot pretend to express an opinion on the point.

When a servant is dismissed for good and sufficient cause, he cannot claim any wages which have accrued due since the last usual time of payment.*

If a servant be wrongfully dismissed, he may bring an action against his master either for the wages due to him for the time between the last payment and his dismissal, or, what is by far the better remedy, he may bring an action for the wrongful dismissal, and recover damages for the master's breach of contract.†

* It is said that some county-court judges are in the habit of deciding to the contrary in the case of domestic servants, on the ground that their wages accrue *de die in diem*. But, with great deference to these learned persons, we think they take an erroneous view of the law. It by no means follows that because such wages are said to accrue *de die in diem* for some purposes (as for calculating the amount of wages due to a servant on the death of the master, which dissolves the contract of hiring and service), they can be treated in the same way when the servant has himself broken the contract. In that case, the correct view appears to be, that nothing is due until the usual time of payment; and, if the contract is terminated by the misconduct of the servant before this time arrives, he can make no claim, because nothing is yet payable.

† The latter form of action is the preferable one, for this reason: in an action for wages, the servant *can* only recover wages up to the time of his discharge. In an action for wrongful dismissal, founded on the obligation of the master to indemnify the servant against all the damage which he may sustain by reason of the master's breach of contract in discharging him, and not allowing him to remain in his service, and earn wages until the expiration of a proper notice duly given, the servant, if the judgment of the court is in his favour, *must* recover more than the wages due at the time of the dismissal, *i.e.* he must recover those wages *plus* something in respect of the *wages he was prevented* from earning.

The amount of damages which a servant recovers in an action for wrongful discharge depends on the nature of the contract and the wages agreed to be paid. In the case of a domestic or menial servant, or where there was an express agreement for a month's notice, it would be a month's wages; but, generally speaking, the amount of damages is a question for the jury to determine, having reference to the rate of wages agreed upon, or if no specified sum had been fixed, then to the usual rate, and to the time likely to be lost before the servant could, with reasonable diligence, obtain a similar situation.

Under the Masters and Servants Act, 1867 (30 & 31 Vict., c. 141), the magistrates have, in certain cases, power to annul any contract of service between employer and employed. We shall not, however, enter here into a subject which will be found fully treated in a subsequent chapter. (See *post*, Chapter XIV.)

an action against the master whose employment he has entered for the wages which he has earned. If he did so he would, however, be held, as it is said, to waive the tort: — *i.e.*, he would not be able to bring both an action for the servant's wages and an action for damages arising from his having been enticed away and harboured by the defendant. He would, of course, also have to pay the servant the wages to which he would have been entitled had he remained in his service. This action is generally brought where an apprentice, in the last years of his indentures, when his labour is peculiarly valuable to his master, deserts his service and enters the employment of another, in order to earn the higher wages he can gain as a journeyman. In such a case the late master may find it both pecuniarily advantageous, and an excellent way of punishing the deserter, to intercept the wages which he is illegitimately earning, and to pay him the smaller sum to which he is entitled under his indentures.

A master is entitled to bring an action against any one who does a personal injury to his servant, whereby the latter is prevented from rendering the service to which he was bound, or to which his master was entitled. Nor is it any answer to such an action that the servant is also suing for, or even that he has actually received, damages for the same injury. In the one case, the gist of the action is the loss of *service* by the master; in the other, it is the personal

suffering and the injury to limb or health sustained by the servant.

Technically speaking, the action for seduction falls under the principle we are now discussing; but we do not propose to treat of it here, since, although nominally, it is not substantially a part of the Law of Master and Servant.

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# CHAPTER VIII.

## OF THE MASTER'S LIABILITY ON CONTRACTS MADE BY HIS SERVANTS IN HIS NAME.

Ground and extent of liability.—Authority to servant; in writing or verbal, express or implied.—Ratification of servant's acts by master.—Master holding out servant as his agent.—Right of third persons to assume that servant is master's agent.—Limitation and revocation of servant's authority.

A MASTER may be liable to third persons for the acts of his servants, on the ground that they have either entered into contracts, or committed wrongs, for which he is responsible. In the present chapter, we shall deal exclusively with the liability of the master in respect of contracts.

That liability is based solely and entirely on the ground that the servant is the agent* of the master, and that he has his authority, either express or implied, for doing the act or entering into the contract for which it is sought to make the master answerable.

* Many persons, such as infants and married women, who cannot make valid contracts on their own behalf, may nevertheless, as agents for others, do acts which will be binding upon the persons whom they represent. A master may, therefore, be liable upon the contract of *his servant* (provided that it was in other respects binding), although *such servant were* an infant or a married woman.

Before we proceed to inquire in what manner servants may become agents of, or may bind, their masters, there is one general proposition which it may be convenient to lay down. It is, that it makes no difference in the *master's* liability whether a contract is made, or an order given,* in his name or in that of his servant, supposing that the latter were in fact acting as his agent, or that he contracted under circumstances which warranted a third person in assuming him to be his agent. It will in all such cases be a question of fact, to be decided, like any other question of the same kind, by evidence whether the servant acted on his own account or on that of his master.

No agent can bind his principal beyond the scope of his authority; but this proposition requires to be supplemented by another:—That in certain circumstances the general public, or some part of them, or a particular individual, may, from the acts of the master, have a right to assume, as against him, that such authority exists, whether it has or has not in fact been given. It is, therefore, in order to avoid confusion, requisite to consider separately each mode in which a master may incur liability for the contract of his servant.

* Where, however, a servant or other agent has signed a *written* contract in his own name, he cannot give parol evidence to *discharge himself* from liability on the contract. That, however, will not prevent the other party from giving parol evidence to charge the master, by showing that it was really on his behalf that the contract was entered into, or the order given.

In the first place, a servant may, either in writing* or by word of mouth, be authorized by his master to do a particular thing or to make a particular bargain. It is clear that, in this case, his authority is strictly limited by the letter of his instructions, and supposing that he is dealing with a person who has had no previous transactions with him on account of his master, the latter will not be responsible for anything he does inconsistent with his orders. It is the duty of a person to whom another comes *for the first time*, professing to be the agent of another, to ascertain whether he really has that character, and with what amount of authority he is entrusted. If he does not ascertain these facts correctly, or chooses to give the agent credit beyond his authority, he must accept the consequences. In this case, at all events, the liability of the principal will be strictly confined to the authority he has expressly conferred upon the agent.

But then a master may give his servant express authority to act for him, not merely in reference to one transaction, but in all transactions of a particular kind. For instance, a merchant may give his manager authority to buy and sell goods on his account, or to

* If the fact that a servant is acting under a written authority from his master is disclosed to or becomes known to the person with whom he purposes to deal on behalf of his master, such third person should insist on seeing the written authority; because, after he has become aware that it exists, he will only be justified in giving credit *to the master* according to its terms, and will not be able to charge *him in respect to* anything inconsistent with or beyond those terms.

do these and other things usually done by the manager of a given business; or the master of a house may give one of his servants authority to buy goods of a particular kind—say, for instance, a butler to buy wine, or a coachman to buy hay and corn for his horses. In that case the servant will be considered to have all the authority necessary for transacting the business entrusted to him, and which is usually entrusted to agents employed in the like capacity. The authority will not, however, be held to go further. If the butler were to take to buying corn and provender for the horses, or the coachman were to go and order wine, the master would not be liable; and, on a similar principle, an authority to buy or to sell goods on the part of the master will not cover any transactions or engagements, wholly collateral to the sale, into which the servant may choose to enter. For instance, it has been held that a servant sent to sell a horse had authority to bind the master by a warranty of soundness given at the time of the sale, in order to effect it, and as part of the transaction; but that, on the other hand, the master would not be liable on a warranty given after the sale, and as a wholly independent transaction.

In order to render the master liable upon a bargain made, or contract entered into, by his servant on his account, it is not necessary that authority should have been given to the servant *before* the transaction. If, after a servant has entered into a contract in the name of his master, the latter adopts, recognizes, and ratifies it, he will be liable upon it exactly in the same

way and to the same extent as if he had previously expressly authorized his servant to enter into it. It must, however, be observed that this rule only applies to contracts entered into by the servant in the *name of his* master. Suppose a servant were to buy goods on his own credit, the master could not, by any subsequent act, make the contract his own. Nor can he take advantage, by subsequently adopting it, of any act, *although done in his name,* to the validity of which it is essential that it should be valid at the time it was done. For instance, if the servant or agent of a landlord gives a tenant notice to quit without either a special authority to do this particular act, or a general authority to act for his master in all matters of the kind, the notice would be bad from the commencement, and could not be made good by any subsequent ratification on the part of the master.*

If a master desires to adopt a contract or bargain which a servant has entered into in his name, but without his authority, he must ratify it as a *whole.* He

* This is subject to a qualification, which is, however, rather apparent than real. Suppose a notice to quit were given earlier than it need be (for instance, if a notice were given on the 20th of March to a yearly tenant to quit his holding on the 29th of September), then, if the master ratifies it *before* the day on which it begins to operate (which in the case we have put would be the 25th of March, six months' notice being requisite to terminate a yearly tenancy), it would be a good notice. But the truth is, that in this case the ratification of the master is, properly speaking, a *new* notice given by himself. *It dates from* the time he intervened, and does not in any way relate *back to the act* of the servant.

cannot take part and reject the rest; appropriate the benefit and reject the burthen.

So far we have been dealing with cases where a servant has express authority to do a certain thing, or things of a certain kind, and the person with whom he deals has no right to assume, as against his master, that he has more. This, as we have already said, is always the case where a transaction is one of an isolated character, is the first of its kind, or is not carried out under circumstances which, whatever may be the actual fact, justify the assumption that the master has given the servant authority to deal in his name with third parties. We have now to discuss that large class of cases in which the authority of the servant is said to arise by implication—that is to say, when the conduct of the master is such that he may be said to hold out the servant to the public as his agent, either in all transactions, or in transactions of a particular kind, and when he thus gives those with whom the servant deals a right to presume that he acts with the authority of the master, and to hold the latter liable on the contracts thus entered into in his name.

1. The first mode in which a master is said to "hold out" a servant as his authorized agent, is by employing him in a certain capacity, and by recognizing and adopting his transactions in that capacity. "A master who accredits a servant by employing him, must abide by the effects of the credit, and will be bound by contracts made by innocent third persons in the seeming course of that employment, and on the

faith of that credit, whether he intended to authorize them or not, or even if he expressly, though privately, forbade them, it being a general rule of law, founded on natural justice, that where one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud should be the sufferer. Upon this principle, where a servant usually buys for his master upon credit, and the master is in the habit of paying for goods so purchased, the master is liable to pay for any goods of a similar nature which the servant may obtain upon credit, even though, in a particular instance, the master furnishes the servant with money to pay for the goods and the servant embezzles the money; or even if the servant, after he has been discharged, pledge his master's credit, unless the party giving credit knew that the servant was discharged." *

Whether the master's course of dealing has been such as to warrant a third person in trusting a servant as his agent is a question of fact, to be decided with reference to the whole circumstances of the case by a jury, if the case is tried before one, or if not (as generally happens in the county court), by the judge. Generally speaking, the inclination of the judge, and still more that of the jury, is in favour of the tradesman, if it can be shown that he had any fairly reasonable ground for thinking that the servant was authorized by the master to order goods in his name.

Where a servant's authority to pledge his master's

* *G. M.* Smith on Master and Servant, p. 157.

credit arises merely by implication, the authority of the servant is coextensive with his usual employment, and the scope of his authority is to be measured by the extent of his employment. Suppose, for instance, that a gentleman's cook was in the habit of purchasing the meat and vegetables for the family, then if the master had been in the habit of paying for the articles she ordered on credit, he would be held liable to pay for all things of the same kind, or of any other kind, which it might reasonably be supposed to come within a cook's province to buy. On the other hand, the fact that her master had paid for articles ordered by her and required in the kitchen, would raise no presumption that he had authorized her to buy table or household linen; and, in the absence of any express authority by him to make such a purchase, he would not be held liable to pay for such articles.

Where a person on one or two occasions draws cheques, or accepts or indorses bills in the name of another, who acquiesces in the payment of the cheques, honours the acceptances, and receives money on the indorsements, these are facts from which a jury or a county-court judge might presume a general authority from the latter to perform similar acts, so as to bind him to the holder of a cheque or bill given or drawn by the former without authority, or even fraudulently. An authority, however, to perform one of these acts would not imply an authority to perform others, but such authority would be construed strictly.

2. The second mode in which a master may be-

come liable for orders given, goods purchased, or money received on his account, either by one of his servants, or indeed by any other person, is, by conferring upon such servant or person, or suffering him to assume, a certain position in which he would, according to the usual course of business, be authorized to do such and such things.

"Thus a merchant has been held bound by a payment in the usual course of business to a person found in his counting-house, and appearing to be entrusted with the conduct of business there, though it turned out that the person was never employed by him, and the money never came into his hands; for, said Lord Tenterden, 'The debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority.' And so a tender to a person, probably a chief clerk, in the office of an attorney, who refused to accept the amount tendered as insufficient, has been held good, being equivalent to a tender to the attorney himself; and an attorney has been held liable to refund money and pay the costs of the application where some one in his office extorted an excessive sum for costs, although the matter did not come to his personal cognizance. And payment to a sheriff's bailiff's assistant has been held good as against the sheriff." *

Again, if a master entrust his servant with goods to sell, he will be considered to confer upon him power to

* Smith on Master and Servant, p. 160.

do everything which, in the usual course of business, is connected with, or requisite to carry out, the transaction; as, for instance, to warrant a horse, to make representations as to the quality of goods, or to undertake that goods shall be supplied equal to the sample exhibited.

It should be remarked that the power which a servant possesses by implication to bind his master by contracts relating to matters within the usual scope of his employment, is not enlarged by the occurrence of an unusual emergency. If he has not a particular power under ordinary circumstances, he does not gain it by the fact that, under extraordinary circumstances, its exercise would be advantageous to his master, either by enabling him to fulfil duties which are incumbent on the latter, or in any other way.*

When a master has once become liable to pay a debt contracted by a servant in his name or on his behalf, he cannot get rid of the liability merely by giving the servant money to discharge it. Nothing will release him except the actual payment of the debt; unless, indeed, the creditor were to lead him to believe that the debt had been paid, when, as a matter of fact, it had not. In that case the creditor would be so far bound by his own statement that he would be prevented from afterwards bringing an action for the money.

* This rule is illustrated by a well-known case, in which it was held that the station-master of a railway company has no implied authority to call in a surgeon to attend on passengers injured by an accident; for the power to enter into such a contract is not incident to his *employment*.

If a servant has authority, either expressly or by implication, to act as the general agent of his master in the transaction of any kind of business, or in the purchase or sale of particular goods, &c., that authority cannot be limited by any *private* order or direction not known to the party dealing with him.* Should the servant in such a case disobey his master's orders, or disregard any secret engagement between himself and his master, he will be accountable to his master for any loss he may sustain thereby, but third persons will not be affected by any limitation of the servant's authority not communicated to them. "The rule is, however, directly the reverse concerning a particular agent or agents employed specially in one single transaction, for it is the duty of the party dealing with such a one to ascertain the extent of his authority, and if he do not he must abide the consequences." †

It follows necessarily from all we have said (but we repeat it for the sake of emphasising the proposition) that unless the master has, either by expressly giving him the power, or by implication from a course of dealing, authorized the servant to pledge his credit, the servant cannot, by so doing, render him liable upon orders he may give in his name. A trades-

* Of course, if a party dealing with a servant on behalf of his master *do know* of a private agreement between the master and servant, or of private instructions given by the former to the latter, he will be bound by his knowledge, and cannot hold the master liable *for* any orders given, or contracts entered into, contrary to such agreement or instructions.

† *Smith's* Mercantile Law.

man, therefore, to whom a servant comes and gives orders on behalf of his master cannot be too careful in ascertaining, when the *first* order is given, that the man has his master's authority. For, if he omits to do this, and it turns out that the man really had no authority, he will not be able to render the master liable, even though he should prove that the master had actually used the articles purchased by the servant. No doubt the fact would be evidence against the master, and if it stood alone might probably lead a judge or jury to come to the conclusion that the servant really had the authority which he professed to have. But it would go for nothing if the master were, on the other hand, to prove either that the tradesman gave credit to the servant in the first instance,* or that the servant was sent with ready money to make the purchase.

If a master has given authority by deed to his servant to enter into contracts or give orders in his name or on his account, that authority can only be revoked by deed. But if the authority has been expressly given, either by writing or by word of mouth, or arises by implication from a course of dealing, it may be revoked either by writing or by word of mouth. But

* The rule of law on this point is this :—If, at the time an order is given, or a contract entered into, the party to whom it is given or with whom it is entered into knows not only that the servant is an agent, but who his master is, and, notwithstanding this knowledge, chooses to debit the servant, he cannot afterwards turn round and charge the master. But, if he knows the servant to be an agent, but does not know who his master or principal is, he may in that case, and although he has in the first instance debited the servant, charge the master or *principal* when he discovers who he is.

in order that the revocation may be binding upon the public, the master must give public notice of it; and when there has been a course of dealing between the servant and tradesmen who have been in the habit of trusting him as his master's agent, notice that he has no longer authority to deal in his master's name must be given to each of those tradesmen.* A private revocation as between the master and servant will not in the slightest degree exonerate the master with regard to those who may have been led by a previous course of dealing to trust the servant.

The master's death operates as a revocation of any authority which he may have given, either expressly or by implication, to pledge his credit. If, therefore, the servant, after his decease, orders goods in his name, his executors cannot be compelled to pay for them.

Lapse of time would in some cases raise a strong presumption that the servant's authority to pledge his master's credit had come to an end. For instance, if a coachman who had, while in a particular service, authority to buy provender for his horses, were, long

* It was held in one case that notice to a servant of the tradesman was not sufficient, but that it must be given to the tradesman himself. In that case, however, the servant was a mere porter charged with the delivery of goods; and it is apprehended that, although he may well have been held not to have been agent of the master for the purpose of receiving notices with respect to the conduct of business, a different decision would have been arrived at had the notice been given to any person employed by the tradesman in a managing capacity. However, to avoid any doubts on this point, it would be advisable that, if *possible, the* notice of revocation should be given to the tradesman *himself.*

after he had left that service, and long after the interruption of the regular course of dealing, to go to a tradesman and give him an order, the latter would not be justified in executing it without ascertaining whether the servant still occupied the same position as formerly. If he were so careless as to neglect this precaution, a court would most likely refuse to hold the master liable.

## CHAPTER IX.

### OF THE MASTER'S LIABILITY FOR WRONGS COMMITTED BY HIS SERVANT.

Criminal Responsibility.—Civil Responsibility.—Liable for Negligence of Servants.—Contractors.—Limits of Liability.—When exonerated by Negligence of injured Person.

A MASTER is not responsible in a criminal court for the illegal acts of his servants, unless he expressly orders or personally co-operates in them. And where one employs another to do a thing which may be done either in an innocent or in a criminal manner, and the servant of his own accord selects the latter, the master cannot be indicted.

If, however, the master expressly directs the servant to commit a crime, there can be no doubt that the master may be proceeded against criminally; whether the servant can also be indicted will depend upon whether he did or did not know that he was committing an offence. If he did know it, he will of course be punishable, because no man is bound to commit a crime at the order of another; if he was in ignorance of the nature of the act, he will, on the contrary, be excused by his master's commands.*

* See further on this point, ante, p. 52.

Although masters are not (with an exception we shall presently mention) liable to indictment for crimes committed by their servants without their complicity, they are liable to informations for penalties incurred by the breach of statutory regulations by persons in their employment, notwithstanding they may be perfectly ignorant that any breach of the law was about to be or has actually been committed.*

Masters are also liable to indictment for public nuisances, such as carrying on offensive trades, committed by their servants, although they had personally nothing to do with the nuisance complained of.†

It would also appear from more than one case, that if the criminal act is done in an ordinary course of business sanctioned by the master, the latter will be

* A frequent illustration of this liability on the part of the master is to be found in the case of informations for breaches of the revenue laws. As was observed by Pollock, C.B., in one case, if the master was not held responsible for the breach by his servants of such of these laws as relate to the conduct of his business, the laws might "be evaded with the utmost facility and impunity; and they would be reduced to a mere dead letter."

† This liability is well illustrated by a case in which the directors of a gas company were indicted for a nuisance occasioned by the refuse from their works having been thrown into the Thames. It was contended that they were not liable, as there was no proof of their having criminally participated in the acts of their servants; and they did not, in fact, even know what was done. They were, however, found guilty and fined. Lord Denman remarked that their ignorance of what had been done was immaterial, provided they gave authority to the manager to conduct the works. "It seems to me," he added, "both common sense and law that, if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants."

liable to an indictment as well as the servant. For instance, a master baker has been held criminally responsible for the act of his foreman in putting lumps of alum into bread.

The fact of the master being criminally responsible for the act of the servant will not exonerate the servant from liability—as we shall have occasion more particularly to mention in a subsequent chapter.

So much for a master's responsibility under the criminal law for the wrongful acts of his servants. We have now to deal with his civil responsibility (*i.e.*, his liability to an action), which, as will soon be seen, is far more extensive.

The general principle applicable here is, that the master is liable, in an action, for any wrongful act of his servant, not only if it be done by his orders, but if it be done without or even against his orders, provided that it be *done in the course of the servant's employment, in his master's service;* and this, as a general rule, will be the case "whether the act of the servant be one of omission or commission, whether negligent, fraudulent, or deceitful, or even if it be an act of positive malfeasance, or wrong."

This rule of law applies not only to domestic servants who have the care of carriages, horses, and other things in the employ of the family, but to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such *servants* be not in the immediate employ or under *the superintendence* of the master. For instance, if

a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff who has other persons under him, all of them being paid out of the funds of the owner and selected by himself or by a person specially deputed by him; if any damage happens through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the owner is answerable for their defaults, and in doing any acts on account of their employer.

If, however, A employs B, who carries on a distinct trade or calling, to execute certain work for him, and an injury be done through the unskilfulness, negligence, or default of the workmen employed by B, then A is not liable. In that case B is regarded not as the servant or agent of A, but as a contractor acting independently, and liable for the default or negligence of the

workmen whom he and not A employs. The test of whether a person is a contractor for certain work or is the servant of another is, whether the original employer retains the power of controlling the work. If he does, he will be regarded as a master, responsible for any negligence which may be committed in the course of its execution; if he do not, he will be regarded as one who has simply contracted with another for the performance of a certain job, and that other will be liable for whatever happens. Thus, to take an instance, which is cited in most of the text books, where a butcher bought a bullock in Smithfield market and employed a licensed drover to drive it home, and the drover employed a boy, through whose negligence the bullock injured the plaintiff's property, it was held that the butcher was not liable, as the drover exercised a distinct calling, and the boy who caused the mischief was *his* servant, and not the servant of the butcher. So also where a builder was employed to make certain alterations at a club-house, including the preparation and fixing of certain gas-fittings, to do which he made a sub-contract with a gas-fitter, through the negligence of whom, or his servant, the gas exploded and injured the plaintiff; the builder was held not liable, as the relation of master and servant did not exist between him and the party causing the injury.

Again, to take a case which possesses great practical interest for a large class of persons, if carriages or *horses are let* out to hire by the day, week, month, or

job, and the driver is selected and appointed by the owner of the carriage, the latter is responsible for all injuries resulting from the negligent and careless driving of the vehicle, although the carriage may be in the possession and under the control of the hirer. But if the latter drives himself, or appoints the coachman and furnishes the horses, the owner of the carriage cannot of course be made responsible for the negligence or want of skill of the coachman. Let us illustrate this by a case. Two old ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses and a driver by the day or drive. They gave the driver a gratuity for each day's drive, provided him with a livery hat and coat, which were kept in their house, and after he had driven them constantly for three years, and was taking off his livery in their hall, the horses started off with their carriage and inflicted an injury upon the plaintiff, and it was held that the defendants were not responsible, as the coachman was not their servant but the servant of the job-master.

It must, however, be borne in mind that, even when a contractor is employed, the person who employs him may by personal interference with the workmen adopt their acts, and so render himself liable. For instance, if a householder agrees with a builder to construct a drain for him, the builder will, if the conduct of the matter be left entirely in his hands, be liable for any accident which may occur, say through the negligence of his men in leaving a heap of earth in the road. If,

however, the householder chooses to interfere with or assume the direction of the workmen, and any mischief arises to a third party in consequence, he, and not the builder, will be responsible. In like manner, if the hirer of a carriage and horses by the job give directions to the driver or postilion to break through a line of carriages, and to do any unusual, improper, or aggressive act, or if he interferes so as to take the actual management of the horses into his own hands, he is responsible for any damage done by the driver whilst carrying out the directions given.*

A master, we have already intimated, is responsible for the wrongful act of his servant, even if it be wilful, reckless, or malicious, provided it be done by the servant within the scope of his employment and in furtherance of his master's business, or for his master's benefit; but if the servant, at the time he does the wrong, is not acting in the execution of his master's business, and within the scope of his master's employment, but is carrying into effect some exclusive object of his own, the master will not be liable for his act.

Wherever, for instance, a master entrusts a servant with the control of his carriage or horses, it is no answer, if the servant, by negligent driving, injures some one else, that he disobeyed his master's orders, and did what he had no business to do, or went where he had no business to go. If the servant driving his

* A person who has borrowed a horse and carriage for his own use *and enjoyment*, and who rides about in it driven by a friend whom he *allows to drive*, is responsible for the negligence of the driver.

master's carriage, *on his master's business*, disobeys the express instructions of the latter, and wilfully or maliciously does what he had been ordered not to do, or makes a detour to call on a friend, or gratify some purpose of his own, and carelessly drives against some other vehicle, the master will nevertheless be responsible.

But if my servant, without my knowledge, wrongfully takes my carriage or my horse for his own purpose, or if while he has them out with my consent he not merely makes a detour from some route which it was his duty to take on my business, but starts off on an entirely independent trip for his own purposes—then if he drives against another person's carriage, I shall not be responsible for the injury. Nor shall I be responsible if, while my servant is out on my business, he does some act which does not come within the scope of his employment, but which is altogether voluntary and gratuitous on his part. Thus, where the defendant's coachman was driving the defendant's carriage through a narrow street which was blocked up by a luggage-van containing goods of the plaintiff, which were being unloaded and taken into the plaintiff's house, and behind the van stood the plaintiff's gig, and the defendant's coachman (there not being room for the carriage to pass) got off his box, and laid hold of the van horse's head, and moved the van, and caused a large packing-case to tumble on the shafts of the gig, and break them, it was held that the defendant was not liable for the injury, the servant at the

time not being in the execution of his master's orders, or doing his master's work.

The 12 Geo. 3, c. 73, s. 35, imposes penalties upon servants who through negligence or carelessness fire any house or building; but this enactment does not exempt the master from responsibility for the negligent acts of the servant while carrying into execution the master's orders and doing something which the master has employed him to do. If, however, the work which the servant is employed to execute does not require the use of fire, and the servant, nevertheless, kindles one for his own purpose—to cook his dinner or light his pipe—then if he carelessly throws burning material amongst combustibles, and destroys valuable property, the master will not be responsible. When a maid-servant, in order to clean a chimney, set fire to the soot with a quantity of furze, and burnt the house down, it was held that the master was not responsible for the damage, as it was no part of the servant's business to clean the chimney, or use fire for the purpose.

When a collision between two conveyances has been caused by negligent driving on both sides, neither owner can recover damages from the other; and it has been held "that a passenger in a vehicle is so far identified with its driver that if any injury is sustained by him from collision with a rival vehicle, through the joint negligence of his own driver and that of the driver of the rival conveyance, precluding the former *from maintaining* an action against the latter, the

passenger is himself equally precluded, and his only remedy is against his own driver, or the employer of the latter." *

A master is not liable for injury caused by the negligence of his servant to a person who might, *by the exercise of ordinary care,* have avoided the consequences of the servant's negligence. But although there may have been some negligence on the part of the person injured that will not deprive him of his right of action *unless* he could, by the exercise of ordinary care, have avoided the consequences of the servant's negligence. Whether ordinary care was used is a question for the jury when the case is tried before one.

If, however, the injured person was a child incapable of taking care of itself, and not under the care of any one who could take care of it, a master has been held liable for the negligence of his servant, although the accident would not have happened but for the act of the child.

We mentioned in a former chapter that a master is not responsible to one of his servants for injuries done

* The case in which this was held has never been overruled; but it has always been considered as one of very doubtful authority. It is so treated by the late Mr. Justice Willes and the present Mr. Justice Keating in their edition of Smith's Leading Cases; and an opinion is there expressed by those very learned lawyers that the person injured has in the case put an action against *both* the parties through whose negligence or misconduct the accident occurred. (See notes to *Ashby* v. *White*, 1 Smith's Leading Cases, 266.)

to him by the negligence of another servant engaged in a common employment, provided that the person in default was properly qualified for the work in which he was engaged in, or was not known by the master to be otherwise.

# CHAPTER X.

## OF THE SERVANT'S LIABILITY FOR ACTS DONE ON ACCOUNT OF HIS MASTER.

On Contracts.—Where Name of Principal disclosed or undisclosed.—Liability on written and on verbal Contracts.—Signature.—In respect of Money received from or for Third Persons.—Responsibility for Wrongs done in Master's Service.

A SERVANT who enters into a contract in his master's name and by his master's authority is not, as a rule, liable upon the contract. But if he contracts in his master's name without having authority * to do so, he may be sued by the person whom he has deceived, if the master should repudiate the contract, as of course, in that case, he may.† Moreover, if the servant, at the time of giving an order or entering into a contract,

* Although the servant may not have authority at the moment he actually gives the order or enters into the contract, he will not be liable if he *has* had authority, and that authority has been revoked without his knowledge, either by the death of his master (see *ante*, p. 96) or otherwise.

† If, indeed, the person *is not* deceived, but knows all the time that the servant has not the authority which he professes to possess, he will be able to sue neither master nor servant—not the master, because he was aware that the servant had no power to bind him; not the servant, because the contract was not made with him.

does not disclose his master's name, and it was not known to the other party, the servant will be liable, even although the fact of his being a mere agent was known at the time he entered into the transaction.

Where an order is given or a contract entered into verbally by a servant, it is always open to him, even although this was done in his own name, to show by evidence that it was, and was known by the other party to be, on account of his master. But this is not the case where the contract is entered into by writing, because it is a rule of law that parol evidence is not admissible to contradict or vary a written contract. If, therefore, a contract purports on the face of it to bind the clerk or agent signing it *personally*, he will not be able to discharge himself from liability by evidence that he was merely acting on behalf of his employer.* To exempt himself from personal responsibility he must, therefore, either sign his employer's name, or if he sign his own must add words (for instance, "as agent" or "perprocuration") clearly indicating that the contract is not entered into on own account.

* It will, in such a case, make no difference that the person with whom he contracted knew that he was acting only as an agent or on behalf of his employer. And, although parol evidence is not admissible to *discharge* a person who appears on the face of a written contract to be entering into it as principal, it is admissible to charge another party as the real principal. That is to say, although a servant or agent who contracts in his own name cannot get rid of his liability by showing the capacity in which he acted, the person with whom he contracts may either sue him or his employer, assuming, of course, *that he can prove* that the contract has been really entered into on *behalf of the latter.*

A servant is not liable to third persons for money which they have handed to him on account of his master, and which he has accordingly paid over to his master, unless he has got possession of the money by some wrongful or illegal act. If, however, before the servant pays the money over to his master, he receives notice not to do so from the person from whom he has received it, he may be compelled to refund it if, under the circumstances of the case, it could have been recovered from the master had it been paid over to him. A servant who receives such a notice must, therefore, before paying the money over to his master, take care to obtain a full indemnity from the latter against all the possible consequences of doing so.

If a master hands money to a servant to pay to a third person, the servant will not, in case of non-payment, be liable to an action at the suit of the latter, unless he has said or done something which amounts to an appropriation of the money to his use. For instance, if A gives B money to pay to C, that fact will not enable C to sue B for it; but if, after B receives the money, he were to tell C that he had got it for him, then an action on the part of C would lie against B.

A servant is responsible in a criminal court for any crimes which he may commit in the service of, or even by direct command of, his master. If, however, an offence does not amount to a crime—if, in language of the law, it is only *malum prohibitum*,

and not *malum in se*—a servant may frequently plead successfully that what he did was by order of his master, and that he did not know he was doing wrong. For instance, if a master directs a servant to kill, assault, or rob a man, and the servant does so, both will be punishable; but it has been held that a servant who went out coursing with a master who was not entitled to kill game, who sold goods in violation of the Hawkers' Act, or who plied on his master's barge in violation of the Thames Waterman's Act, could not be convicted without proof, not only of the wrongful act, but of guilty knowledge on his part.

If by the mere negligence or omission of a servant, while engaged in his master's service, a third person be injured, the master *alone* is liable to an action; but if the servant, while thus engaged, or by the express command of his master, does an act of positive, direct, and active wrong to a third person, then he, as well as his master, will be liable to an action. He will be thus liable not only if he commits an assault or a trespass, but if he is guilty of a fraud, if he wrongfully takes possession or sells goods belonging to a third person; or even if he wrongfully detains goods from the rightful owner, unless he has received them from his own master to keep for him. In the latter case, a servant is held justified in refusing to give them up even to the rightful owner without his master's orders.

# CHAPTER XI.

## OF THE SERVANT'S CHARACTER.

No obligation on Master to give Character.—If given, it must be truthful.—Privileged Communications.—Malice.—When Statements of Master are or are not actionable.—False, fraudulent, or forged Characters.

It has been remarked* that "the giving the character of a servant is one of the most ordinary communications which a member of society is called on to make, but it is a duty of great importance to the interests of the public; and in respect of that duty a party offends grievously against the interests of the community in giving a good character where it is not deserved, or against justice and humanity in either injuriously refusing to give a character, or in designedly misrepresenting one to the detriment of the individual."

Although a master is not morally justified in refusing to give a truthful character to a servant—except under very special circumstances—it is clear that he is under no legal obligation to give a character to a person who has either left or been dismissed from his service, unless there was a binding agreement between him and the servant that he should do so.

* Starkie on Slander, vol. i. p. 293.

If, however, the master does give a character, he must give a truthful one, to the best of his knowledge and belief; for if he makes statements which are wilfully and knowingly false, he will be liable to an action at the suit of the servant whom he may have defamed, or of the master whom he may have misled into employing an unsuitable person. For instance, if a master knowingly gives a false character of a servant to *a person about to hire* him, and the servant afterwards rob or injure his new master, the latter may in an action for the misrepresentation recover from the former master the damages he has sustained in consequence of the false character having been given.

An employer runs no risk in giving a correct character, however injurious it may be to the servant; for anything he may honestly say or write upon the subject to a person *bonâ fide* inquiring is regarded by the law as a privileged communication. But although the servant can bring no action against a master who gives him a bad character, if the master really and honestly believes it to be true, and is only actuated by a sense of duty in giving it, it is otherwise if a master gives a bad character—knowing it to be false—under the influence of malicious motives. If a servant can prove *both* that the character was false and that it was maliciously given, he may recover damages against the master; but it will not be sufficient to prove that the character was false, unless he can also adduce facts from which the jury or county-court judge will infer that it *was given* with a malicious intention.

Of course, it is seldom possible to prove directly that a master who gives a bad character is actuated by a malicious motive. A person who acts in this manner seldom discloses his intentions or objects to third persons. It will be sufficient if the servant can lay before the jury, or county-court judge, evidence which leaves no reasonable doubt that the conduct of the master was not *bonâ fide*. A good illustration of the sort of circumstances in which malice may be and will be presumed is afforded by the following case. In *Rogers* v. *Clifton* (3 B. & P. 587) it appeared that the plaintiff, having been hired as a servant by the defendant, lived six months in his service, when the latter turned him away without giving him a month's warning, in consequence of which the plaintiff, conceiving himself entitled to a month's wages, refused to quit the service without being paid that sum. On this refusal the defendant procured a police officer to put the plaintiff out of the house, and employed his attorney to settle his wages with him. Immediately after this, the defendant called on a Mr. Holland, with whom the plaintiff had previously lived, to inform him that the plaintiff had behaved in an impertinent and scandalous manner, that the defendant had discharged him, but that he refused to go without a month's wages, and the defendant therefore desired Mr. Holland not to give him another character. The plaintiff afterwards offered himself to a Mr. Hand, who wrote to the defendant for his character, and the defendant, in reply, said that he was "a bad-

tempered, lazy, impertinent fellow," and "had given him a great deal of trouble," whereupon Mr. Hand refused to hire the plaintiff. The plaintiff brought an action against the defendant for defamation, and proved, by servants of the family, that while in the defendant's service he had conducted himself well, and that no complaints of the nature ascribed to him in the defendant's letter had all that time existed. The jury found a verdict for the plaintiff, and this verdict was upheld by the court on the ground that the character given by the defendant was proved to be untrue, and his conduct shown to be malicious by his officious interference in going to the plaintiff's former master.

Malice may be inferred not merely from the conduct of the master, but from the language of the libel itself. If this were intemperate and virulent, the jury would scarcely hesitate to arrive at the conclusion that the writer was actuated by personal feeling, rather than by a sense of duty; and in that case, assuming, of course, that the statements made were not, in fact, correct, the servant would have a good right of action.

We have hitherto confined ourselves to the case in which the alleged injury to the servant's character is done by written or spoken statements passing between a former master and a person about to hire the servant. This is, however, not the only case in which a statement with respect to the character of a servant will, if made *bonâ fide*, and without malice, be considered a privileged communication, whether it happens as a

matter of fact to be correct, or the reverse. All statements made by a person (1) in the discharge of some public or (2) private duty, whether legal or moral, or (3) in the conduct of his own affairs, in matters where his interest is concerned, are regarded as privileged. Under the first of these heads comes evidence in courts of justice. To the second may be referred the instances in which it has been held that a master who had, without malice, given a bad character to a servant, was not actionable for repeating it to friends or relations of the servant, who had called upon him to require an explanation of his reason for giving the servant such a character as had lost him or her a place. Under this head also fall the cases in which it has been held that communications *bonâ fide* made by a master to his other servants respecting the character of a discharged servant * are privileged, as also communications made by a tenant to his landlord respecting the character of a servant about to be hired by the latter,† or communications made by one neighbour to

* In *Somerville* v. *Hawkins*, 20 L. J. C. P. 131, a servant, having been dismissed during the week, came to his late master's premises to get some wages which were due to him on the Saturday evening. On seeing him speaking to the persons in his employment, the master said to them: "I have dismissed that man for robbing me. Do not speak to him any more in public or in private, or I shall think you as bad as him." The plaintiff, having brought an action for slander against the master, was nonsuited, Lord Truro ruling that, in the absence of any proof of express malice, the statement made by the defendant was a privileged communication.

† In the case in which this was held, the tenant was a farmer, and the plaintiff was a person about to be employed as a gamekeeper. In

another with respect to the conduct of their servants.* Under the third head it has been decided that a letter written by one joint owner of a ship to another joint owner, reflecting upon the conduct of the master, is privileged; and that a similar immunity extends to letters written to a public authority complaining of the conduct of a subordinate, to letters written by a tradesman to a customer complaining of the conduct of the customer's servant, and to letters from a servant to a master reflecting upon the character of a third person who had either complained or threatened to complain to the master about the servant.

that capacity, he would, of course, have to discharge duties upon or over the tenant's farm; and it is therefore plain that the tenant would have an interest in seeing that a proper person was appointed. It would not, we apprehend, be held that the mere relation of landlord and tenant would render privileged a communication which the latter might make to the former with respect to the character of a person proposed to be employed by the former in a capacity which would not bring him in contact with the tenant.

* The circumstances under which this kind of communication is held privileged will be best shown by a case. In *Rumley* v. *Webb*, Carr. & M. 104, one neighbour said to another, in reply to an inquiry how her servant had behaved during her absence in the country: "You are not aware what kind of servant you have. If you were, you would not keep her; for I can assure you she is often out with a married man. She was out with him last Sunday morning; and, when you were out in the country, she was out gossiping till eleven or twelve o'clock at night;" upon which the mistress discharged her servant. Coltman, J., left it to the jury to say whether the words were spoken with the honest intent of giving a neighbour important information of what was going on in his family, or whether it was *done in* an idle, gossiping, malicious spirit. They found a verdict *for the plaintiff*; and the court above confirmed the direction of the *judge*.

If a communication be of a nature and made under circumstances that would render it privileged if made without actual malice, the mere fact that a stranger was casually present at the time it was made will not render it actionable. At the same time, if it could be proved that the person who made it had failed to avail himself of an opportunity to make the communication privately, and had gone out of his way to make it in the presence of a third party, that would be very strong evidence of actual malice.

Assuming that a communication with respect to the character of a servant is not privileged, either because it was made maliciously or because it was made under circumstances which did not confer that character upon it, or to or by persons whose utterances were not thus protected, the question next arises what kind of statement it is for which a servant is entitled to bring an action. The answer to this question depends not upon any peculiar law applicable to masters and servants, but upon the general law of libel and slander, of which it forms part. That law makes a wide distinction between written and spoken words. Anything which one person writes or prints of another may, if it is calculated to bring him into hatred, contempt, or ridicule, be made the subject of an action for libel. But it is not so with mere spoken words. They are not actionable unless they impute to the plaintiff the commission of a crime, or unless they are spoken of him in relation to his business, trade, profession, or occupation, or unless he can show that some specific injury resulted

to him from them. If, therefore, a servant can show that his present or late master or any third person has said anything imputing that he wants some requisite either for service in general or for the particular employment on which he is engaged—as, for instance, that he is not honest, faithful, sober; or, if a female servant, that she is not chaste; or that he is incompetent to perform the work which he holds himself out to do—and can show, or it can be collected from the context and the surrounding circumstances, that these imputations were cast upon him *in his capacity of a servant*, then, in any of these cases, an action will lie, although it is not proved that the servant sustained any actual injury by some one refusing to employ him or the like. If, however, the words were not in themselves actionable, that is to say, if they were not spoken of the servant in his capacity of servant, or did not affect his character in that respect (as, for instance, if one were to impute want of chastity to a clerk or the reporter of a newspaper), then, in order to make them the foundation of an action, it will, as we have already said, be necessary to show that they were the cause of actual injury being sustained by the servant. It is not, indeed, in all cases easy to say when an injury is, in a legal sense, caused by the slander. In a leading case, it was held that the injury must be, as it was said, the "natural and *legal* consequence of the slander;" and it has been said, in conformity with that decision, that *if a master* were *wrongfully* to dismiss a servant in *consequence* of words spoken of him, that would not

be such special damage as would support an action of slander, because the act of the master would be illegal. Although the point has not yet been expressly decided, it is, however, probable that the view expressed by Lord Wensleydale in *Lynch* v. *Knight* (9 H. L. case 577) will ultimately prevail. In giving judgment in that case his Lordship said:—

"I strongly incline to think that to make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, or we might think ought to follow. . . . I cannot agree that the special damage must be the natural and legal consequence of the words, if true."

This much, however, may be said with confidence, that if, in consequence of anything being said which reflects on the character of a servant, a master were to decline to employ the servant, or were to dismiss him on proper notice, that would be such special damage as would support an action.

In order to protect employers from being led by fraud to take persons of bad character into their service, it was enacted, by 33 Geo. 2, c. 56, that:—

"If any person shall falsely personate any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant of any

such master or mistress, and shall, either personally or in writing, give any false, forged, or counterfeited character to any person offering himself or herself to be hired as a servant into the service of any person or persons;

"If any person or persons shall knowingly and wilfully pretend, or falsely assert in writing, that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever, other than that for which or in which he, she, or they, shall have hired or retained such servant in his, her, or their service or employment, or for the service of any other person or persons;

"If any person or persons shall knowingly and wilfully pretend, or falsely assert in writing, that any servant was discharged, or left his or their service, at any other time than that at which he or she was discharged, or actually left such service, or that any such servant had not been hired or employed in any previous service, contrary to truth;

"If any person or persons shall offer himself or herself as a servant, pretending that he or she had served in any service in which such servant shall not actually have served, or with a false, forged, or counterfeit certificate of his or her character, or shall in any wise add to or alter, efface, or erase any word, date, matter, or thing contained in or referred to in any certificate given to him or her by his or her last or former master *or mistress*, or by any other person or persons duly *authorized* by such master or mistress to give the same;

"If any person or persons, having before been in service, shall, when offering to hire himself, herself, or themselves as a servant or servants in any service whatsoever, falsely and wilfully pretend not to have been hired or retained in any previous service as a servant;

"Any person convicted of any of the above offences before two or more justices of the peace is to forfeit £20 (one-half of which is to go to the person on whose information the conviction is obtained,* and the other half to the poor of the parish in which the offence was committed), or is, in default of payment, to be imprisoned with hard labour for not more than three months, or less than one."

An appeal lies from the decision of the justices, whether they convict or refuse to do so, to the court of quarter sessions.

* This need not be the master or employer who is defrauded. Any person who knows of an offence having been committed under this act may inform, and thus entitle himself to half the penalty. The informer is a competent witness to prove the offence; and it will be evidence that he has heard the person accused say that he or she has been guilty of an act in contravention of the statute. It will, of course, be for the justices to say how far they will act on such evidence, unsupported by other circumstances or the testimony of other witnesses.

## CHAPTER XII.

### OF CRIMINAL OFFENCES ON THE PART OF MASTERS OR SERVANTS.

Neglect to provide Servant with Food, &c.—Larceny by Servants.—Embezzlement.

If a master or servant commits an offence of which the other is the victim, the criminal is for the most part punishable in exactly the same way as if he were a stranger. But there are some cases in which this rule does not apply. We only propose in this chapter to notice such offences as arise out of a breach of the relation of master and servant, or which assume a graver character in consequence of being committed by one or the other. Again, we shall confine ourselves here to such offences as are of general application, dealing in a subsequent chapter with such as are the subject of special enactments for the regulation of particular trades or employments.

#### I.—Offence by Master.

By 24 and 25 Vict., c. 103, s. 26, whosoever, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, clothing,

or lodging, shall wilfully, and without lawful excuse, refuse or neglect to provide the same,* or shall unlawfully or maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been, or shall be likely to be, permanently injured, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

## II.—Offences by Servants.

1. *As to Larceny by Servants* (24 and 25 Vict., c. 96, s. 67).—"Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen, with or without whipping."

* *i.e.*, so as to endanger the life, or to inflict, or run the probable risk of inflicting, a permanent injury to the health of the servant. See also, as to the construction of this act, *ante*, p. 49.

2. *As to Embezzlement by Clerks or Servants* (24 and 25 Vict., c. 96, s. 68).—"Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to, or received, or taken possession of, by him for or in the name or on account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of, his clerk, servant, or other person so employed, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

The clause is so framed as to include *every* case where any chattel, &c., is delivered to, or received or taken possession of by, the clerk or servant, for *or* in the name *or* on account of the master. If, therefore, a man pay a servant money, or hand over to him goods for his master, the case will be within the statute, though it was neither the servant's duty to receive the money or goods, nor had he authority to do so.

By other clauses in the same statute, it is provided

that there may be included in the same indictment either three distinct acts of larceny, or three distinct acts of embezzlement, so that they were committed within the space of six months.

If a servant be indicted for larceny, and the offence turns out to be embezzlement, or *vice versâ*, he will not on that account be entitled to an acquittal, but may be convicted of the crime which the facts disclose.

# CHAPTER XIII.

## ON THE ARBITRATION OF DISPUTES BETWEEN MASTERS AND SERVANTS.

Jurisdiction under 5 Geo. 4, c. 96.—"Councils of Conciliation Act, 1867."—Election and Constitution of Council.—Its Powers.—Appointment of Officers.—The 35 & 36 Vict., c. 46.—Voluntary Councils of Conciliation.

A NUMBER of acts of parliament have been passed in order to promote the amicable arbitration of disputes between masters and servants, either by magistrates or by councils of conciliation. Some notice of these statutes is requisite to the completeness of a work like the present; but as they have turned out almost if not entirely inoperative, the briefest outline of their provisions will suffice.

By 5 Geo. 4, c. 96, magistrates are empowered to arbitrate, or provide for the arbitration of disputes "between masters and workmen, or between workmen and those employed by them in any trade or manufacture, in any part of Great Britain and Ireland," in the following cases:—

Disagreements about the price or wages to be paid for work done or being done;

About the compensation to be paid to the workmen who are required to work a new pattern which will require new or altered implements;

About length, breadth, and quality;

About wages or compensation to be paid for pieces of goods of extraordinary length;

About the manufacture of certain cotton articles, and the number to be contained in the piece;

About sizing and ornamenting goods;

Arising out of or touching the particular trade or manufacture, or contracts relative thereto, which cannot be otherwise mutually adjusted and settled.

But magistrates are not by this Act "authorized to establish a rule of wages or prices of labour or workmanship at which the workmen shall in future be paid, unless with the consent of the master and workmen."

The magistrates may, if the parties consent, decide the dispute themselves, but if no such consent is given, they are then to appoint arbitrators or referees, whose award is to be final, and its performance may be enforced by distress, or, failing that, the recusant party may be imprisoned.

Then by the 30 and 31 Vict., c. 105, called the "Councils of Conciliation Act, 1867," it is recited that, without repealing the act we have just mentioned, and some others on the same subject, it is desirable

that masters and workmen should be enabled to form equitable councils of conciliation or arbitration. With this view it is enacted (we abridge the language of the act) that if any number of masters and workmen, in any particular trade, being inhabitant householders or part occupiers of any house, within any place, and who, being a master, shall have resided and carried on the same within any such place for six calendar months, and being a workman shall have resided for a like period within any such place, and shall have worked at his trade for seven years previously, shall, at a meeting specially convened for that purpose, agree to form a council of conciliation and arbitration, and shall jointly petition Her Majesty to grant them a licence to form such council, to hold, have, and exercise all the powers granted to arbitrators and referees under the acts we have already mentioned, the Secretary of State for the Home Department may grant such licence, provided notice of such petition has been published one month before the application for such licence in the *London Gazette*, and in one or more of the local newspapers of the place whence such petition emanates.

The council is to consist of not less than two nor more than ten masters and workmen and a chairman, and the petitioners for a council are to elect the first council.*

The council have power to appoint their own chairman, and to determine all questions of dispute be-

* Secs. 2 & 3.

tween masters and workmen, as set forth in the before-recited act of the fifth year of King George the Fourth, chapter ninety-six, which may be submitted to them by both parties, and have all the powers and authority granted to arbitrators and referees by that and other recited acts; and their award, in any case of dispute or difference, is conclusive between the parties. The council are further authorized to adjudicate upon any other case of dispute or difference submitted to them by the mutual consent of master and workman or masters and workmen, and the same proceedings of distress, sale, and imprisonment as are provided by the said recited acts or any of them may be had towards enforcing every such award.*

A quorum of not less than three (one being a master and another a workman, and the third the chairman), may constitute a council for the hearing and adjudication of cases of dispute; but a committee, to be denominated the committee of conciliation, is to be appointed by the council, consisting of one master and one workman; and all cases submitted to the council are, in the first instance, to be referred to such committee of conciliation.†

The chairman of the council is to be some person unconnected with trade, and when the votes of the council are equal, he is to have the casting vote.‡

No counsel, solicitors, or attorneys are to attend any

* Sec. 4. † Sec. 5. ‡ Sec. 6.

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hearing before the council or the committee of conciliation unless consented to by both parties.*

On the first Monday in November in the year next after the first appointment of the council, and on the first Monday in November in each succeeding year, a council and chairman are to be appointed, who are to remain in office until the appointment of a new council.†

Each person being twenty-one years of age, belonging to the trade, having a licence for a council, and being an inhabitant householder or part occupier of any house, &c., who, being a master in such trade, has resided and carried on the same within the place, where an equitable council of conciliation and arbitration is formed, for the space of six calendar months previous to the ninth day of November in any one year, and being a workman has resided for a like period within the same limits, and has worked at his trade or calling seven years previous to the ninth day of November in any one year, is entitled to be registered as a voter for the election of the council, and is qualified to be elected a member of such council; but the masters are to appoint their own portion of the council, and the workmen to elect their portion of the council.‡

Other clauses provide for the keeping a register of

* Sec. 7. † Sec. 8.

‡ Sec. 9. The workman need only have spent six months in the *place* for which a council is appointed, although he must have worked *seven years* at his calling.

voters, regulate the mode of nominating and electing the members of the council, direct the appointment of a clerk to the council, authorize the making of bye-laws, and deal with other matters of detail. It is not, however, necessary that we should give even an outline of them, because, as we have already intimated, this act, like the earlier ones on the same subject, has proved almost a dead letter.

By an act passed in 1872 (35 and 36 Vict., c. 46), it is provided that masters and their workmen may enter into an agreement for the reference to arbitration of any dispute smentioned in the 5 Geo. 4, c. 96 (see *ante*, p. 128), or of any question to which the Masters and Servants Act, 1867, applies;* and thereupon, in case any such matter arises between the parties while they are bound by the agreement, the arbitrators or umpire have jurisdiction for the determination thereof, and upon their determining the same, no other proceeding is to be taken before any other court or person for the same matter; but if the disagreement or dispute is not so heard and determined within twenty-one days from the time when it

* The agreement is either to designate the arbitrators and umpire, or point out the manner in which they are to be appointed. It may also provide for notice, not exceeding six days, to be given either by master or servant before terminating any contract of hiring and service; and that during its continuance the parties to it shall be bound by any rules to be made by the arbitrators or umpire as to the rate of wages to be paid, or the hours, or quantity of work to be performed, or the conditions and regulations under which work is to be done; and may specify penalties for the breach of such rules.

arose, the jurisdiction of the arbitrators or umpire ceases unless the parties have, since the arising of the disagreement or dispute, consented in writing that it shall be exclusively determined by the arbitrators or umpire.

The performance of the award may be enforced if need be by proceedings to be taken before the magistrates, in the same way, and by the same means, as an award under the 5 Geo. 4, c. 96 (see *ante*, p. 129). It is as yet too early to say whether this act will have any greater practical value than its predecessors; but we are not aware that it has, as yet, had any material operation.

No doubt councils of conciliation and arbitration have been established with more or less effect for certain trades and localities, but these bodies are of a purely voluntary character, deriving such authority as they exercise from the mere consent of the masters and workmen by whom they are nominated, and possessing no other power to enforce their awards than such as they may derive from an appeal to the honour or good faith of those who have of their own free will referred to them a matter of trade dispute. They are not bodies recognized by the law or deriving from it power to enforce their awards by legal process, and they do not, therefore, come within the province of a work like the present.

# CHAPTER XIV.

## OF THE JURISDICTION OF MAGISTRATES UNDER "THE MASTERS AND SERVANTS ACT, 1867."

Previous Acts on the Subject.—To what Servants the Act of 1867 applies.—Disputes of which Magistrates may take Cognizance.—Procedure.—Powers of Magistrate, to fine or imprison—to annul Contracts—to award Compensation.—Other Provisions.

By a variety of statutes, a jurisdiction has been conferred upon magistrates to determine in a summary manner disputes which may arise between masters and servants, and employers and employed, or to punish offences committed by the one against the other, in certain trades and employments. Without entering at length into these statutes, it will be sufficient to say that by one or the other of them, agricultural labourers and handicraft workmen are, with their employers, brought under the jurisdiction of the justices; but that, on the other hand, they do not extend to or embrace domestic servants, clerks, writers, or, in fact, any class of persons (or their employers) except those who earn their living by manual labour, in the common and ordinary acceptation of that term. In 1867 an act was passed, not repealing these statutes, but containing enact-

ments which are, as it is said, to be "substituted" for such of those enactments, "or so much or such parts of the same as would have applied" had that act not been passed; and this act, the 30 and 31 Vict., c. 141 (the "Masters and Servants Act, 1867") therefore now regulates the jurisdiction of the justices. At the same time, as it was originally only to remain in force for one year, and has since been continued merely from year to year, it is possible, although extremely improbable, that the old statutes may again revive, and it is even now occasionally necessary to refer to them; because, instead of defining or setting forth for itself the trades or employments to which it extends, the act of 1867 only provides that it shall not apply "to any contract of service other than a contract within the meaning of the enactments described in the first schedule* to this act, or some or one of them, or to any employer or employed, other than the parties to a contract of service to which the act applies, or to any case, matter, or thing arising under or relating to any contract of service, or arising between employer and employed, other than cases, matters, and things to which the said enactments respectively apply." For practical purposes, however, it may be taken that,

* The following are the enactments referred to: 7 Geo. 1, stat. 1, c. 13, secs. 4 & 6; 9 Geo. 1, c. 27, sec. 4; 13 Geo. 2, c. 8, secs. 7 & 8; 20 Geo. 2, c. 19; 27 Geo. 2, c. 6; 31 Geo. 2, c. 11, sec. 3; 6 Geo. 3, c. 25; 17 Geo. 3, c. 56, secs. 8 & 19; 33 Geo. 3, c. 55, secs. 1 & 2; 39 & 40 Geo. 3, c. 77, sec. 3; 59 Geo. 3, c. 92, secs. 5 & 6; 4 Geo. 4, c. 29; 4 Geo. 4, c. 34; 10 Geo. 4, c. 52; 5 & 6 Vict., c. 7; 6 & 7 Vict., c. 40, sec. 7; and 14 & 15 Vict., c. 92, sec. 16.

under the acst of 1867, the justices have jurisdiction in all cases of dispute between manual labourers and their employers:—First, when there is a binding contract of service between them;* and second, within the limits and for the purposes which the act itself lays down, and to which we shall now call attention in the detail which the importance of the subject requires.†

* It is absolutely necessary, in order to come within the jurisdiction of the justices, that there should be a binding contract between the parties. As to what is such a contract, see Chapter II., *ante*, p. 18.

† In order to the correct understanding of the act, it is necessary to bear constantly in mind the sense in which it uses certain important words and terms. We therefore give the following extract from the interpretation clause: "The word 'employer' shall include any person, firm, corporation, or company who has entered into a contract of service with any servant, workman, artificer, labourer, apprentice, or other person, and the steward, agent, bailiff, foreman, manager, or factor of such person, firm, corporation, or company. The word 'employed' shall include any servant, workman, artificer, labourer, apprentice, or other person, whether under the age of twenty-one years or above that age, who has entered into a contract of service with any employer. The words 'contract of service' shall include any contract, whether in writing or by parol, to serve for any period of time or to execute any work, and any indenture or contract of apprenticeship, whether such contract or indenture has been or is made or executed before or after the passing of this act. The word 'sheriff' applies to Scotland only, and shall include sheriff substitute. The word 'magistrate' does not apply to Scotland, and means in England, except in the City of London, a stipendiary magistrate, and in the City of London means the Lord Mayor or an alderman, sitting at the Mansion House or at the Guildhall, and in Ireland shall apply only to the Metropolitan Police District of Dublin, and there shall mean one of the divisional magistrates for such district. The word 'justice' means justice of the peace. The words 'two justices' mean two or more justices assembled and acting together."

The character of the disputes of which magistrates or justices may take cognizance, and the mode in which the injured party has to seek redress are set forth in the 4th section of the act:—

"Wherever the employer or employed shall neglect or refuse to fulfil any contract of service, or the employed shall neglect or refuse to enter or commence his service according to the contract, or shall absent himself from his service,* or wherever any question, difference, or dispute shall arise as to the rights or liabilities of either of the parties, or touching any misusage, misdemeanour, misconduct,† ill-treatment, or injury to the person or property of either of the parties under any contract of service, the party feeling aggrieved may lay an information or complaint in writing before a justice, magistrate, or sheriff, setting forth the grounds of complaint, and the amount of compensation, damage, or other remedy claimed for the breach or non-performance of such contract, or for any such misusage, misdemeanour, misconduct, ill-treatment, or injury to the person or property of the party so complaining; and upon such information or complaint being laid, the justice, magistrate, or sheriff shall issue or cause to be issued a summons or citation to the party so complained against, setting out the grounds of complaint, and

* To render an artificer liable for absenting himself from service, it is necessary not only that he should absent himself without a lawful excuse, but that he should have a guilty knowledge that he has no lawful excuse.

† This does not authorize a magistrate to punish misconduct amounting to a felony. The misconduct must be misconduct relating *to and interfering* with the due execution of the contract of service *between the* parties.

the amount claimed for compensation, damage, or other remedy, as set forth in the said information or complaint, and requiring such party to appear, at the time and place therein appointed, before two justices or before a magistrate, or before the sheriff, to answer the matter of the information or complaint, so that the same may be then and there heard and determined."

By the 5th section it is provided that the time for the appearance of the party summoned is never to be less than two days from the *date* of the summons, and, in general, not more than eight days from such date; but if the appearance is to be before justices in petty sessions, or a magistrate at a police court, the time appointed shall be the next sitting-day after the two days, whether that day be within the eight days or not; and by the 6th section every such summons must be *served* on the party complained against by being delivered to him, or left at his usual place of abode or business, not less than two days before the time appointed for his appearance.*

By section 7 provision is made for the issue of a warrant to arrest a defendant who does not duly appear to the summons; while section 8 enacts that if, *at any*

* The effect of the sixth section is, in some cases and to a certain extent, to modify the operation of the fifth. Read together, the two provide that a party summoned must appear at the time named in the summons, provided that such summons has been served upon him two days previously. If it is not so served, he may safely treat it as a nullity, since a magistrate will not grant a warrant for his arrest (under clause 7) without proof that the summons has been served two days before the date which it appoints for the defendant's appearance.

*time after laying the information or complaint* it appears to a justice, magistrate, or sheriff, that the party complained against is about to abscond, the justice, &c., may *issue a summons* requiring the defendant to appear before a justice, &c., at any time not later than twenty-four hours, exclusive of Sunday, from the *date** of the original summons, to find security, by recognizance or bond, with or without sureties, for his appearance to the information or complaint. If the defendant fails to appear to this second summons at the time and place appointed, a justice, &c., may issue a warrant for his apprehension, and he may be kept in custody until the original complaint is heard, unless in the meantime he give security to the satisfaction of the justice, &c.†

* It seems clear that this provision may operate somewhat harshly against a defendant. The summons to appear need not be served more than two days before the time at which it is returnable. Suppose that on the day before it is intended to serve it, a summons to find surety is also obtained. There is no provision requiring the latter summons to be *served* at any particular time before that fixed for the appearance of the defendant (all that is said being that it must be *not later* than twenty-four hours, exclusive of Sunday, from its *date*). It is quite possible, therefore, to serve both summonses together, on the morning of the day on which the latter summons is returnable; and thus the first intimation that a defendant might have that any proceedings were taken against him might be a demand to find security for his appearance at a notice of an hour or two. If he is unprepared with sureties, as is not improbable, he will be committed to prison.

† It will be observed that, although a summons may be granted by one justice, and although one justice may also order a defendant to be detained in custody for not giving security to appear, the summons *must only* be adjudicated upon by *two* justices *or* a stipendiary magistrate.

The next section (the 9th) is of such great importance that we shall give it in the words of the act. It prescribes the nature of the redress or compensation which the justices may award in case they find that the defendant—who may, we need hardly say, be either the master or the servant—has been guilty of breach of contract or other misconduct to which that act is applicable. It is as follows:—

Upon the hearing of any information or complaint under the provisions of this act, two justices or the magistrate or sheriff, after due examination and upon the proof and establishment of the matter of such information or complaint, by an order in writing under their respective hands, in their or his discretion, as the justice of the case requires, either shall.

(1) Make an abatement of the whole or part of any wages then already due to the employed,

(2) Or else shall direct the fulfilment of the contract of service, with a direction to the party complained against to find forthwith good and sufficient security, by recognizance or bond, with or without sureties, to the satisfaction of a justice, magistrate, or sheriff, for the fulfilment of such contract,

(3) Or else shall annul the contract, discharging the parties from the same, and apportioning the amount of wages due up to the completed period of such contract,

(4) Or else where no amount of compensation or damage can be assessed, or where pecuniary compensation will not in the opinion of the jus

tices, magistrate, or sheriff, meet the circumstances of the case,* shall impose a fine upon the party complained against, not exceeding in amount the sum of twenty pounds,

(5) Or else shall assess and determine the amount of compensation or damage, together with the costs, to be made to the party complaining, inclusive of the amount of any wages abated, and direct the same to be paid accordingly ;†

And if the order shall direct the fulfilment of the contract, and direct the party complained against to find good and sufficient security as aforesaid, and the party complained against neglect or refuse to comply with such order, a justice, magistrate, or sheriff may, if he shall think fit, by warrant under his hand, commit such party to the common gaol or house of correction within his jurisdiction, there to be confined and kept

* It is obvious that this part of the clause confers an extremely large discretion upon the justices. Subject to appeal to the quarter sessions, they are left to say, without any guidance either from the statute or from judicial decisions, what is or is not a case which pecuniary compensation will not meet, but which requires the imposition of a fine, which may be as large as £20. For non-payment of a fine more than £5 in amount, the defendant may be committed to prison for a term not exceeding three calendar months. If the fine be of £5 or less, then the scale of imprisonment or non-payment is as follows: For any penalty not exceeding ten shillings, the imprisonment not to exceed seven days; exceeding ten shillings and not exceeding £1, fourteen days; exceeding £1 but not exceeding £2, one month; exceeding £2 but not exceeding £5, two months. The imprisonment is in no case to be accompanied with hard labour.

† If these damages are not paid, imprisonment will follow just as *in the case of* non-payment of a fine or penalty.

until he shall so find security, but nevertheless so that the term of imprisonment, whether under one or several successive committals, shall not exceed in the whole the period of three months:

Provided always, that the two justices, magistrate, or sheriff may, if they or he think fit, assess and determine the amount of compensation or damage to be paid to the party complaining, and direct the same to be paid, whether the contract is ordered by them or him to be annulled or not, or, in addition to the annulling of the contract of service and discharge of the parties from the same, may, if they or he think fit, impose the fine as hereinbefore authorized, but they or he shall not under the powers of this act be authorized to annul, nor shall any provisions of this act have the effect of annulling, any indenture or contract of apprenticeship that they or he might not have annulled, or that would not have been annulled, if this act had not been passed.

Where it is proved that a bond or recognizance for the fulfilment of a contract has not been performed, two justices, or a magistrate, after hearing the parties, may order the security to be wholly or partly enforced in a summary manner.*

* Sec. 10. The security may be enforced (see the next section) in "a summary manner" either by distress or, if no distress is available, then by the imprisonment of the sureties (according to the scale we have already given), under the 11 & 12 Vict., c. 43, and the 23 & 24 Vict., c. 127.

Orders for the payment of money may be enforced by distress, and then, in default of payment, by imprisonment without hard labour, and not exceeding three months.*

After the imprisonment, for whatever term, the fine, compensation, or damages, together with the costs, is considered as discharged, and the order to pay them is annulled; but no wages accruing due to the employed after the date of the order are to be assessed to the amount of damages and costs directed to be paid by him under the warrant of distress.†

Sec. 13 provides that the half of any fine may be directed to go to the complainant.

The 14th section is one of the most important in the act, because, as it will be seen, it confers upon the magistrates the power to imprison without the option of a fine in cases where the misconduct of the defendant, either master or servant, has been "of an aggravated character." It provides that:—

Where on the hearing of an information or complaint under this act it appears to the justices, magistrate, or sheriff that any injury inflicted on the person or property of the party complaining, or the misconduct, misdemeanor, or ill-treatment complained of has been of an aggravated character, and that such injury, misconduct, misdemeanour, or ill-treatment has not arisen or been committed in the *bonâ fide* exercise of a legal right existing, or *bonâ fide* and reasonably supposed to exist, and further, that any pecuniary compensation or other remedy

* Sec. 11. † Sec. 12.

by this act provided will not meet the circumstances of the case, then the justices, magistrate, or sheriff may, by warrant, commit the party complained against to the common gaol or house of correction within their or his jurisdiction, there to be (in the discretion of the justices, magistrate, or sheriff) imprisoned, with or without hard labour, for any term not exceeding three months.

It is, of course, for the justices to decide whether any injury committed by the defendant to the person or property of the complainant, or any misconduct, misdemeanour, or ill-treatment of which he may have been guilty, is of an aggravated character. Their decision upon this point, if it results in a conviction, is, however, subject—as, indeed, is every conviction under the act—to an appeal (sec. 15) to the next general court of quarter sessions, to be holden in or for the county or place wherein such conviction shall have been made.

Upon the hearing and determining of any information or complaint between employer and employed, and on any appeal, under the provisions of this act, the respective parties to the contract of service, their husbands or wives, are competent witnesses.*

No wages are payable to or recoverable by any party for or during the term of his imprisonment under any warrant of committal under this act.†

Nothing in this act prevents employer or employed from enforcing their respective civil rights and re-

* Sec. 17. † Sec. 16.

medies for any breach or non-performance of the contract of service by any action or suit in the ordinary courts of law or equity in any case where proceedings are not instituted under this act.*

Nor does the act interfere with the usual and accustomed mode of procedure in any court of criminal judicature for the trial of indictable offences relating to wilful and malicious injuries to persons or property committed by masters, workmen, servants, or others, either at common law or under the several statutes in force for the punishment of such offences, but so that no person be punished twice for the same offence.†

The remaining sections of the act are for the most part of a technical character; and for these, therefore, we may refer to the statute itself. It is, however, desirable to mention that proceedings under the act are not removable by *certiorari* to a superior court (sec. 23).

* Sec. 18. Of course, if either an employer or employed brings an action for breach of contract, &c., he cannot—and it would be very unjust if he could—also take proceedings under this act.

† Sec. 19.

# CHAPTER XV.

## OF TRADES UNIONS AND COMBINATIONS.

Statutes relating to Conspiracy at Common Law.—When Combinations are punishable, and how.—Punishment of Trade Offences committed by Individuals.—What Trades Unions are legal.—Their Rights and Capacities.—Registration.—Punishment of Persons robbing or defrauding them.—Procedure.

At the present time, trades unions and combinations amongst masters or workmen to raise or lower wages or prices, or to effect other trade objects, are governed by the common law, and by two statutes* passed in the year 1871, and respectively entitled "The Trade Union Act, 1871,"† and the "Act to amend the Criminal Law relating to Violence, Threats, and Molestation." ‡

This subject has two aspects—a criminal and a civil one. We shall commence by considering what combinations, or what acts done in furtherance of those combinations, are the object of punishment, either by indictment or summary proceedings.

* The earlier statutes on the subject of trades unions or combinations were all repealed by the 34 & 35 Vict., c. 32.

† 34 & 35 Vict., c. 31.

‡ 34 & 35 Vict., c. 32

Now, at common law, all combinations of two or more persons may become what the law designates, and punishes as, a conspiracy. A conspiracy is "a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means." It is also said, much to the same effect, in another case, that "the crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing—that is, to effect something in itself unlawful—or to effect by unlawful means something which, in itself, may be indifferent, or even lawful."

It is obviously necessary, therefore, to inquire, first, what trade combinations are legal; and next, by what means their ends may be pursued. At common law, a conspiracy "in restraint of trade" was a combination for an unlawful purpose, and therefore illegal, and the subject of indictment. But by the 2nd clause of "The Trade Union Act, 1871," it was provided that "the purposes of any trade union shall not, by reason *merely* that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise." The effect of the enactment is, therefore, to eliminate "restraint of trade" as an element of criminality; but otherwise it leaves the doctrines of the common law with regard to these associations untouched. We have, therefore, to consider what *those* doctrines are irrespective of the one which the *statute in* question excludes from our consideration.

Now, it is perfectly clear that, on the one hand, masters have a right to agree amongst themselves what wages they will give, and what hours of work they will require; and that, on the other, workmen have an equal right to agree amongst themselves about the wages they will require, and what hours they will work. Both parties have also a right peaceably to try to persuade others to become parties to their agreement, or take part in their combination.

But it has been held, and we apprehend that these cases are still authorities, that it is not lawful for workmen to combine for the purpose of dictating to their masters whom they shall employ, or in order to compel their masters to dismiss an obnoxious workman.* And although unengaged workmen have a clear right to agree not to enter into any service unless they obtain a certain rate of wages, they have no right to combine unlawfully to leave † any service as to which they are under a binding contract, or to persuade other workmen, under contract, unlawfully to absent themselves from their service. Combinations of the kind we have just mentioned are the subjects of indictment, although no unlawful act may be done in pursuance of them; and those who take part in them are guilty of a common law misdemeanour, and may be

* No doubt one ground on which these cases were rested was the alleged restraint of trade; but they may also be supported on the ground of the interference with the personal liberty of the master, and the injury done to him.

† For instance, to leave without giving proper notice.

punished by fine or imprisonment, at the discretion of the court.

But even if the object of a combination be lawful, it may, as we have seen, become illegal as a conspiracy if it is pursued by unlawful means, such as the use of violence, the resort to intimidation, threats, or menaces, or the molestation or obstruction * of any master or workman in his employment or business.

It is of the essence of a conspiracy that two or more persons shall be engaged in it; and no indictment will lie unless it can be proved that two or more persons were so engaged. But although no indictment for conspiracy at common law will lie against persons who commit illegal acts for trade purposes, unless such acts are done in pursuance of a combination in

* "Molestation" and "obstruction" are obviously very vague words; and they have received a very large and elastic construction from the judges by whom indictments for conspiracy have been tried. According to some of the cases, almost any kind of annoyance or pressure inflicted or exerted in a systematic manner and in concert, with a view to compel a master or workman to pursue a particular course, would seem to satisfy them. In a well-known case, Mr. Justice Brett is reported to have told the jury who tried the gas-stokers, that "there would be improper molestation if there was anything done to cause annoyance, or in any way of unjustifiable interference, which, in the judgment of the jury, would have the effect of annoying or interfering with the minds of ordinary persons carrying on such a business;" and this largeness or looseness of construction is still open to the court on a trial for conspiracy at common law. The definition of "molestation" or "obstruction" contained in "The Act to amend the Criminal Law relating to Violence, Threats, and Molestations" only applies to proceedings against *individuals* under that act. It does not restrict their application in *other cases*.

which two or more persons are engaged, it does not follow that individuals may not be punished, without any proof or charge of concert with others, for acts done by themselves either as members of a trade union or at their own suggestion. Of course any one who commits an assault or other crime, in furtherance of the objects of a trades union, is punishable for that offence, exactly in the same way, and to the same extent, as if it had been committed for purposes of gain, or under the influence of passion. But, in addition to the general law applicable to crimes, "The Act to amend the Criminal Law relating to Violence, Threats, and Molestations" contains provisions which, although not directed in terms against trade offences, do nevertheless apply to them in an especial manner. It is provided by the first section of this act that,—

I. Every person who shall do any one or more of the following acts, that is to say,—

(1) Use violence to any person or any property,

(2) Threaten or intimidate any person in such manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace,

(3) Molest or obstruct any person in manner defined by this section,

with a view to coerce such person,—

(1) Being a master to dismiss or to cease to employ any workman, or being a workman to quit any

employment or to return work before it is finished;

(2) Being a master not to offer, or being a workman not to accept, any employment or work;

(3) Being a master or workman to belong or not to belong to any temporary or permanent association or combination;

(4) Being a master or workman to pay any fine or penalty imposed by any temporary or permanent association or combination;

(5) Being a master to alter the mode of carrying on his business, or the number or description of any persons employed by him;

shall be liable to imprisonment, with or without hard labour, for a term not exceeding three months;

A person shall, for the purposes of this act, be deemed to molest or obstruct another person in any of the following cases; that is to say,—

(1) If he persistently follow such person about from place to place:

(2) If he hide any tools, clothes, or other property owned or used by such person, or deprive him of or hinder him in the use thereof:

(3) If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follow such person in a disorderly manner in or through any street or road.

Nothing in this section shall prevent any person from being liable under any other act, or otherwise, to any other or other higher punishment than is provided for any offence by this section, so that no person be punished twice for the same offence.*

Provided that no person shall be liable to any punishment for doing or conspiring to do any act on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinbefore specified in this section, and is done with the object of coercing as hereinbefore mentioned.

All offences under this act are to be prosecuted under the provisions of the "Summary Jurisdiction Acts."

Provided as follows:—

(1) The "Court of Summary Jurisdiction," when hearing and determining an information or complaint, shall be constituted in some one of the following manners (that is to say):—

(*a*) In England,

(i.) In any place within the jurisdiction of a metropolitan police magistrate or other stipendiary magistrate, of such magistrate or his substitute:

(ii.) In the City of London, of the Lord

* The effect of this proviso is this: that a man who has been guilty of any of the acts set forth above, may *either* be indicted with others for a conspiracy, *or* he may be proceeded against individually for the acts alone, either under this or any other statute. It is for the prosecution to choose which course they will adopt; but they cannot pursue more than one.

Mayor or any alderman of the said City:

(iii.) In any other place, of two or more justices of the peace sitting in petty sessions.

(c) In Ireland,

(i.) In the police district of Dublin metropolis, of a divisional justice:

(ii.) In any other place of a resident magistrate.

If any party feels aggrieved by any order or conviction made by a court of summary jurisdiction on determining any complaint or information under this act, he may appeal therefrom to some court of general or quarter sessions for the county or place in which the cause of appeal has arisen, holden not less than fifteen days and not more than four months after the decision of the court from which the appeal is made.

A person who is a master, father, son, or brother of a master, in the particular manufacture, trade, or business in or in connection with which any offence under this act is charged to have been committed, cannot act as or as a member of a court of summary jurisdiction or appeal for the purposes of this act.*

We now turn to the civil aspect of trades unions. These associations being illegal at common law, as in restraint of trade, it followed that they could not hold property, nor prosecute any one by whom they were

* Sec. 5.

robbed or defrauded. This was felt to be a great hardship, and it was accordingly enacted by the 34 & 35 Vict., c. 31, that "the purposes of any trade union shall not by reason *merely* that they are in restraint of trade, be unlawful, so as to render void or voidable any agreement or trust." The effect of this provision is that, if a trade union has no object which the law regards as illegal (as to which see the earlier part of this chapter), it is entitled to hold property with as much security, and on the same terms, as any other voluntary society, and may prosecute* any one—whether its own officers or strangers—by whom that property may be stolen or embezzled. At the same time the rights thus conferred upon trades unions are

* Any trades union which does not contemplate illegal objects may, therefore, whether it be *registered* or *unregistered*, invoke the aid of the law for the protection of its property, or for the punishment of those by whom it is robbed or defrauded, in the same manner, and to the same extent, as any other lawful voluntary society, except in so far as its rights are qualified by sec. 4 of the act, which will be found above. Unregistered trades unions are, in the eye of the law, mere partnerships; and the rights of the members in regard to each other, or to the union, are exactly the same as those of partners *inter se*, or in reference to the firm. The result is, that no action at law can be brought by a member against the union, or by a union against a member, in respect of debts due from the one to the other. The only remedy is by a suit in equity; and even that remedy is not available in cases which come under, or are comprised in, sec. 4. As, however, larceny or embezzlement are now punishable in a partner, an indictment will lie against an offender, even although he may be a member, and the society be *unregistered*. As we shall presently see, trades unions which are *registered* have further and additional means of protecting their property, or punishing offenders in a summary manner.

strictly guarded and carefully limited, for it is provided (sec. 4) that:—

Nothing in this act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

(1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:

(2) Any agreement for the payment by any person of any subscription or penalty to a trade union:

(3) Any agreement for the application of the funds of a trade union,—

(a) To provide benefits to members; or,

(b) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or,

(c) To discharge any fine imposed upon any person by sentence of a court of justice; or,

(4) Any agreement made between one trade union and another; or,

(5) Any bond to secure the performance of any of the above-mentioned agreements.

*But* nothing in this section shall be deemed to con-

stitute any of the above-mentioned agreements unlawful.*

The "Friendly Societies Acts," 1855 and 1858, and the acts amending the same; the "Industrial and Provident Societies Act, 1867," and any act amending the same; and the "Companies Acts," 1862 and 1867, are not to apply to any trade union, and the registration of any trade union under any of the said acts is void; but, on the other hand, any seven or more members of a trade union may, by subscribing their names to the rules of the union, and otherwise complying with the provisions of the act with respect to registry, register such trade union, provided that, if any one of the purposes of such trade union be unlawful, the registration shall be void.†

Any trade union thus registered may purchase or take upon lease, in the names of the trustees for the time being of such union, any land not exceeding one acre, and may sell, exchange, mortgage, or let the same.

All real and personal estate belonging to any trade union registered under the act is to be vested in the

* The effect of this is that, although money cannot be recovered in a court of law under agreement of the kind mentioned, it cannot, if once paid, be recovered by the payer as having been paid for an illegal consideration; and that, although courts of law or equity cannot be appealed to to enforce the execution of agreements or carrying out of transactions of the different kinds enumerated, yet that, on the other hand, the courts cannot be appealed to to undo or set aside anything which has actually been done or carried out.

† Sec. 6.

trustees appointed as provided by the act,* who are (by sec. 9) empowered to bring or defend any action, suit, prosecution, or complaint in any court of law or equity, touching or concerning the property, right, or claim to property of the trade union.

Sec. 10 limits the responsibility of a trustee of a registered trade union to monies actually received by him.

Sec. 11 requires the treasurer or other officers of a trade union to account to the trustees or members (at a meeting of the body) for all monies received by them.

Sec. 12 is a very important clause. It provides that:—

If any officer, member, or other person being or representing himself to be a member of a trade union registered under this act,† or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition obtain possession of any monies, securities, books, papers, or other effects of such trade union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same, or wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such trade union, or any part thereof, the court of summary jurisdiction for the place in which the regis-

* Sec. 8.

† It will be observed that the benefit of the summary mode of *procedure* prescribed by this section is exclusively reserved for *registered* trades unions.

tered office of the trade union is situate upon a complaint made by any person on behalf of such trade union, or by the registrar, or in Scotland at the instance of the procurator fiscal of the court to which such complaint is competently made, or of the trade union, with his concurrence, may, by summary order, order such officer, member, or other person to deliver up all such monies, securities, books, papers, or other effects to the trade union, or to repay the amount of money applied improperly, and to pay, if the court think fit, a further sum of money not exceeding twenty pounds, together with costs not exceeding twenty shillings; and, in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs aforesaid, the said court may order the said person so convicted to be imprisoned, with or without hard labour, for any time not exceeding three months: Provided, that nothing herein contained shall prevent the said trade union, or in Scotland Her Majesty's advocate, from proceeding by indictment against the said party; provided also, that no person shall be proceeded against by indictment if a conviction shall have been previously obtained for the same offence under the provisions of this act.

Secs. 13 to 18 prescribe the mode in which trades unions may be registered with the registrars for friendly societies in England, Scotland, and Ireland, and the returns which they are required to furnish.

In England and Ireland all offences and penalties under the act are to be prosecuted and recovered in manner directed by the "Summary Jurisdiction Acts;" and it is provided that:—

(1) The "Court of Summary Jurisdiction," when hearing and determining an information or complaint shall be constituted in some one of the following manners; that is to say:—

(*a*) In England,

(1) In any place within the jurisdiction of the metropolitan police magistrate or other stipendiary magistrate, of such magistrate or his substitute:

(2) In the City of London, of the Lord Mayor or any aldermen of the said City:

(3) In any other place, of two or more justices of the peace sitting in petty sessions.

(*b*) In Ireland,

(1) In the police district of Dublin metropolis of a divisional justice.

(2) In any other place, of a resident magistrate.*

In England or Ireland, if any party feels aggrieved by any order or conviction made by a court of summary jurisdiction on determining any complaint or information under this act, he may appeal to some court of general or quarter sessions for the county or place in which the cause of appeal has arisen, holden not less than fifteen days and not more than four months after the decision of the court from which the appeal is made.†

* Sec. 19. † Sec. 20.

A person who is a master, or father, son, or brother of a master, in the particular manufacture, trade, or business in or in connection with which any offence under this act is charged to have been committed may not act as or as a member of a court of summary jurisdiction or appeal for the purposes of this act.*

* Sec. 22.

# CHAPTER XVI.

## OF APPRENTICESHIP.

Apprenticeship, what is.—Contract of Apprenticeship.—Stamp Duties.—Who are Parties to Indenture.—Provisions thereof.—Responsibilities and Liabilities of the Apprentice, of his Friends, and of the Master.—Grounds on which, and mode in which, Indenture may be annulled.—Jurisdiction and Powers of Justices in Matters of Apprenticeship.—Statutes relating thereto.—Court of Equity no Jurisdiction to cancel Indenture.—Master may bring Action against any one enticing away his Apprentice.

WHEN an employer carries on some trade or industry, and it is one of the terms of the contract between himself and one of his servants that he shall teach this trade or industry to the servant, as well as employ him and pay him wages for a fixed period, the contract amounts to one of apprenticeship. It is not, however, necessary that the words "teach" and "learn" should be used by the parties; for an agreement to take and maintain a person "after the manner of an apprentice," has been held to constitute an apprenticeship. Indeed, this may be done even without the use of the word "apprentice;" wherever it appears, from the terms used, that it is the intention of the parties that the one is to teach and the other is to learn, the *contract* will be one of apprenticeship.

*As* contracts of apprenticeship are always made to last

for more than one year, they must, in order to be valid, be in writing, and be signed by the party to be charged therewith. Moreover, it is essential that the consideration or premium given with the apprentice should be truly stated and set forth on the face of the instrument, in order that the proper amount of stamp duty should be assessed thereon. Unless duly stamped, a contract of apprenticeship will not be valid. Under the stamp act at present in force, the duties are as follows:—When there is no premium or consideration, 2*s.* 6*d.*; in every other case,—For every £5, and also for every fractional part of £5 of the amount or value of the premium or consideration 5*s.* Instruments relating to any poor child apprenticed by or at the sole charge of any public charity, or pursuant to any act for the regulation of parish apprentices, and instruments of apprenticeship in Ireland, where the value of the premium or consideration does not exceed £10, are exempt from stamp duty.*

* By clause 39 of the Stamp Act, 1870, it is provided that every writing relating to the service or tuition of any apprentice, clerk, or servant placed with any master to learn any profession, trade, or employment (except articles of clerkship to attorneys and others, specifically charged with duty) is to be deemed an instrument of apprenticeship; and clause 40, after providing that the consideration or premium must be fully and truly stated on the face of the indenture, goes on to enact "that if any such sum or other matter or thing be paid, given, assigned, or secured as aforesaid, and no such instrument be made, or if any such instrument be made, and such sum or the value of such other matter or thing be not set forth therein as aforesaid, the master, and also the apprentice himself, if of full age, and any other person being a party to the contract or by whom any such sum or other matter or thing is paid, given, assigned, or secured,

It is not requisite that a contract of apprenticeship should be entered into by deed, but in practice this is always the case. Hence the instrument by which the apprentice is bound is called his "indenture." By this instrument the apprentice and some one or more of his relations or friends—his father, of course, if he has one—usually covenant that he shall faithfully serve his master during the term of his apprenticeship, keep his secrets, obey his lawful commands, and preserve and protect his property; that he shall neither contract matrimony, nor commit fornication, nor play at cards, dice, or other unlawful games; nor buy nor sell for his own gain and profit; nor frequent taverns or playhouses; nor absent himself from his master's service; and generally that he shall behave himself in all things as a faithful apprentice. Provision is also usually made for the assignment of the apprentice to another employer, and the return of a portion of the premium, in case of the death of the master. On the other hand, the master covenants to take the apprentice into his service, and to teach him the trade or industry he himself carries on. If it is intended, as is often the case, that the apprentice shall receive wages during the latter part of his term, when his services may be presumed to be valuable, the master covenants for their payment. And where the apprentice is to reside in his master's house, as was formerly the case more frequently than at present, the latter will then

*shall forfeit* the sum of £20, and the contract and the instrument (if *any) containing* the same shall be null and void."

covenant to find him in meat, drink, and lodging, and sometimes with wearing apparel and other necessaries, during the term.

By the custom of the City of London, an infant, above the age of fourteen and unmarried, is responsible, upon covenants contained in an indenture, just as if he were of full age. But outside the City of London, an apprentice under age cannot be sued upon the contract, although it will be legally valid so far as to bring him within the operation of the statutes relating to masters and servants, and to entitle him to sue the master for the performance of its conditions, and the payment of any wages which may become due under it. It is essential that the indenture should be signed by the apprentice, for otherwise it will not be binding, even although it was executed by his father and the master. But as no action could be brought against the infant apprentice for not serving or for not fulfilling any other term in the indenture, his father or some other friend always becomes bound for his faithful service during apprenticeship, and any action for his breach of duty must be brought by the master against such father or friend.

The parties who covenant for the continued service and good conduct of an infant apprentice are not responsible for trifling and pardonable instances of misconduct, such as staying out on Sunday evenings (where the apprentice resides with his master) half an hour beyond the time allowed, or for temporary absence and disobedience of orders, unattended

by substantial injury to the master. But for all gross misconduct and repeated and lengthened absence, producing substantial injury to the master, they will be held responsible; and if an infant apprentice who has executed an indenture avoids it on coming of age, and refuses to continue in the service of his master, they are bound to make good whatever damage is sustained by the latter by reason of such repudiation of the contract.*

The sickness of the apprentice or his incapacity to serve and learn by reason of ill health or accident, does not discharge the master from a covenant to provide for him and maintain him, inasmuch as he takes him for better and worse, and must, if he engages to maintain him, provide for him necessaries in sickness (including medical attendance) as well as in health.

The amount or kind of misconduct which, as we have seen (*ante*, Chapter VI., p. 71), would justify a master in dismissing a hired servant will not release him from the performance of his covenant in an indenture of apprenticeship. But if the apprentice is guilty of misconduct which practically renders it

* If the term of apprenticeship lasts some time after the infant becomes of age, this may be a very serious responsibility. By the time he is twenty-one, an apprentice ought to be nearly, or, indeed, quite, as good as a journeyman. He will, however, only be receiving small wages, or, it may be, none at all. If a master is obliged, by his desertion of the service, to employ a journeyman at full wages in his *place*, the measure of the damage he sustains will be the difference *between* what he would have had to pay the apprentice and what he *actually* pays the journeyman.

impossible for the master to maintain, employ, and teach him according to the terms of the indenture,* the master cannot be successfully sued for non-performance of his covenant, because the capacity and the willingness of the apprentice to receive instruction, &c., are conditions precedent to the master's liability upon covenant to afford instruction. And if an apprentice runs away from his master's service, and enlists in the army, or contracts any other relation which incapacitates him from *lawfully* returning to his master, the latter is not bound to take him back if he should return.

If a lad goes to a master "on liking," with a view to be bound an apprentice, the intended master cannot charge for board and lodging so long as the lad remains with him "on liking," even although he does not eventually become an apprentice.

A term of apprenticeship is put an end to by the death of the master, and if a master has covenanted to teach two or three trades, and ceases to carry on one of them, not only may the apprentice, if he choose, refuse to continue his service, but the master will be liable to an action for the breach of his covenant. If, however, an apprentice is bound to two partners,

* By the custom of the City of London, a master may turn away his apprentice if he frequents gaming-houses, even although nothing may be said about gaming in the indentures. It would seem that "frequenting" betting-rooms or clubs would come within the custom. Of course, one or more casual visits to such places would not be sufficient.

## CHAPTER VII.

### OF THE RIGHTS OF THE MASTER IN RESPECT OF HIS SERVANT.

May bring action for enticing away servant.—Or sue for wages earned by servant.—May also sue in respect of injury to servant.

A MASTER may bring an action against any one who entices away his servant, and induces the latter to break a binding contract of service with his employer. A mere attempt to entice a servant away would not, however, enable the master to bring an action. For this purpose the attempt must be successful, and damages must ensue.

In the case of *Lumley* v. *Gye*, 2 E. & B. 216, it was held by three judges of the Court of Queen's Bench that this action lay for seducing a dramatic performer away from the plaintiff's theatre, and that it might be maintained wherever one party procured another to break a binding contract, by which the latter had engaged to give his exclusive services to a third. Coleridge, J., on the contrary, was of opinion that the right of action was founded on the Statute of Labourers, and was confined to cases within that statute. Curiously enough the question has never arisen since,

and there has therefore been no opportunity of obtaining the opinion of another court upon it. It may, however, be predicted with some confidence (notwithstanding the high authority of the dissentient judge) that the opinion of the majority will be upheld in case the point should again engage judicial attention.

To maintain this action, the plaintiff must prove that the defendant knew the servant to be his, and that he induced him to break a binding contract of service. If a person merely induces a servant to leave his employment on the completion of the term for which he had engaged to serve, or on the expiration of a notice which he had a right to give, no action will lie, even although it should be proved that the servant would have remained in his employment had it not been for the intervention of the defendant.

If a person continues to employ another man's servant *after notice* that the servant has quitted his employment in breach of his contract, he will be liable to an action at the suit of the master whose employment the servant has thus wrongfully quitted; and this is the case although, at the time the second master took the servant, he did not know that he had broken his contract to the first. The gist of this action is the retaining the servant *after notice.*

If an apprentice or servant be enticed away from the service to which he is bound by indenture or contract, the master whom he has quitted may bring

an action against the master whose employment he has entered for the wages which he has earned. If he did so he would, however, be held, as it is said, to waive the tort: — *i.e.*, he would not be able to bring both an action for the servant's wages and an action for damages arising from his having been enticed away and harboured by the defendant. He would, of course, also have to pay the servant the wages to which he would have been entitled had he remained in his service. This action is generally brought where an apprentice, in the last years of his indentures, when his labour is peculiarly valuable to his master, deserts his service and enters the employment of another, in order to earn the higher wages he can gain as a journeyman. In such a case the late master may find it both pecuniarily advantageous, and an excellent way of punishing the deserter, to intercept the wages which he is illegitimately earning, and to pay him the smaller sum to which he is entitled under his indentures.

A master is entitled to bring an action against any one who does a personal injury to his servant, whereby the latter is prevented from rendering the service to which he was bound, or to which his master was entitled. Nor is it any answer to such an action that the servant is also suing for, or even that he has actually received, damages for the same injury. In the one case, the gist of the action is the loss of service by the master; in the other, it is the personal

suffering and the injury to limb or health sustained by the servant.

Technically speaking, the action for seduction falls under the principle we are now discussing; but we do not propose to treat of it here, since, although nominally, it is not substantially a part of the Law of Master and Servant.

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# CHAPTER VIII.

## OF THE MASTER'S LIABILITY ON CONTRACTS MADE BY HIS SERVANTS IN HIS NAME.

Ground and extent of liability.—Authority to servant; in writing or verbal, express or implied.—Ratification of servant's acts by master.—Master holding out servant as his agent.—Right of third persons to assume that servant is master's agent.—Limitation and revocation of servant's authority.

A MASTER may be liable to third persons for the acts of his servants, on the ground that they have either entered into contracts, or committed wrongs, for which he is responsible. In the present chapter, we shall deal exclusively with the liability of the master in respect of contracts.

That liability is based solely and entirely on the ground that the servant is the agent* of the master, and that he has his authority, either express or implied, for doing the act or entering into the contract for which it is sought to make the master answerable.

* Many persons, such as infants and married women, who cannot make valid contracts on their own behalf, may nevertheless, as agents for others, do acts which will be binding upon the persons whom they represent. A master may, therefore, be liable upon the contract of his servant (provided that it was in other respects binding), although such servant were an infant or a married woman.

Before we proceed to inquire in what manner servants may become agents of, or may bind, their masters, there is one general proposition which it may be convenient to lay down. It is, that it makes no difference in the *master's* liability whether a contract is made, or an order given,* in his name or in that of his servant, supposing that the latter were in fact acting as his agent, or that he contracted under circumstances which warranted a third person in assuming him to be his agent. It will in all such cases be a question of fact, to be decided, like any other question of the same kind, by evidence whether the servant acted on his own account or on that of his master.

No agent can bind his principal beyond the scope of his authority; but this proposition requires to be supplemented by another:—That in certain circumstances the general public, or some part of them, or a particular individual, may, from the acts of the master, have a right to assume, as against him, that such authority exists, whether it has or has not in fact been given. It is, therefore, in order to avoid confusion, requisite to consider separately each mode in which a master may incur liability for the contract of his servant.

* Where, however, a servant or other agent has signed a *written* contract in his own name, he cannot give parol evidence to *discharge himself* from liability on the contract. That, however, will not prevent the other party from giving parol evidence to charge the master, by showing that it was really on his behalf that the contract was entered into, or the order given.

In the first place, a servant may, either in writing* or by word of mouth, be authorized by his master to do a particular thing or to make a particular bargain. It is clear that, in this case, his authority is strictly limited by the letter of his instructions, and supposing that he is dealing with a person who has had no previous transactions with him on account of his master, the latter will not be responsible for anything he does inconsistent with his orders. It is the duty of a person to whom another comes *for the first time*, professing to be the agent of another, to ascertain whether he really has that character, and with what amount of authority he is entrusted. If he does not ascertain these facts correctly, or chooses to give the agent credit beyond his authority, he must accept the consequences. In this case, at all events, the liability of the principal will be strictly confined to the authority he has expressly conferred upon the agent.

But then a master may give his servant express authority to act for him, not merely in reference to one transaction, but in all transactions of a particular kind. For instance, a merchant may give his manager authority to buy and sell goods on his account, or to

* If the fact that a servant is acting under a written authority from his master is disclosed to or becomes known to the person with whom he purposes to deal on behalf of his master, such third person should insist on seeing the written authority; because, after he has become aware that it exists, he will only be justified in giving credit *to the master* according to its terms, and will not be able to charge *him in respect to anything* inconsistent with or beyond those terms.

do these and other things usually done by the manager of a given business; or the master of a house may give one of his servants authority to buy goods of a particular kind—say, for instance, a butler to buy wine, or a coachman to buy hay and corn for his horses. In that case the servant will be considered to have all the authority necessary for transacting the business entrusted to him, and which is usually entrusted to agents employed in the like capacity. The authority will not, however, be held to go further. If the butler were to take to buying corn and provender for the horses, or the coachman were to go and order wine, the master would not be liable; and, on a similar principle, an authority to buy or to sell goods on the part of the master will not cover any transactions or engagements, wholly collateral to the sale, into which the servant may choose to enter. For instance, it has been held that a servant sent to sell a horse had authority to bind the master by a warranty of soundness given at the time of the sale, in order to effect it, and as part of the transaction; but that, on the other hand, the master would not be liable on a warranty given after the sale, and as a wholly independent transaction.

In order to render the master liable upon a bargain made, or contract entered into, by his servant on his account, it is not necessary that authority should have been given to the servant *before* the transaction. If, after a servant has entered into a contract in the name of his master, the latter adopts, recognizes, and ratifies it, he will be liable upon it exactly in the same

way and to the same extent as if he had previously expressly authorized his servant to enter into it. It must, however, be observed that this rule only applies to contracts entered into by the servant in the *name of his* master. Suppose a servant were to buy goods on his own credit, the master could not, by any subsequent act, make the contract his own. Nor can he take advantage, by subsequently adopting it, of any act, *although done in his name,* to the validity of which it is essential that it should be valid at the time it was done. For instance, if the servant or agent of a landlord gives a tenant notice to quit without either a special authority to do this particular act, or a general authority to act for his master in all matters of the kind, the notice would be bad from the commencement, and could not be made good by any subsequent ratification on the part of the master.*

If a master desires to adopt a contract or bargain which a servant has entered into in his name, but without his authority, he must ratify it as a *whole.* He

* This is subject to a qualification, which is, however, rather apparent than real. Suppose a notice to quit were given earlier than it need be (for instance, if a notice were given on the 20th of March to a yearly tenant to quit his holding on the 29th of September), then, if the master ratifies it *before* the day on which it begins to operate (which in the case we have put would be the 25th of March, six months' notice being requisite to terminate a yearly tenancy), it would be a good notice. But the truth is, that in this case the ratification of the master is, properly speaking, a *new* notice given by himself. *It dates* from the time he intervened, and does not in any way relate *back to the act of the* servant,

cannot take part and reject the rest; appropriate the benefit and reject the burthen.

So far we have been dealing with cases where a servant has express authority to do a certain thing, or things of a certain kind, and the person with whom he deals has no right to assume, as against his master, that he has more. This, as we have already said, is always the case where a transaction is one of an isolated character, is the first of its kind, or is not carried out under circumstances which, whatever may be the actual fact, justify the assumption that the master has given the servant authority to deal in his name with third parties. We have now to discuss that large class of cases in which the authority of the servant is said to arise by implication—that is to say, when the conduct of the master is such that he may be said to hold out the servant to the public as his agent, either in all transactions, or in transactions of a particular kind, and when he thus gives those with whom the servant deals a right to presume that he acts with the authority of the master, and to hold the latter liable on the contracts thus entered into in his name.

1. The first mode in which a master is said to "hold out" a servant as his authorized agent, is by employing him in a certain capacity, and by recognizing and adopting his transactions in that capacity. "A master who accredits a servant by employing him, must abide by the effects of the credit, and will be bound by contracts made by innocent third persons in the seeming course of that employment, and on the

faith of that credit, whether he intended to authorize them or not, or even if he expressly, though privately, forbade them, it being a general rule of law, founded on natural justice, that where one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud should be the sufferer. Upon this principle, where a servant usually buys for his master upon credit, and the master is in the habit of paying for goods so purchased, the master is liable to pay for any goods of a similar nature which the servant may obtain upon credit, even though, in a particular instance, the master furnishes the servant with money to pay for the goods and the servant embezzles the money; or even if the servant, after he has been discharged, pledge his master's credit, unless the party giving credit knew that the servant was discharged." *

Whether the master's course of dealing has been such as to warrant a third person in trusting a servant as his agent is a question of fact, to be decided with reference to the whole circumstances of the case by a jury, if the case is tried before one, or if not (as generally happens in the county court), by the judge. Generally speaking, the inclination of the judge, and still more that of the jury, is in favour of the tradesman, if it can be shown that he had any fairly reasonable ground for thinking that the servant was authorized by the master to order goods in his name.

Where a servant's authority to pledge his master's

* *G. M.* Smith on Master and Servant, p. 157.

credit arises merely by implication, the authority of the servant is coextensive with his usual employment, and the scope of his authority is to be measured by the extent of his employment. Suppose, for instance, that a gentleman's cook was in the habit of purchasing the meat and vegetables for the family, then if the master had been in the habit of paying for the articles she ordered on credit, he would be held liable to pay for all things of the same kind, or of any other kind, which it might reasonably be supposed to come within a cook's province to buy. On the other hand, the fact that her master had paid for articles ordered by her and required in the kitchen, would raise no presumption that he had authorized her to buy table or household linen; and, in the absence of any express authority by him to make such a purchase, he would not be held liable to pay for such articles.

Where a person on one or two occasions draws cheques, or accepts or indorses bills in the name of another, who acquiesces in the payment of the cheques, honours the acceptances, and receives money on the indorsements, these are facts from which a jury or a county-court judge might presume a general authority from the latter to perform similar acts, so as to bind him to the holder of a cheque or bill given or drawn by the former without authority, or even fraudulently. An authority, however, to perform one of these acts would not imply an authority to perform others, but such authority would be construed strictly.

2. The second mode in which a master may be-

come liable for orders given, goods purchased, or money received on his account, either by one of his servants, or indeed by any other person, is, by conferring upon such servant or person, or suffering him to assume, a certain position in which he would, according to the usual course of business, be authorized to do such and such things.

"Thus a merchant has been held bound by a payment in the usual course of business to a person found in his counting-house, and appearing to be entrusted with the conduct of business there, though it turned out that the person was never employed by him, and the money never came into his hands; for, said Lord Tenterden, 'The debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority.' And so a tender to a person, probably a chief clerk, in the office of an attorney, who refused to accept the amount tendered as insufficient, has been held good, being equivalent to a tender to the attorney himself; and an attorney has been held liable to refund money and pay the costs of the application where some one in his office extorted an excessive sum for costs, although the matter did not come to his personal cognizance. And payment to a sheriff's bailiff's assistant has been held good as against the sheriff."*

Again, if a master entrust his servant with goods to *sell*, he will be considered to confer upon him power to

* Smith on Master and Servant, p. 160.

do everything which, in the usual course of business, is connected with, or requisite to carry out, the transaction; as, for instance, to warrant a horse, to make representations as to the quality of goods, or to undertake that goods shall be supplied equal to the sample exhibited.

It should be remarked that the power which a servant possesses by implication to bind his master by contracts relating to matters within the usual scope of his employment, is not enlarged by the occurrence of an unusual emergency. If he has not a particular power under ordinary circumstances, he does not gain it by the fact that, under extraordinary circumstances, its exercise would be advantageous to his master, either by enabling him to fulfil duties which are incumbent on the latter, or in any other way.*

When a master has once become liable to pay a debt contracted by a servant in his name or on his behalf, he cannot get rid of the liability merely by giving the servant money to discharge it. Nothing will release him except the actual payment of the debt; unless, indeed, the creditor were to lead him to believe that the debt had been paid, when, as a matter of fact, it had not. In that case the creditor would be so far bound by his own statement that he would be prevented from afterwards bringing an action for the money.

* This rule is illustrated by a well-known case, in which it was held that the station-master of a railway company has no implied authority to call in a surgeon to attend on passengers injured by an accident; for the power to enter into such a contract is not incident to his employment.

If a servant has authority, either expressly or by implication, to act as the general agent of his master in the transaction of any kind of business, or in the purchase or sale of particular goods, &c., that authority cannot be limited by any *private* order or direction not known to the party dealing with him.* Should the servant in such a case disobey his master's orders, or disregard any secret engagement between himself and his master, he will be accountable to his master for any loss he may sustain thereby, but third persons will not be affected by any limitation of the servant's authority not communicated to them. "The rule is, however, directly the reverse concerning a particular agent or agents employed specially in one single transaction, for it is the duty of the party dealing with such a one to ascertain the extent of his authority, and if he do not he must abide the consequences." †

It follows necessarily from all we have said (but we repeat it for the sake of emphasising the proposition) that unless the master has, either by expressly giving him the power, or by implication from a course of dealing, authorized the servant to pledge his credit, the servant cannot, by so doing, render him liable upon orders he may give in his name. A trades-

* Of course, if a party dealing with a servant on behalf of his master *do know* of a private agreement between the master and servant, or of private instructions given by the former to the latter, he will be bound by his knowledge, and cannot hold the master liable *for any* orders given, or contracts entered into, contrary to such agreement or instructions.

† *Smith's* Mercantile Law.

man, therefore, to whom a servant comes and gives orders on behalf of his master cannot be too careful in ascertaining, when the *first* order is given, that the man has his master's authority. For, if he omits to do this, and it turns out that the man really had no authority, he will not be able to render the master liable, even though he should prove that the master had actually used the articles purchased by the servant. No doubt the fact would be evidence against the master, and if it stood alone might probably lead a judge or jury to come to the conclusion that the servant really had the authority which he professed to have. But it would go for nothing if the master were, on the other hand, to prove either that the tradesman gave credit to the servant in the first instance,* or that the servant was sent with ready money to make the purchase.

If a master has given authority by deed to his servant to enter into contracts or give orders in his name or on his account, that authority can only be revoked by deed. But if the authority has been expressly given, either by writing or by word of mouth, or arises by implication from a course of dealing, it may be revoked either by writing or by word of mouth. But

* The rule of law on this point is this :—If, at the time an order is given, or a contract entered into, the party to whom it is given or with whom it is entered into knows not only that the servant is an agent, but who his master is, and, notwithstanding this knowledge, chooses to debit the servant, he cannot afterwards turn round and charge the master. But, if he knows the servant to be an agent, but does not know who his master or principal is, he may in that case, and although he has in the first instance debited the servant, charge the master or *principal* when he discovers who he is.

in order that the revocation may be binding upon the public, the master must give public notice of it; and when there has been a course of dealing between the servant and tradesmen who have been in the habit of trusting him as his master's agent, notice that he has no longer authority to deal in his master's name must be given to each of those tradesmen.* A private revocation as between the master and servant will not in the slightest degree exonerate the master with regard to those who may have been led by a previous course of dealing to trust the servant.

The master's death operates as a revocation of any authority which he may have given, either expressly or by implication, to pledge his credit. If, therefore, the servant, after his decease, orders goods in his name, his executors cannot be compelled to pay for them.

Lapse of time would in some cases raise a strong presumption that the servant's authority to pledge his master's credit had come to an end. For instance, if a coachman who had, while in a particular service, authority to buy provender for his horses, were, long

* It was held in one case that notice to a servant of the tradesman was not sufficient, but that it must be given to the tradesman himself. In that case, however, the servant was a mere porter charged with the delivery of goods; and it is apprehended that, although he may well have been held not to have been agent of the master for the purpose of receiving notices with respect to the conduct of business, a different decision would have been arrived at had the notice been given to any person employed by the tradesman in a managing capacity. However, *to avoid* any doubts on this point, it would be advisable that, if *possible, the notice* of revocation should be given to the tradesman *himself.*

after he had left that service, and long after the interruption of the regular course of dealing, to go to a tradesman and give him an order, the latter would not be justified in executing it without ascertaining whether the servant still occupied the same position as formerly. If he were so careless as to neglect this precaution, a court would most likely refuse to hold the master liable.

## CHAPTER IX.

### OF THE MASTER'S LIABILITY FOR WRONGS COMMITTED BY HIS SERVANT.

Criminal Responsibility.—Civil Responsibility.—Liable for Negligence of Servants.—Contractors.—Limits of Liability.—When exonerated by Negligence of injured Person.

A MASTER is not responsible in a criminal court for the illegal acts of his servants, unless he expressly orders or personally co-operates in them. And where one employs another to do a thing which may be done either in an innocent or in a criminal manner, and the servant of his own accord selects the latter, the master cannot be indicted.

If, however, the master expressly directs the servant to commit a crime, there can be no doubt that the master may be proceeded against criminally; whether the servant can also be indicted will depend upon whether he did or did not know that he was committing an offence. If he did know it, he will of course be punishable, because no man is bound to commit a crime at the order of another; if he was in ignorance of the nature of the act, he will, on the contrary, be excused by his master's commands.*

* See further on this point, ante, p. 52.

Although masters are not (with an exception we shall presently mention) liable to indictment for crimes committed by their servants without their complicity, they are liable to informations for penalties incurred by the breach of statutory regulations by persons in their employment, notwithstanding they may be perfectly ignorant that any breach of the law was about to be or has actually been committed.*

Masters are also liable to indictment for public nuisances, such as carrying on offensive trades, committed by their servants, although they had personally nothing to do with the nuisance complained of.†

It would also appear from more than one case, that if the criminal act is done in an ordinary course of business sanctioned by the master, the latter will be

* A frequent illustration of this liability on the part of the master is to be found in the case of informations for breaches of the revenue laws. As was observed by Pollock, C.B., in one case, if the master was not held responsible for the breach by his servants of such of these laws as relate to the conduct of his business, the laws might "be evaded with the utmost facility and impunity; and they would be reduced to a mere dead letter."

† This liability is well illustrated by a case in which the directors of a gas company were indicted for a nuisance occasioned by the refuse from their works having been thrown into the Thames. It was contended that they were not liable, as there was no proof of their having criminally participated in the acts of their servants; and they did not, in fact, even know what was done. They were, however, found guilty and fined. Lord Denman remarked that their ignorance of what had been done was immaterial, provided they gave authority to the manager to conduct the works. "It seems to me," he added, "both common sense and law that, if persons for their own advantage employ servants to conduct works, they must be answerable for what *is done by those* servants."

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