[HIGH COURT OF AUSTRALIA.]

DARLING ISLAND STEVEDORING AND LIGHTERAGE COMPANY LIMITED Defendant, } APPELLANT;

AND

LONG . . . . . RESPONDENT.
Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1956, SYDNEY, *Nov.* 9, 12, 13;

1957, SYDNEY, May 3.

Williams, Webb, Fullagar, Kitto and Taylor JJ.

Action—Statute—Power to make regulations—Regulation imposing duty—What persons subject to duty—Breach of regulation—Person thereby injured—Right of action—Against whom action lies—Validity of regulation creating right——Master and servant—Vicarious liability—Liability for acts or for torts—Navigation Act 1912-1953 (*Cth.*), *s.* 425 (*c*) (*h*)—*Navigation* (*Loading and Unloading*) *Regulations*, *regs.* 4, 31.

Regulation 4 of the *Navigation* (*Loading and Unloading*) *Regulations* made pursuant to s. 425 of the *Navigation Act* 1912-1953 (Cth.) provides (*inter alia*): "person-in-charge", in relation to the loading or unloading of any ship, means any person directly or indirectly in control of the persons actually engaged in the process of loading or unloading that ship. Regulation 31 of such regulations provides:—"(1). Before any loading or unloading work is begun at a hatch on any vessel to which these Regulations apply, all hatch beams shall be removed unless the hatch is of such size as to permit of the work being carried out without any danger to the workers in the hold from a load striking against any beam left in place. (2). If the cargo is to be loaded or unloaded through more than one hatch and it is necessary to remove the hatch beams, the beams from the topmost hatch shall be removed first, and the beams from upper hatches shall be removed before those from lower hatches. (3). Where any hatch beam is left in place it shall, before loading or unloading work begins, be securely fastened at each end by means of stout bolts, with nuts attached, or other suitable fastenings provided for the purpose of preventing, and in such manner as to prevent, its accidental displacement. Penalty, on the person in charge: One hundred pounds".

Held, (1) by the whole Court, that reg. 31 is authorised by pars. (*c*) and (*h*) of s. 425 of the *Navigation Act* 1912-1953.

(2) by *Williams*, *Webb* and *Fullagar* JJ., *Kitto* and *Taylor* JJ. expressing no opinion, that a private right correlative with the duties imposed by reg. 31 exists in the persons for whose protection such regulation was made.

(3) by the whole Court, that the obligations created by reg. 31 are, regard being had to the definition of " person-in-charge " in reg. 4, cast upon the person actually exercising control on the spot where the operations are being carried out and not upon the employer of such person.

(4) by *Williams*, *Webb* and *Fullagar* JJ., that the obligations being so cast, an action at law for damages based upon breach of such statutory obligations brought against the employer as such of the person actually in control by reason of the latter's failure to perform such obligations will not lie, the employer not being liable for breaches by his employee of statutory obligations cast solely upon that employee and not upon the employer.

(5) by *Kitto* and *Taylor* JJ., that such an action will not lie, because, there being no duty laid upon the employer, the common law does not, where an employee has incurred a liability in damages by reason of an act or omission in the course of his employment, subject his employer to a like liability.

Principles relating to the liability of a master for the actions of his servant in the course of the employment considered ; *per Webb* J.: The law does not attribute to the master the liability that attaches to the servant ; *per Fullagar* J.: The common law rule often stated by the maxim *respondeat superior* is rightly stated in terms of liability and not in terms of duty. The liability is a true vicarious liability; that is to say, the master is liable not for a breach of duty resting on him and broken by him but for a breach of duty resting on another and broken by another ; *per Kitto* and *Taylor* JJ.: The master's liability, when it exists, is not a liability substituted for that of the servant. It exists, not because the servant is liable, but because of what the servant has done. It is a separate and independent liability, resulting from attributing to the master the conduct of the servant, with all its objective qualities, but not with the quality of wrongfulness which, in an action against the servant, it may be held to have because of considerations personal to the servant. The master is to answer for the servant's act as if it were his own; he is not to answer for his liability.

Decision of the Supreme Court of New South Wales (Full Court): *Long* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (1956) S.R. (N.S.W.) 387 ; 73 W.N. 570, reversed.

APPEAL from the Supreme Court of New South Wales.

On 24th November 1954 Alfred Harold Long commenced an action in the Supreme Court of New South Wales against Darling Island Stevedoring and Lighterage Company Limited (hereinafter called the defendant) by which he claimed damages in the sum of £10,000 for personal injuries sustained by him. By his declaration the plaintiff alleged that before and at the time of the committing of the grievances hereinafter alleged and at all material times the

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defendant was a stevedoring firm and employed the plaintiff as a wharf labourer and the plaintiff was then so employed and so engaged at or in connexion with certain loading and unloading operations at a certain hatch on a certain ship in the port of Sydney which said ship was a ship within the meaning of the *Navigation Act* 1912 as amended of the Commonwealth of Australia and to which the *Navigation* (*Loading and Unloading*) *Regulations* applied and the said loading and unloading operations on the said ship were carried out under a supervisor or foreman representing the defendant stevedoring firm and the defendant was thereupon required by the said regulations to securely fasten a certain hatch beam which had been left in place at each end by means of stout bolts or other suitable fastenings provided for the purpose of preventing and in such manner as to prevent its accidental displacement before the loading or unloading work began yet the defendant failed to securely fasten the said hatch beam at each end by means of stout bolts with nuts attached nor by any other suitable fastenings provided for the purpose of preventing and in such manner as to prevent its accidental displacement before the said loading and unloading work began whereby the said hatch beam became displaced and the plaintiff was thrown into the hold of the said ship and suffered injuries and pain of body and mind and for a long time was and will be unable to attend to his usual work and lost and will lose the wages he could and would otherwise have earned and incurred and will incur expense in treating his said injuries and was otherwise greatly damnified.

To the plaintiff's declaration the defendant filed three pleas of which only the third is here relevant and was in effect a demurrer to the whole of the declaration. This plea was as follows: 3. And for a third plea, the defendant says that the declaration is bad in substance. Matters of law intended to be argued (*inter alia*) are:— 1. That the declaration discloses no cause of action against the defendant. 2. That the *Navigation Act* 1912 does not confer power on the Governor-General to create by regulation a right of action for damages for breach of a regulation thereunder. 3. That reg. 31 of the *Navigation* (*Loading and Unloading*) *Regulations* does not create a right of action for and damages based on a breach of statutory duty. 4. That the breach alleged is a breach of regulation and not of statute. 5. That the *Navigation* (*Loading and Unloading*) *Regulations* and in particular reg. 31 in so far as it purports to create a legal liability in damages for a breach of statutory duty is *ultra vires* the legislative power of the Commonwealth of Australia.

6. That the declaration discloses no cause of action by way of breach of statutory duty.

To the third plea the plaintiff replied that the declaration was good in substance, and the demurrer was set down for hearing before the Full Court of the Supreme Court (*Roper* C.J. in Eq., *Ferguson* and *Manning* JJ.) which, *Ferguson* J. dissenting, ordered that judgment on the demurrer be entered for the plaintiff: *Long* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (1).

From this decision the defendant by special leave appealed to the High Court.

Sir *Garfield Barwick* Q.C. (with him *C. Langsworth*), for the appellant. We adopt the view of the court below that reg. 31 lays no duty on the employer but only on the person actually in control of the operation, in this case the foreman stevedore. [He referred to *Payne* v. *British India Steam Navigation Co. Ltd.* (2).] If the regulation lays no duty on the employer, it necessarily follows that the appellant could not be sued by virtue of the statute alone. The theory of actions for breach of statutory duty is that the statute intends that there shall be a cause of action as large but no larger than the criminal responsibility and such cause of action is against the person upon whom the duty is laid. Here, if the employer is not criminally responsible he is not civilly liable. [He referred to *Harrison* v. *National Coal Board* (3).] To say that the action extends beyond the person upon whom the duty is laid is to enlarge the statute. The appellant as employer is not liable for the result of the acts of its servant in breach of a duty owed by the servant, but not by the employer, even though such acts be done in the course of the employment. [He referred to *Adams* v. *Naylor* (4).] There is no precise authority to support the proposition put. The matter has come twice before the House of Lords and the Court of Appeal: see *Harrison* v. *National Coal Board* (5) and *Twine* v. *Bean's Express Ltd.* (6). The obligation to obey the regulation is only in point of duty in the servant, not the master, and if this is so what the servant does cannot involve the master in negligence. The principle of *Twine's Case* (7) is that the employer is only responsible for those acts of his employee which are in breach of the employer's duty if they are done in the course of the employment. [He referred to

(1) (1956) S.R. (N.S.W.) 387; 73 W.N. 570.
(2) (1947) S.A.S.R. 236, at pp. 240, 248, 251-254.
(3) (1951) A.C. 639, at p. 687.
(4) (1946) A.C. 543, at pp. 549, 550.
(5) (1951) A.C. 639, at pp. 650, 653, 656, 658, 659, 671, 687, 688.
(6) (1945) 62 T.L.R. 155, at p. 156; (1946) 1 All E.R. 202, at p. 204; (1946) 62 T.L.R. 458, at p. 459.
(7) (1945) 62 T.L.R. 155; (1946) 1 All E.R. 202.

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Conway v. *George Wimpey & Co. Ltd.* (1); *Wigmore, Select Essays in Anglo-American Legal History*, vol. 3, p. 474; *Broom* v. *Morgan* (2); *Smith* v. *Moss* (3); *Glanville L. Williams, Joint Torts and Contributory Negligence* (1951), par. 115, p. 435; *Salmond* on *Torts*, 11th ed. (1953), p. 117; *Holdsworth, History of English Law*, 1st ed. (1925), vol. 8, pp. 477-479; *Charlesworth* on *Negligence*, 3rd ed. (1956), pp. 66, 444, 445, 453; *National Coal Board* v. *England* (4).] The state of the authorities supports the submission that the employer is not liable for breach of a duty which is not his, even if his servant's duty is broken by an act done in the course of the employment. There is a rule of construction that prima facie where a statute lays a duty to take steps for the safety of people a cause of action will be implied, if an over-all view of the statute warrants such an implication. In relation to the regulation here in question two points arise, first does the regulation on its true construction create a cause of action, and secondly, if it does so, is it authorised. We adopt the analysis of these regulations made by *Abbott* J. in *Payne's Case* (5) and put these considerations:—(a) where the duty is laid on the employee it is unlikely that the legislature intended to lay upon him the entire risk of an action for damages for breach of duty, (b) the legislative emphasis is on having the duty performed rather than supplying a remedy to people who might be injured by its non-performance; (c) the regulation-making power provides for the making of regulations penalties for breach of which should not exceed imprisonment for three months and £100 in amount. One would lean against a construction which would provide a possibly larger liability than the statute itself. [He referred to *Haylan* v. *Purcell* (6).] The present regulations are not part of the Act as was the case in *O'Connor* v. *S. P. Bray Ltd.* (7) and accordingly the intention of the Act cannot be used in the construction of the regulation. There is no authority in the Act to create a cause of action if one be intended. [He referred to *O'Connor* v. *S. P. Bray Ltd.* (8).] Before a regulation can create a cause of action the regulation-making power must authorise its creation. There is here no such authority.

C. R. Evatt Q.C. (with him *M. E. Pile* Q.C. and *H. L. Cooper*), for the respondent.

(1) (1951) 2 K.B. 266, at pp. 272, 273, 274, 275, 276.
(2) (1953) 1 Q.B. 597, at pp. 602, 603, 604, 605, 607, 608.
(3) (1940) 1 K.B. 424, at p. 425.
(4) (1954) A.C. 403, at p. 415.
(5) (1947) S.A.S.R. 236.
(6) (1948) 49 S.R. (N.S.W.) 1; 65 W.N. 228.
(7) (1937) 56 C.L.R. 464.
(8) (1937) 56 C.L.R., at pp. 477, 478.

C. R. Evatt Q.C. The regulation here does create a statutory tort in accordance with the principles of *O'Connor* v. *S. P. Bray Ltd.* (1) and *Whittaker* v. *Rozelle Wood Products Ltd.* (2). Another test as to whether a statute or regulation creates a private right for breach of duty is to inquire whether assuming evidence were given of facts supporting a breach of the language of the statute or regulation, it would be open to a jury properly instructed to find negligence at common law. If a jury could so find, then the private right is created. Regulation 31 would answer this test and so should be construed to create a private right. Regulation 31 binds not only the foreman stevedore but also the stevedoring company. The company can be a " person-in-charge " within reg. 4 and it clearly has control of its employees. To hold otherwise would lead to an untenable situation having regard to the scope, purpose and general scheme of the Act. Alternatively if the company is not bound, it is nevertheless liable for a breach committed by its servant in the course of his employment. *Twine's Case* (3) has been adversely criticised by text writers: see *Modern Law Review* (1954), vol. 17, at pp. 114-116, 118. There are many statutory offences perpetrated by an employee which impose liability on the employer. [He referred to *Bugge* v. *Brown* (4).] Looking at the regulations broadly it is clear they are intended to bind employee and employer alike. The appeal should be dismissed.

M. E. Pile Q.C., with the consent of the appellant, presented written submissions to the Court in amplification of his leader's argument. The principal points are set out hereafter:—Before a civil remedy can be said to be conferred by a regulation it is not necessary that an intention should first be found within the Act itself to empower the Governor-General to create a new cause of action. To determine whether a new civil right is conferred where the duty is imposed by regulation the inquiry is whether the provision of the duty can be regarded as *intra vires* the statute. If the creation of a new obligation can be said to be in this the power delegated and imposed in the interests of the safety of a specified class, then an intention to create a private right will be imputed to the legislature automatically, unless a contrary intention appears in the Act. Instances of this type of approach are to be found in *Kininmonth* v. *William France Fenwick & Co. Ltd.* (5); *Harrison* v. *National*

(1) (1937) 56 C.L.R., at pp. 478, 486.
(2) (1936) 36 S.R. (N.S.W.) 204; 53 W.N. 71.
(3) (1945) 62 T.L.R. 155; (1946) 1 All E.R. 202; (1946) 62 T.L.R. 458.
(4) (1919) 26 C.L.R. 110, at pp. 116, 117.
(5) (1949) 65 T.L.R. 285.

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Coal Board (1); *Badham* v. *Lambs Ltd.* (2); *Johnson* v. *A. H. Beaumont Ltd.* (3); *Gatehouse* v. *John Summers & Sons Ltd* (4); *Hawkins* v. *Thames Stevedoring Co. Ltd.* (5); *Ashworth* v. *J. McQuirk & Co. Ltd.* (6); *Hughes* v. *McGoff and Vickers Ltd.* (7); *Elms* v. *Foster Wheeler Ltd.* (8); *Johnson* v. *Groggon & Co. Ltd.* (9); *Montgomery* v. *A. Monk & Co. Ltd.* (10); *Lane* v. *London Electricity Board* (11); *Hartley* v. *Mayoh & Co.* (12). Intention express or implied to create a cause of action is never found in the Act but is derived from extraneous considerations such as the policy of the Act, the provision or absence of provision of penalties and the pre-occupation of the legislature with the safety of a specified section of individuals. Such intention is imputed not because of, but in spite of, the absence of any words in the Act conveying an intention to create a new cause of action. The English decisions are all contrary to *Haylan* v. *Purcell* (13), which should at best be regarded as an opinion only upon the regulations there in question. Regulation 31 is couched in deliberately general terms to ensure that, whoever may be the actual director of the work, protection will be provided for those below, and should be construed to bind the employer as well as the employed. The provision in the regulation of a penalty upon the "person-in-charge" is no more than an added precaution for enforcing obedience. It is unlikely that the legislature would create a new cause of action and impose it only on a fellow employee. *Payne's Case* (14) was upon a different regulation and does not help here. Vicarious liability in the case of breach of duty under the general law does not differ from vicarious liability for breach of statutory duty. A distinction is not warranted either on principle or authority, and in both cases a breach by the servant creates a liability in the master. [He referred to *Clerk & Lindsell* on *The Law of Torts*, 11th ed. (1954), pp. 112, 113; *Bugge* v. *Brown* (15).] The master bears the servant's liability. The basis of the master's responsibility was examined in *Lloyd* v. *Grace, Smith & Co.* (16); *United Africa Co.* v. *Saka Owoade* (17). The approval of *Uthwatt* J. in *Twine's Case* (18) is a theoretical approach and seems contrary to the current

(1) (1951) A.C. 639.
(2) (1946) 1 K.B. 45; (1945) 2 All E.R. 295.
(3) (1953) 2 All E.R. 106.
(4) (1953) 2 All E.R. 117.
(5) (1936) 2 All E.R. 472.
(6) (1943) 2 All E.R. 446.
(7) (1955) 2 All E.R. 291.
(8) (1954) 1 W.L.R. 1071.
(9) (1954) 1 W.L.R. 195.
(10) (1954) 1 All E.R. 252.
(11) (1955) 1 All E.R. 324.
(12) (1954) 1 Q.B. 383; (1954) 1 All E.R. 375.
(13) (1948) 49 S.R. (N.S.W.) 1; 65 W.N. 228.
(14) (1947) S.A.S.R. 236.
(15) (1919) 26 C.L.R. 110, at pp. 116, 117.
(16) (1912) A.C. 716.
(17) (1955) A.C. 130.
(18) (1945) 62 T.L.R. 155; (1946) 1 All E.R. 202; (1946) 62 T.L.R. 458.

of authority. The House of Lords has exhibited a distinct disinclination to upset the traditional basis of liability: see *Harrison* v. *National Coal Board* (1) and *National Coal Board* v. *England* (2).

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

The following written judgments were delivered:—

WILLIAMS J. This is an appeal by leave from an order of the Full Supreme Court of New South Wales that judgment on demurrer be entered for the plaintiff. The appellant which is a stevedoring company is the defendant in an action in which the plaintiff, who is a wharf labourer, is suing it for £10,000 damages alleging in the sole count in the declaration that he was employed by the defendant to load and unload a ship in the port of Sydney, that these operations were carried on under a supervisor or foreman representing the defendant, and that the defendant was required by the *Navigation* (*Loading and Unloading*) *Regulations* where any hatch beam was left in place, before loading or unloading work began, securely to fasten it at each end by means of stout bolts, with nuts attached, or other suitable fastenings provided for the purpose of preventing, and in such manner as to prevent, its accidental displacement yet the defendant failed to do so whereby the hatch beam became displaced and the plaintiff was injured. To this count the defendant pleaded for a third plea that the declaration was bad in substance. The particulars filed of the matters of law intended to be argued in support of this demurrer included the following: 1. That the declaration discloses no cause of action against the defendant. 2. That the *Navigation Act* 1912 does not confer power on the Governor-General to create by regulation a right of action for damages for breach of a regulation thereunder. 3. That reg. 31 of the *Navigation* (*Loading and Unloading*) *Regulations* does not create a right of action for and damages based on a breach of statutory duty. 4. That the breach alleged is a breach of regulation and not of statute. When the demurrer came on for argument in the Supreme Court before *Roper* C.J. in Eq., *Ferguson* J. and *Manning* J. it soon became apparent that the declaration did not properly raise these questions and it was then agreed that the argument should proceed as though the declaration had been amended so as to do so. But no amendments to the declaration, though apparently contemplated, were actually made. It is of course always of assistance to a court of appeal if amendments to

(1) (1951) A.C. 639, at p. 671.

(2) (1954) A.C. 403, at pp. 415, 416, 421, 422.

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pleadings when allowed are actually made so that there can be no uncertainty or disagreement as to their precise effect. In the absence of any formal order it may be useful to refer briefly to what their Honours said about this agreement. *Roper* C.J. in Eq. said: "This is a demurrer to a declaration which as framed was ill-drawn to raise the issues of law which the parties wish to have decided. It was agreed, however, that the declaration as drawn should be read as though the Commonwealth regulations made pursuant to the *Navigation Act* 1912-1953, and known as the *Navigation* (*Loading and Unloading*) *Regulations*, were set out in it, and as though it alleged the due making of those regulations and a breach of the duty imposed by reg. 31 of them by a supervisor or foreman who was an employee of the defendant and was acting as person-in-charge within the meaning of that regulation, and acting in the course and scope of his employment" (1). *Ferguson* J. said: "As the demurrer book did not properly raise the questions desired to be argued, it was agreed at the hearing that it should be read as if the count demurred to alleged the terms of reg. 31 of the *Navigation* (*Loading and Unloading*) *Regulations*, and as if it were open to the defendant to argue that the regulation did not impose upon the defendant the duty alleged to have been broken, but that such duty was imposed upon some other person to the exclusion of the defendant" (2). *Manning* J. said: "In substance the plaintiff seeks to establish that he was injured as the result of a breach by the defendant of an obligation imposed upon it by the *Navigation* (*Loading and Unloading*) *Regulations*. The question for determination is whether, in the circumstances alleged, the plaintiff is entitled to maintain his action" (3).

It would seem that, pursuant to this agreement, the points of law argued before their Honours were as follows: (1) whether reg. 31 of the *Navigation* (*Loading and Unloading*) *Regulations* creates a civil right of action; (2) if it does, whether such an action can be brought only against the person on whom the obligation is expressly imposed by the regulation, that is to say the person-in-charge, or against what other persons; (3) whether "person-in-charge" in the regulation includes only the person actually in control of the loading or unloading, in this case the supervisor or foreman, or whether it also includes the employer of the person-in-charge; and (4) if it does not, whether the employer is nevertheless liable for a breach of the regulation committed by its servant,

(1) (1956) 56 S.R. (N.S.W.) 387, at p. 388; 73 W.N. 570, at pp. 570, 571.

(2) (1956) 56 S.R. (N.S.W.), at p. 390; 73 W.N., at p. 572.

(3) (1956) 56 S.R. (N.S.W.), at p. 395; 73 W.N., at p. 575.

the supervisor or foreman, in the course of his employment. Their Honours were all of opinion that reg. 31 does create a civil right of action but only against the person-in-charge and that the person-in-charge did not include the defendant. But *Roper* C.J. in Eq. and *Manning* J. were of opinion that the plaintiff was entitled to sue the defendant as the employer of the supervisor or foreman on the ground that an employer is liable for all breaches of duty, even breaches of duty imposed by a statute or regulation on the employee only, provided the breach of duty occurs in the course of his employment. This led the majority of the court to hold that the plaintiff in the present action could sue the defendant for damages in respect of the injuries he suffered from the failure of the supervisor or foreman of the defendant to observe the duty before loading or unloading securely to fasten the hatch beams although it was imposed only upon the supervisor or foreman and not upon the defendant by reg. 31. Their Honours pointed out that this important question had been raised but not decided in the House of Lords in *Harrison* v. *National Coal Board* (1) and *National Coal Board* v. *England* (2). *Roper* C.J. in Eq. said: "Whilst appreciating the doubts cast upon the matter in the cases to which I have referred, I prefer the positive dictum of Lord *MacDermott* expressed in *Harrison* v. *National Coal Board* (1): 'It comes to saying that (apart, of course, from the doctrine of common employment) a master is not vicariously responsible in respect of his servant's statutory negligence. To my mind this, as a general proposition, finds no support in principle or authority. Vicarious liability is not confined to common-law negligence. It arises from the servant's tortious act in the scope of his employment' (3). If this be the correct view, as I think it to be, the plaintiff is entitled to succeed in this demurrer, and in my opinion there should be judgment for the plaintiff in the demurrer" (4). *Manning* J. who was of the same opinion said: "I am of opinion that if a plaintiff is injured by reason of an act done by a servant in breach of a statutory duty expressly imposed upon such servant and the duty relates to an act which necessarily is to be done in the course of his employment, the master is vicariously liable notwithstanding that no duty is imposed, expressly or impliedly, upon the master" (5). On the other hand *Ferguson* J. who dissented said: "At common law a person is liable for a breach of duty causing damage to another only when such duty was personally owed by him to that other, and the breach

(1) (1951) A.C. 639.
(2) (1954) A.C. 403.
(3) (1951) A.C., at p. 671.
(4) (1956) 56 S.R. (N.S.W.), at p. 390; 73 W.N., at p. 572.
(5) (1956) 56 S.R. (N.S.W.), at p. 400; 73 W.N., at p. 579.

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causing the damage was his own act or omission, or the act or omission of his servants or agents acting within the scope of their employment. He cannot be liable for the breach of a duty not personal to himself. In an action claiming vicarious liability against the defendant, the plaintiff must allege in his declaration facts showing a duty owed by the defendant to the plaintiff and a breach of that duty by the defendant personally, or that the defendant by his servants and agents was guilty of the breach. The breach must necessarily be alleged as a breach by the defendant otherwise the count would be demurrable. The position is precisely the same where the duty does not arise at common law, but is imposed by statute or by regulations duly made under a statute. If the obligation so imposed is such that it gives civil rights to anyone injured by its breach, the only person who can be made liable to pay damages for its breach to anyone so injured is the person upon whom the obligation is laid. It follows that if in a particular industry such a statutory duty is imposed, not on the employer but on an employee, a person injured by its breach would be entitled to damages therefor from the employee and not from the employer, and this would be so even though the breach occurred when the employee was acting in the course of his employment in the sense that he was otherwise doing what he was employed to do" (1).

From the judgment of the Full Supreme Court for the plaintiff on the demurrer the defendant company obtained leave to appeal to this Court. The notice of appeal contains a number of grounds of which the following appear to be the most important: "2. That the Supreme Court of New South Wales was in error in holding that the *Navigation Act* 1912 conferred a power on the Governor-General to create by regulation statutory duties giving rise to civil rights of action. 3. That the Supreme Court of New South Wales was in error in holding that a breach of reg. 31 of the *Navigation* (*Loading and Unloading*) *Regulations* causing injury to a person engaged in the loading and unloading of ships gives rise to a private right in that person to maintain a civil action for damages. 4. That the Supreme Court of New South Wales was in error in holding that a civil action for damages based on a breach of reg. 31 of the *Navigation* (*Loading and Unloading*) *Regulations* is maintainable against the defendant as employer of the person-in-charge where the person-in-charge is the person upon whom reg. 31 imposes a statutory duty." The power under which the *Navigation* (*Loading and Unloading*) *Regulations* were made is contained in s. 425 of the *Navigation Act* 1912-1953 (Cth.). This section provides that: "The

(1) (1956) 56 S.R. (N.S.W.), at p. 394; 73 W.N., at p. 574.

Governor-General may make regulations not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act or for the conduct of any business under this Act, and in particular prescribing matters providing for and in relation to—". (Then follow fifteen paragraphs.) These paragraphs include: "(*c*) the protection of the health and the security from injury of persons engaged in the loading or unloading of ships;" and "(*h*) the fixing of penalties for breaches of the regulations, but so that no prescribed period of imprisonment shall exceed three months, and no pecuniary penalty shall exceed One hundred pounds". Regulation 4 of the *Navigation* (*Loading and Unloading*) *Regulations* provides *inter alia* that, unless the contrary intention appears, a "person-in-charge", in relation to the loading or unloading of any ship, means any person directly or indirectly in control of the persons actually engaged in the process of loading or unloading that ship. Regulation 31 on which the present action is founded provides: "(1.) Before any loading or unloading work is begun at a hatch on any vessel to which these Regulations apply, all hatch beams shall be removed, unless the hatch is of such size as to permit of the work being carried out without any danger to the workers in the hold from a load striking against any beam left in place. (2.) If the cargo is to be loaded or unloaded through more than one hatch and it is necessary to remove the hatch beams, the beams from the topmost hatch shall be removed first, and the beams from upper hatches shall be removed before those from lower hatches. (3.) Where any hatch beam is left in place it shall, before loading or unloading work begins, be securely fastened at each end by means of stout bolts, with nuts attached, or other suitable fastenings provided for the purpose of preventing, and in such manner as to prevent, its accidental displacement. Penalty, on the person in charge: One hundred pounds." Regulation 53 provides that: "When loading or unloading operations on a ship are being carried out—(*a*) under a supervisor or foreman as person-in-charge representing a stevedoring firm; or (*b*) under a responsible officer of the ship as person-in-charge, the person-in-charge shall be responsible for appropriate measures being taken for the protection against accident of any person employed on or about the ship, and for the effectiveness of the cargo gear for those operations." Regulation 55 provides that: "(1.) Any person who commits a breach of, or fails to comply with, any of these regulations shall be guilty of an offence. Penalty: Except where otherwise provided, Fifty pounds. (2.)

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Except where a duty or obligation is laid by a regulation upon some other person (in which case the penalty for breach of the regulation shall be upon that person), the master, owner and agent of the ship shall be jointly and severally liable to penalty in respect of any breach of the requirements of the regulation which occurs in relation to the loading or unloading of the ship."

The plaintiff had already sued the defendant for negligence at common law in respect of the same accident and in this action the regulations were tendered as evidence of negligence but the jury found a verdict for the defendant. An appeal to the Full Supreme Court of New South Wales was dismissed: *Long* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (1). The present action is therefore an attempt to relitigate very much the same facts to prove a separate cause of action, the advantage accruing to the plaintiff being that if he succeeds in establishing that the defendant is liable for a breach of a duty imposed by reg. 31 the defendant will be deprived of the defence of contributory negligence assuming that the *Statutory Duties* (*Contributory Negligence*) *Act* 1945 (N.S.W.) applies to duties imposed by regulations made under a statute as well as to duties imposed by the statute itself and also applies to duties imposed by a law of the Commonwealth. The courageous submission which is really on the threshold of the appeal was made by Sir *Garfield Barwick* that in the case of a statute such as the *Navigation Act* a power to make regulations such as that Act contains should not be construed as a delegation by Parliament of a power to enforce those regulations by any means other than the means provided by the power itself—in this case by the power to prescribe a period of imprisonment not exceeding three months or a pecuniary penalty not exceeding £100. It should not therefore be construed as a power to make a regulation prescribing specific precautions to be taken before loading or unloading ships for the safety of those engaged in these operations which gives rise to a civil right correlative to the duty for the breach of which the person on whom the duty is imposed is liable to punishment. The correlative right has been found to exist in numerous regulations made under statutes in the United Kingdom but it was sought to distinguish these regulations made under the *Navigation Act* because the Imperial statutes themselves prescribed the punishment for breach of the regulations whereas in the *Navigation Act* this prescription, within limits, is delegated to the Governor-General in Council. It was contended that where the statute itself prescribes

(1) (1956) S.R. (N.S.W.) 137; 73 W.N. 185.

the punishment it is easy to ascribe to Parliament an implied intention to authorise the delegate to create a correlative civil right but the same intention should not be attributed to Parliament where, instead of prescribing the penalty itself, it authorises its delegate to prescribe the penalty. In this case it should not be implied that Parliament intended to authorise its delegate to make regulations that could be enforced except by the prescribed means.

But it is impossible to see how the circumstance that in one case the criminal sanction is created by Parliament itself whereas in the other it is created by its delegate can produce such a distinction. The question in each case, whether the duty is created by a statute or by a regulation made under the authority of a statute, is whether the duty appears to be created for the individual benefit of all such persons as can bring themselves within its scope or only for the benefit of the State and is of such a kind that the injury likely to be sustained by such individuals from its breach is of such a character that it could be made the subject matter of an action for damages at common law. The principle is now clearly established that where a statute is passed requiring an employer to take specific precautions for the protection of his employees, although the statute only provides for a prosecution for breach, the statute creates an individual civil right of action in the class of persons for whose protection it is passed so that any one of them who is injured by the breach can sue the employer in an action for damages at common law. The principle is stated in felicitous terms in the passage in the judgment of *Dixon* J., as the Chief Justice then was, which is reported in *O'Connor* v. *S. P. Bray Ltd.* (1): "Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears. The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on" (2). It is impossible to limit this principle to duties created by statutes. It must apply equally to regulations made under the authority of statutes where the delegate is authorised to make regulations relating to such a subject matter. The regulation if valid must create the same correlative civil right as the same provision in the statute would create unless the delegate is expressly

(1) (1937) 56 C.L.R. 464.

(2) (1937) 56 C.L.R., at p. 478.

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confined by the statute to making regulations which can only be enforced in a particular manner. The duty could then be enforced in that manner and in no other manner. In the present case s. 425 of the *Navigation Act* authorises the Governor-General in Council to fix penalties for breaches of the regulations. This does not indicate at all that Parliament intended that the regulations should be enforced in this and in no other manner. The indications are to the contrary. The power to fix penalties is simply one of a number of specific powers delegated to the Governor-General in Council. A regulation that is authorised by the general power to make regulations for carrying out or giving effect to the Act or by any of the powers to make regulations relating to specific subject matters would be a valid regulation although the power to fix a penalty for the breach was not exercised at all and the breach of the duty could be punished only as a misdemeanour at common law. Section 425 specifically authorises the Governor-General in Council to make regulations in relation to the protection of the health and the security from injury of persons engaged in the loading or unloading of ships and a law of this character whether contained in a statute or in a regulation made under the authority of a statute is the very kind of law which is likely to give rise to such a correlative civil right.

Regulation 31 of the *Navigation* (*Loading and Unloading*) *Regulations* imposes a penalty of £100 for breach of duty on the person-in-charge. The definition of " person-in-charge " has already been set out. The person directly in control of the process of loading or unloading the ship is alleged in the declaration to be the supervisor or foreman of the defendant. The supervisor or foreman could clearly be prosecuted for a breach of the duty imposed by the regulation. The question is whether the duty is also imposed upon the defendant by the regulation. The definition of " person-in-charge " includes any person indirectly in control of the persons actually engaged in the process of loading or unloading a ship. It is impossible to give any real meaning to the word " indirectly ". An employer, in this case, the defendant stevedoring company, who employs a supervisor or foreman to take charge of the loading or unloading of a ship could not be said to be even indirectly in control of the persons actually engaged in the process of loading or unloading the ship. The employer would not be in control of them at all. Its supervisor or foreman would be in control and it could only be made responsible at common law for any breach of duty on his part because at common law an employer is vicariously responsible for anything done or omitted to be done by his servant in the course of

his employment. The definition of " person-in-charge " seems to be quite inapt to make such a person include the employer of the person actually in control of the work. In reg. 53 the supervisor or foreman as person-in-charge is clearly distinguished from the stevedoring firm he represents, and there is no reason to suppose that " person-in-charge " has not the same meaning in both regulations. Where the ship is being loaded or unloaded under a responsible officer of the ship as person-in-charge reg. 53 clearly places the responsibility upon this officer to see that its requirements are carried out. If it was intended that the same responsibility should at the same time be placed upon the master of the ship as included within the definition of " person-in-charge " there would be no sense in reg. 55 (2) because the provisions of this sub-regulation clearly contemplate that a duty or obligation can be laid by a regulation upon some other person so as to exonerate the master, owner and agent of the ship from liability to see that it is performed. The regulations, in addition to regs. 31 and 53, contain several other regulations, for instance regs. 40, 41, 44 and 45, where the duty is imposed upon the person-in-charge and all these regulations point to the person in actual control of the work of loading or unloading as the person on whom the duty is intended to be laid. Regulation 23 is a regulation which sharply defines the distinction between the duties imposed upon the person actually in charge of the loading or unloading and the master of the ship. The regulations do not detract at all from the vicarious responsibility at common law of the owner or master of the ship or of the stevedore for any negligence on the part of an officer or member of the crew of the ship or of any supervisor or foreman of the stevedore occurring in the course of their employment. Regulation 31 relates to certain simple but very important precautions that must be taken before loading or unloading begins. They are precautions which fall aptly to be observed by the person actually on the spot and in control of the operations. There is no sufficient indication of intention in the regulations as a whole or in particular in reg. 31 that duties imposed upon the person in charge should be imposed upon any person except the person actually in control of the work of loading or unloading the ship. This was the unanimous conclusion of their Honours in the Supreme Court and with that conclusion we should agree.

The final question is whether the appellant can be sued at common law for breach of the statutory obligation placed upon its supervisor or foreman but not upon it by reg. 31 because it is the employer of the supervisor or foreman. On this question, as has been seen, the Supreme Court was divided. *Roper* C.J. in Eq. and *Manning* J.

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were of opinion that the defendant could be sued whereas *Ferguson* J. was of opinion that it could not. If the defendant can be sued it must be because an employer is responsible for statutory wrongs committed by his servant in the course of his employment. In this case reg. 31 provides that the supervisor or foreman of a stevedore shall see that certain precautions are taken before the work of loading or unloading a ship begins. It was contended that this is a statutory duty imposed upon the supervisor or foreman in the course of his employment and that the employer is vicariously liable for breach of such a duty by his employee. But the vicarious liability of an employer for the acts and omissions of his servant in the course of his employment is a liability at common law. If the omission of the supervisor or foreman to take the precautions before loading or unloading a ship prescribed by reg. 31 would be a breach of the duty of care that the supervisor or foreman owed those engaged in loading or unloading the ship at common law the stevedore could be sued at common law because he would be vicariously responsible for this breach of duty. But the employer could not be made liable for the breach by his servant of a duty imposed by a statute or regulation on the servant and not on the employer. To make the employer liable in such a case would be to enlarge the scope and operation of the statute or regulation. Where a statute or regulation creates a civil right of action it can be enforced in an action for damages at common law. But it is the statute or regulation that creates the civil right and not the common law. It is the common law that supplies the remedy. It is only in this respect and to this extent that such a duty can be said to become part of the common law. This was the conclusion reached by *Ferguson* J. and that conclusion was right. The civil right does not originate in the common law at all. It is necessary to go to reg. 31 in order to ascertain the nature and extent of the duty and the persons who are bound to perform it. The duty created by that regulation is imposed not on the stevedore but on his supervisor or foreman. The stevedore is not included within its scope and to hold that the stevedore could be responsible for a breach of the regulation by the supervisor or foreman simply because the latter is in the employment of the former would give the regulation an operation not justified by its provisions. The regulation, as has been said, is a regulation of the kind apt to create a correlative civil right and such a right was probably created by it. But this right would be correlative with the criminal liability and punishment for breach of the duty is not imposed on the defendant but on its supervisor or foreman. Any correlative civil liability for breach of the duty

created by the regulation must therefore also be confined to the supervisor or foreman. It would seem to be quite inconsistent with principle to hold that an employer upon whom no personal liability is imposed by a statute or regulation can be sued for a breach of that duty simply because it is committed by an employee in the course of his employment. The statute or regulation can, if Parliament or its duly authorised delegate sees fit, impose a personal duty on the employer and he is then bound to see that the duty is performed. If the statute or regulation creates a correlative civil right the employer is personally liable if any person whom the law was intended to benefit suffers injury from the failure to perform the duty whether it is the employer himself who fails to do so or his servant or even an independent contractor. But where the employer is only vicariously liable for the acts and omissions of his servant in the course of his employment, the employer could only be liable for the breach by his servant of a statutory duty laid on the servant alone if he was sued at common law and that breach was evidence of the negligence of the servant at common law.

For these reasons the appeal should be allowed.

WEBB J. The facts and the relevant provisions of the *Navigation Act* 1912-1953 and of the *Navigation* (*Loading and Unloading*) *Regulations* are set out in the judgment of *Williams* J. with which I agree.

In my opinion what the present Chief Justice said in *O'Connor* v. *S. P. Bray Ltd.* (1) as to the circumstances under which civil liability is impliedly imposed by a statute applies also to regulations validly made under a statute. I cannot see why it should follow from the fact that Parliament confers power on the regulation-making authority to impose a pecuniary or other penalty for a breach of the regulations and remains silent on the question of civil liability that Parliament thereby reveals an intention to exclude civil liability for such breach. The rule *expressio unius est exclusio alterius* does not have a different application to legislation delegating authority to legislate from what it has to other legislation. If it does not exclude civil liability where the statute itself specifies the safeguards and imposes a penalty for disregarding them, as in *O'Connor* v. *S. P. Bray Ltd.* (2), it does not exclude civil liability where the statute delegates the power both to prescribe the safeguards and to impose the penalty for infringement, although the statute fixes the maximum penalty (s. 425). But apart from any possible application of the *expressio unius* rule there is no difference

(1) (1937) 56 C.L.R. 464, at p. 478. (2) (1937) 56 C.L.R. 464.

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in principle that I can see between the two forms of legislation that would impose civil liability in the one case and exclude it in the other. I think then that civil liability may be incurred for a breach of reg. 31.

Then as to whether the employer is liable in civil proceedings for a breach of reg. 31 by his servant: the employer is not a "person-in-charge" and so has no statutory duty, unless he actually conducts the operation referred to in reg. 31, whether on the spot or from a distance, say through the telephone. And the law does not attribute to the employer the liability that attaches to the servant: *Twine* v. *Bean's Express Ltd.* (1). Then the only duty the employer could have, if he is not a "person-in-charge", would be to direct the employee's attention to reg. 31 and to require him to observe it. But this would still not be a statutory duty of the employer, although arising out of one: if it exists, which I doubt (as to this see *Salmond* on *Torts*, 11th ed. (1953), p. 118) it is a duty at common law and its breach constitutes ordinary actionable negligence, which, however, was negatived in the earlier proceedings between these parties, and cannot be again litigated between them. As I see it this position would arise on any set of facts capable of proof here, as no additional facts could establish in this case anything more than a breach of legal duty apart from contract, i.e. negligence. So I have not been influenced by the fact that the proceedings were on demurrer and thus restricted to alleged facts conceded for that purpose.

FULLAGAR J. The facts of this case, the relevant statutory provisions and regulations, and the effect of the judgments of the learned judges of the Supreme Court, are set out fully in the judgment of my brother *Williams*. I have had the advantage of reading that judgment and I agree with it. I wish, however, to add one or two observations.

I think myself that there is much intrinsic force in Sir *Garfield Barwick's* argument that s. 425 of the *Navigation Act*, which gives an express, but strictly limited, power to the regulation-making authority to attach a penal sanction to a breach of any of the provisions of a regulation, does not, on its true construction, authorise that authority to attach a civil sanction to such a breach. It does not seem to me to be a complete answer to this argument to say that the regulation imposes the duty, while the common law gives the remedy. For the question raised by the argument is whether the Act of Parliament gives power to create by regulation duties enforceable by action at the suit of a person injured by a

(1) (1945) 62 T.L.R. 155; (1946) 1 All E.R. 202, at p. 204.

breach thereof. As is said in *Salmond* on *Torts*, 11th ed. (1953), p. 605, " there is no such remedy unless the legislature, in creating the duty, intended it to be enforceable in this way ". The intention must be found in the legislation, and the distinction between such a case as *Atkinson* v. *Newcastle Waterworks Co.* (1) and such a case as *Groves* v. *Wimborne* (2) seems to be treated as a matter of construction of the relevant enactment. Sir *Garfield Barwick's* point would be, so to speak, brought out into the open, if the regulations expressly declared that an action for damages should lie at the suit of any person injured by a breach of any of their substantive provisions. Would such a provision be authorised by s. 425 of the Act? I feel real difficulty in saying that it would. In *Commerford* v. *Board of School Commissioners of Halifax* (3) there was an ordinance of the city of Halifax, made under the charter of that city, which required the occupiers of abutting premises to remove snow from the sidewalk. The charter, like our *Navigation Act*, gave a limited power to provide penalties for breaches of any provision of an ordinance. *Ilsley* J., after referring to *Thayer's* article in 27 *Harvard Law Review* 317, at pp. 331-333, said that there was no English or Canadian authority directly in point. He said " But does the charter empower the council to impose liability for damages? The intention to confer a power to alter civil rights by Ordinance should certainly not be lightly assumed ". He referred to a case in the Supreme Court of Canada, and to another in the Supreme Court of Ontario, and proceeded : " The legislature of course did not expressly confer on the council power to impose liability for damages. It did expressly confer power to impose penalties . . . . it is impossible that the legislature intended the council to have power to create liabilities for damages when the council's powers to prescribe sanctions or remedies were expressly dealt with " (4). It seems to me, with respect, that there is very great force in this judgment. There are, however, many cases since *Atkinson's Case* (5), in which it has been held that a substantive enactment imposing penalties for breaches of its commands creates also a right of action in a person injured by such a breach. These cases make it difficult to say that a corresponding construction should not be given to an enactment which does not itself give specific command but empowers some authority to give specific commands. The whole position is unsatisfactory, but I agree that we should accept and apply the principle stated by the present Chief Justice in *O'Connor* v. *S. P. Bray Ltd.* (6). It follows, I think, that we should

(1) (1877) 2 Ex. D. 441.
(2) (1898) 2 Q.B. 402.
(3) (1950) 2 D.L.R. 207.
(4) (1950) 2 D.L.R., at p. 217.
(5) (1877) 2 Ex. D. 441.
(6) (1937) 56 C.L.R. 464, at p. 478.

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hold both that reg. 31 creates a duty for breach of which an action may lie, and also that the creation of such a duty is authorised by s. 425.

With regard to the question to which most argument was addressed, I am in complete agreement with the conclusion of *Williams* J. and with the reasons given by his Honour for that conclusion. I do not myself think that it is either necessary or profitable, for the purposes of this case, to inquire into the nature or origin or theoretical justification of the rule of the common law that "a master is liable for any tort committed by his servant while acting in the course of his employment" (*Salmond, Law of Torts*, 3rd ed. (1912), p. 84). The position in this case is simply that the plaintiff sues for breach of a statutory duty, and, in order to succeed, he must find not merely a statutory duty but a statutory duty imposed on the defendant. If the defendant can be brought within the expression "person-in-charge" in reg. 31, the plaintiff can find such a duty. But, in my opinion, that expression cannot be construed as including the defendant company. And, in my opinion, that is the end of the matter. I do not think that any serious question could ever have arisen in the case if that most unfortunate expression, "statutory negligence", had not gained a certain currency. If that expression is used merely as a convenient label, it may do no harm, but it is inaccurate and misleading in the extreme. It is a misuse of a term with a long-established meaning to call a breach of a statutory duty a "tort", and it is, I think, a harmful invention to call it "statutory negligence". Duties of the kind now under consideration are imposed without regard or reference to the common law standard of reasonable care, and a breach of such a duty may or may not, according to circumstance, amount to negligence. Although he declined to express a concluded opinion, and purported merely to be stating an argument, I think it clear that the position is correctly stated in a sentence in the opinion of Lord *Reid* in *Harrison* v. *National Coal Board* (1). His Lordship said: "If Parliament has put no duty on the employer, or if the only duty which Parliament has put on the employer is that he shall do his best to see that his servant carries out his statutory duty, and if the employer has done his best, then he has done all that is required of him . . . " (2).

If I had thought it necessary to analyse the basis of a master's liability for his servant's torts, I should have been much more nearly in agreement with the views of *Manning* J. than with those of *Ferguson* J. The common law rule, which is often stated, but

(1) (1951) A.C. 639.

(2) (1951) A.C., at p. 688.

is neither really formulated nor at all explained, in the maxim "*respondeat superior*", was, I think, adopted not by way of an exercise in analytical jurisprudence but as a matter of policy, which did not really need to be juristically rationalised, but might perhaps be justified (however illogically) as an extension of the notion of agency as a ground of liability: see *Holdsworth, History of English Law*, 1st ed. (1925), vol. 8, p. 477. The rule is, in my opinion, rightly stated, as it always is, in terms of liability and not in terms of duty. The liability is a true vicarious liability: that is to say, the master is liable not for a breach of a duty resting on him and broken by him but for a breach of duty resting on another and broken by another. The notion of liability without breach of personal duty is not a legal impossibility. It seems very clearly exemplified in the common law rule that a husband is liable for the ante-nuptial torts of his wife—a rule which was modified, but not abrogated, by s. 14 of the *Married Women's Property Act* 1882 (Imp.). Under this rule a man might be liable for something done by a person whom he has never known or seen or heard of until long afterwards.

The position is quite different in cases where a person is said (inaccurately) to be liable for the negligence of an "independent contractor", or an employer is held liable for failure to provide a "safe system of working". In these cases there *is* a personal duty on the "employer" and a breach of that duty. The true position is, I think, finally made clear by the House of Lords in the important case of *Stavely Iron & Chemical Co. Ltd.* v. *Jones* (1). In that case Lord *Morton of Henryton* said: "My Lords, what the court has to decide in the present case is: Was the crane driver negligent? If the answer is 'Yes', the employer is liable vicariously for the negligence of his servant. If the answer is 'No', the employer is surely under no liability at all. Cases such as this, where an employer's liability is vicarious, are wholly distinct from cases where an employer is under a personal liability to carry out a duty imposed upon him as an employer by common law or statute. In the latter type of case the employer cannot discharge himself by saying: 'I delegated the carrying out of this duty to a servant, and he failed to carry it out by a mistake or error of judgment not amounting to negligence'. To such a case one may well apply the words of *Denning* L.J. (2): '(The employer) remains responsible even though the servant may, for some reason, be immune'. These words, however, are, in my view, incorrect as applied to a case where the liability of the employer is not personal but vicarious. In such a

(1) (1956) A.C. 627.

(2) (1955) 1 Q.B., at p. 480.

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case if the servant is 'immune', so is the employer" (1). Lord *Porter* (2) said that he agreed with what was said by Lord *Morton of Henryton* and Lord *Tucker*. Lord *Reid* said: "It is a rule of law that an employer, *though guilty of no fault himself*, is liable for damage done by the fault or negligence of his servant acting in the course of his employment" (3). (The italics are mine). Lord *Tucker* expressed agreement with what had been said by Lord *Morton of Henryton*, and himself (4) distinguished between cases of "personal negligence" on the part of an employer and vicarious responsibility for the acts of a servant. Lord *Cohen* agreed with the opinion of Lord *Tucker*. The views expressed by their Lordships in this case appear to me to accord with the view of this Court in *Tooth & Co. Ltd.* v. *Tillyer* (5) and with the view which I expressed at the end of my judgment in *Hamilton* v. *Nuroof (W.A.) Pty. Ltd.* (6).

I have felt impelled to say so much because there was so much argument before us on these matters. But I am of opinion that they have no real bearing on the present case. Here the only question is the question dealt with by *Williams* J.—Does the statute, as a matter of construction, impose a duty on the defendant? And I agree with his Honour that it does not.

I would add only one thing. It appears that the plaintiff brought a previous action against the defendant, alleging negligence as the ground of liability, and using the alleged breach of reg. 31 as evidence of negligence. In that action the jury gave a verdict for the defendant, and judgment was entered accordingly. Both the acts alleged to found liability, and the damage alleged to have been suffered, were apparently the same in that action as in this, and I have great difficulty in understanding why the defence of *res judicata* was not raised in the plaintiff's present action.

The appeal should, in my opinion, be allowed.

KITTO J. Regulation 31 of the *Navigation (Loading and Unloading) Regulations* made under the *Navigation Act* 1912-1953 (Cth.) provides as follows:—"(1). Before any loading or unloading work is begun at a hatch on any vessel to which these Regulations apply, all hatch beams shall be removed unless the hatch is of such size as to permit of the work being carried out without any danger to the workers in the hold from a load striking against any beam left in place. (2.) If the cargo is to be loaded or unloaded through more than one hatch and it is necessary to remove the hatch beams,

(1) (1956) A.C., at p. 639.
(2) (1956) A.C., at p. 640.
(3) (1956) A.C., at p. 643.
(4) (1956) A.C., at pp. 646, 647.
(5) (1956) 95 C.L.R. 605.
(6) (1956) 96 C.L.R. 18, at p. 34.

the beams from the topmost hatch shall be removed first, and the beams from upper hatches shall be removed before those from lower hatches. (3.) Where any hatch beam is left in place it shall, before loading or unloading work begins, be securely fastened at each end by means of stout bolts, with nuts attached, or other suitable fastenings provided for the purpose of preventing, and in such manner as to prevent, its accidental displacement. Penalty, on the person in charge: One hundred pounds."

In my opinion the only person upon whom this regulation places any obligation is the person referred to by the expression the " person-in-charge ". The expression is defined as meaning, in relation to the loading or unloading of any ship, any person directly or indirectly in control of persons actually engaged in the process of loading or unloading that ship. " In control " in this context means, in my opinion, having and exercising control on the spot, as a supervisor, foreman or the like.

The regulation is authorised by pars. (*c*) and (*h*) of s. 425 of the Act, which enable regulations to be made prescribing (*inter alia*) matters in relation to the security from injury of persons engaged in the loading or unloading of ships, and the fixing of penalties for breaches of the regulations.

I shall assume that, on the principles to which I have referred in *Australian Iron & Steel Ltd.* v. *Ryan* (1), and notwithstanding any considerations which may be thought to arise out of the limitations of the constitutional power upon which the validity of the Act and regulations depends, a private right exists in the persons for whose protection reg. 31 is made; that is to say a private right correlative with the duties imposed by the regulation, and entitling any person who enjoys the right and is injured by a breach of the regulation to recover damages from the " person-in-charge ".

The defendant company, however, is not sued as a " person-in-charge ". It is sued as the employer of a " person-in-charge ". Upon an employer, as such, the regulation places no duty, and therefore as against him it creates no private right. No doubt proof of a breach of its provisions would afford evidence of negligence in an action against the employer, as surely as it would in an action against the " person-in-charge "; but the action we have here to consider is not an action of negligence. It is an action in which the plaintiff's whole case is that, personal injury having been caused to him by a breach of the regulation committed by a " person-in-charge " of a process of loading and unloading in which the plaintiff was one of the persons actually engaged, the fact that it was in the course

(1) (1957) 97 C.L.R. 89.

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of his employment by the defendant that the " person-in-charge " committed the breach entitles the plaintiff to damages against the defendant.

This contention accepts as its hypothesis that reg. 31 places no duty upon the defendant. It depends upon the proposition that whenever a servant incurs a liability in damages by reason of an act or omission in the course of his employment (a breach of contract, I suppose, being excepted), the common law subjects his master to a like liability. In my opinion the proposition is not sound.

In the Supreme Court *Ferguson* J. has stated the law as I understand it, and I doubt whether I can very usefully add to what his Honour has said. But recognising the weight which must be allowed to the opposite opinion, and out of respect for those who have given it their support, I must add what I can.

I think it is fair to say that both in judicial statement and in academic writing confusion has arisen at times from the use of language which is ambiguous because it may refer either to a person's acts or omissions considered simply as conduct or to the legal quality of those acts or omissions considered as infringements of some right of another person. Thus " negligence " is often used to refer to a failure to use reasonable care, without necessarily importing that the failure constitutes in the particular instance a breach of a duty to use reasonable care. So, too, it is often said that a master is liable for the " torts " or " wrongs " of his servant committed in the course of the employment, when all that is in mind is that a master is answerable for acts of his servant which are done in the course of the employment and depart from a standard or course of conduct which happens to be obligatory upon both master and servant. The tendency to confuse the acts of a servant (matters of pure fact) with his torts (matters of mixed fact and law) is fostered by the use of the expression " vicarious liability ". As Professor *Glanville Williams* has lately reminded us in a learned article, (1956) 72 *Law Quarterly Review* 522, at p. 524, Sir *Frederick Pollock* wrote in 1916 that he had invented the term thirty odd years before: *Holmes' Pollock Letters*, vol. 1, p. 233. " It has done much ", says Professor *Williams*, " to consolidate opinion that the master is liable for the servant's wrong or tort ". Yet *Pollock*, in using the term as early as 1877, does not seem to have thought that one man's tort was to be treated as another's. The full expression which he used was " vicarious liability for a servant's act "; and he referred to the fiction as being " that act of agent = act of principal ": *Letters*, vol. 1, p. 7. It seems to me that " vicarious liability "

should be recognised as an example of transferred epithet, and as referring to a liability for vicarious acts: see per *Denning* and *Hodson* L.JJ. in *Broom* v. *Morgan* (1). The master's liability, when it exists, is not a liability substituted for that of the servant. It exists, I think, not because the servant is liable, but because of what the servant has done. It is a separate and independent liability, resulting from attributing to the master the conduct of the servant, with all its objective qualities, but not with the quality of wrongfulness which, in an action against the servant, it may be held to have because of considerations personal to the servant. The master " is to answer for the act as if it were his own.": *Dansey* v. *Richardson* (2). He is not to answer for the servant's liability, but for his act; and to say that one man must " answer " for another's act implies that it was a wrongful act for the former to do.

In the common case of damage caused to a stranger by careless driving on a highway by a servant in the course of his employment, the principle requires that the driving of the servant be treated as the driving of the master; but the result is to hold the master liable, not for the servant's breach of a duty of care which he, the servant, owed to the stranger, but for a breach of a duty of care which the master himself owed to the stranger. The duties were of course identical in nature and extent, for the stranger's right not to be injured by carelessness on the highway was a right which he possessed as against everyone. It is not usually of practical consequence to distinguish between the master's duty and the servant's, for the standard of care is the same in each case: *Staveley Iron & Chemical Co. Ltd.* v. *Jones* (3). Accordingly, in the words of Lord *Reid*: " if the servant is liable so is the master " (4); but that, as I understand it, is because the one piece of carelessness constituted a breach of a duty which was incumbent upon master and servant alike. Lord *Reid*, in his references (5) to *Broom* v. *Morgan* (6) and *Stapley* v. *Gypsum Mines Ltd.* (7) appears to recognise that the master may be held liable notwithstanding that the servant has a good defence other than a denial of his having acted without due care. The point which his Lordship was at pains to make was that the duties of care were co-extensive, so that the master could not be held liable " when his servant was not guilty of fault ", which I take to mean when his servant was not guilty of carelessness, that being the objective quality which conduct ascribed to the master

(1) (1953) 1 Q.B. 597, at pp. 607-609, 612.
(2) (1854) 3 El. & Bl. 144, at p. 162 [118 E.R. 1095, at p. 1101].
(3) (1956) A.C. 627, at pp. 639, 643.
(4) (1956) A.C., at p. 642.
(5) (1956) A.C., at p. 644.
(6) (1953) 1 Q.B. 597.
(7) (1953) A.C. 663.

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must exhibit if he is to be guilty of a breach of a duty owed by him. I do not understand Lord *Morton's* language as intended to express a different view (1). As I read his Lordship's observations, what was there being insisted upon, and what all their Lordships insisted upon in criticising some of the words which had been used by *Denning* L.J. in the Court of Appeal, was not that there was anything wrong in saying that " his servant's acts are, for this purpose, to be considered as his acts ", but was that the standard by which the conduct of both master and servant was to be judged was the one objective standard. Nothing said by any of their Lordships appears to me to show disagreement with the view expressed in a note on the case of *Broom* v. *Morgan* (2) in the *Law Quarterly Review* (1953), vol. 69, at p. 297 as to what was described as " an error in the analysis of a master's vicarious liability ": " The error lies in saying that a master is liable ' for any tort committed by his servant ', when the correct statement ought to be that a master is liable ' for any negligent or intentionally wrongful act committed by his servant '. In other words the master is liable not for the tort, but for the act of his servant. It is immaterial therefore whether the servant is himself liable or not."

The point emerged in the case of *Twine* v. *Bean's Express Ltd.* (3), which was followed in *Conway* v. *George Wimpey Ltd.* (4). A servant driving his master's van gave a stranger a lift during a journey which was being made in the course of the servant's employment, and by the servant's negligent driving on that journey the stranger was killed. The servant, clearly enough, owed the stranger a duty of care, and for breach of it he might have been sued. His careless driving was to be considered the careless driving of the master, so that, if harm had resulted to anyone who had a right as against the master not to be so harmed, the master would necessarily have been liable. But the question was, had the stranger any such right as against the master. Since the master did not know, and had no reason to contemplate the possibility, of his being in the van, it could not be said that the stranger had any such right unless it were found that he was there by virtue of a permission given by the servant and binding upon the master. The servant had no actual authority, indeed he was forbidden, to let such a person as the stranger ride in the van. Was, then, the servant's grant of permission to be in the van binding upon the master as an act done in the course of the employment and within the scope of the servant's

(1) (1956) A.C., at p. 639.
(2) (1953) 1 Q.B. 597.
(3) (1945) 62 T.L.R. 155; (1946) 1 All E.R. 202; (1946) 62 T.L.R. 458.
(4) (1951) 2 K.B. 266.

apparent authority? The Court of Appeal affirmed a decision of *Uthwatt* J. (afterwards Lord *Uthwatt*) that there was no ground for so holding. Some discussion of the judgments took place before us, but in so far as there is doubt as to their meaning the doubt can spring only, I think, from failing to observe that it was material for two purposes, and not only for one, to consider what was in the course of the servant's employment. Whether the driving of the van was in the course of the employment determined whether the servant's careless driving should be attributed to the master. Whether the giving of the lift to the stranger, i.e. the continuing permission to the stranger to be in the van, was in the course of the employment determined whether the giving of that permission should be attributed to the master, so as to create in favour of the stranger a duty of care on the part of the master which otherwise would not have existed. In the judgment of *Uthwatt* J. there is a passage which brings out the point of importance for the present case, and it is a passage which met with no expression of disapproval in the Court of Appeal: " The law attributes to the employer the acts of a servant done in the course of his employment and fastens upon him responsibility for those acts. In determining the duty of the employer and the duty of the servant on any occasion, all the circumstances have to be considered. In the general run of cases, the duty of both is the same; but this is a coincidence, not a rule of law. The general question in an action against the employer, such as the present, is technically: 'Did the employer in the circumstances which affected him owe a duty?'—for the law does not attribute to the employer the liability which attaches to the servant " (1).

In the Supreme Court the view seems to have been taken that this represents a modern refinement, peculiar to the law of negligence and resting upon some unstated considerations of public policy which ought not to be regarded as justifying an extension of the refinement to other branches of the law. I think, with respect, that this is a mistake. The conclusion that the true principle makes the master responsible for the servant's acts and not for his liabilities has ample support in authorities far from modern, and neither referring exclusively to negligence nor basing the principle upon reasons which lack validity in relation to wrongs generally. Examples may be found mentioned by Professor *Glanville Williams* in the article above mentioned, and by *Street* in his *Foundations of Legal Liability* (1906). It will suffice to quote from *Bacon's Abridgment*, 5th ed. (1798), vol. 4, p. 583: " The reason why the acts of

(1) (1945) 62 T.L.R. 158; (1946) 1 All E.R. 202, at p. 204.

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the servant are, in many instances, esteemed the acts of the master, arises from the relation between a master and servant; for as in strictness everybody ought to transact his own affairs, and it is by the favor and indulgence of the law that he can delegate the power of acting for him to another, it is highly reasonable that he should answer for such substitute, at least *civiliter*; and that his acts, being pursuant to the authority given him, should be deemed acts of the master". There is nothing to be gained by speculating here upon the various theories which have been propounded from time to time to explain why this is to be considered "highly reasonable". Many would doubtless agree with *Street* that the principle is simply an axiom of the law, and that *Bacon's* words are merely an elaborate expansion of the thesis, the acts of the servant are the acts of the master because it is highly reasonable that this should be so: *op. cit.*, vol. II, pp. 464, 467. At least this statement of the thesis must be acknowledged as an accurate reflexion of *Bacon's* proposition that the master "should answer for such substitute"; for the proposition clearly enough relates to the substitute's acts, and not to his duties or liabilities.

The distinction has an important result in relation to trespass. The old action of trespass was confined to instances of the direct application of force. An indirect application of force would support only an action of trespass on the case. If a servant committed an act of force against a stranger, he was, of course, liable to the stranger in trespass. But, subject to a qualification which will be mentioned, the master was not so liable, even though the servant was acting at the time in the course of his employment. The master was liable in case only. The reason was thus stated by Baron *Parke* in *Sharrod* v. *London & North Western Railway Co.* (1). "The maxim '*Qui facit per alium facit per se*' renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless . . . the act was done 'by his command'; that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it; or some act which leads by a physical necessity to the act complained of" (2). (See also *McManus* v. *Crickett* (3); *McCorquodale* v. *Shell Oil Co. of Australia Ltd.* (4).) The qualification to which I have

(1) (1849) 4 Exch. 580 [154 E.R. 1345].
(2) (1849) 4 Exch., at p. 585 [154 E.R., at pp. 1347, 1348.
(3) (1800) 1 East 106 [102 E.R. 43].
(4) (1932) 33 S.R. (N.S.W.) 151; 50 W.N. 77.

referred is made clear by this passage. It was that a specific command to do the act complained of, or to do something necessarily involving that act, made the servant the master's instrument for the very purpose, and that was considered sufficient for the conclusion that the act was the direct act of the master. But when the master's only connexion with the act was that he had employed the servant for the work in the course of which the act was done, then although it was to be considered " the same as if it were the master's own act " (*Bartonshill Coal Co.* v. *McGuire* (1)), apparently the judges felt that to treat the act not only as the act of the master but as the direct act of the master was carrying strict logic too far. Consequently, although the master was held liable for the act, it was on a different cause of action. The point is that the choice which the courts made was between treating the act as the master's direct act and treating it as his indirect act. They did not carry over the servant's liability to the master in pursuance of a notion that it had been vicariously incurred by him; they fixed the master with a " distinct and independent liability, a liability all his own ": per *Cardozo* C.J. in *Schubert* v. *Schubert Wagon Co.* (2), cited in *Waugh* v. *Waugh* (3) and *Broom* v. *Morgan* (4).

It remains to apply these considerations to the present case. The proceeding in which the Supreme Court gave the judgment now under appeal was a demurrer, misdescribed as a plea, to a declaration which alleged *inter alia* that the defendant was required by the regulations to fasten a certain hatch beam in a particular manner before loading or unloading work began and that the defendant failed to do so. The declaration is not demurrable as it stands, but before the Supreme Court the parties agreed that it should be read as if it were amended in such a manner as to raise for decision the questions of law upon which they were in difference. Unfortunately, no amendment was in fact made. The learned judges were not quite at one in their statements of the amendment agreed upon, but at least it was agreed that the declaration should be understood as alleging that the regulations had been duly made and as setting out *in extenso* the relevant portions of them. The intention must have been that, in the event of reg. 31 being construed as placing the duty mentioned in the declaration upon the person in charge only, the allegations that the defendant was required to fasten the hatch beam in the specified manner before loading or unloading began and that he failed to do so should be treated as alleging that

(1) (1858) 3 Macq. 300, at p. 306.
(2) (1929) 249 N.Y. 253, at p. 257.
(3) (1950) 50 S.R. (N.S.W.) 210, at p. 214; 67 W.N. 175, at p. 178.
(4) (1953) 1 Q.B. 597, at p. 606.

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the person-in-charge was required to do so and that in the course of his employment by the defendant that person committed a breach of this duty. So understood, the declaration is demurrable, because it was only upon the person-in-charge that reg. 31 imposed a duty, and, for the reasons above-mentioned, the fact, if it was a fact, that the person-in-charge committed a breach of the regulation in the course of his employment by the defendant does not carry the consequence that a liability for damage resulting from the breach falls upon the defendant.

I am therefore of opinion that, if the agreed amendments had been made to the declaration, judgment in demurrer should have been entered for the defendant. I do not think, however, that it is right to enter that judgment while the declaration stands in a form which is not demurrable. In my opinion the right course is to set aside the order of the Supreme Court, and to remit the demurrer to that court in order that all proper amendments may be made in the declaration and that the demurrer may then be dealt with according to law.

I agree that the appeal should be allowed.

TAYLOR J. I agree with the views expressed by *Kitto* J. on the matters raised for decision but I wish to make a few observations, firstly, concerning what appears to me to have been the critical point of divergence between the conflicting views held in the Supreme Court and, secondly, concerning the suggestion that the general rule, apart from a " refinement " relating to liability for negligence, is, and always has been, that a master is liable for the torts of his servants committed in the course of their employment.

In undertaking this task it is convenient to start by quoting a passage from the reasons of *Manning* J. After an examination of the manner in which the broad principles relating to the liability of masters for the acts of their servants had developed his Honour noticed a refinement in the principles relating to the liability of a master for the negligent acts of his servants. He said: " The refinement, which has emerged more recently, and which in my view gives rise to most of the difficulties which now exist, is designed to distinguish between the servant's ' tort ' and his ' acts '. In negligence cases it may no longer be correct to say that the master is liable for the ' negligence ' of his servant. He is liable for his servant's ' acts ' in the course of the employment but only when a person to whom the master owes a duty is injured as a result of such ' acts '.

"But assuming as I do that this refinement is one which should be made, the question which now arises is whether a similar refinement should be made in cases where the tort alleged is one other than negligence.

"I have had the advantage of reading the reasons of *Ferguson* J. and I am much impressed with the logical approach which he makes to the problem. Many difficulties would be swept away if the rule developed in the negligence cases could be applied and only the 'acts' of the servant as distinct from his 'torts' examined.

"But the development of this branch of the law has not been based on logic, and, in my opinion, it is necessary to determine whether the considerations of public policy, which gave rise to the refinements I have mentioned, are present in the circumstances now under consideration, or whether, on the contrary, public policy requires that the old rule should be applied, namely that the master is liable for what his servant shall do when acting about the master's business and in the course of the employment" (1).

After observing that it seemed to be impossible to arrive at a completely satisfactory solution his Honour reached the conclusion that the appellant in this case should be held liable. This conclusion resulted from the view that negligence is a particular species of tort and that consideration of the liability of a master for the negligent acts of his servants gives rise to particular questions which do not arise in the case of other torts. Foremost among these, of course, is the question whether there has been a breach of a duty of care owed by the master to a plaintiff. This is the first essential and it is a concept which, in general, is foreign to other torts. Therefore, his Honour concluded, refinements which may be made in formulating the principles upon which a master will be held liable for the negligent acts of his servants have no general application in other cases and, accordingly, that, in such other cases, the master may, in effect, be said to be liable for the torts of his servants committed in the course of their employment.

Whilst not wishing to deny that, perhaps, the latter proposition accurately states what is generally the result of the application of the proper principle, one thing should be made clear. This is that, although in negligence the plaintiff's action is for damages resulting from the breach of a duty of care owed by the defendant to the plaintiff, the basis of a defendant's liability in the case of other torts is no less precisely defined. It is, however, not defined by reference to a duty of care; on the contrary, the plaintiff in such cases seeks to recover damages for the invasion by the defendant

(1) (1956) 56 S.R. (N.S.W.) 387, at p. 400; 73 W.N. 570, at p. 578.

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of some personal or proprietary right. And it is clear that in neither case will a plaintiff be held entitled to recover unless he establishes, in the one case, a breach of an appropriate duty owed to him by the defendant or, in the other, the infringement of some established personal or proprietary right. Since, in cases of the latter type, the same acts, whether performed by the master himself or by his servant, or indeed by any other person, will constitute an infringement of such a right it may be of academic interest only to assert in that, in such cases, the master is responsible, not for the torts of his servants committed in the course of their employment, but only for their acts when so performed. Nor, except in special circumstances such as the present, or such as presented themselves in *Twine* v. *Bean's Express Ltd.* (1), is it much to the point to draw such a distinction in cases of breach of a statutory duty or negligence for, in general, the like duty will be found to have been owed to the plaintiff both by the master and his servant. The present case, however, is exceptional; the basis of the claim is for breach of a duty owed, exclusively, by the appellant's servant to the respondent and no other ground is advanced upon which the latter may assert a claim for damages against the appellant. In these circumstances, I am unable to see that the facts, as assumed to be alleged by the plaintiff, disclose any cause of action against the appellant.

Manning J., in the course of stating the reasons which led him to a contrary conclusion referred to the evolution of the principle by which a master is fastened with responsibility for the tortious acts of his servants when executed in the course of their employment. As he pointed out the principle commenced to develop after a period during which the accepted doctrine was that a master was not liable unless he had commanded the performance of the tortious act in question or unless its performance was necessarily involved in the execution of some particular order. " Many reasons have been assigned by different writers " for the development of the modern principle nearly all of which " have been criticised and declared inadequate " (*Street—Foundations of Legal Liability* (1906), vol. II, p. 458), but, whether or not it is possible to say that any one reason induced the development of the principle more than any other, it may, with reasonable safety, be asserted that the sole purpose and effect of the new principle was to extend the field in which liability should attach to a master for the acts of his servants. The extension of this field, however, did not result in masters becoming legally liable for the torts, as distinct from the acts, of their servants.

(1) (1945) 62 T.L.R. 155 ; (1946) 1 All E.R. 202 ; (1946) 62 T.L.R. 458.

During the period when the so-called doctrine of " particular command " was current the master was so identified with acts performed pursuant to such a command that their performance involved the servant in no liability at all. The master was taken to be completely identified with such acts and it was not until *Michael* v. *Alestree* (1) that the notion developed that liability should attach to both master and servant. " Thereafter " says the learned author of *Foundations of Legal Liability* (1906), vol. II, p. 451, " the idea that only the master, and not the servant, is liable for damages occasioned by the latter's negligence found no recognition ".

As will be observed the liability of a master during the earlier period did not arise because his servant had committted a tort; on the contrary it arose because it was permissible to say that the master, himself, had *directly* performed the tortious act in question. But when the area of the master's liability was extended and he became liable in case for the acts of his servants performed in the course of their employment the notion of identification with the acts of his servants was not completely imported. Yet there was considered to be sufficient in the relationship of master and servant to render the former answerable in case for the acts of his servants when performed in the course of their employment. But, again, this was a liability with respect to the acts of servants and not in respect of their torts. The distinction may be demonstrated by referring to cases such as *Day* v. *Edwards* (2) where it was held that, although a plaintiff who had been injured on the highway by the impact of the defendant's vehicle whilst being driven by the defendant, might sue in trespass, he could not sue in case. " If ", said Lord *Kenyon*, " the injury be committed by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon that act, an action upon the case is the proper remedy " (3). The same view was taken in *Leame* v. *Bray* (4) but it was possible after *Rogers* v. *Imbleton* (5) to forecast its early demise. One may, however, ask what was then the position of a master where a plaintiff had been injured in like circumstances by the negligent driving of the master's servant in the course of his employment. Cases such as *Ogle* v. *Barnes* (6) and *Moreton* v. *Hardern* (7) make it clear that, in such circumstances, it was never thought that merely because the servant's acts had been performed

(1) (1676) 2 Lev. 172 [83 E.R. 504]; (1676) 3 Keb. 650 [84 E.R. 932].
(2) (1794) 5 T.R. 648 [101 E.R. 361].
(3) (1794) 5 T.R., at p. 649 [101 E.R., at p. 362].
(4) (1803) 3 East 593 [102 E.R. 724].
(5) (1806) 2 B. & P.N.R. [127 E.R. 568].
(6) (1799) 8 T.R. 188 [101 E.R. 1338].
(7) (1875) 4 B. & C. 223 [107 E.R. 1042].

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within the scope of his employment the master could be liable in trespass. Yet he would have been held liable in case for the injuries negligently inflicted. The result is, therefore, that after the development of trespass on the case the same set of circumstances might subject a servant to liability for trespass *vi et armis* and the master to an action on the case for injuries negligently inflicted. At this stage it may be said with conviction that, in such circumstances, the master was not liable for his servant's tort, which was trespass *vi et armis*, but answerable only for the negligent act or acts of his servants performed within the scope of his employment and resulting in damage to the third person. *Kitto* J. has already quoted from *Sharrod* v. *London & North Western Railway Co.* (1) observations of *Parke* B. which show clearly that the same set of circumstances might expose a master and his servant, respectively to quite different causes of action.

The early learning on this branch of the law does not suggest to my mind any reason for forming the opinion a master is, or ever was, answerable for the torts, as distinct from the acts of his servants; on the contrary the development of the modern principle consisted in the extension of a notion which identified masters with the acts of their servants but, in the extension of the area of liability, the development did not effect a complete identification as theretofore.

In the circumstances I am of the opinion that the appeal should be allowed and since that view prevails it is desirable that the pleadings should be amended before the case is finally disposed of.

Appeal allowed with costs. Judgment and order of the Supreme Court discharged. In lieu thereof order that judgment on the demurrer be entered for the defendant.

Solicitors for the appellant, *Dawson, Waldron, Edwards & Nicholls.*
Solicitor for the respondent, *Aidan J. Devereux.*

R. A. H.

(1) (1849) 4 Exch. 580 [154 E.R. 1345].