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UNIVERSITY OF GLASGOW

Ph.D. THESIS

"Development of the common law of Master and Servant in Scotland from the close of the Industrial Revolution period to the present day".

ISAAC P. MILLER

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PREFACE

The idea of preparing this work came to me originally whilst I was Senior Lecturer at the former Scottish College of Commerce, but I was unable to make any real progress with research until I joined the Staff of the Department of Law of Glasgow University in October 1960.

A very considerable amount of background and general reading has been done during the compilation of this thesis. Due acknowledgment is made wherever appropriate and, of course, the remainder of the work is entirely my own effort, as are the views (critical and otherwise) expressed, particularly those in chapters one and five.

It is right and proper that I should acknowledge much valuable help from the following persons - Miss Margaret Martin of the Library Staff at Glasgow University, formerly in charge of the Law Branch Library there; Mr. Lawrence Ardern, Librarian of the former Scottish College of Commerce; and the Librarian to The Royal Faculty of Procurators in Glasgow. My requests and queries were always met with unfailing courtesy and it never really surprised me that all three librarians could produce - as if by magic - copies of reference and general works which were virtually unobtainable.

It is hoped that this minor opus will prove to be a useful contribution to the legal literature of "Master and Servant" in Scotland.

Glasgow:
26th March, 1965.

Isaac P. Miller.

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Note:- Although numerous other books and materials were consulted in the course of research, those above listed were selected as being the most relevant and helpful to this work.

Chapter 1

Historical Introduction to the period of study.

The year 1830 has been selected as a convenient starting point for this particular study of the development of the common law relationship of master and servant because it represents the closing phase of the Industrial Revolution.[1] During the period of that revolution Great Britain had virtually changed over from being a nation almost wholly dependant upon an agricultural economy to one which relied upon the output of the industrial machine. The final result was that Great Britain emerged as the leading industrial nation in the latter part of the nineteenth century and perhaps the first quarter of the twentieth.

There seems little doubt, from a study of the pages of the economic historians and the sociologists, that conditions in the factories during the first half of the nineteenth century were frightful[2] and, in addition to

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1. See "The Industrial Revolution" (1760-1830) (O.U.P.) by Emeritus Professor T.S. Ashton - and see also the bibliographical references annexed thereto.
2. See "A Social and Economic History of Britain 1760-1960" by Pauline Gregg (Harrap) (3rd Edn. revised 1962), particularly at pages 54-56 and pages 120-124; and also "The Bleak Age" by J.L. and Barbara Hammond on the important question of social conditions in Great Britain at this time. See particularly the Introductory chapter and also pages 26-32; and pages 44 and 45 of the book.

this, the housing and general living conditions of the working population (though it might be more accurate to refer to this section of the population as the employed classes) were almost comparable with conditions in the factories. Later, during the mid-Victorian period, there seemed to be a more hopeful air of general prosperity hovering over the country as a whole.

Nevertheless, this illusion of prosperity did not mean that the employed classes were inactive and happy to maintain an attitude of "laissez-faire" towards their own position. Nothing could be more untrue. Not only had an early co-operative movement begun in Scotland and also, as seems more widely known, in Rochdale, around 1844,[3] but the trade unionists were striving to build up strong associations which would enable employees in numerous trades to bargain with their employers on terms which might be hoped to be reasonably equal. Of course, they did not go about this task in the same way within each union nor did each union adopt

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3. See Gregg op. cit. pages 74-77, explaining the early movement in Scotland; and G.D.H. Cole's "Short History of the British working class movement 1789-1947" (Allen & Unwin) (1948), stressing the developments in Rochdale - at pages 89 and 114 but particularly at pages 155 to 161 inclusive.

the same rôle in relation to the employers. It must be remembered that the Combination Acts of 1799 and 1800[4] had introduced strong-arm legislation which was principally designed to stifle the growth of active combinations of workpeople for the purpose of improving their conditions of labour and their wages. These Acts were the successors of early statutes both in England and Scotland which had been passed for precisely the same purpose. The 1799 and 1800 Acts were repealed in 1824[5] but some further tightening up of the law took place in 1825[6]. Accordingly, during the first half of the nineteenth century and almost until the first Trade Union Act was formally passed in 1871, many criminal prosecutions were taken in England under the crime of "conspiracy" (which could also be a civil action for damages against the wrongdoer) and although prosecutions were also taken in Scotland it seems that the law of conspiracy (whether criminal or

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4. 39 Geo. 3. c.81 and 39 and 40 Geo. 3. c.106 respectively.
5. Combination Laws Repeal Act (5 Geo. 4. c.95).
6. The Combination Laws Repeal Act Amendment Act, 1825 (6 Geo. 4. c.129).

civil, but particularly criminal) never developed to the same extent as it did in England.[7]

After a trade union revival circa the year 1841, one of the leading unions was the Amalgamated Society of Engineers which developed as a so-called "new model" union. Later on again, it was to change its name to the Amalgamated Engineering Union and to remain as one of the major unions in modern Britain. It seems to be accepted that the Amalgamated Society of Engineers was not a mere benefit society looking to the needs of its members who were in sickness and ill-health, but something much stronger than that - indeed a militant trade union fighting an individual struggle with the engineering employers,[8] who ranked along with the mine-owners as the toughest and most uncompromising of employers. The Engineers saw clearly that their only chance of survival was to fight - not for them the gradual slow-moving process of parliamentary legislation. In any case, they were disenfranchised.

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7. See Macdonald on the "Criminal Law of Scotland" (5th Edn.) (1948) (W. Green & Son) at pages 185 and 187 and relevant footnotes, particularly footnote number one on page 186.

8. See G.D.H. Cole, op cit. pages 173 to 178 inclusive. The best known work dealing with the A.E.U. is J.B. Jefferys - "The Story of the Engineers"; see also Webb (Sidney and Beatrice) - History of Trade Unionism, chapter 4, pages 204-224; and Clegg, Fox and Thompson - History of British Trade Unions, vol. 1, chapter 1.

In contrast to them, other workers - for example in the textile industries - followed a policy of gradual progression, looking to statutory protection to assist them in time. Strangely enough the miners, who fought many bitter struggles with their own employers and eventually became a trade union of great strength and power, themselves adopted a policy of seeking industrial legislative protection.

Prior to the statutory protection afforded to trade unions from 1871 onwards, the position of any combination whose main object was to impose restraint of trade meant that, from the viewpoint of the ordinary civil law, the contractual obligations and trusts of that union or combination were quite void and unenforceable. Moreover, the criminal law afforded no protection to the funds - and if a treasurer or other official embezzled those funds the union could not, in England at any rate, though not - it is submitted - in Scotland where the prosecution is undertaken at the instance of the Crown Office, institute proceedings against the offending official. This latter point, in its relation to the position in England, was very clearly illustrated in the early case of Hornby v. Close,[9] although that decision was over-ruled by statute[10]

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9. (1867) 2 Q.B. 153; followed in Farrer v. Close (1869) 4 Q.B. 602.

10. The Trade Unions Funds Protection Act, 1869. (32 and 33 Vict. c.61).

some two years later.

In the same year as the decision in Hornby v. Close was given, the Government had set up a Royal Commission to look into the whole question of the position and status of trade unions.[11] In the meantime the electoral franchise had been conferred upon workmen for the first time and it was duly exercised at the General Election of 1868.

Furthermore, the Report of the Royal Commission on the Labour Laws appeared in 1875, but it was not very satisfactory from the unions' point of view. It recommended some minor amendments to the law of conspiracy but without advising that strong measure of protection which the unions sought. However, the Employers and Workmen Act 1875[12] and the Conspiracy and Protection of Property Act 1875[13] did contribute to the improvement of the legal status of the unions and confer a certain immunity in the conduct of industrial disputes. So much so, that the unions genuinely thought that their funds were sacrosanct and untouchable - until their views were shattered into fragments by the impact of the decision in

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11. See Webb (Sidney and Beatrice), op. cit. chapter 4, pages 260-262; and Clegg, Fox and Thompson, op. cit. chapter 1.
12. 38 and 39 Vict. c.90.
13. 38 and 39 Vict. c.86.

the famous Taff Vale case,[14] when the House of Lords held that a registered trade union could be sued in its registered name in an action based upon tort (that is delict, in Scotland) and its funds could be attached in satisfaction of any judgment given by the court against the union. The legal force of this decision, on the point of liability in tort, was to be negatived in due course by the Trade Disputes Act of 1906.[15]

Meanwhile, in relation to factories and workshops the legislators had not been idle.[16] The 1867 Act[17] was an important development because it applied to factories generally and to workshops. A Royal Commission was appointed in 1876 to consider the question of the Factory Statutes and thereafter, in 1878, a new Act[18] was passed which consolidated the Statute law relating to factories and which improved the administration, but without making

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14. Taff Vale Railway Co. v. The Amalgamated Society of Railway Servants [1901] A.C. 426; 70 L.J.K.B. 905; 83 L.T. 474.

15. 6 Edw. 7, c.47.

16. See Hutchins and Harrison - "History of Factory Legislation (3rd Edn., 1926), passim.

17. The Factory Act 1867 (30 and 31 Vict. c.103). See also the Workshop Regulation Act 1867 (30 and 31 Vict. c.146).

18. 41 and 42 Vict. c.16.

any major changes. These changes did not really take place until the Act of 1901[19] went on the statute book, to be replaced by the very extensive and comprehensive Factories Act of 1937, amended in 1948 and 1959 and now all replaced and consolidated by the Factories Act, 1961.[20]

In the field of employers' liability the harshness of the attitude to employees who were engaged in a common employment was modified, to some extent, by the Employers' Liability Act, 1880.[21] This was to be followed by an early form of Workmen's Compensation[22] which was itself to be replaced by the Industrial Injuries Scheme of 1946, introduced as part of the new statutory programmes dealing with social security in Britain after the second world war (following up the Beveridge Report[23]) and pointing the way towards a better standard of living in the post-war era. The National Insurance Act of 1946[24] and the National Insurance (Industrial Injuries) Act[25] of the same year were the basic statutes in this new legislation.

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19. The Factory and Workshop Act, 1901 (1 Edw. 7 c.22).
20. 9 and 10 Eliz. 2. c.34; see Redgrave's "Factories Acts" (20th Edn., 1962).
21. 43 and 44 Vict. c.42; see Fraser - Master and Servant.
22. See principally the Acts of 1897 (60 and 61 Vict. c.37), 1906 (9 Edw. 7, c.16) and 1923 (13 and 14 Geo. 5. c.42).
23. "Social Insurance and Allied Services", Report by Sir William Beveridge, 1942 (Cmd. 6404).
24. 8 and 9 Geo. 6. c.67.
25. 8 and 9 Geo. 6. c.62.

Yet industrial unrest continued in the 1880s. The Scottish Miners' Federation was formed in 1886, much of the active pioneering work being done by James Keir Hardie In 1889 the London dockers were involved in a serious dispute with their employers,[26] obtaining certain concessions as a result. Another Royal Commission was appointed in 1891 - this time to go into the whole question of Labour and Industrial Relations. It proved to be quite abortive - and indeed a recommendation made by the Commission that collective agreements should be made legally enforceable and that trade union funds should become liable for any breaches of these agreements received very minor support.

One development of some moment occurred in the Lancashire Cotton industry, in the year 1893. This was the adoption of the "Brooklands Agreement", which provided machinery for settling disputes in that industry, without a stoppage of work.[27]

At the General Election of 1906 the Liberal Party went back into power. The Labour members and trade-unionists (whether members of Parliament or active senior union officials) promised support to the government as a

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26. See Clegg, Fox and Thompson, supra, pages 55-64.
27. Cole, op. cit. at pages 255 and 344.

quid pro quo for the passage of the Trade Disputes Act, 1906[28]. They had been campaigning actively for statutory protection for the unions, ever since the Taff Vale decision of 1901 which prima facie seemed to the trade unionists of the day to strike at the very root and foundation of trade-unionism, namely by limiting their power to organise a stoppage of work as this would be followed by an action (or series of actions) against the union and substantial damages could well be awarded, the union funds being liable for arrestment or attachment in any diligence process whereby the decree or judgment was being enforced. Perhaps the most famous section of the Trade Disputes Act is Section 4, which gives an absolute immunity or protection to the trade unions (or their representatives acting on their behalf) in delictual or tortious actions. This is a protection which they retain today. It is always possible, however, to sue trade union officials in their individual capacity and if they have committed any delictual or tortious act then damages can be awarded against them personally. In such a case the particular trade union concerned might make certain ex gratia payments to these officials to help meet the

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28. See Clegg, Fox and Thompson, op. cit. pages 364-394; and also "Agenda for a Free Society" (Seddon, (ed.)) particularly chapter 8 thereof by Sir Henry Slesser.

damages and legal expenses, although it is not under any legal duty to do so.

Those persons who look upon the trade unions with disfavour hold strong views that the immunity conferred by section 4 of the 1906 Act should either be abolished altogether or should be effectively curtailed. The trade unionists, on the other hand, take the view that the protection which they are supposed to have in the course of a trade dispute is not wide enough and should be extended to include all actings (whether prima facie delictual or tortious) necessary to the effective conduct of a trade dispute and where the actings are done on behalf of or in the best interests of the union and its members (including, for example, all actings in support of a "closed shop" policy).

Following the Taff Vale case (superseded by the Trade Disputes Act, 1906) there came in 1909 and 1910 the very important cases of Osborne v. The Amalgamated Society of Railway Servants[29]. The real crux of the litigation here was the question whether a trade union could, at this time, spend part of its fund for a political object - namely in support of the Labour Party and certain of their candidates. It was held that it could not do so. This decision was over-ruled by statute law, some three years

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29. [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 27 T.L.R. 289.

later, with the passing of the Trade Union Act, 1913.[30] The Labour Party and the trade unions had achieved this object by continual pressure. The statute defined the "specified political activities" upon which moneys from the political fund could be spent. The fund itself was to be governed by a separate code of rules, known as the "political fund rules". The true spirit of the Act was that there was to be no discrimination against members who did not wish to contribute. This very point was tested in the comparatively recent case of Birch v. The National Union of Railwaymen,[31] where there was held to be discrimination against a Branch chairman, a non-contributor to the political fund, who was virtute officii a Trustee of the fund and who was dismissed from office.

Industrial unrest continued prior to the first world war, particularly in the coalfields. During the war years, 1914-1918, an industrial truce was proclaimed by the unions. Nevertheless an unofficial strike (that is to say, one which does not have the backing of the union or unions concerned) took place in the Engineering industry in February 1915 on Clydeside. This was

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30. 2 and 3 Geo. 5, c.30.

31. [1950] Ch. 602; 66 T.L.R. 1223; 94 S.J. 384; [1950] 2 All E.R. 253.

ultimately settled by a reference to government arbitration and an increase in wages, above the limit proposed by the employers, was awarded to the employees in the industry.[32]

Compulsory arbitration was introduced by the Munitions of War Act 1915,[33] which applied primarily to the shipbuilding and engineering industries, but with powers to apply it to other war industries. In fact the statute was used during a major dispute in the South Wales coalfield by the "proclamation" procedure contained in the Act. The miners ignored this and struck. Finally, the government gave way and most of the demands made by the miners were conceded. Compulsory arbitration was abolished in 1918.[34]

The outstanding feature of the year 1917, in the field of industrial relations, was the first Whitley Committee Report[35] which proposed Joint Industrial Councils, representing the trade unions and the employers' associations, with District Councils and Works Committees - but only in the well-organised industries. Apart from the

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32. See Cole, op. cit. at page 354.

33. See Cole, loc. cit.

34. By the Wages (Temporary Regulation) Act, 1918; (8 and 9 Geo. 5, c.61).

35. See Cole, op. cit. pages 368 and 369 and the "Reports of the Whitley Committee on Relations between Employers and Employed". (See the Industrial Relations Handbook published by H.M.S.O.)

development relating to Trade Boards the Whitley scheme was a failure. The "heavy" industries would have nothing to do with it. However, the scheme did lead to a greater use of collective bargaining in state and municipal services and to the passing of the Trade Boards Act of 1918.[36]

The Industrial Court was formed in 1919 by a statute passed in that year.[37] The following year the Emergency Powers Act[38] gave the government special powers to deal with an emergency situation caused by widespread industrial unrest e.g. disruption of the transportation system or of the supply of essential foodstuffs to the general population. The Labour Party continued its pressure on the government for the retention of the "right to strike" and the exclusion of "industrial conscription".

After the close of the First World War there came a very brief period of prosperity with rising wages matched by rising prices and then the inevitable slump. On 4th May 1926 the "General Strike" paralysed the country - its root cause being the "lock-out" of the miners by the coal-owners on 30th April, 1926. The Trades Union Congress pledged "sympathetic" support to the miners and

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36. 8 and 9 Geo. 5, c.32.
37. The Industrial Courts Act, 1919 (9 and 10 Geo. 5 c.69).
38. 10 and 11 Geo. 5, c.55.

proceeded to call out union members in other trades. The general consensus of opinion among the social, political and economic historians (looking back and being themselves noticeably wise after the events) was that whilst the strike itself indicated the great latent power of the masses it was badly organised after the initial calling-out and, most importantly, it lacked forceful direction from the top. Perhaps we can say - after leafing through the pages of history from 1830 to the present time - that the year 1926 was the one and only time within that long period of some one hundred and thirty five years when the British nation stood onthe brink of a major political and social revolution.

From the viewpoint of the lawyers, the most important question regarding the General Strike was whether or not it was legal. Sir John Simon (later Viscount Simon) a former Liberal Attorney-General, and one of the leading members of the English bar, took the quite definite view that it was illegal, but Sir Henry Slesser, who had been Solicitor-General in the Labour Government did not agree with that view. The matter came before the court in the case of National Sailors' and Firemen's Union v. Reed[39] and it is to the opinion of

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39. [1926] Ch. 536. This was an application for an interlocutory injunction in England.

Mr. Justice Astbury[40] in that case that we must turn for judicial guidance. Mr. Justice Astbury stated categorically that the general strike was illegal and that those inciting or taking part in it were not protected by the Trade Disputes Act of 1906. The most important sentence from the judgment reads thus:-

"No trade dispute has been alleged or shown to exist in any of the unions affected, except in the miners' case, and no trade dispute does or can exist between the Trades Union Congress on the one hand, and the Government and the nation on the other."

His lordship's view - which he gave as a personal view unsupported by authority - was quite contrary to the views of the House of Lords and the Court of Appeal in earlier cases (see Conway v. Wade [1909] A.C. 506) where the principle of sympathetic action had been accepted. Most members of the legal profession seemed to have taken the view that the actions of the strikers in coming out were not, in the strict legal view, illegal (being an action in sympathy with the miners it was thought to be protected under the 1906 Act) although the flames of anger and bad-feeling could have been fanned into something like active seditious uprisings. There can be no doubt that

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40. See particularly at pages 539 and 540 of the report. Mr. N.A. Citrine (Trade Union Law p. 508 footnote 30) considers the dictum to have been obiter.

the tactics of the coal-owners amounted to provocation of the very worst kind - because it struck, not only at the individual miner, but at his home and his family. Perhaps there is some force of argument in the view that the Briton - be he governor or governed - has an inbred distaste for injustice and therefore the strikers carried a strong measure of sympathy on their side from the ordinary reasonable citizens who understood their plight.

The Government reacted fairly quickly by pushing through the Trade Disputes and Trade Unions Act, 1927,[41] (repealed, of course, by the Trade Disputes and Trade Unions Act of 1946.[42]) which outlawed the "sympathetic strike" and indeed any strike which might have as its object the coercion of the government.

In 1929 a major depression hit the United States of America and it spread to Europe in 1931. Conditions in Britain among the employed classes were extremely serious. The statistical returns of persons unemployed began to run into the millions figures. This was the era of heartache, heartbreak and hunger - and the government ("responsible" in the general sense as well as the constitutional sense) seemed powerless to deal with the situation and pursued

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41. 17 and 18 Geo. 5, c.22.

42. 9 and 19 Geo. 6, c.52.

the well-known political attitude of more or less ignoring the situation in the hope that some solution would turn up eventually.

From 1934 onwards the slow climb back to recovery began. Conditions at home were considerably overshadowed by happenings in the realm of international affairs. Hitler was demanding "lebensraum" and rearming the German nation at high-speed, in defiance of treaty limitations. Mussolini was strutting abroad, dreaming of a new Roman empire under his command, with its first colonies in Abyssinia and all of North Africa. The war clouds were gathering - but only Winston Churchill and a few other clear-sighted persons could see them. The alarums were sounded but there was no active response by those in authority. Too late, the policy of appeasement (on the face of it, an admission of weakness) was tried and, not surprisingly, it failed. The jackboot was again on the march - the rape of Czechoslovakia and of Poland followed. The cauldron of war bubbled furiously and spilled over into all Europe. France and Britain were again at war. Soon Russia was involved as Hitler, lacking effective naval support, shrank from the channel crossing and turned east. Then America, as the Japanese joined forces strategically with Nazi and Fascist plunderers.

During the second world war an industrial truce was again proclaimed. Direction of labour and the formulation and issue of Essential Works Orders were accepted by trade unionists and politicians alike. Winston Churchill, very wisely, formed a coalition government (i.e. representative of all political parties) which functioned extremely well.[43] Compulsory arbitration was again introduced in 1940 by the National Arbitration Order of (establishing the National Arbitration Tribunal) of that year (known familiarly as Order No. 1305) and continued after the war, until replaced in 1951 by the Industrial Disputes Order (No. 1376) which created the Industrial Disputes Tribunal. This Order was itself revoked in 1958, which revocation became effective in February 1959. Today the only method of compulsory arbitration is the adoption of the "claims" procedure under Section 8 of the Terms and Conditions of Employment Act, 1959,[44] which enables the Industrial Court to make an Award which is equivalent in its legal force to an implied term in the contract of employment.

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43. See Winston S. Churchill (as he then was) - "The Second World War" (Cassell) volume 6, particularly at page 508.

44. 7 and 8 Eliz. 2, c.26. (This section is the only effective section left as the Wages Councils Act 1959 repealed the rest.)

Strikes still continue to be a feature of modern industrial life in Britain and we are no further forward in establishing efficient methods of avoiding stoppages. Each side of industry still continues to be suspicious of the other and the reason for this is based on the historical backcloth of constant struggle between employers on one side and workmen and their unions on the other.

Recent innovations are the formation of the National Incomes Commission (N.I.C.) and the National Economic Development Council (N.E.D.C.) to advise the government respectively on (a) an Incomes policy for each profession or trade to which the Commission's attention is directed for investigation and report and (b) a general economic policy involving the British economy as a whole or directed towards a regional area whose economic development requires serious consideration and report.

Now, in 1964, the outstanding event which has shaken the trade unions to their foundations is the recent House of Lords judgment in the case of Rookes v. Barnard and others.[45] This case will rank along with the Taff Vale case of 1901 in the annals of trade union history. The union's view is that the House of Lords, by placing an unwarranted stress upon the civil wrong of Intimidation

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45. [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367 (H.L.).

within the framework of a trade dispute, (the fact that there was a "trade dispute" was admitted by both parties in the action), have again indicated quite clearly a judicial contempt for the unions by allowing the legal machinery to operate against union officials acting as individuals in the best interests of the union as well as removing, by this judge-made law, the only effective weapon which is left to workmen - namely, the right to withdraw their labour (i.e. the right to strike). The main argument of the unions against the decision is that it seriously restricts the growth and development of membership and bargaining power by limiting the right to enforce membership (generally under a "closed shop" policy) upon individual employees or by bringing force to bear upon employers by insisting upon union membership for all employees. It may be that the unions are taking a much too serious view of Rookes v. Barnard and others, but quite understandably they see the decision as another source of danger to their functions and their powers, as well as to their funds and for that reason they seem to be prepared to close their ranks for action.

Prior to the British General Election of 15th October 1964, the indications from Westminster were that, if the Conservative Party went back into power they might - in the fullness of political time - have appointed a Royal

Commission to look into the whole position, functions and powers of the trade unions, with a view to restricting the legal protection and privileges enjoyed by them meantime under the Trade Union Acts and kindred statutes. Now that the Labour Party has formed the new government (albei with an overall majority of four) there is a certain anticipation that a very brief statute will be passed in early course, which will remove any danger of union officials being exposed to the risk of civil actions against them as individuals in respect of conduct by them whilst acting on behalf of or in the best interests of their unions, which conduct might otherwise be actionable (e.g. as a species of intimidation as in Rookes) in a civil court if committed by an ordinary individual who was not a union official or member at the time. It seems to be known, fairly widely, that the trade unions (and specifically the Trades Union Congress) took legal advice, immediately following the Rookes decision, as to the effec of this decision upon their actions and also as to the leg al machinery which would be required to render the decisio ineffective. The general view upon the approach by the unions is that leading counsel advised a short statute which would amend the Conspiracy and Protection of Propert Act, 1875 and the Trade Disputes Act, 1906 so as to protect the trade union officials, qua officials and

individuals, who were acting bona fide in the best interests of the union.

It seems reasonably certain that some important legal developments regarding the status and powers of the trade unions, in relation to management as well as to their own individual members, are due to take place within the next few years. These developments could have a tremendous impact upon British industrial relations in the 1970s. and future years.

It is against the background of this historical canvas (shaded in its important aspects rather than being finely drawn in detail, as this is not a work dealing principally with industrial relations in the wider social and political sense) that we now turn to examine the contractual relationship between employer and employee and the obligations, duties, liabilities and rights which one party has - by law - towards and against the other party within the framework of that relationship.

Chapter 2

Nature and Formation of the Contract of Service.

(1) Nature of the Contract of Service.

The contract of service is a species of the contract of *locatio conductio* - in two of its forms, viz:- (a) *locatio operis* i.e. the hiring of a person to do a particular task or piece of work and (b) *locatio operarum* - the hiring of a person's services, to act in a particular capacity, without relation to any specific business.[1] It is mainly with the second form that we are concerned.

Definition of a Servant:- The distinction between the modern servant and the slave cannot be defined satisfactorily. A most important point which might arise for consideration here is the legality of a contract for a lon term of years and in which harsh or intolerable conditions are sought to be imposed. It seems that old Scottish

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1. Fraser - Master and Servant (3rd Edition) page 1; see also Scottish Insurance Commissioners v. Church of Scotland 1914 S.C. 16; Stagecraft Ltd. v. Minister of National Insurance 1952 S.C. 288 (per Lord Patrick at p. 302; also the opinions of the Lord Justice Clerk and Lord Jamieson). In English law, see particularly Yewens v. Noakes (1880) 6 Q.B.D. 530 C.A. per Lord Bramwell at pp. 532/3; and A.E.U. v. Minister of Pensions and National Insurance [1963] 1 W.L.R. 441.

legal opinion holds that "the state of slavery is not recognised by the laws of this Kingdom, and is inconsistent with the principles thereof" and "that perpetual service, without wages, is slavery".[2] Yet it cannot be accepted that both points quoted are absolutely and unquestionably correct. It seems to be agreed that the mere obligation of perpetual service is not slavery.

Justinian's definition[3] of slavery is - "qua quis dominio alieno contra naturam subjicitur".

Most help is, however, obtained from Viscount Stair, who says[4] "servants (slaves) being wholly their master's, they could have nothing of their own, so that their peculium, which their masters committed to them to negotiate with, was wholly in their master's power and might be taken away at his pleasure; neither could they be liable to any obligation; neither could there be any civil action for or against them; ... they were accounted as nobody, or as dead men". Accordingly, the master not only acquired a right to the fruits of the labour of his slave, but he also became the governor of one whom his power divested of the birthright of a human being. As an example of this attitude in early law there are the cases of the restrictions upon workmen in coal and salt mines

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2. See Knight v. Wedderburn M. 14545 (1778).
3. Inst. I, 3, 2.
4. Institutions I, 2, 9.

(colliers and salters) who were transferable to a purchaser of the mine, and subject to prosecution if they quitted their employment.[5]

According to more modern law, the definition of a servant is a person who, entirely of his own free will, agrees to give his services to another for a determinate time and an ascertained hire[6] and who may get rid of the contract by paying damages.

To a certain limited extent a contract of service could - in older Scots law - be specifically enforced. A workman refusing to enter upon his service, or deserting it after entry, could be sentenced to imprisonment; but subsequent legislation repealed the Statute (4 Geo. IV c.34) which had authorised such.[7]

It seems possible that the law allows a person to enter into a contract of service for a long term of years (say 20, 25 or 30 years) or even for life. However, this theory is doubted by some writers,[8] notably Bankton, who says that slavery is so much discountenanced that, even by agreement, one cannot be bound to serve another for life.

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5. These restrictions were finally abolished in 1799 (by the Statute 39 Geo. 3, c.56): see T.B. Smith in Stair Society volume 20, chapter XII, page 130 et seq. ("Master and Servant").

6. See Erskine I, 7, 62.

7. See Fraser, op.cit., Part III, chapter i.

8. See particularly Bankton I, 2, 83.

He founds his opinion upon the old case of Allan and Mearns v. Skene[9]. Later writers have not agreed with him, particularly Erskine.[10] In England,[11] in the year 1837, the Court held that a contract to serve for life was not illegal. But it seems to be undecided in Scotland whether or not a contract to serve for life is a pactum illicitum.[12] The writer submits that it is very doubtful, looking to the spirit of the latter half of the twentieth century, whether the court would be anxious to uphold a "life-long contract" which is so much against the principle of freedom of the individual. In the recent case of Cook v. Grubb[13] the phrase "permanent employment" was considered by the Second Division of the Court of Session (on a Reclaiming Motion from an Interlocutor of Lord President Clyde) and it was held that - in view of an amendment made prior to the hearing - a sufficiently specific meaning could be attached to the phrase so as to give the contract a terminus ad quem. But "permanent employment" in this sense is quite a different thing from

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9. M. 9454 (1728).
10. Erskine I, 7, 62.
11. See Wallis v. Day (1837), 2 M. & W. 272.
12. See Mulcahy v. Herbert (1898) 25 R. 1136.
13. 1963 S.L.T. 78 (See opinion of the Lord Justice Clerk (Grant) at pages 83 and 84). (See earlier report in (O.H.) 1961 S.L.T. 405 when the Lord President (Clyde) held the phrase to be too vague and indefinite).

a contract to serve "for life", as we have been discussing above.

(2) Form of the Contract.

There must be consensus in idem before a valid and binding contract of service is completed. The consent itself has to be a final one, otherwise an opportunity for resiling has been created. The consensus or agreement referred to does not mean that every possible term or condition likely to affect the relationship of parties has to be written into the contract. Many things will be afterwards settled by implication, from conduct of parties or intention of parties. What is important is a willingness on the part of each to be bound by a basic general agreement.

The necessary elements of a valid offer and a valid acceptance to the constitution of a legal contract are fully discussed in the Institutional works[14] and in the general textbooks on the law of contract.[15] It is not proposed to elaborate the basic principles in this thesis. Suffice it to be said that so long as there is an offer

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14. See Stair I, 10, 6; and Erskine III, 1, 16; also Bell, Comm. III, 1, 1 sect. (2); and Principles c. 1 paras. 72-79.

15. See particularly Gloag on Contract (2nd Edition) chapter 2.

which is met exactly by an acceptance there is a binding contract.[16]

The general rules of contract relating to vitiation by error, force and fear or fraud or illegality apply equally to contracts of service. So long as the consent is a real consent, willingly given, the contract is good. Mere concealment of a fact, although a material fact, does not ordinarily affect the contract.[17] It may do so where the concealment induces some error in essentials on the part of the other party or gives rise to some fraud which causes loss or injury to the other party.

Although, under the civil law, the contract of locatio was a consensual contract which did not require writing this rule has been departed from in developed Scots law. Now the contract of service is the actual result of a contractual relationship (whether locatio operarum or the innominate contract facio ut des[18]) or it is implied from the fact of service, presumed not to be given gratuitously and therefore it is a contract which may be made in writing or orally. However, it is now recognised that if the duration of the contract is to exceed one year it cannot be constituted by any other form

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16. See Appleby v. Johnson (1874) 9 C.P. 158.
17. Fletcher v. Knell (1872) 42 L.J.Q.B. 55.
18. Bankton i. 20. 7; Erskine i. 7, 62.

than writing and the oath of a party will not supply the deficiency of a writing.[19] The theory behind this rule is based on the analogy of a hiring of services and a hiring of land.[20] There is, of course, the special case of the hiring of services of seamen - and here the legal position seems to be that whilst writing is not essential to the actual hiring of seamen, nevertheless it is a statutory requirement which must be fulfilled before they put to sea.[21]

Oral contracts:- Where the contract is for less than one year it may be constituted orally and be proved by parole evidence.[22] If it is, in fact, constituted in writing then its existence is proved by reference to the writ,[23] but this does not necessarily exclude the use of the parole evidence to establish a contract, some of whose conditions and terms have been set out in written form.[24] It must be kept in mind that where notices,

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19. See Caddell v. Sinclair 1749 Mor. 12, 416; Paterson v. Edingtons 1830, 8 S. 931; Kennedy v. Young 1837 1 Swinton 474; Stewart and M'Donald v. M'Call, 1869, 7 M. 544; also Bell's Principles s. 173; and Dickson on Evidence s. 567.

20. Fraser, op. cit. p. 29.

21. See the Merchant Shipping Act 1894, sections 113 and 114.

22. Smellie v. Gillespie 1833, 12 S. 125; Caddell v. Sinclair cit. supra; Bell loc. cit; and Dickson loc. cit.

23. See Umpherston - Master and Servant, page 24 and cases cited at footnote number six thereof.

24. Barratt v. Stewart 1893, 1 S.L.T. p. 284.

containing terms and conditions affecting the employment, are exhibited in places of work or, alternatively, such terms and conditions are brought to the notice of the workmen in some form other than a written and signed contract or are specified in a verbal agreement, such terms and conditions are then imported into the contract of service and it has to be shown that the workmen were aware of their existence.[25]

It is the task of the party who founds upon a contract to prove its terms.[26]

It does not seem to be decided as yet whether the oral contract for a period in excess of one year is, apart from rei interventus, quite ineffective and legally useless or whether it is good for the usual term in service of the particular type or whether it is good for one year. Bell suggests[27] that the latter view is more correct, whilst Lord Fraser[28] is inclined to the former. The point has been discussed in several cases during the mid-nineteenth century period[29] and again, more recently,

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25. Wright v. Howard, Baker & Co., 1893, 21 R. 25; Cowdenbeath Coal Co. v. Drylie 1886, 3 Sh.Ct.Rep. 3.

26. Robson v. Overend 1878, 6 R. 213; and see particularly Forbes v. Milne 1827, 6 S. 75; Thomson v. Izat 1831, 9 S. 598 (cf. Wilkie v. Bethune 1848, 11 D. 132).

27. Principles s. 173.

28. Master and Servant, page 30.

29. Caddell v. Sinclair, Paterson v. Edingtons, Stewart and M'Donald v. M'Call cit. supra; Murray v. M'Gilchris 1864, 4 Irv. 461; and Young v. Scott 1864, 4 Irv. 541; Currie v. M'Lean 1864, 2 M. 1076; and Forbes v. Caird, 1877, 4 R. 1141.

in the early twentieth century,[30] where Lord Low, in the Reuter case, favoured validity for one year, where the service had been entered upon, proof being by writ or oath. The matter has again been considered in several cases of more recent date.[31]

Accordingly, the oral or informally executed written contract of service for a period exceeding one year is ineffective; but if an oral agreement has been acted upon to the extent that service has been entered upon under it, the contract is binding upon the parties for one year or for a period of time regulated by custom or usage of the particular service, but in any case for no longer than a year. What is said above, in relation to the position at common law, must be re-assessed in the light of the recent statutory change made by the Contracts of Employment Act, 1963, upon which some comment is made in the sub-heading immediately following (viz. "Written contracts").

Written contracts:- The writing required to prove the contract of service exceeding one year may be either a formal document or an exchange of missive letters. The

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30. Reuter v. Douglas 1902, 10 S.L.T. p. 294; Brown v. Scottish Antarctic Expedition 1902, 10 S.L.T. p. 433.

31. See particularly Murray v. Roussel Laboratories Ltd. (O.H.) 1960 S.L.T. 31 and the cases therein considered.

writing must be tested or be holograph of parties or be "adopted as holograph"[32]. It appears that if a partner of a firm himself does the writing in question and then signs it in the firm name, the writing is then regarded as being holograph of the firm.[33]

Any writing which is improbative is not necessarily completely invalid and inaffective, because a special statutory provision[34] guards against a mere informality of execution.

It must be noted, however, that any alteration in the terms of a written contract can only be proved by writing.[35]

The Contracts of Employment Act, 1963,[36] makes an interesting change in the common law position by requiring that all employees, who are employed for more than 21 hours per week, must be supplied with certain written particulars and conditions relating to their employment

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32. See Stewart and M'Donald v. M'Call and Paterson v. Edingtons cit. supra; M'Aslan v. Finlayson 1877, 1 Guthrie's Sh.Ct.Cases 383; Sproul v. Wilson, 1809 Hume 920.

33. See Buchanan v. Dennistoun & Co.'s Trs. 1835, 13 S. 841; and Nisbet v. Graham 1869, 7 M. 1097.

34. See the Conveyancing (Scotland) Act 1874, s. 39.

35. Dumbarton Glass Co. v. Coatsworth 1847, 9 D. 732.

36. 1963, c. 49.

or, alternatively, a notice containing such particulars and conditions must be displayed prominently within the particular establishment.[37] This important statutory change will mean that, in all cases of full-time employment, reference will require to be made to the written particulars supplied to or made available for consultation by the employees. Accordingly, the oral contract will probably now cease to be of any real importance, except perhaps in part-time engagements. It will be appreciated, however, that the particulars supplied under section four of the statute may be couched in such general terms that the meaning is not at all clear. In endeavouring to ascertain the true intention of parties the court may require to hear parole evidence or other evidence from both sides.

Locus poenitentiae:- The general principle relating to the period within which any party may resile without incurring any liability for breach of contract applies with equal force to negotiations which are taking place towards the formation of a contract of service. As soon as there is a true consensus in idem the right to resile is

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37. See particularly section 4 of the Act. The penalties for any failure to comply with section 4 are set out in section 5.

lost.[38]

It may be necessary to take account of some trade custom or usage, which must be fulfilled before the bargain or agreement is regarded as being final. An example of this, taken from the practice of earlier times, would have been the giving of arles or "earnest", when an agreement was completed between the parties - and if not yet given it would seem that the rule of locus poenitentiae was still applicable and effective until such time as the earnest has been given.

Rei Interventus:- This principle may operate so as to exclude the rule of locus poenitentiae and it then becomes equivalent to the completion of a formal contract. The classic definition is to be found in the writings of Erskine and Bell.[39] The contract is perfected by the operation of rei interventus[40] although it is still essential that there should be a proper consensus in idem as to the terms and conditions which have been agreed and accepted between the parties.[41]

The acts which constitute and support the principle of rei interventus should follow upon the agreement. Acts

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38. See Bell's Commentaries i 345; Principles s. 25; Erskine 3, 2, 3.

39. Bell's Principles s. 26; Commentaries i 346; Erskine 3, 2, 3; see also Dickson on Evidence ss. 841-5.

40. Walker v. Flint 1863, 1 M. 417 per L.J.C. Inglis at p. 421.

41. Alexander v. Montgomery & Co., 1773, 2 Pat.App. 300.

prior to a written agreement could only constitute rei interventus if they followed upon a preceding oral agreement which was subsequently reduced to writing.[42]

Where rei interventus follows upon an informal contract a double proof is necessary, viz:- (i) evidence as to the contract itself and (ii) evidence as to the acts forming rei interventus. Mr. Umpherston points out[43] that the strict rules as to proof have not always been adhered to in the case of master and servant. There seems to be no doubt that proof of the acts relied upon as constituting rei interventus may be adduced prout de jure.[44]

Rei interventus may follow upon (a) the contract which is constituted orally or (b) the contract which is constituted by a writing which is informal.

In practice the most common form is where the servant enters upon the service and is paid wages by the master under the contract.

One of the most important questions arises where rei interventus follows upon a verbal contract for more than

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42. See Umpherston page 29 and cases cited at footnote number 5 thereof.

43. Op. cit. pages 29 and 30 and cases etc., cited at footnote 1 to page 30.

44. Dickson on Evidence s. 832.

a year. This was specifically considered in Dale v. Dumbarton Glasswork Company,[45] where the contract was held binding for the whole term. The case is not wholly authoritative because the ground of decision was based upon English law (as the lex loci contractus), wherein an oral contract for more than a year has been held to be binding.

There have been few cases[46] of rei interventus following upon the informal writing. It seems that a rule analogous to that by which possession under an informal written lease constitutes sufficient rei interventus to validate the lease for its whole duration[47] has been applied to service under an informal written contract. Once service has been entered into under the contract and is continued therein this sets up the contract for the full term agreed upon by the parties.

With the advent of the Contracts of Employment Act, 1963, it could well be the case, in full-time employment contracts (i.e. where the hours worked exceed 21 per week), that the doctrine of rei interventus is now of

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45. 1829, 7 S. 369. See also Murray v. Roussel Laboratories Ltd. cit. supra.

46. See, however, Napier v. Dick, 1805 Hume 388.

47. See Umpherston - op. cit. page 31 and cases cited at footnote number 2 thereof.

little moment, although it could retain its importance vis-à-vis the part-time engagement.

Earnest (or Arles):- The practice of giving earnest is now of historical interest only, as it seems to be used no longer in any modern trade or employment.[48] It is said to have been a "test of engagement". Mackenzie[49] calls it "a symbol or mark of agreement". It appears to be only suitable to a contract founded upon an oral agreement and even then lends nothing at all to the particular agreement, although custom of the particular employment may demand that it be given.[50]

To hand back a sum given as earnest did not destroy or dissolve the contract.[51] If the contract was not effectively concluded because locus poenitentiae still operated, although earnest had been given, there was an obligation upon the party who received the earnest and

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48. An analogous case perhaps, in relation to regular enlistment in H.M. Forces is the giving of the "Queen's shilling" to the newly enlisted man as a token of the completed act of engagement and of loyalty to Her Majesty. But of course this type of engagement is quite outwith the contractual relationship of master and servant, which is under consideration here.

49. Institutes 3, 3, 1.

50. Bell - Principles s. 173.

51. Wallace v. Wishart 1800 Hume, 383; Topping v. Barr 1830, 8 S. 973; see Erskine 3, 3, 5.

who was then seeking to resile to return it to the giver.[52]

Where a sum was given as "an evidence of a bargain closed and perfected" this was termed "dead earnest".[53] It should not be confused with part payment under a contract, which may well amount to rei interventus.[54]

It would be most unusual, in modern practice, to require the giving of earnest as evidence of a completed bargain.[55] Indeed none of the present-day writers upon Industrial Law makes any reference to it at all.

Implied contracts of service:- Any claim for wages has to be founded upon a contract to pay wages or upon services rendered by the claimant which were not understood to be gratuitous. There is a presumption that services are given for wages[56] - and not gratuitously. Should it appear from the circumstances that there is a

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52. See Lawson v. Auchinleck, 1699, Mor. 8402.

53. See Stair 1, 14, 3.

54. Lawson v. Auchinleck supra; Graham v. Corbet 1708 Mor. 8428; Clerk v. Murchison 1799, Mor. 9186.

55. The writer believes that it may have been used in practice in agricultural service - particularly in North-Eastern districts of Scotland and up to the beginning of the second world war - as token evidence of the completed service agreement.

56. Anderson v. Halley 1847, 9 D. 1222; and Thomson v. Thomson's Tr. 1889, 16 R. 333 and 26 S.L.R. 217; and Miller v. Miller 1898, 25 R. 995; but in the case of a family relationship subsisting between the parties there is no presumption of a contract to pay wages - see Urquhart v. Urquhart's Tr. 1905, 8 F. 42 etc., (where a child assisted in his father's business and is provided with keep etc.) - where the pursuer or claimant receives his keep etc., (i.e. an equivalent to wages).

reason - other than wages - for the giving of the services, then the presumption does not apply.[57] The test to be applied is this - did the parties act in the respective capacities of master and servant?[58] If so, then wages will be payable upon an implied contract of service.[59]

The onus of proof lies upon the person who founds upon the services rendered. Where an implied contract appears to be in existence the onus of challenging it would then lie upon the master who would aver (and would require to prove to the court's satisfaction) that the agreement between himself and the servant relating to the giving of services gratuitously or merely related to the giving of food and clothing by the master, but in any case it was not in respect of wages.[60] The mere provision

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57. Ritchie v. Ferguson 1849, 12 D. 119; Fyffe v. Lawson 1891, 8 Sh.Ct.Rep. 220; Pratt v. Rankine, 1898, 6 S.L.T. p. 126.

58. See M'Naughton v. M'Naughton 1813, Hume, 396; Shepherd v. Meldrum 1812, Hume 394 and the trilogy of cases in which pursuer was the same person, viz:- Smellie v. Gillespie 1833, 12 S. 125; 1834, 13 S. 700; Smellie v. Cochrane 1835, 13 S. 544; and Smellie v. Miller 1835, 14 S. 12.

59. See Ritchie v. Ferguson 1849, 12 D. 119 supra; Dawson v. Thorburn 1888, 15 R. 891; M'Naughton v. Ross, 1902, 10 S.L.T. p. 322.

60. See M'Naughton v. M'Naughton cit. supra; and Anderson v. Halley cit. supra.

of food and clothing does not displace the onus[61] upon the master, though of importance in relation to an evaluation or assessment of the services rendered to the master.

Finally, a contract of service may be implied where there is a change of circumstances in the status or legal personality of the master. Most common examples are the conversion of a business, owned by an individual or partnership, into a limited company (whether public or private) or the liquidation of a company and subsequent appointment of a liquidator. The employees will usually continue to serve the new company (i.e. their new master) or the liquidator without the preparation of fresh contracts of service or formal consents and in such a case their old contractual relationship is continued by implication to form the new contractual basis which governs their relationship.[62] This new contract would then be affected by legislation designed to protect the legal position of the employee and the employer would require to comply

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61. Shepherd v. Meldrum cit.supra; Smellie v. Gillespie cit.supra; Anderson v. Halley cit.supra.

62. Day v. Tait 1900, 8 S.L.T. p. 40; Taylor v. R.H. Thomson & Co. Ltd. 1901, 9 S.L.T. p. 373; 1902, 10 S.L.T. p. 195; Houston v. Calico Printers' Assocn. 1903, 10 S.L.T. p. 532; Berlitz School of Languages v. Duchêne 1903, 6 F. 181 per Lord M'Laren at p. 185.

therewith.

(3) Terms and duration of the contract of service.

Commencement of the service:- The servant's duty is to enter upon the service at the time agreed unless illness[63] or other cause (over which he has no control or for which he is not responsible) prevent him from so doing. Any failure to do so renders him liable to an action in damages for breach of contract.[64] It is equally a breach of contract by the master, should he refuse to accept the employee into his service.

Mr. Umpherston points out[65] that the date of commencing service may not be expressly stated and, accordingly, resort must be had to the custom of the particular occupation or trade. This difficulty is unlikely to arise in modern practice where "hiring and firing" may be done by a foreman (or foremen) who specifies dates and times.

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63. See Comasky v. Jeffrey 1887, 2 Guthrie's Sh. Ct. Cases 353; Boast v. Firth 1868, 4 C.P. L.

64. See later note at chapter 3, part (i), sub. nom. "breach of contract".

65. Op. cit. pages 43 and 44.

The service itself:- It is most unusual to find that the total duties of the employee are carefully and expressly set forth in the contract. Usually the employee is engaged in a particular character or type of employment and this is simply stated as, for example, chauffeur, housekeeper, qualified clerk or otherwise as the case may be.

The servant usually undertakes to give his time exclusively to the business of his master[66] and perform all services which pertain to the particular type or character of employment, as well as to obey all orders which the master is entitled to give a servant of the particular capacity concerned.[67]

The undertaking to give his time exclusively to the master's business does not mean that the servant cannot engage in business himself or take paid work elsewhere on a part-time basis.[68] What is meant is that the servant cannot undertake any other employment which conflicts with or is in competition with the business of his master. He may, for example, be a cost accountant for the X shipbuild-

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66. Cameron & Co., v. Gibb, 1867, 3 S.L.R. 282: In the case of Currie v. Glasgow Central Stores Ltd. 1905, 13 S.L.T. 88 it was held, in relation to the particular contract concerned, that there was no implied term that the servant must devote his whole time to his master's business. This was a decision given in a Reclaiming Motion against an Interlocutor of Lord Pearson (see 1904, 12 S.L.T. 651), in which his Lordship took the view that, i the circumstances (e.g. no mention in the contract; and also looking to the remuneration), there was no such implied term.
67. Selby v. Baldry 1867, 5 S.L.R. 64.
68. See Currie v. Glasgow Central Stores Ltd. cit. supra.

ing company during the day and be a barman in the local public-house at night, but he cannot do part-time work as a cost-accountant for the Y shipbuilding company, which is in competition with his main employers.[69] This question of dual employment is an extremely interesting and delicate one. Loyalty to the primary employer might be taken to be the main guiding principle. In this era of "two-car families" and "working wives" it will be seen that a certain conflict of interest - if not of duty - might arise where the husband works for firm X and his wife for rival firm Y, each holding a position of responsibility. It would be contrary to human nature if an exchange of ideas did not take place occasionally between husband and wife. This might well give rise to Interdict proceedings or dismissal proceedings. Such happenings would hardly be calculated to preserve the celestial bliss of the matrimonial home.

Duty to obey lawful orders:- The ordinary servant must obey all lawful orders. The personal or domestic

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69. See the following cases:- Pearce v. Foster (1886) 17 Q.B.D. 536 (dismissal of a confidential clerk, advising on securities, who was himself dealing in Stock Exchange speculations); Boston Deep Sea Fishing & Ice Co. v. Ansell (1888), 39 Ch.D. 339; Hivac Ltd. v. Park Royal Scientific Instruments Ltd. [1946] Ch. 169; [1946] 1 All E.R. 350 C.A.

servant, however, must conform to the regulations of his master's household. He is not permitted to have quite the same freedom as the ordinary servant e.g., to keep late hours, be drunk, disobey a lawful instruction or to leave the house against his master's wishes may each constitute a failure by the servant in his household duties.[70] The master is, of course, the judge as to what is reasonable for the administration of his household. Failure to obey may be due to mere neglect and an isolated act of neglect or forgetfulness does not justify instant dismissal.[71]

Nevertheless, where a servant is hired in one capacity he cannot be held bound to perform work which is outside of his normal scope of duties.[72] He may have to perform such extra-ordinary duties if the contract provides for this expressly or if there is a local custom

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70. See Hamilton v. M'Lean 1824, 3 S. 268; Turner v. Mason, 1845, 14 M. & W. 112; (1845) L.J.Ex. 311 (the servant who, against her employer's wishes and refusal to permit her absence, absented herself to visit her sick mother who was believed likely to die was held to be justifiably dismissed); Edwards v. Mackie 1848, 11 D. 67; Silvie v. Stewart, 1850, 8 S. 1010.

71. See Baxter v. London & County Printing Works [1899] 1 Q.B. 901, where the Divisional Court stated that "what constitutes conduct justifying instant dismissal is always one of degree". If the neglect relates to an important matter then instant dismissal would very probably be justified.

72. See particularly - Kirkcaldy v. Landale 1889, 5 Sh.Ct. Rep. 251; Moffat v. Boothby 1884, 11 R. 503; and Wilson v. Simson 1844, 6 D. 1256, this last case involving a special duty which the court supported on the evidence and gave judgment favourable to the master (the servant had claimed damages for wrongful dismissal); see also Cobban v. Lawson 1868, 6 S.L.R. 60, where the decision again proved favourable to the master.

indicating such obligation.

But a servant of a higher grade or level is not bound to perform the tasks of a lower-grade employee, even although he is paid the same wages.[73]

The courts today are reluctant to regard a single isolated act of disobedience as justifying dismissal.[74] Although this is an English case it is not unreasonable to assume that the Scottish courts would take a similar view at the present time.

A most interesting case of legitimate refusal to carry out an instruction from his master is permitted to the servant when the actual doing of the particular task, though otherwise normally within the scope of his duties, would expose him to undue personal danger or risk[75] (e.g. death or physical injury) or would be illegal.[76]

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73. Ross v. Pender 1874, 1 R. 352 (head gamekeeper cannot be forced to work as an under-gamekeeper). See also Gunn v. Ramsay 1801, Hume 334 (a cook cannot be compelled to work as a market-woman) Mr. Umpherston's comment on this case is that an employee hired as cook and housekeeper was held justified in declining to do the work of a cook after her employer had deprived her of the office of housekeeper (op. cit. page 47).

74. Lewe v. London Chronicle (Indicator Newspapers) Ltd. [1959] 1 W.L.R. 698.

75. Sutherland v. Monkland Railway Company 1867, 19 D. 1004; Meeker v. Crawford 1892, 9 Sh.Ct.Rep. 52; O'Neil v. Armstrong, Mitchell & Co. [1895] 2 Q.B. 418; Burton v. Pinkerton 1867, 2 Ex. 340.

76. Phillips v. Innes 1835, 13 S. 778; 1837, 2 S. & M'L. 465.

The risk, or threatened risk, of personal danger has again risen in England in the 1930s in two rather interesting cases - firstly, in Ottoman Bank v. Chakarian,[77] where the employee was successful in an action for wrongful dismissal, based on proof of danger to his life, and, secondly, in Bousourou v. Ottoman Bank[78] where the employee was unsuccessful, since he was unable to discharge the onus of proof relating to danger to life.

As the contract of service is personal by its nature the law requires that the servant should himself perform the obligations and duties laid upon him. Delegation is not permitted,[79] unless, of course, this is specifically authorised and provided for in the contract or the nature of the particular employment itself implies a right by the employee to delegate.

Any performance by a third party cannot, in the general case, be relied upon as a proper performance of the contract.[80]

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77. [1930] A.C. 277.
78. [1930] A.C. 271.
79. Campbell v. Price 1831, 9 S. 264.
80. British Waggon Co. v. Lea (1880) 5 Q.B.D. 149; 49 L.J.Q.B. 321; Tolhurst v. Associated Portland Cement Manufacturers [1902] 2 K.B. 660; Cooper v. Micklefield Coal Co. (1912), 107 L.T. 457.

There may be circumstances in which an employee would purport to delegate his duties (e.g. the driving of a vehicle) and his employer would escape liability because there would be no proper relationship of master and servant. If, however, the employee retained some control over the delegate, then the employer is normally liable qua employer.[81]

Place of service:- The rule is that where the contract of service stipulates for a particular place as the place where the service is to be performed, the master cannot have that service performed elsewhere.[82] That the rule has to be interpreted reasonably is illustrated in the case of Anderson v. Moon[83] where the proprietor of two spinning mills hired his workers from

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81. See opinion of the Lord Ordinary (Fleming) in Fulton's Tutor v. Mason & Sons Ltd. (O.H.) 1927 S.L.T. 428, following Ricketts v. Thomas Tilling Ltd., [1915] 1 K.B. 644 (Court of Appeal).

82. Anderson v. Moon 1837, 15 S. 412; Stuart v. Richardson 1806, Hume, 390; Annett v. Glenburn Hydropathic Coy. 1893, 9 Sh.Ct.Rep. 66; see also the English case of Eaton v. Western (1882) 9 Q.B.D. 636 where by an instrument of apprenticeship an apprentice was to be boarded and lodged by his parent (who lived in London) and to attend daily at the works of his master (then carrying on business in London). The master moved his business to Derby and called upon the apprentice to attend there. Held that the apprentice was not bound to attend at Derby.

83. Cit. supra.

year to year. In the middle of a term he directed a femal employee (who had been employed for some years at one mill to go to work at the other mill, which was a half-mile distant from her home. The kind of work was the same, as were the wages. The proprietor offered to have her meals sent to her each day. It was established that there was a practice of transferring workers from number one to number two mill at the proprietor's discretion. It was held that the employee's objections were not capricious or imaginary and that she was entitled to refuse to go.

In more modern times there are instances of the creation of new Industrial Estates which involve the transfer of large numbers of employees from place to place Unless there was a specific clause in the service agreement which covered this eventuality, it is probably right to say that no employee would be forced to move. Nevertheless he may forfeit valuable rights or benefits if he does not go and therefore he may be forced by circumstances to follow his employer. The real hardship in cases of this type lies with the older employee who is nearing retirement. Generally an arrangement will be made whereby he is pensioned off, without reduction of the actual pension sum and, in addition, he will probably receive a lump sum payment as a measure of compensation. But these payments do not dispel his feeling that he is

being "thrown on the scrap heap" ten years or so before he need be. A humane and more enlightened approach is needed to this problem.

The personal servant is, however, bound to attend his master wherever he goes. This has been interpreted by the text-writers as meaning that he should accompany his master within the United Kingdom, but if the master is going abroad permanently he need not go with him. Should the master be going abroad for a short term only the personal servant is probably bound to accompany him for a reasonable period. It is suggested by Mr. Umpherston[84] that the domestic servant cannot be moved permanently, but this point is not of great importance in modern times.

Days and hours of service:- Generally, the days and hours of service depend upon three things:- (a) the nature of the service (b) the custom of the locality and (c) the regulations which are applicable within the master's establishment. If the contract stipulated expressly the hours and days which the servant had to work then the terms of the contract would be binding upon the servant[85]. Before the servant could absent himself

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84. Op. cit., pages 48 and 49.
85. Cowdenbeath Coal Co., v. Dryhie, 1886, 3 Sh.Ct.Rep. 3.

from the employment during the stipulated period he would require to obtain permission from the master (illness, of course, being always excusable). The matter of periods of employment is generally always a question of agreement in each particular trade between the trade union concerned on the one side and the particular employer or federation of employers on the other side. There is today a fairly general acceptance of the principle of a 44-hour week (which looks like becoming a 40-hour week in the very near future) spread over five normal working days (Monday to Friday inclusive). Daily starting and finishing times may vary slightly from industry to industry or from one establishment to another.

It is also essential to remember that statute law[86] may lay down special provisions regarding periods of employment or, more particularly, restrict the periods and place of employment for special classes of persons e.g. young persons and female employees. It must be said, however, that statute (meaning by that, Parliament) has tended to leave a maximum amount of freedom of contract between the adult male employee and his

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86. E.g. in factories and mines and quarries by - the Factories Act, 1961 (sections 86 to 119 inclusive); and the Mines and Quarries Act, 1954 (sections 124 to 132 inclusive).

employer. To restrict this freedom might give rise to two perfectly valid objections - firstly, it might be interpreted as an attempt by the particular government in power to limit the earning capacity of the employed classes (this would be a major political blunder as it would alienate the political affections of that section of the employed class which had previously voted for the party in power) and secondly, and equally importantly, it might be regarded as restricting the productive capacity and output of British industry generally.

As against this so-called "freedom of contract" theory it has to be stated at once that most employees have very little, if any, bargaining power as individuals in the matter of fixing wages. This is usually done by "group pressure", that is to say by a union or national association or other body negotiating on behalf of work-people with a federation of employers or with a department of State or with the Treasury. For example, school-teachers may be subject to a fixed scale laid down by the Scottish Education Department (or the Burnham Scale, as in England) or University teachers may be subject to scales stipulated by the National Incomes Commission and accepted by the University Grants Committee (H.M. Treasury holding the purse-strings!). Alternatively, a statutory provision or wages council order - applicable to a particular trade

or industry - may specify a minimum wage rate. It would be exceptional in modern practice to find an individual employee who could claim that his salary or wage was the subject of free and unrestricted negotiation between his employer and himself.

On the specific question of Overtime, the common law rules applicable would seem to be that, where no express stipulation is made as to hours or days, the employee does not require to work overtime if he does not wish to do so[87] (though if he does he might be able to do so upon conditions favourable to him) and furthermore the law will not interfere in the ordinary case unless the master is trying to impose unduly harsh and injurious conditions upon the employee.

So far as English common law is concerned, the rule seems to be that the hours to be worked by an employee are a matter for regulation by the express terms of the contract. Some term or terms as to hours of work may be implied into the contract by custom or from agreements made between the employer (or a federation of employers) and the union to which the employee belongs. Whether such a term or terms can be implied depends upon circumstances surrounding the contract of employment[88] (i.e.

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87. Oliver v. Macfarlane 1903, 19 Sh.Ct.Rep. 204.

88. National Coal Board v. Galley [1958] 1 All E.R. 91. (See pages 96 and 97 of the report).

whether the agreement in question has been accepted as forming part of the agreement).

Should an emergency arise within a particular employment, the master is entitled to the labour of his employees for a much longer period than normal.[89] The reason for this is doubtless that the interest of the master is the interest of the servant and the latter must have regard at all times to the business of his master.

Sunday work:- By the Act 1579 c. 70 all "handy labouring or wirking" was prohibited on a Sunday. That Act was confirmed by a further Act of 1690 c.5, which now, however, excepted works of necessity and mercy.[90] These statutes are apparently still in force,[91] so that an employee cannot be forced to work on a Sunday unless the service required is classified as being either one of necessity or of mercy (these exceptions will arise, for example, in the industries relating to the supply of

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89. Greig v. Moir 1893, 9 Sh.Ct.Rep. 341.

90. See Phillips v. Innes 1837, 2 S. & McL. 465 (per L.C. Cottenham at p. 486) - a contract to work on Sunday in contravention of the 1579 and 1690 Acts was illegal. See also the cases of - Wilson v. Simson 1844, 6 D. 1256 and Middleton v. Patersons 1904, 11 S.L.T. No. 610.

91. In Smith v. Wm. Beardmore & Co. 1922 S.C. 131; 1922 S.L.T. 58; 59 S.L.R. 94 - deciding that the statute of 1579 c. 70 did not apply to the occupation of a watchman - the question was raised as to whether the said statute was in desuetude, but of course it was not specifically answered (see the opinion of the Lord Justice Clerk (Scott Dickson) at page 133 of the Session Cases and particularly the opinion of Lord Salvesen at page 134, indicating that, in practice, the old statutes are really disregarded).

water, gas and electricity and again in the Ambulance services etc.). Interpretation will be reasonably wide and dependent upon the circumstances of the particular case1.

There is also the point to note that any particular statute governing employment in certain places, may itself enforce and confirm an absolute prohibition against Sunday work by certain classes of persons.[92]

Holidays:- Before an employer comes under a duty to allow holidays to his employees the common law position seems to be that provision therefor must be expressed in the contract between them or be implied by custom of the trade or locality.[93] Accordingly, if an employee undertook to work on holidays he would be bound by his obligation, unless the fact of his so working constituted a breach of a particular statute.[94]

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92. For example, the Factories Act 1961, section 93; and the Mines and Quarries Act 1954, sections 126(5) and 127 (1) and (4).
In England, the matter is governed by the Sunday Observance Act 1677 which has been continued in force (see s. 1 for the penalties applicable; also 34 and 35 Vict. c.87).

93. R. v. Inhabitants of Stoke-on-Trent (1843) 5 Q.B. 303.

94. Learmonth v. Blackie 1828, 6 S. 533; and Phillips v. Innes, 1837, 2 S. & McL. 465.

Great care must be taken by employers to ascertain whether any particular statute applicable to their industry or trade requires certain holidays to be given to their employees. If so the terms of the statute must be obeyed.[95]

Bank holidays were introduced in 1871 to allow for some holidays being granted to the working classes. This measure was of specific value to shop assistants and others who were providing a daily service to the consumer public.

Holidays with pay were introduced, as a principle, by the Holidays with Pay Act, 1938 (which applied to road haulage and agriculture), although the normal effects of this statute could not be made the subject of careful study because of the advent of the second world war in 1939.

The powers and functions of wages Councils, under the Wages Councils Act 1959, must be kept in mind - as their task includes the fixing of holiday periods and holiday pay in the particular industry for which the Council is established.[96] The question then to be

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95. See, for example, the Factories Act 1961, s.94, relating to the holidays to be allowed to women and young persons employed in factories.

96. For other examples, see the Catering Wages Act 1943 (since repealed) and the Agricultural Wages (Scotland) Act, 1949.

decided is whether an order exists regulating holidays or whether a collective agreement governs the matter and its provisions have become implied into the service relationship.

Public policy forbids the subordination of the duties of citizenship to the obligations of a private contract. In this respect Government Departments as employers tend perhaps to be more understanding than the private employer, who is more personally concerned with any form of absenteeism. Hence the private employer may tend to discourage his employees from seeking election to the local town council or county council. Legally, he is very probably in the right in so doing if he can show that their absences are detrimental or injurious to the business. But he cannot prevent the employee from exercising any citizenship right which can only be done by the employee during the course of his employment,[97] unless possibly in the case of emergency or necessity.

The older common law accepted the position that when the period of service was drawing to a close, the employee

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97. See, for example, the employee's right to vote, protected by the Corrupt and Illegal Practices Prevention Act, 1883, section 2.

was to be allowed sufficient freedom to look for other employment. This was certainly so in the case of agricultural employees, who could take time off to attend a hiring fair, though they could not advance this claim so as to convert a whole working day into a holiday.[98] Whilst this principle may apply generally in modern times it is safer in practice for an employee seeking a change of situation to obtain permission for any essential absences. He need not necessarily disclose the real reason for his intended absence, except that if he is working out a notice period his employer may not trouble to enquire about absences, but would easily deduce the reason for these.

Property in inventions:- Both Lord Fraser[99] and Mr. Umpherston[1] dealt very briefly with the topic of employee's inventions and, not unexpectedly rely upon several old cases in support of their views.[2] Mr. Umpherston relies upon the cases of Martin & Ors. v. Boyd[3] and Lindsay v. MacKenzie[4] for his proposition that

98. See Alexander v. Gardner 1863, 1 Guthrie's Sh.Ct. Cases 369.

99. "Master and Servant", first published in 1846 as part of a larger work; 2nd Edition 1872; 3rd Edition 1882.

1. "Master and Servant" (1904).
2. See Bloxam v. Elsee, 1 C. & P. 558; Abbott, 6 B and C 169 (1827); Rollo v. Thomson, 1857, 19 D. 994; Martin & Ors. v. Boyd 1882, 19 S.L.Rep. 447.
3. Cit. supra.
4. 1883, 2 Guthrie's Sh.Ct.Cases 498.

as the servant engages to give services in return for wages, the property of whatever is produced by his labour in his employment belongs to his master.[5] If, however, the servant's invention is not part of the work which he was engaged to perform then he, and not the employer, is entitled to the patent for the invention, even although the invention is made during the employment and while the service relationship exists.[6]

The English cases,[7] which are more recent than the Scottish ones, tend to support the employer's claim, taking the view that it is an act of bad faith for an employee to infringe patents or dispose of inventions which relate specifically to the first employer's business. Therefore the courts will generally grant an injunction restraining any infringement or may give a declarator that the employee is to hold the patent or invention in trust for the employer.

To obtain the modern view on this difficult question we must turn to the famous, and comparatively recent, trilogy of cases known as Triplex Safety Glass Co. v.

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5. Op. cit. p. 51.

6. See Anemostat (Scotland) v. Michaelis, [1957] R.P.C. 167.

7. See particularly Workington Pumping Engine Co. v. Moore, (1902) 19 T.L.R. 84; British Reinforced Concrete Engineering Co. v. Lind (1917) 86 L.J.(Ch.) 486; and British Syphon Co. Ltd. v. Homewood, [1956] 2 All E.R. 897.

Scorah;[8] British Celanese Ltd. v. Monerieff[9]; and Sterling Engineering Co. v. Patchett.[10] The Triplex case again invoked the trust principle in favour of the employing company, the Court of Appeal took a similar view in the British Celanese case and finally in the Sterling Engineering case the House of Lords held (i) that the ordinary rule governing the master and servant relationship that, if an employee's invention was patented in joint names of employer and employee, the employee held his interest as trustee for his employer, could only be varied by the existence of an express agreement allowing for this or the creation of a new legal relationship; and (ii) that as the court was satisfied that the appellant company was legally entitled to the benefit of the inventions to the exclusion of the respondent, section 56(2) of the Patents Act, 1949, (upon which Mr. Patchett had relied for an apportionment of the benefit of the inventions) did not apply. In the Court of Appeal (the judgment of which was reversed by the House of Lords) the question of apportionment had been received with favour. Now the House of Lords gave no binding opinions upon the application of section 56(2) but the speech of Lord Reid

8. [1938] Ch. 211; [1937] 4 All E.R. 693.
9. [1948] 2 All E.R. 44.
10. [1955] A.C. 534; [1955] 1 All E.R. 369. But see now the Patents (Employees Inventions) Bill which proposes to regard parties' agreements as the main test, otherwise equitable apportionment will be made.

is interesting for his views, admittedly obiter, on that section. These views are extremely limited and restricted and of course the matter of the correct interpretation of section 56(2) is still open for a full and detailed consideration by the House in any future case raising its application.[11]

Servant's earnings from a person other than the master: Where the master lends his employee to another person, for a temporary period, although the employee remains to all intents and purposes an employee of his master, it seems that any moneys paid in respect of the service belong to the master.

The English lawyers take the view that if the employee, in violation of his contract with master number one, enters into a contract of service with master number two, then the first master is entitled to claim all wages earned by the employee under the second contract.[12]

Mr. Umpherston suggests[13] that the Scottish courts would not follow the English method. Instead, their view

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11. For further comment on section 56(2) and the general position re inventions see the author's Paper on "The legal position of the inventive employee" submitted to the International Academy of Comparative Law, Sixth Congress, Hamburg, July 1962.

12. See Smith - Master and Servant p. 132 and cases there cited.

13. Op. cit. page 52.

would be that the master's (that is the first master, and possibly also the second master for any loss sustained by him) proper claim would be against the employee for damages for breach of contract; the measure of damages being the master's loss for want of the services. It is submitted that this view is correct, as the claim by the primary master is equated with other cases of a similar type, where the obligation of loyalty is destroyed e.g. in giving away trade secrets.

Duration of service:- Where the period of service is not specified, this may be inferred from the nature of the service or from other terms of the contract.

There was (and probably still is) a presumption that a gardener[14] is hired for a year and an agricultural servant[15] and a game keeper[16] for a similar period, whilst a domestic employee[17] in an urban area is presumed to be hired for six months. These presumptions are a helpful guide only - they have no weight of absolute legal authority behind them. In the case of the agricultural servant,

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14. Mabon v. Elliot 1808, Hume 393; Scott v. M'Murdo 1869, 6 S.L.R. 301 (see Lord Ardmillan); Broom v. Clark 1859, 21 D. 831.
15. See Muir v. M'Kenzie 1829, 7 S. 717; and the Mabon case and Scott case above cited.
16. Bentinck v. Macpherson 1869, 6 S.L.R. 376; Cameron v. Fletcher 1872, 10 M. 301; Armstrong v. Bainbridge 1846, 9 D. 1198; Ross v. Pender 1874, 1 R. 352.
17. Mabon v. Elliott supra, Hume's note.

the writer understands that they still apply, fairly generally, in the Scottish farming counties.

It may be, however, that in a particular type of service the duration thereof is fixed by custom. This may be for a year or half-year, as appropriate and this may be indicated where service commences at a Whitsunday or Martinmas term.

Failing an express or implied term in the contract or an established local custom, it seems that the service should continue at the pleasure of both parties.[18] The extent of the duration of the contract may be indicated by the circumstances of each particular case, parties' intentions and so on, so that these things would have to be looked at carefully. Payment of wages or salary at so much per annum or per month or per week, whilst certainly not by itself conclusive in fixing the duration of the contract, may raise an understandable inference that the period of hire is on a yearly, monthly or weekly basis.[19]

But all circumstances must be examined. For example, schoolteachers employed by a Local Authority, under the provisions of the various Education Acts, are so employed

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18. London etc., Shipping Co. v. Ferguson 1850, 13 D. 51; Robson v. Overend 1878, 6 R. 213; Forsyth v. Heathery Knowe Coal Co. 1880, 7 R. 887; Morrison v. Abernethy School Board, 1876, 3 R. 945.

19. See Moffat v. Shedden 1839, 1 D. 468 (per Lord MacKenzie); Hoey v. M'Ewan & Auld 1867, 5 M. 814 (per Lord President Inglis at p. 818); Dowling v. Henderson 1890, 17 R. 921 (per Lord Trayner at page 924); and, very importantly, Campbell v. Fyfe 1851, 13 D. 1041.

at the pleasure of the Education Committees of the counties and may be dismissed upon reasonable notice. Schoolteachers employed in a school which is regarded and classified as a "private" school in Scotland are so employed under the terms of their individual contracts with the Governors or other Managing Body of the school.

There is no case-law authority in Scotland on the question of the legality or otherwise of a contract of service for life or for an unlimited (but nevertheless extremely lengthy) period. The old cases[20] do not help much. The most that can be said is that any contract whic appears to lean towards slavery or an unreasonable restriction upon the employee will not be upheld by the courts.

Wages:- The return for the services given is wages. Generally wages are payable in money but may be combined with board, occupation of a dwellinghouse, clothing allowance or other benefits or perquisites.

The general rule seems to be that service is performed for remuneration, which means wages payable in money and this can be inferred from a contract of service which is silent on the point of remuneration. Otherwise, the onus would be upon the employee claiming money wages

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20. Allan v. Skene 1728, Mor 9454; Knight v. Wedderburn 1778 Mor. 14,545; Hailes 776; see earlier observations at page 27 hereof and also the comments thereto annexed re the case of Cook v. Grubb.

to prove that the agreement did in fact relate to the payment or settlement of the remunderation by money wages.[21] Proof (prout de jure) that an agreement to pay wages was concluded would be good enough.[22]

If the contract is silent as to the means of calculating the amount of wages due or if the contract is an implied contract, then the employee will be entitled to receive what is the customary amount in the particular locality for the type of service which has been rendered; otherwise, he is entitled to a quantum meruit[23].

Many industries were and still are regulated to a substantial extent by statute law[24] but it is inappropriate to consider the various statutory provisions[25] in the course of this work where we are principally, if not wholly, concerned with the common law developments.

The wages may be calculated (a) in relation to either

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21. See particularly Smellie v. Gillespie, 1833 12 S. 125; and Cowan v. McMicking 1846, 19 S.Jur. 91.

22. Stuart v. Richardson 1806 Hume 390; Stewart v. Clyne 1831, 9 S. 382; 1833, 11 S. 727; 1835, 2 S. & McL. 45; also Sinclair v. Erskine 1831, 9 S. 487.

23. See Stewart v. Clyne; Sinclair v. Erskine cit. supra; also Stuart v. M'Leod 1901, 9 S.L.T. p. 192; Bell's Principles s. 184.

24. E.g. Hosiery (1845); Silk Weaving (1845); Factories (numerous - the latest statute, in 1961); Coal Mines and Quarries (several - the latest statute being that of 1954). The existence of a Wages Council order under the Wages Councils Act, 1959 must not be overlooked.

25. See G.H.L. Fridman - The Modern Law of Employment, (1963), pages 390 - 405 inclusive, for a useful collection of examples of statutory control.

the actual amount of work done (i.e. piecework) or (b) in relation to the period of time served by the employee. This division also raises the question as to whether an employer must provide work.

In the case of "piecework" the principle established seems to be that an employer is bound to provide constant employment whilst the contractual relationship is in force.[26] In the latter case, he is under no such obligation to provide work[27] and, furthermore, he cannot make any deduction for idle time. If the employee is merely "standing by" a machine for a proportion of his working shift this makes no difference - he is entitled to his full rate of pay for the whole period of the working shift.

It is accepted, however, that there may be circumstances in which there is an implied obligation upon the master to provide work e.g. if the employee is an actor or other paid public-performer, then his interests require that he be given the opportunity of appearing before the

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26. Bell's Principles s. 192; Cowdenbeath Coal Co. v. Drylie 1886, 3 Sh.Ct.Rep. 3 at p. 11; Turner v. Goldsmith 1891 1 Q.B. 544.

27. Lagerwall v. Wilkinson 1899, 80 L.T. 55; Turner v. Sawdon 1901 , 2 K.B. 653.

public as this is essential to the build-up and maintenance of his reputation. The English cases[28] give most help on this particular point, upon which it is submitted that the law in both countries is the same. In Turner v. Sawdon[29] the court held that a master commits no breach of contract in refusing to give his servant any work to do, so long as he pays the agreed wages. The problem of an implied term in "piecework" contracts was mentioned but not decided in Davies v. Richard Johnson etc.,[30] where Luxmoore J. was, however, prepared to assume its existence.

The question as to when wages are payable is a most important one. Do wages accrue de die in diem or as a unum quid payable at stated intervals?

Where the contract is for a period of some duration

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28. See particularly Clayton v. Oliver 1930 A.C. 209; 99 L.J.K.B. 165; 142 L.T. 585; 46 T.L.R. 230; Marbe v. George Edwardes Ltd. 1928 1 K.B. 269; 96 L.J.K.B. 980; 138 L.T. 51; 43 T.L.R. 809; Bunning v. Lyric Theatre, 71 L.T. 396; Collier v. Sunday Referee Publishing Co. 1940 2 K.B. 647; 164 L.T. 10; 109 L.J.K.B. 974; 57 T.L.R. 2; Turner v. Goldsmith 1891 1 Q.B. 544; 60 L.J.Q.B. 247.

29. 1901 2 K.B. 653 applying Emmens v. Elderton (1853) 13 C.B. 495. The use of the word "employ" does not involve an obligation upon the master to find employment or work but merely to keep the servant in his employ in the sense of paying him wages.

30. (1934) 51 T.L.R. 115.

with wages of £X per year, month or half-year, then the unum quid theory is preferred.[31] There seems to be no doubt that this rule does apply to the domestic or agricultural servant engaged for a term or terms - the wages being regarded as a unum quid and the right to demand payment thereof does not arise until the completion of the full term.[32] Payments to account may always be made at intervals throughout the term.

In other cases (and particularly in the case of the contract of service at pleasure) wages accrue from day to day and fall to be paid at intervals, whether in terms of the agreement itself or in accordance with the custom applicable in the particular establishment. Usage between the parties may help to show what their agreement really means.[33]

There may be a custom which is applicable within a particular trade whereby the employer is able to retain at credit or in hand an agreed portion of the wages (for

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31. See Hoey v. M'Ewan and Auld 1867, 5 M. 814; Boston Fishing Co. v. Ansell 1888, 39 Ch.D. 339; and Button v. Thompson 1869, 4 C.P. 330.

32. See Douglas v. Argyle 1736, Mor. 11, 102.

33. Macgill v. Park 1899, 2 F. 272 (particularly the Lord President's opinion at p. 275 where he stresses the need for a terminus a quo - i.e. a date from which the contract must be taken to have run - if the de die in diem principle is to apply).

example, one week's wages is quite usual in the shipbuilding and engineering industry) during the subsistence of the contract of service. This is known as "wages of lying time". The purpose seems to be to enable an employer to protect himself against sudden desertion by his employees. This custom will, after proof to the court, receive effect

As regards "piecework" it seems that wages vest on the completion of each piece of work, even although they are payable at stated intervals.[34]

So far as the possible application of the Apportionment Act, 1870 (or any later statute on this topic) to employees' wages was concerned, it will be recalled from Macgill v. Park[35] that although the point of the applicability of the Act was argued on behalf of the defenders, the court ignored this question completely.[36]

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34. Warburton v. Heyworth 1880, 6 Q.B.D. 1.

35. Cit. supra.

36. The English common law rule of non-apportionment of wages is illustrated in the old case of Cutter v. Powell (1795) 6 T.R. 320 where a seaman died on voyage from Jamaica to England and it was held in the circumstances that payment was only due if Cutter had completed the voyage. Payment here clearly depended upon the completion of the voyage and it may be that this type of contract was a special one.

The matter was very fully discussed in Moriarty v. Regents Garage Co., 1921 1 K.B. 423 (Director's salary was apportionable). Whether a servant is entitled to a proportion of his wages depends upon the contract of service. Otherwise, it appears that no apportionment is possible in English law, until the House of Lords (or perhaps the Court of Appeal) support the dicta of McCardil J. in the Moriarty case, equating the position south of the border with the more equitable rule which seems to be accepted at Scottish common law.

Interest accrues upon wages from the date upon which payment is due.[37] Should the amount be unspecified then interest will run from the date upon which the debt is validly constituted.[38]

The liability for payment rests squarely upon, the master. Any works manager or foreman or other person with power to take on or engage employees incurs no personal liability vis-à-vis wages,[39] unless, of course, he acts in an individual capacity (for example, the Agent assuming th rôle of the principal).

In the special case of merchant shipping the master of the ship is always responsible for the payment of the wages of seamen who are signed on by him.

Where an employee does extra work, that is to say work outwith his ordinary service, the question arises as to whether or not he is entitled to payment therefor? From the opinions in two older cases,[40] there has been evolved a general rule that where the employee was bound to give his whole time to his master's business and the

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37. Mansfield v. Scott 1831, 9 S. 780; 1833, 6 W.S. 277.

38. Wallace v. Geddes 1821, 1 Sh.Ap. 42.

39. Nabonie v. Scott 1815, Hume 353; Cullen v. Thomson's Trs. 1862, 24 D. (H.L.) 10, 4 Macq. 424.

40. Money v. Hannan and Kerr 1867, 5 S.L.R. 32; Latham v. Edinburgh and Glasgow Railway Co. 1866, 4 M. 1084. (See Lord President M'Neill's opinion, in particular.)

particular work done was suitable to the particular type or character of servant and the nature of the employment no extra wages would be due to him. This meant that an employee could only succeed in his claim if he could prove some agreement or stipulation governing extra pay for extra work. Nevertheless the old general rule mentioned must not be overstressed - it is merely a guide for the court in reaching a decision - and indeed in modern employment practice today it is probably more accurate to say that, apart from custom, there may well be a strong inference or implication that where extra work is needed and is performed then there is an implied obligation upon the master to pay for it.

Where "overtime" is worked, the position in modern industrial relations is that the days etc., for working overtime and the rates of pay applicable are generally a matter of agreement between the trade unions concerned and the employers. Otherwise, the matter is settled by the custom of the particular trade or by the custom of the particular industrial establishment.

The "white-collar" clerical worker or professional employee may usually find that there is no remuneration for extra work, but that he or she will receive a payment of a fixed amount (e.g. five shillings) to meet the cost of a meal and expenses incidental to the performance of the extra work.

Illness of servant:- The contractual relationship between master and servant may be terminated by illness.[41] If not so terminated, the question to be resolved is whether the employee can claim wages during his illness or whether the employer can reduce the wages or pay no wages at all during the period of incapacity. It is true that under the modern welfare state the incapacitated employee will receive sickness benefit and others under the National Insurance Acts and it is also very often the case that an arrangement is made between an employer and an employee who is in receipt of full wages that any benefit payments received by the employee will be handed over by him to the employer. But this arrangement does not affect the legal question of liability or non-liability for payment to the employee during illness.

Stair[42] and Erskine[43] take the view that wages suffer no abatement and this seems to be supported in two older cases[44] of which the earlier one, White v. Baillie concerned

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41. See chapter 4 post on Termination of the relationship; and Manson v. Downie 1885, 12 R. 1103; also Westwood v. S.M.T. Co. Ltd. (O.H.) 1938 S.N. 8.

42. i. 15, 2.

43. iii. 3, 16.

44. White v. Baillie, 1794 Mor. 10, 147. Thompson v. Millie, 1806 Mor. (voce Mutual Contract) App. 4. See also M'Lean v. Fyfe, 4th February, 1813, F.C. per Lord Meadowbank.

master and servant. Here the Court held that a farm servant, hired for a year, was entitled to full wages for that period although he had been incapacitated from working for eleven weeks within the year.

In M'Ewan v. Malcolm[45] it was decided that where the disability to give the services required arose through fault or misconduct of the servant, he had disabled himself from performing his part of the contract and he could not call upon the master to pay wages for the time of disablement. A special statutory provision applies this same principle in the case of merchant seamen.[46]

Where the contract is for service for a term or terms, with wages accruing at the end of each term as a unum quid, then the wages payable for each term do not suffer any abatement.[47]

Where wages are payable according to the actual giving of service by the employee, then he is not entitled to any wages payment for any period during which he does not serve. Should the wages be calculated on a time basis (e.g. at an agreed rate per hour or per day) wages are normally only payable for the time served. Where the

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45. 1867, 5 S.L.R. 62.
46. See the Merchant Shipping Act 1894, s. 160.
47. Hoey v. M'Ewan 1867, 5 M. 814.

wages are stated to be or understood to be at a certain sum per week or month (or longer) it seems that the wages will continue to accrue, unless the contract, is terminated by notice or by the failure of the employee to attend at his place of employment.[48] Custom may play an important part in this matter - for example, as Mr. Umpherston says,[49] in parts of Scotland the agricultural servant, hired for a year, is entitled to full wages if not absent from work through illness for more than six consecutive weeks during the year, disregarding the total length of time of his absences throughout the whole year. It is thought that this custom still holds good in modern times.

No claim can be made for wages during a period of illness which began before the date of commencement of the service and ended after that date. The reason for this is that the entering upon the service is a necessary preliminary to the earning of wages.[50]

Medical Attendance and Medicine:- The master is not obliged to provide medicine or medical attendance during

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48. See Umpherston op. cit. page 65 and footnote 2 thereat
49. Op. cit. pages 65 and 66.
50. See Comasky v. Jeffrey, 1887, 2 Guthrie's Sh.Ct.Cases 353.

the employee's illness, even although the injury was sustained in the master's service or the employee resided in the master's house.[51]

If, however, there is a duty of protection owed to an employee, then it would seem that the master is obliged to obtain medical help or to notify parents of the employee timeously, so that medical assistance can be obtained.[52]

It is also to be kept in mind that the neglect by a master to obtain medical assistance for an injured employee, who is subject to his control, may well be a breach of a legal obligation owed to that employee, with the result that the master will be liable in damages.[53] The most interesting case on this question is that of M'Keating v. Frame,[54] where a female employee died from double pneumonia and the employer's attitude in the circumstances of the employee's serious illness seemed to be extremely heartless. Lord Ormidale, in the course of explaining the master's obligation, stated[55] the master's position thus:- "It was the duty of the defender,

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51. Sellen v. Norman 1829, 4 C. & P. 80; and Mitchell v. Adam 1874, 1 Guthrie's Sh.Ct. Cases 361.
52. Jeffrey v. Donald 1901, 9 S.L.T. p. 199; see also M'Keating v. Frame 1921 S.C. 382.
53. See Taylor v. Hill 1900, 7 S.L.T. p. 318 and M'Keating v. Frame, cit. supra.
54. Cit. supra. at footnote number 145.
55. See page 389 of the report on the case.

I do not say to provide medical attendance for the girl, but to obtain for her the medical assistance to which she was entitled by calling in her panel doctor, . . . and was thus in breach of his duty at common law to take such steps to relieve the girl as were reasonable and practicable in the circumstances". It was held that a relevant case had been made out to send the case itself for trial by a jury.

It is open to the master, though it is most unusual and unlikely to be met with in modern practice, to undertake liability for medical attendance, whether expressly or by implication.[56] Where he does so the test of his liability is the extent of his undertaking.

A claim for wages is regarded as being subject to the triennial prescription, which means that it must be pursued within the period of three years from the date when the claim emerges, otherwise the claimant would only be able to prove the obligation to pay by relying upon the writ or oath of the employer.[57]

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56. See Montgomery v. North British Railway Company 1878, 5 R. 796.

57. Dunn v. Lamb 1854, 16 D. 944; Gobbi v. Lazzaroni, 1859, 21 D. 801; and on the question of defences to a claim for wages, as well as possible counterclaims, see Umpherston, op. cit. pages 73-79 inclusive.

Truck:- The common law relating to wages has been modified from time to time by various Truck Acts. The statutes which are currently in force are those of 1831, 1887 (an amending Act), 1896 and 1940, (The 1940 Statute being a "remedial" form of statute which was passed to avoid a spate of actions based upon irregular agreements covering deductions from wages[58]), these being designed to strike at the system of "trucking". This system enabled unscrupulous employers to take advantage of their employees by forcing them to buy at shops owned by the employers or at shops in which employers had an interest.[59] It is necessary to mention the Acts as these are still in force and are complementary to the common law. It is wrong to imagine or suggest that all employers prior to 1831 or 1896 were unscrupulous, yet it did become obvious that certain employers were acting unfairly towards their employees. The possibility of this practice spreading had to be negatived and legislation was the only method

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58. See Pratt v. Cook, Son & Co. (St. Paul's) Ltd. 1940 A.C. 437; [1940] 1 All E.R. 410; and 56 T.L.R. 363.

59. For an interesting historical survey of the system of "trucking" see the recent work by Professor George W. Hilton "The Truck System" (1960). Truck legislation is fully discussed in Chapters IV and V of this work and some very interesting comments on the 1831 Act (which Professor Hilton considers to have been in ineffective statute) are contained in Chapter VI thereof. See also the Karmel Committee's Report of 27th March, 1961, upon proposed changes in this branch of law.

(whether it was effective or not is probably still an open question) by which it could be done. The Acts, therefore, provided for payment of wages in coinage of the realm, subject to deductions for certain approved services (see the Truck Act 1831, section 23) which were governed by a written memorandum or agreement. The 1896 Act permitted certain further deductions for late-coming, spoiled work and the like, provided details were exhibited or notified to employees enabling them to check the ground upon which the employer was claiming to make the deduction and the actual method of calculating the deduction which was claimed or made.

Several cases have arisen from time to time on the application and interpretation of the Acts and mention is made hereunder[60] of the main Scottish cases. It is considered unnecessary to elaborate this question (which is mainly one of statute law) as it very fully dealt with in the leading textbooks[61] in Industrial Law.

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60. See Cowdenbeath Coal Co. v. Drylie, 3 Sh.Ct.Repts. 3; Finlayson v. Braidbar Quarry Co. 1864, 2 M. 1297; M'Lucas v. Campbell (O.H.) 1892, 30 S.L.R. 226; Penman v Fife Coal Co. 1935 S.C. (H.L.) 39; and, more recently, Duncan v. Motherwell Bridge & Engineering Co. 1952 S.L.T 433; 1952 S.C. 131.

61. See, particularly, Mansfield Cooper and John C. Wood "Outlines of Industrial Law"; Batt - "The Law of Master and Servant"; and G.H.L. Fridman - "The Modern Law of Employment".

No major change in the method of paying wages to workpeople was made until Parliament passed the Payment of Wages Act, 1960 (after various Bills by private members had been attempted, following upon the Pye Radio Case in England in 1956). The preamble to this statute calls it "an Act to remove certain restrictions imposed by the Truck Acts, 1831 to 1940, and other enactments, with respect to the payment of wages. . .".

There is little doubt that with a general improvement in economic conditions after the second world war more and more of the ordinary people in the lower middle class and working class bracket were in a position to save money and perhaps invest it in building societies, Defence Bonds, National Savings Certificates and the like. The bank account (whether in a Joint Stock bank or Trustee Savings Bank) was becoming more popular. Administratively it was an advantage to employers to pay direct to employees' accounts with a bank. However, this is probably not the main reason for the statutory departure in the 1960 Act. Unfortunately the crime statistics (particularly theft, robbery, house-breaking with intent to steal etc.,) appear to have climbed steadily from the 1950s and still continue to do so in the 1960s. Attacks upon wages clerks, office safes, banks and even mail trains have become such a regular feature of our modern way of life

that it is little wonder that the world of commerce and industry now almost classify these actings as a form of ordinary business risk or hazard. Accordingly, some method of payment other than cash had to be sought. The 1960 Act stipulates for payment by cheque or money order or postal order or by payment into a bank account. As the statute only became effective on 2nd December 1960[62] (six months after it was passed) it is perhaps too early as yet to attempt a reasonably accurate assessment of its effect. The provisions of the statute are not obligatory - any method of payment under the Act requires the clear consent of the employee.

The trade unions took a stand against this legislation when it was first proposed, upon the pretext that to pay the workman in a form other than cash was an unwarranted break with tradition and, moreover it might well be a breach of privacy - because the personal delivery and confidential nature of the pay-packet was a safeguard to the worker. He, and only he, received it and disposed of it. The suggested replacement system might, they said, allow others to obtain information about his wages. It is difficult to see any real substance in the trade unions' arguments. However, their

62. Except for section 4, which operated from 2nd July 1960.

fears were calmed when it became obvious that the consent of the employee was required as a condition precedent before a change in method of payment could be made.

Local Custom or Usage qualifying the agreement:-

Where local custom or usage is being relied upon to support an implied term in a contract of service, it is necessary that the custom which is being averred must be "uniform and notorious" in the locality.[63]

Whilst it is undoubtedly correct to say that custom may define or may modify an obligation or term of the contract, nevertheless it cannot be made use of in an attempt to create an additional or new obligation or term. If custom is excluded - either impliedly or expressly - when the contract is entered into then it cannot be relied upon at all for a proposed or alleged modification of the contract.

Recent developments:- Some considerable changes in the relationship of employer and employee are proposed and contained in the new Contracts of Employment Act, 1963.[64]

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63. See Morrison v. Allardyce 1823, 2 S. 387; and dicta of Byles J. in Foxall v. International Land Credit Co. 1867, 16 L.J. 637 and Channell J. in Moult v. Halliday [1898] 1 Q.B. 125 at p. 129.

64. 1963, chapter 49. This Act received the Royal Assent on 31st July 1963, but it did not come into operation until 6th July, 1964, following upon the issue of the appropriate commencing order, being Contracts of Employment Act, 1963 (Commencement) Order, 1963 (No. 1916) made on 27th November, 1963.

This statute now introduces minimum periods of notice by employer and employee[65] and makes provision for written particulars[66] of the terms of employment to be given to the employee. The statute also excludes certain categories of employees, of whom dockworkers, ships' masters and apprentices in the sea service are the main examples. Nor is the Crown bound by or affected by the statute.

The above-mentioned provisions relating to statutory minimum periods of notice are more fully dealt with and explained in chapter four hereof.

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65. See section 1 of the Act.

66. See section 4 of the Act.

Chapter 3

Common law duties, obligations and remedies of the employer and employee in relation to (i) each other and (ii) third parties.

Part (i)

(1) Employee's duties and obligations generally:-

There are certain general duties and obligations which the common law places upon the employee, arising from the creation of the contractual relationship. It is necessary to examine these in some detail and to consider how, if at all, these duties and obligations have altered in modern law and practice, viz:-

(a) Enter into service and continue in it.

The employee is obliged to enter into the service at the agreed time, otherwise he becomes liable in damages for breach of contract. He cannot compel the employer to accept a substitute for him, as the rule of delectus personae is implied in the contract.[1] After entry upon the service, the requirement is that the servant should continue therein, until such time as the contract itself

1. Campbell v. Price (1831), 9 S. 264.

is legally terminated[2] or until the master is in breach of contract, when the servant will normally be justified in leaving. Any desertion of the service would result in a forfeiture of wages, as well as enabling the master to sue (if he deemed it prudent and/or worthwhile so to do) for breach of contract.

(b) Knowledge of work and perform it carefully.

When the servant takes on his particular employment he is held to be giving an assurance or guarantee to his employer that he is competent to perform the tasks customarily to be executed within the particular type of employment. He (i.e. the employee) must exercise all reasonable care and diligence in the performance of his work.[3] The maxim applicable here is spondet peritiam artis.

It follows from what has been said above that if one employee is required to work with valuable materials belonging to his employer, whilst another employee works with inferior materials, then a greater degree of care and diligence is required from the first employee.[4]

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2. See chapter 4 infra on the subject of Termination.

3. See particularly Bell's Principles secs. 148-150 and 154; Erskine 3,3,16; Harmer v. Cornelius, 28 L.J.C.P. 85 (1858); dicta of Wilkes J. approved of by Lord Campbell in Cuckson v. Stones, 28 L.J.Q.B. 25.

4. See Bell's Commentaries, vol. I, pages 488-490; and Hinshaw v. Adam (1870), 8 M. 933.

The rule is the same whether the employee is hired to discharged a particular office or perform a particular task. Incompetency of the employee will free the employer from his own contractual obligation,[5] unless there is an acquiescence in the situation by the employer himself. He may hope that the employee will learn eventually to do his work reasonably efficiently. On the other hand if the employee frankly discloses his incompetence but nevertheless is engaged, the master cannot break the contract on a plea of incompetence,[6] because the new test becomes the reasonable exercise of the actual skill which the employee possesses.

The employee is always required to exercise care in the handling of property belonging to his master, any failure in reasonable care rendering him liable in damages for any loss suffered by the master.[7]

Nor does the servant guarantee his master's property against all risks. There is no liability upon him for any loss caused, for example, by inevitable accident or damnum fatale.

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5. Erskine 3,3,16; Bell's Principles sec. 154.
6. Gunn v. Ramsay (1801) Hume's Decisions p. 384; Bell's Principles loc. cit.
7. Walker v. The British Guarentee Association (1852) 18 Q.B. 277; see also Bankton 1,20,21; Erskine 3,3,16.

(c) Be respectful and obedient.

It is an employee's duty to be respectful to his employer at all times. Insolence provides a good ground for dismissal - though the test of insolence has to be related to the actual relationship between the parties as individuals, e.g. it may be easier to establish insolence from a menial servant than from a qualified employee[8] (whose qualifications may, indeed, be superior to his employer's), who may be - firmly, but tactlessly - questioning his employer's opinion or view on a technical matter.

Blatant disobedience is, however, quite another matter. Any wilful refusal to obey orders or any action committed in violation of orders may generally, and usually does, amount to a major breach of contract justifying the employee's dismissal (provided always that the order was lawful and that the employer had a right to give it and perhaps also, following in this respect the English legal view, that it was a reasonable order in the circumstances).

The trend of the cases illustrates that each side must act reasonably and with common sense. This is an understandable guiding principle in modern industrial relationships between employer and employees but it may be extremely difficult to follow in practice, where there is

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8. See Fraser, op. cit., page 71.

a vociferous "hot-headed" element on one side and an arrogant and unbending attitude on the other side. The result could be a lengthy stoppage of work with each side being as stubborn as possible. Therefore, the strict legal course may not always be the most sensible one to take in the circumstances. Compromise, without loss of face, very often pays handsome dividends.

The employer is not obliged to give explanations or reasons to the employee for any general order or instruction or particular order or instruction. It is quite sufficient that the order is lawful and is one which would normally be expected from the employer in the particular type and scope of employment. Nor, indeed, may the employee refuse to perform the ordered task until explanations are given to him.[9]

In a well-known English case,[10] the master was held justified in dismissing a housemaid who persistently left his household, against orders, to visit her sick and dying mother. Three of the older Scottish cases[11] illustrate a similar approach by the courts here, where again there was disobedience (after due warnings) to the lawful orders of

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9. Thomson v. Douglas, Hume's Decisions 392 (1807).
10. Turner v. Mason (1845), 14 M. & W. 112; 2 D. and L. 89
11. Elder v. Bennet, Hume's Decisions 386 (1802); Hamilton v. M'Lean, 1824, 3 S. 268; and A. v. B. 1853, 16 D. 269.

the employer. It is submitted that the modern courts would take a more humane view of the circumstances, particularly in cases of the Turner v. Mason type.

It does not seem to be a valid defence for the employee to say that he disobeyed his master's instructions so as to benefit his master or to say that his conduct was due to over-anxiety or over zealousness.

Should the employer order the servant to do something which is morally or legally wrong the courts will recognise that such an order - unlawful or immoral - cannot be forced upon the servant. Disobedience in such a case will not constitute a ground for the employee's dismissal, nor will the court impose on the employee any penalty or other award in respect of his non-performance. Of course, any agreement by the employee to do for his master any act which is illegal or immoral will usually result in both employee and employer being held liable under the criminal law as well as in damages under the civil law. It is no defence to the employee to plead that he was ordered to do the particular act by his master.

(d) Time during which employee must work.

Where the contract specifies the times during which the employee is to work, then any question between the parties becomes a question of construction and interpretation of the contract itself. If nothing is said in the contract then the length of time of employment falls to

be decided by reference to the custom or usage of the locality or of the particular establishment or, failing all of these tests, by reference to what is a reasonable time in the circumstances. This will vary according to the nature of the work involved and the status of the employee concerned.

It is essential that the servant attend punctually at his place of employment and he must not be absent without lawful cause or excuse.[12] Any failure to do so may lead, in most circumstances, to dismissal of the employee.

It seems to be accepted that when a servant is under notice from his employer or is "working his own notice" he is entitled to some time off to look for another situation As the legal requirement of notice is primarily designed to enable the employer to obtain a replacement and the employee to obtain alternative employment, some reasonable freedom of movement is to be allowed. The authority for this proposition is basically an old English case,[13] in which it was stressed that absence by a servant to seek other employment did not justify dismissal.

The employee himself must act reasonably in the matter, so as not to cause any unnecessary inconvenience

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12. See chapter 4 *infra*, on Termination of the relationship.

13. See particularly R. v. Polesworth, 2 B and Auld. 483 (1819).

to his master, e.g. if the absence can be arranged during a slightly extended lunch-hour period this is quite reasonable, rather than have the employer inconvenienced during a particularly busy morning or afternoon period.

Where the employee is not under notice he must ask permission from his master before absenting himself for interview or for the purpose of seeking other employment. Whilst he is not bound to disclose the reason for his intended absence, nevertheless he must protect himself by obtaining a proper permission.

(e) Kind of work he must perform.

The obligation upon the servant is to perform the kind of work for which he was engaged. There is no obligation upon him, in the ordinary case (i.e. apart from an emergency) to perform some other type of work or to act in some other capacity. Obviously, this question as to what is a different type of work or a different capacity from that which was contracted upon between the parties, is one which can give rise to innumerable disputes between employer and employee.

Lord Fraser says[14] that a general rule has been evolved to the effect that although the work demanded from the servant may not be within the precise line of his

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14. Op. cit. page 78.

contract, yet if asked of him during an emergency, his scruples to do it will not be listened to and he will be guilty of disobedience.

Mr. Bell suggests[15] that orders inferring trifling deviations from the line of duty form no grounds of objection in favour of the employee, so long as these orders are not constantly repeated. But if the deviation is substantial or takes place on numerous occasions or if the employee is placed in some personal danger then the Court will protect the employee by upholding his refusal to perform.

Moreover an employee cannot be obliged or compelled to work on a lower status than that at which he was engaged. There are several older Scottish cases[16] which support this view. It will be appreciated that if the servant is taken on for the performance of general duties (perhaps, for example, on the basis of an unskilled labourer) then he or she can be ordered to perform any lawful task within the scope of that general employment. There is no room for a demarcation dispute (in theory) between the employer concerned and the particular employee

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15. Principles, sec. 176.

16. See, inter alia, Gunn v. Ramsay, Hume's Decis. 384 (1801); Stuart v. Richardson, Hume's Decis. 390 (1806); Thomson v. Douglas, Hume's Decis. 392 (1807); and Ross v. Pender (1874), 1 R. 352.

On the question of risk of personal danger or violence, justifying refusal to obey an order from the master, reference may be made to certain of the older cases.[17] The test seems to be that the risk involved is not fairly within the contemplation of the contract.

This approach to the question has been continued in modern law and it is further illustrated by several notable cases, both English and Scottish, of which the three examples quoted below[18] are perhaps the most outstanding and well-known.

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17. See Turner v. Mason (1845) 14 M. & W. 118; Sutherland v. Monkland Railways Co. (1857), 19 D. 1004; and Fraser - op. cit. cap.X and cases therein cited.

18. See particularly -

M'Keating v. Frame, 1921 S.C. 382 (an order to a domestic servant to go home when she was too ill to move from her bed was quite unreasonable);

Ottoman Bank v. Chakarian [1930] A.C. 277 (an order to an Armenian employee of the bank sending him to Istanbul (then Constantinople) where his life was in danger; employee's refusal to continue serving in Istanbul and his subsequent dismissal. He succeeded in his action for wrongful dismissal);

Contrast Bouzourou v. Ottoman Bank [1930] A.C. 271 (where it was held that the appellant, Bouzourou, had failed to discharge the onus of proof upon him that his life was in danger and therefore his action for wrongful dismissal could not succeed).

(f) Must conduct himself morally.

The servant must behave himself during the employment, that is to say conduct himself in a respectable and decent manner. He must not do anything which scandalizes or brings disrepute upon his employer or his family. This is particularly so in the case of servants who are residen within the employer's household[19] (though they are a rapidly diminishing class of employee).

Although the immoral act is committed outwith the master's household, this will still justify dismissal if the master's interests, feelings or reputation are seriously prejudiced thereby.[20]

The misconduct in question must occur during the service. Prior misconduct does not - unless continued - justify dismissal.[21]

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19. See Atkin v. Acton (1830) 4 C. & P. 208 (justified dismissal of a resident employee, guilty of assaulting a maid-servant with intent to ravish her).

20. Connors v. Justice (1862), 13 Ir.C.L.R. 457.

21. R. v. Westmeon (1781), Cald. 134.

Moreover, in the absence of fraud by the employee, there is no obligation upon a servant to disclose to his employer, when he is being taken on as an employee, any material fact concerning his character. The principle of uberrima fides has no application in the master and servant relationship.[22]

Dishonesty is one of the more common types of acts of moral turpitude. If an employee steals his employer's property then he has broken his contract and may be dismissed at once.[23]

Any other act of moral turpitude may justify dismissal, although a prosecution had not been or could not be taken; for example, the use of obscene language by a tutor to his master's children justifies his immediate dismissal;[24] or gross misconduct in the treatment of female workers on a farm by the foreman, thereby causing quarrels etc., with his wife and consequent interruptions of work.[25]

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22. See Fletcher v. Krell, 42 L.J.Q.B. 55; and also Hands v. Simpson Fawcett & Co. Ltd. (1928) 44 T.L.R. 295; also Bell v. Lever Bros., Ltd., [1932] A.C. 101.

23. Bell's Principles sec. 178; Turner v. Robinson (1833) 6 C. & P. 15; Smith v. Thompson, 8 C.B. 44; 18 L.J.C.P. 314 (1849); Blenkarn v. Hodges' Distillery Co. (1867), 16 L.T.N.S. 608.

24. Matheson v. MacKinnon (1832), 10 S. 825.

25. Greig v. Sanderson 1864, 2 M. 1278.

Intoxication is another example of improper conduct. Before dismissal is justified the intoxication must be habitual or frequent, unless of course it can be shown that one particular instance was of itself of such a serious and aggravated character[26] as to justify dismissal.

It is always a question of circumstances as to the extent of intoxication which justifies dismissal. Not only is the degree of intoxication and its frequency to be looked at but, in addition, the position of parties and the nature of the service should also be considered.[27] The basic general test as between employer and employee would be whether the state of intoxication interferes with the proper function of the employee's duties. If it does then he may be dismissed.

(g) Revealing secrets.

In important manufactures or processes or trades the master may have some secret or hidden method of manufactur which may be quite unknown to rival traders. His reputation and his business superiority and success will

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26. Edwards v. Mackie (1848), 11 D. 67; Speck v. Phillips (1839) 5 M. and W. 279; Wise v. Wilson (1844) 1 C. and K. 662.

27. M'Kellar v. Macfarlane (1852), 15 D. 246; (the master of a ship dismissed for drunkenness in a foreign port; reinstated; and told not to carry spirits abroad; disobeyed; incapacitated by drink for part of homeward voyage; held to have forfeited his wages in consequence).

usually depend upon that process, which he desires to keep secret and in regard to which the law will give him a measure of protection. When an employee is engaged it is not unusual in certain trades or manufactories to require him to maintain a strict silence as to the methods or processes used by his employer. If he should break that undertaking which he has given then he may be liable in damages to his master and he may well be dismissed.[28]

(h) Earnings belong to Employer.

During all the hours of employment the employee's time and labour belong to his master. By the contract itself the employer is purchasing the skill, ingenuity and labour of the servant. Therefore, the servant comes under a legal obligation (not just a moral obligation) to exert his skill, his ingenuity and his labour to the maximum for the advantage and benefit of his master.[29]

Should the first master give his consent to the

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28. See Rutherfoord v. Boak, 19 March, 1836 F.C. Jury Sittings vol. xi p. 32; and Liverpool Victoria Friendly Socy. v. Houston, 1900 3 F. 42; 8 S.L.T. 230. See also Devosse v. Campbell, 31 Sh.Ct.Rep. p. 161 to the effect that it is open to the employer to take Interdict proceedings to prevent disclosure by the employee.
A fairly recent and more well-known English case illustrating the employer's remedy of Injunction (the English version of the Interdict) is that of Hivac Ltd. v. Park Royal Scientific Instruments Ltd. [1946] Ch.169.

29. Thompson v. Havelock (1808) 1 Camp. 527 per Lord Ellenborough.

second employment then it is possible that the first master might recover the employee's wages, based upon an agency contract. But if the employee takes a second situation or appointment without the consent of his first master, the correct remedy is to proceed against the second employer for loss of service or against the servant himself for breach of contract. It is useless to claim the wages from the second employer because he and the pursuer (i.e. the first employer) are not parties to any contractual relationship. If the wages have already been paid to the employee it seems competent for the first employer to sue the employee for the amount of the wages paid to him by the second employer.

The rules noted above will apply where the employee's actings are clearly prejudicial to the first employer, based on the theory that the "second" contract is against public policy and therefore it is void and unenforceable.

Should the actings of the servant vis-à-vis his second employment be in no way prejudicial to his original master it would seem that the second employment is perfect ly lawful and the first master cannot interfere.

It is now accepted, in modern practice, that an employee may take employment (which is, of course, non-prejudicial to his master) elsewhere, during his spare time, but he cannot undertake without special consent to

work for a second master during a period of time when he is under contract to his original master.

(i) Bound to accompany employer.

There seems to be no doubt that, in certain cases, an employee must accompany his employer wherever the latter goes within the United Kingdom and particularly where the nature of the service is personal e.g. a domestic employee such as a valet, a chauffeur or also a private secretary. But an employee is not bound to go outwith the United Kingdom, if he does not wish to do so.[30]

Both Mr. Bell[31] and Mr. Tait[32] took the view that a servant employed in Scotland was not bound to move outside of Scotland - even to another part of the United Kingdom.

It will be appreciated that where the servant's contract is terminated whilst he is absent from home he is entitled to his expenses for the journey home. Moreover, it is reasonable to allow him a certain time during which to seek alternative employment and accordingly the employer should permit him to return home at a reasonable time before the final termination of the engagement, for this purpose.

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30. Tait's Justice - vidé servant; and see also Stuart v. Richardson, Hume's Decis. p. 390 (1806).

31. Principles sec. 180.

32. Op. cit. (vidé servant).

Where the work to be performed by a particular servant has reference to a place rather than to a person, it would appear that the master cannot remove him to another place which is at an inconvenient distance for the servant. This rule is departed from during emergencie (particularly in war-time) when movement of employees becomes regulated generally by the Ministry of Labour (under Essential Works Orders, Control of Engagement Orders and the like) and the actual engagement of artisan employees is subject to compulsory regulation by the state.

The place where the master has his work at the time of the engagement is (unless stipulated expressly otherwise) held to be the place where it is implied that the servant is to labour. This point was quite clearly illustrated in the old case of Anderson v. Moon[33], where all the facts and circumstances were carefully weighed and upon an examination of these the court held that the female employee concerned could not be compelled by her master to work at another factory, some distance away from the original place of employment.

(j) Not to injure the business of his employer.

If there is any question of the servant's conduct causing serious harm or loss to the master's business then

33. (1837), 15 S. 412.

dismissal is justified. The conduct here is something other than moral turpitude, disobedience or habitual negligence.[34]

A case where the possibility of causing injury to an employer's business arises not infrequently and which is of the species of conduct which we have in mind in this paragraph, is that where an employee solicits business from his master's customers knowing that he (the employee) is about to commence in business for himself. The principle which is applied here would seem to be this - that if the servant is soliciting business when the service relationship is at an end then there is no justification for dismissal. However, if the service relationship is still subsisting then the master may justifiably dismiss him and sue for damages for the loss incurred.[35]

If the servant engages in business on his own account and that business is in competition with the business of his master then he becomes liable to dismissal, even although he can show that he has given full time

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34. Turner v. Robinson, 5 B. and Ad. 789; 6 C. & P. 15 (1833) (foreman assisting an apprentice to escape to America); see also Read v. Dunsmore, 9 C. & P. 588 (1840); and Lacy v. Osbaldiston, 8 C. & P. (1837); also Amor v. Fearon, 9 A. & E. 548 (1839).

35. Nichols v. Martin, 2 Esp. 732 (1799).

and attention to the master's business.[36]

As soon as the service relationship is over there is no restriction upon the ex-employee from commencing business on his own account. If he can persuade his former employer's customers to patronise his new business then it seems that his old employer can do nothing about this. In view of this possible danger it is not unusual to find that somewhat strict restrictive covenants or obligations are introduced into the contract of employment itself so as to prevent the former employee from setting up business in opposition to his old master for a specified number of years and within a certain prescribed area. The question which then arises is whether - looking to the public interest and also that of the person claiming to enforce the restriction - the particular restrictive covenant is wholly or partially enforceable. If it is too wide then it will be void and quite unenforceable.

This important topic of agreements in restraint of trade is very fully covered in many of the leading Scottish and English textbooks and general reference works[37] and it is not proposed therefore to deal with the

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36. See Mercer v. Whall, 5 Q.B. 447 (1845); and Hobson v. Cowley, 27 L.J.Ex. 205 (1858).
37. See particularly Gloag on Contract (2nd Edn.); Gloag and Henderson - Introduction to the Law of Scotland (6th Edn.); Cheshire and Fifoot - The Law of Contract (6th Edn.); and Chitty on Contracts (22nd Edn.), particularly volume I thereof.

topic in the course of this work. It is sufficient to note what seems to be the broad basic role of both Scottish and English law, namely:- that any agreement by which a man binds himself that he will not carry on a trad of any kind, although limited in space or that he will not carry on a particular trade, if unlimited in space, are both equally bad in law and accordingly are quite void and unenforceable.[38]

(2) Employer's duties and obligations generally:-

As the law places certain duties and obligations upon an employee towards his employer so it places a corresponding set of duties and obligations upon the employer in relation to each of his employees. It is now appropriate to consider what these duties and obligations are and also to note in what respects, if at all, they have changed and developed in modern law.

(a) To receive employee and allow him to continue in service.

The master's primary duty is to take the servant into his employment and to allow him to continue therein.[39] The exceptions to this obligation are considered in chapter

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38. See Fraser - op. cit. page 91; and the leading case of Nordenfeldt v. Maxim Nordenfeldt Guns & Ammunition Co. (1894) A.C. 535.
39. Bell's Principles sec. 182; Braceegirdle v. Heald, 1 B. and Ald. 722; Clarke v. Allatt, 4 C.B. 335.

form hereof (under the general heading of "Termination") and also in that section of this work dealing with "justifiable dismissal".[40]

(b) To treat employee properly:-

The nature of the relationship requires a mutual respect for each other - a forbearance, loalty and reserve in using the service and a mildness in giving orders.[41] It has been pointed out earlier in this work that an employee must impliedly give obedience, submission, loyalty and respect to his master. Equally, there is an implied obligation upon the master of protection and moderation toward the servant, that is to say in his general treatment of the servant. The test as to whether an employee may leave his employment because the master is not fulfilling his obligation has to be a test of reasonableness in the circumstances. The law does not - and can hardly be expected to - protect the over-sensitive employee. The employee himself cannot leave, without any justification, upon the ground that his employer is perpetually petulant or gruff or ill-mannered or bad-tempered or indeed even just plainly and generally disagreeable. Something more is needed -

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40. See chapter 2, paragraph (3) (remedies of the employer).

41. See Fraser - Master and Servant p. 124, quoting from Paley's Moral and Political Philosophy.

perhaps personal violence or a threat of such violence, the habitual use of intemperate language or acts of cruelty such as destroy the whole basis of a relationship which should rest upon mutual trust and mutual respect.[42] The court will look at the circumstances of each case[43] and while the decision in any one case of this type may be a guide to a set of circumstances arising subsequently it should not necessarily be regarded as a precedent (it is an exceeding rarity in practice to find a reported decision which agrees, in all respects, with the particular problem in hand). The Court will be concerned to see that the principle of "natural justice" is not transgressed by the employer.[44]

One aspect of the authority which the master had over his servant is illustrated by the question of personal chastisement. Erskine took the view[45] that the master had a power of moderate chastisement over his servants. Later writers have opposed that view because there was no

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42. See particularly Bankton 1,2,55; and Smart v. Gairns Hume's Decisions 18 (1794) as to cruel treatment of an apprentice.

43. See Fraser, op. cit., page 125 and also footnote (b) thereto.

44. See Palmer v. Inverness Hospitals Board of Management (O.H.) 1963 S.L.T. 124.

45. Ersk. 1,7,62.

need, they said, for a master to have such power, which could be an instrument of oppression. It is conceded that, in earlier days, when young servants and apprentices spent their time at the employer's place of work or in his household some quasi-parental authority was necessary and the practice of mild chastisement might at that time have been acceptable[46] but it is submitted that this so-called power of chastisement (whether termed "mild" or not) must be disregarded completely in modern times. The same is probably true of the master and apprenticeship relationship also, in which of course in former days the idea of personal chastisement had been more readily accepted. It may be that today the only master with a power to chastise those who work under him is the ship's master and he is protected by the Merchant Shipping Acts.

In the general case of employer and employee there is no need for personal chastisement when the law permits dismissal to the master and an action in damages to the servant.

The female employee would be entitled to leave the

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46. See Blackstone, 6 1 c. 14; and Winstone v. Linn, 1 B. & C. 469; 2 D. and R. 465.

service if her employer had attempted to seduce her.[47] In such a case the employer would be obliged to pay the wages for the whole period of the service and perhaps also for such further loss or damage as she has suffered. This conduct by the master is a distinct breach of his implied obligation to protect a female servant.[48]

Most importantly, as soon as a good reason for leaving arises the employee should depart at once. If he does not do so he will be held to have condoned the particular act complained of and therefore he will have debarred himself from founding upon it.[49]

(c) To provide work.

It is accepted that wages are payable (a) in proportion to the amount of work done, i.e. "piecework" or (b) according to the time served. In the former case the master is bound to provide constant employment during the subsistence of the agreement.[50] In the latter case,

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47. M'Lean v. Miller (1832) 5 Deas' Rep. 270; also Gray v. Miller 1901, 39 S.L.R. 256; and Reid v. Macfarlane 1919 S.C. 518; 1919, 2 S.L.T. 24; 56 S.L.R. 482 (the last-mentioned case being most interesting for the observations it contains regarding the evidence necessary to prove seduction by the employer).
48. See Bowie v. M'Corkindale, 39 Sh.Ct.Rep. p. 325.
49. See the opinion of L. Pres. Inglis in Fraser v. Laing 1878, 5 R. 596 (a catalogue of condoned grievances cannot be brought up as a ground for damages where a domestic servant remained in service for the full period).
50. Bell's Principles s. 192; Cowdenbeath Coal Co. v. Drylie, 1886, 3 Sh.Ct.Rep. 3 at p. 11; Turner v. Goldsmith, [1891] 1 Q.B. 544 (wages were payable here by commission and it was held that the employer was bound to give the opportunity of earning it).

there is generally no obligation to provide work[51] and wages must be paid on the agreed basis although the employee be merely standing by doing nothing.

It may be that there is an implied obligation, under certain circumstances, to provide work - for example, where the employee is an actor, concert pianist or other person who has to maintain a reputation before the public or whose business interests require him to maintain contact with a particular market. It is, furthermore, important to note that where the contract is a written one its terms provide the basis of agreement and the master cannot say that he has an implied right or privilege of varying these terms. There is an old Scottish case[52] illustrating the attempt by a master to vary the terms upon the ground that as the new raw materials supplied to him were of better quality and more easily processed in manufacture therefore he was entitled to reduce the piecework rate of wages. But the Court refused to accept the master's contention.

The question of implied terms had also arisen in certain English cases which were decided not long after the Scottish case above-mentioned. For example, there might be a written agreement between the employer (colliery

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51. Lagerwall v. Wilkinson, 1899, 80 L.T. 55.
Turner v. Sawdon [1901] 2 K.B. 653.

52. Grieve v. Gordon, 1821, 1 S. 41.

-owners) and the employee stipulating that when the pit was idle the employee should continue to serve the employers and be subject to their orders and directions and do a full day's work on every working day. The English courts took the view that the employers were not bound to employ the plaintiff (Scottish "pursuer") on all reasonable working days or to create work for him so as to give him something to do.[53] There was nothing imperative in an agreement of this type.

In a later case again concerning a colliery worker there was a provision that wages should be paid fortnightly and that the employee should not be discharged without twenty-one days' notice in writing, except in cases of misconduct. It was held that this implied an obligation to find work for the servant and to pay him wages every fortnight.[54]

The trend of the more recent decisions - where the question of an implied obligation has arisen - has been to support the general principle stated in the opening sentence of the second paragraph of this chapter. It must be observed at once that most of these decisions are from

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53. Williamson v. Taylor, 13 L.J.Q.B. 81 (1843); Hartley v. Cummings (1847), 17 L.J.C.P. 84; Pilkington v. Scott, 15 M. & W. 657 (1846).

54. Whittle v. Frankland (1862) 2 B. and S. 49. See also Cook v. Sherwood (1863) 11 W.R. 595.

England[55], but nevertheless this is a topic upon which there is little if any variation between the laws of Scotland and England.

However, the basic principle on this question of provision of work still remains - that there is no general obligation upon an employer to provide work.

(d) To provide food and clothing.

It will depend upon the terms of the agreement (or engagement) or upon the nature of the service itself whether or not an employer is bound to provide food and lodging for his employee. Obviously, this obligation will arise towards the domestic servant[56] and any failure in the performance of that obligation will allow the employee to leave the service - although, in the first place, the servant has a duty to notify the master of his grievance and give him a chance to put matters right. Once the

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55. See Clayton v. Oliver [1930] A.C. 209; 99 L.J.K.B. 165; 46 T.L.R. 230. Turner v. Sawdon [1901] 2 K.B. 653. Marbe v. George Edwardes Ltd. [1928] 1 K.B. 269; 96 L.J.K.B. 980; 43 T.L.R. 809; but see Withers v. General Theatre Corporation [1933] 2 K.B. 536; 102 L.J.K.B. 719 (no compensation for alleged damage to an existing reputation). See also - Collier v. Sunday Referee Publishing Co., [1940] 2 K.B. 647; 109 L.J.K.B. 974; 57 T.L.R. 2; and Re Reubel Bronze Co., [1918] 1 K.B. 315; 87 L.J.K.B. 466; 34 T.L.R. 171.

56. See Bell's Principles sec. 182; Bankton 1,2,55; 2 Hutch., 170.

grievance has been reported and nothing has been done about it, then it is in order for the servant to leave[57] Lord Fraser says[58] that so far as lodgings are concerned the master may compel a male domestic servant to reside out of the house upon paying board wages, but he cannot do so in the case of the female servant, because it is implied in her engagement that she shall have the protection of the master's house and family.

Mr. Umpherston explains[59] that it is not uncommon in agricultural service and perhaps in other cases too by agreement, for the employer to give or allow to the servant a specified quantity of meal, potatoes, coal etc., although the employee has not necessarily a right to demand the particular items themselves. It seems, however, that he is absolutely entitled to a similar quantity of sustenance or fuel.[60] The case of Sheills v. Dalyell, cited in the footnote to this page, supports the view that the master may not make any change in the specific articles supplied unless the circumstances became so extraordinary and unforeseen as to make the fulfilment of the letter of the contract impracticable.

This question of board and lodging was quite important

57. Fraser, op. cit. p. 127.
58. loc. cit. (see footnote (b)).
59. op. cit. p. 72.
60. See Sheills v. Dalyell 1825, 4 S. 136.

to the employee in the Victorian era and perhaps even down to the commencement of the Second World War, but since then it has hardly been a material matter. Oddly enough though, it has re-occurred in modern business life in the form of the provision of Luncheon Vouchers as an added inducement to employees to remain in the particular service or to prospective employees to join the particular establishment. This new device raises interesting questions in relation to income tax and legitimate business expenses, but these are not relevant to the question as to whether or not the provision of Luncheon Vouchers has or has not become a term or stipulation or condition of the contract of employment. The matter is important to the employee as it may mean a benefit being conferred upon him which is equivalent to a rise in wages of, say, one pound sterling per week (calculated on the basis of a four shillings voucher per day for a five-day week).

It is also relevant to this particular section to consider whether there is any obligation upon an employer to provide medical and or attendance for his employees.

It seems to be beyond doubt that there is no obligation upon a master to provide medicine or medical attendance during the illness of his employee. Nor is any exception made to this rule where the illness is caused by injury received in the service or during residence in the

master's household.[61] Mr. Umpherston suggests[62] that the master's obligation of protection, in the case of female and young domestic servants, implies a quasi-parental care of and for the servant's health and morals, similar to the master and apprentice relationship of the eighteenth and early nineteenth centuries. He also thinks that such an obligation might, in certain circumstances, include the provision of medical attendance. In support of this, he cites Jeffrey v. Donald,[63] a case where a young female domestic servant was injured within the household and subsequently died without the employer having sent for a doctor or having communicated with the girl's parents until three days after the accident. Whilst agreeing that the particular decision was justified upon a failure to fulfil his duty of protection, Mr. Umpherston submits[64] that the master's conduct in the circumstances was not just a moral delinquency but a failure in a legal obligation, because the employee was, at the relevant time, subject to the master's control and being helpless, such an emergency imposed a legal duty upon the master to

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61. See Sellen v. Norman 1829, 4 C. & P. 80; Mitchell v. Adam 1874, 1 Guthrie's Sh.Ct. cases 361.

62. op. cit. p. 66.

63. 1901, 9 S.L.T. p. 199.

64. op. cit. p. 67.

obtain medical assistance.[65]

The question of the legal duty of care imposed upon the master has come up again in the important case of M'Keating v. Frame,[66] where the principle of liability upon the master arising out of his legal duty of care was very clearly accepted by the court. The breach of that legal duty will give rise to an action in damages against the master based upon reparation.

It seems that English law takes a similar view[67] of the duty of care so imposed upon the master.

In certain circumstances a master may undertake liability for medical attendance, whether expressly or impliedly, but this liability was limited to the extent of his undertaking.[68] He cannot make any deduction from wages in respect of that medical attendance, unless he is able to point to a stipulation to that effect.[69]

Taking into account the development of National Health Insurance schemes, administered by the State, during this

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65. See Taylor v. Hill, 1900, 7 S.L.T. p. 318.
66. 1921 S.C. 382.
67. See Mansfield-Cooper & J.C. Wood "Outlines of Industrial Law"; Diamond "Master and Servant" and Batt "The Law of Master and Servant", being the principal textbooks in English law, for examples of this duty.
68. Montgomery v. North British Rly. Co. 1878, 5 R. 796.
69. Mitchell v. Adam 1874, 1 Guthrie's Sh.Ct. Cases 361.

century, this question of liability for medical attendance upon an employee (in the nature of a quasi-parental protection) is no longer important. However, the question of the employer's legal duty of care towards his employee is still very important, as has been indicated in this main section.

It is also interesting to note that the Conspiracy and Protection of Property Act, 1875[70] makes it a criminal offence, punishable by fine or imprisonment and after a summary conviction, for a master who is legally liable to provide for his servant or apprentice any necessary food, clothing, medical aid or lodging, to refuse or neglect to provid(e) To indemnify the employee for injury sustained in the employment.

(e) To indemnify the employee for injury sustained in the employment.

The common law position of the employer in relation to his own personal fault, which causes injury to an employee, seems to be clear. The employer is bound to conduct his business or trade so as not to endanger the lives or limbs of his workmen. Therefore, if he acts negligently or carelessly (e.g. in failing to take proper safety precautions in the course of a manufacturing process) he becomes liable in a reparation action to the injured employee.

Nevertheless, the employee himself is regarded as assuming all ordinary risks of the particular employment, even where the work is of a highly dangerous nature. No

70. 38 and 39 Vict. c.86, section 6.

master is, nor can he be expected to be an insurer against all risks whatsoever which arise in the scope of employment. It is the failure in the legal duty of care based upon all the circumstances which gives rise to the common law liability. If the master ought to have foreseen the particular danger, which caused the injury, and thereafter have taken appropriate steps to guard against that danger, he will be liable for any failure so to act. Of course, the employee himself may have the same opportunity as the master of appreciating the danger and yet continue to work without protest or objection or he may assume a greater risk than necessary or, even act contrary to his employer's instructions. Where he does any of these things he would normally lose his right of recourse against the employer - as the maxim volenti non fit injuria applies.[71]

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71. See M'Neill v. Wallace (1853), 15 D. 818; Gray v. Lawson 1860, 22 D. 710 (but compare M'Aulay v. Brownlee 1860, 22 D. 975); Cook v. Bell 1857, 20 D. 137; and O'Neill v. Wilson 1858, 20 D. 427.

On the "volenti" principle see particularly Lord Curriehill's opinion in Cook v. Bell cit. supra.; and also the opinion of L.J.C. Hope in Paterson v. Wallace 1855, 17 D. 623 (see Lord Cranworth's remarks on this case in Bartonshill Coal Co. v. Reid 1858, 3 M'Q. 286), Paterson's case was reversed on appeal but the principle that knowledge of risk on the employee's part was a material factor, was fully accepted.

The principle was raised again in Wallace v. Culter Paper Mills Co. Ltd. 1892, 19 R. 915, where an employee was killed whilst pointing out a defect in a machine to his employer's engineer. The machine was proved to have been dangerous. The employers were held to be in fault for failing to fence the machine and the court also took the view that where an employee continues to work in the knowledge of an existing danger there is no implied agreement by him to relieve the employers of their responsibility. The opinions of Lord Adam and Lord M'Laren are most helpful - see pages 918 to 920 inclusive of the report - and

The duty which the common law places upon the employer is that of taking reasonable care. This was referred to by Lord Abinger in the early English case of Priestley v. Fowler[72] and the principle has been accepted in later cases.[73] If the danger is concealed from the employee or if

71. continued
both were quite clearly of the view that this present was ruled by the leading English case of Smith v. Baker & Sons L.R. [1891] A.C. 325 before the House of Lords, as the principle of law was the same in both countries.

In Wilkinson v. Kinneil Cannel and Coking Company Limited 1897, 24 R. 1001, by a majority of a court of seven judges, the pursuer was allowed an issue, based on the volenti principle and, more importantly perhaps, upon the "volunteer" principle (later to become more well-known from the leading English case of Haynes v. Harwood [1935] 1 K.B. 146; [1934] All E.R. 103).

The volenti principle again arose for consideration in Robertson v. Primrose & Co. 1910 S.C. 111, where an employee was injured on two separate occasions by a defective crane. The Lord Ordinary disallowed the claim, holding that the pursuer had known of the risk on each occasion and had accepted it. The First Division recalled the Lord Ordinary's interlocutor and allowed an issue, stressing that the question whether pursuer knew of and had accepted the risks - which were not ordinary risks incidental to th employment, but additional risks alleged to be caused by the employers' fault - was a question of fact to be answered by a jury. Lord President Dunedin's opinion is most valuable (see pages 114 and 115) and here he followed the guiding principle of Smith v. Baker & Sons, ctt. supra

In the most recent Scottish case of Kirkham v. Cementation Coy. (O.H.) 1964 S.L.T. (Notes) 33 the plea of volenti non fit injuria, was again put forward by the employer. The court repelled the plea on this occasion, however, holding that it was not supported by relevant averments on behalf of the employer.

72. (1837) 3 M. & W. 1; see also Riley v. Baxendale (1861) 30 L.J.Ex. 87; and Ogden v. Rummens, (1863), 3 F. & F. 751.

73. Woodley v. Metropolitan District Railway Co. (1877), 2 Ex.D. 384; Assop v. Yates, 27 L.J.Ex. 156; Saxton v. Hawksworth (1872), 26 L.T. 851; Skipp v. Eastern Counties Railway Co., 23 L.J.Ex. 23; and Robertson v. Adamson (1862 24 D. 1231.

he is given a false assurance that precautions have been taken or he is told that some precaution will be taken and the accident happens the employer will be liable.

A situation may sometimes arise wherein the employee may have been induced by the employer to continue work which was dangerous and the employee himself knew of the danger and had complained of it. Does the law then regard the employee as having himself assumed the risk? It seems that it does not.[74] Lord Cockburn (Cockburn C.J.) gave a most instructive opinion in which he distinguished clearly between the case where the employee knowlingly enters into a contract to work upon defective machinery and the other case where, upon a defect arising, the employee is induced by the employer, to whose notice the defect has now been brought, to continue working in the usual manner, under a promise that the defect will be remedied.

The English case of Holmes v. Clarke[75] does not seem to be easily reconciled with the Scottish case of Chichton v. Keir,[76] where defender knowlingly supplied an unfit

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74. Holmes v. Clarke (1862), 31 L.J.Ex. 356 (where fencing had broken and the employer promised to replace it. Accordingly an element of personal negligence arose - and the case was decided on this ground, rather than breach of statutory duty); see also Holmes v. Workington (1861) 2 F. & F. 533.

75. Cit. supra.

76. 1863, 1 M. 407 (see the opinion of L.J.C. Inglis - (as he then was)).

horse, but induced the pursuer to continue his work, promising him another horse. Pursuer was well aware of the risk. It was held that he had no ground of action. He ought to have refused to continue working in face of the manifest danger. Presumably the difference really lies in the fact that the danger in Crichton's case was more manifest and therefore perhaps more likely to cause injury than it was in Holmes - so that the reasonable and sensible employee would have refused to accept the unfair balance of risk. It is submitted that the cases of Wallace v. Culter Paper Mills Co. Ltd. and Robertson v. Primrose & Co., referred to in footnote number 71 above, taken along with Smith v. Baker & Sons, as one of the leading cases on the volenti principle, have done a great deal to clarify the law on this very difficult point and that the old case of Crichton v. Keir might well be completely disregarded.

Although the employer may have been negligent, nevertheless he escaped liability completely - under the old law - if he could show that the employee's own recklessness or negligence materially contributed to the accident.[77]

The Employers' Liability Act, 1880 (since repealed) made important limitations in the common law doctrine of

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77. See, as a matter of historical interest, - Senior v. Ward (1859) L.J.Q.B. 139; M'Naughton v. Caledonian Railway Co., 1858, 21 D. 160; also M'Martin v. Hannay, 1872 10 M. 413; Galloway v. King 1872, 10 M. 788; Dublin etc., Railway Co. v. Slattery (1878) 3 App.Cases 1166; Radley v. London and North-Western Railway Co., (1876) 1 App.Cases 754; see also Fraser, op. cit., chapter 13.

"collaborateur" (or fellow-servant) but it left unchanged the position where the employer could plead negligence by a servant which materially contributed to his own injury.

Although a modification of this strict common law rule of protection to the employer was sought by the trade unions and by the workpeople and their Parliamentary representatives it was not finally achieved until the Law Reform (Contributory Negligence) Act of 1945.[78] This Act enabled the jury (or the court, if no jury sitting) to assess the total amount of the loss arising from the accident and then to apportion the blame between pursuer and defender. Damages would then be awarded to the pursuer which took into account his own contribution by way of blame - for example, if the total loss or injury were assessed at £10,000 and pursuer's blameworthiness was agreed at 20%, the pursuer would recover £8,000 (which is precisely equivalent to defender's blameworthiness). The Act effected an important change by enabling an employee to recover an adjusted and agreed proportion of the loss based upon the employer's degree of fault,[79] whereas prior to the Act, he was virtually without any remedy where he had contributed to the loss in any respect.

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78. 8 & 9 Geo. 6 cap. 28.

79. See Professor D.M. Walker's "Law of Damages in Scotland" particularly at chapter 27, pages 779-781 and also the illustrations of types of claim contained in Appendix A thereof, in many instances a reduction in the award being made upon proof of contributory negligence.

One very important question which may well settle at once the question of the employer's liability in the circumstances is whether or not the employee was acting within the scope of his employment at the time when the accident occurred.[80] Where the employee clearly volunteers to do something outwith the scope of his duties then the risk of injury normally lies wholly upon himself and he cannot hold his employer responsible.[81]

Where there is a latent danger in the particular operation and the employer knows or ought to have known of this, and neglects to inform the employee, then the employer will be liable for the injury to the employee.[82] The rule is the same where the danger is not obvious to a person in the servant's position and where the latter might reasonably be held to have relied upon the judgment of his

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80. See Brydon or Marshall v. Stewart 1852, 14 D. 596; 1855 2 M'Queen 30; Paterson App. 447; also Lord Cranworth's remarks in Bartonshill Coal Co. v. Reid 1858, 3 M'Queen 286; Paterson App. 793. See also cases of Jardine v. Lang 1911 (O.H.) 2 S.L.T. 494 and Gormanley v. Evening Citizen Ltd. (1962) 78 Sh.Ct.Rep. 88; and also Docherty v. Ancell Motor Co., (1963) 79 Sh.Ct.Rep. 50, a case in which employers had failed to prove that the employee was acting outwith the scope of his employment.

81. Sutherland v. Monkland Railways Co. 1857, 19 D. 1004.

82. Davies v. England (1864), 33 L.J.Q.B. 321.

employer for his protection.[83]

The employer may also be liable if he is guilty of negligence and the risk involved is not incidental to the service.[84]

On the subject of machinery, the position at common law seems to be this, - the employer must provide reliable and sufficient machinery but it need not be the very latest up-to-the-minute appliance produced within the particular industry[85] - which is to be kept in a proper state of repair, though he does not warrant absolutely the condition of that machinery. His liability is not equated with that of the insurer - his duty is to exercise that skill and caution which is the hallmark of the prudent man of business (i.e. in his particular trade or business). He cannot be liable for latent defects quite unknown to him or of whose existence he could reasonably be supposed to be unaware.[86] The onus of proving negligence and knowledge of a defect (or reasonable apprehension of a defect by using ordinary skill and attention) lies upon the employee who is averring negligence by his employer.[87]

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83. See Pollock v. Cassidy 1870, 8 M. 615; Stark v. M'Laren 1871, 10 M. 31; Robertson v. Brown 1876, 3 R. 652.

84. See Mansfield v. Baddeley 1876, 34 L.T. 696.

85. See the observations of the Lord Justice Clerk in Edwards v. Hutcheon 1889, 16 R. 694; 26 S.L.R. 550; and the earlier case of Mitchell v. Patullo 1885, 23 S.L.R. 207.

86. Ovington v. M'Vicar 1864, 2 M. 1066.

87. See Weems v. Mathieson, 1861, 4 M'Q. 215; Paterson App. 1044; also Lord MacKenzie in Sneddon v. Addie 1849, 11 D. 1159; see also Gemmills v. Gourock Ropework Co., 1861, 23 D. 425; and

But statute law may place a very heavy obligation upon the employer to protect his workmen and any failure to

87. continued
and Darby v. Duncan & Co. 1861, 23 D. 529; and Murphy v. Phillips 1876, 35 L.T. 477.

It has been held in the recent case of McMillan v. B.P. Refinery (Grangemouth) Ltd. 1961 S.L.T. (Notes) 79, that if there is a latent defect in machinery supplied to a workman's employers the onus is upon the workman to prove that the makers were not reputable manufacturers upon whose skill his employers were entitled to rely. That is an extremely heavy onus of proof. The case itself seems to form a corollary to the important case of Sullivan v. Gallagher and Craig 1959 S.C. 243, which was being heard by the Court of Session at the same time as the leading English case of Davie v. New Merton Board Mills Limited [1959] A.C. 604 was before the House of Lords. Indeed the Scottish case was adjourned to await the Lords' decision in Davie. Their lordships in the Second Division were very much impressed by the English decision, as their observations thereon show. But the circumstances of the to cases were not identical. It was held in Sullivan's case that his employers were not liable in the circumstances for a latent defect in a truck supplied by the third-named defenders in the original action (who were held to be responsible to Sullivan and against whom the Lord Ordinary had awarded £400 damages). The Lord Justice Clerk (Thomson) stresses that, as a result of Davie's case, it can no longer be said that an employer who engages an outsider to provide plant which his employees will use is automatically made vicariously liable for the outsider's negligence. His lordship had previously taken that view in Donnelly v. Glasgow Corporation 1953 S.C. 107 - but this case was clearly over-ruled by the House of Lords in Davie. Lord Patrick's opinion (see particularly pages 261/262 of the report) is very helpful. He was much impressed by the decision in Davie and confirms his view that the employer is not under a wide liability (popularly classified as "absolute" in former cases of this pattern) for any defect in plant supplied by him. The correct statement of the law relating to the master's duty was - as the House of Lords accepted in Davie - that expressed by Lord Herschell in Smith v. Baker & Sons [1891] A.C. 325 at page 362, namely, - "The duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so carry on his operations as not to subject those employed by him to unnecessary risk". Lord Mackintosh takes a similar line (see pages 264 and 265 of the report).

This so-called personal duty had been firmly established by the well-known case of English v. Wilsons & Clyde Coal

fulfil that obligation may make him liable beyond question. The statutory provision will have to be carefully studied to confirm whether the particular requirement is obligatory or whether it allows the employer a measure of discretion (e.g. has he to something "so far as is reasonably practicable" or is it good enough if, say, the particular machinery in his factory is safe by position?). A reference to sections 12, 13 and 14 of the Factories Act, 1961[88] will illustrate the point which is being made here.

Not only may a statute impose a penalty upon the employer for breach of the safety regulations or other provisions designed for the benefit of employees but, in addition, breach of the statutory provisions may well enable an employee to bring an action in reparation for the injury which he has suffered and this breach may perhaps, on occasion, be more easily proved than to rely upon breach of a common law duty. Of course, the employer may still be able to plead contributory negligence by the employee, just

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87. continued
Co. 1937 S.C. (H.L.) 46, but it had tended to be interpreted - wrongly, as it now seems, in certain respects - as an "absolute" duty. Both Davie and Sullivan have now corrected that misinterpretation.

88. 9 & 10 Eliz. 2 cap. 34.

as he can do in a common law action[89] and apportionment of responsibility would now be made under the Law Reform (Contributory Negligence) Act 1945.[90]

Injury caused by fellow-servant - One of the ordinary risks of employment is that injury will be caused to an employee by one of his fellow-servants. Initially this was a limitation upon the liability of the employer. It seems that this doctrine of fellow-servant or collaborateur originated in the United States, was then developed in England and was then forced upon Scots law by the House of Lords.[91] Before the injured servant could have recovered damages he would have had to show that he was not acting within the course of his employment at the time when the accident occurred.

Prior to the Bartonshill[92] case in 1858 the general rule in Scotland was that the mere fact that the injury was suffered by X because of the negligence of Y, his fellow-

89. Casswell v. Worth, 1856, 25 L.J.Q.B. 121; Gibb v. Crombie 1875, 2 R. 886; per contra Lord Chelmsford in Wilson v. Merry & Cunningham, 1868, 6 M. (H.L.) 84; Paterson App. p. 1597; L.R. 1 Sc.App. 326; see also Traill v. Small and Boase, 1873 11 M. 888; Holmes v. Clarke (1862) 31 L.J.Ex. 356; Britton v. Great Western Cotton Co. (1872) 7 Ex. 130.

90. 8 & 9 Geo. 6 cap. 28.

91. See Farwell v. Boston and Worcester Railroad Corporation (1842) 4 Metc. 49; Hutchinson v. York, Newcastle and Berwick Railway Co. (1850) 19 L.J.Ex. 296; and Bartonshill Coal Co. v. Reid, 1858, 3 M'Queen 286 (see Lord Cranworth's references to the judgment of Shaw C.J. in the Farwell case); Fraser, op. cit. p. 193 et seq.; Mr. Munkman's disagrees with the view that the origin is American and says that Priestley v. Fowler (1837) 3 M. & W. 1 is the foundation of the doctrine and that only some five years or so later did the Americans establish the doctrine in the Farwell case - see his "Employers' Liability" (5th edition p. 7).

92. Bartonshill Coal Co. v. Reid cit. supra.

servant, made no difference to the master's liability. The master was still clearly liable on the maxim "qui facit per alium facit per se". In the then well-known case of Dixon v. Renton[93] the Court of Session rejected "common employment" but the House of Lords was to establish it as a firm doctrine of British law in the Bartonshill cases and spark off a complexity of litigation (much of it needless and illogical) which was to last for nearly a hundred years.

In 1858 the old Scottish view of the master's liability was cast aside,[94] on the authority of the House of Lords. In this case the defenders asked a direction that if they used due and reasonable care in the selection and appointment of the enginemen (whose fault caused the accident) and if he was fully qualified to perform his duties and was furnished with proper machinery and other necessary appliances they were not liable for his fault or negligence. Pursuers maintained that, granted the soundness of defenders' plea where common employment was properly present, it did not apply here as both servants were not engaged in the same task. The court disallowed defenders' plea on

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93. 1852, 14 D. 420 (per L.J.C. Hope). See comments on Bartonshill and "common employment" by Emeritus Professor A.D. Gibb in "Law from over the Border" at pages 58 and 59. See also Cook v. Duncan 1857, 20 D. 180, following Dixon.

94. Reid v. Bartonshill Coal Co. 17 D. 1017; reversed by the House of Lords sub nom Bartonshill Coal Co. v. Reid 1858, 2 M'Queen 266; Paterson, App. 785.

exception, but that decision was reversed on appeal.[95] The decision drew a clear distinction between the liability of the employer to a stranger suffering injury from a servant's fault or negligence and the absence of liability upon the employer where a fellow-servant suffered the injury. The House was firmly of the opinion that the law in Scotland and in England should be the same, on this particular point and accordingly what had previously been the law of England now also became a major principle of common law in Scotland.[96]

At the same time as the Reid case, another case,[97] arising out of the same accident, was being decided. In this other case, the Lord Chancellor (Chelmsford) said- "...It is necessary..., in each particular case, to ascertain whether the servants are fellow-servants in the same work.... Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence in the course of his peculiar work is not within the exception and the master's liability attaches in that case...." Lord Brougham put the point more succinctly by saying - "To bring

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95. The House of Lords judgment being delivered by Lord Cranworth.

96. See the comments of Professor A.D. Gibb in "Law from over the Border" at pages 58 and 59; see also previous comment herein on the preceding page.

97. Bartonshill Coal Co. v. M'Guire (1858) 3 M'Q. 300; Paterson, App. R. 785.

the case within the exemption, there must be this most material qualification, that the two servants shall be in the same common employment and engaged in the same common work under that common employment."

Following upon the House of Lords' judgment in the Bartonshill case, the Court of Session attempted to limit the immunity of the employer to cases of common employment in the most strict sense - excluding cases where one servant was the "superior" of the other and also drawing distinctions in cases where the fault was committed by a "superior" servant.[98] This view was shortly to be considered by the House of Lords, as explained in the following paragraph, and to be quite discounted by them - again restoring the strength of the doctrine in the employer's favour.

Lord Fraser points out[99] that after the dicta pronounced in Wilson v. Merry and Cunningham[1] such distinctions as have been referred to are no longer sound. Accordingly, a foreman or manager is just as much a fellow-servant as the employee who is working at the next machine or bench - or better still, the same machine or

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98. Fraser - op. cit. page 197 et. seq.

99. Op. cit. page 198.

1. 1867, 5 M. 807; aff. 6 M. (H.L.) 84; L.R. 1 Sc.App. 326; Paterson App. R. 1597 (1868).

bench. He then goes on to consider, at some length, who are and who are not, fellow-servants.[2]

The "volunteer" servant was - in relation to the old doctrine of common employment - no better off than the injured fellow-employee. No recourse against the temporary employers was open to him or his dependents.[3]

It was important to ascertain whether or not the pursuer was a volunteer servant. If so, he was not able to sue[4] - but if he could establish that he was not a fellow-servant (whether volunteer or ordinary) he might well be able to recover.[5]

So long as the master took reasonable care in the selection of competent servants he escaped liability for negligence by them which caused injury to other servants.

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2. Op. cit. pages 202-203.

3. Degg v. Midland Railway Co., (1857) 1 H. and N. 773; 26 L.J.Ex. 171; Potter v. Faulkener (1861) 5 L.T. 455; 31 L.J.Q.B. 30.

4. See Wiggett v. Fox (1856) 11 Exch. 832; 25 L.J.Ex. 188.

5. Wyllie v. Caledonian Railway Co., 1871, 9 M. 463; Holmes v. North-Eastern Railway Co., (1869) 4 Ex. 254; Wright v. London and North-Western Railway Co., (1876) 1 Q.B.D. 252; and Woodhead v. Gartness Mineral Co., (1877) 4 R. 480 per L.P. Inglis. The same test of "scope of employment" and the relationship of common employees has been accepted and continued to test liability - although the doctrine itself has gone - as is illustrated by the more recent cases of Malley v. L.M.S. Railway Coy. 1944 S.C. 129; 1945 S.L.T. 313 and Kelly v. Spencer & Co. 1949 S.C. 143; 1949 S.L.T. 178 and Leckie v. Caledonian Glass Co. 1957 S.C. 89; 1958 S.L.T. 25. See also Alford v. National Coal Board 1952 S.L.T. 204 (House of Lords affirming the decision of the First Division).

This was an accepted extension of the doctrine of collaborateur or common employment.[6]

But if the master should interfere personally in the management of his work he may thereby incur a liability towards an injured employee. This point is illustrated in the case of Roberts v. Smith[7] where a labourer had rejected certain poles as unfit for use but the master ordered him to use them. One defective pole snapped, causing the collapse of a scaffold upon which plaintiff (Scottish "pursuer") was working. The court held that there was sufficient evidence to go to a jury of personal interference and negligence by the master. It is further illustrated by two later Scottish cases.[8]

If the employer goes further than the stage of interfering with the work but himself acts as a fellow-servant then obviously he will be answerable for his negligence to the other employees.[9] The theory of liability is that the employee is entitled to expect from a master that care and attention which the superior position and presumable

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6. See particularly Farrant v. Webb (1856), 25 L.J.C.P. 261; Balleny v. Cree 1873, 11 M. 626; Sneddon v. Mossend Iron Co., 1876, 3 R. 868; Gallagher v. Piper, 33 L.J.C.P. 329.
7. 2 H and N 213; 26 L.J.Ex. 319 (1857).
8. Stark v. M'Laren 1871, 10 M. 31; and Robertson v. Brown 1876, 3 R. 652.
9. Ashworth v. Stanwix (1861), 30 L.J.Q.B. 183; and Mellors v. Shaw (1861), 30 L.J.Q.B. 333.

sense of duty of the master ought to command. The ordinary doctrine of common employment has, therefore, no application to a case of this type.

An interesting legal point which also arises in the field of common employment is this - is the employee of a contractor a fellow-servant with the employee of the contractor's employer? Although the doctrine of common employment has gone this question may still be important when considering the matters of scope of employment and the "control" test where an employee appears to be under the orders of two masters.[10] On this particular point the case of Woodhead v. Gartness Mineral Co.[11] is most instructive. A miner employed by contractors upon work in a mine, belonging to an owning company, whose manager and underground manager were in charge of the mine, was killed because of the negligence of the underground manager, who was admittedly a competent person. Furthermore, the pit duly complied with the rules and regulations contained in the Coal Mines Regulation Act then in force. The court (on a majority of seven judges) held that the

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10. See the comments contained in and the more recent cases cited at footnote number 5 at page 128 supra. It was again made quite clear in Lindsay v. Charles Connell & Co. 1951 S.C. 281; 1951 S.L.T. 395 that, as the doctrine of common employment was no longer applicable, the law would be that prior to 1858 (the year of the "Bartonshill" cases) and employers would normally be liable once more for the faults of a fellow-servant).

11. 1877, 4 R. 469, over-ruling Gregory v. Hill 1869 8 M. 282. See also M'Credie v. Denny, 1865, 3 M. 539.

owning company was not liable. The opinion of the Lord President (Inglis) is very important and he puts the matter very clearly, thus:- "...the mine-owner is free from responsibility, not because the injured and injurer are both his own hired and paid servants, but because he is not personally in fault and has not warranted the injured workman against the perils of the work. On the other hand if there was personal fault of the mine-owner in selecting for the work an incompetent person, from whose incompetency the injured workman suffered, the owner would be equally liable, whether the incompetent person selected by him were a servant or what is called an independent contractor. In all cases his liability must rest on personal fault and where there is personal fault it will be attended by liability."

The Woodhead case might usefully be compared with the English case of Rourke v. White Moss Colliery Co.,[12] which went to the Court of Appeal. Although the action was taken against the defendants (Scottish, "defenders") as colliery-owners they were held not liable in the circumstances as the engineer whose negligence caused the injury to plaintiff was, at the time of the accident, under the orders and control of the contractors who were employed to do a job in the mine, although he remained the general

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12. (1877) 2 C.P.D. 205.

servant of the defendants. Here the "control test" was applied. In Woodhead's case the particular contractor had no control over the underground manager whose negligence caused the accident.

Again, in the English case of Turner v. Great Eastern Railway Co.,[13] the common employment theory was not invoked, because the "collaborateur" relationship did not exist, so as to prevent the contractor's employee from recovering damages from the employing company.

Lord Fraser discusses[14] the position of employees of one railway company injuring employees of another railway company as illustrative of the difficult and narrow questions which can arise in applying the common employment doctrine. Historically, these cases are of interest and they were added to quite substantially right up to the year 1948, as is mentioned later on in this chapter.

The common employment doctrine protected the master only in relation to the employees themselves. It did not do so where, for example, the wife of an employee was injured by the negligence of a fellow-employee. In support of this Lord Fraser cites an American case.[15] It is submitted that the liability certainly exists in

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13. (1875) 33 L.T. 431.
14. Op. cit. pages 212-213 and footnotes there.
15. Gannon v. Housatonic Railroad Co., (1873) 17 Am. Rep. 82 (Mass.).

modern law and it does so under the ordinary principles of delictual liability, applying in this instance the well-known doctrine of vicarious liability.[16]

Moreover, where a stranger was injured by the negligence or fault of the servants of another person it was, in Scotland, no defence for that other person (i.e. the employer concerned) to say that the pursuer's fellow-servants were guilty of contributory negligence.[17] It seemed that the English courts took an opposite view.[18]

Certain inroads into the protection afforded to employers by the common employment doctrine were made by the Employers' Liability Act.[19] It is essential to look briefly at this statute as it forms an historical link in an arresting chain of common law and statutory law which was being forged against the unrestricted movement of the collaborateur doctrine.

By this statute the first statutory breach was to be made in the doctrine. But it gave only a partial remedy

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16. In Webb v. Inglis, (O.H.) 1958 S.L.T. (Notes) 8 Lord Wheatley approved a claim by the wife of an employee (driver) against his employer based upon the latter's vicarious responsibility for the negligence of the former. In this, his lordship took account of and approved of (but he was not, of course, bound to follow) the (English) Court of Appeal in Broom v. Morgan 1953 1 Q.B. 597.
17. Adams v. Glasgow and South Western Railway Co. 1875, 3 R. 215.
18. Armstrong v. Lancashire and Yorkshire Railway Co. (1875 10 Ex. 47.
19. 43 & 44 Vict. cap. 42.

to workmen. To succeed under the Act the pursuer workman had to prove that the accident resulted from a defect in "the ways, works, machinery or plant" or from the negligence of some person placed in a position of superviser or superintendent or whose orders the workman had to obey or, in the railway cases, from the negligence of engine-driver or signalman.[20] The defence of common employment was *pro tanto* excluded in those limited categories of cases coming within the Act. The Act applied to railway employees and manual workers generally. There is no doubt that it provided a fruitful source of litigation.[21]

The Act was followed by a scheme of Workmen's Compensation (statutes of 1897 and 1906 and a consolidatin(statute of 1925) in which the rule of common employment

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20. See the opinion of Lord Watson in *Smith* v. *Baker & Sons* 1891 A.C. 325.

21. An examination of the following selection of cases will illustrate the point made:-

Irwin v. *Dennystown Forge Coy.* 1885, 22 S.L.R. 379; *Bowie* v. *Rankin & Coy.* 1886, 13 R. 981; 23 S.L.R. 706. *Sweeney* v. *M'Gilvray* 1886, 14 R. 105; 24 S.L.R. 91. *Brown* v. *Furnival & Co.* 1896, 23 R. 492; 3 S.L.T. 258; 33 S.L.R. 345. *Donnelly* v. *Spencer & Co.*, 1897, 1 F. 1107; 36 S.L.R. 876. *Harper* v. *James Dunlop & Co.* 1902, 5 F. 208; 10 S.L.T. 407; 40 S.L.R. 174. *Canavan* v. *John Green & Coy.* 1905, 8 F. 275; 13 S.L.T. 679; 43 S.L.R. 200.

played no part. Compensation (not damages) became automatic where there was an accident in the course of employment and where incapacity for work resulted, although this compensation award was generally much lower than a damages award would have been in a reparation action.

In addition to the limitation upon the employer's protection brought about by the Employers' Liability Act 1880, the Judges were also moving - slowly but with deliberation and care - towards a total abolition of the common employment doctrine. Finally, in 1948 the doctrine of common employment was swept away by the Law Reform (Personal Injuries) Act[22] of that year, but not before several cases[23] had arisen in which judicial hair-splitting was becoming stretched to the limit. Fortunately, the doctrine has gone.

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22. 11 & 12 Geo. 6 cap. 41.

23. See Calder v. Caledonian Railway, 1871, 9 M. 833 (a guard of one railway company and a pointsman of another were not in common employment); Johnson v. Lindsay & Co. [1891] A.C. 371 (where two contractors were engaged in building the same house - a servant of one dropped a bucket on the servant of the other. Held that the injured man could recover damages from the master of the negligent man); The Petrel [1893] P. 320 (crews of two ships owned by the same company were not in common employment, at least on the Thames or the high seas, where they were just as likely to collide with any other vessel); Radcliffe v. Ribble Motor Services Ltd. [1939] A.C. 215; [1939] 1 All E.R. 637 (drivers of motor coaches in convoy were not in common employment, at least when out on the streets); Hay v. Central S.M.T. Co. Ltd. (O.H.) 1944 S.L.T. 196; 1943 S.N. 78 (collision between 'buses owned by same company - converging routes); Kerr v. Glasgow Corporation 1945 S.C. 335; 1946 S.L.T. 41; 1945 S.N. 37 (workman and driver employed in different branches

(f) To pay wages.

It is accepted that in return for the services rendered to him, there is - in the general case - an obligation upon an employer to pay wages. This obligation has been considered at some length in the second chapter of this work,[24] to which reference should be made for detailed observations.

(g) Giving employee a character.

There is no legal obligation upon a master to give a character or certificate of service to his employee. But,

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23. (continued)
of the same Transport Department - held that they were fellow-servants); Miller v. Glasgow Corporation [1947] A.C. 368; [1947] 1 All E.R. 1 (the drivers and conductors of different tramcars were in common employment). Miller's case supra was distinguished in the case of Neilson v. Glasgow Corporation (H.L.) 1948 S.L.T. 42; 1947 S.C. (H.L.) 64 (where the defence of common employment was held to be not admissable unless the party injured had a special interest in the skill and caution of the other party arising from the relationship. Here the drivers and conductors of different motor-buses were held not to be in common employment); and, in England, the case of Lancaster v. London Passenger Transport Board [1948] 2 All E.R. 796 (where a trolley-bus injured a man on a tower-wagon who was repairing the overhead wires. A majority decision of the House of Lords was against common employment on the ground that the plaintiff might equally well have been injured by any other tall vehicle.)

24. See supra, chapter 2, paragraph (3).

if he chooses to give one, then it must be given in bona fide and it ought to be true.[25]

Sometimes it may be made a condition prior to commencement of service that a satisfactory character reference from the former employer should be exhibited. If the former employer refuses to issue a character, with the result that the employee does not get the new appointment (failure to fulfil the condition precedent) then there can be no damages action taken against the former employer.[26]

Nevertheless, an employer is entitled to give a character to a servant.[27] He may claim qualified privilege in doing this so long as the recipient has an interest in receiving it. The recipient may be the employee himself or a prospective employer or a person acting as intermediary or a person with whom the employee has entered into a contract of service.[28] But there can be no publication of it without sufficient cause.[29]

In the interesting English case of Gardner v. Slade,[30]

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25. See particularly Grant v. Ramage and Ferguson, 1897, 25 R. 35 per Lord Young at page 39; Moult v. Halliday, [1898] 1 Q.B. 125 per Hawkins J. at p. 129.

26. Carrol v. Bird, 1800, 3 Esp. 201.

27. Christian v. Kennedy, 1818, 1 Mur. 419; Anderson v. Wishart 1818, 1 Mur 429; Muskets Ltd. v. MacKenzie Bros., 1899, 1 F. 756.

28. Child v. Affleck, 1829, 9 B. & C. 403.

29. Christian v. Kennedy cit. supra. (per Ld.Ch.Comr. Adam at p. 427).

30. 1849, 13 Q.B. (A & E) 796 (particularly per Wightman J. at page 801).

the former employer was held entitled to communicate to the new employer facts which came to the former's knowledge after the grant of the certificate of character and which were inconsistent with the tenor of the certificate.

It also seems that the master is quite entitled to issue a certificate of character ex proprio motu,[31] though this might lead a jury to suspect a malicious intention on his part. However, if he gives the certificate in good faith he is probably safeguarded from any action.[32]

When a servant is dismissed for misconduct, the master is entitled at the time of dismissal to state the reason and he is apparently privileged when he does so.[33] This privilege has been held to apply to statements made to the parents of a girl who had been dismissed for immorality.[34]

An equal protection extends to the headmaster of a school[35] or a railway inspector[36] in making proper reports upon junior employees. Furthermore, a member of a public body may criticise the performance of duties by its servants and any accusation of incompetence, neglect,

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31. Pattison v. Jones, 1828, 8 B. & C. 578.
32. Rogers v. Clifton 1803, 3 B. & P. 587 per Rooke J.
33. Reg. v. Perry 1883, 15 Cox C.C. 169; Taylor v. Hawkins 1851, 16 Q.B. (A. & E.) 308; Manby v. Witt 1856, 18 C.B. 544; Stuart v. Moss 1885, 13 R. 299
34. Watson v. Burnet 1862, 24 D. 494.
35. Milne v. Bauchope 1867, 5 M. 1114.
36. Martin v. Cruickshanks 1896, 23 R. 874.

dishonesty or others is privileged.[37] An interesting case was Dundas v. Livingstone & Co.[38] where a firm, insured against defalcations, stated to the insurance company that a commercial traveller, who had by this time left their employment, had embezzled a considerable amount of money belonging to them. This statement was held to be privileged.

Once the privilege of the employer is established (which is a point of law) it is for the employee to overcome the privilege by showing malice - and this is a question of fact. The general principles of the law of defamation will apply, including reliance upon innuendo, which requires a very high degree of proof.[39] In the English case of Manby v. Witt,[40] Jervis C.J. said that the circumstances "must be such as to induce the Court or any reasonable person to conclude that the occasion has been taken advantage of to give utterance to an unfounded charge". Presence of a third party when the statement is

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37. Neilson v. Johnston 1890, 17 R. 442; Munro v. Mudie 1901, 9 S.L.T. p. 91; Teague v. Russell 1900, 8 S.L.T. p. 253; Pittard v. Oliver [1891] 1 Q.B. 474; Leitch v. Lyal, 1903 11 S.L.T. 394.

38. 1900, 3 F. 37.

39. See the old cases of Neilson v. Johnston 1890, 17 R. 442; Laidlaw v. Gunn 1890, 17 R. 394; Macdonald v. M'Coll 1901 3 F. 1082; Macdonald v. Rupprecht 1894, 21 R. 389; Kennedy v. Henderson 1903, 11 S.L.T. No. 156.

40. 1856, 18 C.B. 544 at page 547.

made does not necessarily displace the privilege but it may be indicative of a malicious intention as the element of bona fides now appears to be lacking.

There is no doubt whatsoever that where a master fraudulently gives a servant a good character with the intention of assisting him to procure employment and thereafter a third party, relying upon this false character, employs the servant and then suffers loss, the aggrieved third party may take an action in damages for his loss against the initial employer, basing his action upon the issue of the false character which caused that loss.[41]

Before leaving this section, there remains to be considered the Servants' Characters Act, 1792,[42] which must be read along with the common law position. Mr. Umpherston dismisses this statute very briefly by a note[43] that the Act was evidently not intended to apply to, and had not in fact been put in force in, Scotland.

Lord Fraser summarises[44] the penalties upon employers and servants imposed by the Act and then goes on to quote from Tait's "Justice"[45] to the effect that the statute

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41. Foster v. Charles, 1830, 6 Bing. 396, 7 Bing 106; Wilkin v. Reed 1854, 15 C.B. 192; and Anderson v. Wishart, 1818, 1 Mur. 429 per Lord C.C. Adam 440.

42. 32 Geo. 3, c. 56.

43. Op. cit. page 184.

44. Master and Servant, 2nd edition, pages 131-132.

45. v. "Servant" p. 468.

applies to England. The learned editor of the third edition of Lord Fraser's opus on Master and Servant goes somewhat further and disagrees with Mr. Tait's view that the statute in question applies to England only. He says[46] that the Act is quite absolute and general and that there is nothing in it to indicate that it was to be restricted to England in its operation. Mr. Tait took the view that the Scottish common law dealt with the types of offences mentioned in the Act quite vigorously and effectively as frauds. The comment upon this is[47] that whilst it is quite true, nevertheless the statute affords a speedy and effective check, whilst the common law was somewhat vague both as to procedure and punishment.

The learned editors of Macdonald's "Criminal Law of Scotland"[48] make no reference to the statute, but this is quite understandable when it is declared in the Preface that the book is dealing with indictable crimes.

(h) Employer's common law obligations.

The common law imposes a three-fold obligation upon the master, videlicet:-

(i) to provide and maintain suitable materials;

(ii) to keep premises safe and work on a safe system; and

(iii) to exercise care in the selection of fellow employees.

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46. See 3rd edition, pages 133-134.
47. loc. cit.
48. 5th edition (W. Green & Son).

Mr. Umpherston explains[49] that it used to be argued that a distinction fell to be made, as regards the employer's obligations, between the case where a master personally superintended his works and that where he did not do so, but delegated the task to a manager - and in the latter case the obligation was limited to providing suitable plant and materials and to employ competent managers.

The decisions, however, show that the liability is as wide in a question with his workmen as with strangers (subject to the exception which used to apply in the case of fault by a fellow-employee) whether personal supervision is exercised or not.[50] A selection of cases, at or towards the turn of the century, indicate quite clearly that the obligations attach to the employer qua employer and it matters not how he chooses to carry on his business[51] and this is true both of an obligation which arises at common law or specifically under statute. If his system of working is dangerous or if he employs young or inexperienced workers on dangerous work for which they are quite unsuited, he could not escape liability by pleading delegation to a

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49. op. cit., pages 156 and 157.
50. Sword v. Cameron, 1839, 1 D. 493; Peterson v. Wallace 1854, 1 Macq. 748; Bartonshill Coal Co. v. Reid, 1858, 3 Macq. 266; Bartonshill Coal Co. v. M'Guire, 1856, 3 Macq. 300; Wallace v. Culter Paper Mills Co., 1892, 19 R. 915.
51. Wright v. Dunlop & Co., 1893, 20 R. 363; M'Killop v. N.B. Railway Co., 1896, 23 R. 768; Macdonald v. Udston Coal Co. 1896, 23 R. 504; Henderson v. John Watson Ltd., 1892, 19 R. 854.

manager who was a fellow-workman.[52]

(i) Suitable materials:-
(Plant, machinery etc.)

The employer's primary duty is to provide and maintain suitable and fit materials for carrying on the work. He does not normally - and cannot be expected to - warrant his plant and machinery against latent defect but he does undertake that (latent defect, apart) it will be reasonably fit and suitable for the purpose for which it was supplied.[53] Initially, of course, this applies to the condition of the material or appliances originally provided - e.g. if a scaffolding were constructed of wood which was in a rotting condition, the employer would be liable if a section collapsed under stress or strain causing injury to an employee (or indeed to a third party, not trespassing). Cases involving faulty waggons, vessels or machinery are quite common.[54] The obligation was formerly in no way affected by trying to establish that the faulty appliances were supplied by a third party and were not manufactured by the employer himself, but this view has been modified in

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52. M'Killop v. N.B. Railway Co., cit. supra; O'Byrne v. Burn, 1854, 16 D. 1025; Gibson v. Nimmo & Co., 1895, 22 R. 491.

53. Ovington v. M'Vicar, 1864, 2 M. 1066; Weems v. Mathieson, 1861, 4 Macq. 215.

54. See particularly Matthews v. M'Donald Grieve & Co., 1865, 3 M. 506; Rothwell v. Hutchison, 1886, 13 R. 463; Welsh v. Moir, 1885, 12 R. 590.

the light of more recent cases.[55]

It is also the case that an employer is obliged, as a precautionary measure, to inspect from time to time any machinery or plant which is liable to become defective through ordinary wear and tear. Accordingly, in an action against the employer in which the pursuer avers that the defect could have been discovered by inspection (the onus of proof here resting with pursuer)[56] the employer may disprove the alleged negligence on his part by showing that by periodical inspection he had taken all ordinary and reasonable steps to detect any defects.[57] It is normally the jury's task to say what periodic inspection was reasonable and whether the measures taken to that end

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55. See particularly Davie v. New Merton Board Mills [1959] 1 All E.R. 346, H.L.; now Davie over-ruled Donnelly v. Glasgow Corporation 1953 S.C. 107 and was subsequently followed in Scotland (though technically the Scottish Court was not bound by Davie's case) in Sullivan v. Gallagher & Craig 1959 S.C. 243; 1960 S.L.T. 70. However, in the fairly recent case of McMillan v. B.P. Refinery (Grangemouth) Ltd. 1961 S.L.T. (Notes) 79, the view has been expressed that where there is a latent defect in machinery supplied to a workman's employers, the onus is upon the workman to prove that the makers were not reputable manufacturers upon whose skill his employers were entitled to rely.

56. Gavin v. Rogers, 1889, 17 R. 206.

57. Sneddon v. Addie & Co., 1849, 11 D. 1159; Gavin v. Rogers cit. supra; Fraser v. Fraser 1882, 9 R. 896; Irwin v. Dennystoun Forge Co., 1885, 22 S.L.R. 379; Terry v. Ashton, 1876, 1 Q.B.D. 314; and see also per Cockburn C.J. in Webb v. Rennie 1865, 4 F. & F. 608.

were reasonable, looking to all the circumstances.[58] It will be appreciated that the duty of inspection follows on from the main obligation to provide and maintain suitable materials. Therefore, if the employer's servants are working on occasion with defective plant belonging to a third party there is no special duty upon the employer to inspect that plant,[59] in the general case. But circumstances may alter the employer's responsibility for inspection, e.g. if plant or machinery is on loan from a third party and it is used in such a way as to form part of the employer's own plant and equipment then a duty of inspection will arise.[60]

The employer, after fulfilling his primary obligation as mentioned, cannot be held responsible for improper use which his employees make of the plant and machinery nor for such defects as subsequently arise and as ought to have been put right by the employees themselves.[61] If, however,

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58. See Murphy v. Phillips, 1876, 35 L.T.N.S. 477 per Pollock B.
59. See particularly Robinson v. John Watson Ltd., 1892, 20 R. 144; Nelson v. Scott, Croall & Sons, 1892, 19 R. 425; M'Inulty v. Primrose, 1897, 24 R. 442; Simpson v. Paton 1896, 23 R. 540; M'Lachlan v. ss. "Peveril" Co. Ltd. 1896, 23 R. 753; see also Oliver v. Saddler & Co., 1929 S.C. (H.L.) 94, where employees of a porterage company were held entitled to rely upon inspection by a stevedoring firm of slings supplied by the latter.
60. See Warwick v. Caledonian Railway Co., 1897, 24 R. 429; (which was distinguished in Oliver v. Saddler & Co., supra and Macdonald v. Wylie, 1898, 1 F. 339, followed in Thomson v. Wallace (O.H.) 1953 S.N. 15.
61. Wilson v. Merry and Cunningham, 1868, 6 M. (H.L.) 84; Stewart v. Coltness Iron Co., 1877, 4 R. 952; Cook v. Bell 1857, 20 D. 137; Cook v. Duncan, 1857, 20 D. 180; Gordon v Pyper 1892, 20 R. (H.L.) 23; M'Laughlan v. Dunlop & Co., 1882, 20 S.L.R. 271; Mackenzie v. s.s. "Tregenna" Co., 31 S.L.R. 141.

the employer personally superintends the work in which use is being made of the particular materials, plant or machinery then, quite apart from his responsibility as employer, there is an additional responsibility arising from the superintendence or control of the work and liability will accrue to him in respect of all defects which ought to have been discovered and remedied during the progress of the work. If pursuer can show that the resulting defect (arising after an initial supply of plant which was then in good working order) was known to him and went unremedied, liability attaches to the employer.[62]

(ii) Safe Premises and Safe System of Work:-

The second common law obligation upon an employer is to keep his premises in a safe condition (so far as is consistent with the conduct of his work) and to conduct his business on a system which does not involve unusual or unnecessary danger to those whom he employs.[63] This obligation, taken along with the former obligation already discussed, may be described comprehensively as a duty to take precautions for the general safety of his employees. Naturally the responsibility will vary with the nature and

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62. Stanforth v. Burnbank Foundry Co. 1937, 24 S.L.R. 722; and see also Marney v. Scott [1899] 1 Q.B. 986 per Bigham J. at page 992.

63. See English v. Wilsons & Clyde Coal Co., 1937 S.C. (H.L.) 46 (there can be no delegation of this duty so as to avoid responsibility).

the conditions of the work carried on by the employer - but the degree of precaution required is no higher than what is reasonable and ordinarily to be expected in the circumstances.[64] The common law does not place the employer in the position of a guarantor or insurer. It is not essential to use the very latest and safest appliances - so long as he does make use of those which are reasonably safe and in general use.[65] Should it happen that the employer is proposing to carry out an operation which is very difficult - and this requires special precautions or unusual measures for the safety of the employees - then these precautions must be taken.[66]

A good example of one of the highest precautions which an employer must take for the safety of his employees is the fencing of machinery. Apart from the statutory obligations imposed by the Factories Act, 1961, or other relevant statutes, the common law clearly imposes such a duty upon the employer. When fencing of machinery is an ordinary and reasonable precaution for safety then it

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64. Murray v. Merry and Cunningham, 1890, 17 R. 615; M'Culloch v. Clyde Navigation Trustees, 1903, 11 S.L.T. No. 242.

65. Moore v. Ross, 1890, 17 R. 796; M'Gill v. Bowman & Co. 1890, 18 R. 206; Mitchell v. Fatullo, 1885, 23 S.L.R. 207.

66. Stark v. M'Leron, 1871, 10 M. 31; Henderson v. Carron Co., 1889, 16 R. 633.

must be done.[67] If the machinery is to be used by young and/or inexperienced persons then, obviously, in deciding the question as to fencing or no fencing, serious regard will have to be paid to the quality of the employees.[68] Fencing will remain a continuing obligation so long as the machine is in use.[69] Any failure in the statutory obligation or common law duty to fence will raise an immediate presumption of liability on the employer's part where injury results to the employee.[70] Unless the statutory obligation is an absolute one (upon a correct construction of the particular section) then the presumption mentioned may be rebutted by the employer if he can show that the accident was attributable to a cause other than lack of fencing, e.g. some carelessness or negligence on the part of the employee himself[71] - subject, however, to this plea by the defender (i.e. the employer) being incompetent in circumstances where a statute is obviously designed

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67. Edwards v. Hutcheon 1889, 16 R. 694; Ross v. Thomson & Co., 1882, 20 S.L.R. 46; Murray v. Merry & Cunningham cit. supra; Milligan v. Muir & Co., 1891, 19 R. 18; Cameron v. Walker 1898, 25 R. 449.

68. Gemmill v. Gourock Ropework Co., 1861, 23 D. 425.

69. Traill v. Small and Boase, 1873, 11 M. 888.

70. Traill v. Small & Boase supra; Kelly v. Glebe Sugar Refining Co. 1893, 20 R. 833; Shields v. Murdoch and Cameron, 1893, 20 R. 727.

71. Greer v. Turnbull & Co., 1891, 19 R. 21; Robb v. Bulloch, Lade & Co., 1892, 19 R. 971; Cameron v. Walker 1898, 25 R. 449.

to protect a certain class of persons (e.g. young or inexperienced employees) against this particular happening.[72]

Exactly the same principles apply to the employment of young and/or inexperienced persons at dangerous and unsuitable work. The ground of liability may be either (a) that a dangerous system of work is in operation where such persons are employed or (b) the employees of this type cannot be held to have undertaken the risk of employment as ordinary, competent, qualified or experienced employees do in the general case. The cases support the rule that such employment amounts to negligence on the part of the employer.[73] Again, a presumption of liability arises when an injury occurs,[74] but this may also be rebutted by the employer if he can show a wilful disobedience to orders or some misconduct by the employee which caused the injury.[75]

Examples of breaches of the obligation to keep premises in a safe condition are very numerous, but the following will illustrate the type of failure which is under consideration:-
pitfalls in unlighted places;[76] or defective gates[77] whose

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72. Pringle v. Grosvenor, 1894, 21 R. 532.
73. O'Byrne v. Burn, 1854, 16 D. 1025; Robertson v. Brown, 1876, 3 R. 652.
74. Sharp v. Pathhead Spinning Co. 1885, 12 R. 574; Gibson v. Nimmo & Co. 1895, 22 R. 491; Gibb v. Crombie 1875, 2 R. 886; cf. Carty v. Nicoll, 1878, 6 R. 194.
75. Morris v. Boase Spinning Co., 1895, 22 R. 336.
76. Jamieson v. Russell & Co., 1892, 19 R. 898; Macleod v. Caledonian Railway Co. 1885, 23 S.L.R. 68.
77. Johnson v. Mitchell & Co., 1885, 22 S.L.R. 698.

unsafe condition is known or ought to have been known to the employer.[78] Another example might be an unsafe pit shaft.[79]

The allegation of carrying on work upon a dangerous or defective system means that pursuer is saying that the employer has been guilty of some failure in giving instructions or some failure in taking precautions to ensure that the workmen are reasonably safely protected whilst carrying out a dangerous operation. There are numerous cases on this point.[80] A good example of this type of failure might arise where a gang of railway platelayers was working on a section of main line track, without adequate look-outs being posted to warn the workmen of approaching trains. The allegation mentioned would apply equally to a negligent method of utilising machinery which is perfectly sound in itself.[81] Of course, the exceptional or casual operation does not form part of a "system of working".[82]

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78. Paterson v. Wallace 1854, 1 Macq. 748; Brydon or Marshall v. Stewart 1855, 2 Macq. 30.
79. Brydon or Marshall v. Stewart, cit. supra.
80. Sword v. Cameron 1839, 1 D. 493; Smith v. Baker [1891] A.C. 325; M'Inally v. King's Trs. 1886, 14 R. 8; M'Guire v. Cairns & Co., 1890, 17 R. 540; Cook v. Stark 1886, 14 R. 1; Morton v. Edinburgh and Glasgow Railway Co., 1864, 2 M. 589; Edgar v. Law and Brand 1871, 10 M. 236; Murdoch v. MacKinnon 1885, 12 R. 810; Stark v. M'Laren 1871, 10 M. 3 31; Pollock v. Cassidy 1870, 8 M. 615; Grant v. Drysdale 1883, 10 R. 1159.
81. See Welsh v. Moir 1885, 12 R. 590.
82. Harper v. Dunlop & Co., 1902, 5 F. 208.

(iii) Selection of Competent Staff:-

The final obligation undertaken by the employer towards each individual employee is that he (the employer) will exercise reasonable skill in the selection of other employees.[83] This obligation is no longer so important today as it was prior to the passing of the Law Reform (Personal Injuries) Act, 1948,[84] when the doctrine of common employment was applicable - because the employer's failure in selecting competent staff precluded him from relying upon the doctrine.[85]

Since the passing of the 1948 Act just mentioned and the consequential abolition of the common employment doctrine, the three common law obligations discussed above have ceased to be quite so important as they once were, but it remains perfectly relevant in any reparation claim based upon the common law to plead any one or more of the said obligations. The tendency in modern industrial law is for the legislature to impose more and more duties and liabilities upon employers, e.g. recent legislation on factories (consolidated in 1961), mines and quarries (consolidated in 1954) and offices, shops and

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83. Bartonshill Coal Co. v. Reid, 1858, 3 Macq. 266; Bartonshill Coal Co. v. M'Guire 1858 3 Macq. 300; Wilson v. Merry and Cunningham 1867, 6 M. (H.L.) 84; and Tarrant v. Webb 1856, 18 C.B. 797.
84. 11 & 12 Geo. 6 cap. 41.
85. M'Aulay v. Brownlie 1860, 22 D. 975.

railway premises (the new Act of 1963).[86]

(3) Employer's remedies upon the employee's breach of contract.

Basically, the general law of contract applies where there is a breach. The aggrieved party may claim damages in the normal case, but he may also be entitled to terminate the relationship and regard the initial obligation as no longer binding upon him. The situation involving breach may arise before the actual commencement of service (e.g. either side may indicate an unwillingness to perform as from the commencement date). To the English lawyer this is "anticipatory breach". The party not at fault may sue on the breach at once, if he elects to do so, rather than await the effective commencement date of the agreement.[87]

The more difficult question is whether there can be a breach of contract after the service relationship has been terminated (apart from the "restraint of trade" cases). This matter came up in the case of Liverpool Victoria Friendly Society v. Houston[88] where the court

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86. The Offices, Shops and Railway Premises Act, 1963 (1963 cap. 41) received the Royal Assent on 31st July, 1963 and came into operation on various dates from 18th February 1964 onwards, although the main operative date is regarded as being 1st August 1964.
87. See Hochster v. De la Tour, 1853, 2 E. & B. 678 per Lord Campbell C.J. at p. 689; also Frost v. Knight, 1872, 7 Ex. 111; Johnstone v. Milling, 1886, 16 Q.B.D. 460.
88. 1900, 3 F. 42.

granted an interdict against defender (who was a former employee of the pursuers), prohibiting the circulation of information, obtained during the employment, to third parties concerning the pursuers' business affairs and where a nominal sum of damages was awarded as the pursuers could not prove loss. The decision was based upon breach of faith and loyalty (the main obligation of any employee) and therefore breach of contract. English law is the same on this question of faith and loyalty.[89] The principle of post-service breach is, therefore, fully recognised and it is not just restricted to the restraint of trade cases.

The rights and remedies available to a master, upon breach of the service contract, may be summarised as follows, videlicet:-

(1) A claim of damages.
(2) A right to withhold or refuse to pay wages.
(3) Specific Implement.
(4) Interdict.
(5) Personal chastisement.

Each must be examined briefly to assess its usefulness and, more particularly, its place in modern law and practice.

(1) Master's claim of damages:- The claim may rest upon breach of an express term or of an implied obligation.[90]

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89. Merryweather v. Moore, [1892] 2 Ch. 518; Lamb v. Evans, [1893] 1 Ch. 218; Robb v. Green [1895] 2 Q.B. 1, 315; Barr v. Craven 1903, 20 T.L.R. 51.
90. Clerk v. Murchison, 1799 Mor. 9186; Cameron v. Gibb, 1867, 3 S.L.R. 282; Murray v. Macfarlane, 1886, 2 Sh.Ct. Rep. 6; Cooper v. M'Ewan, 1893, 9 Sh.Ct.Rep. 311; Gunn v. Goodall, 1835, 13 S. 1142.

Generally, the master will have to prove his loss and the usual principles of contract law relating to assessment of damages will apply - even although the basis of the claim is pitched no higher than that of trouble and inconvenience caused to the master.[91]

(2) Withholding or refusing to pay wages:- The servant who breaks his contract is generally held to have forfeited his claim to wages for the period after termination and perhaps also, in certain cases, for the prior period.[92] The early view of the common law was that the servant ought to be punished for desertion or misconduct (with resultant forfeiture of wages) but this is certainly not so today in the sense of punishment geared to breach of contract. If the misconduct is, in fact, criminal then it is punished separately (not by the employer) in the criminal courts as an offence or attempted offence of a particular kind.

Earlier statute law[93] had fortified the employer's position by enabling him to have proceedings taken against an offending or deserting employee. Meanwhile the common law was quite clearly moving towards the "freedom of contract" theory.

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91. Webster & Co., v. Cramond Iron Co. 1875, 2 R. 752.
92. Umpherston, op. cit. page 131 and footnote number 1 thereof.
93. See particularly the old Master and Servant Acts and the Employers and Workmen Act, 1875 re defaulting apprentices.

The question of accrual and apportionment of wages has already been considered at some length.[94] It is necessary to remember that the servant will normally be entitled to claim all wages due prior to termination,[95] that is to say those wages which have accrued and which are outstanding at the termination date. If an employee is paid monthly, quarterly or half-yearly and is properly dismissed within the month, quarter or half-year then the wages for the whole payment period would be regarded as forfeited. English law follows the same rule.[96]

An interesting feature of the Employers and Workmen Act, 1875[97] is that, in determining what is an equitable amount in all the circumstances, the court has power to adjust and set-off all claims for wages, damages and otherwise and irrespective of whether these claims are liquidated or unliquidated.

(3) Specific Implement:- The old Scottish common law permitted a summary petition in the Sheriff Court (either of defender's domicile or of the actual place of work[98]) for the apprehension of a servant or apprentice who had

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94. See chapter 2, section (3) supra.
95. Gibson v. M'Naughton, 1861, 23 D. 358; and Hogg v. M'Lean and Auld, 1867, 5 M. 814.
96. Ridgway v. Hungerford Market Co., 1835, 3 A. & E. 171; Lilley v. Elwin, 1848, 11 Q.B. (A. & E.) 742; and Dutton v. Thompson, 1869, 4 C.P. 330.
97. 38 & 39 Vict. c. 90, section 3. (Sheriff Court in Scotland).
98. McDougall v. Stewart 1833, 11 S. 795.

deserted his service and this might be enforced, if necessary, by imprisonment.[99] Before imprisonment was competent there had to be desertion of the service, otherwise the court might have ordered the servant to enter upon the service (i.e. by a decree ad factum praestandum).[1] Punishment was at the discretion of the court. The master might still have his action of damages in breach of contract[2] or he might attempt to enforce a penalty clause in the agreement. As Mr. Umpherston points out,[3] there is no legal principle which sanctions the enforcement of a purely civil contract in this way and the procedure was threrfore quite contrary to the recognised rule that a civil obligation cannot be enforced by summary imprisonment. Not surprisingly, this particular procedure was limited to the humbler classes of servants, such as labourers and artisans.

But it is to statute law that resort must be had to trace the improvement in the status of the employee and the development of the modern view that both parties are essentially free and equal in the service relationship, that their duties under the service contract are reciprocal and, moreover, that their rights are virtually identical.[4]

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99. Umpherston - op.cit. - pages 132-136 and in particular the list of cases cited in footnote number 4 to p. 132.
1. Tulk v. Anderson, 1843, 5 D. 1096.
2. Anderson v. Moon 1836, 14 S. 863.
3. Op.cit. page 134 and footnote number 3 thereof.
4. See particularly - 4 Geo. IV. c.34; The Master and Servant Act, 1867 (30 and 31 Vict. c.141); The Employers and Workmen Act, 1875 (38 and 39 Vict. c.90) and The Conspiracy and Protection of Property Act, 1875 (38 and 39 Vict. c.86).

(4) Interdict:- A court of law will not grant interdict against an employee or employer so as to order performance or implement of the contract. The usual remedy is damages.

The general rule above-stated applies to ordinary performance, but nevertheless there may be, on occasion, some special term or condition in the contract which can be enforced by interdict. A good example would be the breach or possible repeated breach of a clause in restraint of trade or of the loyalty and good faith owed by the servant.[5] The English cases also illustrate the modern attitude of the courts to breach of faith, but it seems that the English equivalent (injunction) of the Scottish interdict is limited to cases involving the enforcement of an obligation of a negative character.[6] It is suggested that the Scottish courts would take the broader view of what is more reasonable and equitable in the circumstances, looking to the restriction sought to be imposed upon one party and the particular interest of the other party in having that restriction enforced. Scottish authority upon this topic of difficulty is virtually non-existent.

(5) Personal chastisement:- Leaving aside the special case of the disciplinary powers of the ship's master, the

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5. Liverpool Victoria Friendly Society v. Houston, 1900, 3 F. 42.
6. See Macdonnell - Master and Servant p. 199; Smith - Master and Servant p. 126; Fraser, op.cit. p. 112; and Umpherston op.cit. pages 137 and 138 and relevant footnotes.

older authorities considered that a master or employer had a power of moderate chastisement over his servants.[7] Later authorities consider[8] that this power could no longer be accorded recognition, except perhaps where the master stood *in loco parentis* to a very young servant. There seems no doubt that the master may reprimand and rebuke an employee but he cannot resort to personal physical chastisement. In any case the existing remedies permitted by law are more than sufficient to protect the employer without his resorting to archaic methods more suitable to the feudal era. One could reasonably assume that any attempt to enforce this old-fashioned remedy would be met immediately by a criminal charge of assault. The reaction of fellow-employees would doubtless be an immediate "sympathetic" strike and a request for a public apology. No master would be so arrogant or so stupid as to resort to this remedy today.

There was never, of course, any question of one servant being permitted by the law to chastise his fellow-servant.

(4) Employee's remedies upon the employer's breach of contract

The remedies available to an employee are:-

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7. See particularly Erskine I, 7, 62.

8. Fraser - op.cit. p. 125; Smith - op.cit. p. 106; Macdonnell - op.cit. p. 32.

(i) a claim of damages; and
(ii) a lien or right of retention.

The damages claim is allowed upon the same principles as those which apply in the master's case. Usually the claim will be based upon wrongous dismissal and the sum payable will be a sum representing the wages for the unexpired period of the contract or, where the contractual period is indefinite, a sum representing an amount which the employee was prevented from earning. The usual contractual principle of "minimisation of loss" by the aggrieved party (i.e. the employee) applies,[9] but he is not obliged to take up any nondescript type of employment which is available - as this might prejudicially affect his position.[10] The court may award a sum larger than mere wages if satisfied that the circumstances justify such an increase.[11] Should the amount of the claim represent compensation in lieu of notice then, strictly speaking, the action is not one of damages but of compensation.[12]

As regards lien or the right of retention, the general principles of contract law again apply. All that

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9. Stuart v. Richardson, 1806 Hume 390; Hoey v. M'Ewan 1867, 5 M. 814; Ross v. Pender 1874, 1 R. 352; and Landon v. Brand, 1894, 11 Sh.Ct.Rep. 317.
10. Gunn v. Ramsay, 1801, Hume, 384; Ross v. Pender cit. supra and Ross v. M'Farlane, 1894, 21 R. 396.
11. Cameron v. Fletcher, 1872, 10 M. 301; Maw v. Jones, 1890, 25 Q.B.D. 107.
12. Morrison v. Abernethy School Board, 1876, 3 R. 945.

need be said here is that whilst the master has a right of lien over his employee's wages for non-implement of the contractual obligations, the employee may, in certain circumstances, have a right of retention over his employer's property which is in his (the employee's) possession. Seamen, of course, were in a special position at common law as regards a lien for wages. The Merchant Shipping Acts create a statutory lien in favour of the ship's master as regards (a) his wages and (b) disbursements incurred by him on account of the ship.[13]

Part (ii)

(5) Liability of Employer for employee's contracts:-

Basically, each employee is the general agent of his master and the test of the master's liability is that the servant must be acting within the scope of his employment. If the servant is a special agent it is the scope of his authority which is the test of liability. The liability is usually much wider in the case of the general agent whilst it is, or should be, more clearly defined in the case of the special agent.[14] The "holding-out" cases

13. See the Merchant Shipping Act 1894, section 167.

14. The case of Morrison v. Statter, 1885, 12 R. 1152, illustrates that any acting outwith the general scope of employment raises the question of special agency and the agent's capacity to bind his employer is tested by reference to the private instructions given by the employer - as it is upon these that the agent's authority rests.

require that the master's conduct be carefully examined to establish whether there was created in the mind of the third party an understanding that the employee was indeed a general agent.

The principle of Ratification and the rules relating thereto apply equally within the master and servant relationship and references should be made to the leading textbooks on the law of Agency.[15]

Termination of the master and servant relationship does not necessarily prevent the third party from proceeding against the master. It is a question of circumstances whether the third party had notice of a withdrawal of authority or ought to have been on guard against the possibility of cancellation of authority (e.g. by the master's death or insolvency), as facts which ought to have been known to the ordinary prudent businessman. The effect of termination seems to be that the onus rests clearly upon the master of showing that the third party concerned had no reasonable cause for supposing that the servant's authority still continued.

If the servant contracts without any authority whatsoever from his master - then he is personally liable upon the contract, unless it were to be (and could be) ratified subsequently by his master.

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15. See, in particular, Gloag on Contract 2nd Edition chapter 8, section (2); Bowstead on Agency (12th Edition) chapter 2, section 4; Powell on Agency (2nd Edition) chapter 3.

(6) Liability of employer for employee's delicts:-

The ground of liability is based on the maxim qui facit per alium facit per se. The master is responsible for any loss or injury to a third party which is caused by the negligent or wrongful act of his employees, provided that they were acting within the scope of employment. The master escapes liability if he can show that the servant was not, in fact, a servant at the time when the loss or injury occurred or alternatively, that the particular act complained of was not within the scope of the particular employment.

Where the claim against the master is rested upon the master and servant relationship, the pursuer is generally required to establish the following three points, viz:-

(i) that the act of the employee was the proximate cause of the loss or injury;

(ii) that the wrongdoer (i.e. employee) was at the particular time acting on behalf of and in furtherance of his master's interests; and

(iii) that the master and servant relationship did apply between the actual wrongdoer and the defender (i.e. the master).

The servant himself always remains liable for his own wrongful acts and may be made a joint defender along with his employer.

The liability of a master to a third party for the negligence of his servants is greater than that of an employer who engages contractors to do work for him. In the second case the master's liability is not strictly that of an employer but is indeed a vicarious liability as, say, the owner or occupier of heritable property or is a liability based upon an express statutory authority. In the cases where there is a true relationship of master and servant the employer is the person who directs performance of the work and he exercises a complete control over the employee. This "control test" has been popular for many years as the test of liability.[16]

The question of "proximate cause" is part of the general law of delict and the principles thereof apply with equal force here.[17] Any defences which would have been available to the employer under the general law of delict may be pleaded relevantly here also e.g. contributory negligence of the pursuer (prior to 1948, of course, such a plea if successful would have exoused the master completely from liability).

"Scope of employment" is, in several instances, regarded more as a defence available to the employer

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16. See infra pages 169-172 inclusive and the footnotes thereto.

17. See Glegg on Reparation (4th Edition) chapter 2, page 37 et. seq. and the new work on the Law of Delict by Professor David M. Walker, Q.C., Ph.D., LL.D., to be published under the auspices of The Scottish Universities Law Institute.

rather than a primary ground of liability. The question is really one of fact and the answer to it determines, as a matter of law, the master's liability or non-liability.[18] Nevertheless, a reasonable latitude must be allowed to the employee. His duties ought not to be scrutinised with meticulous exactitude to discover whether or not the particular act was properly undertaken. There will be occasions upon which a servant will do more than is reasonably required of him. The attitude of the law seems to be this - that if the servant's actings are in the general line of duty and for the benefit and interest of his master, the responsibility for such actings must rest with the master.[19]

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18. See particularly Gallagher v. Burrell & Son 1883, 11 R. 53; Martin v. Ward, 1887, 14 R. 814; Beard v. London General Omnibus Company, [1900] 2 Q.B. 530 (the 'bus conductor who drove the 'bus when his driver was ill - no part of his duties and no implied or other authority - the employing company held not liable to an injured passenger); and, more recently, Peebles v. Cowan & Co. (O.H.) 1915, 1 S.L.T. 363 (driver giving "lifts" - employers not liable) Dowd v. Fletcher 1936 S.N. 118 (similar facts); Togher v. Gilbert McClung Ltd. (O.H.) 1962 S.L.T. (Notes) 31. (Employers not liable for injury when unauthorised "lifts" given.); and in England, particularly the cases of Twine v. Beans Express [1946] 1 All E.R. 202; 62 T.L.R. 458, C.A. and Conway v. George Wimpey [1951] 1 All E.R. 363; 2 K.B. 266, C.A; but compare Young v. Edward Box [1951] 1 T.L.R. 789, C.A. (foreman's "ostensible" authority).

19. See Limpus v. London General Omnibus Co. 1862, 1 H. & C. 526; Ward v. General Omnibus Co. 1873, 42 L.J.C.P. 265; Avery v. New Park School (O.H.) 1949 S.L.T. (Notes) 7; Henderson v. Edinburgh Corporation (O.H.) 1950 S.L.T. (Notes) 63; Hutchison v. Dumfries County Council 1949 S.L.T. (Notes) 10; and Bell v. Blackwood Morton & Sons Ltd., 1960 S.C. 11; 1960 S.L.T. 145

If the particular act is done by the employee for his own ends, the whole responsibility for the consequences lie upon him and not upon the employer. It sometimes happens, in the transport cases, that an employee deviates from the route which he normally takes, whilst driving for his employer, for some purpose which is purely personal or he takes out his employer's van or lorry or motor-car, after completing his ordinary delivery tasks for the day, on a ploy of his own. Who is responsible in these two cases if a third party is injured - the employee alone or the employer also? It seems that if the employee is on the master's business - though he deviate for personal reasons - the master will be liable. In the second case, the employe is taking the vehicle for his own purposes, usually without any authority from the master, so that no liability will attach to the master. The claim against the master is a good one even although the particular act complained of is merely incidental to the employment.[20]

The master may expressly forbid the doing of a particular act or forbid its performance in a particular manner. Does disobedience by the servant to these instructions enable the master to escape liability?[21] The answer is

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20. See Ruddiman v. Smith, 1889, 60 L.T. 708.
21. See Twine v. Bean's Express Ltd. [1946] 1 All E.R. 202; Conway v. Geo. Wimpey & Co. Ltd. [1951] 2 K.B. 266; [1956] 1 All E.R. 363; and Young v. Edward Box & Co. Ltd. [1951] T.L.R. 789 - particularly per Denning L.J. (as he then was) at p. 794.

that it does not necessarily excuse the master. The servant, as a general agent, is presumed to be vested with all the powers proper to his tasks.[22] However, a master is entitled to lay down limits within which the servant is to perform his duties and if the prohibitions applied by the master extend to things outwith the normal scope of such duties then there is no liability upon the master.[23]

It is sometimes argued that the master is not liable for any wilful and illegal act (in the sense of an unlawful act but not necessarily a criminal act) done by the servant.[24] It has already been observed that the master may be liable for the wilful act of his servant he may also be liable, in a civil action, if the offence is a criminal one, so long as it was committed in the course of his employment.[25] Railway and omnibus company employees

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22. See Limpus v. London General Omnibus Co., 1862, 1 H. & C. 526 per Willes J. at p. 539.
23. D. Roxburghe v. Waldie, 1822, 1 S. 344; 1825, 1 W.S.1; Docherty v. Glasgow Tramway Co., 1894, 32 S.L.R. 353. Limpus v. London General Omnibus Co., cit. supra; and Stevens v. Woodward, 1881, 6 Q.B.D. 318 per Grove J. at p. 320.
24. Hanlon v. Glasgow & S.W. Rly. Co., 1899, 1 F. 559; Wardrope v. D. Hamilton, 1876, 3 R. 876; and D. Roxburghe v. Waldie, cit. supra.
25. Bayley v. Manchester S. and L. Rly Co., 1873, 8 C.P. 148; Bryce v. Glasgow Tramway Co. 1898, 6 S.L.T. p. 49; Wood v. N.B. Railway Co., 1899, 1 F. 562; but contrast Gillespie v. Hunter 1898, 25 R. 916 (the barman arguing politics with a customer and forcibly ejecting him - no action against the proprietor).

(whether British Transport Commission employees or otherwise) have a presumed authority to use force against any persons who misconduct themselves upon railway property or who, for example, attempt to travel without a ticket. If unnecessary violence is used or if the employees use force improperly, then the company, as employers, will be liable.[26]

Statutory power to apprehend may be conferred (usually upon railway companies and the like) and any misuse of that power by the employees would render the employer liable.[27] In the absence of a statutory power or an implied common law power to make the particular arrest, the employer cannot be made liable.

Another case illustrating the unusual act falling

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26. Highland Rly. Co. v. Menzies 1878, 5 R. 887; Apthorpe v. Edinburgh Tramways Co. 1882, 10 R. 344; Lowe v. Great Northern Rly. Co., 1893, 62 L.J.Q.B. 524 (the company held liable where a station-master and porter forcibly and quite wrongly ejected a passenger who had the correct ticket); Seymour v. Greenwood 1861, 6 H. & N. 359; (a 'bus proprietor held liable where a conductor thrust an intoxicated passenger off the 'bus with such violence that he was thrown down in the roadway and run over by another vehicle); Hanlon v. Glasgow and South Western Rly. Co., cit. supra; and Bayley v. Manchester S. and L. Rly. Co., 1873, 8 C.P. 148.

27. See Lundie v. MacBrayne, 1894, 21 R. 1085 following earlier English authority on the point (see Moore v. Metropolitan Railway Co., (1872) 8 Q.B. 36).

within the scope of employment is Poland v. John Parr & Sons[28], where a carter employed by defendants was walking home after work, behind a lorry driven by one of his employers. Seeing a youth climbing upon the lorry and thinking that he was stealing sugar, the carter struck him, so that the youth fell and was injured. The employers were held liable - but they would not have been liable if the carter's act had been so excessive as to take it quite outwith the scope of authorised acts. Here the emergency justified the particular act. Whether there is an emergency or not is a question of fact.[29]

The employer is liable for any fraud or embezzlement committed by the employee in the course of the employment, just as he is for any other wrongful act. The ground of liability is that the employee is acting in a particular capacity with reference to certain kinds of acts and accordingly the master must be liable for the way in which those acts are carried out by the employee.[30]

The third and final requirement, if the master is to

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28. [1927] 1 K.B. 236.

29. See Gwilliam v. Twist [1895] 2 Q.B. 84; Beard v. London General Omnibus Co. [1900] 2 Q.B. 530; but contrast Ricketts v. Thos. Tilling Ltd. [1915] 1 K.B. 644 (a company was held liable for the negligence of a driver in allowing an unauthorised person to drive the vehicle).

30. See the leading English case of Lloyd v. Grace Smith & Co., [1912] A.C. 716; also Uxbridge Permanent Benefit Building Society v. Pickard (1939) 2 K.B. 248; (1939) 2 All E.R. 344, C.A.

be held responsible, is that the relationship of master and servant must apply. The existence of a contract of service is sufficient proof, but if this is denied then the pursuer has the onus of proving that the relationship does in fact exist.

Some difficulties might be apparent where two persons are entitled to give orders to a servant at the time of the wrongful or negligent act. We are here envisaging the case of the servant who has virtually two masters. The question to be answered is - who was the master at the particular time when the wrongful or negligent act took place? He is the person who is responsible. Two different tests have been suggested in answer to this question, videlicet:-

(a) Who selected the servant, who pays him and who can dismiss him? or

(b) Who has the right to control the servant as to the way in which he must perform his duties?

The former test is certainly important as regards determining such questions as breach of contract or lawful and unlawful dismissal. However, as regards liability in negligence, there is little doubt that the "control test" is accepted as being the primary one.[31] This view has

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31. See the earlier cases viz:- Cairns v. Clyde Navigation Trs. 1898, 25 R. 1021; Connelly v. Clyde Navigation Trs., 1902, 5 F. 8; Anderson v. Glasgow Tramway Co. 1893, 21 R. 318; M'Fall v. Adams & Coy. 1907 S.C. 367; 14 S.L.T. 625 (the essential test is "control"). Johnson v. Lindsay 1891 A.C. 371; Donovan v. Laing, Wharton & Down Construction Syndicate, [1893] 1 Q.B. 629; also Murray v. Currie,

obtained support from the judges of the earlier part of the nineteenth century[32] right down to the present time. It has been tested again in the leading English case of Mersey Docks and Harbour Board v. Coggins & Griffiths (Liverpool) Ltd.,[33] a case in which Donovan v. Laing, Wharton & Down Construction Syndicate[34] was carefully considered and distinguished.

The general principles relating to the transference or loan of employees from and by one master to another were discussed at some length in Chowdhary v. Gillot.[35] Mr. Justice Streatfield's five propositions in that case are most helpful and are as follows, viz:-

(i) Where transfer is in issue, the presumption is always against it.

(ii) The onus of proof is on the general employer that control has passed from him.

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31. continued

1870, 6 C.P. 24 and Rourke v. White Moss Colliery Co., 1877, 2 C.P.D. 205.

32. See Dalyell v. Tyrer 1858, El.Bl. & El., 899; and Fenton v. Dublin Steam Packet Co., 1838, 8 A. & E. 835; and, in particular, the following well-known English cases Quarman v. Burnett 1840, 6 M. & W. 499; Jones v. Liverpool Corporation 1885, 14 Q.B.D. 890; and Jones v. Scullard [1898] 2 Q.B. 565, where the "control" test was clearly applied. For an interesting article by Professor Otto Kahn-Freund, criticising the "control" test, see 14 M.L.R. 505.

33. [1947] A.C. 1; [1946] 2 All E.R. 345; 115 L.J. (K.B.) 465; 62 T.L.R. 533.

34. Cit. supra.

35. [1947]2 All E.R. 541.

(iii) The general employer must prove that there is such a transference as passes the right to control the servant in the manner of execution of the act in question.

(iv) Whether such a transference has taken place is a question of fact.

(v) There cannot be such a transference without the servant's consent.

The "control test" has come up for consideration time and again in the "hospital cases".[36] It may be thought, perhaps with reasonable justification, that the control test has been pushed too far and that it has obscured the real test of the basic contractual relationship between the parties, to be determined by the first-mentioned test, rather than by attempting to identify the element of control. From the strictly logical standpoint it is an exaggeration or, more correctly, an over-simplification to say, for example, that a Hospital Board of Management "controls" its qualified senior medical staff in the sense

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36. See particularly the case of:- Foote v. Directors of Greenock Hospital 1912 S.C. 69; 1911, 2 S.L.T. 364. Scottish Insurance commissioners v. Edinburgh Royal Infirmary 1915 S.C. 751; 1913, 1 S.L.T. 353. Lavelle v. Glasgow Royal Infirmary 1932 S.C. 245; 1932 S.L.T. 179. Reidford v. Aberdeen Magistrates 1933 S.C. 276; 1933 S.L.T. 155. Davie's Tutor v. Glasgow Victoria Hospitals (O.H.) 1950 S.C. 382; 1950 S.L.T. 392. Hayward v. Edinburgh Royal Infirmary Board and Macdonald v. Glasgow Western Hospitals Board, 1954 S.L.T. 226.

that it will tell them how to perform a major or even a minor operation. Nevertheless, within the broad field of industrial operations it seems clear from Donovan's case and the Mersey Docks case, above mentioned, that where there is some actual mechanical or physical operation involved the courts will apply the "control" test.

(7) How far employee liable for acts done in the employer's service:-

When the servant has committed some wrongful act or is guilty of some negligence this makes him liable as a wrongdoer to the third party who has suffered the injury or loss. The fact that the employer has had to meet the claim by the third party or is by the existing law, under the doctrine of vicarious liability, required - qua employer - to meet the loss does not excuse the offending employee from his primary responsibility. If the wrongful act is the product of both master and servant then each is a contributing party with a shared primary responsibility. The master may have his legal claim to a contribution[37] from the employee or he may have a right of indemnity[38] against the servant. Whether it is good policy to enforce either of these rights is quite another matter. There are two main reasons for this, viz:-

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37. See the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940; and footnote 38 following.
38. Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] 1 All E.R. 125; A.C. 555 (H.L.).

(a) it is bad for industrial relations in any particular trade or establishment if employers are constantly enforcing their rights of contribution or indemnity (the simple remedy is to get rid of the careless or incompetent servant, for whose vagaries the insurance companies will normally pay, in any event); and

(b) if it becomes widespread local knowledge that a particular employer is in the habit of enforcing his rights of indemnity or contribution against all of those employees who involve him in a damages claim, that employer in question is going to find that recruitment of a suitable labour force will become a very difficult task indeed - and, moreover, his Shylockian insistence on his legal "pound of flesh" may do his business infinitely more harm than one or two damages claims.

Procedurally, the pursuer might raise his action of damages against both master and servant, jointly and severally, enforcing his decree against one or other or both. Should he take an action against the master alone and thereafter attempt unsuccessfully to enforce the decree he cannot then initiate a fresh action in respect of the same wrong against the employee. In practice the pursuer will almost always go against the employer and that will be an end of the matter.

The indemnity principle in Scots law seems to be founded upon the authority of the old case of Anderson v. Brownlee[39] upon the reasoning that as the master is bound at common law to relieve and indemnify the servant for any loss to him from conformation with orders, so the servant has a reciprocal obligation to indemnify the master - whether the loss be a direct loss to the master or a payment of damages or compensation to a third party. The English lawyers seem to have taken a very long time indeed to reach the same conclusion as is now evidenced by the Lister case.[40]

(8) Employer and Employee in the Criminal Law

Any instruction by a master to his servant to do something which amounts to a criminal offence involves both parties in criminal liability. They are liable in Scotland, as "art and part" in the offence. If the servant is merely an "innocent agent" then he escapes liability and it is the master alone who has to answer for the crime. In the case of a common law offence, the prosecution will require to prove the master's participation in the offence before a conviction will be obtained against him. The nature of the offence will be a very

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39. 1822, 1 S. 442; see also Clydesdale Bank v. Beatson, 1882, 10 R. 88.

40. Lister v. Romford Ice and Cold Storage Co. Ltd., [1957] 1 All E.R. 125; A.C. 555 (H.L.).

important matter to be considered in the first place. For example, an indictment for reckless driving or driving whilst under the influence of drink or drugs would not normally involve the employer, qua employer, in any criminal liability, although it would most certainly usually involve him in a civil liability.

The liability under statute law may be quite different and so far as the employer is concerned he may be made absolutely liable qua employer (and that liability may attach to him as a principal or it may also attach to him vicariously as the employer of S, the particular employee or agent who actually committed the statutory breach) or as owner or occupier or proprietor of particular premises occupied and used for a particular purpose and governed by special statutes.[41] There may be a "saving clause" to the master in certain statutes which enables him to report that

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41. See, for example, the Factories Act, 1961; the Mines and Quarries Act, 1954; the Offices, Shops and Railway Premises Act, 1963 and the statutes relating to Licensing and Weights and Measures; and, for example, the cases of Greenhill v. Stirling 1885, 12 R.(J.) 37; Galloway v. Weber 1889, 16 R.(J.) 46; Lindsay v. Dempster, 1912 S.C.(J.) 110; Robertson v. Gray 1945 J.C. 113 (weights and measures); Ferguson v. Campbell 1946 J.C. 28; 1946 S.L.T. 58 (Licensing Acts) and Shields v. Little 1954 S.L.T. 146; 1954 J.C. 25 (trafficking in excisesable liquor) and also, from the aspect of vicarious criminality under statute the older cases of - Burnette v. MacKenna 1917 J.C. 20; 1916, 2 S.L.T. 293; Auld v. Devlin 1918 J.C. 41; 1918, 1 S.L.T. 33; Davidson v. Alexander 1927 S.N. 91; Bean v. Sinclair 1930 J.C. 31; 1930 S.L.T. 423; and, most importantly, Hall v. Begg 1928 J.C. 29; 1928 S.L.T. 336.

the particular breach was caused by a definite and identifiable person and that he (the master) had no knowledge of the breach and had done his best to see that the Act's requirements were fully met. On the other hand, the liability may be absolute.

In each case of statutory liability the primary task is one of construction of the particular statutory provision in order to ascertain (a) the reason for the obligation and (b) the capacity in which that obligation is being imposed by the legislature. Knowledge on the part of an employer may be vital in fixing an additional liability or even the primary liability upon him, as the prosecution would require, in the ordinary case, to prove this knowledge by the employer.[42] If, on the other hand, the wording of the statute is clearly absolute, giving knowledge or acquiescence no place in the offence, the test of liability is the factual commission of the particular act which is expressly forbidden by the Act itself.

The common-law doctrine of vicarious liability, so well-known in the field of civil wrongs or delict has no similar application in the field of common-law crime.

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42. See particularly "Mens rea in statutory offences" by J.Ll. Edwards, where the question of statutory liability is very exhaustively examined.

(9) Rights and remedies arising to the employer (in respect of the Contract of Service) against third parties:-

The remedies are as follows:-

(a) An action for inducing a breach of contract.

(b) An action for harbouring a servant.

There is not available in Scotland (as there is in England)

(c) An action for injury to the servant.

There remains to be considered, in somewhat broad compass, the basic question of the grounds of action against third parties.

(a) Action for inducing a breach of contract.

There is a long tradition in Scottish common law that if any person, knowingly and intentionally, induces a servant to commit a breach of his contract (e.g. by deserting the service), so that the master suffers loss, such person becomes liable to an action of damages at the instance of the master.[43] It seems that the third party's act, by which he induces the breach, may be an act of any kind which results in a breach causing loss, for example, revealing trade secrets or some confidential information.[44]

The third party who is to be made liable must have had notice of the contract infringed, otherwise he cannot

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43. See Dickson v. Taylor, 1816, 1 Mur. 141; Rutherfoord v. Boak, 1836, 14 S. 732; Couper & Sons v. Macfarlane 1879, 6 R. 683.
44. Rutherfoord v. Boak, supra; Kerr v. D. Roxburgh, 1822, 3 Mur. 126; Roxburgh v. M'Arthur, 1841, 3 D. 556

be said to have committed any wrongful act. Even knowledge of the existing relationship between the master and his employee will not be enough - if such knowledge does not justify an inference of wilfully and intentionally inducing the breach. Obviously, a mere giving of advice, without injurious motive or wilful intention against the master, will not involve liability, on the part of the third party, to the master.

The particular contract whose breach has been alleged must be one which is enforceable; if, for example, it is void there can be no contractual right arising to the master and there is no question of his having a remedy for breach - because the contract itself is a nullity.[45]

(b) Action for harbouring a servant.

It is equally established at common law that if any person harbours or continues to employ a deserting servant, after notice of the facts, then he becomes liable to the master whose servant has deserted him.[46] The test of

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45. Sykes v. Dixon, 1839, 9 A. & E. 693; Hartley v. Cummings, 1847, 5 C.B. (M.G. & S.) 247; De Francesco v. Barnum, 1890 45 Ch.D. 430.

46. Dickson v. Taylor; Sykes v. Dixon; Hartley v. Cummings; and De Francesco v. Barnum, cit. supra; and also Rose Street Foundry etc., v. Lewis & Sons 1917 S.C. 341; 1917, 1 S.L.T. 153; other examples are Blair v. Robertson 31 Sh. Ct.Repts. p. 193; Park & Co. v. Luttrell & Robertson op. cit. p. 251; Lohoar v. Gemmell, op. cit. p. 245; Adamson v. Muirhead, 32 Sh.Ct.Repts. p. 20; Spence v. MacKenzie 32 Sh. Ct.Repts. p. 36; and Holmes v. Johnstone Co-operative Society Limited, 40 Sh.Ct.Repts. p. 49.

liability is the third party's continuation of the employment of the servant after his knowledge of the facts that the servant is in desertion from his previous employment. Such an action would be a deliberate interference with the primary relationship and accordingly some protection must be given to the master. Although this action is perfectly possible, in theory, it is submitted that it is most unlikely to be met with in modern practice. If any remedy is to be available it will generally be found that an action for inducing a breach of contract is the most satisfactory one. If professional malpractice by a third party employer is involved, then a formal complaint should be lodged with the disciplinary body of the particular profession.

(c) Action for injury to the servant (?)

Scots law does not permit any action at the instance of a master against a third party who has caused injury to the servant (thereby, of course, resulting in loss and inconvenience to the master). English law tends to allow such an action because there is a deprivation of services, in which the master is said to have a quasi right of property.

This type of action was tried in Scotland in the case of Allan v. Barclay,[47] but the Lord Ordinary held it to be

47. 1864, 2 M. 873.

incompetent upon the ground of remoteness of damage. The Inner House of the Court of Session also expressed serious doubts as to its competency. The same type of action was again tried many years later in Reavis v. Clan Line Steamers,[48] but was again regarded as incompetent.

English law seems to be the same in principle but it allows an exception in the case of menial servants, employed as part of the domestic staff, basing damages on the action per quod servitium amisit.[49]

This whole question was recently examined exhaustively by the Law Reform Committee for Scotland. Their Report[50] concludes unanimously that any possible alterations in the law would produce worse results than any supposed defect or unfairness and therefore, for the reasons explained by them[51], they recommended that no legislation was necessary. That is how matters stand at present.

Grounds of action against third parties.

There remains to be considered the development of the ground of action against third parties who interfere with the master and servant relationship. This is a matter of considerable interest and not a little complexity.

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48. 1925 S.C. 725.
49. See Inland Revenue Commissioners v. Hambrook, [1956] 2 Q.B. 641; and Receiver for the Metropolitan Police District v. Croydon Corporation and Another [1957] 2 Q.B. 154.
50. Eleventh Report of the Law Reform Committee for Scotland, presented to Parliament in July 1963 and published by H.M. Stationery Office (Command Paper No. 1997).
51. ibid, pages 4 and 5.

The grounds seem to fall into two definite and agreed categories:-

(a) where the acts in question are unlawful acts; and

(b) where the said acts are lawful but are procured by unlawful means.

The authorities are mainly drawn from English law but, nevertheless, there are several Scottish authorities of extreme importance. The early leading cases on this topic are the following:-
Lumley v. Gye;[52] Bowen v. Hall;[53] Mogul S.S. Co. v. M'Gregor, Gow & Co;[54] Temperton v. Russell;[55] Flood v. Jackson[56], appealed to the House of Lords as Allen v. Flood;[57] and Quinn v. Leatham.[58]

In Lumley v. Gye the ground of action was that defendant had "maliciously intending to injure plaintiff... enticed and procured (Miss) Wagner to break her contract". The action was held to be competent. However, Coleridge J. dissented, taking the following points - (i) the damage was too remote (ii) the motive was too elusive in character to be a test of legal action and (iii) the action of damages for enticing a servant was an exception to the general rule and applied only to labourers in husbandry

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52. 1853, 2 E. & B. 216.
53. 1881, 6 Q.B.D. 333.
54. 1889, 23 Q.B.D. 598; 1892 A.C. 25.
55. [1893] 1 Q.B. 715
56. [1895] 2 Q.B. 21.
57. [1898] A.C. 1.
58. [1901] A.C. 495 (reported as Leatham v. Craig [1899] 2 I.R. 667.

and menial servants.

Lumley's case was considered and approved in Bowden v. Hall.[59] Again the ground of action was "knowingly inducing a breach".[60] The three conditions necessary to found an action were set out clearly by Brett L.J. (as he then was), viz:- (i) the defendant's act must be wrongful in law and in fact, (ii) the breach of contract should be a natural and probable consequence of the act of persuasion and (iii) the breach of contract should be the cause of the injury to the plaintiff - but such injury must not be too remote.

In Mogul S.S. Co. v. M'Gregor, Gow & Co.,[61] no allegation of procuring a breach was made. The position was that certain traders in the china tea trade had combined to keep their competitors out of the market by offering rebates to customers who dealt exclusively with them and by reducing freights, as well as by threatening to cease employing their own agents who also acted for other traders outside the combination. The action was in damages, founded upon an illegal combination or alternatively, standing the combination, that it made use of unlawful means The action was unsuccessful - the Court holding that, in spite of any loss to the plaintiff, the object of the combination was to secure and protect the trade of the defendants. No violence, intimidation, fraud, misrepresen-

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59. cit. supra.
60. See per Brett L.J. (later Lord Esher) at p. 337, delivering the majority judgment of the Court.
61. cit. supra.

tation or procurement of a breach of contract had occurred. No right of the plaintiffs had been violated.[62] Both the Court of Appeal and the House of Lords held that the defendants had not exceeded the legal limits of competition in the course of trade.

Temperton v. Russell[63] is interesting as it was an action taken by a manufacturer against the members of a joint committee of three trade unions. Two grounds of action were relied upon, namely:- (i) that defendants had, unlawfully and maliciously, procured certain persons to break contracts with plaintiff and (ii) that they did maliciously conspire to induce certain persons not to enter into contracts with plaintiff. The court held that defendants were actuated in what they did, not by any spite or malice against plaintiff personally, but by a desire to injure him in his business by forcing him not to do something which he had a legal right to do and to compel him to comply with the unions' requirements; accordingly, they had then induced certain persons to break their contracts with plaintiff and they knew about the existence of these contracts; and, moreover, the plaintiff had suffered loss from the breaches of contract. On the second ground of action, the facts proved to the court's satisfaction were - the same desire of defendants

62. See dictum of Bowen L.J. in the Court of Appeal - 23 Q.B.D. at p. 613 (criticised by Lord Herschell in Allen v. Flood, [1898] A.C. 1 at p. 139).
63. cit. supra.

as before, an acting in combination, success in inducing breaches of contract and consequent loss to the plaintiff. Accordingly, the malicious purpose, the successful inducement of breaches of contract and the consequent loss, taken together, were held to found a good ground of action against those persons acting in combination.[64]

The foregoing cases indicate that two basic conditions must be fulfilled before the action in damages for procuring a breach will succeed, viz:- (a) the loss must be caused to the party who is claiming the damages; and (b) the procuring of the breach must be "malicious".

The very important question of the meaning and effect of "malice" was discussed, at great length, in Allen v. Flood.[65] Briefly, the facts were that two shipwrights, Flood and Taylor, were employed by Glengall Iron Company to repair a ship. The boiler-makers employed by the company objected to Flood and Taylor being employed claiming that the two men had invaded their province by carrying out iron-work in another yard ("demarcation" at an early stage). Allen, the trade union delegate of the boilermakers, persuaded the company to dismiss Flood and Taylor, threatening that if it did not do so the boiler-makers would be called out on strike or would come out on

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64. See per Lopes J.J. at p. 731 of the report.
65. Originating as Flood v. Jackson and reported [1895] 2 Q.B. 21 and moving to the House of Lords as Allen v. Flood and reported [1898] A.C. 1.

strike. There was no breach of contract, as the company could discharge Flood and Taylor at any time. The jury found that Allen had "maliciously induced" the company to dispense with the services of plaintiffs and had "maliciously induced" the company not to engage plaintiffs. ("Maliciously", as used here, meant an intention to punish the plaintiffs or injure them in their trade or obtain some benefit to the boilermakers at the shipwrights' expense). But, the House of Lords held that there was no ground upon which an action could be maintained. The company had committed no legal wrong against plaintiffs and presumably it was not a wrongful act for Allen to persuade or induce the company to do that which it had a perfect legal right to do at any time. A strong argument was put forward that a special right existed in every person to exercise his trade or dispose of his labour, free from molestation or interference and that any such interference was actionable unless done with just cause or excuse. This view was rejected. Before any action could be taken there had to be a wrongful act - and, moreover, an act which was otherwise lawful could not be made unlawful (i.e, wrongful) because it was prompted by a bad motive. Malice by itself is not actionable.

Quinn v. Leathem[66] took the development a stage further. This case involved the elements of (i) threats

66. [1901] A.C. 495 (reported as Leathem v. Craig in [1899] 2 I.R. 667).

and (ii) conspiracy. The court made no attempt to distinguish or define "legal threats" and "illegal (i.e. unlawful) threats". It was found, in fact, that defendants had acted in combination and with a common purpose to injure plaintiff in his business by preventing the free action of those customers dealing with him and that actual loss had resulted to plaintiff and that defendants had no just cause or lawful excuse, because their acts were not legitimately done to protect or advance their own interests. The particular acts here done were not proved to have resulted in any breach of contract through which plaintiff suffered loss, but nevertheless they caused others to refuse to deal with plaintiff and in this way pecuniary damage was caused. Based upon these facts, the action was sustained.[67] Quinn's case is clearly based on an unlawful combination which resulted in loss and with no justification in law for the particular acts. It was suggested that the means employed - namely coercion by threats - were themselves sufficient to attach liability to defendants. This very point was to occur again many years later, as we shall see shortly.

It seems, therefore, that two main types or patterns of case could be encountered:-

(i) Where the action is based upon a wrongful act

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67. Thereby approving the second ground of action in Temperton v. Russell.

done by one or more persons, but without any acting in concert; and

(ii) where the action is based upon a lawful or unlawful act done by unlawful means, including therein an illegal combination.

Lumley's case, Bowen's case and Allen v. Flood[68] all fall into category (i) above, whilst Mogul S.S. Co. and Quinn v. Leathem[69] fall into category (ii) above. It would appear that Temperton v. Russell overlaps both categories. Class (i) requires a violation of some right (contractual or otherwise), done knowingly and intentionally and resulting in some loss. Class (ii), being based upon illegal conspiracy requires a combination of persons with the object of causing injury to another, some act or acts done in furtherance of that purpose and loss arising therefrom.

Scots law has not, however, developed the law of "conspiracy" to the same extent as English law, but has chosen instead to regard conspiracy as a form of "attempt" in the criminal sense or as a form of "fraud" in the civil sense, leaving the common law remedies to be applied. Nevertheless, an early case of "conspiracy" in Scotland which must be noticed is that of Scottish Co-operative Society v. Glasgow Fleshers' Association.[70] Here it was alleged that defenders had entered into an illegal

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68. All cit. supra.
69. Both cit. supra.
70. 1898, 35 S.L.R. 645.

combination to induce, and had induced, the salesmen at Yorkhill Quay to insert in their conditions of sale provisions under which bids from pursuers were not to be received; that such conditions were illegal and that pursuers had sustained injury through the refusal of salesmen to accept bids from them. It was held that the conditions excluding pursuers' bids were not illegal and, as regards a conspiracy to induce salesmen to insert conditions refusing bids, defenders had merely done what was legitimate for their own protection, under conditions of trade competition. The case was said to be clearly governed by the precedent of Mogul S.S. Co. v. M'Gregor, Gow, & Co.[71] The point about legitimate trade protection was to be raised again in the leading Scottish case of Crofter Hand Woven Harris Tweed Co. v. Veitch[72].

"Conspiracy" in English law is, (throughout most reports and textbooks) referred to, but perhaps not truly defined, thus - "that which is lawful when done by one person or several persons acting individually may be unlawful when done by a number of persons acting in combination". Moreover, conspiracy was an offence punishable in the English criminal courts[73] and at the same

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71. 1889, 23 Q.B.D. 598; [1892] A.C. 25.
72. [1942] A.C. 435.1; 1942 S.C.(H.L.) 1; [1942] 1 All E.R. 142, H.L.
73. See Russell on Crime (12th Edn. by J.W. Cecil Turner) and Kenny "Outlines of Criminal Law" (18th Edn. by J.W. Cecil Turner).

time, it could give rise to a civil action in damages (now the "tort of conspiracy"). It is important to realise that an illegal conspiracy has two branches:- (a) the whole object may be unlawful or (b) the object may be quite lawful, but the method of attaining the object may be unlawful (e.g. violence, threats or intimidation, fraud etc.).

So far as Scotland is concerned it has been said that "where an act would not be unlawful if done by one person it does not become unlawful or criminal when two or more persons combine to do it".[74] The conspiracy may be charged as a criminal act in Scotland[75] as well as charging the criminal acts themselves as specific crimes, but this type of procedure never seems to have been popular in Scotland.[76] It would seem that civil liability in Scotland arising from a combination which is not by itself criminal could only be attached where the acts done or the methods used by the combination would be wrongful if done by a single individual. However, the House of Lords over-ruled that view in Quinn v. Leathem.[77] The law was amended, in regard to trade disputes, by section one of the Trade Disputes Act, 1906.[78]

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74. Couper & Sons v. Macfarlane, 1879, 6 R. 683 per Lord Gifford at p. 697.
75. See Alison i 369; Hume i 170; but see Macdonald on The Criminal Law of Scotland sub. nom. "Conspiracy".
76. Alison; Hume; and Macdonald loc. cit.
77. Cit. supra.
78. Which added the following new paragraph after the first paragraph of section 3 of the Conspiracy & Protection of

Intimidation is expressly forbidden by section 7 of the Conspiracy and Protection of Property Act, 1875.[79] The case of Allen v. Flood, referred to above, seems to indicate that molestation and/or obstruction are not actionable unless either is effected by unlawful means.[80]

Trade unions have been involved to a considerable extent in these matters of combination, coercion, intimidation and the like. Prior to 1906 it seemed that the decisions - correctly interpreted under the law as it then stood - were mostly unfavourable to the unions. The Trade Disputes Act of 1906,[81] section 4, gave general immunity to the trade unions themselves against actions in delict (or tort), so that their funds could no longer be legally attached in satisfaction of a damages decree or judgment and furthermore, in the special case of a trade dispute existing, the trade union itself (and its funds) was apparently protected from any proceedings arising out of that dispute - or so it seemed until fairly recently.[82]

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78. continued
Property Act, 1875, viz:- "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."
79. 38 & 39 Vict., cap. 86.
80. See also the Mogul S.S. Co. and Scottish Co-operative Society cases above-mentioned and above cited.
81. 6 Edw. 7, cap. 47.
82. See the note on Rookes v. Barnard and Others infra at page 194.

The employer may sue any third party who induces his servant to disclose confidential information[83] or he may obtain interdict against a rival firm employing his workmen and obtaining an advantage from their specialised skills.[84]

Unjustifiable encouragement to break contracts must be distinguished clearly from (a) cases where X is induced to stop working, without a breach of contract and where no unlawful means are used[85] and from (b) cases where defendants neither knew nor ought to have known about the alleged wrongful act.

In British Industrial Plastics Ltd., v. Ferguson[86] plaintiff's employee made a leaving agreement with them and promised not to interest himself in manufacture or sale of certain chemicals used in plaintiff's secret processes, before a certain date. Some three months later the employee went to defendants and offered them a process for which their patent agent made application for a patent Plaintiffs began an action of breach of contract against their former employee and against defendants for inducing the breach. It was held that there was no ground of action against the company as they had no knowledge of the breach (either actual knowledge or constructive knowledge)

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83. See Dents Brewery Co. Ltd. v. Hogan [1945] 2 All E.R. 570.
84 Hivac Ltd. v. Park Royal Scientific Instruments Ltd. [1946] 1 Ch. 169; [1946] 1 All E.R. 350.
85. i.e. Allen v. Flood [1898] A.C. 1.
86. [1940] 1 All E.R. 479.

Wrongful interference was also looking in D.C. Thomson & Co. Ltd. v. Deakin,[87] where plaintiffs required their employees to sign an undertaking that they would not join a trade union. Several employees had broken this obligation and one such employee was dismissed. He appealed to the union for help. The union called out its members on strike and asked other unions for assistance. Certain employees of a company supplying paper to plaintiffs said they were unwilling to handle paper destined for plaintiffs. The supplying company then told plaintiffs they would not be able to make deliveries of paper as required by the contract. Plaintiffs then took Injunction proceedings (Scottish "Interdict") against the union officials to restrain them from causing or procuring breaches of contract between the supplying company and the plaintiffs. The court was of opinion that had defendants had actual knowledge of the contract and had they attempted by wrongful acts to make it impossible to perform, an action would have lain. The evidence did not show this and therefore the injunction was refused. Jenkins L.J. gave the opinion[88] that actionable interference with contractual relations should be confined to cases where it is clearly shown:-

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87. 1952 Ch. 646; [1952] 2 All E.R. 361.
88. Ibid. pp. 696 and 379 respectively.

(a) that the person charged with actionable interference knew of the existence of the contract and intended to procure its breach;

(b) that that person did definitely and unequivocally persuade, induce or procure the employees to break their contract, with intent;

(c) that the employees so persuaded...did break their contracts of employment; and

(d) that breach of contract forming the alleged subject of interference resulted as a consequence of the breaches of the contracts of employment.

The employee will be entitled to damages against any person who unjustifiably induces his employer to break a subsisting contract of service.[89] But there must be breach of a subsisting contract - there is no offence, so long as no unlawful means are used.[90]

The Trade Disputes Act 1906,[91] section three, provides that any act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person to dispose of his capital or his labour as he wills. This section was successfully invoked in the

89. See Reed v. Friendly Society of Operative Stonemasons of England, Ireland and Wales [1902] 2 K.B. 732.
90. Allen v. Flood [1898] A.C. 1.
91. 6 Edw. 7, cap. 47.

Court of Appeal in the recent case of Rookes v. Barnard and others[92] but the House of Lords reversed[93] the Court of Appeal decision by placing great reliance upon the delict or tort of Intimidation and, being satisfied that the actings by the trade union officials concerned did amount to intimidation, found in favour of Mr. Rookes (i.e. by upholding his appeal against the Court of Appeal decision) on the question of law but remitted the case to the lower court for purposes of fixing the amount of damages (the original award of £7,500 was felt to be much too high). This case has caused considerable disquiet in trade union circles as it seems to suggest that the provisions of Sections 1 and 3 of the Trade Disputes Act, 1906 can always be got round if the pursuer (or plaintiff) can base his case upon Intimidation as a separate delict or tort.[93] This will enable him to succeed against any trade union official in an individual capacity and, indirectly, he (pursuer) may be able to strike at the union's funds to satisfy the sum of damages and expenses contained in the decree. It seems reasonable to prophesy that Rookes v. Barnard and others will become as big a landmark in the field of trade union law and history as the Taff Vale case did sixty-three years ago. A case subsequent to Rookes and raising other difficulties from the viewpoint of the unions is that of J.T. Stratford &

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92. [1962] 2 All E.R. 579 (at first instance [1961] 2 All E.R. 825).
93. [1964] 2 W.L.R. 269; and [1964] 1 All E.R. 367. H.L. See comments on the Trade Disputes Bill (Chapter 5 infra).

Son v. Lindley,[94] although the case itself is not so momentous as Rookes. In Stratford's case, wherein interlocutory injunctions were sought by the plaintiff company, the House of Lords has now reversed the Court of Appeal holding (i) defendants guilty of procuring breaches of contract and (ii) that sections 1 and 3 of the Trade Disputes Act, 1906 did not apply as the actings of defendants were not in contemplation or furtherance of a trade dispute. The House applied Lumley v. Gye supra and considered but distinguished Rookes v. Barnard and others.

It still seems possible to put forward, with reasonable confidence, the plea of protection of legitimate trade interests. It would seem that if it can be shown to the court's satisfaction that the true motive for the particular acting was protection of legitimate trade interests then the court will be reluctant to find against defenders so acting.[95] It would appear from a close reading of the Crofter Harris case that the actings of Veitch and MacKenzie, the trade union officials concerned, amounted to a combination or acting together but these actings did not amount to the delict or tort of "conspiracy" because there was created in favour of Veitch and MacKenzie, upon the factual circumstances, the legal and

94. [1964] 3 W.L.R. 541; [1964] 3 All E.R. 102 (H.L.)
95. See Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch [1942] A.C. 435 and the various cases cited therein; see also Sorrell v. Smith [1925] A.C. 700. The legal principle in the "Crofter Harris" case was approved and applied in Huntley v. Thornton [1957] 1 W.L.R. 321; [1957] 1 All E.R. 234 where "conspiracy" was alleged and upheld against certain defendants, and the court was satisfied that there wa

protective buffer or cushion of "legitimate trade interest". This still leaves open the very important question as to what decision the court would take today were they faced with the same facts as before in the Crofter Harris case but with the addition of intimidation, threats or coercion by union officials practised against competitors under the guise of "legitimate trade interest". One is forced to conclude that - looking to the Rookes v. Barnard and Others decision - the scales of justice would now be weighted against the trade union officials.[96]

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95. continued

not a trade dispute in existence, for the defendants were not asserting a trade right nor were any interests of trade involved.

96. See now comments upon the Trade Disputes Bill (1965) in chapter 5 hereof (pages 260-261 infra).

Chapter 4

Termination of the Contract of Service

(1) Notice and Tacit Relocation

The requirement of notice as a preliminary step in the termination of every relationship of employer and employee is often over-stated and misunderstood. Indeed it is never an essential part of every service contract. Nevertheless, it is widely used and then it becomes a mutual obligation.[1] As soon as there is a desire on both sides to bring the employment relationship to an end, this can be done at once without invoking any formal notice procedure.

The requirement as to notice may be either express or implied. The former involves a question of construction of the contract, whilst the latter is decided by reference to either local custom[2] or trade custom,[3] but not to custom in a particular establishment.

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1. Renwick v. Gordon, 10 Sh.Ct.Rep. 321.
2. Morrison v. Allardyce, 1823, 2 S. 387.
3. Hamilton v. Outram, 1855, 17 D. 798; and M'Lean v. M'Farlane, 1863, 4 Irv. 351.

The purpose of giving notice is accepted as being a twofold one - firstly, it prevents the operation of the principle of tacit relocation, which might otherwise be inferred from a continuation of the relationship and, secondly, it sets up a fixed termination date for a contract of service which has been, until then, a contract during the pleasure of parties.[4]

If neither part of the said purpose is to be brought into use, then any requirement as to notice is probably valueless.[5]

Instead of giving notice, appropriate in the circumstances, and permitting the employee to work out his notice period, the master may elect to pay him the wages (including any board wages) due in lieu of notice and dismiss him instantly. This action of the master does not amount to a breach of contract in the ordinary case.[6] There is, of course, no converse right in favour of an employee whereby he may buy himself out of his contract of employment by paying to his employer a sum of money

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4. Morrison v. Abernethy School Board, 1876, 3 R. 945; Robson v. Overend 1878, 6 R. 215.
5. Wallace v. Wishart, 1800, Hume, 383; Brenan v. Campbell's Trs. 1898, 25 R. 423; see also the opinions of L.J.C. Monoreiff and Lord Young in Lennox v. Allen and Son 1880, 8 R. 38 for dicta which seem not to agree with the twofold purpose of notice.
6. See Morrison v. Abernethy School Board, cit. supra; Robson v. Overend, cit. supra; and Hastie v. M'Murtrie, 1889, 16 R. 715.

representing the unexpired portion of the contractual period.[7]

The actual method of the giving of the notice need not be formal - it may be in writing or verbal or it may even be inferred from the actings of the parties themselves. No matter how it is given there are two points which are most important - firstly, the giving should be timeous and, secondly, it must notice which is quite definite. The reason for these requirements is that any notice provision is never lightly inferred.[8] If the giving of notice is to be inferred from parties' actings then this is a question of fact (and if a jury is sitting, it is the jury's task to answer the question).[9]

The length of notice required to be given is usually expressed in the contract of service itself. If this is not so then an equitable decision of the matter is called for - and in any event, the notice given must be reasonable.[10] It is said that the employee's right to receive warning is rested upon "equity and custom".[11]

It appears, however, that agricultural and domestic servants in Scotland, hired by the year or half-year, are

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7. This principle is accepted in H.M. Forces, but service in Armed Forces of the Crown is not service under a contract of employment.
8. MacLean v. Fyfe, 4th Feb. 1813 F.C.
9. Anderson v. Wishart, 1818, 1 Mur. 429 per L.C.C. Adam at page 438.
10. See Wilson v. Anthony 1958 S.L.T. (Sh.Ct.) 13; (1957) 73 Sh.Ct.Repts. 298.
11. Cameron v. Scott, 1870, 9 M. 233, per L.J.C. Moncreiff and Lennox v. Allan & Son, cit. supra, per Lord Gifford at page 40.

entitled to forty days clear notice and this period is also applicable in the case of other servants who are hired by the yearly or by the half-yearly terms e.g. gamekeepers, foresters, farm managers and the like.[12] The forty days period was to be counted, at one time, from the date at which de facto the term of service was to end,[13] but the Removal Terms (Scotland) Act 1886 (amended in 1890) impliedly altered the common law[14] by requiring the warning to be given forty days before 15th May or 11th November even although the actual cessation date of tenancy or service was 28th May or 28th November (those dates being accepted in modern practice as tenants' removal days). It does seem, however, that the older common law was restored by a subsequent case[15] which provided that forty days notice before 28th May or 28th November was good enough. The Rent Act, 1957,[16] has (in addition to other statutes) made further changes with special regard to the giving of notice in respect of rented property, but it has made no change in the customary notice period referred to above, which applies to the

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12. M'Lean v. Fyfe; Anderson v. Wishart; and Ross v. Pender, cit. supra; also Armstrong v. Hainbridge, 1847, 9 D. 1193.
13. See Cameron v. Scott, 1870, 9 M. 233; 8 S.L.R. 181 (applying the analogy of the ordinary leasehold tenant).
14. As stated in Cameron v. Scott, supra.
15. Stewart v. Robertson 1937 S.C. 701; 1937 S.L.T. 465.
16. See particularly section 16 and paragraphs 28, 29 and 30 of the sixth schedule.

agricultural and domestic servant.

In English law, judicial notice is taken of a custom that where domestic servants are engaged on yearly wages (which is not usual in modern practice), either party is entitled to terminate the contract at the end of the first month and upon giving notice during the first fortnight of the intention to terminate. The servant is then entitled to his or her month's wages.[17] It seems to be very doubtful whether such a custom was ever accepted as being applicable in Scotland also.

In other cases, the length of notice may be settled by local custom or by usage of trade or perhaps also by regulations within a particular establishment.[18] Where custom is pleaded it must be proved.[19] Quite often, particulars as to the length of notice required and other general conditions and regulations affecting the employment may be exhibited in the factory or works premises or they may be contained in a written or printed form which the workman must sign or which must be brought to the attention of the employees in some other way.[20] This practice is indeed allowed for in the first United Kingdom statute which provides for a statutory notice

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17. See George v. Davies [1911] 2 K.B. 445.
18. Hamilton v. Outram, 1855, 17 D. 798 per L.J.C. Hope at page 801.
19. Moult v. Halliday, [1898] 1 Q.B. 125.
20. Foodick v. N.B. Railway Co., 1850, 13 D. 281; Anderson v. Moon, 1897, 15 S. 412; Govdenbeath Coal Co. v. Dryllie 1856, 3 Sh.Ct.Rep. 3; Wright v. Howard Malror & Co., 1893, 21 R. 25.

period, namely the Contracts of Employment Act, 1963.[21]

Failing determination of the length of notice by any of the methods before mentioned, the rule is that the length of notice must be reasonable in the circumstances. This really means that an employee is to be permitted an adequate space of time in which to seek another appointment or the master an opportunity of recruiting a replacement employee.[22]

The modern cases still maintain the same principle of the test of reasonableness - for example, in Wilson v. Anthony,[23] a period of four weeks was considered reasonable in the case of the assistant manageress of an hotel. Of course, these illustrations from the common law cases will now lose much of their value as guides to employers and employees when the statutory provisions introduced by the Contracts of Employment Act, 1963, become operative.[24]

The English cases have also followed a pattern which is very similar to the Scottish cases - for example, three months was reasonable notice for a clerk[25] or

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21. See section 1. This Act came into operation on 6th July, 1964.
22. Some of the older cases give some helpful guidance on what notice is reasonable:- See Campbell v. Fyfe, 1851, 13 D. 1041; Eddy v. Glasgow Echo Co., 1895, 11 Sh.Ct.Rep. 345 (15 days not sufficient for a newspaper editor); Morrison v. Abernethy School Board, 1876, 3 R. 945 (3 months for a parish schoolmaster); Forsyth v. Heathery Knowe Coal Co., 1880, 7 R. 887 (3 months for a colliery manager); Mollison v. Baillie, 1885 22 S.L.R. 595 (3 months for an estate factor); Vibert v. Eastern Telegraph Co., 1883, 1 C. & E. 17 (one month for a telegraph company clerk on £135 p.a; Currie v. Glasgow Central Stores Ltd., 1905, 13 S.L.T. 88; (and the same principle of reasonableness as a test was adopted in Wilson v. Anthony 1958 S.L.T. (Sh.Ct.) 13; (1957) 73 Sh.Ct.Rep. 298 as is mentioned infra).
23. 1958 S.L.T. (Sh.Ct.) 13; (1957) 73 Sh.Ct.Rep. 298.

commercial traveller;[26] twelve months for the editor of a major newspaper;[27] three months for the editor of a minor newspaper;[28] six months for a sub-editor[29] and foreign correspondent,[30] whilst an ordinary journalist might reasonably expect one month's notice. The chief officer of an ocean-going passenger might, however, require twelve months' notice.[31]

Where insufficient notice is given this cannot operate to avoid the principle of tacit relocation, because such notice is completely worthless and might as well not have been given at all.[32]

Again, where service is during mutual pleasure and insufficient notice is given, the employee's claim is for wages (and board wages, if appropriate) in lieu of notice, not a claim for damages. If a claim is made on the basis of damages it is relevant to aver what the earnings were in the previous employment in order to assist the Court in reaching a proper assessment of damages.[33]

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24. The statute became operative from 6th July, 1964.
25. Foxall v. International Land Credit Co., (1867), 16 L.T. 637.
26. Metzner v. Bolton (1854) 9 Ex. 518; 23 L.J. Ex. 130; and also Grundon v. Master & Co. (1885) 1 T.L.R. 205.
27. Grundy v. Sun Printing & Publishing Association (1916), 33 T.L.R. 77.
28. Baker v. Mandeville (1896), 13 T.L.R. 71.
29. Chamberlain v. Bennett (1892) 8 T.L.R. 234.
30. Lowe v. Walter (1892), 8 T.L.R. 358.
31. Savage v. British India Steam Navigation Co. (1930), 46 T.L.R. 294.
32. See Anderson v. Wishart; Ross v. Pender; Gibson v. M'Naughton; and Campbell v. Fyfe, all cit. supra.
33. Sweeney v. Colvilles Ltd. (O.H.) 1962 S.L.T. (Notes) 42.

It has been argued that a servant who accepts wages and departs quietly upon his dismissal without notice at the termination of the contract waives any claim which may be open to him based upon the inadequate notice.[34] Such waiver is never to be readily inferred. Although an employee is obliged to leave quietly (though he is unjustifiably dismissed) he is under no duty to intimate a claim for damages or compensation. It is quite useless to plead acquiescence and then to attempt to support it by saying that the employee left without protest or intimation of a claim.[35]

Tacit Relocation:-

By reference to the law of Leases, the Institutional writers define[36] tacit relocation as a presumption in the minds of both parties to continue the lease, by mutual consent, upon the same terms and conditions as previously. This same principle is adopted and applied within the master and servant relationship and it sets up an implied contract to continue that relationship. If either party relies upon a different agreement then the implied

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34. Baird v. Don 1779, 5 B.S. 514; and 1779, M. 9182.
35. Rose v. Pender, 1874, 1 R. 352.
36. See Stair 2,9,22; Bankton 2,9,33; Erskine 2,6,35; Bell's Principles s. 1265; see also Neilson v. Mossend Iron Co., Ltd., 1886, 13 R. (H.L.) 50 per Lord Watson at page 54.

contract would be inapplicable,[37] whilst a reference to new terms, not contained in the original agreement, would mean that the party who alleges the existence of these new terms would have to prove them.[38]

This presumption of tacit relocation may also be based upon a lack of due notice or timeous warning of the termination of the contract being given. That is to say, the operative date for the giving of effective notice has passed and parties still continue to stand in the relationship of master and servant.[39] However, the principle of tacit relocation cannot be applied to those contracts which do not require any form of notice or other warning to bring them to a conclusion.[40]

The Lennox case[41] appears to indicate that there are three important elements in relation to the probable application of the principle of tacit relocation, where there has been a lack of notice. These elements are:- (a) a written contract, (b) a servant of the artisan class and (c) an unusual duration.

As regards element (a), the form of the original

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37. Sutherland's Trs. v. Miller's Trustee 1888, 16 R. 10.
38. Tait v. M'Intosh, 1841, 13 Scot.Jur. 280.
39. See Erak. 2.6.36; Bell's Principles s. 173; Baird v. Don 1779 5 B.S. 514 and 1779, M. 9182; Kelly v. Govan's Exrs. 1891, 7 Sh.Ct.Rep. 109; Morrison v. Allardyce, 1823, 2 S. 387.
40. Lennox v. Allen & Son, 1880, 8 R. 38; Brenan v. Campbell's Trs., 1898, 25 R. 423; the opinion of L.J.C. Monereiff in Lennox's case (see particularly page 40 of the report) being most instructive.
41. See footnote number 40.

contract may be in writing or be made orally; the particular form does not affect tacit relocation.

In the case of element (b), the rule seems to be that the doctrine applies only in those cases where a warning is necessary.

So far as element (c) is concerned, it would appear that tacit relocation may follow upon a contract for any length of time, but not when either the duration or any of the other conditions are of an unusual character in the class of employment, in which case the contract will conclude at the time mentioned, without need for any notice whatsoever.[42]

The legal effect of tacit relocation is that all the stipulations and conditions of the original contract remain in force, so far as these are not inconsistent with any implied term of the renewed contract.[43] But where service is continued at different wages, or in a different character, it cannot be ascribed to tacit relocation.[44] Such is indeed the creation of an entirely new contract.

The duration of the renewed contract may differ from that of the original one, though generally it will be the

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42. Brenan v. Campbell's Trs.; Lennox v. Allen & Son cit. supra; see also the opinion of Lord Robertson in Maclean v. Fyfe 4th Feb. 1813, F.C.
43. Neilson v. Mossend Iron Co., cit. supra, per Lord Watson, loc. cit.
44. Murray v. M'Gilchrist, 1863, 4 Irv. 461.

same - for example, an agricultural or domestic employee engaged for a year or for six months will, by tacit relocation, continue for a further year or for six months, as the case may be.[45]

Tacit relocation can only apply where the parties to the new implied contract are the same as those who entered into the original agreement. There can be no tacit relocation with a new master.[46]

(2) Other methods by which the contract is is terminated

We have already considered the question of the normal duration of the contract of service and the normal method by which it is terminated. However, it may well happen (and indeed it very often does happen) that the relationship is terminated in a manner other than that contemplated originally by the parties e.g. death, illness or some other unforeseen event. Sometimes the happening may amount to a breach of contract by one or other party. Sometimes neither may be at fault. It

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45. Kelly v. Cowan's Exrs. cit. supra.
46. Taylor v. Thomson, 1901, 9 S.L.T. p. 373; 1902, 10 S.L.T. p. 195; and Houston v. Calico Printers' Association 1903, 10 S.L.T. p. 532; and see also the observations of the Lord President in Stanley Ltd. v. Hanway 1911, 2 S.L.T. 2; 1911, 48 S.L.R. 757 on the application of the doctrine of tacit relocation.

is necessary to examine certain of these methods which are most commonly met with. Accordingly, we must look at termination by death, insolvency, dissolution of firm or company, dismissal of employee, illness, marriage of employee, imprisonment of the employee and termination by the Court. Before examining each of these in turn, it is essential to consider, very briefly, termination by lapse of time and by consent.

Expiry of time:- Where parties have agreed expressly that the contractual relationship of master and servant is to exist for a definite period of time there is no doubt that the relationship continues in being for that time and the contract expires at the conclusion of the agreed period. The contract may be replaced by a new agreement expressly made or by an implied contract set up by tacit relocation. Where the contract is not in express terms, the Court will consider the presumed intention of parties and as aids to ascertaining this intention they will consider custom of the particular trade or of the particular locality. Where notice has to be given to terminate a particular contract then this should always be done, otherwise (as has been explained in the preceding paragraph) tacit relocation may apply to continue the contract for a further period corresponding with the original contract.

Consent:- The contract may also be terminated by the consent of parties, whether expressly or alternatively impliedly from the modes in which they behave towards each other.[47] Where an employer is told that his servant intends to leave and thereupon he acts in such manner as to indicate an assent to the servant's departure then he is held to have given an implied consent.[48]

Once the servant intimates his resignation and this is accepted by his employer, he may be dismissed (and he has no claim for damages), even although he attempted to retract his resignation shortly after making it.[49]

Death:- Death of either party dissolves the contractual relationship of master and servant. Death never operates as a breach of contract. It is a factual circumstance which prevents the due performance of the contract.[50] The executors of a deceased servant are able to recover from his employers the proportion of wages for the time he had served from the last payment of wages until the date of death.[51] Where the servant had been employed on piece-work, the master's liability is to pay for so much of the

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47. Ferguson v. M'Kenzie, Hume's Decis. 21 (1815); Robinson v. Smith & Co., Hume's Decis. 20 (1800).
48. See Boyle v. Parker, quoted by the learned editor of Fraser on "Master and Servant" (3rd edn.) at p. 316.
49. Peter v. Glasgow Millboard Co., (1875) 13 S.L.R. 127.
50. Hoey v. M'Ewen, 1867, 5 M. 814.
51. Erskine 3,3,16; Bell's Principles, s. 179.

work as has been done. With the developing popularity of pension-schemes in the past twenty years or so, it should not be forgotten that there may be also be payable (not only to office staff but also to workmen on the machine-shop floor) a lump sum payment into the estate representing the proceeds of a life assurance policy on the employee's life, as well as a refund of contributions made to the fund during life. If the particular pension scheme is approved by the Inland Revenue Authorities, these payments would normally be free from liability for estate duty.

Where an employee was in occupation of a dwelling-house (known in modern parlance as a "tied" house) by virtue of his employment, then upon his death the right of occupancy terminates[52] and the employer may re-possess the house.[53]

Upon the master's death the liability to pay wages does not necessarily cease and any wages incurred become a competent charge against the estate, e.g. if a domestic or other servant is hired for a term he or she continues in the service of the family until the following term or perhaps the next term after that if death occurred within the notice period and no notice of termination had

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52. See particularly Dunbar's Trs. v. Bruce, 1900 3 F. 137; Aitchison v. Lothian, 1890, 18 R. 357.
53. Torrance v. Traill's Trs., 1897, 24 R. 837.

actually been given.[54] Any prior dismissal of the employee would give him a right to claim wages from the estate (and also board wages, if appropriate).[55] However, the employee cannot sit back thereafter and do nothing - he must seek another situation, so as to minimise the loss. Wages earned in his new situation are taken into account in computing the liability of his late employer's estate for outstanding wages and maintenance.[56]

Where a domestic employee has been hired for a year, instead of a half-yearly term, it would appear that she is able to claim maintenance until the end of that year should her master die within the yearly period.[57]

In all other cases, provided the hiring period is definite, the same principle is applied. When wages accrue periodically the employee becomes entitled to wages for the whole period current at death.[58]

It seems that if the representatives of the deceased employer make an offer to employ the servant until the completion of the term at the same work and at the same rate of wages this would be a good defence to a claim for wages for the balance of the term.[59] This is simply

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54. Hoey v. M'Ewan, 1867, 5 M. 814 per Lord Deas at page 818.
55. Bell's Principles s. 186; Fraser - Master and Servant (3rd Edition) page 143; and Shepherd v. Meldrum, 1812, Hume, 394.
56. Hoey v. M'Ewan and Kelly v. Cowan's Exrs. cit. supra.
57. Muir v. M'Kenzie 1829, 7 S. 717 (applying also in Hoey v. M'Ewan and Kelly v. Cowan's Exrs. cit. supra. which followed Muir's case in principle).
58. See Hoey v. M'Ewan 1867, 5 M. 814.
59. See opinions in Ross v. M'Farlane 1894, 21 R. 396.

another application of the general rule that the employee cannot sit back and do nothing.

In those cases where the service is during pleasure, it would appear that the employer's death is equivalent to notice and accordingly if the servant continues to serve his late employer's representatives or successors then it may well be that a new contract of service is implied. The terms of this new contract of service will fall to be deduced from the actings of the parties themselves.[60]

Common law gave to certain classes of servant, on the master's death, a certain preference for wages, viz:- the executor was entitled to pay them within the six months period after death, without constitution of the debt.[61] According to Bell,[62] the effect of this was that if the master died insolvent the servant's wages are privileged as upon his bankruptcy, the date of death being substituted for that of bankruptcy.

Employer's Insolvency and Bankruptcy:- Bankruptcy of the employer terminates the contract of service with each employee, even although it is involuntary. The ground of termination is that the bankruptcy has constituted a breach of contract.[63] Consequently, the employee is now entitled

60. See Umpherston - Master and Servant at page 92.
61. Stair 3,8,64,72; Erskine 3,9,43; Bell's Principles s. 1404; Commentaries ii 149.
62. Principles - s. 186.
63. Bell's Principles s. 135; Puncheon v. Haig's Trs. 1790, M. 13, 990; Hoey v. M'Ewan 1867, 5 M. 814 per Lord President Inglis; Day v. Tait 1900, 8 S.L.T. page 40.

to a claim in damages for the breach - it is not a claim for wages in respect of the balance period of the contract.[64]

In the case of the limited company there is authority for the principle that an order for its winding-up or liquidation (i.e. a compulsory order) amounts to constructive notice to all employees, with the result that they may leave at once; they need not remain after notice, unless the employer is able to pay full wages during the period of notice.[65]

Where the liquidation or winding-up is voluntary it seems that the Resolution to wind-up has a similar effect i.e. it operates as a constructive notice.[66] As regards the operative date, the better opinion seems to be that this is the date of publication of the "Gazette" (London or Edinburgh) notice and not the date of the resolution itself.[67]

The sum which the employee receives is an amount representing wages in lieu of notice. It seems that the English lawyers regard the payment as damages as for a

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64. Puncheon v. Haig's Trs. cit. supra.
65. Day v. Tait, cit. supra; Chapman's case 1866, L.R. 1 Eq. 346; MacDowell's case 1886, 32 Ch.D. 366; Laing v. Gowans 1902, 10 S.L.T. p. 461.
66. The authority on this is mainly English - vidé Shirreff's case 1872 14 Eq. 417; ex parte Schumann 1887 19 I.R. 240 is also helpful.
67. Vidé Chapman's case - 1866, 1 Eq. 346.

wrongful dismissal. It is always open to the liquidator and the employees to waive the notice, so long as it is quite clear what their intentions are, i.e. there must be a clear and unmistakeable consensus to waive the notice.[68]

The liquidator may convert the constructive notice into actual notice - and it seems that he might then be entitled to obtain from the employee his normal service until the notice period expires, so long as he can pay the correct rate of wages and make available the right type of work to the employee.[69]

It will be appreciated that the decisions point towards the ascertainment as a question of fact, in cases where the liquidator continues the business and employees continue to serve, whether there has been a novation (so that the employees are working under a new contract) or whether the employees are continuing to complete the period under the original contract, which is now defined by the application of the constructive notice.[70]

When bankruptcy or liquidation arises the employees have certain privileges or preferences, both at common law and by statute. It is necessary to say a word or two about each.

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68. Per Chitty J. in MacDowall's case, cit. supra.
69. Per Lord Stormouth Darling in Day v. Tait, cit. supra.
70. Day v. Tait and MacDowall's case cit. supra; see also Reid v. Explosives Co. Ltd. 1887, 19 Q.B.D. 264; and ex parte Harding 1867, 5 Eq. 341.

At common law, a preference or privilege is given for the term's wages (but not including board).[71] This relates to wages for the term current at the master's death or bankruptcy irrespective of whether the "term" be a year or half-year or some other period.[72] Now, the important point is that this privilege arises only to the domestic and agricultural servant.[73] Perhaps the most interesting feature about it, however is that it is not simply applicable to servants taken on at Whitsunday or Martinmas or to those engaged in regular employment. It also covers casual servants (of the classes stipulated), taken on at irregular times and for short periods, so long as they are in employment at the date of death or bankruptcy.[74]

It may, of course, be a very difficult point to decide as to who is a domestic and who is an agricultural servant. There is no hard and fast rule or precise legal formula for arriving at a decision. Some of the older cases give some help in this matter.[75] The Court may

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71. Bell's Principles s. 186.
72. Bell's Principles ss. 186, 1404; Erskine 3,9,43; Stair 3,8,64,72; Bell's Commentaries ii 149; Bankton 1,2,55.
73. Bell's Principles s. 1404; Marshall v. Philp 1828 6 S. 515; Fraser - Master and Servant p. 145.
74. Lockhart v. Paterson 1804 Mor. voce "Private Debt", Appendix ii.
75. See Melvil v. Barclay, 1779 Mor. 11, 853 ("servants kept for the purposes of the farm" were privileged); White v. Christie 1781, Mor. 11, 853 (servants on the farm were entitled to privilege; others employed in the trade of wright were not); see also Ridley v. Haig's Creditors, 1789 Mor. 11, 854 (distilleryman not privileged); Marshall v. Philp, cit. supra (brewer's mashman); Maben v. Perkins 1837, 15 S. 1087 (drysalter's clerk).

tend to take a liberal view where the servant performs a dual task.[76]

The term for which the wages are preferred is that current at the date of death or bankruptcy as the case may be. It has been held (in the Sheriff Court) that the term "bankruptcy" as used here does not necessarily mean or refer to either sequestration or notour bankruptcy but may mean insolvency and stoppage of payment.[77] Accordingly, the privilege arising at that date is not lost by expiry of the term of service before sequestration.[78]

It now remains to consider, briefly, the position by statute law.

The matter was initially dealt with by the Bankruptcy (Scotland) Act 1856, section 122 and thereafter by the Bankruptcy (Scotland) Act 1875, section 3, taken in conjunction with the Preferential Payments in Bankruptcy Act, 1888. This last-mentioned statute seems to have been basically an English statute, but there is quite a strongly held view that it may also have been applicable to Scotland.[79] The statutory position in modern law is to be

76. E.g. in M'Lean v. Shireffs 1832, 10 S. 217, where an employee was engaged as a gardener but also did some agricultural duties - the privilege was extended to him. The question of whether a gardener was a domestic servant or not was reserved. On this point the Lord President (Hope) was non-commital.
77. Watt v. Mackie's Trs. 1885, 1 Sh.Ct.Rep. 219.
78. Templeton & Son v. M'Kenna 1896, 12 Sh.Ct.Rep. 99.
79. See Umpherston - Master and Servant pp. 100-101 and, in particular, the cases cited at footnotes numbers 5 and 6 to page 100.

found in the Bankruptcy (Scotland) Act, 1913 and the Companies Act, 1948. The relevant provisions of these statutes may be summarised, briefly, thus:-

In the Bankruptcy (Scotland) Act, 1913, section 118 deals specifically with preferential payments. A priority is created over all other debts in respect of:-

(a) All poor or other local rates and land tax property tax and income tax for a period of twelve months prior to the sequestration date.

(b) All wages or salary of any clerk or servant in respect of service rendered to the bankrupt during four months before the date of the sequestration award, not exceeding a sum of £50 to any one clerk or servant.

(c) All wages of any workman or labourer not exceeding £25 to any one workmen or labourer, whether payable for time or piece-work, in respect of services rendered to the bankrupt during two months before the said date of sequestration.

In addition to the above, National Insurance (Industrial Injuries) employer's contributions for a twelve months' period, as well as contributions as an employer or employee under the National Insurance Acts, were to be regarded as preferential. All of the foregoing were to rank equally among themselves and were to be paid in full, unless the assets were insufficient to meet them, in which

case they were to abate in equal proportions.[80]

In the case of the company employer going into liquidation, the relevant section is section 319 of the Companies Act, 1948. This section follows broadly the pattern of section 118 of the Bankruptcy (Scotland) Act, 1913. Briefly, section 319 creates a priority for payment of the following debts:-

(a) Rates and taxes (e.g. local rates, land tax, income tax, profits tax, purchase tax).

(b) All wages or salary of any clerk or servant during the 4 months prior to the relevant date (appointment of provisional liquidator or of winding-up order in a compulsory winding-up; otherwise the date of passing of the resolution for the winding-up) and all wages of any workman or labourer in respect of services rendered for a like period.

In addition, any sum ordered to be paid under the Reinstatement in Civil Employment Act 1944 or accrued holiday pay, national health insurance and industrial injuries contributions of the employer (for the twelve

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80. Section 118 was amended generally by the National Service Act, 1948 (11 & 12 Geo. 6. cap. 64 s. 56(b)) on a question of compensation; and s. 118(1) was extended by, inter alia, the Reinstatement in Civil Employment Act, 1944 (7 & 8 Geo. 6 c. 15 s.21), again on the question of a compensation payment.

months prior period), workmen's compensation payments and the like must also be given a preferential treatment.[81] All of the foregoing debts are again to rank equally amongst themselves and to be paid in full, unless the assets are insufficient, in which case they are to abate in equal proportions. There is a special exception under sub-section (9) of section 319 where the relevant date defined in sub-section (7) of section 264 of the Companies Act, 1929 occurred before the commencement of the 1948 Act.[82]

The definitions of the terms "clerks and shopmen and servants" and "workmen" contained in the aforementioned 1875 Act and of the terms "clerk or servant", "labourer or workmen" and "labourer in husbandry" contained in the 1888 Act, beforementioned, had occasioned - particularly in the case of the later statute - some consideration and litigation.[83] This matter became of little or no importance with the passing of the Bankruptcy (Scotland) Act 1913, as section 118(6) makes it clear

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81. But the limit applied is £200 for each claimant under paras. (a) to (g) of section 319(1) - see particularly section 319(2) on this point.
82. Section 319 was amended by the Finance Act, 1952 (15 & 16 Geo. 6 and 1 Eliz. 2 c.33) section 30, which added the employer's tax liability for a twelve months period as a prior debt; and also by the Companies (Floating Charges) (Scotland) Act, 1961.
83. See Umpherston, op. cit., pages 101-102 and cases there cited.

that the Preferential Payments in Bankruptcy Act, 1888 was not to apply to Scotland and, moreover, references to that Act or to section 3 of the Bankruptcy (Scotland) Act 1875 were to be read and construed, as regards Scotland, as references to section 118 of the 1913 Act.

There is authority in an old case[84] that the preference of the farm-servant's wages prevailed over the landlord's hypothec for rent. The textwriters tend to favour this view.[85] Mr. Umpherston explains[86] that the decisions in the Sheriff Court are contradictory and Court of Session authority is lacking, but nevertheless there was a tendency to prefer such a type of debt as servant's wages. This tendency seems to have prevailed into modern law, as the writer has been unable to find any authority which goes directly against it.

Dissolution of firm:- Mr. Umpherston says[87] that where a contract of service is entered into between a person and a firm, in the firm name, the contract is with the firm and not with the individual partners. A dissolution of the firm involves the employees in no obligations towards the partners as such. The foregoing statement must immediatel

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84. M'Glashan v. Duke of Athole, 29th June 1819 F.C.
85. Fraser, op. cit., pp. 148-150; see also Goudy on Bankruptcy; Rankine on Leases; and Hunter - Landlord and Tenan
86. Umpherston - op. cit., page 103 and footnote (6) thereto.
87. Op. cit. page 92.

be qualified by the comment that it cannot be accepted in absolute terms.

If dissolution occurs because of the death of one partner - the contract does not subsist against the remaining partners.[88] There is no breach of contract - and the parties' rights are determined in the same way as upon the master's death.[89]

The firm may be dissolved for other reasons e.g. retiral of old partners and the assumption of new ones. But this is not quite the same situation as the death of a partner. Certainly each case does involve the dissolution of an existing firm and the creation of a new firm (i.e. substituting one _persona_ for another). If, however, the alteration does not prevent the parties to the contract of service from performing their respective duties to one another then the _delectus personae_ element is not affected to any appreciable extent. Technically and theoretically, there may well be a contractual breach but there will be no real foundation for anyone leaving the service and claiming damages,[90] although in certain circumstances the employee might be able to claim from

88. Hoey v. MacEwan and Auld 1867, 5 M. 814; Tasker v. Shepherd 1861, 6 H. & N. 575.
89. Hoey v. MacEwan and Auld, cit. supra.
90. See Young v. Brown & Co., 1785, 3 Pat.App. 42 (an apprenticeship indenture); but compare Bruce v. Calder, [1895] 2 Q.B. 253; cf. Robson v. Drummond 1831, 2 B. & A. 303; and see also Lord M'Laren's remarks in Berlitz School of Languages v. Duchêne, 1903 6 F. 181.

retiring partners a guarantee or indemnity against any loss arising from the changed situation.[91] In one case[92] two new partners were taken on by defender (Smith), whom the pursuer (Harkins) had agreed to serve for a period of five years as works manager, during the subsistence of the contract of service. Pursuer left the service and claimed the balance of salary for the remainder of the term, basing his claim upon the ground that the introduction of two new partners constituted a breach of contract. The Court held that defender had not committed any breach which would have allowed pursuer to leave and claim damages. Had defender left the business altogether or transferred this to the two new partners themselves then this would have been quite a different matter[93] - because, the defender would then have been unable to perform the obligations which he had undertaken towards the pursuer.

The point decided by the Harkins v. Smith case was that an artisan employee is not able to sue his master in breach of contract upon the ground that his master had assumed partners into the business.[94] Mr. Umpherston suggests[95] that probably the more correct ground for the

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91. Ross v. M'Farlane 1894, 21 R. 396 (particularly per Lord Rutherford Clark); see also Brace v. Calder [1895]2 Q.B. 253.
92. Harkins v. Smith, 11th March 1841, F.C.
93. Ross v. M'Farlane 1894, 21 R. 396.
94. See the Lord Ordinary's opinion: "...artisan servants ...are not warranted by law in holding that their masters violate their contract...by the mere act of introducing a new partner".
95. Op. cit., page 94.

decision would have been - that, allowing that a technical breach had occurred, the servant was not entitled to leave the service and claim damages. A great deal will depend, of course, upon the personal relationship between the particular employees and their employers.

Employee's dismissal:- Here the contractual relationship is being terminated by the master before it has run its full course. It is accepted, of course, that the master is entitled to dismiss the employee at any time, upon payment of wages to the end of the particular term (and a sum will be included for board wages, if appropriate).[96]

Mr. Umpherston takes the view that the servant has a correlative right to leave at any time upon payment of damages[97] and it seems that these rights on either side distinguish the master and servant relationship from one which is purely that of slave labour.

It has been the guiding principle of Scottish (and English) law for many many years that the courts will not order or enforce the specific implement of a personal contract between free parties.

Dismissal becomes unjustifiable when it occurs without payment of wages and without good cause.[98]

It is necessary, therefore, to look at the quality

96. Graham v. Thomson 1822, 1 S. 287; Mollison v. Baillie 1895, 22 S.L.R. 595.
97. Op. cit. page 104.
98. Lord Kinnear's observations on "malice" in the case of Brown v. Edinburgh Magistrates 1907 S.C. 256; (1907) 14 S.L.T. 610 are interesting; although in this case pursuer's action was dismissed as irrelevant.

and character of the dismissal to decide whether it is lawful or not.

It is essential to remember that in all those cases which are being considered under this heading the wages will not have been paid for the unexpired portion of the term (because, obviously, if wages in lieu of notice had been paid no question could arise as to the legality or otherwise of the dismissal).

Where the parties have been involved in some heated argument (or indeed even without this) it may be difficult to determine whether the employee was dismissed or whether he departed voluntarily. The question is one of fact,[99] The master may, by his actings, allow a servant to stay on and sometime thereafter attempt to dismiss him or replace him, but he (the master) may then be quite unjustified in so doing.[1]

If the contract itself contains specific conditions as to its termination then the sole test is compliance with the condition contained in the agreement.[2] No question of justifiability can arise and no reason needs to be given for the dismissal.[3] No action in damages for wrongous dismissal will lie in such a case. But the conditions stipulated in the agreement of parties do not

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99. See Umpherston, op.cit., page 105 and cases cited at footnote number one thereof.
1. See Campbell v. Mackenzie 1887, 24 S.L.R. 354.
2. Pollock's Trs. v. Commercial Banking Co., 1822, 1 S.428; 1829, 3 W. & S. 430; Mitchell v. Smith 1836, 14 S. 358; Fraser v. City of Glasgow Bank 1880, 7 R. 961.
3. Foodick v. N.B. Railway Co. 1850, 13 D. 281; Pollock's Trs. v. Commercial Banking Co. and Mitchell v. Smith cit.

conflict in any respect with the master's ordinary right of dismissal for misconduct[4] or other cause (which is hereinafter examined).

Although dismissal may be justified it need not operate immediately. It may suit the master (and perhaps also the servant) to allow the servant to work to a time notice (which is quite apart from and should not be confused with the length of notice which would have operated had the contract been fully performed) and the servant will receive wages for the period during which he has worked.[5] There is, of course, no duty or obligation on either side to make or accept this arrangement.

When dismissal operates (whether justifiable or not) the servant is obliged to leave quietly. He has no right to say that he can stay on, placing this plea upon an alleged illegal dismissal.[6] At the same time, if he is in occupation of a dwellinghouse qua servant then he must give this up too, as has been pointed out earlier on in this chapter by reference to the so-called "tied" house. He must also hand back or assign (where appropriate) to the

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3. continued.
supra; Mollison v. Baillie 1885, 22 S.L.R. 595; Barkley v. Prudential Assurance Co. 1896, 13 Sh.Ct.Rep. 71; Finlay v. Royal Livor Friendly Society 1901, 4 F. 34.
4. See Silvie v. Stewart 1890, 8 S. 1010.
5. Thomson v. Stewart 1838, 15 R. 806; Scott v. M'Murdo 1869, 6 S.L.R. 301.
6. Ross v. Ponder 1874 1 R. 352; First Edinburgh etc., Building Society v. Munro 1864, 21 S.L.R. 291.

master any property or rights therein, acquired during the service.[7]

When a servant is illegally dismissed he does not have to make a reservation of his claim or intimate to the master that he does not acquiesce.[8] His claim against the master is reserved by the law, where he departs quietly in compliance with that obligation so to do.

The important question now to be considered is - whether the dismissal is justified or not. The master can dismiss the employee (that is to say, without paying wages for an unexpired period) only when the latter has committed a breach of contract and then, of course, the dismissal is legal. If the dismissal is illegal, the master himself is in breach of contract.

Those actings which involve dismissal of an employee have been classified as "moral misconduct, either pecuniary or otherwise, wilful disobedience or habitual neglect".[9]

It is perhaps more convenient to examine them (as Mr. Umpherston does[10]) under the following divisions, viz:-

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7. Clift v. Portobello Pier Co., 1877 4 R. 462; see also Hawick Heritable Investment Bank v. Huggan 1902, 5 F. 75.
8. Ross v. Pender, cit. supra; Baird v. Don 1779, 5 B.S. 514; Mor. 9182; Batchelor v. M'Gilvray 1831, 9 S. 549.
9. Per Parke, J. in Callo v. Brouncker 1831, 4 C. & P. 518.
10. Op.cit. page 108.

(i) Disobedience and want of respect;

(ii) Dishonesty, drunkenness, insubordination and other misconduct; and

(iii) Incompetence, general neglect and absence from work.

(i) Disobedience and want of respect:- The best example of disobedience is the wilful and direct refusal by the servant to obey a peremptory and lawful order from the master (or his authorised agent) or, alternatively, the deliberate performance by the servant of some act which the employer (or his authorised agent) has expressly forbidden. Conduct of this particular type reverses the rôles of employee and employer. Therefore, it justifies the employee's immediate dismissal.[11]

The English courts take the view that wilful disobedience justifies dismissal provided that the particular order or command given by the master is a reasonable one.[12]

In cases other than wilful refusal or deliberate disobedience, the general circumstances require to be looked at rather carefully. It may well be that immediate dismissal was too harsh a step to take and that some form of reprimand or warning from the master would have met the situation perfectly well.[13] However, the courts seem to

11. Wilson v. Simpson 1844, 6 D. 1256 (per L.J.C. Hope at p 1259); A v. B 1853, 16 D. 269; Hamilton v. M'Lean 1824, 3 S. 268; Cobban v. Lawson 1868, 6 S.L.R. 60; M'Keller v. M'Farlane 1852, 15 D. 246; Trotters v. Briggs 1897, 5 S.L.T. p. 17.

12. See Turner v. Mason 1845, 14 M. & W. 112.

13. Thomson v. Stewart 1888, 15 R. 806 (per L.J.C. Moncreiff); see also Thomson v. Douglas 1807, Hume, 392.

prefer not to interfere with the discretion which the employer has to dismiss the servant - unless, of course, the servant was entitled to refuse to obey the particular order or unless the court was satisfied that the plea of disobedience was merely used as a pretext for getting rid of the servant or unless the master's act was too harsh and oppressive in the circumstances.[14] The modern approach seems to be that if the employer has acted in any manner or way which is contrary to the concept of "natural justice" then the courts will protect the employee (that is, generally, by an award of damages to the employee).[15]

A master cannot lawfully dismiss a servant for refusing to obey an order which the master himself had no lawful right to give or an order which the servant was entitled to refuse to comply with in the circumstances (e.g. if the servant were being exposed to personal physical danger, quite unlooked for in relation to his

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14. Lord Kinnear's judgment in Brown v. Magistrates of Edinburgh 1907 S.C. 256, at pages 268 to 271 inclusive, is most interesting. Here his lordship is dealing with the question of "malice" (in the sense of ill-will against an employee or in the "legal" sense of a wrongful act done intentionally without just cause or excuse - and his lordship considers that since Allen v. Flood infra there is no difference) and stresses that an evil motive or intention cannot make unlawful that which is otherwise lawful - and he quotes Lord Watson's opinion (see p. 270) in Allen v. Flood L.R. 1898 A.C. at p. 100 in support.

15. See Palmer v. The Inverness Hospitals Board (O.H.) 1963 S.L.T. 124.

normal daily task). Again, the master may give the order in such a way that he displays little, if any, consideration for the servant, who is then provoked into refusing. In a case of this latter type the master is barred from founding upon the disobedience to the extent of instant dismissal,[16] though it will be appreciated that this type of case is exceptional.

The subsidiary duty upon the employee is that of treating his master (either personally or through his authorised representatives) with deference and respect. The ideal situation is to have mutual trust and mutual respect between master and servant. The degree of deference owed by servants will vary according to their class, e.g. there is a world of difference between the domestic servant and, say, the highly qualified works manager of a large shipbuilding or engineering establishment. Accordingly, the want of respect which will justify the employer in using his remedy of dismissal will be a question of circumstances and degree. The more senior the employee (i.e. in relation to status not time served, primarily) the more serious the disrespectful conduct needs to be. Yet, no master need tolerate gross insolence.[17] Any combination of disobedience and

16. Greig v. Moir 1892, 9 Sh.Ct. Rep. 341.
17. Dobbie v. Cross 1895, 12 Sh.Ct.Rep. 246.

disrespectful conduct would be sufficient to justify instant dismissal.[18]

It seems to be accepted that a master will not be justified in dismissing a servant for one simple act of disrespect, so long as it does not amount to gross insolence (the test of this is always a question of circumstances).[19]

Continued disrespect will certainly allow the master, in the exercise of his discretion, to dismiss the servant.

(11) Dishonesty, Drunkenness, Insubordination and other Misconduct:-

Misconduct justifying dismissal (the type and degree being difficult to judge and the conclusion being a very narrow one indeed) need not involve actual moral wrongdoing, so long as there is a failure in duty by the employee. If the misconduct is prior to the contract of service coming into existence or operation then dismissal is not justified,[20] upon two perfectly good grounds:- (firstly) because the duty cannot arise until the contract itself is made and (secondly) there is no general duty of

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18. Elder v. Bennet, 1802 Hume, 286; Silvie v. Stewart 1830, 8 S. 1010; Cello v. Brouncker 1831, 4 C. & P. 518; Stewart v. Crichton, 1847 9 D. 1042; Scott v. M'Murdo 1869, 6 S.L.R. 301.
19. See Ridgway v. Hungerford Market Co. 1835, 3 A. & E. 171 and Edwards v. Levy 1860, 2 F. & F. 94; see also Laws v. London Chronicle (Indicator Newspapers) Ltd. [1959] 1 W.L.R. 698 (distinguishing Turner v. Mason cit. supra.).
20. Fraser - op.cit. p. 85; Fletcher v. Krell 1872, 42 L.J.Q.B. 55; Andrews v. Garstin 1861, 31 L.J.C.P. 15; and K v. Raschon 1878, 38 L.T. 38.

disclosure on the prospective servant apart from specific inquiries.

Whenever the contract has been completed and service has been entered upon, the misconduct may take place either during working hours or outwith them.[21] In the case of domestic and personal (i.e. family, rather than business) servants, the accepted principle would seem to be that dismissal is justified by any misconduct which interferes with the proper discharge of duties or which disturbs the harmony of the family home or which adversely affects the morals of the household.

In the case of the servant who is engaged in business or profession, the misconduct necessary to justify dismissal would be, again, such as would interfere with the proper performance of duties or such as would be calculated to injure the business of the master. It is most important to note that it is quite enough for the conduct to be prejudicial or be likely to be prejudicial to the business reputation or business interests of the master.[22]

Any act of dishonesty (for example, theft or destruction of the master's property) justifies dismissal,

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21. Read v. Dunsmore 1840, 9 C. & P. 588.
22. Pearce v. Foster 1886, 17 Q.B.D. 536 per Lopes L.J; Lacy v. Osbaldiston 1837, 8 C. & P. 80.

whether or not the employee has been convicted by the appropriate criminal court.[23]

The number of cases involving misconduct of a minor nature but nevertheless sufficient to justify dismissal is almost legion, as one might expect. A selection of earlier cases of this type is noted below.[24]

Drunkenness is quite a common ground for dismissal and particularly if it is an aggravated case (both as to degree of drunkenness and the occasion upon which it occurred or either of these), when there is no real difficulty in justifying dismissal.[25] It seems to be doubtful whether the master can dismiss a servant for a single occasion of drunkenness which is not aggravated by the occasion upon which it takes place.[26]

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23. Sharp v. Rettie 1884, 11 R. 745 (averments of damage to ship's machinery caused by engineer's neglect of duty).
24. Wight v. Ewing, 1828, 4 Mur. 584 (cheating the customers); Baillie v. Kell, 1838, 4 Bing 638 (false entries in books); Amor v. Fearon 1839, 1 P. & D. 398 (employee claiming to be a partner); Bray v. Chandler, 1856, 18 C.B. 718 (agent receiving money, contrary to his express orders; Horton v. M'Murtry, 1860, 5 H. & N. 667 (false statements to employer); Blenkarn v. Hodge's Distillery Co. Ltd. 1867, 16 L.T. 608 (traveller supplying goods to a married woman who kept a brothel and from whom payment could not be recovered), Malloch v. Duffy 1882, 19 S.L.R. 697 (soliciting business from master's customers); Pearce v. Foster 1886, 17 Q.B.D. 536 (Stock Exchange clerk speculating); Boston Fishing Co. v. Ansell 1888, 39 Ch.D. 339 (secret commissions).
25. See Edwards v. Mackie 1848, 11 D. 67.
26. Per Lord Mackenzie in Wise v. Wilson, 1845, 1 C. & K. 662.

Habitual drunkenness is most certainly a good ground for dismissing the personal (i,e, domestic or family) servant and also for dismissing the business or professional employee when it occurs during working hours or if it causes irregularity in attendance or otherwise interferes with the proper performance of duties by the servant.

Any insubordination caused by an employee creating a disturbance or arguing heatedly with other employees would also seem to justify that employee's dismissal.[27] But the circumstances would require to be looked at very carefully, in cases of this type, because the propriety of the act itself is certainly a matter for the exercise of the master's discretion.

There appears to be no doubt that immorality is a valid ground for dismissing the personal servant[28] and it may well be so in the case of other servants also. It should be noted perhaps at this juncture that if an employer suspects that one of his unmarried female employees is pregnant he seems to have no legal right to

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27. Trotters v. Briggs 1897, 5 S.L.T. p. 17; Churchward v. Chambers, 1860, 2 F. & F. 229.
28. Atkin v. Acton 1830, 4 C. & P. 208 (the clerk who assaulted his master's maid - servant, with intent to ravish her); Matheson v. MacKinnon 1832, 10 S. 825; Connors v. Justice 1862, 13 Ir.C.L.R. 451 (an unmarried maid who is pregnant may be dismissed); Greig v. Sanderson 1864, 2 M. 1278 (a foreman guilty of gross misconduct towards female workers - constant quarrels with his wife interrupting his duties as foreman - held to be justifiably dismissed).

insist upon that employee being medically examined.[29]

(iii) Incompetence, General Neglect and Absence from work:-

There is always an implied term in the contract that the employee is (a) reasonably competent to discharge the duties which he undertakes and (b) ready and willing to render the services required by the cntract. Should it transpire that the servant be incompetent or be guilty of some wilful refusal or omission to serve then the master may dismiss him, because there has been a breach of contract by the servant.[30] On the other hand, if the employer - knowing that the particular servant and potential employee does not have the requisite capacity for the job nevertheless engages him, then the employer is debarred from dismissing him on the ground of incompetence.[31]

It will be appreciated that the servant must show reasonable skill and reasonable diligence. His skill need not be that of the expert nor is he required to guarantee success to the master in every facet of his task.[32]

Habitual neglect will certainly justify dismissal, as will a single case of gross neglect.[33] It has, for

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29. See Latter v. Braddell (1881) 50 L.J.(Q.B.) 448.
30. Sharp v. Rettie 1884, 11 R. 745; Cuckson v. Stones 1858, 1 E. & E. 248; Harmer v. Cornelius 1858, 5 C.B.(N.S. 236; Searle v. Ridley 1873, 28 L.T. 411.
31. Gunn v. Ramsay 1801, Hume 384.
32. Dowling v. Henderson 1890, 17 R. 921.
33. Campbell v. Price 1831, 9 S. 264.

example, been held in England that a single act of forgetfulness or neglect, causing serious damage to valuable machinery, was a sufficient reason to justify immediate dismissal.[34]

Absence from work during recognised hours of service, without leave or good excuse, also forms a good ground for dismissal. It may be necessary to decide what is meant by "recognised hours of service". In the case of the personal servant no particular hours may be specified and, therefore, any unpermitted absence will require a sufficient reason. In other cases, the hours may be stipulated in the particular contract or agreement between the parties or may be decided by reference to trade custom or local custom.

It has, for example, been held in the mining industry, that dismissal for absence may take place where a workman has undertaken to work so many days per fortnight and fails to complete the required number.[35]

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34. Baxter v. London and County Printing Works [1899] 1 Q.B. 901.
35. Cowdenbeath Coal Co. v. Drylie 1886, 3 Sh.Ct.Rep. 3; see also Morrison v. Galloway & Co. 1890, 7 Sh.Ct.Rep. 65 (where miners agreed to take an "idle" day and this combination by them was held to be a breach of good faith justifying dismissal of an employee affected by the combination). See also Bowes v. Press, [1894] 1 Q.B. 202 (miners refusing to go down the pit in a cage with a non-union employee - held to have committed a breach of contract by absenting themselves from work).

What particular absence justifies dismissal of the employee is entirely a matter of the circumstances e.g. if a head gardener absents himself for four days then his dismissal is justified.[36] Similarly, the apprentice tradesman who attends irregularly, is habitually late and wastes time whilst engaged upon some simple errand for his master may also justifiably be dismissed.[37] The circumstances, to which reference has been made in this paragraph, are:- (a) the nature of the services to be given to the master and (b) the trouble and inconvenience likely to be occasioned to the master by the absence.

The master is not, however, entitled to dismiss an employee because a member of the latter's family is suffering from an infectious disease.[38] Nor can he dismiss an employee merely because he is ill.[39] It may be thought, and this view seems to be a perfectly reasonable one, that the master is quite entitled to refuse to allow an employee to work where there is a danger of the spread of the disease.[40] Mr. Umpherston says[41] that if it can be

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36. Craufurd v. Reid 1822, 1 Sh.App. 124, reversing Reid v. Lindsay, 1816 Hume 398.
37. See Stewart v. Crichton 1847, 9 D. 1042. Reference should always be made, when dealing with the question of failure by an apprentice to perform the services required of him, to the Employers and Workmen Act 1875 and the special provisions therein contained which enable the master to have recourse to a Court of Summary jurisdiction
38. King v. Reid 1870, 2 Guthrie's Sh.Ct.Cases 356.
39. Craig v. Graham, 1844, 6 D. 684; Hunter v. Brown, 39 Sh.Ct.Repts. p. 342; see also Westwood v. Scottish Motor Traction Co. (O.H.) 1938 S.N. 8.
40. Fraser, op.cit., page 330.
41. Op.cit., page 120.

shown that the servant was under a duty to abstain then the case is equated with the situation where the servant cannot work because of his own illness. From the master's viewpoint, it should also be remembered that there is an obligation upon him to look to the general welfare of his other employees and therefore, as a practical step in a situation of this latter type which is under discussion, it would be a sound suggestion for the employer to liaise with the medical officer of health for the particular area or, failing him, with the family doctor (as there is an obligation to report any case of infectious disease to the Public Health Authorities).

Another very interesting point is raised by the old case of Mennie v. Blair[42], which seems to suggest that an employer is not entitled to dismiss a workman because he refuses to join the trade union to which his other employees belong. Accordingly, if the trade union should threaten to call out the other employees in the establishment unless the particular employee is sacked this does not form any justification for dismissing the servant. But there have been many instances where this type of occurrence has taken place and the non-union employee has been dismissed. This particular point is more fully dealt with in chapter three of this work, particularly from the

42. 1842, 14 D. 359.

aspect of the possible remedies available to (1) the non-union employee himself and (ii) the employer, who is or has been threatened with the withdrawal of his remaining employees.

A further question sometimes arises for consideration, viz:- whether a master is justified in dismissing an employee upon facts not known to him at the time of the dismissal.[43] Mr. Umpherston disagrees with the older authorities and takes the view[44] that the real ground of dismissal is breach of contract by the servant and, accordingly, as soon as this breach comes to the knowledge of the master he may determine the contract or elect to hold it at an end. Termination from any other cause in the meantime does not bar the master from his election.

However, if the employer had been aware of his servant's breach of contract and had continued to employ him, although subsequently dismissing him for some other cause, he has condoned the earlier breach but he must be able to justify the dismissal by the subsequent events which led up to it.[45]

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43. See Bentinck v. Macpherson 1869, 6 S.L.R. 376; and also Lord Chief Commissioner Adam's charge to the jury in Wight v. Ewing 1828, 4 Mor. 584 at page 592, which support the view that he is not so justified.
44. Op.cit. page 121.
45. Horton v. M'Murtry 1860, 5 H. & N. 667 per Bramwell B. at p. 675; Oussons v. Skinner 1843, 11 M. & W. 161 per Lord Abinger C.B. at p. 169; Boston Fishing Co. v. Ansell 1883, 39 Ch.D. 339 per Cotton L.J. at p. 358.

Upon this main point under discussion, most help is obtained from English cases. For example, Coleridge J. has said[46] "where the servant has been dismissed and the master is sued for wages, the master may avail himself of the misconduct of the servant as a defence, although he may not have dismissed him for that cause". Alderson B. has also said,[47] "If an employer discharge his servant and at the time of the discharge a good cause of discharge in fact exists, the employer is justified in discharging the servant although at the time of the discharge the employer did not know of the existence of that cause". This rule was affirmed in the leading case of Boston Fishing Co. v. Ansell.[48]

Where the cause of dismissal is obvious, the master need give no reason or explanation for it. In other cases, where a servant asks the cause of dismissal, the older authorities tend to support the view that the master is under a moral obligation to state it.[49] However, this moral right of the servant is not founded upon the contract itself and indeed it is quite unenforceable against the employer. The master may refuse to assign a reason - and if the servant subsequently sues

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46. in Ridgway v. Hungerford Market Co., 1835, 3 A. & E. 171.
47. in Willets v. Green, 1850, 3 Car & K. 59
48. Cit. supra.
49. See Watson v. Burnet 1862, 24 D. 494 per Lord Deas at page 497.

him, then it is always open to the master to justify the dismissal, in defence or partial defence to that action.[50]

It is perhaps appropriate, at this juncture, to consider very briefly the question of DESERTION by an employee.

There is no doubt that if a servant leaves his work *sine animo revertendi*, without lawful cause or excuse, he has committed a breach of his contract of employment. The position of merchant seamen is a very special one, which is dealt with by statute law and which is not pertinent to the general field of this study.[51]

Desertion, in the sense in which it is being used here, means something more than a mere temporary absence (which may, by itself, justify dismissal in certain cases) or absence through illness or other necessary cause, which may terminate the contract because of failure of performance.

The existence or absence of the *animus revertendi*

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50. Bell's Principles s. 182; see also *Taylor* v. *Smith*, 1909 (O.H.) 1 S.L.T. 453. The interesting feature about *Taylor's* case is that, by the terms of the contract itself, the master was made the judge of that conduct which would justify dismissal. In other cases, the master would require to satisfy the court, in answer to an action based upon wrongous dismissal, that the dismissal was justified.

51. but see particularly the Merchant Shipping Act 1894, sections 221-224; and *O'Neil* v. *Rankin* 1873, 11 M. 538.

will require to be deduced from the facts themselves. Perhaps the absence may only be such as to justify a dismissal (which is serious enough from the employee's point of view) without amounting to a complete desertion. One or two of the older cases illustrate the dividing line between desertion and non-desertion; for example, in Cooper v. M'Ewan,[52] the contract was for three years and the employers alone had power to terminate it at any time by notice. After two years' service the servant gave a month's notice and left. He was held to be in the position of a deserter.

Again, in Dumbarton Glass Co. v. Coatsworth[53] a servant, who had entered into a seven years' contract, left before the completion of the term but he was held not to be a deserter because a reduction in his wages had ended the old contract and substituted a new contract, during pleasure.

Where an employee is entitled to leave his employment after giving notice of a certain length, it is desertion if he leaves upon shorter notice, because the latter is really equivalent to no notice at all.[54]

Should the master himself commit a breach of contract which entitles the servant to hold the contract terminated, it is then no desertion for the servant to

52. 1893, 9 Sh.Ct.Rep. 311.
53. 1847, 9 D. 732.
54. Gibson v. M'Naughton 1861, 23 D. 358.

quit the service. Examples of such breach would be:- the master's supervening bankruptcy;[55] a transfer by the master of his business and employees to another person, without the consent of the employees;[56] harsh treatment of employees and generally making their position unbearable;[57] or failing to pay the wages stipulated or agreed upon between the parties.[58] Another good example would be where, by the act of the master, the service became dangerous beyond the degree contemplated when it was entered into - and this would not amount to desertion by the servant if he left the employment.[59]

Where a servant is dismissed illegally, he is not bound to return if a continuation of service is offered and indeed he is not liable as a deserter if he refuses to return.

"Desertion" has (except in the case of certain public undertakings) ceased to be of importance in modern times. The principal reason for this is that the old remedies which the law allowed to the master - and imprisonment was one of the main ones - have long since

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55. Day v. Tait 1900, 8 S.L.T. p. 40.
56. Ross v. M'Farlane 1894, 21 R. 396.
57. See Reekie v. Norrie 1842, 5 D. 368; Gunn v. Goodall 1835, 13 S. 1142.
58. Dumbarton Glass Co. v. Coatsworth, cit. supra. (footnote 54).
59. O'Neil v. Armstrong, Mitchell & Co., [1895] 2 Q.B. 70, 418; Burton v. Pinkerton 1867, 2 Ex. 340.

disappeared.

Illness:-

The basic principle which applies here is that mere illness of the employer or employee does not terminate the contract of service.[60] Nevertheless, this principle which has been enunciated must be qualified immediately by saying that if the illness should prevent either party from properly fulfilling his duties and obligations under the contract then the contract itself may be ended, because of failure in the performance thereof - without (except as hereinafter mentioned) involving the consequences of a breach of contract.[61]

If the unforeseen illness on the servant's part be protracted or result in a situation which prevents the relationship being continued then the contractual relationship will cease. Where the illness is lengthy and serious there is usually little doubt that performance will be impossible and the employer would be justified in engaging a replacement employee. Where, however, the illness is of a short temporary nature there is no justification for the employer terminating the relationship.[62]

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60. The same principle is preserved, by statute, under the recent Contracts of Employment Act 1963.
61. Menson v. Downie, 1885, 12 R. 1103; but a reasonable allowance of time must be made before termination - looking to all the circumstances - see Westwood v. Scottish Motor Traction Co., (O.H.) 1938 S.N. 8.
62. Craig v. Graham 1844, 6 D. 684.

Where the question of impossibility of performance does arise the whole circumstances of the case will have to be looked at - and particularly the following (a) duration of the contract, (b) nature of the business and (c) the services to be given. Obviously if the employer had to hire a substitute employee this could be a very important factor.[63]

Should it happen that the employee's illness was caused by his own misconduct or fault then his disability amounts to a breach of contract for which he is liable.[64] Lord Fraser says[65] (and here he is relying upon American authority) that the law is the same when the disability - due to a cause preceding the contract - might have been foreseen but was in fact concealed, upon the reasoning that the servant had broken the condition that one who undertakes to give personal services must not render himself physically incapable of performing these services. This seems to be a reasonable view.

But in a case where an employee became unable to perform his service through illness contracted prior to but only developing after the contract was made, which he could not be expected to foresee and did not conceal when he made the contract, the court held that it could not go behind the occurrence of the illness and consider

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63. Manson v. Downie cit. supra; but see particularly Westwood v. S.M.T. Co., cit. supra.
64. M'Evan v. Malcolm 1867, 5 S.L.R. 62.
65. Master and Servant - pages 318/319.

whether it was due to the servant's misconduct.[66]

In the case where the contract does come to an end because of the employee's illness, and for which he is in no way to blame, his rights in relation to wages are similar to those rights which would have arisen upon his death. The position under statute law must now be kept in view, by special reference to the Contracts of Employment Act, 1963.[67]

Marriage of employee:-

Mr. Umpherston states[68] that if a female employee is married during the term her husband has a claim upon her society and services which is preferential to that of her employer. Nevertheless, should she leave the service on that account she commits a breach of contract. The general rule of law is that the marriage of an employee has no effect upon the service relationship between the employer and that employee and it cannot liberate or excuse the employee from any of the obligations under the contract of service.[69]

It may well be that an employer is somewhat reluctant to employ married woman, because their home interests are generally in conflict with their obligations under their

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66. K. v. Rasohen 1878, 38 L.T. (N.S.) 38.
67. Applying the safeguards to the employee under section 1 and Schedule 1 of the Act.
68. Op. cit. page 124.
69. See particularly Watson v. Merrilees 1848, 10 D. 370.

contracts of service. It is permissible to include a clause in the agreement which requires a female employee's resignation upon her marriage. However, this would be unusual in modern times when large numbers of married women take up paid employment, either full-time or part-time.

An interesting point might arise where a female employee gets married, returns to work and in due course becomes pregnant. It is submitted that her absence from work prior to the birth of her child (perhaps for, say, two months) and for a short period thereafter falls to be considered on the same basis as absence through illness. If, of course, the absence is likely to be lengthy - during the infancy of the child - then there is an inability on the employee's part to implement her contract, with the result that the employer would be quite justified in dismissing her. A situation of this type should not require litigation as a mode of settlement. Both employer and employee should be able to negotiate a reasonable basis for a settlement, bearing in mind their obligations arising out of the contractual relationship of master and servant.

Imprisonment of employee:-

Obviously, imprisonment of an employee results in his inability to perform his part of the contractual obligation. It is important to ascertain whether or not the imprisonment is due to the fault of the employee - and

here the position seems to be the same as an inability to perform the contract because of illness. Therefore, where the imprisonment is lawful and the actual fault of the employee himself he has disabled himself from performance and is guilty of a breach of contract. Conversely, if the imprisonment is wrongful - termination of the contractual relationship may take place, but it is not followed by the usual consequences which arise from a breach of contract.

Mr. Umpherston correctly points out[70] that under the old law relating to imprisonment of servants for desertion such imprisonment did not terminate the contract, but the reason for this was that the master had elected to punish the servant and had retained him in service rather than terminate the relationship on the ground of breach of contract. This form of imprisonment is now of course abolished, although the courts retain certain powers, particularly in relation to the imprisonment of apprentices and employees in certain essential supply undertakings (water, gas, electricity etc.) under the Employers and Workmen Act, 1875 and subsequent statutes, but this is a development of the theory of "contempt of Court"

Termination by the Court:-

In terms of the Employers and Workmen Act 1875,

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70. Op. cit. page 125.

section 3, where there is any proceeding before the Sheriff Court in relation to any dispute between an employer and a workman arising out of or incidental to this relationship as such, the court may rescind the contract. This may be done upon such terms as to the apportionment of wages or other sums due under the contract, and as to the payment of wages or damages or other sums due, as the Court thinks just. The Court has similar powers in the case of the indentured apprentice, under section 6 of the Act.

Effect of termination of service:-

When the employee is dismissed, whether lawfully or otherwise, he is obliged to leave quietly - and his silence is not regarded as acquiescence in the breach of contract by his employer.[71] He must also hand over to the employer all property which belongs to the latter and which was held by him (i.e. the employee) during the subsistence of the relationship.[72]

If the employer had undertaken to provide clothes for the employee (whether plain clothes or livery - there is no distinction[73]) these remain, in the absence of any special agreement to the contrary, the master's property.

71. Ross v. Pender (1874) 1 R. 352.
72. Clift v. Portobello Pier Co. (1877) 4 R. 462, (delivery of a licence; interesting questions raised re grant and assignation of licence.)
73. Sheills v. Dalyell, 1825, 4 S. 136.

Where the employee is occupying a dwellinghouse or other premises qua servant then he must quit the subjects upon the termination of the service relationship.[74] Normally he does not have the privileges of a tenant, nor is he therefore entitled to any warning notice or notice to quit, which has to be given to or served upon the ordinary tenant.[75] It seems that if he refuses to go, a summary application for his removal would be competent.[76]

If the servant refuses to go of his own accord, there is old authority which seems to support the view that the master is quite entitled to turn the servant out and to remove his effects from the premises without process of law.[77]

It has been held that even where an employer

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74. It is important to verify that the occupancy is qua servant and not qua tenant. If the latter, the employee may not be required to remove immediately or indeed he may even be able to continue in occupation under a tenancy which is protected by the Rent Acts (meaning by that the Rent Restrictions Acts and the Rent Act 1957).

75. For notice provisions in ordinary tenancies see the Rent Act, 1957.

76. See Whyte v. School Board of Haddington 1874, 1 R. 1124; on questions of competency and relevancy of the procedures relating to Removals and Ejections see the Sheriff Courts (Scotland) Acts 1907 and 1913; and also Dobie - Sheriff Court Practice and Lewis - Sheriff Court Practice.

77. See Fraser - Master and Servant page 332; Scott v. M'Murdo (1869), 6 S.L.R. 301; Smith - Master and Servant, 3rd Edition, p. 112.

wrongfully dismissed an employee (for which he becomes immediately liable in damages for breach of contract), who refused to leave the premises occupied by him, the employer might remove the furniture to another place and was not liable for subsequent damage to it or loss from it - upon the ground that when his service ceased he had no right to retain possession and become a trespasser.[78]

The opinion has been expressed, with reference to this question which is under consideration, that it is of no importance whether the dismissal was justifiable or not. What is required therefore is that the act of dismissal must be done by someone who has the power to dismiss. When that is done the dismissal is valid - though it is quite another question whether or not it is justifiable or wrongous. Yet once the dismissal order is validly given the servant, by staying on in the premises without extended contractual permission or special agreement, becomes a trespasser.[79]

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78. Per Williams J. in Lake v. Campbell (1862) 5 L.T.N.S. 582.
79. See Donaldson v. Williams (1833) 1 Cr. and M. 345.

Chapter 5

Conclusions

There now remains the task of looking back at the field of study which has been the subject of examination in this work and of deciding in what respects the law has changed from the close of the Industrial Revolution period.

No special comment seems to be needed upon the subject-matter of the first chapter in which an attempt was made to sketch the historical background of the period under review. Certain observations regarding the trade union position and the approach to industrial negotiation were made in that chapter and these are referred to again later in this chapter, as being two of the fields in which the law could be of some assistance to both sides.

As regards the second chapter, in which an examination of the nature and formation of the contract of service was made, some comment upon the present-day position is undoubtedly required.

Although it is still open for an employer and employee to negotiate freely - within the general limits of the law and bearing in mind the new requirements of

the Contracts of Employment Act, 1963[1] - this will be unusual in relation to the adjustment of the terms of the contract. Most cases will depend upon, and will continue to depend upon, the existence of collective agreements between confederations of employers and trade unions. The main points contained in these agreements tend to be accepted between employers and workers and therefore they become incorporated into the service contracts by implication. This situation requires proof of these implied terms to the court's satisfaction.

There is a great deal to be said, from the legal viewpoint, for giving all such collective agreements the full protection of the law,[2] but it is fairly obvious that both sides of industry are quite content with the situation as it is. Doubtless they feel that this system has worked reasonably well (as they see it) for many years and accordingly they prefer to continue with negotiating machinery on a well-known pattern, rather than make the situation more rigid (in the sense of strict legal interpretation of contract clauses). History seems to show, for the workers

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1. 1963 c. 49.

2. There is at present (March 1965) before the House of Commons a Private Member's Bill (Mr. R. Graham Page) known as the Collective Contracts of Employment Bill, which contains provisions designed to replace certain of the non-enforceable contracts stipulated in the Trade Union Act, 1871, section 4. This Bill is receiving very little notice and it seems doubtful whether it will pass the House in its present form.

and unions at any rate, that when resort to law has been necessary the outcome has very seldom been beneficial. It is virtually impossible meantime to dispel this in-built distrust, although perhaps in the not too distant future it may be possible to see the formulation of a Labour Code and the foundation of Labour Courts in England and Scotland, to which immediate reference can be made for the authoritative determination of any industrial dispute of importance, the decision itself having the force of law. This would, in the writer's submission, be more likely to be beneficial to industry and the public as a whole, rather than to allow the continued subjection of industrial unrest to political whim, political gain and political chicanery in general.

In other cases, wages and salaries will depend upon agreed scales of remuneration (e.g. schoolteachers, civil servants, local government employees, University teachers etc.) and employees will be appointed generally within the particular scale. Their bargaining power would normally be limited to the scale range of the individual appointment.

In chapter three hereof, an attempt was made to examine the duties, obligations and remedies of both employer and employee. There has been very little change in the field of legal remedies, with the exception of the complete abandonment of the doctrine of common employment.

This was long overdue. It was, however, perhaps a little surprising that the Law Reform Committee for Scotland was not prepared to recommend an extension of the remedies against third parties (the "quod servitiam amisit" principle of English law). Upon reflection, their view seems to be perfectly sensible - because to hold otherwise might well be to place a limitation upon the liberty and the legal rights of the individual employee.

The duties and obligations upon each side have to be read carefully and in relation to modern circumstances. The feudal and Victorian influences have given way to a more reasonable and more friendly approach between individual employer and individual employee. The employer of today recognises that employees will give of their best when treated with respect and with fairness at all times. There is no room for the autocratic feudalistic baronial overlord in modern industrial relations.

Perhaps the most significant change in the field of termination of the employment contract is the attempt by Parliament to lay down a "dismissal procedure" or "notice procedure" in the terms of section 1 to the Contracts of Employment Act, 1963. This is the first time that it has ever been done in the United Kingdom. Prior thereto the Court was faced with the task of ascertaining the intention of parties or attempting to assess what period of notice was "reasonable" in all the circumstances. What

the statute has done is to prescribe a minimum requirement, but it leaves it open to the parties to negotiate a notice period which is outwith the statutory provisions, so long as the agreement does not attempt to lower the minimal requirements. The contractual notice period may still require to be interpreted and decided by the court, but the fixing of statutory minimum requirements might well mean that parties would be prepared to accept an amicable adjustment geared to these requirements rather than resort to lengthy and expensive litigation.

Once again, the modern approach to valid grounds for termination must be stressed. Which is reasonable in all the circumstances? If there is clearly a breach of the principle of natural justice and fairplay, then the courts will uphold the claim by the employee and award damages for wrongous dismissal (wrongful dismissal in England) against the employer.

Her Majesty's Government is also concerned with the creation of effective safeguards against arbitrary dismissal of employees by their employers. In this connection, they are prepared to accept Recommendation No. 119, dealing with Termination of Employment at the Initiative of the Employer, which was adopted at the Forty-Seventh (1963) Session of the International Labour Conference.[3]

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3. See Command Paper No. 2548 (December 1964), containing a statement of the proposed action by H.M. Government, upon inter alia Recommendation No. 119 above-mentioned. The actual text of inter alia Recommendation No.119 was published in Command Paper No. 2159.

The underlying principle of that Recommendation is very important. It is as follows "...termination of employment should not take place unless there is a valid reason ...connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service". H.M. Government now proposes to discuss with representatives of employers and trade unions the provision of procedures which will give effective safeguards against arbitrary dismissal.[4]

Whilst the earlier relationship of master and servant resembled closely that of the feudal relationship of superior and vassal, it must be conceded immediately that progress has been made, to some considerable extent, towards an equality of bargaining power between employers and employees. It is too early to assess as yet the importance and effect of the Contracts of Employment Act, 1963[5] which is, as has been mentioned above, the first attempt of statute law to stipulate a minimum requirement for a dismissal procedure between employer and employee as well as being the first statutory attempt to regulate conditions concerning the formation of the contract of employment. It seems to be a step in the right direction, although the trade unions complain that it does not go far enough.

In the field of Wages, the recent Payment of Wages

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4. See Command Paper No. 2548 at page 7.
5. c. 49.

Act, 1960[6] has gone some way to equate the position of the worker on the factory floor with the white-collar worker in the office - as both may now receive their wages (or salary) in exactly the same way. Therefore, to some extent, and in spite of criticisms of payment by any methods other than in coinage of the realm, the status of the former has been improved. Yet the gap between office-level and shop-floor will not truly disappear until the worker on the shop-floor is regarded by management and executives as being, in the main, a technically qualified and highly skilled tradesman who is every bit as valuable and important within the organisation as the accountant who sits at his desk preparing a costing statement for some new production method which is being considered by the board of directors. Accordingly, some new thinking by the trade unions is needed - along the line of an abolition of hourly wages rates and piece-work rates and the substitution of a salary and grading scheme appropriate to skilled trades and unskilled trades, with provision for transfer from an unskilled category to a skilled category for those who succeed in obtaining the proper qualification. New facilities for training employees and a new attitude to this concept will be needed from the government and from employers and

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6. 8 & 9 Eliz. 2. c. 37.

employees alike.[7] That new approach may also contribute indirectly to a better attitude from both sides in the whole field of industrial relations.

One very important question, upon which both Scottish Law and English Law are equally silent, is that of the position of the displaced employee - the person who, after serving an employer for some thirty-five or forty years, is declared "redundant" or who is suddenly faced with the prospect of moving from his family home and circle, because his employer's business is being moved some three or four hundred miles either "for good economic reasons" or "in the interests of efficiency". It is unrealistic to expect that employee to disrupt his life at the whim of an employer or even if the move is financially necessary. Some protection must be afforded to persons so placed until they are able to find alternative employment. It is suggested that a scheme[7a] along the lines of the Industrial Injuries scheme might be brought into operation for the payment of Industrial Displacement (or Redundancy) Benefit. This scheme would require the constitution of a new Fund into which employing organisations would require to pay according to their size, structure, capacity and profits and which fund

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7. The Local Employment and Industrial Training Acts are an important step forward and it is hoped that their value will be appreciated and full use be made of them.

7a. See now the Redundancy Payments Bill (1965).

could be underwritten by the State, so that Parliament would have available in every year a detailed statement of Accounts showing the financial position of the Fund.

The principle of payment to the employee declared redundant as well as to the employee who is displaced must be the same, as has been indicated in the preceding paragraph.

In the case of the office-worker and shop-worker, the new Offices, Shops and Railway Premises Act, 1963[8] again represents a forward step in that it applies to the office-worker and shop-worker principally, a code of safety, health and welfare regulations which has been in operation in factories and other establishments for many many years. The guiding principle is again the welfare of the employee.

It is, however, in the field of Industrial Relations that the greatest developments will come eventually. These developments will affect materially the legal relationship of master and servant as it has been examined in this work. Towards the last Conservative government and the Judiciary, the trade unions seemed to be adopting an attitude of distrust and grievance. In the case of the last government, it was very widely felt that there would be no extension of protection to employees and trade unionists during industrial disputes, but

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8. 1963, c. 41.

that instead a Royal Commission would be appointed to look into the whole question of the unions and their position under the law, with a view to limiting their protections and their powers. Towards the judiciary, the trade unions felt a major grievance over the decision in Rookes v. Barnard & Others.[9] Since the Trades Union Congress of 1964, the unions have pursued a policy of campaigning for reform of the law by seeking a statutory clarification and amendment of the Trades Disputes Act, 1906, so that the circumstances disclosed in the Rookes v. Barnard & Others case can never again be made the subject of an action in damages. An examination of Her Majesty's most gracious speech at the State opening of Parliament on Tuesday 3rd November, 1964, will reveal that the new Labour Government promised to introduce a short Bill which would deal with this matter and give the unions the protection which they seek. This has, in fact, now been done with the presentation of the Trade Disputes Bill, which is Government-sponsored. The Bill proposes to give protection to unions and their officials in circumstances similar to those in the Rookes v. Barnard case and within the ambit of a trade dispute (in contemplation or in furtherance thereof). No action in

9. [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367 (H.L.).

damages for tort or in reparation is now to lie against a trade union or its officials on the ground only of threatening a breach of contract or threatening to induce another person to break a contract of employment. It seems likely that the Bill will pass through Parliament, albeit with a very slight majority vote.

Although a detailed consideration of the trade unions is outwith the scope of this work, it must be pointed out that some reforms may well be necessary on the question of the trade union member's position vis-à-vis his own union. Does the union have too much power over its members? Can it virtually "destroy" a member (i.e. take away completely his means of livelihood) if it so wishes? Does it exercise its disciplinary powers in tyrannical fashion and, if so, what can be done about this? These are some of the questions which concern all of us, although nothing may well be done about them under the present Labour Government as the matter may well be thought to be one which contains so much political dynamite that the age-old practice of the ostrich may be adapted suitably for the occasion. In any event, no action will probably be taken until a very full report is available upon the status, power and functions of the trade unions in modern society. The new Royal Commission on the Trade Unions may well take some three years to

complete its task, so that a full picture, with recommendations, is unlikely to emerge until 1968 or 1969.

There does seem to be a case, however, for reviewing the functions and powers of the Industrial Court. It is respectfully suggested that the Court, as now constituted by the 1919 statute, should be abolished and in its place there should be created a new Industrial Relations Court, which should function in Scotland and in England under the chairmanship of a Judge of the Court of Session in Scotland and a Judge of the High Court of Justice in England respectively each being appointed (aut vitam aut culpam) for this particular task and each having knowledge and experience of Industrial Relations and Industrial Law. The Court might well sit in Glasgow and London respectively. In each case, the Judge presiding should be accompanied by three assessors who should submit advisory memoranda (within an agreed time limit) to the Judge before the latter issues a final judgment, which should be fully binding upon the parties as soon as pronounced. The Court should be able to compel the attendance of witnesses, to require production of documents and to enforce its judgments. No appeal (to the Inner House in Scotland or Court of Appeal in England) should be necessary, unless a gross miscarriage of justice could be established. It is envisaged that

either side should be able to bring his case before the Court and service of the claim would be effected upon the other side, in the same way as an ordinary civil proceeding. Where both parties agreed to submit a dispute to the Court it should then sit as an Industrial Arbitration Court, with full powers, and its award should have binding legal force. Provision should also be made for the Minister of Labour referring any dispute to the Court, sitting as an Industrial Arbitration Court. The Conciliation Act, 1896 and the arbitration provisions of the Industrial Courts Act, 1919 should be repealed.

It is recommended, however, that the Minister of Labour should be allowed to retain the special power of setting up a Court of Inquiry, as meantime provided in Part II of the Industrial Courts Act, 1919, where a question of public interest is raised. This procedure involves a report being submitted to both Houses of Parliament. The Government may then take one of two major courses, if the recommendations herein proposed are acceptable, namely:- (firstly) pass any legislation necessary to correct the situation which caused the dispute or (secondly) refer the whole matter - through the Minister of Labour - to the Industrial Relations Court for the formal issue of a judgment disposing of the matter. The Court would have before it the full

report and transcripts of evidence, including all documents, from the Court of Inquiry. If necessary, it could require the re-attendance of parties or witnesses or counsel and solicitors for purposes of clarification or elucidation of any doubtful or ambiguous points on the record of the Court of Inquiry.

It would be absolutely essential that any new Industrial Relations Court, created along the lines suggested above, should carry out its work both efficiently and expeditiously. No loopholes for misuse of procedure should be left open in any enacting and procedural legislation.