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## Master and Servant-Assault and Battery

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MASTER AND SERVANT—ASSAULT AND BATTERY.—Plaintiff was a debtor of the defendant corporation, which sent its servant to collect the debt. The jury was instructed that if the servant, at the time of the assault and battery, was acting as the collector for the master corporation and while so acting and while he was attempting to perform his duties, and while in the act of collecting an account due his master, then and there assaulted the plaintiff in an effort and attempt to collect money due the master, the verdict should be for the plaintiff. *Held*, the instruction is erroneous. The instruction would hold a master liable merely because an assault and battery was committed during the time his servant was acting for him, without regard to whether said act was within the scope of his employment. *Moskin Stores, Inc. v. DeHart* (Ind. App. 1940), 24 N. E. (2d) 800.

The doctrine of the liability of the master for the wrongful act of his servant is predicated upon the maxims *respondeat superior* and *qui facit per alium facit per se*.<sup>1</sup> Modern authority now holds the master liable for the negligent and intentional acts of his servant, performed while engaged in the pursuit of the master's business, within the scope of his employment,<sup>2</sup> or which, from all the circumstances, may be reasonably, fairly, or necessarily included, or by implication embraced within the objects of the business, the execution of which has been confided to the servant's charge,<sup>3</sup> even though the master had no knowledge of the act,<sup>4</sup> or disapproved it,<sup>5</sup> or had expressly forbidden it.<sup>6</sup>

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<sup>20</sup> *Shick v. Goodman* (1939), 333 Pa. 369, 5 Atl. (2d) 363; *Ohio Casualty Ins. Co. v. Gordon* (C. C. A. 10th 1938), 95 F. (2d) 605.

<sup>1</sup> *Hardeman v. Williams* (1907), 150 Ala. 415, 43 So. 726. No distinction need here be made between a corporation and a natural person, as principals. *Brokaw v. New Jersey R. Co.* (1867), 32 N. J. Law 323, 90 Am. Dec. 659. The liability rests on a contract between the master and servant, and an infant, having no power to bind himself by contract, cannot be held for the torts of his servant. *Burns v. Smith* (1902), 29 Ind. App. 181, 64 N. E. 94. This note does not concern tortious conduct of a servant within the scope of his employment, when that employment is *ultra vires* to the corporation. *Cf. Bissell v. Michigan S. R. Co.* (1860), 22 N. Y. 258; Note (1928), 57 A. L. R. 302.

<sup>2</sup> As usual, the question may be for the jury, *Craven v. Bloomingdale* (1912), 171 N. Y. 439, 64 N. E. 169, or in clear cases, for the court, *Drobnicki v. Packard Co.* (1920), 212 Mich. 133, 180 N. W. 459. See *Pittsburgh, etc., R. Co. v. Kirk* (1885), 102 Ind. 399, 1 N. E. 849.

<sup>3</sup> *Brudi v. Lührman* (1901), 26 Ind. App. 221, 59 N. E. 409; *American Express Co. v. Patterson* (1881), 73 Ind. 430; *Evansville & Terre Haute R. Co. v. McKee* (1884), 99 Ind. 519, 50 Am. Rep. 102.

<sup>4</sup> *Pittsburgh, etc., R. Co. v. Kirk* (1885), 102 Ind. 399, 1 N. E. 849; *Redding v. South Carolina R. Co.* (1871), 3 S. C. 1, 16 Am. Rep. 681.

<sup>5</sup> *Spice v. Astry* (1915), 184 Ind. 1, 110 N. E. 201; *Thomas Steamboat Co. v. Housatonic R. Co.* (1855), 24 Conn. 40, 63 Am. Dec. 154.

<sup>6</sup> *Oakland City Agric. & Ind. Society v. Bingham* (1891), 4 Ind. App. 545, 31 N. E. 383; *Powell v. Deveny* (1849), 3 Cush. (Mass.) 300, 50 Am. Dec. 738; *RESTATEMENT, AGENCY*, Sec. 230. Early law imposed liability only when the act was expressly commanded by the master. *Penas v. Chicago etc. R. Co.* (1910), 112 Minn. 203, 127 N. W. 926. This theory was probably taken from the criminal law, which still requires a command or knowledge and acquiescence. See 43 A. L. R. (N. S.) 1.

If a servant abandons or departs from the business of his master and engages in some matter suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose individually and exclusively his own, and while so engaged, commits a negligent or intentional tort, the master is not answerable,<sup>7</sup> although he was using his master's property,<sup>8</sup> and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations with the master.<sup>9</sup>

The liability of the master for the tortious conduct of the servant done within the scope of the employment is based primarily upon social policy. The burden of an enterprise is put upon him for whose immediate benefit the project is being carried out, as a cost of doing business, since he is better able to administer the risk by avoiding, preventing, shifting, or distributing it.<sup>10</sup>

Early law did not hold the master liable for the willful and malicious torts of his servant, although committed by the servant in forwarding the master's business,<sup>11</sup> on the ground that a willful act was a departure from the master's business,<sup>12</sup> or was presumed *prima facie* to be outside the scope of the employment.<sup>13</sup> It is now well settled that if the act was committed within the scope of the employment,<sup>14</sup> the master is responsible,<sup>15</sup> whether the wrong was negli-

<sup>7</sup> *Fisher v. Fletcher* (1921), 191 Ind. 529, 131 N. E. 24. But there are two exceptions, where a master is held liable for negligent torts even though the servant was *not* acting within the scope of his employment: (1) Dangerous instrumentalities; *Euting v. Chicago etc. R. Co.* (1902), 116 Wis. 13, 92 N. W. 358; (2) Family automobile; 5 A. L. R. 226, 10 A. L. R. 1449, 32 A. L. R. 1504, 50 A. L. R. 1512. Indiana is *contra* as to the latter. *Smith v. Weaver* (1919), 73 Ind. App. 350, 124 N. E. 503. See also HARPER, *THE LAW OF TORTS* (1933), Secs. 283, 291.

<sup>8</sup> *Swanson Electric & Mfg. Co. v. Johnson* (1923), 79 Ind. App. 321, 138 N. E. 262.

<sup>9</sup> *Premier Motor Mfg. Co. v. Tilford* (1915), 61 Ind. App. 164, 111 N. E. 645; *Louis. & Nash. R. Co. v. Gillen* (1905), 166 Ind. 321, 76 N. E. 1058; RESTATEMENT, AGENCY, Sec. 238.

<sup>10</sup> Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 Yale L. J. 584.

<sup>11</sup> *Johnson v. Barber* (1849), 5 Gilman (Ill.) 425, 50 Am. Dec. 416; *Moore v. Sanborne* (1853), 2 Mich. 519, 59 Am. Dec. 209.

<sup>12</sup> *Wright v. Wilcox* (1838), 19 Wend. (N. Y.) 343, 32 Am. Dec. 507. *Cf.* *Ciarmataro v. Adams* (1931), 272 Mass. 521, 176 N. E. 610, in which a master was held not liable for the death of a child caused by a trap-gun placed on the premises by the caretaker, on the ground that it was a "departure" beyond the master's reasonable expectation. Contrast with *Great A. & P. Tea Co. v. Roch* (1931), 160 Md. 189, 153 Atl. 22, holding the master liable where the servant intentionally put a dead rat in a package delivered to the plaintiff.

<sup>13</sup> *Gulf. R. Co. v. Reed* (1891), 80 Tex. 362, 15 S. W. 1105.

<sup>14</sup> *Princeton Coal Co. v. Dowdle* (1924), 194 Ind. 262, 142 N. E. 419.

<sup>15</sup> The federal courts do not allow exemplary or punitive damages against the master merely by reason of wanton or malicious intent of the servant. *Lake Shore R. Co. v. Prentice* (1893), 147 U. S. 101, 13 S. Ct. 261. Some states allow malice of the servant to enhance damages against the master, *Citizens Street R. Co. v. Willoebey* (1893), 134 Ind. 563, 33 N. E. 627, even if the malice was directed against the master himself, *Stranahan Bros. v. Coit* (1896), 55 Ohio St. 398, 45 N. E. 634, and although the act was not ratified or authorized by the master, *Jeffersonville R. Co. v. Rogers* (1871), 38 Ind. 116, 10 Am. Rep. 103. See Note (1910), 9 Mich. L. Rev. 337; Morris, *Punitive Damages in Tort Cases* (1931), 44 Harv. L. R. 1173, at 1199 et seq.

gent,<sup>16</sup> intentional,<sup>17</sup> or willful and malicious;<sup>18</sup> but again, the master is not liable if the act was committed by the servant from a purely personal malevolence,<sup>19</sup> or at the direction of another.<sup>20</sup>

Where assault and battery results from an attempt on the part of the servant to collect money due to the master, the decisions are divided. Some courts have held that the master is not liable for the servant's use of this excessive force, unless the master ratified the act or had retained the servant in his employ with knowledge that he was likely to commit it.<sup>21</sup> Others have said merely that assaulting a debtor is not a recognized or usual means resorted to for the collection of a debt,<sup>22</sup> and so held the act outside the scope of the employment. These courts have refused to accept as analogous those cases where a master is held liable for an assault by a servant engaged to retake goods sold on instalment,<sup>23</sup> on the ground that an assault is more to be expected from the nature of the employment.<sup>24</sup> They have said it is not enough that the act may bear some relation to the authorized duties, but the incidental connection should be so close and definite that the damage may justly be imposed on the master as a normal risk of business, which the master could reasonably have anticipated as *probable* in view of the terms of the employment and the general situation, known to the master or of which he had an adequate opportunity to know.<sup>25</sup> Some courts, however, have held the master liable, regardless of the master's lack of knowledge, assent, or ratification,<sup>26</sup> and regardless of the unexpected methods used by the servant,<sup>27</sup> if the act was directed toward the achievement of the purpose of the employment.<sup>28</sup>

<sup>16</sup> *Brudi v. Lehurman* (1901), 26 Ind. App. 221, 59 N. E. 409.

<sup>17</sup> *American Express Co. v. Patterson* (1881), 73 Ind. 430; *Evansville & Terre Haute R. Co. v. McKee* (1884), 99 Ind. 519, 50 Am. Rep. 102.

<sup>18</sup> *Jeffersonville R. Co. v. Rogers* (1871), 38 Ind. 116, 10 Am. Rep. 103; *Terre Haute etc. R. Co. v. Jackson* (1881), 81 Ind. 19; *Indianapolis etc. R. Co. v. Anthony* (1873), 43 Ind. 183. These cases found the master liable on the theory that the master was a common carrier and therefore held to a high duty of safe carriage. But in *Citizens Street R. Co. v. Willoby* (1893), 134 Ind. 563, 33 N. E. 627, recovery was allowed solely on the theory that a corporation is liable for wilful and malicious injury inflicted by its servant while acting within the scope of his employment. See also *Junior Toy Corp. v. Novak* (Ind. 1939), 21 N. E. (2d) 445; *Singer Sewing Machine Co. v. Phipps* (1911), 49 Ind. App. 116, 94 N. E. 793; *Great A. & P. Tea Co. v. Roch* (1931), 160 Md. 189, 153 Atl. 22; *Ruppe v. City of Los Angeles* (1921), 186 Cal. 400, 199 P. 496.

<sup>19</sup> *Grimes v. B. F. Saul Co.* (1931), 60 App. D. C. 47, 47 F. (2d) 409.

<sup>20</sup> *Kohl v. Lenhart Furn. Co.* (1914), 58 Ind. App. 7, 106 N. E. 399. But see *Rink v. Lowry* (1906), 38 Ind. App. 132, 77 N. E. 967.

<sup>21</sup> *Matsuda v. Hammond* (1913), 77 Wash. 120, 137 P. 328; *Murphy v. Buckley Newhall Co.* (1912), 151 App. Div. 520, 136 N. Y. Supp. 309.

<sup>22</sup> *Collette v. Rebori* (1904), 107 Mo. App. 711, 82 S. W. 552. See also *Johanson v. Pioneer Fuel Co.* (1898), 72 Minn. 405, 75 N. W. 719.

<sup>23</sup> *Singer Sewing Machine Co. v. Phipps* (1911), 49 Ind. App. 116, 94 N. E. 793. But see *Fineran v. Singer Mfg. Co.* (1897), 20 App. Div. 574, 47 N. Y. Supp. 284; *McGrath v. Michaels* (1903), 80 App. Div. 458, 31 N. Y. Supp. 109 (no liability where the servant disobeys instructions).

<sup>24</sup> *Matsuda v. Hammond* (1913), 77 Wash. 120, 137 P. 328.

<sup>25</sup> *Loper v. Yazoo & M. V. R. Co.* (Miss. 1933), 145 So. 743. This is the view taken by the RESTATEMENT, AGENCY, Sec. 229.

<sup>26</sup> *Duggins v. Watson* (1854), 15 Ark. 118, 60 Am. Dec. 560.

<sup>27</sup> *Son v. Hartford Ice Cream Co.* (1925), 102 Conn. 696, 129 Atl. 778.

<sup>28</sup> *Bergman v. Hendrickson* (1900), 106 Wis. 434, 82 N. W. 304; *Baylis v. Schwalbach-Cycle Co.* (1891), 38 N. Y. S. R. 492, 14 N. Y. Supp. 933. The

The ultimate question to be determined is whether the defendant master or the plaintiff debtor is to bear the risk of reprehensible conduct on the part of the servant collector in that zone where it is difficult to ascertain whether the servant acted from personal malevolence or in pursuit of the purpose of his employment. It seems just that doubt should be resolved against the master, since misconduct of the servant is a foreseeable, probable, and normal risk of that particular type of business. It is he who employs the servant and sends him into the home or business house of the debtor and receives the benefit from the collection. The debtor should not be forced to rely alone on his remedy against a servant who comes to him at the request of another, unless the servant's act was clearly, unequivocally, and unquestionably so individual, personal, and exclusive that it would be grossly unjust to hold the master therefor.<sup>20</sup>

The court in the principal case is undoubtedly correct in stating that time alone is not the controlling factor, and that emphasis on time to the exclusion of a consideration of whether the act was actually "within the scope of the employment" is erroneous. The court is justified in sending the case back if it believed that the jury would so interpret it. To the writer, however, the instruction seems merely to say that if the assault was part of an attempt to collect the account, the master is liable. This is the test suggested above to establish the act as within the scope of the employment.

W. D. B. JR.

NEGOTIABLE INSTRUMENTS—TRADE ACCEPTANCES—EFFECT OF REFERENCES TO EXTRANEOUS AGREEMENTS ON NEGOTIABILITY.—Action on a trade acceptance in the general form of a bill of exchange payable to order on a fixed date. The single question was whether the instrument was rendered non-negotiable by the addition of these words, "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with the original terms of purchase." Held, the trade acceptance is negotiable within the meaning of the Negotiable Instruments Law. *State Trading Corp. v. Toepfert* (Mass. 1939), 23 N. E. (2d) 1008.

The issue presented in the principal case attracted considerable attention and great diversity of opinion in the period between 1922 and 1932 and only recently has it come before the courts again. The answer depends on whether the reference on the face of the instrument subjects the instrument to the terms of the extraneous agreement, thereby rendering it conditional and non-negotiable; or whether the reference is merely "a statement of the transaction which gives rise to the instrument," according to the Negotiable Instruments Law,<sup>1</sup> and thereby not affecting the negotiability of the instrument. The principle of law is clear; the courts have not been consistent in its application.

The first cases to arise involved only the first half of the statement as used in the principal case. This was the standard form prepared by the Federal

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purpose must be that of the master, not the servant. *McDermott v. American Brewing Co.* (1901), 105 La. Ann. 124, 29 So. 498.

<sup>20</sup> *Grimes v. B. F. Saul Co.* (1931), 60 App. D. C. 47, 47 F. (2d) 409. Care-taker of apartment house, upon pretense of collecting rent, entered plaintiff's room and assaulted her with intent to rape. The master was not liable. See also, *Polk Sanitary Milk Co.* (Ind. 1938), 17 N. E. (2d) 860.

<sup>1</sup> Mass. G. L. (Ter. Ed.), c. 107, sec. 25 (N. I. L., sec. 3(2)).