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Master and Servant--Torts--Liability of the Master for Acts of the Servant Beyond the Scope of Employment (Ford v. Grand Union Co., 268 N.Y. 243 (1935))

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MASTER AND SERVANT—TORTS—LIABILITY OF THE MASTER FOR ACTS OF THE SERVANT BEYOND THE SCOPE OF EMPLOYMENT.—Defendant is a corporation operating a chain of stores for the sale of groceries and meats. Each of the stores is under the direct control of a manager. A boy entered one of the defendant's stores with a rifle, to display it to the employees. The manager, with two other employees, accompanied him to the basement where they nailed a piece of wood to a door opening upon a street and, using it as a target, each of them fired at least one shot thereat. A bullet penetrated the door and killed plaintiff's intestate who was passing along the street. On appeal from judgment for the plaintiff, *held,* judgment reversed and complaint dismissed. The use of the basement as a shooting gallery was not authorized by the defendant nor did the defendant have knowledge or acquiesce in the use of its premises for that purpose. *Ford* v. *Grand Union Co.,* 268 N. Y. 243, 197 N. E. 266 (1935).

The decision of the court is in accord with authority. It is true that one in possession of property is under a duty not to use such property, either himself or through his employees, in a manner dangerous to others.[1] But the doctrine of *respondeat superior* has generally been restricted by the courts to acts of employees within the scope of their duties [2] and in the course of their employment.[3] However, the liability of the master is not so narrowly confined in all situations.[4] Corporations have been held liable for the tortious acts of their employees, when such acts were beyond the scope of their employment.[5] The test in these cases is whether the master is negligent in controlling the acts of his servant.[6] If the tortious act is done within the scope of the servant's duties, then the negligence of the servant is imputed to the master.[7] But if the negligent conduct of the employee is beyond the scope of his employment, liability of the master can be predicated only when it has been proved that the act was committed on premises in possession of the master, or with the use of his chattel, and with his knowledge or acquiescence.[8]

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[1] RESTATEMENT, TORTS, COMMENTARIES (1926) §371; Appell v. Muller, 262 N. Y. 278, 186 N. E. 785 (1933).

[2] Fiocco v. Carver, 234 N. Y. 219, 137 N. E. 309 (1922).

[3] Standard Oil Co. v. Parkinson, 152 Fed. 681 (C. C. A. 8th, 1907).

[4] Harper and Kime, *The Duty to Control the Conduct of Another* (1934) 43 YALE L. J. 886, 896. For a general discussion of liability of the master outside the course of employment.

[5] Fletcher v. Baltimore & Potomac R. R. Co., 168 U. S. 135, — Sup. Ct. — (1897); Hogle v. Franklin Manufacturing Co., 199 N. Y. 388, 92 N. E. 794 (1910).

[6] Hogle v. Franklin Manufacturing Co., 199 N. Y. 388, 92 N. E. 794 (1910).

[7] 1 BLACKSTONE, COMMENTARIES (Sharswood ed. 1860) §431: General rule of common law "If a servant by his negligence does damage to a stranger the master shall be answerable for his neglect." McLaughlin v. N. Y. Edison Co., 252 N. Y. 202, 169 N. E. 277 (1929); Coughlin v. Rosen, 220 Mass. 220, 107 N. E. 914 (1915).

[8] RESTATEMENT, TORTS, COMMENTARIES (1926) §317; instant case, 268 N. Y. 243, 197 N. E. 266 (1935).

Thus, a single tortious act of the employee beyond the scope of his employment on the premises of the employer, yet without its knowledge or acquiescence or that of its authorized agent, absolved the corporation from liability.[9] In the instant case, had the defendant the means of control and notice of the necessity of using such means? It is clear that it did not. When the manager left the store to engage in the target practice, he temporarily stepped out of the bounds of his agency, and, *pro tempore,* the defendant was left without a manager. Through whom then could it receive notice of its employees' conduct? Through whom could it exercise control? The conclusion is inevitable that the defendant had no reasonable means of control over the situation which caused the injury.

D. G.

MORTGAGES—RIGHT OF HOLDER OF GUARANTEED MORTGAGE TO REVOKE AGENCY OF GUARANTEE COMPANY IN REHABILITATION.—The City Bank Farmers Trust Company was the owner of a bond and mortgage to secure the payment of $5,000.00 with interest at 6% which had been guaranteed by the respondent under a policy issued by the Bond and Mortgage Company providing that the guarantee company "is irrevocably the agent of the insured until the mortgage be paid." This policy contained the following conditions: (a) that the guarantee company was bound to continue the guarantee on the extension of the mortgage; (b) that the policyholder was bound to permit the guarantee company to collect all interest and principal so secured, and to enforce any payment which may come due under said mortgage; and (c) that the policyholder was bound to assign the bond and mortgage to the guarantee company, if requested to do so, upon receipt from it of the amount due the policyholder. The bond and mortgage was past due and the principal was unpaid. The interest had been paid and there were no arrears in taxes. The Superintendent of Insurance was appointed rehabilitator and took possession of the business and property of the respondent guarantee company. In an action by the appellant bank for release from its obligations under the policy, *held,* the appellant is entitled to judgment absolving it from the obligations of the contract upon its release of the guarantee company. *Matter of People (Bond and Mortgage Guaranty Company), City Bank Farmers Trust Company,* 267 N. Y. 419, 196 N. E. 313 (1935).

The guarantee company here has no power coupled with an interest, and the stipulation making it "irrevocably the agent" of the

[9] Walton v. New York Central Sleeping Car Co., 139 Mass. 556, 2 N. E. 101 (1885); Walker v. Hannibal and St. Joseph R. R. Co., 121 Mo. 575, 26 S. W. 360 (1894).