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A MASTER'S LIABILITY FOR ACTS OF HIS SERVANT OUTSIDE THE SCOPE OF THE EMPLOYMENT.—The reports of practically all common law jurisdictions abound in cases dealing with the power of an agent to subject his principal to tort liabilities. Sometimes these cases present the question of the principal's liability to respond in damages for tortious conduct of his agent from which some third party is the sufferer. Again the question may be whether a master is liable for some personal injury sustained by a servant at the hands of some other servant. The opinions in such cases so generally propound the broad general rule that the principal is liable for the torts of his agent where such torts amount to a negligent performance by the agent of some act or acts within the scope of the agent's usual duties¹ that we are apt uncritically to accept this broad general rule as the sum total of

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¹ This rule is, of course, elementary and fundamental. *Qui facit per alium facit per se* finds its foundation in public policy and convenience. In the language of Best, C. J., in *Hall v. Smith*, 2 Bing. (Eng.), 156, 160, 9 E. C. L. 327, (1824); "The maxim of *respondent superior* is bottomed on this principle: That he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain by it."

the law upon this subject. But it is a mistake naively to assume that the rule stated will, in and of itself, decide all concrete cases, or that, thus aphoristically stated, it is the *alpha* and *omega* of the the law of master and servant. Well considered cases exist from which, it is believed, there may fairly be formulated doctrines important to a proper view of a master's tort liability, whether these doctrines be corollaries to the general rule noted, exceptions thereto, or independent principles.

Typical of such cases is that of *Fletcher v. Baltimore and Potomac Railway Company*.² In that case plaintiff, while standing in a street, was injured by a stick of wood thrown off a passing work train by employees of the defendant company not then on duty and returning from their day's work. It was pleaded that the defendant company had knowledge of and acquiesced in the habit of employees', upon returning from work by this work train, throwing sticks of fire wood, gathered by them, off the train near their respective homes for their own use. It was one such sticks of fire wood which injured the plaintiff. The court said:

"If the act on the car were such as to permit the jury to find that it was one from which, as a result, injury to a person on the street might reasonably be feared, and if acts of a like nature had been and were habitually performed by these upon the car to the knowledge of the agents or servants of the defendant, who with such knowledge permitted their continuance, then in such case the jury might find the defendant guilty of negligence in having permitted the act, and liable for the injury resulting therefrom, notwithstanding the act was that of an employee and beyond the scope of his employment and totally disconnected therewith. . . ."³

In another case the owner of a factory was held liable to one injured by a piece of iron thrown from a factory window, by an employee, pursuant to a practice of the employees, known to the proprietor.⁴ In another case certain employees of a livery stable were permitted by a responsible representative of the employer then on the ground, to enter the livery stable late at night in an intoxicated condition and smoking. Fire resulted, destroying the livery barn and a horse then being kept therein for a customer. The master was held liable, the specific negligence relied upon being not that of the employees' smoking, however, but that of

² 168 U. S. 135, 43 Law Ed. 411, (1897).

³ *Fletcher v. Baltimore and Potomac Railroad Co.*, *supra*.

⁴ *Hogle v. H. H. Franklin Mfg. Co.*, 199 N. Y. 389, 92 N. E. 794, (1910).

permitting the smokers in their intoxicated condition to go into the barn to sleep.⁵ In still another case, the employees of a department store were in the habit of snapping or throwing pins at persons or objects in the store and on one such occasion a pin so snapped or thrown struck a customer in the eye, destroying the eye. The proprietor was held to liability for having negligently failed to take reasonable precautions effectively to forbid and forestall the course of conduct resulting in the injury.⁶

Some of the cases noted were influential in the disposition of a recent case in our own jurisdiction.⁷ In that case there was evidence tending to show that the injury complained of resulted to plaintiff from a fire, which fire, some evidence indicated, might have originated from a cigarette thrown into a waste basket by one Thorpe, an employee of the defendant. If, however, the fire so originated, the cigarette was thrown by Thorpe during hours other than his hours of employment and while he was lodging or sleeping upon the premises in question by permission of the defendant. The trial court gave the following instruction:

“The court instructs the jury that the witness Thorpe is not shown by the evidence in this case to have been engaged in the service of the defendant while he was present in its office just prior to the fire in question in this case and that the defendant cannot be held responsible for any act of his at that time which in the opinion of the jury, caused the fire.”⁸

Considering the correctness of this instruction the appellate court said:

“It is not charged by plaintiff that Thorpe was actually engaged in service when the cigarette was supposedly thrown; but he was defendant’s employee. This is admitted. It is averred that he was employed by defendant, and was permitted to sleep of nights in defendant’s factory and was knowingly permitted to smoke therein. Defendant shows that Thorpe smoked in the drying room, and he did this notwithstanding repeated warnings. Why was he warned? Because defendant knew of the danger. Then, when it was saw that Thorpe disobeyed its warnings, it was its duty to stop his smoking there, and, if necessary, to discharge him. We do not think that under these circumstances it can absolve itself from liability by showing that at the time he is supposed to have thrown the lighted cigarette he was not actually in its service, and that it had warn-

⁵ *Eaton v. Lancaster*, 79 Me. 447, 10 Alt. 449, (1887).

⁶ *Swinarton v. Le Boutillier*, 7 Misc. Rep., (N. Y.), 639, 28 N. Y. Supp. 53, (1894).

⁷ *Keyser Canning Co. v. Klots Throwing Co.*, 118 S. E. 521, (W. Va. 1923).

⁸ *Keyser Canning Co. v. Klots Throwing Co.*, *supra*.

ed him against smoking in the building. Defendant owed a higher duty to plaintiff than to give mere warnings to Thorpe. Had it not known that he was disobeying instructions, it would have been a different situation; but according to its evidence it was well aware that he was disobedient, and yet permitted him to sleep there. The night watchman says he was smoking at 1 o'clock Sunday morning and he scolded him for it. If this were so, he ought to have put him out of the building."

"We think the instruction should not have been given, as it absolves defendant from all liability for Thorpe's negligence, though defendant permitted him to remain there knowing him to be disobedient and negligent. . . ."

It is believed that the soundness of the cases cited and quoted is, upon consideration, apparent. The *ratio decidendi* of the cases in question seems to be that where, either during the hours of employment or outside the hours of employment, the master is so situated as that he may, either himself, or by some other servant functioning as his responsible representative on the ground, control the actions and conduct of the servant whose doings come into question,¹⁰ it becomes his duty so to control the activities of such servant as that innocent third parties or other innocent servants may not be injured thereby. Where, however, the master is not personally present or where he has no knowledge, actually or constructively, the details of the actions and conduct of the servant after the hours or outside the scope of the employment, the master will not, under the holdings in these cases, be liable. But where, owing to the habitual nature of the negligent misconduct of the servant,¹¹ the master is affected with notice thereof and fails to

⁹ Keyser Canning Co. v. Klots Throwing Co., *supra*.

¹⁰ Where, for instance, the servant is upon or about the premises of the master after hours, although not then engaged in his usual duties, as was true in Keyser Canning Co. v. Klots Throwing Co., *supra*, it may fairly be said that the master is so situated that he can control the actions and conduct of the servant. Again, where, as in Swinarton v. Le Boutillier, *supra*, during the hours of employment the servant wilfully or negligently departs from his usual duties under such conditions as that the master is affected with notice thereof, that notice and the fact that the master has, during the hours of employment, the power to require the diligent pursuit by the servant of his duties and the right to forbid departure therefrom, give rise to a duty on the part of the master to forbid the prospectively injurious conduct of the servant.

¹¹ The cases herein considered all seem to have arisen under such conditions as that the masters may be said to have been affected with knowledge of the courses of conduct of the servants resulting in the injury. It by no means follows, however, that it is only in such manner that the master may be affected with notice of the injurious action of the servant in such way as to be subject to the duty to forbid and forestall such action. If the master has notice of the preparation for, indulgence in, and consummation of a *single act* from which injury to another or others may be reasonably foreseeable, ought not the master who is in position to forestall and prevent the same, upon principle, be subject to the duty thus to forestall the injurious conduct. Note the following dictum:

"But if a passenger upon a train or an employee of the company upon one of its cars should supply himself with a quantity of stones for purpose of throwing them off the train as it passed through a city, can it be possible that under such circumstances, if this intended use of the stones came to the knowledge of those who had the conduct of the train, it would not be their duty to prevent the act?" Fletcher v. Baltimore and Potomac Railway Co., *supra*.

forbid and forestall such negligent misconduct, he will be liable.

It seems clear, however, that the master's liability does not result from the specific act of the servant whose hand inflicts the injury complained of but from negligent failure to exercise reasonable care to forestall and prevent the course of conduct¹² culminating in the specific act productive of the injury complained of. The master's liability is not, therefore, grounded upon the rule of *respondeat superior*¹³: rather it arises from his own neglect of a duty enjoined upon him by law. It does not result from the doctrine of representation at all. But it is believed important to consider and associate the cases herein discussed and the rule of liability which they propound with the larger group of cases and the better known rule, to the end that one may apprehend and keep in mind the fact that the rule holding the master liable for the acts of the servant performed within the scope of the employment is not the only hypothesis upon which a master's liability in tort may be predicted.¹⁴

—S. C. M.

¹² Or, perhaps, in a proper case the specific injurious act itself. See note 11, *supra*.

¹³ Of course, the situation might be such, especially in the case of a corporate principal, that it is a servant other than and perhaps superior to the one whose hand does the injurious act who has notice of the injurious misconduct. His notice may become by the operation of *respondeat superior* the notice of the corporate principal. This doctrine would thus affect the case.

¹⁴ It should be remarked, in passing, that the liability existing under the principle of the cases herein discussed is not limited to injury occurring at the hands of servants. It is as much the duty of the proprietor of an establishment, for instance, to take reasonable precautions to forestall and forbid the negligent misconduct of trespassers, for example, upon and about his premises, as it is the duty of the master to take the same precautions to guard against negligent misconduct of servants about such premises. *Tucker v. Illinois Central Railway Company*, 42 La. An., 114, 7 South., 124, (1890).

The rule of liability noted is applied in an interesting manner in a recent West Virginia case, decided since the writing of most of the foregoing note. In this case a plaintiff employee declared upon a personal injury sustained while at his work as a section hand on a railroad. The declaration alleged that plaintiff had been struck in the eye and injured by a stone thrown by one of his co-workers, pursuant to a negligent and dangerous habit of said co-workers indulged in with the knowledge and acquiescence of the defendant. The declaration was so framed as to invoke the aid of the Federal Employers' Liability Act, Act of April 22, 1908, ch. 149, s. 1, 35, Stat. 65, Barnes, Federal Code, s. 8069, p. 1937, 8 Federal Statutes, Annotated, (1916 Ed.), s. 1208, U. S. Compiled Statutes, (1916 Ed.), s. 3657. Upon demurrer, the matter was certified to the Supreme Court of Appeals. It was there held that four of the five counts of the declaration were good on demurrer and that by reason of the fact that the declaration averred a case showing plaintiff to have been lawfully upon defendant's premises at the time of the injury, in pursuit of his duties as an employee of the defendant in interstate commerce, plaintiff was entitled to the benefit of the Federal Act noted, the consequence of which holding is, of course, to deprive the defendant of the common law defenses inhibited by the Federal Statute. *Griffin v. The Baltimore and Ohio Railroad Company*, — S. E. —, (W. Va. 1924).