NOTES AND COMMENTS

AGENCY

MASTER AND SERVANT—MASTER'S LIABILITY FOR INTENTIONAL TORT OF SERVANT GROWING OUT OF PAST INTERFERENCE WITH SERVANT'S WORK

While the plaintiff's car and the defendant's bus were stopped at an intersection, the driver of the bus got out, went back to the plaintiff's car, and after an argument with plaintiff, assaulted him. Previously the bus driver had had difficulty in passing the plaintiff on the highway because the plaintiff was driving in the center of the road. In an action brought against the employer of the bus driver, the court held that the employer was not liable as the servant was not acting within the scope of his employment. One judge dissented.[1]

If there had been no previous interference with, or annoyance to the authorized performance of the servant, here the driving of the bus, the employer would not be liable for the intentional tort of his servant,[2] unless the use of force was authorized, or implied from the authorized act, such as in protection of property.[3] Nor, under the majority opinion, will the presence of interference or annoyance with the authorized performance be enough to bring the torious act, otherwise outside the scope of employment, within such scope.[4] This is especially true when the force used is extreme, and accompanied by display of anger and desire for revenge on the part of the servant.[5] It is the state of mind of the

[1] Plotkin v. Northland Transportation Co., 204 Minn. 422, 283 N.W. 758 (1939).

[2] Little Miami Ry. Co. v. Whetmore, 19 Ohio St. 110, 2 Am. Rep. 373 (1869); 2 MECHEM, AGENCY (2d ed.) secs. 1977, 1978 and cases cited.

[3] Blakely v. Greer, 28 Ohio C.C. 33, affirmed without opinion, 81 N.E. 1197 (1907); Bearman v. Southern Bell Telephone Co., 17 La. App. 89, 134 So. 787 (1931); Montalbana v. Rainbow Garden, 9 Cal. App. (2d) 661, 50 P. (2d) 972 (1935); Philipovich v. Pittsburgh Coal Co., 314 Pa. 585, 172 Atl. 136 (1934); Metzler v. Layton, 298 Ill. App. 529, 19 N.E. (2d) 130 (1939).

[4] Cleveland Ry. Co. v. Huntington, 119 Ohio St. 518 (1929); Pratley v. Sherwin-Williams Co., 56 S.W. (2d) 510, (Texas Civ. App. 1933); State *ex rel.* Gosselin v. Trimble, 328 Mo. 760, 41 S.W. (2d) 801 (1931); Trebitsch v. Goelet Leasing Co., 252 N.Y. 554, 170 N.E. 140 (1929); Druce v. Sparrow-Kroll Lumber Co., 133 N.W. 938, 47 L.R.A. (N.S.) 959 (1911); Cleveland v. Newson, 45 Mich. 62 (1881); see cases cited in 2 MECHEM, AGENCY, (2d ed.) sec. 1977, 1978; (1939) 23 MINN. L. REV. 981; (1939) 19 ORE. L. REV. 184.

[5] Plumer v. Southern Bell Telephone Co., 58 Ga. App. 622, 199 S.E. 353 (1938); Pratley v. Sherwin-Williams Co., 56 S.W. (2d) 510 (Texas Civ. App. 1933); Commonwealth Casualty Co. v. Header, 118 Ohio St. 429, 161 N.E. 278 (1928).

servant that is material,[6] and the master is relieved from liability if the servant had no intent to act on the master's behalf, even though the events from which the tortious acts follow arise while the servant is acting in the employment, and although the servant became angry because of them.[7]

However some courts have held the master liable if the quarrel, personal or otherwise, was inspired by something connected with the servant's work.[8] Under these decisions, the master has been held liable in cases where installment collectors assaulted the plaintiff while attempting to repossess the article sold,[9] and also in cases involving the use of force to coerce payment of bills, even when such force was expressly forbidden.[10] A New York court held that the servant was acting within the scope of his employment when, after passing the vehicle of a competitor, he intentionally backed into such vehicle, a case factually similar to the one under discussion.[11] In *Interstate Co.* v. *McDaniel*, the Mississippi court stated the rule that where the act complained of is not so separated by time and logical sequence from the act or conflict within the scope of the agency, the master is not relieved from liability if all the features constitute one continuous and unbroken occurrence.[12] In that case the servant thought the plaintiff had taken and eaten oranges the servant was to sell, and therefore assaulted the plaintiff. It is similar to the principal case in that it involved past interference, but as it also involved protection of property from future interference it is not definitely in point. But in *Chicago Mill and Lumber Co.* v. *Bryeans*, [13] where a quarrel growing out of decedent's interference with workers under the servant's supervision had been stopped, the court held the master was nevertheless liable for the death resulting from a resumption of the quarrel. Responsibility is not determined by the motive which makes an employee do what he does, and is not limited to those acts which promote the object of the employment.[14] The intentional tort must, however, be closely connected in regard to time and place with an act or conflict within the authorized performance; other-

[6] A.L.I. RESTATEMENT OF AGENCY, sec. 235.

[7] A.L.I. RESTATEMENT OF AGENCY, sec. 245.

[8] (1932) 45 HARV. L. REV. 342.

[9] Anderson v. Tadlock, 27 Ala. App. 513, 175 So. 412 (1937); Rouda v. The Lowery and Goebel Co., 9 Ohio App. 91 (1917); Russell-Locke Service v. Vauphn, 179 Okl. 377, 40 Pac. (2d) 1090 (1935).

[10] Son v. Hartford Ice Cream Co., 102 Conn. 696, 129 Atl. 778 (1925).

[11] Curley v. Electric Vehicle Co., 68 App. Div. 18, 74 N.Y.S. 35 (1902); see also Limpus v. London General Omnibus Co., 1 H. & C. 526 (1862).

[12] Interstate Co. v. McDaniel, 178 Miss. 276, 173 So. 165 (1937); *contra*, John v. Lococo, 256 Ky. 607, 76 S.W. (2d) 897 (1934).

[13] Chicago Mill and Lumber Co. v. Bryeans, 137 Ark. 341, 209 S.W. 69 (1919); *semble*, Gulf C.S.F. Ry. v. Cobb, 45 S.W. (2d) 323 (Texas Civ. App. 1931).

[14] Netzler v. Layton, 298 Ill. App. 529, 19 N.E. (2d) 130 (1939).

wise even under this rule, the master will not be liable.[15] So in *Normington* v. *Neely*[16] the court held that it was necessary to find that the assault was a continuation of an occurrence which was within the scope of employment, and that after a taxi driver had checked in for the night, and then attended the theatre, the employer was not liable for an assault committed upon meeting a competing taxi driver, although the assault arose out of a quarrel which took place during working hours several hours previously. And in *Raben* v. *Hamilton Diamond Co.*[17] the California Court of Appeals sent a case back for retrial to determine whether the agent had completed his work before or after the assault took place. The facts in the principal case do not reveal the time intervening between the conflict for precedence on the road and the assault upon the plaintiff, and the absence of mention of the time factor indicates that it was viewed by the court as immaterial, as long as the conflict preceded the assault. If the intervening time was a matter of minutes rather than hours, the court has apparently aligned itself with the majority rule.

F.F.V

CONFLICT OF LAWS

CONFLICTS — SALES — EFFECT OF CERTIFICATE OF TITLE LAW ON OUT OF STATE CONDITIONAL SALE

One Welikson, on August 26, 1936, purchased an automobile from the Goodman Co. in New York upon a conditional sales contract which was duly recorded there. Later, the Union Commercial Corp. purchased the Goodman Co.'s interest in the note. Welikson, in 1937, without the consent or knowledge of the holder of the conditional sales contract brought the car to Ohio where he had obtained employment. In Richland County, Ohio, he filed a sworn statement of ownership with the Clerk of Courts without mentioning the conditional sales contract. Welikson then obtained an Ohio license. In January, 1938, he purchased a new car and traded in the old one to the R. J. Schmunck Co., filing with the Clerk of Courts of Cuyahoga County an application and certificate of title for the old car without disclosing the lien. A certificate of title was issued him showing it free of all encumbrances and he, in turn, assigned it to the R. J. Schmunck Co., which then had a new certificate issued to it. On February 2, 1938, the Union Commercial Corp. heard of the transaction and brought a replevin action, which was decided in favor of the defendant in the Cleveland Municipal Court.

[15] Richberger v. American Express Co., 73 Miss. 161, 18 So. 922 (1896).
[16] Normington v. Neely, 58 Idaho 134, 70 P. (2d) 369 (1937).
[17] Raben v. Hamilton Diamond Co., 19 Cal. App. (2d) 282, 65 P.(2d) 98 (1937).