Principal and Agent: Liability of Principal for Acts of Agent Involving Physical Force

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Although the courts hold that where an insurance policy is susceptible to two constructions the one most favorable to the insured should be adopted, the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are unambiguous the terms are to be taken in their plain, ordinary, popular sense. It does not follow that the terms of an insurance policy may be distorted from their natural meaning, or that the agreed liability of the insurer should be enlarged into one which only a new contract could have imposed. Carpenter v. Continental Casualty Co., 95 F. (2d) 634 (C.C.A. 8th, 1938). In National Automobile Ins. Co. v. Industrial Accident Commission, 11 Calif. (2d) 689, 81 P. (2d) 926 (1938) a workman's compensation policy provided that if the policy provided that if the policy was issued to an individual, it should cover only his liability as an individual employer and not any liability as a member of a copartnership. Such a policy was issued to a restaurant owner, individually. It was held not to cover his liability for injuries sustained by a dishwasher, after the insurer took in his sister as a partner in operating his restaurant business. The rule is, where the provisions of a policy are definite and certain, there is no room for interpretation, and the courts will not indulge in a forced construction to cast a liability upon an insurer which it has not assumed. Where life insurance policies unambiguously provided that on due proof of disability the insurer would waive payment of premiums and pay disability benefits, the conditions of furnishing due proof, were conditions precedent to waiver of premiums or payment of benefits. Botts v. Equitable Life Assurance Society of the United States, 78 P. (2d) 860 (1938). In New York Life Ins. Co. v. Malloy, 21 F. Supp. 1001 (D. N.H. 1938), a clause providing that the life insurance policy should be incontestable after two years except for non-payment of premiums and except as to provisions and conditions relating to disability and double indemnity benefits, did not preclude insurer, after expiration of two years from obtaining cancellation of double indemnity and disability clauses for fraud practiced by insured at the inception of the policy. The excepting clause in life policy must be construed in accordance with its language and the fair meaning expressed. Moreover, a fire insurance policy covering potatoes handled or used by insured growers association, its own or those held in trust or in storage, "if in case of loss the insured is legally liable therefor," was so unambiguous that the association could not set up insurer's conduct, after loss, where the association was not liable to members for loss. The terms of an insurance policy are to be taken and understood, in absence of ambiguity, in their plain ordinary and popular sense. Miller's Mutual Fire Ins. Ass'n. of Ill. v. Warroad Potato Growers Ass'n., 94 F. (2d) 741 (C.C.A. 8th, 1938).

A. A. Hindin.

Principal and Agent—Liability of Principal for Acts of Agent Involving Physical Force.—Plaintiff, a boy of fifteen years, while attending a theatre of the defendant, was told by a substitute usher to remove his hat and on replying that he was about to leave, the substitute usher remarked, "You are leaving, and damned quick." Thereupon the usher seized the plaintiff and hurried him up the aisle. When they came to one of the plate glass doors the substitute usher gave the plaintiff a shove, and in an attempt to ward off injury, plaintiff put up his hands and struck the plate glass causing it to break and inflict serious injury upon him. The substitute usher was a helper who received
passes for doing little jobs and helping out about the theatre. The trial court denied the defendant's request to recognize as a matter of law that the evidence was insufficient to establish the fact that the substitute usher was an agent of the defendant, or that there was negligence on the part of the defendant, or its servant.

On appeal, held, that the evidence established the existence of a principal and agent relationship. Where such relationship is established, the principal is liable for the acts of the agent even though greater force than is necessary be used by the agent to carry out the particular act within the scope of his employment. Curran v. Dorchester Theater Co., 308 Mass. 469, 32 N.E. (2d) 690 (1941).

The rule that the principal is liable for the acts of his agent done in the course of and within the scope of his employment, even though the agent acts with force, is generally accepted, 2 Am. Jur., Agency, sec. 360. However, the difficulty arises when an attempt is made to give effect to the rule, inasmuch as the question of what brings the particular act within the course of and within the scope of the employment varies according to the nature of the agency. Whether the acts of a servant are within the scope of his employment is ordinarily a question for the jury. Ratcliffe v. C., M. & St. P. R. Co., 153 Wis. 281, 141 N.W. 229 (1913).

The principal case cites another Massachusetts case wherein a theatre usher was authorized to maintain order by calling special police if admonition to those causing disturbance failed to achieve the end. Acting under that authority the usher forcibly removed a boy of eight years of age for an alleged annoyance, and pushed him onto the floor of the outer lobby of the theatre causing him personal injury. The court held that inasmuch as the employer had authorized its usher to perform an act of such a nature as is commonly accompanied by the use of force, liability attached even though greater force was used than was necessary under the circumstances, provided that the force was exerted for the purpose of accomplishing a result within the scope of the employment. Fanciullo v. B. G. & S. Theatre Corp., 297 Mass. 44, 47, 8 N.E. (2d) 174 (1937).

Likewise, where a corporation authorized its foreman to hire and discharge workmen, and impliedly authorized him to use reasonable force to eject discharged employees, and where in carrying out his duty the foreman assaulted a discharged employee, the corporation was found liable even though the excessive force arose from violence of temper. Roghan v. The Moore Mfg. & Foundry Co., 79 Wis. 573, 48 N.W. 669 (1891). A corporation has also been held liable for a superintendent's unreasonable use of force where a reasonable use of force is authorized, on the ground that the corporation owes a duty of abstaining from all unnecessary violence in keeping its employees at or "near their work until the whistle blew at twelve o'clock." Richard v. Amoskeag Mfg. Co., 79 N.H. 380, 109 Atl. 88 (1919). And even where a manager of a beer parlor used a blackjack in ejecting a disorderly person, in pursuance of authority to oust drunken and unruly patrons, the master was held answerable for the act since it was done in furtherance of the business entrusted to the manager. Westerland v. Argonaut Grill, 185 Wash. 411, 55 P. (2d) 819 (1936). But, where a conductor authorized to remove a passenger who refused to pay fare, acted maliciously or with ill feeling and without mistakenly conceiving a necessity for the use of force, the street railroad company was held not liable. Jackson v. The Second Ave. Railroad Co., 47 N.Y. 247, 7 Am. Rep. 448 (1872).

Where a servant uses means fairly adapted to accomplish the purpose of his employment and causes injury to an innocent bystander the master is subjected
to liability; such was the holding where a watchman accidentally shot and injured a child observing his attempt to scare child trespassers off employer's grounds. *Fletcher et al. v. Central Wrecking Corp.*, 124 Pa. Super. 271, 188 Atl. 612 (1936). Similarly, where it is left to a house detective's discretion as to the manner to be followed or method adopted in carrying out instructions to prevent dancing on the mezzanine floor of a hotel, an uncalled for exercise of force by such detective has been the basis of liability imposed on the hotel. *Womack v. Hotel Frances, Inc., et al.*, 151 So. 128 (La. 1933). And where an agent of a detective agency, authorized to obtain a confession, in executing his authority, committed an assault and battery upon the suspect, the principal was held responsible for the agent's selection of means by which the orders were carried out. *Mansfield v. William J. Burns International Detective Agency*, 102 Kan. 687, 171 Pac. 625 (1918).

Again, acts wherein excessive force is used for which the principal is liable, are those arising in the course of employment and incidental thereto, as where an employee was charged with an alternative duty of collecting the sale price of a battery or obtaining its return. *Russel-Locke Super-Service v. Vaughan*, 170 Okla. 377, 40 P. (2d) 1090 (1935); or repossessing a tractor for failure to keep up payments. *Rich v. Dugan et al.*, 135 Neb. 63, 280 N.W. 225 (1938).

Too, where an assault committed by an agent arises in an attempt to perform a particular duty with which he is entrusted, the principal has been held answerable even though such method of performance may have been expressly prohibited, as in the case of a bartender engaging in an altercation with a "patron" in an attempt to obtain the price of three drinks which the latter purchased, *Bergman v. Hendrickson et al.*, 106 Wis. 434, 82 N.W. 304 (1900); or where the manager of a store injured a pedestrian on the sidewalk in front of the store during a fight occasioned by the manager's attempt to adjust a customer's complain of being shortchanged, *Chisholm v. Berg et al.*, 78 S.W. (2d) 486 (Mo. 1935); or where a garage superintendent had a duty to see repair work properly performed and to adjust differences and disputes with customers as to the character of the work performed. *Central Motor Co. v. Gallo*, 94 S.W. (2d) 821 (Tex. 1936).

But if the nature and type of employment is such as to confer but a limited designated authority, and the one authorized to act resorts to physical violence or force, liability does not attach to the principal for the reason that such authority carries with it no implied authority, e.g., where a mother gave her son authority to request a tenant to vacate the premises if he thought it advisable, and the son after so notifying the tenant committed an assault and battery upon the tenant, *Hahn v. Owens*, 176 Miss. 296, 168 So. 622 (1936); or where a foreman used physical force in an attempt to get a termination of service record and tool clearance record approved by one voluntarily ending employment with the company, *Moore v. Ford Motor Co.*, 265 Ky. 575, 97 S.W. (2d) 400 (1936); or where one authorized to collect money beat the debtor to carry into effect the act of collecting. *Kastrup v. Yellow Cab & Baggage Co.*, 129 Kan. 398, 282 Pac. 742 (1929).

Another class of cases in which the principal is amenable for the agent's acts in which excessive force is entertained arises where protection of property is entrusted to the latter's care. Accordingly, where an employee injured a minor by throwing a hammer, to prevent his walking onto cement then being poured, the employer was held liable, *Young v. Sinclair Refining Co. et al.*, 92 S.W. (2d) 995 (Mo. 1936); *Bearman v. Southern Bell Telephone & Telegraph*
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Co., 17 La. App. 89, 134 So. 787 (1931); so also where a vendor of fruits and other merchandise on a train assaulted a drunken passenger whom he accused of stealing fruit from his possession, Interstate Co. v. McDaniel, 178 Miss. 276, 173 So. 165 (1937). However, where the defendant's truck driver charged with the duty of protecting the truck from damage committed an assault upon another with whom he had collided when no further damage was threatened, it was held that the defendant was not liable since the act was motivated by personal anger and in no way served to protect the property. Plumer v. Southern Bell Telephone & Telegraph Co., 58 Ga. App. 622, 199 S.E. 353 (1938); See Polk Sanitary Milk Co. et al. v. Berry, 106 Ind. App. 29, 17 N.E. (2d) 860 (1938); Pratley v. Sherwin-Williams Co. of Texas, 58 S.W. (2d) 510 (Tex. 1933). And where a superintendent of a building crew had authority to remove trespassers coming on the premises and in pursuance of that authority ordered a laborer to shoot in the direction of a trespasser, thereby killing him, it was held that the authority carried with it no power to shoot the invader, especially not where the master is without putative knowledge of the presence of firearms on the premises which might be available for such use, and where no peaceable attempt is made to remove previous to the shooting. However, the court pointed out that if one empowered to remove trespassers killed one of their number in an altercation where peaceable attempts failed the master would be liable inasmuch as the killing would be a continuation of the authorized act. Strader's Adm'rs. v. Pres. and Directors of Lexington Hydraulic & Mfg. Co., 146 Ky. 580, 142 S.W. 1073 (1912). But, where a railroad company employs a gateman who inflicts an intentional mortal wound upon a third party during the course of his employment and such act arises from a dangerous physical or mental condition of the gateman, negligently overlooked by the company when hiring the gateman, the company was held liable. Davis, Director Gen. of R.Rs. v. Merrill, 133 Va. 69, 112 S.E. 628 (1922).

Liability of the principal may also arise by reason of certain technical relations as defined by law. For example, in New York where the Civil Rights Law, sec. 40, included saloons, restaurants and barrooms as places of public accommodation, it has been held that where the principal's restaurant and barroom servant wilfully struck a patron who expressed dissatisfaction with the operation of a "pin-ball" machine as he left the premises, the patron's right to recover evolved from the principal's duty to provide safety to such patron. This duty was held to grow out of his legal relation to the guest who came onto the premises to partake of the principal's offer of the place as one of public accommodation; and inasmuch as the law put such place in the category of the inn-keeper-guest relation the patron could recover either on tort or contract. Schell v. Vergo et al., 4 N.Y.S. (2d) 644, 166 Misc. 839 (1938). However, where an apartment house elevator-boy struck a tenant in consequence of a personal dispute, the owner of the apartment house was held not answerable for the act of the operator. Trebitsch v. Goelet Leasing Co., 235 N.Y.S. 426, 226 App. Div. 557 (1929). If a customer is on the premises of a mercantile establishment by invitation on business for which the establishment is operated, the company has been considered liable for any unlawful act toward the customer arising out of a transaction within the scope of an employee's employment. J. M. High Co. v. Holler, 42 Ga. App. 657, 157 S.E. 209 (1931); Central Motor Co. v. Gallo, supra. Likewise carriers are under a duty to save passengers from harm, as in the instance of a fellow-passenger assisted by the conductor in forcibly removing a negress from that part of a train reserved for whites to that part set aside for her race. International & G. N. Ry. Co. v. Miller et al., 9 Tex. Civ. App. 104,
28 S.W. 233 (1894). Even where a person steals a ride and the conductor removes him in an illegal manner, the railroad has been held liable, since the conductor's duty to exercise proper care in executing his authority is referrable to the company. *Hoffman v. New York Central & Hudson River Railroad Co.*, 87 N.Y. 25, 41 Am. Rep. 337 (1881).

An apparent conflict with the last mentioned case arises in a later New York decision wherein a landlord was held unanswerable for its agent's unlawful beating of a tenant who refused to pay rent when due. The court reasoned that inasmuch as the act was something unlawful and therefore something the landlord could not wisely do, it could neither be authorized nor could it be considered within the scope of the agent's employment. *Zucker v. Lannis Realty Co., Inc., et al.*, 217 N.Y.S. 65, 217 App. Div. 487 (1926). The incongruity however may be explained on the basis of the peculiar liability of public carriers.

In California the court has invoked the rule that a servant may so combine his own act with the master's business as to make the latter liable. Though the rule is in perfect accord with the principles of the foregoing authorities, it seems that the court gave an extraordinary play to the imagination to find a master liable where its servant, after receiving payment of the bill he was authorized to collect, assaulted the debtor following an argument, and then handed him a receipt acknowledging payment. "Responsibility is not limited to acts promoting objects of employment," said the court. *Hiroshima v. Pacific Gas and Electric Co.*, 18 Cal. App. 24, 63 P. (2d) 340 (1936). In Texas an employer was relieved of liability for the very reason that the employee's act was neither in furtherance of the business nor for the accomplishment of the object for which he was employed. *ABC Stores, Inc. v. Brown*, 105 S.W. (2d) 725 (Tex. 1937); See also *Kentucky, John v. Lococo*, 256 Ky. 607, 76 S.W. (2d) 897 (1934).

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