It is settled, however, that statements by employers uttered "in a context of violence"[13] do not come within the protection of the Constitution.[14] The utterance loses its significance as an appeal to reason, and becomes an instrument of force. Consequently, there is no longer any reason to lend the protection of the first amendment.

It is submitted that the court, in the instant case, in construing the letter in its entirety, completely misconstrued the case. In order to decide whether or not there has been interference, restraint, or coercion, it is necessary to go behind any particular document and construe all the facts in the background of the case. The remarks complained of are certainly not so innocuous that it is inconceivable that they could be coercive in nature, in the proper background. The background of an anti-union policy did exist in this case, and the National Labor Relations Board found it easy indeed to conceive the coerciveness of the expression. This finding of fact, properly within the province of the board, has been overruled by a narrow construction of the elements of the case by the court.

M. G.

AGENCY—RESPONDEAT SUPERIOR—AGENT'S NEGLIGENT USE OF PUBLIC DOOR—[Missouri].—Defendant's route boy violently entered a revolving door, which was provided for public use, and crushed the plaintiff, inflicting serious injuries. The defendant, a credit rating corporation, employed route boys to deliver reports to its customers, but it furnished them no means of conveyance. Plaintiff brought an action for damages against the defendant and recovered. Defendant appealed and assigned as error the trial court's refusal to sustain its demurrer, on the ground that it was not liable for its employee's negligent use of the public door. *Held:* Affirmed;[1] since it was necessary to use the door to effectuate the duties of the employment, the boy was, at the time of the injury, acting in the scope of his employment. *Salmons v. Dun & Bradstreet.*[2]

The general rule of *repondeat superior* is that a master is responsible to third persons for injuries occasioned by the negligence or misconduct of his servants acting within the scope of their employment.[3] This doctrine

13. Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc. (1941) 312 U. S. 287.

14. N. L. R. B. v. Link-Belt Co. (1941) 311 U. S. 584; N. L. R. B. v. Colten (C. C. A. 6, 1939) 105 F. (2d) 179; Montgomery Ward & Co. Inc., v. N. L. R. B. (C. C. A. 7, 1939) 107 F. (2d) 555; N. L. R. B. v. Sunshine Mining Co. (C. C. A. 9, 1940) 110 F. (2d) 780; N. L. R. B. v. Viking Pump Co. (C. C. A. 8, 1940) 113 F. (2d) 759; N. L. R. B. v. Elkland Leather Co. Inc. (C. C. A. 3, 1940) 114 F. (2d) 221; N. L. R. B. v. Reed & Prince Mfg. Co. (C. C. A. 1, 1941) 118 F. (2d) 874.

1. One judge dissented.

2. (Mo. App. 1941) 153 S. W. (2d) 556.

3. Hunter v. First National Bank of Morrilton (1930) 181 Ark. 907, 28 S. W. (2d) 712; Skala v. Lehon (1930) 258 Ill. App. 252, aff'd (1931) 343 Ill. 602, 175 N. E. 832; Hughes v. Western Union Tel. Co. (1931) 211 Iowa 1391, 236 N. W. 8; Funk v. Fulton Iron Works Co. (1925) 311 Mo. 77, 277

is said to be based on public policy.[4] In the application of this doctrine, liability has been imposed on an employer for injuries to third persons resulting from the negligent operation of vehicles by agents,[5] for injuries to a child when the employer's delivery man ran into the child on the sidewalk and injured him with his ice tongs,[6] for injuries to a pedestrian who was knocked down on the sidewalk by the employer's delivery man after making a delivery,[7] and for injuries to a bystander who was knocked beneath a train by a railroad brakeman returning to the train from a restaurant.[8]

However, the Missouri Supreme Court has rendered at least one decision out of line with the foregoing cases.[9] In *Phillips v. Western Union Tel. Co.*[10] the defendant's messenger negligently ran into and injured the plaintiff while the latter was on a public sidewalk, and the court held that the employer was not liable for the injuries sustained, on the theory that at the time of the injury the messenger was using the sidewalk in his public right. The reason announced for this decision by the court is difficult to justify. It has been pointed out by high authority and sustained in effect by the cases in other jurisdictions that scope of the employment is not

S. W. 566; Lajoie v. Rossi (1931) 225 Mo. App. 651, 37 S. W. (2d) 684; Daniel v. Phillips Petroleum Co. (1934) 229 Mo. App. 150, 73 S. W. (2d) 355; Skvorc v. Hager (1928) 93 Pa. Super. 527.

4. The basis of *respondeat superior* is discussed in 2 Mechem, *Agency* (2d ed. 1914) 1457-1458, §1874. Also see Chase v. New Haven Waste Material Corp. (1930) 111 Conn. 377, 150 Atl. 107, 68 A. L. R. 1497.

It should be noted, however, that scholars and courts are in disagreement as to the actual basis of *respondeat superior*. For a discussion of the various views expounded, see Cochran v. Michaels (1931) 110 W. Va. 127, 157 S. E. 173.

5. Dismang v. Western Union Tel. Co. (D. C. N. D. Okla. 1938) 24 F. Supp. 782; St. Louis, I. M. & S. Ry. v. Robinson (1915) 117 Ark. 37, 173 S. W. 822; Kuehmichel v. Western Union Tel. Co. (1914) 125 Minn. 74, 145 N. W. 788, L. R. A. 1918D 355; Hoelker v. American Press (1927) 317 Mo. 64, 296 S. W. 1008.

6. Price v. Simon (1898) 62 N. J. L. 153, 40 Atl. 689.

7. Schediwy v. McDermott (1931) 113 Cal. App. 218, 298 Pac. 107.

8. Missouri, K. & T. Ry. v. Edwards (Tex. Civ. App. 1902) 67 S. W. 891.

9. Comment (1932) 17 ST. LOUIS LAW REVIEW 279. This is a comment on Ritchey v. Western Union Tel. Co. (1931) 227 Mo. App. 754, 41 S. W. (2d) 628. The case follows the *Phillips* case, and the comment criticizes the holdings of both cases as unduly narrowing the doctrine of *respondeat superior*.

10. (1917) 270 Mo. 676, 195 S. W. 711, L. R. A. 1917F 489. The history of this case is complicated by a prior decision on the same incident, Phillips v. Western Union Tel. Co. (1916) 194 Mo. App. 458, 184 S. W. 958. The action in the Missouri appeals case was brought by the husband of the injured plaintiff in the supreme court case, and judgment was had against the defendant, the court holding that there was sufficient evidence to go to the jury on the issue of scope of the employment. The supreme court in its decision recognized the former appeals decision as persuasive but reached a contrary conclusion without expressly ruling on the validity of that decision. Also see Ritchey v. Western Union Tel. Co. (1931) 227 Mo. App. 754, 41 S. W. (2d) 628 and Lajoie v. Rossi (1931) 225 Mo. App. 651, 37 S. W. (2d) 684 in which the supreme court decision in the *Phillips* case has been followed.

dependent on time or place, but rather on the connection of the act with the employment.[11] And even in Missouri recovery is allowed where the negligent operation of vehicles by the agent on a public way results in injury to third persons.[12]

The instant case purports to follow the general rule of *respondeat superior*, but because of the *Phillips* case the court apparently felt it necessary to attempt a distinction between injuries occurring through the use of a public door on one hand, and through the use of a public sidewalk on the other. The distinction attempted in the instant case was that the defendant, in directing the route boy to deliver this particular report, had impliedly authorized the use of the door, in contrast to the point of view of the *Phillips* case that the messenger there was using the sidewalk in the public right.[13] If, however, it can be said that the defendant in the instant case authorized the use of the door because of his knowledge of the necessity of its use, does it not follow that the defendant in the *Phillips* case also authorized the messenger to use the street and, hence, should have been held liable for the latter's negligence?[14]

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11. 2 Mechem, *Agency* (2d ed. 1914) 1461-1462, §1180 reads as follows: "As has already been pointed out, the question of what acts can be deemed to be done within the course of the employment is not merely a question of time or place. Not every act which an agent or servant may do while he is in the place appointed for the service, or during the time in which he is engaged in the performance, can be deemed to be within the course of the employment, or within the scope of the authority. The test lies deeper than that; it inheres in the relation which the act done bears to the employment. The act cannot be deemed to be within the course of the employment, unless, upon looking at it, it can fairly be said to be a natural, not disconnected and not extraordinary part or incident of the service contemplated." In Price v. Simon (1898) 62 N. J. L. 153, 40 Atl. 689, and Schediwy v. McDermott (1931) 113 Cal. App. 218, 298 Pac. 107, the injury occurred at a time when the agents were acting on a public sidewalk. The cases were decided on the factual issue of the relation of the acts to the employment. No reference was made to the fact that the injuries occurred when the agents acted on a public way.

12. Koelling v. Union Fuel & Ice Co. (Mo. App. 1924) 267 S. W. 34; Hoelker v. American Press (1927) 317 Mo. 64, 296 S. W. 1008; Margulis v. Nat'l Enameling and Stamping Co. (1930) 324 Mo. 420, 23 S. W. (2d) 1049; Chiles v. Metropolitan Life Ins. Co. (1936) 230 Mo. App. 350, 91 S. W. (2d) 164.

13. Salmons v. Dun & Bradstreet (Mo. App. 1941) 153 S. W. (2d) 556, 559.

14. There is authority in Missouri subsequent to the *Phillips* case to support the writer's belief that the case was wrongly decided. Liability has been tried on the issue of whether the acts of the agents were in the scope of the employment, ignoring the fact that the injury occurred on a public street, in at least two cases, Margulis v. National Enameling & Stamping Co. (1930) 324 Mo. 420, 23 S. W. (2d) 1049 and Chiles v. Metropolitan Life Ins. Co. (1936) 230 Mo. App. 350, 91 S. W. (2d) 164. The scope of the employment was defined in both cases as a question of fact to be determined by a consideration of the relation of the act done to the employment. In fact, the opinion of the latter case states that the former case has impliedly overruled the *Phillips* case because liability was determined solely on the relation of the act to the employment without so much as mentioning the "public way" doctrine.

By losing sight of the test for the scope of the employment, the Missouri Supreme Court in the *Phillips* case has caused the embarrassment of the court in the instant case in its application of the rules of *respondeat superior*. It is to be hoped that the Supreme Court of Missouri will, on a hearing of the instant case,[15] put an end forever to the doctrine of *Phillips v. Western Union Tel. Co.*[16] R. T. S.

CONSTITUTIONAL LAW—ELECTIONS—RIGHT OF CONGRESS TO REGULATE PRIMARIES—[United States].—The defendants, Commissioners of Elections, conducted a primary election under the laws of the state of Louisiana to nominate a Democratic party candidate for representative in Congress. They were indicted in the District Court for Eastern Louisiana for having wilfully altered and falsely counted the ballots of the voters. The charge was based upon section 19[1] of the U. S. Criminal Code which makes it a federal crime to conspire "to injure, oppress, threaten, or intimidate any citizens in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," in this case (1) the right of qualified voters to have their votes counted as cast in a Congressional party primary election and (2) the right of candidates in a Congressional party primary to have votes cast for them properly counted. A demurrer to the indictment was sustained by the district court on the ground that no right "secured by the Constitution and laws of the United States" had been infringed. On review before the Supreme Court, *held:* the rights of voters and candidates to have votes properly counted in a Congressional party primary are "secured by the Constitution and laws of the United States" in Article I, sections 2, 4[2] and so are within the purview of section 19 of the U. S. Criminal Code.—*United States v. Classic.*[3]

To sustain its view that the right to an honest count of votes in a Congressional party primary was secured by the Constitution, and so was within the purview of section 19 of the U. S. Criminal Code, the majority of the Court, speaking through Mr. Chief Justice Stone, found that Congressional power to regulate the election of its members under Art. I, sections 2 and 4, extended to the conduct of primary as well as general elections.

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15. The dissenting judge in the instant case has of his own motion certified the case to the Supreme Court of Missouri. Salmons v. Dun & Bradstreet (Mo. App. 1941) 153 S. W. (2d) 556, 566.

16. (1917) 270 Mo. 676, 195 S. W. 711, L. R. A. 1917F 489.

1. (1909) 35 Stat. 1092, c. 321, 18 U. S. C. A. 51.

2. U. S. Const. Art. I., §2: "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." U. S. Const. Art. I., §4: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to places of choosing Senators."

3. (1941) 61 S. Ct. 1030.