terpreted or applied by the state court, the federal court may not stay its proceedings even though the state decisions interpreting the statute are obscure or not definitive,[32] but must interpret the statute in the light of those decisions. Furthermore, if the statute itself is unambiguous and clear—capable of bearing only one interpretation—the federal court need not and should not await the state court's supplying the obvious answer.[33] Since the statute in the instant case was clear, and there was no question of interpretation, the "doctrine of abstention" found no application.

Inasmuch as the jurisdiction of the court was properly invoked, it is submitted that the court of appeals was correct in directing a trial on the merits. The statutory and judicial restrictions on federal interference with state activities were inapplicable, and there was a sufficient showing of irreparable harm, both great and immediate, to warrant granting the injunction.

TORTS—NEGLIGENCE—LIABILITY OF EMPLOYER FOR EMPLOYEE'S MISCONDUCT

Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956)

The defendant-manager of defendant-realty company employed a complete stranger to paint various interiors of an apartment building owned by the realty company. According to plaintiff's evidence defendants did not require references, nor was any other investigation made to ascertain the hired man's character or background. The employee was assigned to paint the apartment of a young woman who defendants knew lived alone. While in the apartment the "painter" strangled the tenant. Subsequently, the employee was adjudicated to be a person of unsound mind, dangerous and irresponsible. In a suit brought by the administratrix of the deceased tenant's estate, the United States District Court for the District of Columbia directed a verdict for the defendants at the conclusion of plaintiff's evidence. On appeal the circuit court reversed and remanded, holding that the absence of any investigation of the employee would be sufficient to support a jury finding that defendants were liable for the death of the tenant.[1]

---

32. Doud v. Hodge, 350 U.S. 485 (1956); Meredith v. City of Winter Haven, 320 U.S. 228 (1943).

33. "The statutes involved are clear and there is no such need for interpretation or other special circumstances as would warrant the Court in staying action pending proceedings in courts of the state . . . ." Toomer v. Witsell, 73 F. Supp. 371, 374 (E.D.S.C. 1947). "[W]e agree with the District Court that there is neither need for interpretation of the statutes nor any other special circumstance requiring the federal court to stay action pending proceedings in the State courts." Toomer v. Witsell, 334 U.S. 385, 392 n.15 (1948). The clarity of the ordinance in the principal case was never questioned by either side. See note 1 *supra*.

1. Kendall v. Gore Properties, Inc., 236 F.2d 673 (D.C. Cir. 1956).

The facts of the case suggest several theories that the plaintiff might have relied upon: (1) the doctrine of *respondeat superior* making the master liable for the action of his servant;[2] (2) negligence of a landlord to a tenant by creating through affirmative action an unsafe condition in the premises;[3] (3) breach of a duty to protect arising from the relation between plaintiff and defendant, in this case landlord-tenant;[4] (4) negligence of the defendant in placing a third person in such relation to another as to create unreasonable risk of injury to the other person.[5]

The plaintiff did not invoke the doctrine of *respondeat superior*. Since the act of the employee—viz., murder—was far from within the scope of his employment,[6] obviously the defendants could not be liable under this doctrine. The second possible theory of recovery, the duty of a landlord making repairs of leased premises not to leave it in a dangerous condition,[7] would also seem inapplicable to the facts of the principal case. Generally, under this theory the condition is a physical one rather than the activity of a person.[8]

Under the third theory the relationship between the defendant and the plaintiff should be considered to determine whether the defendant had a duty[9] to protect the deceased from various foreseeable dangers.[10]

2. *Id.* at 681 n.18.
3. *Id.* at 680-81.
4. *Id.* at 678-79, 681.
5. *Id.* at 677-80.
6. RESTATEMENT, AGENCY § 219 (1933); 2 MECHEM, AGENCY § 1874 (2d ed. 1914). See La Lone v. Smith, 39 Wash. 2d 167, 234 P.2d 893 (1951). *Cf.* Smothers v. Welch & Co., 310 Mo. 144, 274 S.W. 678 (1925); Hogle v. H.H. Franklin Mfg. Co., 199 N.Y. 388, 92 N.E. 794 (1910). *But see* Hall v. Smathers, 240 N.Y. 486, 148 N.E. 654 (1925), in which the court in dicta stated that the doctrine of *respondeat superior* was applicable where tenant was assaulted by defendant's building superintendent who defendant had reason to know was a dangerous person. Since the plaintiff relied solely on the doctrine of original negligence, the court gave no reasons to support the statement.
7. The RESTATEMENT, TORTS § 362 (1934), limits negligence to cases in which the landlord has left the premises in a *more* dangerous condition than they were before the repair was made. Several courts reject this limitation. See PROSSER, TORTS § 80, at 476-77 (2d ed. 1955); Bartlett v. Taylor, 351 Mo. 1060, 174 S.W.2d 844 (1943). *Cf.* Bailey v. Zlotnick, 149 F.2d 505 (D.C. Cir. 1945).
8. Dean v. Hershowitz, 119 Conn. 398, 177 Atl. 262 (1935); Olsen v. Mading, 45 Ariz. 423, 45 P.2d 23 (1935); Bloecher v. Duerbeck, 333 Mo. 359, 62 S.W.2d 553 (1933). In Bailey v. Zlotnick, 149 F.2d 505 (D.C. Cir. 1945), in which the landlord employed an independent contractor, the court expressly distinguished between negligent activity and the defective condition resulting from the negligence, holding the landlord not liable for the former but only for the latter. 149 F.2d at 506-07.
9. In determining whether liability exists in a negligence case of this type, assuming defendant is in the causal chain, two distinct problems must be solved. First, it is neessary to determine whether, as a result of defendant's conduct, there is foreseeability of harm to a person or property. If not, the defendant is free of negligence and therefore free of liability. But if there is foreseeability of harm, the defendant's activity may be classified as negligent and the court may find liability. However, it is here that the court faces the second problem—*i.e.*, whether to limit defendant's liability. For example, suppose defendant-cab company employs a taxi driver known to be dangerous for assaults. See RESTATEMENT, TORTS § 319 (1934). If the driver assaults a pedestrian on the street, it is likely defendant will not be held liable although he was negligent. *Cf.* Linden

The court in the principal case seemed to consider this possibility,[11] but such an approach does not seem sound as applied to the facts of the case. Generally this duty rests upon the defendant's custody or control of the person or thing injured,[12] such as the duty of a sheriff to protect a prisoner. Normally the relation of landlord-tenant does not create a duty to protect a tenant from harm at the hands of third persons. It is only when the tenant is living alone and unprotected, as in the principal case, that such a duty could arise, and even then it would not extend to all foreseeable dangers. Certainly, had a stranger murdered the tenant the court would not have held the defendant liable. Thus, if liability exists, it must logically rest on the fourth theory, *i.e.*, the relation between the defendant and the tortfeasor.[13]

---

v. City Car Co., 239 Wis. 236, 300 N.W. 925 (1941). But had the taxi driver assaulted a passenger, the court would probably permit a finding of liability. This comment is confined to the question of negligence and does not consider the question of limiting liability.

10. See Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 899 (1934): "Where the custody of a person is by law entrusted to another under circumstances which deprive that person of a normal means of defending himself, there is a duty upon one in charge to exercise reasonable care to afford protection to the other." The authors argue, for example, that the relation of sheriff-prisoner imposes a duty on the sheriff to protect the prisoner from mob violence and other prisoners. *Id.* at 900-01. Also the authors contend that an employment relationship imposes a duty on an employer to protect an employee from known dangers incident to the employment. *Id.* at 902. This same line of reasoning could be applied to place a duty on an occupier to protect business visitors from conduct of third persons. *Id.* at 903-05. Several garagekeeper cases would seem to support this view. In Medes v. Hornbach, 6 F.2d 711 (D.C. Cir. 1925), the court held that a garagekeeper, having a duty to protect plaintiff's automobile, must exercise due care in the employment of servants. *Accord*, Goldberg v. Kunz, 185 Md. 492, 45 A.2d 279 (1946).

It should be noted that under the above rule, the general definition of liability in terms of relationship to the injured party indicates that it is not essential for the injured party to be on defendant's land. RESTATEMENT, TORTS § 320 (1934).

11. 236 F.2d at 678-79, 681.

12. See note 10 *supra*.

13. The garagekeeper cases cited in note 10 *supra* might also be subject to the same analysis. For example, in Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N.W. 703, 705 (1913), the court indicated that it was negligent to retain an employee: "If he [employer] had notice or knowledge . . . that such employee was possessed of proclivities rendering it likely that he would injure the property of others so delivered it was his duty to exercise ordinary care to protect the same from the danger of injury to which it was thus subjected." It would appear, therefore, that the garagekeeper would be absolved of liability although he was negligent in selection of the employee, if the proclivity of the employee was not the same as the actual conduct which caused the damage. For example, in the *Travelers Indemnity Co.* case, a garagekeeper knew the employee was likely to damage a customer's vehicle, but the court indicated it would have denied liability if the tort of the servant was a theft of the car. See also Renfroe v. Fouch, 26 Ga. App. 340, 106 S.E. 303 (1921) (syllabus opinion).

> [I]f a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity . . . . If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand. . . . Liability results . . . not because of the relationship of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. . . .

RESTATEMENT, AGENCY § 213, comment *d* (1934).

Under the fourth theory liability rests upon creating an unreasonable risk to another through the employment of a third person who is likely to commit torts or crimes.[14] Several cases have held the landlord liable for employing persons who he knows or should know are likely to cause injury to a party on the premises.[15] The next extension of the doctrine occurs in a few cases which impose liability when the

14. The actor's conduct may create a situation which affords an opportunity or temptation to third persons to commit more serious forms of misconducts which may be of any of several kinds. (1) The third person may intend to bring about the very harm which the other sustains. (2) He may not intend to bring it about but may intentionally so misconduct himself as to make such harm probable. (3) He may act recklessly in conscious indifference to the safety of others. The actor is required to anticipate and provide against all of these misconducts under the following conditions in all of which it is immaterial to the actor's civil liability that the third person's misconduct is or is not criminal at common law or under a statute:

. . .

5. where he has brought into contact with the other, or intentionally caused the other to associate himself with, a person whom the actor knows or should know to be peculiarly likely to commit intentional or reckless misconduct; the association being one which creates temptation to, or affords peculiar opportunity for, such misconduct . . . .

RESTATEMENT, TORTS § 302, comment *n* (1934). See also RESTATEMENT, AGENCY § 213, comment *d* (1934).

The doctrine was rejected by several of the older cases. See Henderson v. Dade Coal Co., 100 Ga. 568, 28 S.E. 251 (1897) (defendant negligent in guarding convicted sexual offender who raped plaintiff after escape, but held not liable because convict was an independent intervening force); Oakland City Agricultural and Industrial Soc'y v. Bingham, 4 Ind. App. 545, 31 N.E. 383 (1892) (defendant not negligent in absence of facts sufficient to raise doctrine of *respondeat superior*). As late as 1931, the Louisiana court in Cappel v. Pierson, 15 La. App. 524, 132 So. 391 (1931), refused to recognize the doctrine. In the last cited case the defendant-superintendent of an insane asylum released a homicidal maniac who shortly thereafter killed plaintiff's husband. Conceding that the defendant was negligent, the court found him not liable for lack of proximate causation. This position seems inconsistent since the hazard that occurred was that which made the conduct negligent. See Harper & Kime, *supra* note 10, at 898; RESTATEMENT, TORTS § 449 (1934).

The modern trend is to accept the doctrine. Austin W. Jones Co. v. State, 122 Me. 214, 119 Atl. 577 (1923) (defendant liable for negligence in paroling insane person who burned plaintiff's building); Missouri, K. & T. Ry. v. Wood, 95 Tex. 223, 66 S.W. 449 (1902) (defendant liable for his guard's negligence in letting smallpox charge escape and infect plaintiff). This same rule seems applicable where one puts a dangerous chattel in the control of a third person who is likely to create an unreasonable risk of harm to others in using it. RESTATEMENT, TORTS § 308 (1934). See, *e.g.*, Mitchell v. Churches, 119 Wash. 547, 206 Pac. 6 (1922) (defendant held liable to plaintiff for negligence in permitting an intoxicated friend to drive his car).

The usual reason given for finding negligence is that the defendant stands in such a relation to the third person as to give him some control over his actions. PROSSER, TORTS 189-90 (2d ed. 1955); Harper & Kime, *supra* note 10 at 895-98. See Brooke v. Bool, [1928] 2 K.B. 578. See also cases cited in notes 15-20 *infra*. However, "control" should be liberally construed to include cases in which the harm occurs after defendant's relationship to the tortfeasor has ended. *E.g.*, in Janof v. Newsom, 53 F.2d 149 (1931), defendant-employment agency violated the licensing statute by failing to check references of the person it sent as a servant to plaintiff's home. The next day the servant made off with plaintiff's jewelry. Had defendant investigated, he would have discovered that the servant had been guilty of similar thefts. The court held the violation of the statute constituted negligence and refused to limit liability because the statute was intended to protect persons in the plaintiff's class.

injury to plaintiff occurs on the plaintiff's premises rather than on the defendant's.[16] The principal case is of course an excellent example.

It is doubtful, however, whether land ownership or possession is of any material importance in determining liability. For example, in *Fleming v. Bronfin,*[17] in which the employee assaulted the plaintiff on the latter's premises, the court said: "One dealing with the public is bound to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee."[18] The court, in holding defendant liable, did not consider as relevant the fact that the injury did not occur on his premises. In *La Lone v. Smith,*[19] a landlord, who retained an employee known to be of violent temper and guilty of previous assaults, was held liable for the employee's assault on a tenant, not because the act occurred on the defendant's premises, but on the general principle that "negligent employment or retention of an incompetent employee makes the employer liable for injuries inflicted upon a third party by such employee."[20] Thus, it is submitted, when an employer knows or should know that an employee has a propensity for misconduct, he will be liable for injuries inflicted on persons to whom he sends the employee where the tort results from the injurious propensities.[21]

---

15. See, *e.g.,* Hall v. Smathers, 240 N.Y. 486, 148 N.E. 654 (1925), in which the landlord was held liable for retaining building superintendent known to be dangerous who assaulted the tenant-plaintiff in basement of the building. See also Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937); La Lone v. Smith, 39 Wash. 2d 167, 234 P.2d 893 (1951).

The same line of reasoning might be applied to garagekeepers held liable for damage by reason of their negligent selection or retention of employees. See Renfroe v. Fouch, 26 Ga. App. 340, 106 S.E. 303 (1921) (syllabus opinion); Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N.W. 703 (1913); Handley v. O'Gorman, 45 R.I. 242, 121 Atl. 399 (1923). See also Annot., 43 A.L.R.2d 403, 440 (1955).

16. The leading case is probably Brooke v. Bool, [1928] 2 K.B. 578, in which the defendant-landlord was authorized to enter and inspect tenant's shop at night. When another tenant reported to defendant that he had detected the odor of escaping gas, defendant invited him into the shop to help find the leak. Defendant struck a match in an effort to locate the leak. When he failed, the invitee climbed on top of a counter and struck another match. The resulting explosion injured plaintiff's goods. The court found the defendant liable on any one of three grounds: (1) agency, (2) failure to control invitee, and (3) joint-enterprise. *Cf.* Janof v. Newsom, 53 F.2d 149 (1931).

17. 80 A.2d 915 (D.C. Mun. App. 1951).

18. *Id.* at 917. The court cited RESTATEMENT, AGENCY § 213, comment *d* (1934) and RESTATEMENT, TORTS § 302, comment *n* (1934).

19. 39 Wash. 2d 167, 234 P.2d 893 (1951).

20. *Id.* at 171, 234 P.2d at 896. The court relied almost completely on RESTATEMENT, AGENCY § 213, comment *d* (1934). See also Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937), in which defendant-landlord retained a janitor who had assaulted others previously. The janitor fired a shotgun through a tenant's window and the landlord was held liable for the injuries. Again, the controlling factor was that the landlord allowed his servant to come in contact with others. *Id.* at 736-39, 193 S.E. at 354-55.

21. The courts unanimously hold the employer liable when he knows or should have known of the dangerous propensity of the employee. See, *e.g.,* Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 735, 193 S.E. 347, 353 (1937). Logically the next question presented is whether the employer is under a duty to investi-

Nor does the liability of the employer appear to be restricted to those cases where he deliberately places the employee in contact with the plaintiff. For example, in *Fletcher v. Baltimore & Potomac R.R.*,[22] the defendant was found negligent in permitting its employees to throw, from moving trains, kindling wood for their personal use. In *Hogle v. H.H. Franklin Mfg. Co.*,[23] an employer was found negligent in allowing its employees to throw iron objects out of the factory windows.

Thus, several propositions concerning the employer's liability for the employee's torts seem rather evident. It would appear that an employer has a duty to refrain from employing persons having propensities toward committing torts. His liability should not be limited because of the intervening act of the employee, for it is the foreseeability of this very circumstance that renders the employment negligent.[24] The doctrine thus formed would cover untold situations: e.g., the house-to-house salesman, the proprietor who sends his employees into private homes, and the filling-station operator who sends an employee on a repair call. The principal case merely represents another application of the growing doctrine.

The issue of causal relation raises difficult problems in some of the cases arising under this doctrine, and this is true of the principal case.

---

gate the employee, or whether he must have actual knowledge of the propensity or at least of facts from which knowledge might be inferred. A reading of the cases indicates that if the selection of the employee is not negligent, the employer is under no duty to investigate further. If, however, he later learns of dangerous propensities, subsequent retention is negligent. *Cf.* Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937); Traveler's Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N.W. 703 (1913); La Lone v. Smith, 39 Wash. 2d 167, 234 P.2d 893 (1951). In any case he has the duty to investigate when selecting the employee. Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Argonne Apartment House Co. v. Garrison, 42 F.2d 605 (D.C. Cir. 1930); Medes v. Hornbach, 6 F.2d 711 (D.C. Cir. 1925); Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. App. 1951). *Cf.* Janof v. Newsom, 53 F.2d 149 (D.C. Cir. 1931) (statutory duty to investigate).

Whether there has been a sufficient investigation is usually a jury question. See, *e.g.*, Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Fleming v. Bronfin, 104 A.2d 407 (D.C. Mun. App. 1954). Sometimes, of course, the investigation may be held adequate as a matter of law. See Argonne Apartment House Co. v. Garrison, 42 F.2d 605 (D.C. Cir. 1930). See also Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1951).

22. 168 U.S. 135 (1897). The Court said:

> It is not a question of scope of employment or that the act of the individual is performed by one who has ceased for the time being to be in the employment of the company. The question is, does the company owe any duty whatever to the general public, or, in other words, to individuals who may be in the streets through which its railroad tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could by the exercise of reasonable diligence on the part of the company have been prevented?

Id. at 140.

23. 199 N.Y. 388, 92 N.E. 794 (1910).

24. See RESTATEMENT, TORTS § 449 (1934). However, liability may be limited on other grounds. See note 9 *supra*. But the reader is reminded that the issue of limiting liability is beyond the scope of this comment.

Technically, if the plaintiff shows that the defendant did not investigate at all or investigated inadequately, he makes a case for the jury on the issue of negligence and he also shows a clear causal connection between the defendant's *conduct* and the harm. But, if his proof does not show that a reasonable investigation would have given notice of the danger, he has failed to demonstrate clearly that there is a causal relation between the defendant's *negligence* and the harm.[25] The question is whether the plaintiff should be required to offer further proof on this issue, or whether it should simply be left to the defendant to show that a reasonable investigation would not have put him on notice. Since the proof on the issue of causation need only be by a preponderance of evidence, it is submitted, that the plaintiff should be allowed to go to the jury. Once negligence is established, it seems that a causal relation between negligence and harm is likely enough to permit a jury to draw the inference if it wishes.[26] The trial court in the principal case directed a verdict for the defendant at the close of the plaintiff's evidence which showed that the defendant had made no investigation but did not show what an investigation would have revealed. In reversing this, the court of appeals held, inferentially at least, that the plaintiff had made a jury case without further proof on the issue of causation. An earlier decision of the same court in a similar case, *Argonne Apartment House Co. v. Garrison*,[27] contains this sentence: "There was no evidence to show that a further investigation would have disclosed sufficient facts to put the defendant on notice as to the dishonesty of Johnson."[28] In its context this may mean that the burden of showing what a reasonable investigation would have revealed is on the plaintiff. Under the circumstances, the law of the court on this point must be considered doubtful, but it is submitted that the conclusion inferentially reached in the principal case is correct. Of course, it should always be open to the defendant to show that a reasonable investigation would have been fruitless.

---

25. A similar issue arises in the manufacturer's liability cases, for the manufacturer"s *conduct* is always clearly connected to the harm done by his products, but his *negligence* is not causally connected if a reasonable inspection would not have revealed the defect. See Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 216, 240 N.W. 392, 395 (1932); PROSSER, TORTS 505-06 (2d ed. 1955).

26. See Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956).

27. 42 F.2d 605 (D.C. Cir. 1930).

28. *Id.* at 608.