St. John's Law Review

Volume 16
Number 2 *Volume 16, April 1942, Number 2*

Article 3

July 2013

Imputed Negligence in Automobile Accident Cases

Andrew J. Graham

NOTES AND COMMENT

IMPUTED NEGLIGENCE IN AUTOMOBILE ACCIDENT CASES

Introduction

The large number of automobile accidents which occur in the United States each year are productive of a considerable amount of litigation. Apart from statutory enactments, which in many states have somewhat changed the common law, its rules still govern. These rules grew out of custom, as interpreted by the courts, but as times and customs change, too frequently the law does not keep pace. Only thirty or forty years ago nearly all vehicles were horse-drawn. If the owner of a wagon and team handed the reins over to a passenger and let him drive, control of the horses was within easy reach. If he didn't think the driver reined up fast enough at a railroad crossing, he could reach out and resume control. The farmer riding on his loaded hay-wagon or the city dweller riding in his coach might choose to spurn the driver's seat for a more comfortable berth, but if they desired to do so they could ride with the driver, and in a very real sense control his actions. Actual control was a possibility, not a fiction. In this age of split-second timing the owner who allows another to drive would only increase the risk of accidents by interfering with the driver's control of the car or by diverting his attention. It is the writer's purpose to discuss briefly the automobile owner's rights and liabilities in collision cases, and to attempt to point out how statutory changes in New York have resulted in actionable negligence being imputed in certain cases in which contributory negligence will not be imputed.

Actionable Negligence

Few doctrines of the common law are more firmly established than that of *respondeat superior*.[1] This doctrine stems from a public policy which declares that the employer, rather than the public at large, should suffer any loss resulting from his employee's misconduct.[2] Presumably it is the employer who profits primarily from the execution of his business by the employee, and therefore it is but just that he should assume full responsibility for the manner in which his employee performs his duties. The master's liability does

[1] 1 BL. COMM. 429; Barwick v. Eng. Joint Stock Bank, Ex. Ch. L. R. 2 Ex. 259 (1867).

[2] Farwell v. Boston & W. R. Corp., 4 Metc. 49, 55 (Mass. 1842): "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or his servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it."

not arise from *status,* as in the case of a husband's liability at common law for his wife's torts, but from the fact that the servant's acts are deemed to be those of the master.[3] Thus, the master is liable only for the acts of his servant done with his consent, express or implied.[4] Applying the common law principle to the use of motor vehicles, we find that an employer is liable for injuries resulting from his employee's negligence occurring within the scope of his employment.[5] The employee's negligence is imputed to the employer in an action by a third person irrespective of the employer's presence in the vehicle.[6] Of course, if the third person's negligence, or the negligence of one whose negligence is imputable to him, has contributed to his injury he may not recover from either employer or employee.[7] When the owner of a vehicle is present when an accident occurs, under our common law rule he is held liable upon the theory that his control of the vehicle may be presumed from his presence. This follows even though another is driving.[8] In this instance, whether

---

[3] COOLEY, LAW OF TORTS (Students' ed. 1907) § 25; WEBB, POLLOCK ON TORTS (New Am. ed. 1894) 63: "As to married women, a married woman was by the common law incapable of binding herself by contract, and therefore, like an infant, she could not be made liable as for a wrong in an action for deceit or the like, when this would have in substance amounted to making her liable on a contract. In other cases of wrong she was not under any disability, nor had she any immunity; but she had to sue and be sued jointly with her husband, inasmuch as her property was the husband's; and the husband got the benefit of a favorable judgment and was liable to the consequences of an adverse one." As to the effect of statutory changes upon the "unity" of husband and wife see (1941) 16 ST. JOHN'S L. REV. 78.

[4] 1 BL. COMM. 429; Ford v. Grand Union Co., 268 N. Y. 243, 197 N. E. 266 (1935); Riley v. Standard Oil Co. of New York, 231 N. Y. 301, 132 N. E. 97 (1921); Rounds v. The D. L. & W. R. R., 64 N. Y. 129 (1876).

[5] Riley v. Standard Oil Co. of New York, 231 N. Y. 301, 132 N. E. 97 (1921); 42 C. J. 1095 *et seq.*

[6] 1 BL. COMM. 429: "As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se.*" Thus, the *presence* of the master is not the basis of his liability. The fact that the servant is subject to his command, whether or not he be present, renders the owner liable for all of the servant's acts done within the scope of his employment.

[7] Rider v. Syracuse R. T. Co., 171 N. Y. 139, 63 N. E. 836 (1902).

[8] Gochee v. Wagner, 257 N. Y. 344, 178 N. E. 553 (1931): "It was the respondent's car, he was present and had a legal right to control its operation, and the negligent conduct of the driver was imputable to him. The mere fact that he chose to sit on the rear seat and refrained from directing its operation did not change his rights or limit his liability.

"If the driver had negligently injured another, without fault on the part of the person injured, respondent would have been liable under the common law, for the car would have been operated in his presence and under his authority and control. The negligence of the driver should be imputed to the owner when present in the car, where the owner seeks to recover from the other negligent party for damages to his person or car."

Note that although the owner's control is *presumed,* he would not be liable for the driver's negligence if he actually was not in control. The presumption of control is not irrebuttable despite the *dictum* quoted above. Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78 (1917).

or not the driver is an employee is not important because the owner's liability rests upon the presumption that he is in actual control.[9] It does not follow from this, however, that the driver is not also liable.[10]

At common law the owner of a vehicle is not liable for injuries resulting from its operation by one not a servant and not in the owner's presence.[11] From this it is apparent that the common law does not impose a different liability upon the owner of an automobile than it does upon the owner of any other kind of inanimate personal property.[12] Frequently the drivers of vehicles were found to be less responsible financially than the owners, who, as we have seen, were liable for injuries produced by negligent use of the vehicle only if present or if the driver was an employee acting within the scope of his employment. To protect the public, Section 59 of the Vehicle and Traffic Law was enacted in New York.[13] By this stat-

---

[9] *Ibid.*

[10] Tanzer v. Read, 160 App. Div. 584, 145 N. Y. Supp. 708 (1st Dep't 1914); Kiffer v. Bienstock, 128 Misc. 451, 453, 218 N. Y. Supp. 526 (1926): "It is elementary that a tort feasor is liable for any damage, even though he may not be the owner of the property, the operation of which causes the damage. It is sufficient that he controls the property and operates it in a careless manner to charge him with liability."

[11] Prior to the enactment of Section 59 of the Vehicle and Traffic Law, an owner was not liable for the negligence of one who borrowed his car, whether the person was a stranger, member of his family, or servant on a personal errand. Psota v. Long Island R. R., 246 N. Y. 388, 159 N. E. 180 (1927); Renza v. Brennan, 165 Misc. 96, 300 N. Y. Supp. 221 (1938); Shaw v. Blainey, 154 Misc. 495, 277 N. Y. Supp. 466 (1935).

[12] In *Van Blaricum* v. *Dodgson*, 220 N. Y. 111, 115 N. E. 443 (1917), plaintiff sought to recover damages from defendant upon the theory that defendant was liable for injuries resulting from his son's negligent use of the family car which was owned by defendant. The son was driving alone when the accident occurred. The court held that as the son was on his own business, and not his father's, there was no theory upon which negligence could be imputed to the father, saying: "If contrary to ordinary rules, the owner of a car ought to be responsible for the carelessness of everyone whom he permits to use it in the latter's own business, that liability ought to be sought by legislation as a condition of issuing a license rather than by some new and anomalous slant applied by the courts to the principles of agency."

[13] VEHICLE AND TRAFFIC LAW § 59. Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner. All bonds executed by or policies of insurance issued to the owner of a motor vehicle or motor cycle shall contain a provision for indemnity or security against the liability and responsibility provided in this section; but this provision shall not be construed as requiring that such a policy include insurance against any liability of the insured, being an individual, for death of or injuries to his or her spouse or for injury to property of his or her spouse. If a motor vehicle or motor cycle be sold under a contract of conditional sale whereby the title to such motor vehicle or motor cycle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee or his

ute the owner of a motor vehicle driven upon a public highway is liable for injuries caused by its negligent operation, provided the owner has expressly or by implication consented to its use by the driver.[14] The owner's liability rests solely upon the fact that the statute imputes the driver's negligence to him.[15]

Contributory Negligence

If an owner is present in his car while it is driven by another, the driver's negligence is imputed to the owner because the owner is presumed to be in control.[16] This is true whether we are dealing with the owner's liability, or with his right to recover for injuries to person or property. The presumption of control which arises from the owner's presence in the vehicle may be overcome, and if it is, then the owner is in the same position he would be in if not present.[17] Thus, if present in the vehicle he may recover for injuries to person or property only if it is established that he was actually *not* in control.[18] The tendency of the New York courts seems to be towards

---

assignee shall be deemed such owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such motor vehicle or motor cycle. A chattel mortgagee, conditional vendor, or an entruster as defined by Section 51 of the Personal Property Law, of motor vehicle or motor cycle out of possession shall not be deemed an owner within the provisions of this section. As amended L. 1941, c. 627, § 2, eff. April 21, 1941.

[14] The statute abrogates common law rules only when the vehicle is driven upon a *public* highway. It was held in Sylvester v. Brockway Motor Truck Corp., 232 App. Div. 364, 250 N. Y. Supp. 35 (3d Dep't 1931), that a roadway on private grounds is not a "public highway", and hence an accident occurring there does not fall within the statute. In addition, the statute does not apply to a case where the owner has not consented to the use of his vehicle by the driver, or the driver operates the vehicle in violation of his instruction. Cohen v. Neustadter, 247 N. Y. 207, 160 N. E. 12 (1928); Fluegel v. Coudert, 244 N. Y. 393, 155 N. E. 683 (1927); Psota v. Long Island R. R., 246 N. Y. 388, 159 N. E. 180 (1927).

[15] Fluegel v. Coudert, 244 N. Y. 393, 155 N. E. 683 (1927): "The effect of this statute is to render obsolete the doctrine of such cases as *Van Blaricum* v. *Dodgson,* 220 N. Y. 111, 115 N. E. 443, L. R. A. 1917 F, 363 (1917), and *Potts* v. *Pardee,* 220 N. Y. 431, 436, 116 N. E. 78, 2 A. L. R. 785. Liability is no longer dependent upon use or operation by a servant in the 'business' of a master. Liability is dependent upon legal use or operation in business 'or otherwise', with permission or consent. The owner who loans a car to a friend or an employee will be liable hereafter for the negligence of the operator, though the loan is unrelated to employment, a mere friendly accommodation. The father will be liable for the negligence of the son to whom he has intrusted the use of the family automobile. *Van Blaricum* v. *Dodgson, supra.* We make no attempt at exhaustive enumeration. What has been said will suffice for illustration and example."

[16] *See* note 8, *supra.*

[17] In *Potts* v. *Pardee,* 220 N. Y. 431, 116 N. E. 78 (1917), the owner of the car was present but the driver's negligence was *not* imputed to her because he was deemed to be under the control of her husband who was also present and who was the employer of the driver.

[18] *Ibid.*

finding control by the owner if he is present and in a position to control the vehicle if he desires to do so.[19] The cases do not delimit clearly the extent to which control will be presumed, but certainly there is some point at which the presumption will dissolve because there can be no doubt that presence is mere evidence of control, which in turn is the only legally significant factor.[20] Where the driver is an employee of the owner and he is acting within the scope of his employment, his contributory negligence is imputed to the owner, irrespective of the owner's presence, because when he is so acting he is deemed to be under the employer's control and acting pursuant to his commands.[21] In this case, therefore, imputed contributory negligence would bar an action by the owner against a negligent third person. There is no difference in principle between the owner's right to recover damages for injuries to person or property, but it would indeed be a rare case in which the owner could claim damages for personal injuries unless he were in the car at the time of the accident, although this does not at all follow with respect to claims for injuries to the vehicle. Summarizing, we find that the driver's contributory negligence will be imputed to the owner when:

1. The vehicle is driven by an employee, acting within the scope of his employment, whether the owner is present or not.

2. The vehicle is driven by one other than an employee, and the owner is present and in control, or could exercise control if he so desired.

The driver's contributory negligence will not be imputed to the owner when:

1. The owner is not present and the driver is not an employee.

2. The owner is not present and the driver is an employee acting outside the scope of his employment.

3. The owner is present in the vehicle, but is not in control and could not exercise control even though he desired to do so.

The common law rules governing the imputation of contributory negligence were held to have been unaffected by Section 59 of the Vehicle and Traffic Law in *Mills* v. *Gabriel*.[22] In that case the driver,

---

[19] Gochee v. Wagner, 257 N. Y. 344, 178 N. E. 553 (1931).

[20] 42 C. J. 1076, 1077, and cases there cited.

[21] Wood v. Coney Island R. R., 133 App. Div. 270, 117 N. Y. Supp. 703 (2d Dep't 1909); Reed v. Metropolitan St. Ry., 58 App. Div. 87, 68 N. Y. Supp. 539 (1st Dep't 1901); Smith v. New York Cent. R. R., 4 App. Div. 493, 38 N. Y. Supp. 666 (4th Dep't 1896).

[22] 259 App. Div. 60, 18 N. Y. S. (2d) 78 (2d Dep't 1940), *aff'd*, 284 N. Y. 751, 31 N. E. (2d) 512 (1941). Accord: Applebaum v. N. Y. Rys. Corp., 166 Misc. 129, 300 N. Y. Supp. 526 (1938). *But see* Shuler v. Whitmore, 138 Misc. 814, 246 N. Y. Supp. 528, *aff'd*, 233 App. Div. 892, 251 N. Y. Supp. 886 (4th Dep't 1931). In that case plaintiff was riding as a passenger in her

who was not an employee, was using the plaintiff's automobile with her consent, but in her absence, when it collided with another vehicle. The evidence established that the drivers of both cars were negligent. The Court of Appeals held that under the common law rules the plaintiff-owner could recover from the driver of the other car for damage done to her car. It was urged by the defendant, however, that the common law had been abrogated by the enactment of Section 59 of the Vehicle and Traffic Law, so that the contributory negligence of the driver of the plaintiff's car was imputable to her and was therefore a bar to her recovery. The court said that the purpose of this statute is to prevent the owners of motor vehicles from escaping liability for injuries resulting from its use by denying that it was being used in pursuit of their business.[23] The court held, therefore, that the statute may be invoked only to impute the driver's negligence to the owner when the owner is sought to be held for injuries to an-

---

own automobile when it collided with a truck driven by defendant's agent. Defendant moved to bring in the driver of plaintiff's car under C. P. A. § 193 (subd. 2) on the ground that if plaintiff recovered, he had a right to be indemnified by her because her negligence contributed to the injury. The court denied the motion on the ground that defendant had not shown that he would be entitled to indemnity from the driver of plaintiff's car, because if the driver was negligent plaintiff could not recover from defendant and there would be no reason for indemnification. In holding that the *contributory negligence* of a driver is imputed to the owner by Section 59 of the Vehicle and Traffic Law, the court said: "The claim is made that the responsibility imposed upon the owner of a motor vehicle by section 59 of the Vehicle and Traffic Law does not include injury to the person or damage to the property of the lender. The statute contains no such restriction, nor does any good reason why its effect should be so limited suggest itself. If the negligence of the operator is imputable to the owner in actions by third person against the owner, the converse must also be true; that is, the negligence of the operator will be imputed to the owner in actions by the owner against third persons.

"While I have been unable to find any case arising in this state where the question has been presented, the Supreme Court of the state of Iowa, in the case of *Secured Finance Co.* v. *Chicago, Rock Island & Pacific Railroad Co.*, 207 Iowa 1105, 224 N. W. 88 (61 A. L. R. 855), has held that the contributory negligence of the borrower of an automobile, in case the car is injured by a third person, is imputable to the owner, in view of the statute making the owner liable for any damage done by the car by reason of the negligence of one who is driving with the consent of the owner."

None of these remarks were necessary to the decision because even if the driver's negligence were not imputable to the owner, the defendant's motion could have been denied because the defendant, being negligent, would not have been entitled to indemnity from the driver of plaintiff's car, and hence could not implead her under C. P. A. § 193 (subd. 2). In addition, even if he could have impleaded the driver, reference to Section 59 of the Vehicle and Traffic Law was entirely unnecessary because by virtue of her presence in the car the owner would have had the driver's contributory negligence imputed to her under the common law rule.

[23] "The statute was enacted to remove the hardship which the common law rule visited upon innocent persons by preventing 'an owner from escaping liability by saying that his car was being used without authority, or not in his business'. Plaumbo v. Ryan, 213 App. Div. 517, 518, 210 N. Y. Supp. 225 (2d Dep't 1925)."

other.[24] That this interpretation may not always be productive of a logical result was conceded by the court, but it refused to enlarge the scope of the statute beyond its express terms, saying that if a driver's contributory negligence is to be imputed to the owner in cases beyond those provided for by the common law it is within the province of the legislature expressly to so provide. To illustrate the result of this interpretation, let us assume that *A* lends his car to *B*, and *X* lends his to *Y*. The cars collide as a result of the negligence of both *B* and *Y*, neither *A* nor *X* being present. Under Section 59 of the Vehicle and Traffic Law, as construed by the court, the negligence of *B* will be imputed to *A* in an action by *X*, and the negligence of *Y* will be imputed to *X* in an action by *A*. It will be seen that upon common law principles neither owner would be liable to the other, but that by the statute each may recover from the other unless the statute also provided for the imputation of contributory negligence. Under the court's interpretation of the statute it does not so provide, and a situation is presented which certainly was never intended by the legislature.[25]

If the legislature amends the statute so as to provide for the imputation to the owner of the contributory negligence of anyone who drives with the owner's consent, then in our illustration neither *A* nor *X* could recover from the other. This would allow them a remedy only against the drivers of their cars, respectively. This does not seem to be a harsh result, for it is within the control of an automobile owner to restrict its use only to persons who are careful, or who are at least financially responsible. This would also abolish an aspect of the common law which is still in force and for which there is apparently no sound reason, *viz.*, the determination of the owner's control, and hence the imputation of contributory negligence to him,

---

[24] *See also* Webber v. Graves, 234 App. Div. 579, 255 N. Y. Supp. 726 (4th Dep't 1932).

[25] The contributory negligence of the driver *was* imputed to the owner under circumstances similar to those in *Mills* v. *Gabriel* in *Buckin* v. *Long Island R. R.*, 285 N. Y. 146, 36 N. E. (2d) 88 (1941), but without in any way affecting the holding in the Mills case which the court recognized as containing a proper interpretation of the statute. Buckin's car was driven by another, not an employee, in his absence and with his consent. Buckin's son was a passenger in the car which was struck by one of defendant's trains. The occupants of the car sued for personal injuries and Buckin joined with them asserting a claim for damage to his car. The trial court charged the jury: "Of course, if the driver was negligent, the owner can't recover at all because he gave him permission, but if the boy is entitled to recover, then Mr. Buckin is entitled to recover." Buckin did not take exception to this charge. Judgment was entered in favor of all three plaintiffs. The Appellate Division affirmed as to Buckin, but reversed as to the occupants of the car as it found them to be negligent as a matter of law. The Court of Appeals affirmed the Appellate Division's determination with respect to the occupants, but reversed as to Buckin. The court held with respect to his claim that the doctrine of *Mills* v. *Gabriel* is sound but that the trial court's erroneous charge became the law of the case because Buckin raised no objection to it.

from the fact of his presence in the vehicle.[26] In the above illustration let us vary the facts slightly and observe the result. If owner *A,* after lending his car to *B,* rode with him and was present when the accident occurred, the legal picture would be materially changed. In this case, *X,* the absent owner of the other vehicle, could recover for damages to it from *A, B* and *Y.*[27] *A,* because of his presence in his car when it was driven by *B,* would be deemed to be in control, and therefore the negligence of the driver, *B,* would be imputed to him.[28] Hence, for the injuries to his car he could look only to *B.* If both owners were present in their cars when the accident occurred, neither could recover from the other, or from the driver of the other car, because, as they presumptively were in control, their driver's contributory negligence would be imputed to them. This would allow each to recover for damage to his car only against his driver. Is it fair or logical to predicate liability or non-liability solely upon the presence or absence of the owner of the vehicle? A moment's thought satisfies the mind that the cases are few in which an owner could actually control the conduct of the driver of his car. It is true that he could direct him as to the matter of speed, but to require a driver to wait for a command before starting, stopping or turning would only increase the hazards of the road. Rules of the "Horse and Buggy" days do not fit the exigencies of today's relatively high-speed traffic. The presence of the owner is significant only so long as control may reasonably be inferred from it, but by strict adherence to precedent the courts have reached a point where the fact of presence and not the fact of *actual* control seems to govern.[29]

Conclusions

Once we have agreed that the owner of a motor vehicle, rather than the public at large,[30] should suffer any loss caused by its negli-

---

[26] *See* notes 8 and 24, *supra.*

[27] Mills v. Gabriel, 259 App. Div. 60, 18 N. Y. S. (2d) 78 (1940), *aff'd,* 284 N. Y. 751, 31 N. E. (2d) 512 (1941).

[28] Gochee v. Wagner, 257 N. Y. 344, 178 N. E. 53 (1931).

[29] Of course, when the owner proves that another was in control of the driver, the latter's negligence is not imputable to him. Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78 (1917). But it seems that without evidence affirmatively establishing actual lack of control, it will be presumed from presence. In the cases which have held that an owner may recover from a third person for damage to his car despite the fact that the driver was negligent, the fact that the owner was absent when the accident occurred is stressed. Buckin v. Long Island R. R., 286 N. Y. 146, 36 N. E. (2d) 88 (1941); Mills v. Gabriel, 259 App. Div. 60, 18 N. Y. S. (2d) 78, *aff'd,* 284 N. Y. 751, 31 N. E. (2d) 512 (1941). Control may not logically be presumed from the owner's presence, for as a practical matter, in most cases, it is an impossibility. This seems to afford an excellent example of how the doctrine of *stare decisis* can cause the perpetuation of a rule long after the reason for it has ceased to exist.

[30] The recent enactment of Article 6-A of the Vehicle and Traffic Law,

gent use, whether he is absent or present, it follows that ownership rather than control, actual or presumed, should be the criterion for determining the rights and liabilities arising from collisions. By amending the Vehicle and Traffic Law so that the negligence of the driver will be imputed to the owner in all cases where the vehicle is used with his consent, express or implied, the legislature may achieve a result that is uniformly just. In addition to putting an end to the anomalous situation which has resulted from the interpretation of Section 59 of the Vehicle and Traffic Law in *Mills* v. *Gabriel* such an amendment would substitute sound public policy for the fiction that the owner's presence in a vehicle gives him control over the driver.

ANDREW J. GRAHAM.

POWER TO REMOVE ACCRUED CUMULATIVE DIVIDENDS—BUSINESS EXPEDIENCY VERSUS THE LAW

"A cumulative dividend is one 'With regard to which it is agreed that if at any time it is not paid in full the difference shall be added to the following payment'.[1] * * * The idea being that arrearages of one year are payable out of surplus earnings in subsequent years." [2] Except as provided for by the contract in the charter all stockholders have fundamentally the same rights.[3] Therefore, a conservative purchaser of stock, who may not wish to take the common risk that a corporation will earn a profit every year or if earned that it will be distributed, buys preferred stock providing for cumulative dividends.

"Before paying dividends to the common stockholders, the stated dividend with all arrearages, if any, must first be paid to these preferred stockholders. As against the common stockholders, the right to this cumulative preferred dividend is fixed and vested though payment thereof has been postponed.[4] When under the charter dividends which are cumulative are not paid, such dividends are said to be accrued cumulative dividends. In New York State it is well

---

which is in fact, if not in law, a provision for "compulsory insurance" for automobiles, makes it clear that the policy of New York is to place the risk of automobile operation squarely upon the owner rather than upon the public.

[1] CENT. DICT.

[2] Lockwood v. General Abrasive Co., 210 App. Div. 141, 205 N. Y. Supp. 511 (4th Dep't 1924).

[3] Lloyd v. Pennsylvania Electric Vehicle Co., 75 N. J. Eq. 263, 72 Atl. 16 (1909) ("It has been held, and may be regarded as entirely settled, that calling stock 'preferred stock' does not of itself determine the rights of the holders, for the extent of the preference is to be determined by the terms of the contract").

[4] PRASHKER, CASES AND MATERIALS ON THE LAW OF PRIVATE CORPORATIONS (1937) 772; Pennington v. Commonwealth Hotel Const. Corp., 17 Del. Ch. 394, 400, 155, Atl. 514, 517 (1931).