

## The Liability of an Owner for the Negligent Driving by a Third Person

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United States.<sup>73</sup> The Treasury is authorized to designate any of the Reserve Banks as depositaries of the United States.<sup>74</sup> Once funds are entrusted to the duly designated depositary, they are, in effect, in the Treasury and no longer in the possession of the receiving officer.<sup>75</sup> Such deposits are insured, and, therefore, the possibility of the public suffering a loss is reduced tremendously. Since, however, such funds may never reach the depositary through the negligence or misconduct of a subordinate, a statute expressly exempting the officer or changing the conditions of the official bonds seems necessary. When considering the complexities of the modern public service system, and the inequitable results of the operation of the "insurer" rule, it is manifest that public policy now requires only a limited liability of the officer.<sup>76</sup>

ROSE M. TRAPANI.

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THE LIABILITY OF AN OWNER FOR THE NEGLIGENT DRIVING BY A  
THIRD PERSON.

I.

The automobile has undoubtedly brought to the average man many social and economic advantages.<sup>1</sup> These advantages, however, have been obtained at a heavy cost in injury and death.<sup>2</sup> Notwithstanding the great damage to property and loss of life occasioned by the use of the automobile on public highways, the courts of New York,<sup>3</sup> as well as the courts in a majority of jurisdictions,<sup>4</sup> have con-

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<sup>73</sup> 41 STAT. 654, 655 (1920), 31 U. S. C. § 492 (1934).

<sup>74</sup> 38 STAT. 265 (1913), 12 U. S. C. §§ 391, 392 (1934).

<sup>75</sup> Branch v. United States, 100 U. S. 673 (1879).

<sup>76</sup> The writer wishes to thank Bernard Newman, Esq., of the New York Corporation Counsel's office, for his assistance and suggestions in the preparation of this article.

<sup>1</sup> Bohlen, *50 Years of Torts* (1937) 50 HARV. L. REV. 725; for an interesting discussion of the social effects occasioned by the automobile, see 2 ENCYC. SOC. SCI. 328.

<sup>2</sup> According to statistics furnished by the Motor Vehicle Bureau, the number of deaths in the United States during 1937 were 39,700 and the number of injuries 1,221,090. For the same year, the number of deaths in New York alone totaled 3,065 and the number of injuries 106,482. At the time of the writing of this note, the statistics for 1938 had not yet been completed. The New York Motor Vehicle Bureau, however, approximated that the number of deaths in the United States in 1938 would amount to 41,685 and the number of injuries 1,272,144. Approximate deaths in New York State for the same period were estimated at 3,218 and the number of injuries at 112,086.

<sup>3</sup> "A motor vehicle is not *per se* of so dangerous a character as to render a master liable for the negligence of a competent chauffeur to whom the master loaned the car for private use." *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057 (1st Dept. 1908); *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853 (1915); *Vincent v. Candall & Godley Co.*, 131 App. Div. 200,

stantly refused to regard the automobile as an inherently<sup>5</sup> dangerous instrumentality. The majority rule seems logical, for, if an automobile were considered to be dangerous *per se*, as dynamite,<sup>6</sup> or ferocious animals,<sup>7</sup> the rules of common law would not permit its operation on public highways for general use.<sup>8</sup>

In view of the fact that a majority of jurisdictions have rejected the "dangerous instrumentality theory", the liability of the operator or owner has not generally been that of an insurer, and liability must, therefore, be predicated on the theory of negligence.<sup>9</sup> It is elementary that after negligence has been established, the negligent operator is personally liable for all damages proximately resulting,<sup>10</sup> regardless of whether such operator is the owner, agent, servant, or bailee. The liability of the owner of a motor vehicle for damages occasioned by the negligence of a third person, however, is not so easily established nor so conclusively settled. This note is chiefly concerned with this

115 N. Y. Supp. 600 (2d Dept. 1909); *Towers v. Errington*, 78 Misc. 297, 138 N. Y. Supp. 119 (1912).

<sup>4</sup> *Fielder v. Davidson*, 139 Ga. 509, 77 S. E. 618 (1913); *Christy v. Elliot*, 216 Ill. 31, 74 N. E. 1035 (1905); *Premier Motor Mfg. Co. v. Tilford*, 61 Ind. App. 161, 111 N. E. 645 (1916); *Whitlock v. Dennis*, 139 Md. 557, 116 Atl. 68 (1921); *Fleischner v. Durgin*, 207 Mass. 435, 93 N. E. 801 (1911); *Coca Cola Bottling Works v. Brown*, 139 Tenn. 640, 205 S. W. 926 (1918); *Farlane v. Winters*, 47 Utah 598, 155 Pac. 437 (1916); *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876 (1916); *Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016 (1910).

*Contra*: *Schweinhaut v. Flaherty*, 49 F. (2d) 533 (App. D. C. 1931), *cert. denied*, 283 U. S. 864, 51 Sup. Ct. 656 (1931) (holding a taxicab to be a dangerous instrumentality); *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920); Note (1932) 17 CORN L. Q. 305; for collection of cases, see 16 A. L. R. 255; 5 AM. JUR. 523, 524.

<sup>5</sup> Although the courts in the majority of jurisdictions do not regard the automobile as dangerous *per se*, many decisions recognize the dangerous potentialities of the vehicle when operated by incompetent, negligent or reckless drivers. *Feitelberg v. Matuson*, 124 Misc. 595, 208 N. Y. Supp. 786 (1925); Note (1938) 12 ST. JOHN'S L. REV. 281; (1913) 43 L. R. A. (n. s.) 87; Note (1933) 3 BROOKLYN L. REV. 58; see cases cited notes 3, 4, *supra*.

<sup>6</sup> The courts take judicial notice of the fact that dynamite, nitroglycerin and gunpowder are dangerous agencies, under all circumstances, and at all times. *Mattson v. Minnesota etc. R. R.*, 95 Minn. 477, 104 N. W. 443 (1905); *Peterson v. Standard Oil Co.*, 55 Ore. 511, 106 Pac. 337 (1910). See also 11 R. C. L. 653, 654.

<sup>7</sup> The liability of an owner of ferocious animals such as lions, bears, etc. is that of an insurer. *Van Leuvan v. Lyke*, 1 N. Y. 515 (1848); *Malloy v. Starin*, 191 N. Y. 21, 83 N. E. 588 (1908); see 1 R. C. L. 1086, 1087.

<sup>8</sup> *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 443 (1907); see note 7, *supra*; (1922) 16 A. L. R. 271.

<sup>9</sup> *O'Tier v. Sell*, 252 N. Y. 400, 169 N. E. 624 (1930); *Lowell v. Williams*, 183 App. Div. 701, 170 N. Y. Supp. 596 (2d Dept. 1918), *aff'd*, 228 N. Y. 592 (1920); *Douglass v. Hewson*, 142 App. Div. 166, 127 N. Y. Supp. 220 (3d Dept. 1911); *Parsons v. Wisner*, 113 N. Y. Supp. 922 (App. T. 1909).

<sup>10</sup> *Uda v. Yale Upholstering Mfg. Co.*, 229 App. Div. 842, 242 N. Y. Supp. 862 (1st Dept. 1930); *Towers v. Errington*, 78 Misc. 297, 138 N. Y. Supp. 119 (1912); *Devuano v. Muller*, 126 Misc. 669, 214 N. Y. Supp. 577 (1926), *rev'd in part*, 128 Misc. 501, 219 N. Y. Supp. 83 (1926).

problem. Numerous factual situations with respect to the relation between the owner and the operator at the time of the accident may arise which directly affect the owner's liability. It is necessary, therefore, in order to understand properly the nature and extent of an owner's liability for the negligent driving of a third person to consider briefly the common law rules, as well as present statutory provisions.<sup>11</sup>

## II.

The common law principles in respect to an owner's liability for damages resulting from the negligence of a third person are few and comparatively simple. Difficulty arises, however, in the application of these rules to factual situations. The liability of an owner who was not operating the automobile at the time of the accident was predicated solely upon the theory of agency, or *respondeat superior*,<sup>12</sup> and this was so even though it was apparent in many cases that by so limiting the liability of an owner the injured person was afforded a sorely inadequate remedy in the recovery of damages for the injuries he had suffered.<sup>13</sup> The courts on several occasions deplored the inequitable results of the unfavorable situation,<sup>14</sup> but were so deeply imbedded in judicial precedent that they expressed the view that the situation could

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<sup>11</sup> N. Y. CONS. LAWS c. 71 (Vehicle and Traffic Law) § 59. For similar statutes in other states, see CAL. CIV. CODE (1929) § 1714¾; IOWA CODE (1927) § 5026; MICH. COMP. LAWS (Cahill, 1915) § 4825, as amended by MICH. PUB. ACTS 1927, No. 56, MICH. PUB. ACTS 1929, No. 19; ONTARIO HIGHWAY AND TRAFFIC ACT (1923) § 42(1); Note (1931) 17 CORN. L. Q. 158.

<sup>12</sup> Kellogg v. Church Charity Foundation of L. I., 203 N. Y. 191, 96 N. E. 406 (1911); Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853 (1915); Van Blaricum v. Dodgson, 220 N. Y. 111, 115 N. E. 443 (1917); Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Supp. 161 (1st Dept. 1905); McCann v. Davidson, 145 App. Div. 522, 130 N. Y. Supp. 473 (2d Dept. 1911); Cullen v. Thomas, 150 App. Div. 475, 135 N. Y. Supp. 22 (1st Dept. 1912); Tanzer v. Read, 160 App. Div. 584, 145 N. Y. Supp. 708 (1st Dept. 1914); Farthing v. Strouse, 172 App. Div. 523, 158 N. Y. Supp. 840 (2d Dept. 1916).

<sup>13</sup> In Cohen v. Neustadter, 247 N. Y. 207, 160 N. E. 12 (1928), the court stated that § 59 of the Vehicle and Traffic Law was enacted by the legislature chiefly to cure "the remediless plight of a highway traveler injured by a motor vehicle, other than the one in which he might be travelling, through the recklessness of an irresponsible driver to whom the owner had intrusted the vehicle and thereby made the accident possible."

<sup>14</sup> In Cunningham v. Castle, 127 App. Div. 580, 588, 111 N. Y. Supp. 1057 (1st Dept. 1908), the court stated, "It may be that it would be wise and in the public interests that responsibility for an accident caused by an automobile should be affixed to the owner thereof irrespective of the person driving it but the law does not so provide." To the same effect see Bohlen, *50 Years of Torts* (1937) 50 HARV. L. REV. 725, 727, wherein he states, "Perhaps it would have been for the best had our courts recognized the risk of injury or death both to motorists and to other travellers which experience has shown to be inseparable from even careful driving, as sufficient to require of those who use this new means of transportation, the burden of answering for even unavoidable accidents."

be remedied only by legislative enactment. Judicial opinion on this point was aptly expressed by Chief Justice Hiscock,<sup>15</sup> when he said:

"If contrary to ordinary rules, the owner of a car ought to be responsible for the carelessness of the person 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."

Thus, the courts reluctantly, but strictly, applied the principles of agency as the sole basis of an owner's liability.<sup>16</sup> The test applied was not whether it was convenient or just to consider the negligent operator the agent of the owner, but was rather, whether the driver was in fact the agent of the owner in respect to some transaction in which the driver represented and acted for the owner.<sup>17</sup>

In *Potts v. Pardee*,<sup>18</sup> a leading common law case, the defendant owned an automobile which at the time of the accident was being driven by a chauffeur employed by the defendant's husband. When the accident occurred both the defendant-owner and her husband were present in the vehicle. The plaintiff sought to hold the defendant liable on the ground that she was the owner and was riding in the car at the time of the accident. The court refused to allow recovery against the owner on the ground that at the time of the accident there existed no relation of principal and agent or master and servant between the defendant-owner and the negligent chauffeur, and consequently the negligence of the chauffeur could not be imputed to the defendant. In so holding the court stated that as a general rule an injured person "must seek his remedy against the person whose actual negligence caused the injury and that person alone is liable."<sup>19</sup> The case of master and servant is an exception to the general rule and the negligence of the latter is imputable to the master where the servant is doing the act which occasions the injury, and is at the time acting within the scope of his employment. This exception is based upon the fact that the servant is standing in the master's place and is representing him—since he must obey.<sup>20</sup>

It is apparent that the doctrine of imputed negligence is predicated upon the theory of the employer's control over the agent or servant.<sup>20</sup> The presence of the owner in the vehicle, at common law,

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<sup>15</sup> *Potts v. Pardee*, 220 N. Y. 431, 435, 116 N. E. 78, 80 (1917).

<sup>16</sup> See note 12, *supra*.

<sup>17</sup> *Van Blaricum v. Dodgson*, 220 N. Y. 111, 117, 115 N. E. 443, 445 (1917); Note (1933) 3 BROOKLYN L. REV. 58, 59.

<sup>18</sup> See note 15, *supra*.

<sup>19</sup> *King v. N. Y. C. & H. R. R. R.*, 66 N. Y. 181 (1886); *Engle v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052 (1893); see also note 11, *supra*.

<sup>20</sup> *Terwilliger v. Long Island R. R.*, 152 App. Div. 168, 136 N. Y. Supp. 733 (2d Dept. 1912), *aff'd*, 209 N. Y. 522, 102 N. E. 1114 (1913); *Blake v. Brown*,

raised a strong presumption that he had control of its operation<sup>21</sup> but the mere presence of the owner did not necessarily make him liable.<sup>22</sup> The presumption of liability might be rebutted by proof that at the time of the accident the relationship between the owner and the operator was not that of principal and agent or master and servant.<sup>23</sup> The courts in a few jurisdictions advanced the rule that the owner regardless of his relation to the driver was under a duty to prevent if possible, the driver from operating the vehicle in a dangerous manner or in violation of law.<sup>24</sup>

The strict application of the theory of agency and *respondeat superior* as the basis of an owner's liability at common law exempted the bailor from liability for the consequences of the negligent driving of the bailee.<sup>25</sup> Under certain circumstances, however, the bailor was held liable, but in those cases he was in effect held liable for his negligence in loaning a car that was in need of repair,<sup>26</sup> or in loaning the vehicle to a person who he knew was an incompetent driver.<sup>27</sup>

The fact that the bailor was present in the automobile at the time of the accident did not in and of itself make him liable for the manner in which it was operated,<sup>28</sup> for the bailee was deemed to have

180 N. Y. Supp. 441 (App. T. 1920); *Horandt v. Central R. R.*, 81 N. J. L. 448, 83 Atl. 511 (1911).

<sup>21</sup> *Kellogg v. Church Charity Foundation of L. I.*, 203 N. Y. 191, 96 N. E. 406 (1911); *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 182 (1915); *Matter of Carrol v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507 (1916).

<sup>22</sup> See cases cited note 28, *infra*; (1919) 2 A. L. R. 888; (1932) 80 A. L. R. 285, and cases cited therein.

<sup>23</sup> See cases cited note 12, *supra*.

<sup>24</sup> *Randolph v. Hunt*, 41 Cal. App. 739, 183 Pac. 358 (1919); *Harris v. Boling*, 132 Okla. 17, 269 Pac. 274 (1928); see *Huddy*, 7, 8 *Cycl. of Auto. Law* § 92. There are no cases in New York directly in point. It is apparent that the application of the rule is limited to those situations wherein the driver drives negligently for a period of time sufficient to allow the owner to interfere. The rule could have no application in situations such as the one presented in *Potts v. Pardee*, *supra*, wherein it appeared that the only negligent act of the driver, and the resulting accident, occurred almost simultaneously, and thus the owner was afforded no opportunity to protest against the manner in which the vehicle was being driven.

<sup>25</sup> *Van Blaricum v. Dodgson*, 220 N. Y. 111, 115 N. E. 443 (1917); *Tallon v. Swachhomer*, 226 N. Y. 444, 123 N. E. 737 (1919); *Schultz v. McGuire*, 241 N. Y. 460, 150 N. E. 516 (1926); *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057 (1st Dept. 1908); *Davis v. Anglo-American Tire Co.*, 145 N. Y. Supp. 341 (Sup. Ct. T. T. 1913).

<sup>26</sup> *Knapp v. Gould Automobile Co., Inc.*, 252 App. Div. 430, 299 N. Y. Supp. 688 (4th Dept. 1937).

<sup>27</sup> *Devitt v. Continental Casualty Ins. Co.*, 269 N. Y. 474, 199 N. E. 765 (1936).

<sup>28</sup> In *Hartley v. Miller*, 165 Mich. 115, 130 N. W. 336 (1911), the defendant loaned his automobile to a friend and was persuaded to accompany him. The plaintiff was injured through the negligent manner in which the car was driven by the defendant's friend and brought action against the owner. The court held that at the time of the accident the automobile was not subject to his control and he was, therefore, not liable for the negligent way in which it was driven, notwithstanding his presence in it. *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78 (1917).

exclusive possession and control of the vehicle.<sup>29</sup> The position of the bailor was, therefore, unlike that of the principal or master in that he had no control over the vehicle or the person driving it and consequently the negligence of the bailee was not imputed to him.<sup>30</sup>

For the same reason, the doctrine was extended to the "family car" and resulted in exempting the head of the household from liability for the negligence of a member of his family in operating the car while pursuing his own pleasure.<sup>31</sup> Thus, in *Van Blaricum v. Dodgson*<sup>32</sup> the court refused to hold the defendant liable for damages caused by the negligence of his son, while on an errand of his own, even though the defendant-father knew of his son's use of the vehicle.

In 1909, there was an apparent attempt to extend, by judicial legislation, the well established principles governing the liability of the principal<sup>33</sup> and bailor-owner.<sup>34</sup> A novel proposition was presented in *Ingram v. Stockamore*,<sup>35</sup> wherein the court held that "the owner of an automobile should be responsible for injuries caused by it by the negligence of anyone whom he permits to run it in the public street."<sup>36</sup> The practical results of the rule set forth in the *Ingram* case would have been to extend the liability of an owner even beyond that imposed by present statutory provisions.<sup>37</sup> The New York courts, however, bound by judicial precedent, refused to follow the *Ingram* case and awaited legislative enactment regulating the liability of the owner.

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<sup>29</sup> See *Gochee v. Wagner*, 257 N. Y. 344, 178 N. E. 553 (1931); Note (1931) 17 CORN. L. Q. 158.

<sup>30</sup> *Ibid.* At common law the negligence of the bailee was not imputed to the bailor when sued by a third person. When the bailor brought an action to recover damages done to his vehicle due to the combined negligence of the bailee and a third person, the bailee's negligence was imputed to the bailor and he was precluded from a recovery. Present statutory provisions have not changed this rule.

<sup>31</sup> *Heissenbittel v. Meagher*, 162 App. Div. 752, 147 N. Y. Supp. 1087 (1st Dept. 1914), *aff'd*, 221 N. Y. 511, 116 N. E. 1050 (1917); *Kohlmeier v. Allen*, 201 App. Div. 445, 194 N. Y. Supp. 597 (1st Dept. 1922); *Powers v. Wilson*, 203 App. Div. 232, 196 N. Y. Supp. 600 (3d Dept. 1922); see (1929) 64 A. L. R. 844.

<sup>32</sup> 220 N. Y. 111, 115 N. E. 443 (1917).

<sup>33</sup> See note 12, *supra*.

<sup>34</sup> See notes 17, 25, *supra*.

<sup>35</sup> 63 Misc. 114, 118 N. Y. Supp. 399 (1909).

The case presented the following factual situation: The defendant loaned his automobile to his chauffeur in order that the chauffeur could make a pleasure trip with some friends. Chauffeur while on the trip negligently drove the defendant's car into a carriage owned by the plaintiff, and as a result the plaintiff was injured. The plaintiff brought action against both the defendant-owner and the negligent chauffeur.

<sup>36</sup> The owner of a motor vehicle, under the rule laid down by the court in the *Ingram* case, *supra*, would apparently be liable for the negligence of a driver in possession of the car with the consent of the owner, even though at the time of the accident the driver was using the car in a manner expressly prohibited by the owner. The court, therefore, held, in effect, that the automobile was a dangerous instrumentality.

<sup>37</sup> See note 47, *infra*.

## III.

The long-awaited legislative aid came with the enactment of Section 59 of the New York Vehicle and Traffic Law,<sup>38</sup> which provides that:

"Every owner of a motor vehicle or motorcycle 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 motorcycle, *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." (Italics ours.)

After considerable controversy the section was held to be constitutional as a valid exercise of the police power of the state.<sup>39</sup> The undoubted purpose of the statute was to increase the liability of a non-culpable owner of an automobile for its operation on public highways.<sup>40</sup> The courts in their interpretation of the enactment presumed, however, that the legislature intended to make no further innovations upon the common law than was required by the situation to be remedied,<sup>41</sup> and held therefore, that the section was intended to do no more than to abrogate the common law rule<sup>42</sup> exempting the owner of a *loaned* motor vehicle from liability for damages resulting from its negligent operation by the borrower. Section 59 has, therefore, in effect, changed the common law basis of imputing the negligence of a driver to a non-culpable owner, in that at present a driver's negligence may be imputed to an owner not only when there is an existing relationship of master and servant or principal and agent,<sup>43</sup> but also when the driver (bailee) is using the automobile with the express or implied consent of the owner.<sup>44</sup> The creation of the owner's

<sup>38</sup> N. Y. CONS. LAWS, c. 71 (Vehicle and Traffic Law) § 59.

<sup>39</sup> In *Commissioners of Palisade Park v. Lent*, 240 N. Y. 1, 5, 147 N. E. 228, 229 (1924), the court stated: "The state may prohibit the use of automobiles, except on such reasonable conditions as it may see fit to prescribe." *Atkins v. Hertz Drive-Ur-Self Stations*, 261 N. Y. 352, 185 N. E. 408 (1933); *People ex rel. Albrecht v. Harnett*, 221 App. Div. 487, 224 N. Y. Supp. 97 (4th Dept. 1927); *McNutt Auto Delivery Co.*, 126 Misc. 730, 214 N. Y. Supp. 562 (1926).

<sup>40</sup> *Fluegel v. Coudert*, 244 N. Y. 393, 155 N. E. 683 (1927); *Plaumbo v. Ryan*, 213 App. Div. 517, 210 N. Y. Supp. 255 (2d Dept. 1925); *Aarons v. Standard Varnish Works*, 163 Misc. 84, 296 N. Y. Supp. 312 (1937).

<sup>41</sup> "Statutes changing the common law are to be strictly construed and it will be held to be no further abrogated than the clear import of the language used in the statutes absolutely requires." *Dean v. Metropolitan Elevated Ry.*, 119 N. Y. 540, 547, 23 N. E. 1054, 1055 (1890); see *Cohen v. Neustadter*, 247 N. Y. 207, 160 N. E. 12 (1928); *Matter of Anderson*, 91 App. Div. 563, 87 N. Y. Supp. 24 (2d Dept. 1904).

<sup>42</sup> See notes 30, 31, *supra*.

<sup>43</sup> See case cited note 12, *supra*.

<sup>44</sup> *Chaika v. Vandenberg*, 252 N. Y. 101, 169 N. E. 103 (1930); 30 COL. L. REV. 563; see Note (1933) 3 BROOKLYN L. REV. 58.

consent as an additional basis for rendering him liable has, of course, rendered obsolete such cases as *Potts v. Pardee*<sup>45</sup> and *Van Blaricum v. Dodgson*,<sup>46</sup> for in the former the presence of the owner in the automobile would under our statute, constitute the necessary consent to its use by the driver, and in the latter unprotested knowledge of use would constitute implied consent.

The fact that an owner has loaned an automobile to another does not, however, necessarily render him liable under all circumstances for the negligence of the borrower. An owner may under present statutory provisions, as at common law,<sup>47</sup> so limit his consent to the use of the vehicle, as to free himself from liability if the borrower exceeds it.<sup>48</sup>

#### IV.

As has been already stated, the effects of the statute reached only to those instances in which the owner of the vehicle loaned it to a stranger or members of the family.<sup>49</sup> The common law principles, therefore, are still applicable in cases wherein the relation of employer and employee exists *and the car is being driven in the employer's business*.<sup>50</sup> The test, therefore, in determining whether, in any given case, an owner is liable for the servant's negligent driving is still whether the servant, at the time of the accident, is acting within the course and scope of his employment.<sup>51</sup>

The term "scope of employment" is at best a vague term, incapable of being defined in conclusive terms. A determination of whether at any given time the servant is acting within the scope of his employment depends upon the facts of each case.<sup>52</sup> The test generally applied, however, is whether the servant-driver is, at the time of the accident, engaged in the furtherance of his employer's business, concerning which he was employed.<sup>53</sup> It has consequently been con-

<sup>45</sup> 220 N. Y. 431, 116 N. E. 78 (1917).

<sup>46</sup> 220 N. Y. 111, 115 N. E. 443 (1917).

<sup>47</sup> *Goldberg v. Borden's Condensed Milk Co.*, 227 N. Y. 465, 125 N. E. 807 (1920); *Rolfe v. Hewitt*, 227 N. Y. 486, 125 N. E. 804 (1920); see *Rose v. Balfe*, 223 N. Y. 481, 119 N. E. 842 (1918); *Psota v. L. I. Ry.*, 246 N. Y. 388, 159 N. E. 180 (1927); *Rhodes v. Ocean Accident & Guarantee Corp., Ltd.*, 239 App. Div. 92, 266 N. Y. Supp. 593 (4th Dept. 1933).

*Cf. Arcara v. Moresse*, 258 N. Y. 211, 179 N. E. 389 (1932).

<sup>48</sup> For interesting discussion on the point see EDGAR AND EDGAR, *LAW OF TORTS* (3d ed. 1936) § 54.

<sup>49</sup> See note 25, *supra*.

<sup>50</sup> *Grant v. Knepper*, 245 N. Y. 158, 156 N. E. 650 (1927); *Steele v. C. G. Meaker Co.*, 131 Misc. 675, 227 N. Y. Supp. 644 (1928).

<sup>51</sup> See cases cited note 12, *supra*.

<sup>52</sup> See HUFFCUT, *AGENCY* (2d ed. 1901) § 245.

<sup>53</sup> *Freiberg v. Brady*, 143 App. Div. 220, 128 N. Y. Supp. 121 (1st Dept. 1911); *Cullen v. Thomas*, 150 App. Div. 475, 135 N. Y. Supp. 22 (1st Dept. 1912); *Amann v. Thurston*, 133 Misc. 293, 231 N. Y. Supp. 657 (1928), *aff'd*,

sistently held that the negligence of a driver is not imputable to his employer, when at the time of the accident the driver is on business of his own without the owner's consent, or acting solely for the benefit of a third person.<sup>54</sup>

A review of cases dealing with the scope of a servant's employment discloses that in numerous instances, novel factual situations render difficult the application of the rules governing the master-servant relationship. Particularly outstanding in this respect are *Bindert v. Elmhurst Taxi Corp.*<sup>55</sup> and *Babington v. Yellow Taxi Corp.*<sup>56</sup>

In the *Bindert* case<sup>57</sup> one of the defendant's cab drivers was hailed by another cab driver, whose cab had been stolen, and directed to pursue the stolen cab. At the trial it was conceded that the person who had hailed the defendant's cab had no intention of becoming a fare-paying passenger and also that the defendant's driver did not pull down the meter flag to register a fare. While in pursuit of the stolen cab, the defendant's driver negligently collided with the plaintiff's automobile. The plaintiff brought action against the defendant cab company to recover for damage done to his car. The court dismissed the complaint on the ground that at the time of the accident the driver was not acting within the course and scope of his employment, stating that the duties of the driver were clear, *i.e.*, "to receive and transport passengers for hire; it was not part of his duties to perform police functions without the defendant's permission, expressed or implied."

In the opinion of the writer the decision reached in this case can be justified on the ground that at the time of the accident the defendant's driver was carrying a person from whom he intended to receive no payment. The fact that the defendant was engaged in the *business* of transporting passengers for hire would seem to negative any inference that the driver could use the cab for solely gratuitous purposes.<sup>58</sup> It is submitted that the position of the defendant-owner

224 App. Div. 782, 230 N. Y. Supp. 794 (4th Dept. 1928); *Irolla v. City of New York*, 155 Misc. 908, 280 N. Y. Supp. 873 (1935); *Davies v. Anglo-American Auto Tire Co.*, 145 N. Y. Supp. 341 (Sup. Ct. T. T. 1913).

<sup>54</sup> *O'Brien v. Stearn Brothers*, 223 N. Y. 290, 119 N. E. 550 (1918); *Matter of Kowalek v. N. Y. Cons. R. R.*, 229 N. Y. 489, 128 N. E. 888 (1920); *Champion W. & Mfg. Co.*, 230 N. Y. 309, 130 N. E. 304 (1921); *Matter of Clark v. Voorhees*, 231 N. Y. 14, 131 N. E. 553 (1921); *Der O'hannessian v. Elliot*, 233 N. Y. 326, 135 N. E. 518 (1922); *Benevento v. Poertner Motor Car Co.*, 235 N. Y. 125, 139 N. E. 213 (1923); *Bryan v. Bunis*, 208 App. Div. 389, 203 N. Y. Supp. 634 (4th Dept. 1924); *Keer v. Clark*, 236 App. Div. 10, 257 N. Y. Supp. 869 (1st Dept. 1932); *Rosenberg v. Syracuse Newspapers, Inc.*, 248 App. Div. 294, 289 N. Y. Supp. 91 (4th Dept. 1936).

<sup>55</sup> 168 Misc. 892, 6 N. Y. Supp. (2d) 666 (1938).

<sup>56</sup> 250 N. Y. 14, 164 N. E. 726 (1928).

<sup>57</sup> See note 55, *supra*.

<sup>58</sup> In *Salomone v. Yellow Taxi Corp.*, 242 N. Y. 251, 257, 151 N. E. 442, 444 (1926), the court refused to hold the defendant taxi owner liable for the negligence of one of its drivers, where it appeared that the driver was carrying

was, therefore, analogous to that of an owner whose chauffeur invites strangers to ride contrary to orders, and as has already been stated,<sup>59</sup> in such cases the owner is not liable for injuries sustained by the invitee.

In the *Babington* case<sup>60</sup> a police officer jumped on the running board of one of the defendant's cabs and commanded its driver to chase another car in order to arrest its occupant. While the taxi driver was in pursuit of the fleeing car, he collided with another car and was killed.<sup>61</sup> The driver's widow sought compensation under the Workmen's Compensation Law,<sup>62</sup> which provides that certain classes of employers are liable for the disability or death of their employees caused by injury, "arising out of and in the course of employment."<sup>63</sup>

In affirming an award of the State Industrial Board, the court in the *Babington* case based its decision chiefly on the mandatory provisions of Section 1848 of the N. Y. Penal Law<sup>64</sup> which makes it a misdemeanor for anyone to refuse, when ordered by a police officer, to aid in making an arrest.

In holding that the death of the taxicab driver occurred while he

passengers who had no intention of paying a fare. The court held that the " \* \* \* [defendant] is answerable for the acts of \* \* \* [its driver] when acting as its servant in the course of his employment. It is not liable if he were accommodating his friends."

<sup>59</sup> See note 47, *supra*.

<sup>60</sup> See note 56, *supra*.

<sup>61</sup> See cases cited note 20, *supra*. It is difficult to see, how, in the *Babington* case, *supra*, the defendant owner had control over its driver, for even if it had given express instructions to its driver not to aid a police officer under the mandatory provisions of Section 1848, it would appear that such instruction would not be binding upon the driver. The driver was under a duty under all circumstances to aid an officer when called upon to do so.

<sup>62</sup> N. Y. WORK. COMP. LAW § 10 as amended by L. 1922, c. 615; L. 1933, c. 384, and L. 1934, c. 769:

"Every employer \* \* \* shall \* \* \* except as otherwise provided \* \* \* secure compensation to his employees and pay or provide compensation for their *disability or death from injury arising out and in the course of the employment* without regard to fault as a cause of the injury, except that there shall be no liability for compensation under this chapter when the injury has been solely occasioned by intoxication of the injured employee while on duty or by wilful intention of the injured employee to bring about the injury or death of himself or another." (Italics ours.)

<sup>63</sup> For injuries arising out of and in the course of employment see cases *Heidemann v. American District Telegraph Co.*, 230 N. Y. 305, 130 N. E. 302 (1921); *Costello v. Taylor*, 217 N. Y. 179, 111 N. E. 755 (1916); *Smith v. Price*, 168 App. Div. 421, 153 N. Y. Supp. 221 (3d Dept. 1915); *Miller v. Taylor*, 173 App. Div. 865, 159 N. Y. Supp. 999 (3d Dept. 1916).

*Cf.* *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665 (3d Dept. 1915).

<sup>64</sup> N. Y. PENAL LAW § 1848 as amended by L. 1932, c. 480: "A person, who, after having been lawfully commanded to aid an officer in arresting any person, or in re-taking any person who has escaped from legal custody, or in executing any legal process, wilfully neglects or refuses to aid such officer is guilty of a misdemeanor \* \* \*."

was acting within the scope of his employment, Chief Justice Cardozo stated that under Section 1848 of the Penal Law<sup>65</sup> the defendant-owner was chargeable with knowledge "that driver and car alike would have to answer to the officer's call. The \* \* \* [driver] in charge of the car could not desert it without peril to his master's interests. The fact that while protecting it for his master, he used it incidentally to preserve the public peace, was not such a departure from the course of duty as to constitute an abandonment of his employment."

The court in the *Bindert* case attempted to reconcile its decision with that of the *Babington* case on the narrow ground that the factual situations presented in the two cases were vastly different in that in the latter case the driver's aid was demanded by a police officer, while in the *Bindert* case the driver's assistance was requested by a private individual. It is submitted that the two cases cannot be reconciled on that ground, or in fact on any other ground, for, in the opinion of the writer, the majority opinion in the *Babington* case seems to have disregarded the well-established rule that the negligence of a servant-driver is imputed to an owner only when the owner has control over the driver.<sup>66</sup> As stated by Justice Kellogg in a dissenting opinion: "Unquestionably when the employee driver in obedience to a lawful command gave aid to the police he became himself a member of the police department. The direction which he took, the speed at which he drove his cab—these became subject to the supervision and control of the policeman on the running board. Since, from then on, in all his movements he must have yielded obedience, not to his original employer, but to the officer, he ceased to be a servant of the former and became a servant of the police department of the government."

The view expressed by Justice Kellogg seems logical and is in accord with the few cases dealing with the point.<sup>67</sup> A closely similar situation was presented in *Kennelly v. Stearns Salt & Lumber Co.*<sup>68</sup> wherein the court refused to allow recovery under the Michigan Workmen's Compensation Law, for the loss of a railroad employee's eye while fighting a forest fire under the command of a fire marshal, even though existing statutory provisions made it a misdemeanor to refuse to obey such order.

The decision in the *Bindert* case,<sup>69</sup> though contrary to that in the

<sup>65</sup> *Ibid.*

<sup>66</sup> See note 20, *supra*.

<sup>67</sup> *Monterey County v. Industrial Accident Commission*, 199 Cal. 221, 248 Pac. 912 (1926); *West Salem v. Industrial Commission*, 162 Wis. 57, 155 N. W. 929 (1916).

There are no cases in New York directly in point. The cases cited above, however, held that a person commandeered to do an act for the state became a servant of the state, and thus entitled to compensation under state laws providing compensation for officers of the municipality injured while acting within the course of their employment.

<sup>68</sup> 190 Mich. 628, 157 N. W. 378 (1912).

<sup>69</sup> 168 Misc. 892, 6 N. Y. Supp. (2d) 666 (1938).

*Babington* case,<sup>70</sup> however, did not have the effect of overruling the latter, for a comparison of the two cases clearly shows that the court in each instance was faced with an entirely different problem.

The *Babington* case<sup>71</sup> involved an interpretation of Section 1848 of the Penal Law<sup>72</sup> and the application of Section 10 of the Workmen's Compensation Law.<sup>73</sup> The court, in extending the scope of employment beyond the bounds set by other adjudicated cases<sup>74</sup> on point, undoubtedly had in mind the purpose for which the Workmen's Compensation Law was enacted, namely, providing greater security for the employee in the way of compensation for injuries and death sustained while engaged in his master's business.<sup>75</sup>

The *Babington* case left open the question of liability of an owner under the circumstances therein presented for injury done to a third person. In view of the court's ruling, it would seem to follow as a necessary conclusion that the owner would be liable for injury to a third person, for if the driver were acting within the course of his employment in one case, it would seem paradoxical to say that injury done to a third person would alter that fact.

Any extension of the doctrine advanced by the court would seem to place upon an owner of an automobile liability commensurate with that of a dangerous instrumentality.<sup>76</sup>

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<sup>70</sup> 250 N. Y. 14, 164 N. E. 726 (1928).

<sup>71</sup> *Ibid.*

<sup>72</sup> Note 64, *supra*.

<sup>73</sup> Note 62, *supra*.

<sup>74</sup> Notes 67, 68, *supra*; see (1929) 61 A. L. R. 1358; (1939) 42 HARV. L. REV. 713.

<sup>75</sup> *Post v. Burger*, 216 N. Y. 544, 111 N. E. 351 (1916), *aff'g*, 168 App. Div. 403, 153 N. Y. Supp. 505 (3d Dept. 1915); "The purposes of the act are to provide for injuries sustained or deaths incurred by employees in the hazardous employments specified in the statute without regard to fault as a cause thereof." *Lindebauer v. Weiner*, 94 Misc. 612, 159 N. Y. Supp. 987 (1916).

<sup>76</sup> See notes 4, 14, *supra*.