

Further Limitation of Motorcar Owners' Statutory Liability

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damaging) was admitted in evidence against him. The Court believed it "clear that the seizure of the ledger and bills, in the case now under consideration, was not authorized by the warrant."³² However the conviction was sustained, for when the officers arrested the co-defendants, they had the right without a warrant to search the place, a right which "extended to all parts of the premises used for the unlawful purpose."³³

In *Gambino v. United States*,³⁴ the defendants' automobile was stopped by state police and searched without a warrant. Liquor was found. The prisoners and liquor were immediately delivered to federal authorities. At the time, the state prohibition law had been repealed. Defendants' motion to suppress the liquor as evidence was denied, and it was later introduced at the trial. The Court, in reversing the conviction, determined that the state officers had acted without probable cause and in the erroneous belief that it was their duty to enforce the National Prohibition Act. While they were not, at the time, "agents of the United States," still "the wrongful arrest, search, and seizure were made solely on behalf of the United States." The "protection of the Fourth and Fifth Amendments" (restrictions upon federal action) was here extended to embrace state action "on behalf of the United States."³⁵ If there must be a rule of exclusion it is only proper that it be logically applied.³⁶

In conclusion, it might be observed that but fourteen of the forty-six states in which the question has arisen, have subscribed to the federal rule.³⁷ The argument that exclusion is the only feasible means of enforcing the Fourth Amendment³⁸ has been generally rejected in the interests of the greater social need that crime go not unpunished.

V. J. K.

FURTHER LIMITATION OF MOTORCAR OWNERS' STATUTORY LIABILITY.—It is interesting to observe that revolutionary extensions of

³² 48 Sup. Ct. 74, 76.

³³ *Ibid.* 77.

³⁴ *Supra* note 2.

³⁵ 48 Sup. Ct. 137, 138.

³⁶ In *Byars v. U. S.*, 273 U. S. 28 (1927), the Court had said, following its previous decisions, "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."

³⁷ See in this connection an editorial, N. Y. L. J., Dec. 1, 1927.

³⁸ See Atkinson, *supra* note 4, at page 26, exclusion is "warranted as the only practical method of giving force to the letter of the Fourth Amendment." Self-help and proceedings against the offender were considered ineffectual.

common law liability accomplished through statutory enactment at times become palpably restricted by refinement of exception or by severity of modification of subsequent judicial opinion. Section 282-e of the Highway Law¹ presents a striking illustration of this observation. Prior to the enactment of this statute it was the law that an owner was not liable for the negligence of a person to whom he had loaned his car, be that person a member of his family, a servant on a personal errand, or a stranger.² In other words the party injured must seek his redress against him whose actual negligence caused the injury.³

By the introduction of this new Section,⁴ the owner's liability was extended so as to charge him with responsibility for the negligence of a person to whom he loaned his car, in the course of its operation upon the highway. In this connection such lendee became the owner's agent.⁵ The rule, however, was soon circumscribed to the extent that where the owner of a car loans the same to another, who in turn gives it over to a third party without the consent of the owner, and while thus under the control of such third party an accident results, the owner is not liable if the original lendee was not present with the third party at the time of the accident.⁶

¹"Every owner of a motor vehicle 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 in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, expressed or implied, of such owner. * * * " Laws of 1924, Chap. 534; as amended by Laws of 1926, Chap. 730.

²*Potts v. Pardee*, 220 N. Y. 431, 116 N.E. 78 (1917); *Van Blaricum v. Dodgson*, 220 N. Y. 111, 115 N. E. 443 (1917); *Fallon v. Swackhammer*, 226 N. Y. 444, 123 N.E. 737 (1919).

³*King v. N. Y. C. & H. R. R. R.*, 66 N. Y. 181, 184 (1876). There is an exception to this rule in master and servant cases on the theory that the servant is deemed to act for his master and insofar as he obeys his orders he represents him. *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052 (1893).

⁴*Supra* note 1.

⁵*Fluegel v. Coudert*, 224 N. Y. 393, 155 N. E. 633 (1927).

⁶*Owen v. Gruntz*, 216 App. Div. 19, 214 N. Y. Supp. 543 (1926). Where the lende remains in control of the car, though permitting another to actually drive the same, the onus of responsibility is the owner's, *Stapelton v. Hertz Drivurself Stations*, 131 Misc. 52, 225 N. Y. Supp. 661 (1927); *Feitelberg v. Matuson*, 124 Misc. 595, 208 N. Y. Supp. 786 (1925); *Grant v. Knepper*, 245 N. Y. 158, 156 N. E. 650 (1927); since the lendee or appointed chauffeur of the owner was, to use the words of Judge Cardozo "still the director of the enterprise, still the custodian of the instrumentality confided to his keeping, still the master of the ship." *Grant v. Knepper, supra*, at 165. The fact that the act of the substituted driver was sudden and unexpected will not alter the rule.

The recent case of *Psota v. Andrews*,⁷ evinces a further restriction of Section 282-e. The action in question was one for personal injuries arising out of an automobile accident at St. James, Long Island. Nash, the chauffeur of the defendant, Mrs. Andrews, while driving defendant's car invited Rosalie and George Psota for a ride. Shortly thereafter the car was struck by a train of the Long Island Railroad, Nash was killed and the two children sustained injuries. They and their father now bring suit against the railroad company and Mrs. Andrews. The jury exonerated the railroad and found three verdicts in varying amounts against Mrs. Andrews. In the course of the trial, counsel for the defendant Andrews attempted to show that at the time of the accident, Nash was not using the car with her consent, expressed or implied, and was not engaged in operating the car in the course of his employment; furthermore, that his invitation to the Psota children to ride was in violation of and contrary to, her expressed instructions to him. Such testimony on the part of the defense was excluded by the trial judge to the exception of the defendant.

On appeal by the defendant to the Appellate Division of the Second Department, the decision of the Trial Court was unanimously affirmed,⁸ but leave was given to appeal to the Court of Appeals where it was held that the decision of the Court below must be reversed and a new trial granted. Crane, J., writing for a unanimous Court found that it was reversible error for the trial judge to rule out the foregoing testimony since Section 282-e⁹ applied only in the event that the chauffeur, Nash, was operating the car with the permission of Mrs. Andrews, and in the course of his employment. In this regard the Highway Law has not changed the rule of common law to the extent that under the new provision a master is liable for the acts of his servants or agents committed without their authority.¹⁰ The rule has always been that a chauffeur of an automobile must drive the same according to his instructions, expressed or implied.¹¹ Therefore, even though Nash was driving the car with the permission, expressed or implied, of Mrs. Andrews, he was not acting within the scope of his employment if he invited these children to ride contrary to her instructions.

⁷246 N. Y. 388, 159 N.E. 580 (Nov. 22, 1927).

⁸219 App. Div. 836, 220 N. Y. Supp. 912 (1927).

⁹*Supra* note 1.

¹⁰*Rolf v. Hewitt*, 227 N. Y. 486, 125 N.E. 804 (1920); *Goldberg v. Bordens Condensed Milk Co.*, 227 N. Y. 465, 125 N.E. 807 (1920).

¹¹*Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057 (1908); *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161 (1905); *O'Brien v. Stern Brothers*, 223 N. Y. 290, 119 N.E. 550 (1918).

¹²213 App. Div. 517, 210 N. Y. Supp. 225 (1925). See also *Roche v. N. Y. Central R. Co.*, 221 App. Div. 497, 224 N. Y. Supp. 656 (1927).

The holding in the instant case, renders obsolete the rule asserted in *Plaumbo v. Ryan*¹² where a similar question was raised. There it was ordained that an owner is liable if a third person was using his automobile with his consent and it will not avail the owner to contend that at the time and place of the accident his car was operated without the pale of his authority and not on his business. It was asserted, moreover, that the Highway Law abrogated the doctrine of *Rolf v. Hewitt*¹³ and made the owners of automobiles¹⁴ liable for the negligence of any person operating a car with permission of the owner, whether such automobile was being used in the business of the owner or otherwise.

The Court in the *Psota* case,¹⁵ on the other hand, maintained that the Legislature in modifying the previous law did no more than place the borrower and lender of a car in a relationship analogous to that of master and servant, principal and agent—but did not increase the liability of the lender beyond that of the master for the acts of his servant coming within the scope of employment.¹⁶

It has been held that the section under consideration is so extensive as to apply to persons riding within the car and not merely restricted to the protection of travelers on the highway.¹⁷ Under such a situation, however, care should be taken to distinguish cases where the owner of the car expressly forbade his chauffeur or lendeer from inviting people to ride and those cases where expressed permission so to invite was given. In the former class the owner is held to be not liable for injuries sustained by the invitee by reason of the negligent operation of the car by the chauffeur or lendeer.¹⁸ In the latter class the owner is deemed to be liable since the negligence of the chauffeur or lendeer is, in effect, that of the master.¹⁹

What the disposition of the Court would be in situations where it appeared that the owner's assent was given to take the car for the business of the borrower, but no intimation was given respecting the presence in the car of an invitee of the borrower, is the question still to be determined. The assumption is that even in such a case, the owner would be liable to the invitee of the borrower on the theory that implied authority was vested in the borrower to invite others to ride.

Further reflections on the principal case convinces one of its

¹²*Supra* note 10.

¹⁴After July 1, 1924.

¹⁵*Supra* note 7.

¹⁶*Ibid* 246.

¹⁷*Cohen v. Neustadter*, 247 N. Y. 207 (Jan. 1928).

¹⁸*Psota* case, *supra* note 7.

¹⁹*Cohen* case, *supra* note 17.

apparent soundness. Such an impression is strengthened by what has been hitherto determined to be the law, that the Legislature may not be presumed to have made any innovation upon the common law further than is required by the mischief to be remedied.²⁰ The purpose of the Highway Law was to cure the remediless plight of a highway traveler injured by a motor vehicle, other than the one in which he might be traveling, through the recklessness of an irresponsible driver to whom the owner had entrusted the vehicle and thereby made the accident possible.²¹ But in according this protection, it does not follow that the common law rule of master and servant must be abrogated. The principle was already put in jeopardy by earlier judicial interpretation of the section.²² There was set in it an entering wedge that might have been the beginning of its destruction. The *Psola* decision was imperative if the rule was to be preserved.

V. J. M.

TERRITORIAL JURISDICTION OF THE CITY COURT OF THE CITY OF NEW YORK.—The new city court act for the city of New York¹ recently has been the subject of judicial construction in the appellate term of the supreme court, first department.² The immediate point involved was the validity of section 27 providing for the execution of the court's process and mandates in any part of the state.³ Service of a summons was made upon the defendant in the city of Albany where he resided and had his place of business. A motion was made to dismiss the complaint on the ground that the said court had no jurisdiction over the person of the defendant and that it had no power to serve its process beyond the city limits. Respondent contended that the provision that the city court should have original jurisdiction concurrent with the supreme court in the class of actions enumerated⁴ empowered the city court to issue its process throughout the State. *Held*, Section 27 of the act was unconstitutional so far as it authorized the service of mandates indiscriminately in every part of the State because it transcended the jurisdiction

²⁰Dean v. Metropolitan R. Co., 119 N. Y. 540, 547; 23 N.E. 1054 (1890).

²¹*Supra* note 17, at p. 210.

²²*Supra* note 12.

¹N. Y. Laws 1926, ch. 539, enacted under authority of constitutional amendment (art. 6, sec. 15) approved by the people at the general election held Nov. 3rd, 1925, in effect Jan. 1st, 1926.

²American Historical Society Inc. v. Glenn, 131 Misc. 291 (1928).

³N. Y. City Court Act §27, provides that "all process and mandates of the court may be executed in any part of the State."

⁴*Ibid.* §16.