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NOTES AND COMMENT

NEW YORK MOTOR VEHICLE LAW; EFFECT ON COMMON LAW LIABILITY OF OWNER OF MOTOR VEHICLE.*—An interesting light is thrown on Section 282e of the Highway Law 1 by the recent decision. 2 In that case the owner had lent his automobile to one, who, in turn, had lent it to another, the first lendee not being in the car at the time it collided with and damaged plaintiff’s vehicle. The Court held that the owner was not liable inasmuch as he had not consented either expressly or impliedly that the lendee should turn the car over to another person. In distinguishing the case from Feitelberg v. Matuson, 3 the Court pointed this out and remarked that in the latter case the borrower was actually in the car when the accident occurred and had merely turned the wheel over to another person.

It is interesting to note that neither of these actions would have been maintainable against the owner of the automobile at common law. The general rule, prior to statutory enactment, was that mere ownership of an automobile did not render the owner liable for its negligent operation by another. 4 If an automobile was hired without a chauffeur the owner was not responsible for the negligence of the borrower’s operator during the time it was hired. Although the title remained in the owner, the hirer had the exclusive use of the thing hired during the period of hire; and neither the owner nor the creditors of the owner


1 L. 1924, ch. 534, as amended by L. 1925, ch. 167 and L. 1926, ch. 730, in effect May 3, 1926. “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, express or implied, of such owner. All bonds executed by or policies of insurance issued to the owner of a motor vehicle shall contain a provision for indemnity or security against the liability and responsibility provided in this section. If a motor vehicle be sold under a contract of conditional sale whereby the title to such motor vehicle 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 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. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section.”


3 124 Misc. (N. Y.) 595 (1925).

had any right to disturb him in the lawful enjoyment of it during that time. The hirer was, in effect, an independent contractor, whose acts were not to be attributed to the owner.\(^5\) A gratuitous bailment came within the same general rule, and by completely relinquishing control an owner could escape liability for the negligent acts of the bailee.\(^6\) Again, so far as the rule of \textit{"respondeat superior"} was concerned, the fact that the car was being driven by an employee did not fasten liability conclusively on the master unless it could be shown that such employee was acting within the general scope of his authorized employment at the time the act of negligence was committed.\(^7\)

The effect of the Highway Law, supra, has not yet so permeated these rules that it can be said to have abrogated them, though the few cases in the reports indicate an important change in the law. In Brooks v. McNutt,\(^8\) the defendant had leased a car on April 28 to Turner, a stranger. The car, according to the testimony of defendant's witnesses, was to be returned next day. Turner, while recklessly driving


\(^7\) 18 R. C. L. 804, and cases therein cited; Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78 (1917); Rolfe v. Hewitt, 227 N. Y. 486, 125 N. E. 804 (1920); Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801 (1911); Hartnett v. Gryzmish, 218 Mass. 258, 105 N. E. 988 (1914); Orr v. Thompson Coal Co., 219 Ill. App. 116 (1920); Durham v. Strauss, 38 Pa. Super Ct. 620 (1909); Gewanski v. Ellsworth, 166 Wis. 250, 164 N. W. 996 (1917); White Oak Coal Co. v. Rivoux, 88 Ohio 18, 102 N. E. 302 (1913); Pease v. Montgomery, 111 Me. 582, 88 Atl. 973 (1913); Adams v. Weisendanger, 27 Cal. App. 590, 150 Pac. 1016 (1915). “It is elementary that the master is not liable for injuries occasioned to a third person by the negligence of his servant, while the latter is engaged in some act beyond the scope of his employment, although he may be using the instrumentalities furnished him by the master with which to perform the ordinary duties of his employment.” Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133 (1906).

\(^8\) 126 Misc. (N. Y.) 730 (1926).
NOTES AND COMMENT

the car on May 1, injured plaintiff. The vehicle was found later abandoned and was re-delivered to the defendant by the police. The Court said, "In the absence of any statutory provision, the defendant having divested itself of control of the car and turned over control to someone else, the person in charge of the car would be solely liable for any damages caused by negligence." In its opinion the Motor Vehicle Law, supra, furnished the necessary provision; for, disregarding the fact that Turner was an independent bailee for hire over whose acts defendant had absolutely no control, the Court held it liable. In line with this decision is Stapleton v. Independent, a Michigan case, which was decided under a statute similar to the local one. The bailee, in that case, was a corporation, and in holding the owner liable, the Court decided that a bailor for hire could be liable for the acts of the servant of an independent bailee.

The reported cases since the enactment of the Michigan and New York statutes, supra, do not appear to have touched on the change, if any, in the liability of an owner of a motor vehicle for the negligent acts of his chauffeur. The common law rule is that a material deviation from the line of duty by a servant is sufficient to relieve the master from liability for his acts, and the same rule applies where the servant operates the car contrary to the strict orders of the owner that it shall not be operated at certain times or for other than designated persons. But in Plaumbo v. Ryan, the Court held that the object of the statute was to provide that the owner should be liable if the third person was using the automobile with his consent and to prevent the owner from escaping liability by saying that his car was being used at the time and place of the accident without specific authority or not in his business. In Michigan, Hatter v. Dodge, stands for a similar proposition, and if such is the settled law it would appear that modern legislatures

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11 Cronecker v. Hall, 92 N. J. L. 450, 195 Atl. 213 (1918); Solomon v. Commonwealth Trust, 256 Pa. 55, 100 Atl. 534 (1917); Youngquist v. L. J. Droese Co. (Wis.) 167 N. W. 736 (1918); Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801 (1911). "A plaintiff cannot recover where the chauffeur was not upon the defendant's business or acting within the scope of his employment but was going away from his work and in an opposite direction for a purpose of his own and on an errand for a friend." O'Brien v. Stern Bros., 223 N. Y. 290, 119 N. E. 550 (1918).
12 Sultzbach v. Smith, 174 Iowa 704, 156 N. W. 673 (1916); Linville v. Nissen, 162 N. Car. 95, 77 S. E. 1096 (1913).
14 "Aside from this, as the law now stands (under the statute—ed.) it is not a prerequisite for recovery to prove that the motor vehicle causing an injury was being operated in the business of the owner, for his use and enjoyment, or by his servant or employe." 202 Mich. 97 (1918).
have gone Lord Holt, the propounder of the doctrine of "respondeat superior," one better by holding that a master is liable for the acts of his servant as long as the latter has possession of the machine with the former's consent.

The New York Motor Vehicle Law, supra, fastens liability on the owner of an automobile only where his consent to driving the car, either express or implied has been given to the operator. Reverting to Owen v. Gruntz, it is clear that if the defendant had given only the bailee, a gratuitous one, consent to operate the vehicle, such consent could not be stretched by implication to cover any other person who did not exist in the contemplation of the owner. In contradistinction, Feitelberg v. Matuson, supra, was a case where the borrower was in the car and was merely permitting another person to operate it when the accident occurred. Control was still in the bailee though the ministerial act of operation was in another, and the owner's consent impliedly carried with it the permission to the bailee to use his own chauffeur or other person to perform the mechanical act of operation. If the latter decision is correct it may be argued from analogy that a similar result should follow where a servant remains in the automobile but turns the wheel over to a third person. As the servant is master "ad hoc" of the vehicle it may be said with some truth that he may do anything which the master could do with respect to its operation. Hence if he relinquishes the mechanical act of operation it would be equivalent to the master's act. But if this should be the law then certainly the old rule holding the master liable only where he has given the servant express or implied authorization to do so has been discarded. If the servant should leave the car entirely after relinquishing control to another, however, then the common law rule above stated would probably yet apply, inasmuch as there has been such a substitution of servants as even the statute cannot overcome. The rule is well settled that there cannot be a substitution of either master or servant without the consent of both.

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15 Vicarious Liability (T. Baty, p. 151); Brucker v. Fromont, 6 T. R. 659; Boson v. Sandford, 2 Salk. 440 (1689); Labatt’s Master and Servant, (2d ed.) p. 6727; "For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given and the circumstances under which the act is done, the master is responsible." Ritchie v. Waller, 63 Conn. 160, 28 Atl. 29, 27 L. R. A. 161, citing (1893) Stone v. Hills, 45 Conn. 47 (1877).

16 Supra, note 1.
17 Supra, note 2.
19 Cleveland, etc. R. Co. v. Berry, 152 Ind. 607, 53 N. E. 415 (1899);
Authority for the action of the Legislatures in this State and in Michigan rests in the police power inherent with the State. In Tennessee, South Carolina, and Connecticut statutes have been passed and held valid which made damages due to injuries received from negligent or illegal driving a lien on the vehicle, irrespective of who was driving the car as long as the operator had the consent of the owner to do so. The first Michigan statute on the point was declared unconstitutional so far as it attempted to impose liability where a trespasser obtained possession of the machine without the owner’s fault inasmuch as such liability was in violation of the “due process” clause of the Federal and State Constitutions. This error was remedied by the subsequent enactment.

A motor vehicle has been judicially declared not to be a nuisance; other Courts have held that they are not dangerous machines “per se” although under certain conditions and circumstances they may become such; and no Court has gone so far as to hold that the theory

Roddy v. Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112 (1891); Hanna v. Chattanooga, etc. R. Co., 88 Tenn. 310, 12 S. W. 718 (1889); Miller v. Moran Bros. Co., 39 Wash. 631, 81 Pac. 1089 (1905); Rhodes v. Georgia R. etc. Co., 84 Ga. 320, 10 S. E. 922 (1889).


21 Chap. 173, Sec. 5, L. 1905; Constitutionality upheld in Core v. Resha, 140 Tenn. 408, 204 S. W. 1149 (1917).

22 Act. 1915 (27 St. at Large, p. 737); Constitutionality upheld in Merchants’ v. Brigman, 106 S. Car. 362, 91 S. E. 332 (1916).

23 General Statutes, Sec. 1572; Constitutionality upheld in Wolf v. Sulik, 93 Conn. 431, 106 Atl. 443 (1919).


26 Supra, note 7.

27 Gaskins v. Hancock, 156 N. C. 56, 72 N. E. 80 (1911); Huddy Law of Automobiles (7th ed.) p. 35.

28 Linville v. Nissen, 162 N. Car. 95, 77 S. E. 1096 (1913); Hartley v. Miller, 165 Mich. 115, 130 N. W. 336 (1911); Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057 (1908); McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750 (1906); Jones v. Hoge, 47 Wash. 663, 92 Pac. 433 (1907). “An automobile is not a ‘dangerous instrumentality’ in the sense in which that term is used in the law; and the relation between the owner of a car and his chauffeur is determined, in the absence of a statute, by the general rules of law relative to master and servant.” Brinkman v. Zuckerman, 192 Mich. 624, 159 N. W. 316 (1916).

“It is not the ferocity of the automobile that is to be feared, but the ferocity of those who drive them. Until human agency interferes they are usually harmless.” Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338 (1908).
of dangerous appliances applies in the case where an automobile is hired to an independent contractor. Nevertheless, as was said in Stapleton v. Independent, "If the owner of such agency (referring to an automobile) consents to turn it over to the control of an incompetent or reckless chauffeur he is not deprived of any legal right in holding him liable for its negligent operation when in such control and a greater degree of safety to the general public is likely to follow. The owner of an automobile is supposed to know, and should know, about the qualifications of the persons he allows to use his car, to drive his auto, and if he has doubts of the competency or carefulness of the driver he should refuse to give his consent to the use by him of the machine." It is this reasoning which has prompted the several State Legislatures to enact the statutes which, in effect, create "double-barrelled" liability against the owner besides the driver in favor of an injured plaintiff.

L. L. W.

EXAMINATION BEFORE TRIAL.—Section 288 of the Civil Practice Act provides in part that: "Any party to an action in a court of record may cause to be taken by deposition, before trial, his own testimony or that of another party which is material and necessary in the prosecution or defense of an action." The section also goes on to say: "A party to such an action may cause to be so taken the testimony, which is material and necessary of the original owner of a claim which constitutes, or from which arose, a cause of action acquired by an adverse party by grant, conveyance, transfer, assignment or endorsement and which is set forth in his pleading as a cause of action or counterclaim." * * *

This section substantially differs from the code of Civil Procedure in that now all parties are subject to examinations, and makes it incumbent on the objector to apply to the court for an order to vacate the notice of examination inasmuch as the purpose of this section is to remove all procedural trammels and permit examinations with as few restrictions as possible. It was necessary under the code, however, for the moving party to prove circumstances which would authorize such examination, the theory being that ordinarily parties were not subject to examination.1

1 Burbank v. Bethel Steam, 75 Me. 373 (1883); Whitney v. Clifford, 46 Wis. 138, 49 N. W. 835 (1879); Powell v. Virginia Const. Co., 88 Tenn. 692, 13 S. W. 691 (1890); Cunningham v. International, 51 Texas 503 (1879); "The only obligation on the part of an employer in reference to tools or appliances supplied is to exercise due care not to let the contractor have an appliance which is a nuisance or is apparently defective or likely to cause injury to third persons." 14 R. C. L. 84-85.

* Supra, note 6.