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*Bowersock Mills* and *O'Neill* cases are harbingers of the future judicial approach to these problems. Time alone will enable us better to evaluate their significance.

It is submitted that given a bona fide debt of a genuine business corporation, the courts should follow the statutory mandate and honor the obligation as an indebtedness. One would not be far amiss in noting that the failure to do so is fast obliterating the line between tax avoidance and tax evasion, despite the lip service so eloquently paid to the principle that:

"The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."<sup>53</sup>

## VOIDANCE OF AGREEMENTS EXEMPTING NEW YORK GARAGES AND PARKING PLACES FROM LIABILITY FOR NEGLIGENCE

WARREN FREEDMAN†

### I. THE STATUTE

"Garages and parking places: agreements exempting from liability for negligence void.

"No person who conducts or maintains for hire or other consideration a garage, parking lot or other similar place which has the capacity for the housing, storage, parking, repair or servicing of four or more motor vehicles, as defined by the vehicle and traffic law, may exempt himself from liability for damages for injury to person or property resulting from the negligence of such person, his agents or employees, in the operation of any such vehicle, or in its housing, storage, parking, repair or servicing, or in the conduct or maintenance of such garage, parking lot or other similar place, and any agreements so exempting such person shall be void."<sup>1</sup>

Beginning with the twenty-ninth day of March, 1949, the effective date of the above statute, the State of New York took a decidedly progressive step in the direction of sound legislation which should dispel in at least one field much of the confusion already inherent in the law pertaining to contractual limitations of liability resulting from negligence.<sup>2</sup> In the litigious field of negligence involving garages and parking places the courts seem never to have marked out a definite path with respect to contractual agreements exempting such places from liability for their owner's or employee's negligence. The statute quoted above represents a forceful and positive declaration of the prevalent common law and at the same time an adoption of the statutory law governing analogous

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53. *Gregory v. Helvering*, 293 U. S. 465, 469 (1935).

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1. N. Y. GEN. BUS. LAW Art. § 89b (Supp. 1949).

2. The bill was introduced upon the recommendation of the New York Law Revision Commission. See, N. Y. LEG. DOC. No. 65 (M) (1949).

situations. All garages, parking places, service stations, or any similar place<sup>3</sup> which have the capacity to park, store, service, or repair four or more motor vehicles<sup>4</sup> are prohibited from contracting against liability for damages for injury to person or property due to negligence, if the place is conducted or maintained for hire or other consideration.<sup>5</sup> The damage resulting from the negligence of the garage owner, his agents or employees<sup>6</sup> is covered, and all such exculpatory agreements are declared void.

The language of the statute might have been more carefully drawn so as to eliminate much of the difficulties with definitions, even though the provisions of the New York Vehicle and Traffic Law are referred to as a source of definition. Therein, "parking" is defined as the stopping upon a public highway and the leaving of a motor vehicle "unattended by a person capable of operating it, for a period longer than necessary to load or unload passengers or freight."<sup>7</sup> The irrelevancy of this definition to the context of the statute is apparent since the statute under discussion is concerned with stopping, not on a public highway, but on an open lot, place, or location, or in a covered place or garage owned by a person operating or maintaining a "parking" business.<sup>8</sup> Moreover, the definition of "motor vehicles" under Section 2(8) of the Vehicle and Traffic Law appears to be rather inappropriate to serve the purpose of the statute.<sup>9</sup> Similarly undefined is the term "person,"<sup>10</sup> and the question whether garages and parking places owned or operated by the state, county or a municipality are

3. Note the "open end" phrase here. See generally Jones, *The Parking Lot Cases*, 27 GEO. L. J. 162 (1938).

4. N. Y. VEHICLE & TRAFFIC LAW § 2 (8) (Supp. 1948) reads as follows:

"'Motor Vehicle' shall include all vehicles propelled by any power other than muscular power, except motor cycles, traction engines, road rollers, fire and police vehicles, tractors used exclusively for agricultural purposes, tractor cranes, power shovels, road building machines, snow plows, road sweepers, sand spreaders, well drillers, trucks with small wheels used in factories, warehouses and railroad stations and operated principally on private property, and such vehicles as run only upon rails or tracks."

5. Another "open end" with respect to "consideration."

6. On the vicarious liability of an employer, see *Gorchar v. Bauer*, 13 N. Y. S. 2d 328 (Rochester City Ct. 1939) and *Goldberg v. Kung*, 45 A. 2d 279 (Md. 1946). Where garages undertake to deliver vehicles to and from the garage and cause injury, the owner of the vehicle under § 59 of the N. Y. Vehicle & Traffic Law becomes liable to the person injured (*Zuckerman v. Parton*, 260 N. Y. 446, 184 N. E. 49 (1933)). However, the ultimate liability should rest upon the garage owner. See *Drollinger v. McCurdy*, 228 App. Div. 664, 238 N. Y. Supp. 219 (2d Dep't 1929); *Leonardi v. Bassett*, 161 Misc. 324, 291 N. Y. Supp. 947 (N. Y. City Ct. 1936); *Svenson v. Zakrocki*, 268 App. Div. 777, 48 N. Y. S. 2d 567 (2d Dep't 1944); *Blake v. Salmonson*, 188 Misc. 97, 67 N. Y. S. 2d 607 (Syracuse Munic. Ct. 1946).

7. N. Y. VEHICLE & TRAFFIC LAW § 2 (20).

8. The question may be raised whether a car owner who sits in his auto while "parked" on a lot or in a garage for a consideration is covered by the above statute since control and possession are not in the garage or parking lot owner.

9. See note 4 *supra*.

10. N. Y. GEN. CONSTRUCTION LAW § 37, defines "person" as including the state, county or city only when designating a party whose property may be the subject of any offense.

included therein is unanswered.<sup>11</sup>

Precedent for according similar treatment to garages and open-air parking lots is found in the New York case of *Galowitz v. Magnor*.<sup>12</sup> Similarly Babbitt in his work entitled *The Law Applied to Motor Vehicles* declares that "one who takes cars at such a place [an open-air parking lot] assumes the duties of a bailee for hire just as if the car was left in a covered garage."<sup>13</sup> The Administrative Code of the City of New York also treats garages and parking lots together in its licensing and regulating provisions.<sup>14</sup>

## II. CONTRACTUAL LIMITATION OF LIABILITY IN NEW YORK

Businessmen have always sought to protect themselves by contract from liability caused by their own negligence. The earliest New York rule on the subject, found in *Gould v. Hill*,<sup>15</sup> invalidated such an agreement by a carrier. The court declared that a carrier had no right by contract to limit its common law liability or to evade the consequences of a breach of its duty. Shortly thereafter in *Moore v. Evans*<sup>16</sup> and in *Dow v. New Jersey Steam Navigation Co.*,<sup>17</sup> the courts began to permit carriers by special contract to limit their liability in respect to certain specified risks provided the contract was fairly and voluntarily entered into by the passenger or shipper.

In 1872 the New York Court of Appeals in *Cragin v. New York Central R.R.*<sup>18</sup> extended the doctrine still further by allowing contractual exemption from liability even for losses resulting directly from the carrier's own negligence.

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11. That the question raised is not entirely academic may be gathered from the following language used on two separate parking receipts which were issued to the author by two different N. Y. State Park Commissions, subsequent to the effective date of the N. Y. General Business Law:

(1) "All persons individually and collectively concerned in the operation of this parking field accept this automobile for storage and upon the express understanding and condition that they shall not be responsible for the loss of, nor any damage to, this stored automobile nor for loss of, or damage to, contents or part of this stored automobile.

"These provisions apply regardless of any loss or damage being due to negligence of the Finger Lakes State Park Commission or any Concessionaire or any of their employees or from any other cause of any name or nature.

"Acceptance of this check ratifies the agreement contained in the above conditions."

(2) "The Long Island State Park Commission provides parking space for automobiles and attendants to assure the orderly parking of cars, but neither the Commission nor the State of New York accepts any responsibility for loss or damage to the car or its contents, and the person accepting this receipt thereby releases the Commission and the State from any responsibility for such loss or damage."

12. 208 App. Div. 6, 203 N. Y. Supp. 421 (2d Dep't 1924).

13. *BABBITT, THE LAW APPLIED TO MOTOR VEHICLES* § 860 (4th ed. 1933).

14. Art. 34 added by the Laws of 1947. Section B 32-250.0 defines a garage or a "building, shed or enclosure or any portion thereof" and a parking lot as any "outdoor space or uncovered plot of ground" which has the capacity to hold five or more motor vehicles "and which is used to accommodate, store or keep any motor vehicle for the payment of a fee or other consideration charged directly or indirectly."

15. 2 Hill 623 (N. Y. 1842). See generally, 28 HARV. L. REV. 550 (1915).

16. 14 Barb. 524 (N. Y. 1852).

17. 11 N. Y. 485 (1854).

18. 51 N. Y. 61 (1872).

In that case the defendant railroad transported hogs from Buffalo to Albany. In consideration of a reduced rate the shipper agreed to assume the risk of injuries from various causes including heat. Forty-three hogs died of heat enroute, due to defendant carrier's negligence in not watering and cooling the hogs by wetting. In the action to recover damages the court denied liability, overlooking completely the common law liability of a carrier for the safe carriage and delivery of property entrusted to its care. The court in passing considered the "vitality of the freight" and the fact that the carrier "does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation because they refuse to eat, or they may die from heat or cold."<sup>19</sup> The court further declared:

"In this State it is well settled that a carrier may, by express contract, exempt himself from liability for damages resulting from any degree of negligence on the part of his servants, agents or employees."<sup>20</sup>

The court also ruled that there was sufficient consideration for the special contract limiting liability.

The importance of the *Cragin* decision was somewhat lessened years later in *Kennedy v. New York Central & H. R. R.R.*<sup>21</sup> where the court, though echoing the language of the *Cragin* decision by saying that "the rule is firmly established in this state that a common carrier may contract for immunity from its negligence, or that of its agents" went on to state that considerations of public policy based upon the nature of the carrier's undertaking required that the exemption from liability be "read in agreement *ipsissimis verbis*"<sup>22</sup> and held that the words of exemption in the case before the court were too general to preclude recovery. Cases supporting the *Cragin* opinion proceeded on the theory that a carrier's contract with his shipper was a private matter with which the public properly has no concern; and if the parties freely and voluntarily contracted to exempt the carrier from all liability, the presumption was that the carrier parted with sufficient consideration for the exemption.<sup>23</sup> Today in a world of fast-moving carriers, with greater capitalization and far-flung business connections, as well as improved safety devices, the contract between the carrier and the shipper should no longer be considered a purely private one. The carrier and bailee for hire has public responsibilities and added duties of safe carriage and proper delivery.

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19. *Id.* at 63. The New York Court of Appeals some nine years later distinguished the *Cragin* decision by stating that even at common law a carrier was not liable for the vitality of freight. *Holsapple v. Rome, W. & O. R.R.*, 86 N. Y. 275, 279 (1881).

20. 51 N. Y. 61, 64 (1872).

21. 125 N. Y. 422, 425, 26 N. E. 626, 627 (1891).

22. *Id.* at 425, 26 N. E. at 627. See also *Boyle v. Bush Terminal R.R.*, 210 N. Y. 389, 104 N. E. 933 (1914); *Blair v. Eire Ry.*, 66 N. Y. 313, 318 (1876) (concurring opinion of Allen, J.); *Perkins v. N. Y. Central R.R.*, 24 N. Y. 196, 206 (1862).

23. See generally N. Y. LEG. DOC. No. 65 (M) (1949). See also *Smith v. N. Y. Central R.R.*, 24 N. Y. 222, 238 (1862) (dissenting opinion by Allen, J.).

### III. STATUTORY REGULATION OF LIMITATION OF LIABILITY

The result of the *Cragin* case was, however, expressly overruled in 1913 by the enactment of Section 38 of the New York Public Service Law:

" . . . No contract, stipulation or clause in any receipt or bill of lading shall exempt or be held to exempt any common carrier, baggage company, transfer company, railroad corporation or street railroad corporation from any liability for loss, damage or injury caused by it to property from the time of its delivery for transportation until the same shall have been received at its destination and a reasonable time shall have elapsed after notice to consignee of such arrival to permit of the removal of such property. Every common carrier, baggage company, transfer company, railroad corporation, and street railroad corporation shall be liable for all loss, damage or injury to property caused by delay in transit due to negligence . . . the burden of the proof shall be upon the defendant to show that such delay was not due to negligence."<sup>24</sup>

This section renders the carrier liable for the full value of the baggage or freight but requires a value in excess of \$150 to be stated on the receipt and permits the carrier to charge a reasonable sum for the assumption of liability in excess of \$150.

Since the advent of Section 38 of the Public Service Law, the status of garages and parking places as *quasi-public* enterprises much like "common carriers, baggage companies, transfer companies, railroad corporations or street railroad corporations" has been undergoing a change. In the early case of *Smith v. O'Brien* the garage was said to be "the modern substitute for the ancient livery stable."<sup>25</sup> Professor Ingram in his study, *The Automobile and the Law*, has stated that "it may therefore be taken as a primary proposition that the general rule established by the courts defining the rights and duties of keepers of livery stables apply to and govern garage keepers."<sup>26</sup> Closely allied are the innkeepers whose common law liability was based upon their duty to provide every traveler a public shelter from highwaymen and the rigors of the weather.<sup>27</sup>

That public garages and parking lots are affected with a public interest is manifest from the fact that they are subjected to regulation. The Administrative Code of the City of New York requires a license where the garage or parking lot has the capacity to hold five or more motor vehicles; a schedule of rates must be filed and conspicuously posted; vehicles must be stored or parked in a manner approved by the regulating authorities and failure to pay a judgment will result in suspension or revocation of the license.<sup>28</sup> The constitutionality of such regulations, as well as of the above statute, seems clear:

" . . . by the weight of authority, it is within the province of the Legislature, in the exercise of its police powers, and in the absence of any consti-

24. N. Y. PUB. SER. LAW § 38.

25. 46 Misc. 325, 327, 94 N. Y. Supp. 673, 674 (Sup. Ct. 1905).

26. INGRAM, *THE AUTOMOBILE AND THE LAW* 90 (1911).

27. PROSSER, *TORTS* 382 (1941).

28. N. Y. C. ADMIN. CODE, Art. 34 § b, 32-250. o to 32-258 (Supp. 1948).

tutiona. restrictions, to authorize municipalities of a state to direct the location of and regulate the construction and use of property as, public garages and supply stations for automobiles."<sup>29</sup>

Nineteen years ago in *Strauss & Co. v. Canadian Pacific Ry.*, the New York Court of Appeals held:

"By those various statutes the will of the Legislature has been clearly expressed to the effect that contracts which purport to totally exempt in the cases named from liability for negligence are against the public policy of the State, and the early decisions, which expressed a different view and represented the public policy of the State when made, have been superceded. Public policy is necessarily variable. It changes with changing conditions. It is evidenced by the expression of the will of the Legislature contained in statutory enactments."<sup>30</sup>

#### IV. THE GARAGE KEEPER AND PARKING LOT OWNER AS A BAILEE

One of the earlier English common law decisions on provisions in a bailment contract attempting to limit liability was written in 1815 in *Maving v. Todd*.<sup>31</sup> There, a bailee expressly limited his liability for loss by fire and effect was given to the limitation, irrespective of the cause of the fire. Since then English law has generally permitted an ordinary bailee to limit liability resulting from his own negligence, upon the ground that every individual has a right to contract without interference.<sup>32</sup> In the United States, the courts have reiterated this doctrine.<sup>33</sup> One commentator has declared that "contracts exempting a bailee from liability for negligence are primarily concerned with individual property rights and the alleged tendency to encourage negligence thus is overbalanced by the greater interest in the freedom to bargain as one pleases."<sup>34</sup> A Pennsylvania court, however, in *Lancaster County National Bank v. Smith*<sup>35</sup> has held that "a bailee cannot stipulate against liability for his own negligence." Stipulations by bailees for hire seeking immunity from liability have been frowned upon.

The determination whether a garage or parking lot owner is a bailee

29. 7 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 4901 (perm. ed. 1935).

30. 254 N. Y. 407, 413, 173 N. E. 564, 569 (1930).

31. 1 Stark. 72, 4 Campbell 225 (K.B. 1815).

32. *Van Toll v. South Eastern R.R.*, 12 C.B. N.S. 75 (1862); *Gibaud v. Great Eastern Ry.*, [1921] 2 K.B. 426 (C. A.); *Rutter v. Palmer*, [1922] 2 K.B. 87 (C. A.).

33. *Sante Fe, P. & P. Ry. v. Grant Brothers Construction Co.*, 228 U. S. 177 (1913). See also Willis, *The Right of Bailees to Contract against Liability for Negligence*, 20 HARV. L. REV. 297 (1907). *Contra*: *Williams v. H. L. Weil & Co.*, 1 La. App. 188, 191 (1924): "It is elementary that a bailee or depositor cannot in any such manner or in fact in any other manner exempt himself from responsibility for his own lack of care or prudence." See, *Jersey Ins. Co. of N. Y. v. Syndicate Parking Co.*, 78 N. E. 2d 692 (Ohio 1948).

34. Note, 86 U. OF PA. L. REV. 772, 778 (1938).

35. 62 Pa. 47, 55 (1869).

36. *Albert & Davidson Pipe Corp. v. Gibney Iron & Steel Co.*, 110 N. J. Eq. 285, 159 Atl. 676 (1932). See also 12 FORD. L. REV. 178 (1943).

for hire, a lessor of the space,<sup>36</sup> or a licensor of use of all the space,<sup>37</sup> presents a little problem. "The storage of motor vehicles in a garage is that form of bailment known technically as *locatio custodiae*, which involves the letting of the care and the custody of a thing for hire. This is one of the mutual benefit bailments. . . ."<sup>38</sup> The analogy to the warehousemen is immediately evident. But in order "to constitute a bailment there must be a delivery of the subject of the bailment to the bailee, either actual or constructive, and there must be such a full delivery of the property to the bailee as will entitle him for the period of the bailment to exclude from possession thereof even the owner. . . ."<sup>39</sup> Thus, possession or control of the motor vehicle by the garage or parking lot owner distinguishes a bailment from these other relationships.<sup>40</sup> An interesting case arises where the employee of a parking lot owner refuses to permit the driver to lock his car in order to be able to move the car. In *Keenan Hotel Co. v. Funk*,<sup>41</sup> the Appellate Court of Indiana held a bailment was created when the driver had to give up his car key to the garage owner. Therefore, the bailee was held liable for loss of the car by theft. But where the plaintiff drove into the fair grounds, paid admission fee for himself and his car, parked in space specially provided, but did not deliver the car into the custody of the agent of the fair ground association, nor receive a check, no bailment was created.<sup>42</sup> Similarly, in a Missouri case<sup>43</sup> where the plaintiff entered an amusement park with his car, parked it gratuitously in the place provided by a city policeman who was not an agent of the amusement park, locked the car and left it, no bailment relationship existed. In the Administrative Code of the City of New York the language *implicitly* treats the relationship of garage or parking lot owner and the driver of the motor vehicle as a bailment by requiring the issuance of claim checks.<sup>44</sup> A garage or parking lot owner, whether the vehicle is delivered for storage, repairs or supplies, is generally considered to be a bailee for hire,<sup>45</sup> and "the usual rule applies to a garage keeper that as a bailee for hire he cannot by contract so limit his responsibility that he is not liable for his own negligence, or the negligence of his employees. . . ."<sup>46</sup> In the very recent case of *Malone v. Santora*,<sup>47</sup> the Connecticut

37. *Ashbry v. Tollhurst*, [1937] 2 K.B. 242 (C. A.). Note that a licensor, like a landlord, has no duty to take reasonable care of the chattel.

38. *BABBITT, op. cit. supra* note 13, § 858.

39. 7 *BLASHFIELD, op. cit. supra* note 29, § 4661.

40. 12 *FORD. L. REV.* 178 (1943).

41. 93 *Ind. App.* 677, 177 *N. E.* 364 (1931). See also, 7 *BLASHFIELD, op. cit. supra* note 29, § 4668.

42. *Lord v. Oklahoma State Fair Ass'n*, 95 *Okla.* 294, 219 *Pac.* 713 (1923).

43. *Suits v. Electric Park Amusement Co.*, 213 *Mo. App.* 275, 249 *S. W.* 656 (1923).

44. *N. Y. C. ADMIN. CODE*, Art. 34, § B 32-256.0 (Supp. 1948).

45. *INGRAM, op. cit. supra* note 26 at 90. See also, *Burt v. B. M. Supply Co.*, 67 *Idaho* 548, 186 *P.* 2d 498 (1947).

46. *BABBITT, op. cit. supra* note 13, § 866. *Wendt v. Sley System Garages*, 124 *Pa. Super.* 224, 188 *Atl.* 624 (1936); *Downs v. Sley System Garages*, 129 *Pa. Super.* 68, 194 *Atl.* 772 (1937).

47. 135 *Conn.* 286, 291, 64 *A.* 2d 51, 54 (1949).

court held a parking lot owner to be a bailee for hire, and stated that:

" . . . the provision against liability printed on the ticket could not avail the defendant to bar recovery by the plaintiff. This is so because of the 'well-recognized rule that the right of a bailee for hire to limit his liability by special contract does not go to the extent of relieving him against his own negligence' [citing cases]. The reason is that such a provision is 'revolting to the moral sense and contrary alike to the salutary principles of law and a sound public policy.'"

However, "a garage keeper or parking lot owner is not an insurer of the safety of cars entrusted to him as bailee for hire, and is not liable for mere deterioration not due to his fault. . . ."48 In the absence of good faith, the bailee for hire is liable only for his negligence.

#### V. RELATIONSHIPS ANALOGOUS TO GARAGE AND PARKING LOT BAILMENTS

Under the terms of Section 89b of the New York General Business Law, a garage or parking lot owner cannot contract away the duty of reasonable care imposed by law. Some states have declared such exculpatory provisions in a contract to be contrary to public policy, even in the absence of statute,<sup>49</sup> and by what appears to be "the weight of authority, a garage keeper or repairman, as a bailee for hire cannot by contract so limit his liability as not to be liable for his own negligence, or that of his servants acting within the scope of their employment, with respect to the performance of the duties assumed by him."<sup>50</sup>

Analogies to the prohibition of a garage or parking lot bailee for hire exempting himself by contract for liability for negligence are found in the law on

48. See 7 BLASHFIELD, *op. cit. supra* note 29.

49. See, N. Y. LEG. DOC. No. 65 (M) (1949) and cases cited. In *Hotel Statler Co. v. Safer*, 103 Ohio St. 638, 642, 134 N. W. 460, 462 (1921) the court opined: "As a bailee for hire impliedly contracts to use ordinary care, it follows that he may not contract against his own negligence or the lack of such care. An implied agreement generally can have effect only in the absence of a contrary express agreement." What the Ohio court undoubtedly meant was that the agreement to use care is so obvious, that any contrary express agreement should be disregarded as repugnant to the essential character of the relationship.

50. 7 BLASHFIELD, *op. cit. supra* note 29, § 5040. In *Munger Auto Co. v. American Lloyds*, 267 S. W. 304 (Tex. Civ. App. 1924), the Texas Court of Civil Appeals, deemed the problem one "of apparent conflicting authorities. In many of the opinions where the question has been discussed the direct question (of the right of the bailee for hire to exempt himself by contract for his negligence) was not involved. . . . The weight of authority seems to hold that where there are no statutory provisions to the contrary, a contract made between the bailee and bailor by which the bailee relieves himself from liability due to his or his employee's negligence, is valid, at least as against all but gross negligence. We can see no valid reason for denying parties who receive automobiles for repair the right to make a contract limiting their liability in case the cars should be stolen. . . ."

" . . . If parties to a contract desire to limit their liability, where the limitation is not against public policy nor against the statutes the courts will enforce same."

warehousemen,<sup>51</sup> keepers of livery stables,<sup>52</sup> common carriers,<sup>53</sup> innkeepers and hotel keepers,<sup>54</sup> landlords or lessors of space,<sup>55</sup> safe deposit companies,<sup>56</sup> and public checkrooms.<sup>57</sup>

The American Law Institute in its *Restatement of the Law of Contracts* has two pertinent sections on limiting liability for negligence. Section 574 states:

"A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm is legal, except in the cases stated in section 575."

An examination of the state annotations to the *Restatement* reveals that seven out of twenty-seven states did not concur with the language of Section 574.<sup>58</sup> Section 575 (1)(b) of the *Restatement* declares a bargain for exemption to be illegal if "one of the parties is charged with a duty of public service and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation." Unanimity of the state and federal annotations is accorded this section, except for limitations based upon varying reduced rate provisions which give the bailor sufficient choice.<sup>59</sup>

#### VI. CASES NOT COVERED BY THE STATUTE

Where Section 89b of the New York General Business Law, for one reason or another, is clearly inapplicable or of doubtful application, several important factors must be considered. These include: (1) The necessity of notice; (2)

51. UNIFORM WAREHOUSE RECEIPTS ACT, 3 U. L. A. §§ 2, 3; N. Y. GEN. BUS. LAW § 91. See, *Adler v. Bush Terminal Co.*, 161 Misc. 509, 291 N. Y. Supp. 435 (Sup. Ct. 1936), *aff'd*, 250 App. Div. 730, 294 N. Y. Supp. 726 (2d Dep't 1937). *Blashfield* states that the garage keeper is in effect a warehouseman. (7 *BLASHFIELD*, *op. cit. supra* note 29, § 5022).

52. In *Hanna v. Shaw*, 247 Mass. 57, 59, 138 N. E. 247, 248 (1923), the court observed that "The rights, duties and liabilities of garage keepers are analogous in many respects to those of livery stable keepers and warehousemen."

53. Common carriers under the Uniform Bills of Lading Act (4 U. L. A. § 3) may not insert in an intrastate bill of lading a provision exempting themselves from liability for negligence and such exculpatory provisions are void under the Harter Act (27 STAT. 445 (1893), 46 U. S. C. §§ 190-195 (1946)).

54. N. Y. GEN. BUS. LAW § 201.

55. N. Y. REAL PROP. LAW § 234. The constitutionality of this voidance of an exculpatory clause was upheld in *Billie Knitwear v. N. Y. Life Ins. Co.*, 288 N. Y. 682, 43 N. E. 2d 80 (1940).

56. N. Y. BANKING LAW § 331 (1). See *Sporsem v. First Nat. Bank*, 133 Wash. 199, 204, 233 Pac. 641, 643 (1925).

57. See, *Klar v. H. & M. Parcel Room, Inc.*, 270 App. Div. 538, 541, 61 N. Y. S. 2d 285, 288 (1st Dep't 1946).

58. The seven states were Connecticut, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Washington, and West Virginia.

59. See *Norfolk Southern R.R. v. Chatman*, 224 U. S. 276 (1916); *N. Y. Central R.R. v. Lockwood*, 17 Wall. 357 (U. S. 1873); *Anderson v. Erie R.R.*, 223 N. Y. 277, 119 N. E. 557 (1918); *D'Utassy v. Barrett*, 219 N. Y. 420, 114 N. E. 786 (1916); *Glinsky v. Dunham Reid, Inc.*, 230 App. Div. 470, 245 N. Y. Supp. 359 (1st Dep't 1930).

the nature of the receipt; (3) the choice of reduced rates; (4) the "degrees" of negligence; and (5) the effect of custom.

(1) Where the motor vehicle owner delivers the vehicle to the garage or parking lot under a claimed exemption from liability, sufficient notice of the disclaimer must be shown.<sup>60</sup> In the New York case of *Galowitz v. Magner*<sup>61</sup> the plaintiff put his car in parking space adjacent to a bathing beach, paid fifty cents, and received a ticket, on the back of which in fine print was written: "The person accepting this ticket assumes all risk of accident, and expressly agrees that the managements shall not be liable under any circumstances for any injury to person, loss, or damage." The Appellate Division held the disclaimer by the bailee for hire to be invalid because notice to the plaintiff was inadequate. In a Georgia case a sign posted in a public garage, "Not responsible for fire, theft, or articles left in cars," did not relieve the garageman from liability for negligent acts of himself or his servants.<sup>62</sup>

(2) In the notable bailment case of *Sandler v. Commonwealth Station Co.*,<sup>63</sup> the Massachusetts court held that "it could be found to be a reasonable assumption by the plaintiff that the stub that was given him was a receipt for his automobile, or a means of identifying him when he should return to get his automobile rather than a contract freeing an apparent bailee from all responsibility."<sup>64</sup> Generally, claim checks are not contracts<sup>65</sup> since the mutual assent necessary to the formation of a contract is lacking, and the bailor does not always read the check.<sup>66</sup> A repair order containing a provision that the garageman assumed no responsibility for loss or damage by theft or fire has been held not to absolve him from his own negligence.<sup>67</sup> Such receipts or tokens of identification are unlike carrier passage contract tickets which contain express limitations on the amount of the carrier's liability for loss of passenger's property taken on the voyage.<sup>68</sup>

(3) The responsibility of a bailee for hire may be diminished<sup>69</sup> or even increased<sup>70</sup> if a true choice of rates, depending upon limitation or non-limitation from liability, is given to the bailee.

60. *Ohge v. LaSalle-Randolph Garage Corp.*, 328 Ill. App. 665, 66 N. W. 2d 725 (1946).

61. 208 App. Div. 6, 203 N. Y. Supp. 421 (2d Dep't 1924).

62. *Renfore v. Fouche*, 26 Ga. App. 340, 106 S. E. 303 (1921); *Weinberger v. Werremeyer*, 224 Ill. App. 217 (1922).

63. 307 Mass. 470, 30 N. E. 2d 389 (1940).

64. *Id.* at 474, 30 N. E. 2d at 391.

65. *Marine Ins. Co. Ltd. v. Rehm*, 177 So. 79 (La. App. 1937).

66. See Note, 86 U. OF PA. L. REV. 772, 773 (1938) (citing *Cascade Auto Co. v. Petter*, 72 Colo. 570, 212 Pac. 823 (1923) and *Dietrich v. Peters*, 28 Ohio App. 427, 162 N. E. 753 (1928)).

67. *Sign Animation Corp. v. Wilkie Buick Co.*, 129 Pa. Super. 234, 188 Atl. 628 (1936).

68. *Reichman v. Compagnie General Transatlantique*, 290 N. Y. 344, 49 N. E. 2d 474 (1943).

69. *BABBITT, op. cit. supra* note 13 § 866. On the question of "choice" of contracting with or without limitation, see, *Roseweb Frocks Inc. v. Rose*, 52 N. Y. S. 2d 901 (N. Y. Munic. Ct. 1945); *Mickey Finn Clothes, Inc. v. Yale Transport Corp.*, 175 Misc. 242, 23 N. Y. S. 2d 84 (N. Y. Munic. Ct. 1940).

70. The bailee may enlarge ordinary responsibility by agreement and assume the liability

(4) It has been stated that the weight of authority rejects the idea of degrees of care and that: "There are no 'degrees' of care as a matter of law; there are only different amounts of care, as a matter of fact; and gross negligence is the same thing as ordinary negligence, with the addition, as Baron Rolfe put it, 'of a vituperative epithet.'"<sup>71</sup> Yet decisions persist in distinguishing degrees of negligence in authorizing contractual limitations on liability for "ordinary" negligence.<sup>72</sup> The difficulty originated in 1704 in *Coggs v. Bernard*,<sup>73</sup> which recognized the varying degrees of slight, ordinary, and gross negligence. The distinctions have been repudiated in England<sup>74</sup> and rejected generally as vague and impracticable in their nature, unfounded in principle.<sup>75</sup> In any event a bailee for hire may not limit the degree of care for which he will be responsible to less than that fixed by statute. An Oklahoma statute declares: "A bailee for hire must use at least ordinary care for the preservation of the thing bailed."<sup>76</sup> In *Scott Auto & Supply Co. v. McQueen*<sup>77</sup> the plaintiff left his car to be painted at a garage where a large sign was posted denying responsibility for loss by fire. The Oklahoma court, applying the statute, refused to allow the garage owner, by notice or by contract, to release himself from the duty imposed by this statute to exercise ordinary care.<sup>78</sup>

(5) Any custom or practice of garage keepers or parking lot owners, contrary to the implied obligations of a bailee for hire, of which the owner of the automobile was unaware, cannot in any way absolve the keeper from the observance of the necessary care.<sup>79</sup>

#### VII. REASONS FOR THE STATUTE

Various factors today justify the statutory prohibition of contractual limitations upon liability on the part of public garage and parking lot owners. It has been pointed out that the nature of the garage keeper's calling, conjoined with the nature of the subject matter of the bailment, for example, its mobility and the easy access which garage attendants have to its use, coupled with the difficulty the bailor would experience in detecting and proving its unauthorized use, suggest that responsibility more strict than in the case of the ordinary

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of an insurer, *Pennroyal Fair Ass'n v. Hite*, 195 Ky. 732, 243 S. W. 1046 (1922); *Smith v. Economical Garage*, 107 Mo. 430, 176 S. W. 479 (1919).

71. PROSSER, TORTS 258 (1941).

72. *Munger Auto Co. v. American Lloyds of Dallas*, 267 S. W. 303 (Tex. Civ. App. 1924); *Langford v. Nevin*, 117 Tex. 130, 298 S. W. 536 (1927).

73. 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703).

74. *Grill v. General Iron Screw Collier Co.*, L. R. I. 1 C. P. 600 (1866).

75. SALMOND, TORTS 462, n. a (9th ed. 1934). See also, *Leonard v. Bartle*, 48 R. I. 101, 135 Atl. 853 (1927); *Union Traction Co. v. Berry*, 188 Ind. 514, 121 N. E. 655 (1919); *Reed v. Western Union*, 135 Mo. 661, 37 S. W. 904 (1896).

76. OKLA. COMP. STAT. § 5206 (1921).

77. 111 Okla. 107, 226 Pac. 372 (1924).

78. See also, *Interstate Compress Co. v. Agnew*, 255 Fed. 508 (8th Cir. 1919); *Morse v. Imperial Grain & Warehouse Co.*, 40 Cal. App. 574, 181 Pac. 815 (1919); *Inland Compress Co. v. Simmons*, 59 Okla. 287, 159 Pac. 262 (1916).

79. *Simms v. Sullivan*, 100 Ore. 487, 198 Pac. 240 (1921).

bailee.<sup>80</sup> Moreover, exemption provisions would have a tendency to induce a lack of care.<sup>81</sup>

Public policy favors the voidance of agreements exempting bailees for hire from liability for negligence where there is a great disparity of bargaining power between the bailor and bailee<sup>82</sup> and the lack of automobile storage space in large cities such as New York creates such a disparity. This condition may not exist elsewhere in the United States, for example, Chicago, if one commentator, who favors freedom of contract, is accurate in his appraisal.<sup>83</sup>

#### VIII. UNANSWERED QUESTIONS

Like every statute, Section 89b of the New York General Business Law will require judicial interpretation. A number of questions are left unanswered. For example, does the statute apply to public garages and parking lots operated by a municipality, a county or the state; to businessmen who operate parking space for patrons; to service stations which allow "free" parking to accommodate customers? Does the prohibition against disclaimer of liability apply where a true bailment is lacking; for instance, where the owner of the vehicle has not surrendered complete possession and control to the garage or parking lot operator? Have garages and parking lots covered by the statute become by virtue thereof public service institutions which are obliged to accept all customers without discrimination?

While there is no essential inconsistency between the licensing and regulatory provisions of the New York City ordinance and the statute, it would appear that uniformity of treatment should suggest an amendment of the New York City ordinance to reduce the capacity standard to four vehicles.<sup>84</sup>

#### CONCLUSION

The enactment of the statute will mean a shifting of the responsibility and the burden for loss or injury from the vehicle's owner to the bailee for hire, where in justice such burden and responsibility belong. Those who for profit

80. 12 *FORD. L. REV.* 178, 181 (1943).

81. *N. Y. Central R.R. v. Lockwood*, 17 Wall. 357 (U. S. 1873); *Southern Express Co. v. Owens*, 146 Ala. 412, 41 So. 752 (1906); *Cole v. Goodwin and Story*, 19 Wend. 251, 281 (N. Y. 1838).

82. *F. A. Strauss & Co. v. Canadian Pacific Ry.*, 254 N. Y. 407, 173 N. E. 564 (1930); *PROSSER, TORTS* 381 (1941).

83. 8 *U. OF CHI. L. REV.* 763, 765 (1941).

84. While N. Y. C. *ADMIN. CODE* Art. 34, § B 32-250.0 (Supp. 1948) requires a license for garages or parking lots which have a capacity for holding *five* or more vehicles, Art. 11, § C 19-66.0 requires a certificate of fitness for an attendant of a storage garage containing *four* or more vehicles. For the sake of uniformity, it would seem that the licensing and regulatory provisions of the New York City ordinances should be amended to designate a minimum capacity of *four* motor vehicles as enough to warrant the treatment of garages and parking lots as affected with a public interest, whether it be for licensing and regulatory purposes or for the important purpose of rendering void attempted exculpatory contractual "agreements".

take over the possession and care of a motor vehicle, with all its potentialities for harm to itself and others, should bear the risk of loss. From the practical and economic viewpoint, the enactment of the statute will undoubtedly entail a slightly higher storage, parking or garage rate to compensate for increased insurance premium. Anyone but a cynic would hope for a corresponding reduction in the insurance premium of the motor vehicle's owner.