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### Liability of Public Officials for the Defaults of Their Subordinates

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mount to a direction of a verdict. Thus we find a method of doing indirectly that which is not permitted to be done directly.

There have been some abortive attempts to pass legislation prohibiting the federal trial judge from commenting<sup>56</sup> and thus follow the lead of most of the states. It does seem, however, that the proposed changes would have tied the hands of the court a little too completely.<sup>57</sup> Undoubtedly, the trial court may be of great assistance to the jury by giving them the benefit of training and experience, and so making a little less formidable the oftentimes imposing array of witnesses and testimony. To take away this power would be hindering rather than furthering the ends of justice. The solution to the whole problem seems to have been arrived at in the following extract taken from the circuit court of appeals opinion<sup>58</sup> in the *Murdock* case:

"It is true the trial court has an important duty to perform in assisting the jury to arrive at a true verdict. There is, however, in practical operation, we fear, considerable danger of the court's substituting its opinion for that of the jury. It would seem the better practice to comment upon the character of the evidence, and, if and when an opinion is expressed, to limit it to a basic fact, or an issue involved, upon which the guilt of accused is in part dependent. By so doing, the jury is left to perform its constitutional duty of determining the guilt or innocence of the accused, and at the same time the court fully meets its very important duty of assisting the jury in reaching an intelligent verdict."<sup>59</sup>

JOHN L. CONNERS.

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#### LIABILITY OF PUBLIC OFFICIALS FOR THE DEFAULTS OF THEIR SUBORDINATES.

Any consideration of the problem of the liability of an officer entrusted with public funds for the defaults of his subordinates, assumes a three-fold aspect,—the relation of the officer to the subordinate, the liability of the officer under his official bond, and finally, public policy. Much confusion exists both in the decisions of the courts

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<sup>56</sup> For a discussion of the proposed bills see Osborne, *Some Problems of Procedural Reform* (1921) A. B. A. J. 249; Editorial (1928) 14 A. B. A. J. 200; (1935) 19 J. AM. JUD. SOC. 23; (1937) 23 A. B. A. J. 521; Parker, *The Federal Judiciary* (1938) 24 A. B. A. J. 239.

<sup>57</sup> For a discussion of the contemplated legislation and its effects see (1937) 23 A. B. A. J. 521.

<sup>58</sup> *Murdock v. United States*, 62 F. (2d) 926 (C. C. A. 7th, 1933).

<sup>59</sup> *Id.* at 927.

and the opinion of the text-writers as to the character and extent of the officer's responsibility.<sup>1</sup> This divergence of opinion is a result of an adherence to one or the other of conflicting theories;<sup>2</sup> rather than a result of an analysis of the particular problem presented by an individual case.<sup>3</sup> One of these theories is that the officer is an insurer of the funds lawfully coming into his hands in his official capacity; the other, that the officer is merely a bailee for hire for such funds.

### *Officers and Employees Distinguished.*

Under the majority rule prevailing in the United States,<sup>4</sup> public officers having the custody of public moneys are subjected to stringent rules of liability. In spite of the practical necessity, therefore, of distinguishing between a public officer and a public employee,<sup>5</sup> the line of demarcation between them has not been too carefully drawn by judicial expression<sup>6</sup> and courts have used the terms loosely.<sup>7</sup> The distinction is, at times, shadowy,<sup>8</sup> as the same person may in some phases of his duties be deemed an officer and in others merely an employee.<sup>9</sup> There is, however, one indispensable characteristic of a public officer—his duties must involve the exercise of some portion, be it great or small, of the sovereign power.<sup>10</sup> Unless the person is required to function in some legislative, judicial or executive capacity,<sup>11</sup> he is not an officer, notwithstanding language to the contrary

<sup>1</sup> *Town of Hamden v. American Surety Co. of N. Y.*, 9 F. Supp. 733 (D. C. Conn. 1935); *Jordan v. Baker*, 252 Ky. 40, 66 S. W. (2d) 84 (1933); Note (1936) 14 N. C. L. Rev. 193.

<sup>2</sup> *Jordan v. Baker*, 252 Ky. 40, 66 S. W. (2d) 84 (1933).

<sup>3</sup> *United States v. Prescott*, 3 How. 578 (U. S. 1845); *Tillinghast v. Merrill*, 151 N. Y. 135, 45 N. E. 375 (1896); *Lane v. Cotton*, 1 Ld. Raym. 646, 91 Eng. Rep. 1332 (K. B. 1701).

<sup>4</sup> PRASHKER, *OUTLINES OF THE LAW OF MUNICIPAL CORPORATIONS* (1927) 66.

<sup>5</sup> FLOUTON, *OUTLINE OF THE LAW OF MUNICIPAL CORPORATIONS* (1926) 70.

<sup>6</sup> *Matter of Dawson v. Knox*, 231 App. Div. 490, 247 N. Y. Supp. 731 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935); *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 246 App. Div. 803 (1936).

<sup>7</sup> *Matter of Dawson v. Knox*, 231 App. Div. 490, 247 N. Y. Supp. 731 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935).

<sup>8</sup> 1 DILLON, *MUNICIPAL CORPORATIONS* (5th ed.) § 425, p. 736: "The question whether a person is an officer or a mere employee is one which is involved in difficulty and for the determination of which it is probable that no satisfactory rule can be enumerated. The question who are the officers and who are employees will, almost necessarily, be determined in each jurisdiction by decisions made upon the facts of each particular case. \* \* \*"

<sup>9</sup> *United States v. City of New York*, 12 F. Supp. 169 (S. D. N. Y. 1935).

<sup>10</sup> *Kingston Association v. La Guardia*, 156 Misc. 116, 121, 281 N. Y. Supp. 390 (1935), *aff'd*, 216 App. Div. 803 (1936); FLOUTON, *op. cit. supra* note 5, at 71; PRASHKER, *op. cit. supra* note 4, at 52.

<sup>11</sup> *Matter of Dawson v. Knox*, 231 App. Div. 490, 247 N. Y. Supp. 731 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935).

used in the statute creating the office<sup>12</sup> or conferring the appointment. Generally speaking, a public officer is one chosen by election or appointment<sup>13</sup> to an office created by constitutional provision, or fiat of the legislature or by some board or body exercising delegated legislative powers.<sup>14</sup> The term public office carries with it the element of tenure, duration<sup>15</sup> and emoluments;<sup>16</sup> it involves the idea that the incumbent has taken an oath of office<sup>17</sup> and that he has given an official bond.<sup>18</sup> The right to receive compensation is attached to the office as an incident thereof,<sup>19</sup> and it is not dependent upon the performance of actual services. If, however, the office carries with it no compensation, the officer is not entitled to receive any, as he is deemed to have accepted the office with knowledge of such fact.<sup>20</sup>

An officer holds a fiduciary relationship towards the public<sup>21</sup> and is charged with a public duty or trust.<sup>22</sup> He must have contact with

<sup>12</sup> *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 216 App. Div. 803 (1936); *State ex rel. Zively v. Hackman*, 300 Mo. 59, 254 S. W. 53 (1923). But *cf.* *People ex rel. Kelley v. Common Council*, 77 N. Y. 503 (1879) (A Representative of Congress is an officer even though the Constitution does not designate him among the officers of the Government of the United States).

<sup>13</sup> *Matter of Dawson v. Knox*, 231 App. Div. 490, 247 N. Y. Supp. 731 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935).

<sup>14</sup> *Flouton*, *loc. cit. supra* note 5.

<sup>15</sup> *United States v. Hartwell*, 6 Wall. 385 (U. S. 1867); *United States v. Germaine*, 99 U. S. 508 (1878); *Matter of Hathaway*, 71 N. Y. 238 (1877); *People v. Duane*, 121 N. Y. 367, 24 N. E. 845 (1890); *Matter of Dawson v. Knox*, 231 App. Div. 490, 247 N. Y. Supp. 731 (3d Dept. 1931, *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935)); *Olmstead v. Mayor*, 42 N. Y. Sup. Ct. 48 (1877); *Flouton*, *op. cit. supra* note 5, at 77; 2 *McQUILLAN, MUNICIPAL CORPORATIONS* (2d ed. 1928) 77. But *cf.* *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 246 App. Div. 803 (1936) (It does not follow, however, that the absence of a definite term precludes it from being a public office).

<sup>16</sup> *Matter of Dawson v. Knox*, 231 App. Div. 490, 247 N. Y. Supp. 731 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935); *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 246 App. Div. 803 (1936).

<sup>17</sup> *Matter of Dawson v. Knox*, 231 App. Div. 490, 247 N. Y. Supp. 731 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935); *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 246 App. Div. 803 (1936); *Whitfield v. Lord Le Despencer*, 2 Cowp. 753, 98 Eng. Rep. 1344 (1778); *Flouton*, *op. cit. supra* note 5, at 70, 78; *McQUILLAN, op. cit. supra* note 15, at 35.

<sup>18</sup> *Flouton*, *op. cit. supra* note 5, at 71; *McQUILLAN, op. cit. supra* note 15, at 35.

<sup>19</sup> *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 216 App. Div. 803 (1936); *Flouton*, *op. cit. supra* note 5, at 70.

<sup>20</sup> *I DILLON, op. cit. supra* note 8, at 731.

<sup>21</sup> *Dawson v. Knox*, 231 App. Div. 490, 247 N. Y. Supp. 731 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935); *Kingston Association v. La Guardia*, 156 Misc. 116, 121, 281 N. Y. Supp. 390 (1935), *aff'd*, 216 App. Div. 803 (1936); 2 *McQUILLAN, op. cit. supra* note 15, at 264.

<sup>22</sup> *People ex rel. Kelley v. Common Council*, 77 N. Y. 503 (1879); *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 216 App. Div. 803 (1936); 2 *McQUILLAN, op. cit. supra* note 15, at 34.

the public, acting in some capacity for its benefit<sup>23</sup> and as the agent of the government.<sup>24</sup> The fact that the statute creating the position refers to the incumbent as the agent of the government is not controlling.<sup>25</sup> That the incumbent is indeed such an agent must appear from the nature of the office itself, the controlling factors being the origin of the position, the duties attached to it, and its relation to the general scheme of the government.<sup>26</sup> Although the officer is the agent of the state, the relationship is not such as to render the state liable for the torts of the officer unless the state has expressly assumed such liability.<sup>27</sup> This immunity is based upon the theory that the state is sovereign and the sovereign can do no wrong.<sup>28</sup>

The employee, like the officer, is in the service of the public,<sup>29</sup> but the nature of his duties and his relationship toward the public differ radically from those of the officer.<sup>30</sup> He has no independent official status.<sup>31</sup> His employment is in matters of mere administrative detail or in some subordinate clerical or advisory relation to another.<sup>32</sup> His work is routine and he exercises no discretion. His rights arise out of contract and his compensation depends upon services rendered or of a tender of such services.<sup>33</sup> The distinction between an officer

<sup>23</sup> *People ex rel. Hoefle v. Cahill*, 98 App. Div. 312, 90 N. Y. Supp. 689 (2d Dept. 1904); *Matter of Dawson v. Knox*, 231 App. Div. 490, 247 N. Y. Supp. 731 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935).

<sup>24</sup> *Walsh v. Trustees of New York and Brooklyn Bridge*, 96 N. Y. 427 (1884).

<sup>25</sup> *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 216 App. Div. 803 (1936).

<sup>26</sup> 1 DILLON, *loc. cit. supra* note 8.

<sup>27</sup> *McQuillan v. Mayor*, 62 N. Y. 160 (1875); *Evans v. Berry*, 262 N. Y. 61, 186 N. E. 203 (1933). But see *United States v. City of New York*, 12 F. Supp. 169 (S. D. N. Y. 1935), where it was held that in an action by the Federal Government against the City, the relationship of master and servant did exist between the police commissioner of New York and the City, and the property clerk and the City, and the City was liable for the failure of the clerk to turn over to federal agents the sum of \$18,000 upon which the Government had attached a lien.

<sup>28</sup> *Evans v. Berry*, 262 N. Y. 61, 186 N. E. 203 (1933).

<sup>29</sup> *Matter of Dawson v. Knox*, 231 App. Div. 490, 492, 247 N. Y. Supp. 731, 734 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935) ("The holder of a public office is in the employment of the public, but all those who are in the public employment are not public officials and do not hold public office"); *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 246 App. Div. 803 (1936); MICHAM, *LAW OF AGENCY* (1888) 426.

<sup>30</sup> PRASHEK, *op. cit. supra* note 4, at 52 ("The mayor or the comptroller, are officers; clerks in their offices are employees"); *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, 81 N. E. 453 (1907); *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 246 App. Div. 803 (1936); FLOUTON, *loc. cit. supra* note 5.

<sup>31</sup> FLOUTON, *op. cit. supra* note 5, at 71.

<sup>32</sup> *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, 81 N. E. 453 (1907); *People ex rel. Corkhill v. McAdoo*, 98 App. Div. 312, 90 N. Y. Supp. 689 (2d Dept. 1904); *Hulbert v. Craig*, 124 Misc. 273, 207 N. Y. Supp. 710 (1925); *Kingston Association v. La Guardia*, 156 Misc. 116, 281 N. Y. Supp. 390 (1935), *aff'd*, 246 App. Div. 803 (1936).

<sup>33</sup> FLOUTON, *op. cit. supra* note 5, at 70, 71.

and an employee has been expressed thus: "The officer is distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps give an official bond; in the liability to be called to account as a public offender for misfeasance or non-feasance in office, and usually though not necessarily, in the tenure of his position."<sup>34</sup>

Ordinarily, an officer cannot be held liable for the negligence, misconduct or omissions of his official subordinates upon the theory of *respondeat superior*, as the relationship of master and servant does exist between them.<sup>35</sup> Frequently, such subordinates are appointed directly by the governmental power and are removable only at its pleasure.<sup>36</sup> However, even when they are appointed and removed by the officer, the latter is not liable unless he himself has been guilty of negligence in their selection or retention, appointment or qualification, or in the supervision of his office.<sup>37</sup> If the officer cooperates with his subordinate, or directs or encourages him in the commission of the offending act, his official status affords him no protection and he is liable.<sup>38</sup> This general rule of exemption from liability for the acts of subordinates is subject, in most jurisdictions, to the important exception of cases involving fiscal officers and public funds.

#### *English View.*

The solution of the question of a fiscal officer's liability for the defaults of his subordinates hinges upon the nature of the liability reposing upon the officer himself. Indubitably, the difficulty of measuring the extent of the liability of a custodian of public funds was aggravated by the stress laid upon "public policy"<sup>39</sup> by the early English cases. In *Lane v. Cotton*,<sup>40</sup> the plaintiff sought to hold the Postmaster General personally liable for the loss of a banknote enclosed in a letter which had been duly deposited with a receiver at the post office. The receiver had been appointed by the Postmaster General, and was subject to removal by him. His salary was paid

<sup>34</sup> 2 McQUILLAN, *op. cit. supra* note 15, at 38, citing Judge Cooley.

<sup>35</sup> *Martin v. Mayor of Brooklyn*, 1 Hill 545 (N. Y. 1841); *Bailey v. Mayor of New York*, 3 Hill 531 (N. Y. 1842); *Donovan v. McAlpene*, 85 N. Y. 185 (1881); DILLON, *op. cit. supra* note 8, at 763; МЕСЧЕМ, *op. cit. supra* note 29, at 427.

<sup>36</sup> МЕСЧЕМ, *loc. cit. supra* note 29.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Dowler v. Johnson*, 225 N. Y. 39, 121 N. E. 487 (1918).

<sup>39</sup> *Lane v. Cotton*, 1 Ld. Raym. 646, 91 Eng. Rep. 1332 (K. B. 1701); *Whitfield v. Lord Le Despencer*, 2 Cowp. 735, 98 Eng. Rep. 1344 (K. B. 1778).

It is interesting to note that the English judges considered it necessary to protect the officers against the cupidity of the public, while the American judges thought it necessary to protect the public against the cupidity of the officers. *United States v. Thomas*, 82 U. S. 337 (1872); *Jordan v. Baker*, 252 Ky. 40, 66 S. W. (2d) 84 (1933).

<sup>40</sup> 1 Ld. Raym. 646, 91 Eng. Rep. 1332 (K. B. 1701).

out of the revenue collected at the office, and at the discretion of the Postmaster General, the receiver was to give security to the government. The theory upon which the plaintiff proceeded was that the Postmaster, in consequence of the hire he received, assumed liability for all the damage that might occur in his office, whether owing to the negligence or dishonesty of persons employed under him or for any reason whatever. The court, in finding for the defendant, denied the officer's liability except for misfeasance or neglect. In reaching this conclusion it considered the nature and extent of the office, the nature and extent of the control exercised by the defendant over his subordinates, the hazards besetting the execution of the office and the probable consequences of admitting the liability of the defendant under the circumstances. Great emphasis was given to the belief that "if this action lay, it would be of very mischievous consequence, because it would expose the defendant to all the frauds of the merchants men. As a man might rob the mail of that which he himself put into a letter, and afterwards bring an action and recover it."<sup>41</sup> The decision rested upon general principles of expediency and justice, and the fact that the patent creating the office expressly exempted the defendant from liability occasioned by the defaults of inferior officers,<sup>42</sup> while not entirely ignored, was relegated to the background of the argument rather than being made the basis of it. The court rejected the dissenting opinion of Judge Holt, in which he argued from the nature of the trust that the officer was bound to keep all letters safe at his peril; and that the situation did not differ from that of the Marshal of the King's Bench or Warden of the Fleet who were obliged to keep the prisoners safe. Likewise, it was no defense that the King's enemies had broken the prison against their will and that the law was the same where goods were levied upon by the sheriff and rescued from him. He also likened the case to that of a common carrier or the master of a ship taking goods on board for freight and concluded that for the foregoing reason the defendant should be absolutely liable without assigning any particular neglect to him. Upon appeal, the question was carefully weighed and the judgment was affirmed.

Some time later, a case<sup>43</sup> presenting a strikingly close parallel to the *Lane* case, *supra*, was before an English court and the reasoning and conclusions of the earlier case were enthusiastically embraced. It reviewed Judge Holt's objections and categorically rebutted each and every analogy drawn by him in his attempt to enlarge the officer's liability. In order to predicate liability upon the superior officer, the court said, "It is a clear principle that whoever holds an office which renders him responsible for any act done it, ought to have the entire management and controul of such office. If responsible for the acts of his servants, he alone ought to have the privilege of appointing

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<sup>41</sup> *Id.* at 649, 1334.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Whitfield v. Lord Le Despencer*, 2 Cowp. 753, 98 Eng. Rep. 1344 (K. B. 1778).

them; upon his own terms, and at his own direction and with as absolute a power over them in every respect as he has over the servants of his own house." <sup>44</sup> Unless such control is present, which would in effect create a master and servant relationship, the liability of the officer is only such as that of the Lord Commissioner of the Treasury, the Commissioner of Customs and Excise, the Auditors of the Exchequer, etc., who were never thought liable for any negligence or misconduct of the inferior officers in their several departments. <sup>45</sup>

Through those two cases it became the firmly established rule in England that the liability of a public officer receiving funds was that of a bailee only, and all defenses available to a bailee were available to the officer. Under this rule the officer is required to exercise only ordinary prudence and business care in preserving the public funds. He is responsible only for the exercise of good faith and reasonable diligence and is not liable for loss occurring without his fault or negligence. Under the "bailee" theory, the officer unless guilty of a breach of good faith, or negligence, or lack of caution, is not answerable for the defalcations of his subordinates. <sup>46</sup>

#### *American Common Law Rule.*

Admittedly, the common law of the United States is that the officer is a bailee for hire, <sup>47</sup> but the determination of a state official's liability and the construction of his official bond are matters of local law as distinguished from general jurisprudence. <sup>48</sup> The courts have recognized that the choice of any rule is governed by the weight given to conflicting considerations of public policy. In an early New York case, *Supervisors of Albany v. Dorr*, <sup>49</sup> an action was brought upon an official bond the condition of which was that the "treasurer shall faithfully execute the duties of said office and shall pay according to law all money." The defense was that the moneys had been feloniously stolen from the treasurer's office without any fault or negligence on his part before he had been requested to pay out the same. The Supreme Court held that no action would lie upon the bond as the condition of the bond recognized the common law rule as laid down in *Lane v. Cotton* and *Whitfield v. Lord Le Despencer*, *supra*. The

<sup>44</sup> *Id.* at 759, 1346.

<sup>45</sup> *Id.* at 764, 1349.

<sup>46</sup> *Land v. Cotton*, 1 *Ld. Raym.* 646, 91 *Eng. Rep.* 1332 (K. B. 1701); *Whitfield v. Lord Le Despencer*, 2 *Cowp.* 753, 98 *Eng. Rep.* 1344 (K. B. 1778).

<sup>47</sup> *United States v. Thomas*, 82 U. S. 337 (1872); *Town of Hamden v. American Surety Co. of New York*, 9 F. Supp. 733 (D. C. Conn. 1935); *People ex rel. Nash v. Faulkner*, 107 N. Y. 477, 14 N. E. 415 (1887); *Wilson v. People*, 19 Colo. 199, 34 Pac. 944 (1893); *Cumberland County v. Pennell*, 69 Me. 357 (1879); *York County v. Watson*, 15 S. C. 1 (1880); *State v. Copeland*, 96 Tenn. 296, 34 S. W. 427 (1896).

<sup>48</sup> *Town of Hamden v. American Surety Co. of New York*, 9 F. Supp. 733 (D. C. Conn. 1935).

<sup>49</sup> 25 *Wend.* 440 (N. Y. 1841).



Court for the Correction of Errors affirmed but the members were equally divided in opinion. This affirmance had no binding force as precedent as the case was apparently overruled by *Muzzy v. Shattuck*<sup>50</sup> in which the court said, "I cannot assent to the proposition that the liability of the collector is limited by the common law rule applicable to the ordinary case of misfeasance or neglect in the discharge of the duties of office, by a public officer."<sup>51</sup> But the specific ground upon which the common law liability was rejected was founded upon the court's contention that by statute the collector was recognized as a debtor for the amount of the taxes to be collected and since " \* \* \* the statute imposes a definite liability on the collector and his sureties for the omission to collect and pay, \* \* \* whether that omission is the result of misfeasance or neglect, unavoidable accident or felony committed by another, I do not think it furnishes any defense to the action."<sup>52</sup> In view of the fact that the decision of *Supervisors v. Dorr*, *supra*, was much criticized, and the contrary decision of the *Muzzy* case was justified upon other grounds, the question was regarded as an open one and was neatly sidestepped in *People ex rel. Nash v. Faulkner*.<sup>53</sup> In that case, the court held that money received by a surrogate in discharge of his duties was not public money but the money of a private estate or private individual and "it does not follow because public policy requires that public officers should be held to a rigid responsibility, that the same rule should be applied to public officers who receive the money of individuals who are stimulated by private interest to some watchfulness over the conduct of the officials and to some scrutiny as to the custody of their funds."<sup>54</sup>

For forty-five years the case of *Supervisors v. Dorr*, *supra*, stood without being directly overruled, but in 1896, the Court of Appeals was squarely confronted with the question in *Tillinghast v. Merrill*.<sup>55</sup>

<sup>50</sup> 1 Denio 233 (N. Y. 1845).

<sup>51</sup> *Id.* at 238.

<sup>52</sup> *Ibid.*

<sup>53</sup> 107 N. Y. 477, 14 N. E. 415 (1887). This distinction has been maintained and officers of courts having custody of property of suitors are bailees and liable only for the exercise of good faith and reasonable diligence, and are not responsible for loss occurring without their fault or negligence. Likewise a City Chamberlain or Treasurer with whom moneys are deposited by order of a court during his term of office is a trustee of those funds and moneys lost by the unlawful acts of a predecessor may not be recovered from the incumbent. *Gerschon v. Travelers Ins. Co.*, 276 N. Y. 53, 11 N. E. (2d) 349 (1937); *Pfeffer v. Lehmann*, 255 App. Div. 220, 7 N. Y. Supp. (2d) 275 (2d Dept. 1938). In *City of New York v. Fox*, 232 N. Y. 167, 133 N. E. 434 (1912), however, the court refused to apply this distinction as to private funds and held a warden liable for moneys received from prisoners and embezzled by a subordinate. "It is earnestly urged that moneys deposited with the warden were not public moneys and that, therefore, he having been guilty of no negligence \* \* \* is not responsible for the wrongful conduct of his subordinates. We think differently" (p. 169).

<sup>54</sup> 107 N. Y. 477, 487, 14 N. E. 415, 419 (1887).

<sup>55</sup> 151 N. Y. 135, 45 N. E. 375 (1896).

The court declared that the question was considered and decided upon general principles and in the light of public policy. The defendant, while supervisor of a town, deposited with a firm of bankers to his credit, as supervisor, certain of the moneys so collected. The bank failed and the money was totally lost. No negligence or misconduct was imputed to the defendant. The action was brought to recover the money upon the theory that the supervisor on receiving the money had become the debtor of the county and that the deposit of the money was at his own risk. The court held that there was no explicit declaration of legislative intent to make the supervisor a debtor of the county for the public moneys in his hands, and that the condition of the bond to "safely keep, faithfully disburse and justly account for the same" did not add to the liability created by statute. Nevertheless, the defendants were held liable, and in a passage which has since become famous, the court justified its adoption of the "insurer" rule. "In the case of an officer disbursing the public moneys much may be said in favor of limiting his liability where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect. It is at this point, however, that the question of public policy presents (itself) and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents."<sup>56</sup> It became firmly fixed thereafter that New York was aligned with the federal courts and the courts of the majority of the states and imposed the liability of an insurer upon her officers.<sup>57</sup>

#### *Majority Rule.*

The origin of the "insurer" rule is said to have been in the time when there were few banks.<sup>58</sup> Be that as it may, great impetus was

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<sup>56</sup> *Id.* at 142.

<sup>57</sup> *Village of Oneida v. Thompson*, 92 Hun 16 (N. Y. 1895); *Yawger v. American Surety Co.*, 212 N. Y. 292, 106 N. E. 64 (1914); *Trustees of Village of Bath v. McBride*, 219 N. Y. 92, 113 N. E. 789 (1916); *City of New York v. Fox*, 232 N. Y. 167, 133 N. E. 434 (1921); *In re Harris' Estate*, 161 Misc. 793, 293 N. Y. Supp. 250 (1937); *Matter of Bird v. McGoldrick*, 277 N. Y. 492, 14 N. E. (2d) 805 (1938). The N. Y. Times, Nov. 29, 1938, reported that A. A. Berle, Jr., will eventually have to reimburse New York City for funds stolen by an assistant while the former was City Chamberlain.

<sup>58</sup> *Jordan v. Baker*, 252 Ky. 40, 66 S. W. (2d) 84 (1933).

given to the spread of the rule by the general misconception arising as to the precise holding of the leading case on the problem, *United States v. Prescott*.<sup>59</sup> The action was brought on a bond guaranteeing the faithful discharge of the duties of receiver of public moneys according to the laws of the United States and that the receiver would "well, truly, and faithfully keep safely and pay over such funds," and the question was whether the felonious taking and carrying away of the money was a valid defense. The statement "This is not a case of bailment and consequently, the law of bailment does not apply to it"<sup>60</sup> was much quoted to refute the bailee theory. When, however, the entire decision is read, it is seen that the defendant's liability arose out of his official bond and as the defendant expressly undertook without qualification to keep safely and pay over the moneys, he could not be exonerated. The court with greater generality than the case before it required, stated, "Public policy requires that every depository of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practised without impunity. A depository would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys and others who receive more or less of the public funds and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of Congress. As every depository received the office with a full knowledge of its responsibilities, he cannot in case of loss complain of hardship. He must stand by his bond and meet the hazards which he voluntarily incurs."<sup>61</sup>

The point really established by the *United States v. Prescott* case was that a bond with an unqualified condition to account for and pay over public moneys deprives the officers of such defenses which are available to an ordinary bailee. Public policy influenced the construction the courts gave to the bonds but in a later case<sup>62</sup> which cited *United States v. Prescott* with approval, it was held " \* \* \* that no rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity or taken from by a public enemy, without fault or neglect on his part."<sup>63</sup> The "insurer" rule is followed by the federal courts<sup>64</sup> and in the courts

<sup>59</sup> *United States v. Prescott*, 3 How. 578 (U. S. 1845).

<sup>60</sup> *Id.* at 588.

<sup>61</sup> *Ibid.*

<sup>62</sup> *United States v. Thomas*, 82 U. S. 337 (1872).

<sup>63</sup> *Id.* at 352.

<sup>64</sup> *Boyden v. United States*, 13 Wall. 17 (U. S. 1871); *United States v.*

of the majority of the states. It necessarily follows that in such jurisdictions officers will be liable for the loss of any funds caused by the negligent or felonious acts of their subordinates.

### *Conclusion.*

Many courts have recognized the harshness of the "insurer" rule,<sup>65</sup> but as one court said, "It is a very important one and it should not be frittered away in seeking to give relief in hard cases."<sup>66</sup> Few courts would have the courage to expressly overrule their previous decisions as did the Kentucky court<sup>67</sup> which said, "After mature deliberation, and in view of the changed conditions referred to, and in the absence of any statute to the contrary, we have arrived at the conclusion that those courts adopting and approving the 'bailee' rule are more in accord with what we think is the correct one under modern conditions than are the courts adopting and applying the 'insurance' rule. Such conclusion not only harmonizes with the above defined status and relationship sustained by the officer toward the collected funds and which could not be true under the 'insurance' rule, but it also affords equal protection to the public against dishonesty, graft, carelessness and imprudence and other forms of selfishness and indifference as is done under the 'insurance' rule." However, there seems to be a growing tendency to ignore public policy as a rationalization for the rule and the trend is to base the decisions squarely on the debtor-creditor relationship,<sup>68</sup> or on the phraseology of the statute,<sup>69</sup> or of the bond.<sup>70</sup> Apparently, any relief from the rigors of the rule must come from the legislature.<sup>71</sup>

The adoption of a system such as now exists in regard to federal funds, would do much to ease the situation. Although federal officers are required to keep safely the public moneys placed in their possession and custody,<sup>72</sup> they are also affirmatively required to deposit the same with, or pay to, the Treasurer or a depository of the

Thomas, 82 U. S. 337 (1872); *Smythe v. United States*, 188 U. S. 156, 23 Sup. Ct. 279 (1902); *Town of Hamden v. American Surety Co. of New York*, 9 F. Supp. 733 (D. C. Conn. 1935).

<sup>65</sup> *Jordan v. Baker*, 252 Ky. 40, 66 S. W. (2d) 84 (1933); *Overton County v. Copeland*, 96 Tenn. 296, 34 S. W. 427 (1896).

<sup>66</sup> *Trustees of Village of Bath v. McBride*, 219 N. Y. 92, 97, 113 N. E. 789, 790 (1916).

<sup>67</sup> *Jordan v. Baker*, 252 Ky. 40, 66 S. W. (2d) 84, 88 (1933).

<sup>68</sup> *Overton County v. Copeland*, 96 Tenn. 296, 34 S. W. 427 (1896).

<sup>69</sup> *Matter of Bird v. McGoldrick*, 277 N. Y. 492, 14 N. E. (2d) 805 (1938).

<sup>70</sup> *American Surety Co. v. City of Thomasville*, 73 F. (2d) 584 (C. C. A. 5th, 1934).

<sup>71</sup> An officer cannot modify the terms of his official bond as the bonds are executed according to statutory requirements. Nor would it be feasible for him to obtain insurance covering his liability, as, obviously, the premiums would be extremely high.

<sup>72</sup> 42 STAT. 974 (1922), 31 U. S. C. § 521 (1934).

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,