An employee of the state, who was an Auditor, used a state-owned automobile to go from one assignment to another. "Chauffeur" was defined by statute as "every person operating a motor vehicle for hire as an employee of the owner thereof." The court said "Appellee was never employed as a chauffeur, but as a State Auditor, and the extent of his operation of the motor vehicle was purely incidental to the purposes of his employment, and only as a means of enabling him to make his assignments and return to his home in Baltimore."

See also Des Moines Rug Cleaning Company v. Automobile Underwriters, Inc. (1932), 245 N. W. 215 (Iowa).

GENERAL ASSEMBLY: Liability of municipality for torts committed by its employees.

MUNICIPALITY: Liability in tort action.

February 25, 1943.

Honorable James M. Knapp,
Representative Wayne County,
General Assembly,
Indianapolis, Indiana.

Dear Sir:

This is in answer to your request for an opinion as to whether a city, town, or any public department or agency of the State would be liable for injuries caused by any defect in or the failure of a railroad crossing protective device to work, or the negligence of a crossing watchman provided for by the terms of House Bill 71.

In my opinion there would be no such liability on the part of any municipality or agency or department of the State.

Cities and towns and the State Highway Commission are now authorized by statute to require by ordinance, resolution or orders, the installation by railroads of protective signal devices at certain railroad crossings, and to order watchmen maintained by railroads at certain crossings.

When a municipality or state department acts under such statutes to require such public protection it is acting in its governmental capacity in the exercise of the police power
of the State for the public safety, and the rule is general that
where a municipality is so acting no liability can be asserted
against it in connection with the exercise of such power.

A well-known example of this rule is in regard to negligent
acts of employees in the fire department of a city, where the
city even hires the men and pays their salary and has control
over their acts, but the courts universally hold that there is no
liability on the part of the city. The power exercised by muni-
cipalities, under authority of the legislature, to provide these
safety measures is governmental and sovereign in its nature
and no liability can attach to the municipality for negligence
in connection therewith.

As was said in the case of City of Indianapolis v. Butzke,
217 Ind. 203 (1940), quoting from page 213:

"* * * the liability or nonliability of a municipality
for torts does not depend upon the nature of the tort
but upon the capacity in which the city was acting in
committing the tort complained of, that is whether it
was acting in a public or private capacity. * * *

Upon the historical theory that the king or sovereign power is
being exercised in the keeping of the peace, passing and enforc-
ing laws and ordinances, preserving the public health, prevent-
ing fires, caring for the poor and carrying on a system of edu-
cation and that such power is inherently present in such activi-
ties, it is generally held that a city is exercising governmental
powers in the operations of the departments having charge of
these matters, and that it is therefore not liable for torts
committed in the discharge of the duties connected therewith.

Again in the case of City of Cincinnati v. Gamble, 34 N. E.
2nd 226, 138 Ohio St. 220.

"The state's performance of duties imposed thereon
as obligations of sovereignty, such as protection from
crime, fires, or contagion, preservation of citizens'
peace and health and protecting their property is 'gov-
ernmental function' and municipality undertaking per-
formance thereof, whether voluntary or by legislative
imposition becomes an arm of state's sovereignty and
governmental agency entitled to immunity from liabil-
ity enjoyed by state itself."
And again: Board of Commissioners of Jasper County v. Allman, Admr., 142 Ind. 573, quoting from page 576,

"It is a well settled proposition that when subdivisions of a state are organized solely for a public purpose by a general law, no action lies against them for an injury received by anyone on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute; that such subdivisions as counties and townships are instrumentalities of government and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state."

In the case of Kistner, Exec. v. City of Indianapolis, 100 Ind. 210 (219-220), it was pointed out that the legislature had given the city authority to provide for the safety of citizens and others by requiring safety gates and other protective devices at railroad crossings and that such power was a legislative or governmental power and it was held that the City would not be liable for acts done thereunder as well as for failure to act.

House Bill 71 provides in substance that in certain cases, when such protective devices are installed pursuant to an ordinance or order, the railroad or railroads affected shall install the same and shall repair and maintain the same, but that the municipality or Highway Commission shall reimburse the railroad for a part of the cost thereof, and in certain cases where watchmen are required, the railroad shall provide the watchman and the railroad shall be reimbursed for a part of his salary.

The provisions requiring the municipalities or state departments to reimburse the railroad for a part of the cost of the safety device or a part of the compensation of watchmen in certain cases would not render the municipality or state department liable for failure of the device to work or for negligence of the watchman.

The city does not construct or keep the device in repair, but that is to be done by the railroad. If the railroad is negligent in that regard and injury results, it would be liable, but in no sense can it be said to be a negligent act of the municipality.
Furthermore, as pointed out above, the municipality is acting in a governmental capacity in all it does in this regard, and it would not be liable even if its officers were negligent in regard to the same.

The municipality or public department would not be liable for any negligence of the watchman. He is not hired by the municipality, cannot be discharged by it and the municipality does not control the manner in which he does his work. He is not the agent of the municipality as all the elements required to create the relation of master and servant so as to make the municipality liable for his acts are absent, namely the right to hire and discharge and control the manner of his work.

Even if he were an employee of the municipality, then the same rule would apply as to the providing of the other safety devices, namely that the municipality would be acting in its public or governmental capacity under its power to provide for the general welfare and safety, like in furnishing police or fire protection, and it would not be liable for any acts of such an employee.

CIVIL PROCEDURE: Execution, right of judgment creditor to control same.

General Assembly.

February 27, 1943.

Mr. Donald H. Hunter, Member,
House of Representatives,
Indianapolis, Indiana.

Dear Sir:

Pursuant to your request, I have examined Engrossed Senate Bill No. 99. The title to this Bill is:

"A BILL FOR AN ACT to amend section 486 of an act entitled 'An act concerning proceedings in civil proceedings,' approved April 7, 1881."

In my opinion the title to this bill is sufficient and complies with the requirements of the constitution of the State of Indiana.