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* Feb. 22.
* Mar. 25.

HERBERT DALLAS AND MABEL DALLAS (PLAINTIFFS) ..... } APPELLANTS;

AND

LORNE G. HINTON ..... DEFENDANT;

AND

HOME OIL DISTRIBUTORS LTD. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Liability of master for servant's negligence—Accident through alleged negligent driving of motor car by company's salesman on his way home from evening lecture arranged by company for its salesmen—Question whether salesman was at the time acting in the course of his employment.

The action was for damages by reason of injuries suffered in an accident caused by alleged negligent driving of a motor car by H., and the question on the appeal was whether or not at the time of the accident H. was acting in the course of his employment by the defendant company, against whom liability was claimed.

H. was employed by defendant company as a salesman, on salary, to sell oil, gasoline and other products in the district of New Westminster. The company's office was in Vancouver. In the first few months of his employment H. had resided in Vancouver, but had later moved to New Westminster, as being more convenient for his work. His place of residence was no part of his contract and the company had nothing to say about his moving. In selling the company's products, H. drove a motor car owned by himself, but the company supplied the oil and gasoline used, paid for the car licence and for repairs. H.'s normal working day was from 8.30 a.m. to 5 p.m. He had no office of his own but used a telephone at a filling station in New Westminster for messages sent or received. He reported to the company's office several times a week and generally telephoned to it daily. At the company's office in Vancouver a pigeon hole was provided for the salesmen in which messages were left. H. received a notice there of four evening lectures to be given, and stating that he was "expected to attend." On the evening in question, H., whose own car was away for repairs, borrowed a car and drove to one of these lectures

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

in Vancouver. He left it about 9 p.m. to go home and on the way the accident occurred.

Held: At the time of the accident H. was not under any control of the defendant company so as to render it liable for his negligence.

Judgment of the Court of Appeal for British Columbia, 52 B.C.R. 106, in setting aside the judgment at trial against the defendant company, affirmed.

Bain v. *Central Vermont Ry. Co.*, [1921] 2 A.C. 412; *St. Helens Colliery Co. Ltd.* v. *Hewitson*, [1924] A.C. 59; *Alderman* v. *Great Western Ry. Co.*, [1937] A.C. 454, and *Blee* v. *London & North Eastern Ry. Co.*, [1938] A.C. 126, referred to.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for British Columbia (1) in so far as it allowed the appeal of the defendant Home Oil Distributors Ltd. from the judgment of Manson J. (2).

The action was for damages by reason of injuries suffered by the plaintiff Mabel Dallas (wife of her co-plaintiff) when she was struck by a motor car driven by the defendant Hinton. The plaintiffs alleged that the accident occurred by reason of negligence on the part of the defendant Hinton in the operation of the motor car, which, it was alleged, was being driven by him in the course and within the scope of his employment as a servant of the defendant Home Oil Distributors Ltd., against which company also the damages were claimed.

The trial Judge, Manson J., gave judgment against both defendants (2). The Court of Appeal for British Columbia upheld the judgment against Hinton but (McPhillips J.A. dissenting) allowed the appeal of Home Oil Distributors Ltd. and set aside the judgment against it (1). From the said allowance of the company's appeal, the plaintiffs brought the present appeal to this Court; and the question in issue on this appeal was whether or not at the time of the accident Hinton was acting in the course of his employment by the company.

The material facts and circumstances of the case, so far as the question in issue in this appeal is concerned, are sufficiently stated in the judgment of this Court, now reported. The appeal to this Court was dismissed with costs.

J. de B. Farris K.C. for the appellants.

C. H. Locke K.C. for the respondent.

(1) 52 B.C.R. 106; [1937] 3 W.W.R. 145; [1937] 4 D.L.R. 260.
(2) 51 B.C.R. 327; [1937] 1 W.W.R. 350.

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The judgment of the court was delivered by

HUDSON J.—This is an action for damages by a husband and wife for injuries sustained by the wife in the collision of an automobile negligently driven by the defendant Hinton, who was at the time of the accident a salesman in the employ of the co-defendant, the Home Oil Distributors Limited.

The action was tried at Vancouver before Mr. Justice Manson and judgment was given by him against both defendants (1). On appeal to the Court of Appeal of British Columbia the judgment of the trial judge against Hinton was sustained but the majority of the court held that at the time of the accident Hinton was not acting in the course of his employment and that, therefore, the defendant company was not liable (2).

On appeal to this Court the sole question submitted is whether or not the accident happened while Hinton was acting in the course of his employment.

There is little or no dispute about the facts bearing on this issue. Hinton was employed by the defendant company as a salesman working on a salary and selling oil, gasoline and other products in the district of New Westminster, which adjoins the city of Vancouver to the east. In the first few months of his employment he resided in the city of Vancouver but later on moved to New Westminster as being more convenient for his work. His place of residence was no part of his contract and his employers had nothing to say about his removal from Vancouver to New Westminster. In selling defendant's products Hinton drove an automobile owned by himself, but the defendant company supplied him with oil and gasoline and paid for the automobile licence and for necessary repairs to his car. His normal working day was from 8.30 a.m. until 5 p.m., and the company's sales manager said, on enquiry as to whether salesmen worked after those hours, that they did from time to time, that they might do the odd job if something of an emergency should arise, but that they were not asked to work after that time. Hinton had no office of his own but used the telephone at a filling station

(1) 51 B.C.R. 327; [1937] 1 W.W.R. 350.
(2) 52 B.C.R. 106; [1937] 3 W.W.R. 145; [1937] 4 D.L.R. 260.

in New Westminster, from where he sent and at which he received messages. The office of the defendant company was in Vancouver and Hinton reported there several times during the week and generally communicated therewith by telephone daily. At this office a pigeon-hole was provided for the salesmen in which messages were left from time to time. On or about 14th May, 1935, a notice was put in Hinton's pigeon-hole at the Vancouver office, stating that four lectures would be given in the evening on certain dates mentioned and "that you are expected to attend." Martin, the sales manager, said that attendance was not compulsory but desirable in the company's interests. At any rate, in the evening in question Hinton, whose own car was away for repairs, borrowed another car for the occasion and drove to the meeting at Vancouver. About 9 p.m. he left the meeting to go home in this car and shortly thereafter the accident took place.

The learned trial Judge held on these facts that the accident took place while Hinton was engaged in the course of his employment and, as above stated, the majority of the Court of Appeal took the opposite view. Before us it was argued on behalf of the plaintiffs that Hinton's attendance was in accordance with a special order arising out of his general employment, that he used a car in the performance of his duty that evening in the same way as when normally doing his daily work, that the special work took its colour from the general nature of his services, that he was engaged in his master's business in going to, attending and returning from the lecture, that in returning he was in fact returning to his business headquarters from where he would make his start on the following morning to perform his regular duties.

On behalf of the respondent it was argued that it was not part of Hinton's contract to attend the meeting in question, that in any event, as soon as he left there, he was a free agent to do as he pleased, that his employers had no control over him, that he could return to his home by any mode of transportation that he chose, that in returning to New Westminster he was, as he said, going home, that there was no evidence that he had other duties to perform for his employers that evening, that the situa-

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tion did not differ from what existed prior to removing his residence from Vancouver to New Westminster.

The question of when a servant can be held to be acting in the course of his employment has been the subject of numerous decisions in the courts and I shall refer to only a few of the more important.

In the case of *Bain* v. *Central Vermont Railway Company* (1), the appellant's husband was killed owing to the negligence of the respondent company's engine driver in disregarding the signals of another company upon whose line he was driving the engine under an agreement between the companies for joint working; each company paid the drivers employed in the joint service for the service on its own line. The appellant sued the respondents for damages. It was held that the respondent company was not liable, since at the moment of the accident the engine driver was under the control of the other company. Lord Dunedin in delivering the judgment of the Judicial Committee, at page 416, quotes with approval a statement of Bowen L.J. in *Donovan* v. *Laing Syndicate* (2), as follows:

> We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.

St. Helens Colliery Co. v. *Hewitson* (3): A workman employed at a colliery was injured in a railway accident while travelling in a special colliers' train from his work to his home at M. By an agreement between the colliery company and the railway company the railway company agreed to provide special trains for the conveyance of the colliery company's workmen to and from the colliery and M., and the colliery company agreed to indemnify the railway company against claims by the workmen in respect of accident, injury or loss while using the trains. Any workman who desired to travel by these trains signed an agreement with the railway company releasing them from all claims in case of accident, and the colliery company then provided him with a pass and charged him a sum representing less than the full amount of the agreed fare, and this sum was deducted week by week from his

(1) [1921] 2 A.C. 412. (2) [1893] 1 Q.B. 629, 633, 634.
(3) [1924] A.C. 59.

wages:—*Held* (by Lord Buckmaster, Lord Atkinson, Lord Wrenbury and Lord Carson; Lord Shaw of Dunfermline dissenting), that, there being no obligation on the workman to use the train, the injury did not arise in the course of the employment within the meaning of the *Workmen's Compensation Act, 1906*. Lord Buckmaster states at p. 67:—

> The workman was under no control in the present case, nor bound in any way either to use the train or, when he left, to obey directions; though he was where he was in consequence of his employment, I do not think it was in its course that the accident occurred.

Lord Atkinson, at p. 81:

> In my opinion, the evidence does not establish that the workmen of the appellants in travelling to or from the appellants' colliery in these provided trains were discharging any duty to their employers which their contracts of service bound them to discharge.

Lord Wrenbury, at p. 95:

> The man is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service that he is found in the place where the accident occurs. If there is only a right and there is no obligation binding on the man in the matter of his employment there is no liability.

And again at p. 96:

> If I apply the other test which I have suggested, the workman when in the train owed no duty to obey an order the employers might there give him.

In *Alderman* v. *Great Western Railway* (1), the applicant was a travelling ticket collector in the employment of the respondent railway company, and had in the course of his duty to travel from Oxford, where his home was, to Swansea, where he had to stay overnight, returning thence on the following day to Oxford. Being also qualified as a guard and, as such, liable to be called upon in an emergency, he was required by the railway company to leave, and he in fact left with them, the address of his Swansea lodgings. Apart from this obligation he had an unfettered right as to how he spent his time at Swansea between signing off and signing on, and he could reach the station by any route or by any method he chose. In proceeding one morning from his lodgings to Swansea station to perform his usual duty, he fell in the street and sustained an injury in respect of which he claimed compensation. It was held by the House of Lords that while in the street proceeding from his lodgings to the station, the

(1) [1937] A.C. 454.

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applicant was not performing any duty under his contract of service and that, therefore, the accident did not arise in the course of his employment and that consequently he was not entitled to compensation. Lord Russell of Killowen, at p. 460, said:—

> As I have already indicated there is no evidence of any contractual limitation at all of the man's choice of abode either at Swansea or Oxford. But even if there had been some term of the contract, which ensured that his lodging should not be unreasonably far from the Swansea station, it would still have been impossible to say that his contract of employment necessitated his presence on the spot where the accident occurred. He was there only because it lay on the route between the station and the particular house which he himself had happened to select. The case would still have failed to contain the element of fact which was the essential ground of the decision in the case of *London & North Eastern Ry. Co.* v. *Brentnall* (1), namely, the contractual obligation to go to the particular place where the accident happened.

and again at p. 462:—

> He was * * * subject to no control and he was for all purposes in the same position as an ordinary member of the public, using the streets in transit to his employer's premises.

In *Blee* v. *London and North Eastern Railway Company* (2), a ganger in the service of a railway company was, by the terms of his contract of service, liable to be called upon in case of emergency to go to the place where the emergency had arisen, notwithstanding that he might have finished his normal day's work, and when so called upon after his normal day's work he was entitled to be paid overtime from the hour he left his home in order to proceed to the place where the emergency had arisen. One night, after he had completed his day's work and after he had gone to bed, he received a message requiring him to go to a certain siding to assist in replacing a derailed truck, and in compliance with that order he rose and was proceeding to the siding when he was knocked down in the street by a motor car and sustained injuries from the effects of which he died. On a claim for compensation by his widow:—

Held, by the House of Lords, that as the deceased man was obliged by the terms of his contract to obey an emergency call at any hour, as he was paid from the time he left his home in obedience to the call, and as he was obliged to proceed with reasonable despatch to the place where his services were required, there was evidence to

(1) [1933] A.C. 489. (2) [1938] A.C. 126.

support the finding of the county court judge that the accident arose out of and in the course of the deceased man's employment, and, therefore, that his widow was entitled to compensation.

In the course of his judgment, Lord Atkin states:—

> There can be no question that had the workman been going to his ordinary work in the morning he would not have been entitled to compensation for injury suffered from street risks incurred in transit. His time in such a case is his own; he arrives at the scene of his labours as he pleases; and though it is his duty to present himself at the appointed time yet his "employment" does not in ordinary circumstances begin for the purposes of the Act until he reaches the place where he is employed.

and he quotes from the words of Lord Russell of Killowen in *Alderman's* case (1):—

> The cases in which men are employed to work at a distance from their homes and have to find lodgings for themselves must be innumerable. Yet there is no case in the books, or at all events none was cited, in which such an one meeting with an accident when merely on his way to or from his work has been held entitled to compensation. In order to entitle him to compensation in such a case some other element must be present (involving the discharge of a contractual duty to the employer) which in law extends the course of his employment so as to include the moment of time when the accident occurred.

The learned Lord expressed some doubt but in the end arrived at the conclusion that on the special facts there was in that case a special duty to obey the emergency call, that he was paid from the time he left the house so that that time was his master's time and that he was under an obligation to proceed with reasonable despatch by the reasonably shortest route, which afforded evidence from which the judge could infer that from the time the workman started from his house he was actually engaged in the performance of his contract of service.

Lord Maugham concurred in the opinion of Lord Atkin and at p. 134 said:—

> We can test the view of the arbitrator by supposing that a superior officer of the company happened to meet the workman loitering on his way to the place or diverging from the proper route. Could not the officer properly have ordered the workman to proceed direct to the place to which he has been called? The circumstance as to payment affords, I think, a decisive answer in the affirmative.

Lord Roche, in concurring, at p. 134, stated:—

> A workman may be acting in the course of his employment or, put more shortly, he may be on duty, when in a public street. Ordinarily he is not so acting when proceeding to the place where his work proper begins. But he may be so if he is proceeding to that place by a pre-

(1) [1937] A.C. 454, at 461.

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scribed route or by a prescribed means of conveyance. The circumstances here are different in that neither route nor conveyance were prescribed.

The question whether a given act of an employee is within the scope of his employment, in the sense in which that phrase is used for the purpose of determining the employer's liability to third persons, is, strictly, not the same question as the question whether an injury received by an employee at a given moment in given circumstances was an injury received in the course of his employment for the purposes of applying the *Workmen's Compensation Act*. Nevertheless, judicial reasoning in respect of the latter class of questions may be, and in the circumstances of this case is, valuable and illuminating.

In our opinion, the question we have to consider is whether or not Hinton was on his master's business at the moment of the accident.

He had gone to the lecture on his master's invitation and, at least to some extent, for his master's benefit. The area of his business was some miles away and he had to return there in order to resume his work, but his home was also in the area of his business. It was a place of residence of his own choice, not that of his master. After leaving the meeting his day's work was done; he was free to do as he pleased and free to go home without any further control or direction from his master as to the route, mode of transportation or otherwise. His only obligation was to be at work in New Westminster the next morning at 8.30 a.m.

Under these circumstances, we cannot hold that Hinton was under any control of his masters so as to render them liable for his negligence and would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Campbell.*

Solicitor for the respondent: *W. S. Lane.*