1951

*Oct. 15, 16
*Dec. 17.

HARRY MARSH (DEFENDANT) .... APPELLANT;

AND

ALEX KULCHAR (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Automobile—Master and servant—Car entrusted by owner to wife who put employee in charge for limited purpose not including driving—Whether possession given employee—Negligence of employee in driving—Whether owner has statutory liability—Whether car wrongfully taken out of wife's possession—Vehicles Act, 1945 (Sask.), c. 98, s. 141(1).

By virtue of s. 141(1) of the *Vehicles Act, 1945 (Sask.)*, c. 98, the owner of a car is liable for damage caused by the driver's negligence "unless the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof".

Appellant's wife was entrusted by him with the care of his truck for a trip in which she was accompanied by their farm hand. At her destination, she left the key in the ignition and told the farm hand "to look after the car so no kids could touch it". Although the latter had never driven a car for his employer nor did he have an operator's licence, he decided to drive it to a coffee shop a short distance away. He stated that his reason for driving it there was so that he might continue to watch it. Owing to his negligence, a pedestrian was injured. The action against the appellant was dismissed by the trial judge but maintained by the Court of Appeal for Saskatchewan.

Held (Estey and Cartwright JJ. dissenting), that the appeal should be allowed as the appellant has met the burden placed upon him by the statute.

Per Rinfret C.J., Kellock and Locke JJ.: The farm hand was in the position of a watchman or guard and not that of one to whom possession had been given. When he moved the car for purposes of his own convenience, he took actual physical possession of it, and that was a wrongful taking of possession within the exception in s. 141(1) of the *Act*.

Per Estey J. (dissenting): The section contemplates that the owner is to be relieved of liability only where the driver has exercised a dominion or control inconsistent with the possession of a person in the position of the wife. No such case was made here. Not only did he not deprive the wife of possession but, on the contrary, he sought to continue his supervision in order that her possession would neither be disturbed nor damaged.

Per Cartwright J. (dissenting): The farm hand was not given possession of the truck but only the custody of it. The truck was never taken out of the wife's possession, since the farm hand's lawful custody could be converted into wrongful possession only if there was an intention on his part to hold the truck as his own and to the wife's exclusion, and no such finding would be consistent with the facts.

*PRESENT: Rinfret C.J. and Kellock, Estey, Locke and Cartwright JJ.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the decision of the trial judge and holding the appellant, as owner of the car, liable for the damages caused by the negligent driving of his employee.

G. H. Yule K.C. and *E. M. Woolliams* for the appellant. The contention of the appellant is that there was no finding by the trial judge that the wife gave any instructions to the farm hand with respect to the truck. The trial judge only assumed that there had been instructions. If there were no instructions as contended, then the truck was stolen. There is express denial that such instructions were ever given. Assuming that there had been instructions, there is no evidence that the farm hand ever agreed to carry them out. The fact that he was in the general employment of the appellant is not relevant.

But even if there were such instructions, the owner cannot be held liable since the farm hand was not put in possession but only given the custody. *Smith* v. *Webb* (2) is relied on. When he started to drive he took possession away or out of the owner. The word "wrongfully" in the section, means that there was no consent express or implied. He never had possession within the concept of that word in *Vancouver Motors-U Drive Ltd.* v. *Terry* (3).

The true interpretation of the section is that if an owner delivers possession to anyone for the purpose of the vehicle being driven, then he is liable for the damage and it makes no difference if the person so entrusted drives in violation of the instructions of the owner.

Cases at common law as to liability of the master for the acts of the servant are not helpful, since under the section, the master would have been liable no matter for what purpose the servant drove the vehicle.

But cases more pertinent at comman law are cases where the servant improperly took the master's vehicle, such as: *Halperin* v. *Bulling* (4), *Limpus* v. *London General Omnibus Co.* (5), and *Beard* v. *London General Omnibus Co.* (6).

(1) [1951] 3 D.L.R. 64.
(2) (1896) 12 T.L.R. 450.
(3) [1942] S.C.R. 391 at 402.
(4) (1914) 50 Can. S.C.R. 471.
(5) 158 E.R. 993.
(6) (1900) 2 Q.B. 530.

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If, at common law, there would have been no liability on the appellant for the reason that the servant wrongfully drove the vehicle, then the language of the section cannot be strained to impose liability, in virtue of the rule of strict construction of a statute that tends to modify the common law.

No argument can be advanced that when he moved the truck, he was acting in the interests of the master, as there is no such finding by the trial judge. Even if he decided to take it to where he was going in breach of his duty to watch it where it was, he still would be taking it improperly if his reason for taking it was to watch it at a new location to which he wished to go for his own private purposes.

F. B. Zurowski for the respondent. A perusal of the various amendments of the *Act* discloses that the legislature has been enlarging on the common law liability of the owners of vehicles. Therefore, the common law is not of assistance to this case. The question of the extent of the owner's liability, once it is clear the driver was placed in possession was dealt with in *Sebda* v. *Hupka & Buchkowski* (1). Asking somebody to watch the car amounted to giving possession of it, in the circumstances here. There is no evidence to contradict the evidence of the farm hand respecting the instructions. The trial judge has held that he exceeded his instructions and that he had no authority to drive the car. That is a finding of credibility which is supported by the evidence and by the circumstances.

There is an essential difference in law between the liability of the owner for the acts of one who has been placed in possession of the vehicle and exceeds his authority by moving it, and his liability for the acts of one who obtains possession of the vehicle either by theft or wrongful means (*Bailey* v. *Manchester Sheffielf & Lecolnshire Ry. Co.* (2).

The following authorities are submitted on the question of the owner's liability: *Vancouver Motors-U Drive Ltd.* v. *Terry* (*supra*), *Volkert v. Diamond Truck Co.* (3), *Lloyd* v. *Dominion Fire* (4), *Bobby* v. *Chodiker* (5) and *Smith* v. *Drewrys Ltd.* (6). The case of *Smith* v. *Webb* cited by the appellant (*supra*) is of no assistance here.

(1) [1950] 2 W.W.R. 165.
(2) 7 C.P. 415.
(3) [1940] S.C.R. 455.
(4) [1940] 1 W.W.R. 210.
(5) [1929] 1 W.W.R. 770.
(6) [1937] 1 W.W.R. 107 at 110.

The judgment of the Chief Justice and of Kellock and Locke JJ. was delivered by

KELLOCK J.:—This appeal arises under the provisions of sub-s. (1) of s. 141 of the *Saskatchewan Vehicles Act,* 1945, c. 98, the material part of which reads as follows:

. . . when any loss, damage or injury is caused to any person by a motor vehicle . . . the owner thereof shall also be liable to the same extent as the driver unless at the time of the incident causing the loss, damage or injury, the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of any person intrusted by him with the care thereof.

The respondent was injured by a motor vehicle driven by one Beukert, a farm hand in the employ of the appellant, the owner of the car. So far as his employment is concerned, however, Beukert had nothing to do with the motor car, and had no license to drive. On the evening in question, he had merely accompanied the appellant's wife in the car to a supper in the village of Mistatim, which was to be followed by a dance. On arriving at the village, Mrs. Marsh left the key of the car in the ignition for the reason that, as she explains, she had not her purse with her and was afraid she might lose the key if she took it with her. While Mrs. Marsh denies she spoke to Beukert about the car at all, he says she did, and that the substance of what she said was,

she told me to look after it so no kids . . . could touch it.

Mrs. Marsh and one or two friends who had accompanied her, went into the supper, as did Beukert, and some time later, it is suggested when Mrs. Marsh was at the dance, Beukert got into the car and drove it a short distance to a restaurant, in front of which the accident in which the respondent was injured, occurred.

The learned trial judge accepted Beukert's version of what had been said by Mrs. Marsh with respect to the car on their arrival at the village, and on that evidence, held that Beukert had not been given possession of the car and that in driving it as he did, he had wrongfully taken it out of her possession. In the Court of Appeal (1), Proctor J.A., who delivered the judgment of himself, Gordon, McNiven and Culliton JJ.A., construed this judgment as proceeding on the ground that possession of the car had been

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given by Mrs. Marsh to Beukert, and that the latter in driving it, had merely exceeded his authority. Martin C.J.S., who delivered a separate judgment, took a similar view.

With respect, I do not think the trial judgment is open to such a construction. The finding of the learned judge is an express one that Beukert "wrongfully took the truck out of the possession of Mrs. Marsh," which presupposes that possession had never in fact been delivered to him. He says that on the basis of what was said by Mrs. Marsh, all Beukert had to do was to "keep his eye on the truck and leave it where it was." In my view, the evidence is not open to any other interpretation, and Beukert's position, on his own story, was that of a watchman or guard, and not that of one to whom possession had been given. Accordingly, when he drove the car, that was, as against Mrs. Marsh and the appellant, a wrongful taking of possession.

Respondent's counsel contended that it was within the contemplation of Mrs. Marsh that the car should be driven by Beukert. In my opinion, this contention is not open upon the words used. Moreover, Beukert admits that, to him, they had no such implication. It is worth while quoting, on this point, a further extract from his evidence:

Q. But you got in the truck?

A. Yes.

Q. Knowing that you should not drive it?

A. Yes.

Q. And where were you going with it?

A. Going over to the cafe and have coffee.

Coming to the statute, the owner is not liable if it be shown that the motor vehicle had been stolen from him or "otherwise wrongfully taken out of his possession," or "out of the possession of any person entrusted by him with the care thereof."

The word "possession" in English law is, as has often been pointed out, a most ambiguous word. As most often used, however, it imports actual physical possession. As stated by Erle C.J. in *Bourne* v. *Fosbrooke* (1),

"In most instances, it is considered to import the manual custody of the chattel."

(1) (1865) 18 C.B.N.S. 515 at 526.

In *The Tubantia* (1), Sir Henry Duke, P., said:

> I have also taken this to be a true proposition in English law: a thing taken by a person of his own motion and for himself, and subject in his hands, or under his control, to the uses of which it is capable, is in that person's possession.

When a motor car is stolen from the owner, the thief takes actual physical possession, and thus takes it out of the possession of the owner, although the right to possession remains with the latter. That this is the idea in contemplation of the statute is shown by the use of the phrase, "or otherwise . . . taken out of his possession." The statute also contemplates that the person to whom the care of the car has been entrusted, has been put into possession by the owner, as it deals with the wrongful taking out of the possession of such person. When actual physical possession is taken of a motor car by the wrongful act of another, it is, in the contemplation of the statute, taken out of the possession of the owner or such other person.

There is no doubt that when Beukert moved the car for purposes of his own convenience, he took actual physical possession as above described, thereby depriving Mrs. Marsh of possession. In my opinion, this was a wrongful taking.

In Pollock and Wright on "possession in the Common Law," the authors deal at p. 120 with the case of a person having a right to a particular chattel which may or may not coincide with the right of ownership, and secondly with the case of mere physical possession without either ownership or right to possession. They point out at p. 121 that a violation of the first of these relations is a conversion or "wrongful detention," while a violation of the second is a trespass. In the latter case, if a stranger take the chattel away without leave, the possession is "wrongfully" changed and the former possessor, whether he be owner or not, can bring either trover or trespass de bonis asportatis, and if the trespass be committed animo furandi, the trespasser may be prosecuted for theft from the possessor. A wrongful taking in circumstances such as are here present is also rendered a crime by s. 285(3) of the *Criminal Code*. The difference between such wrongful taking and theft is, of course, the presence in the latter case of fraudulent intent.

(1) [1924] P. 78.

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I think, therefore, the appellant met the burden placed upon him by the statute, and that the action was properly dismissed at the trial. I would therefore allow the appeal with costs here and below, and restore the judgment of the trial judge.

ESTEY J. (dissenting):—The appellant, owner of a 1940 Ford truck, appeals from a judgment of the Court of Appeal in Saskatchewan (1) under which, by virtue of the provisions of sec. 141(1) of the *Vehicles Act* (S. of Sask. 1945, c. 98), he has been held liable for damage suffered by the respondent when an employee of his, Beukert, was driving the truck. The contention of appellant is that Beukert had wrongfully taken the truck and, therefore, that he, as the owner, is not liable within the exception to sec. 141(1). Sec. 141(1) reads as follows:

141(1) 1. Subject to the provisions of subsection (2), when any loss, damage or injury is caused to any person by a motor vehicle, the person driving it at any time shall be liable for the loss, damage or injury, if it was caused by his negligence or improper conduct, and the owner thereof shall also be liable to the same extent as the driver unless at the time of the incident causing the loss, damage or injury the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of any person intrusted by him with the care thereof.

The accident occurred about 8:30 Saturday evening, September 6, 1947. Beukert had been employed for a month prior thereto upon appellant's farm, where it was no part of his duty to drive, nor did he drive, this truck or any motor vehicle. In fact, he did not have a driver's licence. On the evening in question the appellant's wife drove the truck, with her sister-in-law and Beukert as passengers, into Mistatim to attend a fowl supper and social evening. When she parked the truck in Mistatim, having left her purse at home, she left the keys in the ignition because she thought they were safer there than in her pocket. Beukert deposed that Mrs. Marsh, as she parked the truck, asked him to look after it and, at another time, added "so no kids could touch it." This was denied by Mrs. Marsh and, in effect, by her sister-in-law. Beukert, when the truck was parked, separated from the women. About 8:30 he decided to have a cup of coffee and, as he says, was moving the truck about 125 feet to a spot where

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he could watch it from the inside of the coffee shop. It was in the course of so moving the truck that he struck and seriously injured the respondent.

Mr. Yule contended that the learned trial judge did not make a finding of fact to the effect that Mrs. Marsh had requested Beukert to keep the "kids" away from the truck. The learned trial judge first stated his conclusion to the effect that Beukert had wrongfully taken the truck and then stated: "The evidence is this," and went on to state certain facts, including "Mrs. Marsh said to Beukert to take care of the truck and keep the kids away or something to that effect." The learned trial judge did not suggest that he was summarizing the evidence, or in any way reviewing it, and, when read as a whole, it appears that he was setting forth the facts which he found in support of the conclusion he had already stated. I am, therefore, in agreement with Mr. Justice Procter, with whom Mr. Justice McNiven and Mr. Justice Culliton agreed, that "the trial judge accepted Beukert's story."

That the injury resulted from the negligent driving of Beukert there is no question and no appeal is taken from the judgment rendered against him.

Section 141(1) imposes upon appellant liability "to the same extent" as upon Beukert for the latter's "negligence or improper conduct" in driving the truck. It then provides, by way of an exception, that the appellant may be relieved of that liability if it be established that Beukert had "stolen" or "otherwise wrongfully taken" the truck "out of the possession of any person intrusted by him with the care thereof."

That the appellant, as owner, had intrusted Mrs. Marsh with the care of the truck and that she was, therefore, a person in possession thereof, within the meaning of the section, was not contested.

Mrs. Marsh, when she requested Beukert to take care of the truck, as found by the learned trial judge, retained possession thereof. The appellant's contention is that Beukert, in moving the truck as aforesaid, took it out of her possession within the meaning of sec. 141(1).

That Beukert had neither a licence nor permission to drive the truck, and, therefore, in doing so acted wrongfully is apparent. That his conduct in this regard ought

not to be condoned must be conceded. That he acted wrongfully, however, is not sufficient. It must be established, in order for the appellant to succeed, that Beukert's conduct was such that it brought him within the section as one who had "otherwise wrongfully taken" the truck "out of the possession of" Mrs. Marsh. The words "otherwise wrongfully taken . . . out of the possession of" are words, apart from any context, sufficiently wide and comprehensive to include many wrongs, but, as here used in association with the word "stolen," they must be given a more restricted meaning. "Theft" is defined in sec. 347 of the *Criminal Code* as

the act of fraudulently and without colour or right taking . . . with intent,

(*a*) to deprive the owner . . .

The specific intent essential in sec. 347 of the *Criminal Code* is not required under that portion of sec. 141(1) with which we are here concerned. In both sections there must be a taking. The Legislature, by its language in sec. 141(1), contemplates more than an interference with possession sufficient to constitute a mere trespass, even if that include a moving of the motor vehicle. It would rather appear that in using the words "wrongfully taken . . . out of the possession of" the Legislature intended the owner should be relieved of liability only where the driver has exercised a dominion or control inconsistent with the possession of a person in the position of Mrs. Marsh. The evidence accepted by the learned trial judge does not support such a taking.

Whether, within the meaning of sec. 285(3), Beukert's moving of the truck constituted a taking with intent to operate or drive need not be here ascertained. It is sufficient to observe that a prosecution under that section does not raise any question of taking out of possession, but rather of a taking without the consent of the owner. The owner's consent is an essential factor under that section and as it is in sections corresponding to sec. 141(1) in some of the other provinces. In the statute here in question it is the wrongfully taking out of the possession which involves quite distinct issues.

Beukert was employed by Mrs. Marsh. He had been requested to give supervision to the truck by Mrs. Marsh and when, in the course of the evening, he desired a cup of

coffee he decided not to neglect, but rather continue, his supervision of the truck by moving it. That in the course of so moving it he inflicted the unfortunate injuries for which damages are here claimed does not alter or affect his conduct in relation to the question of whether Mrs. Marsh was deprived of her possession of the truck. Beukert, in moving the truck, did not assert any control or dominion over it inconsistent with the possession of Mrs. Marsh; nor did he, in fact, deprive her of her possession. On the contrary, he sought to continue his supervision in order that her possession would neither be disturbed nor damaged. It cannot, therefore, be said that the conduct of Beukert constituted him as one who had "otherwise wrongfully taken" the truck "out of the possession of" Mrs. Marsh, within the meaning of sec. 141(1).

The appeal should be dismissed.

CARTWRIGHT J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for Saskatchewan (1) allowing an appeal from a judgment of McKercher J. and directing judgment to be entered in favour of the respondent for the amount of damages assessed by the learned trial judge.

The detailed facts of the case are stated in the judgment of my brother Estey and certain relevant portions of the evidence are set out in the judgment of Procter J.A. but in order to make plain the grounds upon which my opinion is based it is desirable that I should summarize what I regard as material.

It was not contested that the respondent's injuries were caused by the negligence of Beukert in driving a motor truck owned by the appellant or that the possession and care of such truck had been entrusted by the appellant to his wife on the evening of the accident. The following findings of fact appear to me to have been made by the learned trial judge and concurred in by the Court of Appeal and to be supported by the evidence. (i) Beukert was at the time of the accident and had been for some weeks prior thereto employed by the appellant. (ii) During this time he had not operated the motor vehicle which injured the respondent or any other motor vehicle belonging to the

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appellant. (iii) Beukert was not licensed to drive a motor vehicle. (iv) On the evening of the accident the wife of the appellant had left the key in the truck and had told Beukert "to look after the truck so that no kids could touch it." (v) While Beukert was taking care of the truck he wanted a cup of coffee and decided to get this at a coffee shop, distant 125 feet from where the truck was standing. (vi) He decided to drive the truck to the coffee shop so that he could continue to keep the truck in his sight through the window while having his coffee. (vii) Beukert thought he was justified in doing this. (viii) The respondent was struck by the truck just as Beukert was completing the journey of 125 feet.

It was not seriously suggested that under these circumstances Beukert could be said to have stolen the truck but the learned trial judge was of the view that the result in law of the facts stated was that Beukert at the moment of the accident had wrongfully taken the truck out of the possession of a person (Mrs. Marsh) entrusted by the appellant with the care thereof, within the meaning of section 141(1) of the *Vehicles Act,* S. of Sask., 1945, c. 98.

In the Court of Appeal, Procter J.A., with whom McNiven and Culliton JJ.A. agreed, proceeds on the basis that Mrs. Marsh had given possession of the truck to Beukert and that consequently although he had exceeded his authority in driving it he could not be said to have taken it wrongfully out of her possession. The learned Chief Justice of Saskatchewan, with whom Gordon J.A. agrees, speaks of Beukert having been "put in charge of the truck for a limited purpose by Mrs. Marsh" and also says in part: "Beukert was in possession of the truck and in a position to drive it." The Court were unanimous in allowing the appeal.

I am in agreement with the Court of Appeal as to the result and, bearing in mind the often repeated statement that "possession is a word of ambiguous meaning" (vide e.g., Halsbury, 2nd Edition, Vol. 25, pages 194 et seq), I am not prepared to differ from the reasons given, but it seems to me that I should have reached the same conclusion on a somewhat different view as to the legal result of the facts found.

I incline to the view that Mrs. Marsh did not give Beukert possession of the truck but only the custody of it. As is said in Stephen's Digest of the Criminal Law, 9th Edition, at page 304: "A moveable thing is in the possession of . . . the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure." If this be the right view, in my opinion, Beukert at no time took the truck out of Mrs. Marsh's possession at all. In order that Beukert's lawful custody should be converted into wrongful possession it would be necessary to find an intention on his part to hold the truck, at least temporarily, as his own and to the exclusion of Mrs. Marsh. Such a finding would, I think, be quite inconsistent with the facts stated above. Beukert's intention in moving the truck was not to take it from Mrs. Marsh's possession but rather to enable him to continue to keep the custody of it with which he had been entrusted while at the same time enjoying the cup of coffee which he desired.

It seems to me that there is danger of confusion arising from the facts that the moving of a truck by an inexperienced driver is always attended with the possibility of causing damage and that Beukert was not licensed to drive. As was pointed out by Fisher J.A. speaking for the majority of the Court of Appeal for Ontario in *Thompson* v. *Bourchier* (1), the operation of an automobile is not necessarily synonymous with the possession of an automobile. It could not, I think, be successfully argued that if instead of committing the truck to Beukert's care Mrs. Marsh had handed him her suit-case to look after and he had carried it less than fifty paces to purchase a cup of coffee that he would have thereby wrongfully taken the suit-case out of her possession.

For the appellant it was argued that when Beukert commenced to drive the truck he thereby deprived Mrs. Marsh of the "actual physical possession" thereof and that this was wrongful as he had neither the consent of the owner nor the license to drive required by law. The fallacy of this argument is that at the moment when Beukert commenced to drive Mrs. Marsh did not have the "actual physical possession"; she was physically absent; and if the word "possession" in section 141(1) is synonymous with

(1) [1933] O.R. 525 at 529, 530.

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the words "actual physical possession" as used in this argument then Mrs. Marsh had transferred such possession to Beukert when she committed the truck to his care and went about her business. Unless and until it appears that the truck had been taken out of her possession an inquiry as to whether the conduct of the alleged taker was wrongful is irrelevant.

It was further submitted on behalf of the appellant that Beukert took the car out of Mrs. Marsh's possession because he drove it solely for his own purposes thereby evidencing an intention to hold it, at least for a time, as his own. But this argument fails on the evidence and on the findings of fact. Beukert's reason for moving himself to the coffee shop was for his own purpose of drinking a cup of coffee. He could and normally would have fulfilled that purpose without moving the truck. His reason for driving the truck to the coffee shop, instead of temporarily abandoning it, was so that he might continue to watch it while having the coffee.

In my opinion on the facts as found the appellant is not within the exception from liability which the section provides.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Van Blaricom & Woolliams.*

Solicitor for the respondent: *F. B. Zurowski.*