MOSES HALPARIN (PLAINTIFF).....APPELLANT;

AND

ALFRED C. BULLING (DEFENDANT)..RESPONDENT.

1914

*Oct. 21.
*Dec. 29.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Master and servant—Use of motor car—Disobedience—Act in course of employment—Employer's liability.

B. was owner of an automobile and hired a chauffeur to run it, giving him positive instructions that the car was not to be used except for purposes of the owner and his family, and that, when not in use for such purposes, it was to be kept in a certain garage. On the evening of the accident in question the chauffeur took his master's family to a theatre, in Winnipeg, and was directed by them to take the car to the garage and return for them after the close of the performance. The chauffeur took the car from the garage before the appointed time and proceeded with it for the purpose of visiting a friend in a distant part of the city. While so using the car, contrary to instructions, he negligently ran down the plaintiff, causing injuries for which an action was brought to recover damages against B.

Held, affirming the judgment appealed from (24 Man. R. 235), that, at the time of the accident, the chauffeur was not engaged in the performance of any act appertaining to the course of his employment as the servant of the owner of the car and, consequently, his master was not liable in damages. *Storey* v. *Ashton* (L.R. 4 Q.B. 476), followed.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Prendergast J., at the trial, and dismissing the plaintiff's action with costs.

The circumstances of the case are sufficiently stated in the head-note.

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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Davies J.

Nesbitt K.C. and *H. Phillips* for the appellant.

W. N. Tilley for the respondent.

DAVIES J.—I think this appeal should be dismissed and the judgment below affirmed on the ground which was clearly established that the chauffeur from the time he took the motor car out of the garage until the accident occurred was on his own business and pleasure and not on any business of his master's.

He was not acting within the scope of his duty as his master's chauffeur, but outside of and beyond that scope.

IDINGTON J.—In this case the learned trial judge finds that the respondent's chauffeur in driving his automobile was guilty of negligence and respondent liable to answer for the damages consequent therefrom suffered by appellant.

I assume the facts to be as reported by the learned trial judge, that respondent had in engaging the chauffeur bound him never to use the automobile without leave, and on such occasions as the night in question when he took the wife and some of respondent's family to the theatre, that the automobile should be at once returned to a neighbouring garage and left there till the time had approached to take it out and go and bring the family home.

On the night in question the automobile, after respondent's people had been duly left at the theatre, was taken to the neighbouring garage and left there by the chauffeur, but in a very short time thereafter taken out and used by him for purposes of his own in course of which the appellant was very seriously injured.

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It would seem to me idle to contend that when this respondent's servant took his automobile out of the garage from which it was not to be taken until at least two hours later, he was not a trespasser and liable as such to instant dismissal for doing so. It seems he was not dismissed but retained in respondent's service despite such gross disobedience and the suffering caused thereby. I quite agree this is a state of things which in a well ordered state ought not to be suffered.

I regret to be compelled to hold that the common law relative to the ordinary relations of master and servant, and the responsibility of the former for the latter, under such circumstances, does not enable the courts to do absolute justice and that the statutory amendments thereto do not reach far enough to cover such a case as this.

Let us hope the law will be changed so far at least that the master who thus flaunts his support of such a wrongdoer in the face of one of those he has grossly injured, shall be made liable for all damages done by him whilst in such service.

Indeed, I think the legislation needed might go further, but to this extent at least it would be a deterrent for both master and man.

If this man had, as in the case of *Venables* v. *Smith* (1), relied upon by appellant's counsel, after leaving the theatre and before placing the automobile in the garage, gone upon some brief errand of his own, something might have been said for the case made.

Unfortunately for the appellant it seems to have been such a departure from the course of the chauf-

(1) 2 Q.B.D. 279.

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feur's employment that in law the master cannot be held bound to answer therefor.

The appeal should be dismissed with costs if the respondent claims them as it is to be hoped he will not.

DUFF J.—The principle of law by which our decision in this appeal must be governed is stated in these words by Cockburn C.J. in *Storey* v. *Ashton*(1), at page 479:—

> The true rule is that the master is only responsible so long as the servant can be said to be doing the act in the doing of which he is guilty of negligence in the course of his employment as servant.

The question in controversy is this question of fact — Was the chauffeur, Stapleton, about his master's business when he ran down the unfortunate victim of his carelessness or was he making use of the respondent's car in an independent excursion of his own? I think the conclusion at which the Court of Appeal arrived was right and that the question must be answered in the sense in which they answered it, namely, that Stapleton was not then engaged in the doing of anything appertaining to the course of his employment as the respondent's servant.

I think the provisions of the "Motor Vehicles Act" of Manitoba to which our attention was called have no relevance to any point arising on the appeal.

ANGLIN J.—I concur with Mr. Justice Duff.

BRODEUR J.—It is with a great deal of hesitation that I have come to the conclusion that this appeal should be dismissed, though it is true that when the

(1) L.R. 4 Q.B. 476.

accident occurred the respondent's chauffeur was not acting within the scope of his duty. His instructions were to have the automobile at a certain garage or at the respondent's residence, and instead he took the motor car and used it for his own purpose and pleasure. During that errand of his own he struck the appellant.

A local Act of Manitoba, in which province the accident occurred, was invoked by the appellant; but it has no bearing upon the issues in this case.

The jurisprudence under the English common law is that the master is not liable for the negligence of his servant while the latter is engaged in some act beyond the scope of his employment for his own purpose, though he may be using the instrumentalities furnished by the master to perform his duties as servant. *Mitchell* v. *Crasweller*(1), in 1853; *Storey* v. *Ashton* (2), in 1869; *Rayner* v. *Mitchell*(3), in 1877; *Dowling* v. *Robinson*(4), in 1909.

I may add that the decision in this case should not be considered as a precedent in Quebec, where the liability of the master rests on different principles. Sainctelette, Responsabilité des propriétaires d'automobiles, p. 216, No. 188; Dalloz, 1908-1-351; Gazette du Palais, 1904-1-140; Le Droit, 22 Oct., 1914, Cour de Cassation.

Appeal dismissed with costs.

Solicitors for appellant: *Phillips, Rogers & Scarth.*

Solicitors for the respondent: *Moran, Anderson & Guy.*

(1) 13 C.B. 237.
(2) L.R. 4 Q.B. 476.
(3) 2 C.P.D. 357.
(4) 43 Ir. L.T.R. 210.