THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

The Twenty-Third Annual Meeting of The Canadian Bar Association will be held in the City of Vancouver, B.C., on the 17th, 18th and 19th days of August, 1938.

* * *

CASE AND COMMENT

NEGLIGENCE—CAUSATION—ULTIMATE NEGLIGENCE. — The decision of the English Court of Appeal in *The Eurymedon*[1] seems to add a very definite nail in the coffin of the doctrine of ultimate negligence and last clear chance, particularly in cases where apportionment of the degrees of negligence is permissible. Further, the decision seems to have released English law, to some extent, from the self-imposed shackles of an artificial theory of causation which never explained the true position of limiting liability for wrongful acts, no matter how satisfying to persons who sought for convenient "rules" giving the appearance of consistency. Some writers have sought to support the doctrine of ultimate negligence on the ground that it depended on a definite theory of causation. Thus, Dean V. C. MacDonald, writing in this REVIEW[2] stated :

> The doctrine of ultimate negligence . . . . . merely means that he who *caused* the injury should pay for or bear it . . . . . to abolish ultimate negligence is to destroy the whole sub-stratum of the law of contributory negligence . . . . . [and] is to abolish our whole doctrine of causality in the one type of situation (sequential negligence) in which sole cause can be determined.

[1] *Corstar* (*Owners*) v. *Eurymedon* (*Owners*), *The Eurymedon*, [1938] 1 All E.R. 122.

[2] MacDonald, *The Negligence Action and the Legislature* (1935), 13 Can. Bar Rev. 535, 559.

Attempts to explain the doctrine of contributory negligence in terms of causation are very common, although it is now more or less agreed that such explanation falls short of the mark.[3] Further, some judges have spoken of a doctrine of causation which fixes sole responsibility for damage on the "last human wrongdoer".[4] This is a view which acquired a new lease of life in the judgments of Lord Sumner, particularly in *Weld-Blundell* v. *Stephens*[5] and *S.S. Singleton Abbey* v. *S.S. Paludina*[6], in both of which cases it was held that the conscious wrongful act of a third person broke the chain of causation and insulated the original wrongdoer from liability. It seems apparent that when we take into consideration the wrongfulness of a third person's act as terminating liability of the original wrongdoer, we are outside the scope of finding cause as a fact, and are engaged in the altogether different task of determining whether liability *should* extend to cover the risk in question.[7] Further, the doctrine of isolating the last conscious wrongdoer has never been able to explain all the cases[8] and it is probably correct to say, despite occasional throw-backs as indicated in the last two cases cited, that "the tendency of modern authority is to make the liability of the original actor depend, not upon the negligence or even intentional wrongfulness of the subsequent act of the third party, which is the final decisive cause of the plaintiff's harm . . . but rather upon this,—whether or not, in view of the surrounding circumstances and the conditions which the defendant's conduct might be expected to make, the third party's subsequent action was normal, and so, expectable."[9]

---

[3] SALMOND, TORTS, 9th ed., pp. 486-7, 489-491; WINFIELD, TEXTBOOK OF THE LAW OF TORT (London, 1937) pp. 438 *ff.* See also Bohlen, *Contributory Negligence* (1908), 21 Harv. L. Rev. 233, reprinted in BOHLEN, STUDIES IN THE LAW OF TORTS, p. 500. Reference will be made in later notes to page number in the latter publication.

[4] Discussed as the "isolation test" in SALMOND, TORTS, 9th ed., pp. 147 *ff.*

[5] [1920] A.C. 956.

[6] [1927] A.C. 16. For an admirable analysis of the so-called rule as applied in this case, see a Comment in (1928), 76 Univ. of Penn. L.R. 720.

[7] Whether this task be labelled as determining culpability, of limiting liability on social or moral grounds, or as determining the ambit of the duty of care (See GREEN, THE RATIONALE OF PROXIMATE CAUSE (Kansas, 1927), and by the same author, JUDGE AND JURY (Kansas, 1930)) is, for purposes of this note immaterial. All that is contended for here is that causation as a *fact* is not in issue.

[8] See SALMOND, *op. cit.*, and compare, *inter alia*, *Lynch* v, *Nurdin* (1841), 1 Q.B. 29; *Clark* v. *Chambers* (1878), 39 Q.B.D. 327; *McDowell* v. *Gt. West Ry.*, [1903] 2 K.B. 331; *McKenna* v. *Stephens*, [1923] I.R. 2 K.B. 112; *Northwestern Utilities Co.* v. *London Guarantee and Accident Co.*, [1936] A.C. 108.

[9] Bohlen, *op. cit.*, at p. 505. This has sometimes been treated as a phase of "foreseeability". If the risk of a third person's intervention was foreseeable as likely to happen, it is the probability of its happening which

While many instances could be given bearing out this statement, the doctrine of the "last clear chance" does seem to depend on the idea of isolating the last wrongdoer. The rule that the last human factor is the "legal cause" of damage, is usually attributed to the judgment of Lord Ellenborough in *Vicars* v. *Wilcocks*.[10] It is no doubt true that under that influence the early cases, *e.g.*, *Butterfield* v. *Forrester*[11] and *Davies* v. *Mann*,[12] linked up the doctrine of "last clear chance" with a theory of causation. That "last clear chance" and "ultimate negligence" retained such a hold on English legal thinking should not necessarily involve an acceptance of the last wrongdoer rule in causation. Its growth at common law may be taken as an indication of a desire to escape from the harsh consequences of contributory negligence in deserving cases.[13]

The fact that illustrations can be given where a conscious act of an individual, even though done intentionally did not limit liability of the original wrongdoer,[14] while ultimate negligence flourished and expanded, seems to indicate that ultimate negligence was "an anomalous exception" perpetuated to alleviate a harsh situation. Once eliminate the rigors of contributory negligence and there seems no justification either for retaining the doctrine of ultimate negligence or seeking to bolster it by reference to a doctrine of causation whose chief support today is the very theory of ultimate negligence itself.

It is believed that *The Eurymedon* discloses a situation in which ultimate negligence might very well have been applied by a court seeking to find relief for a plaintiff who would otherwise have been barred at common law by his contributory negligence. It is also important as a warning against pressing artificial rules of causation too far. On the facts as found by the trial judge, the Corstar had anchored athwart the fairway on the Thames River in what was found by the judge to have been an

makes the defendant's conduct negligent. This view is taken in some of the cases in note 8, and see *Haynes* v. *Harwood*, [1935] 1 K.B. 146. On the other hand, foresight is always different in acuteness than hindsight, and even though the exact method in which the defendant's conduct resulted in harm could not, before the event, be contemplated, yet, if looking at the sequence of events *after* the event it is possible to say that they arose "naturally" or "normally" from the defendant's negligent conduct there should be liability. The cases do not always make this distinction.

[10] (1806), 8 East 1.

[11] (1809), 11 East 60.

[12] (1842), 10 M. & W. 546.

[13] As early as 1908, Professor Bohlen called it "an anomalous exception based on the hardship which would result from the rigorous and logical application of the general principles of contributory negligence". See BOHLEN, *op. cit.*, at p. 507.

[14] See *supra*, notes 8 and 9.

improper manner, lacking in good seamanship. Those in charge of the vessel were therefore held negligent, in as much as their conduct made "a collision probable with vessels proceeding up or down the river". The Eurymedon was also held negligent due to the fact that those in charge of her "were not sufficiently alert to the possibility of danger ahead and did not take proper action to reduce their speed in due time". The trial judge found that those in charge of the Eurymedon *saw, ot should have become aware of the anchor lights of the Corstar in time to avoid a collision with her.*[15] On these facts, it seems extremely difficult, if not impossible, to make any logically satisfactory distinction from the situation in *Davies* v. *Mann,* where the plaintiff had improperly tied his donkey in the highway, and which is usually cited as the *fons et origo* of the doctrine of ultimate negligence. That all members of the Court appreciated this difficulty is made abundantly clear in the judgments. A recent definition of ultimate negligence from our own courts is given in the following language of Riddell J.A.:[16]

> Ultimate negligence is confined definitely to cases where, though the plaintiff is negligent there would have been no damage if the defendant after he became aware or ought to have become aware of the plaintiff's negligence, had not been subsequently and severably negligent.

As the Eurymedon had, or should have had, an opportunity of avoiding the accident "in ample time", it is submitted that under the common law which existed prior to any of the acts allowing apportionment, it is probable that the case would have been held to be one of ultimate negligence. The Court of Appeal, however, held that in the present case there should be apportionment under the admiralty rule, as between both vessels.

Scott L.J. in giving judgment stated :[17]

> When a solution of problems of this type is sought solely in terms of causation, it is difficult to avoid the temptation of concluding that the last act or omission in point of time is of necessity not only the last link in the chain of causation, but also the determining factor in the result, since, *ex hypothesi,* but for that last link the result would never have happened. But legal responsibility does not necessarily depend only on the last link.

This statement seems to bear out the writer's submission that ultimate negligence is not a question of causation at all. The problem of causation is determined once a court decides the

[15] Italics mine.
[16] *Falsetto* v. *Brown,* [1933] O.R. at p. 660.
[17] [1938] 1 All E.R. at p. 132.

accident would not have happened but for the negligence of the person in question. When a court starts talking of ultimate negligence, in most cases it is doing under that guise what is now expressly permissible under acts allowing apportionment, namely, weighing relative culpability of the parties.[18] Thus, for example, in the much discussed case of *British Columbia Electric Co.* v. *Loach*,[19] there seems no reason to deny that the person who negligently got on the railway comapny's line was in a very real sense a cause of his own harm. While not a *sole* cause, he was at least *a* cause. The Privy Council, in elaborating the doctrine that "a last opportunity which the defendant would have had but for his own negligence, is equivalent in law to one which he actually had,"[20] was, it is submitted, merely saying that the railway company was more blameworthy in sending out trains with defective brakes than a person who negligently gets on their line.[21] It seems useless today to justify such a case in terms of causation, even though the fiction served its purpose at the time, and it is interesting to observe that in *The Eurymedon* the *Loach Case* was quoted by both Slesser and Scott L.JJ. as an authority in favour of allowing apportionment. This they did by saying that the *Loach Case* showed that the negligence of the Corstar in anchoring where she did was negligence which continued up to the time of the accident. In other words, they seemed to liken the position of the Corstar to the position of the railway company in the *Loach Case*. But in the *Loach Case* that was determinative of "last clear chance". Here it was not. It is interesting to observe that since the adoption of the principle of apportionment in negligence cases in Ontario, the *Loach Case*, essentially a decision expanding the doctrine of ultimate negligence, has been invoked to favour apportionment by using it as an authority only "to extend" the effect of some anterior negligence up to the time of impact.[22] It is submitted that the peculiar use of an authority directed to establishing ultimate negligence, to disprove ultimate negligence when apportionment is permissible, is proof of the fact that ultimate negligence itself was a mere device to avoid the disabling effect of a plaintiff's contributory negligence, and that today it may be treated as a fifth wheel to a coach. If a jury finds that the plaintiff's negligence did contri-

[18] See *supra*, note 9.
[19] [1916] 1 A.C. 719.
[20] SALMOND, TORTS, 9th ed., p. 485.
[21] This view is taken by HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. VIII, p. 462. It is submitted that it is correct. *Cf.* SALMOND, *op. cit.*, p. 489.
[22] See, for example, *Topping* v. *Oshawa Street Ry. Co.* (1931), 66 O.L.R. 618; *McLean* v. *McCannell*, [1938] O.R. 37 at p. 39.

bute to an accident and that the defendant's negligence also contributed to the accident, there would seem no further question possible save that of apportionment. If the jury find as a *fact* that a negligent act did not contribute, there is no problem.[23]

The Eurymedon does not go that far. In fact, Greer L.J. sets out five rules as arising out of "the *Davies* v. *Mann* principle". These five rules he enumerates as follows :

(i) If, as I think was the case in *Davies* v. *Mann*, one of the parties in a common law action actually knows from observation the negligence of the other party, he is solely responsible if he fails to exercise reasonable care towards the negligent plaintiff.

(ii) Rule (i) applies also where one party is not in fact aware of the other party's negligence if he could by reasonable care have become aware of it, and could, by exercising reasonable care, have avoided causing damage to the other negligent party.

(iii) The above rules apply in admiralty with regard to collisions between two ships as they apply where the question arises in a common law action. [Likewise under the Canadian Negligence Acts allowing apportionment.]

(iv) If, however, the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both.

(v) It the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made, then both are equally to blame.

Scott L.J. had difficulty in fully appreciating the fifth rule of Greer L.J. Apparently it was designed to meet the present situation which the court rationalized somewhat as follows: the Corstar's position, being so unusual, actually induced the Eurymedon to take less precautions than a reasonable man would have, whereas in *Davies* v. *Mann* it could not be said that leaving the donkey on the highway induced the defendant to go at his high rate of speed. This, however, is, as Scott L.J. said, only a statement of the legal result of the facts of the present case and, it is submitted, the true key to the case is found in the statement of Scott L.J. when he said "I cannot see how he [the trial judge] could attribute *all the blame* to the Eurymedon." Undoubtedly this same feeling was behind the notion of ultimate

[23] This at least makes for simplicity. It does not exclude a court ruling that there was no evidence on which a jury could find as a fact that the negligence of one party was a cause. For an instance where wrongful conduct was not a cause in fact, see *McLaughlin* v. *Long*, [1927] S.C.R. 303. The accident would have happened in exactly the same way if the plaintiff had been properly on the running board of the car. Therefor his wrongful act was not a contributing cause in fact. Being there was a cause, but not *wrongfully* being there.

negligence at common law, save that the most blameworthy there had to bear the full burden.

Lord Wright in *Rose* v. *Ford*[24] spoke of "a tendency common in construing an Act which changes the law, that is, to minimize or neutralize its operation, by introducing notions taken from or inspired by the old law which the words of the Act were intended to abrogate". It is submitted that ultimate negligence being part and parcel of the old law of contributory negligence, albeit an ameliorating part, should now be discarded. Any argument founded on a theory of legal causation (excluding, of course, causation in fact)[25] would seem today to be founded on false premises. Further, as Scott L.J. said in *The Eurymedon*, the spirit of the proportional rule calls for such a wide view of joint responsibility as was given effect to in the present case.[26]

Ultimate negligence served its purpose of allowing a rough comparison of blame at a time when the common law denied the existence of apportionment. We profoundly wish that, like other wholesome but obsolete fictions, it may rest in peace,—but we feel quite sure that it will do no such thing.

C. A. W.

* * * *

CONFLICT OF LAWS—DONATIO MORTIS CAUSA—TRANSFER INTER VIVOS OR QUESTION OF ADMINISTRATION OR SUCCESSION.—The general maxim that the *lex situs* governs transactions *inter vivos* in respect of movables was extended to a *donatio mortis causa* in the case of *In re Korvine's Trusts*.[1] There it had to be decided by what law the validity of a *donatio mortis causa* of movable property situate in England by a domiciled Russian was governed. It was held that a *donatio mortis causa* was a transfer *inter vivos* and therefore was governed by the law of the place where the movables were situate at the time when the gift was made.

Similar facts gave rise to the recent case of *In re Craven's Estate, Lloyds Bank* v. *Cockburn* (No. 1).[2] There a testatrix domiciled in England, who had given a power of attorney to her son in respect of certain moneys and securities situate in Monaco, before undergoing a dangerous operation, directed the son to get the property in his own name because she wished it

[24] [1937] A.C. 826 at p. 846.
[25] *Supra*, note 23.
[26] [1938] 1 All E.R. at p. 133.
[1] [1921] 1 Ch. 343.
[2] [1937] Ch. 423.

to be his in the event of her death. The Court had to determine whether this transaction constituted a valid *donatio mortis causa*. It was held that this question, as it arose in the administration of the estate of the deceased was governed by the law of the domicile of the testatrix, that is, English law. According to English law a transaction is a valid *donatio mortis causa* only if: (1) there is a clear intention to give, but to give only if the testator dies; (2) the gift must be made in contemplation of death, that is, death within the near future, death believed for some reason to be impending; (3) the donor must part with the dominion over the subject-matter of the *donatio*.[3]

The Court determined the first two questions according to English law as the law of the last domicile of the testatrix. The third question, however, whether there was a parting with the dominion was determined by the law of Monaco, the country where the property was situated at the time of the transaction.

It is respectfully submitted that the reasons for this decision are not quite in accordance with established principles. It was said by Farwell J. that the question to be determined in *In re Craven's Estate* was "a question of administration in the sense that the executors are bound to get in the whole of the estate of their testatrix and as soon as they found that apparently part of her estate consisted of these shares and this money they were bound to endeavour to get it in and the question whether or not they can rightly claim it from the person who was in possession at the death is one to some extent, at any rate, of administration and in my judgment must be decided by English law, subject only to this; it being necessary according to English law that there should be an effective parting with dominion over the property, that which is said to constitute the parting with dominion must be an act which would be effective in the place where the property is situate according to the law of that place".[4]

This decision, it is submitted, does not distinguish between the question what property constituted the assets of the deceased at the time of her death, and the question to whom the estate of the deceased should devolve on her death. Only the second question is a question of administration of assets or succession. On the other hand, transactions *inter vivos* in respect of proprietary rights to movables are governed by the law of the place where

[3] Per Farwell J. in *Re Craven's Estate*, [1937] Ch. 423 at p. 426.
[4] [1937] Ch. 423 at pp. 429, 430.

the property is situated. If, as was decided in *In re Korvine's Trusts*,[5] a *donatio mortis causa* is a transfer *inter vivos*, and not a testamentary gift to which the *lex domicilii* of the testator at the time of his death should apply, the fact that the question of its validity arises in connection with the administration of the estate of the donor would seem to be immaterial. Or should another law govern the validity of such a gift when it arises, e.g., in the case of a bankruptcy of the donee, or in the case of a voluntary transfer *inter vivos* by the donee to a third person? It would seem that such a solution would cause great insecurity in respect of property transferred by a *donatio mortis causa*. It having been once decided that a *donatio mortis causa* is to be regarded as a transfer *inter vivos*, the law which applies to transfers *inter vivos*, the *lex situs*, should determine whether a transaction constitutes a valid *donatio mortis causa* or not, whatever may be the event which gives rise to the litigation. This law should not only govern the question whether the donor passed the dominion over the property, as was held in *In re Craven's Estate*, but it should also determine whether the other conditions constituting a valid *donatio mortis causa* are fulfilled.

F. HELLENDALL.

London, England.

* * *

CONFLICT OF LAWS—DONATIO MORTIS CAUSA—TRANSFER INTER VIVOS OR QUESTION OF ADMINISTRATION OR SUCCESSION —CHARACTERIZATION OF THE QUESTION—PROPRIETARY RIGHTS. —Dr. Hellendall's criticism, contained in the foregoing comment on *In re Craven's Estate*,[1] of Farwell J's treatment of the problem raised by that case would seem to be obviously justifiable. I venture to add a further note in order to point out (1) that the case involves an important question as to the proper method of approach to the problem, and (2) that the method of approach adopted by the learned judge was not only wrong in itself but also led to a wrong result.

The fact that the result was wrong is obscured in the reports of the case in the *Law Reports* and in the *All England Law Reports* because the judge's statement with regard to the evidence of the law of Monaco is omitted in both reports. On the other hand, the report in the *Times Law Reports* furnishes

[5] [1921] 1 Ch. 343, per Eve J. at p. 348.

[1] [1937] Ch. 423; [1937] All E.R. 33. A better report is given in (1937), 53 Times L.R. 694.

us with the material which is missing in the other reports. It appears from the evidence of the expert witness[2] that according to the French Civil Code, in force in Monaco, a *donatio mortis causa* as defined by English law is unknown to the law of Monaco, and furthermore, that the law of Monaco would not in any other way (as, for example, by way of a trust) give effect as a transfer *inter vivos* to the transaction in question in the *Craven Case*, that is, a transaction which was admittedly conditional on the donor's death.

In the case of *In re Korvine's Trusts*[3] the question related to the validity of a *donatio mortis causa* alleged to have been made by a person domiciled in Russia of movables situated in England, and the court applied the law of England (the *lex rei sitae*). The problem of conflict of laws was simply whether, according to the law of England, a *donatio mortis causa*, which in some respects resembles a gift *inter vivos* and in some respects resembles a testamentary gift, should be characterized as being analogous to the one so as to be governed by the *lex rei sitae*, or as being analogous to the other so as to be governed by the *lex domicilii*. Whether it is more nearly analogous to the one rather than to the other is a nice question which was answered in favour of the *lex rei sitae* in the *Korvine Case*.[4] It happened in that case that the *lex rei sitae* was also the *lex fori*, so that it was obvious that the nature of the transaction in question had to be determined by the law of England, and that when it had been decided that the transaction was such as to confer a proprietary interest upon the donee and to prevent the subject matter from forming part of the estate of the donor, it became unnecessary, as regards that transaction, to refer to the *lex domicilii*.

In the *Craven Case* the situation was different. The testatrix was domiciled in England at the time of her death and the forum was English, but the movables in question were situated in Monaco at the time of the transaction in question. Resort to the foreign *lex rei sitae* was therefore necessary for the purpose of the characterization of the transaction, because if by that law the son of the testatrix acquired a proprietary interest in the lifetime of the testatrix, effect should be given to that

[2] 53 Times L.R. 694, at p. 697.
[3] [1921] 1 Ch. 343.
[4] The question was answered in the same way in the well reasoned judgment in *Emery* v. *Clough* (1885), 63 N.H. 552; *cf.* 2 BEALE, CONFLICT OF LAWS (1935) 981.

interest in England.[5] It happened that if the transaction were governed by English law it would have been a valid *donatio mortis causa*, but this is entirely beside the point; and it is submitted that there is no justification for saying that any part of the transaction under which the son claimed was governed by English law. When the son claimed that he was entitled under a transaction which took place in the life time of the testatrix with regard to movables then situated in Monaco, the court ought to have consulted the law of Monaco, as proved, for the purpose of ascertaining whether any transaction (whether by way of *donatio mortis causa* or otherwise) had taken place which by that law had the effect of a transfer *inter vivos* or which by that law was sufficiently analogous to a transfer *inter vivos* to be regarded by an English court as coming within the rule that the *lex rei sitae* governs the transfer of property or the creation of proprietary rights. If by that law the son in the lifetime of the testatrix acquired the property in the movables, the English court would of course have held his claim to be valid, and consequently as regards those movables no question of succession (governed by the *lex domicilii*) would arise. The expert witness, however, not only did not say that the son acquired the property in the movables, but he also negatived any interest which, although possibly falling short of being, from the point of view of English law, a strictly proprietary interest, might be regarded as analogous to a proprietary interest, legal or equitable, in the movables. Trust and *donatio mortis causa* were expressly negatived. It is submitted that in these circumstances Farwell J. ought to have disallowed the son's claim and held that the movables in question were part of the estate of the testatrix, distributable in accordance with her will.

In conclusion it is submitted that the passage quoted from Farwell J.'s judgment[6] in Dr. Hellendall's note is open to one further critical observation. Whereas succession, in the sense of the distribution of the beneficial interest in an estate among the beneficiaries is governed by the *lex domicilii* as regards movables and by the *lex rei sitae* as regards immovables, it is of course broadly true, that administration, in the sense of the getting in and management of the assets and the payment of

[5] The general method of approach has been discussed in my *Characterization in the Conflict of Laws* (1937), 53 L.Q.R. 235; *Conflict of Laws: Examples of Characterization* (1937), 15 Can. Bar Rev. 215. As to the special treatment of matters of proprietary rights, see 53 L.Q.R. at pp. 543, 559, 561; 562; 15 Can. Bar Rev. at pp. 233 *ff.*

[6] [1937] Ch. 423, at 429, 430.

creditors' claims, is governed by the *lex fori;* but in the course of the administration many matters may arise which under the conflict rules of the forum are governed by some other law, and the mere fact that they arise in the course of the administration is not a reason, as Farwell J. would seem to say, for applying the local law of the forum. For example, a creditor may claim under a contract the proper law of which is some foreign law, and, as in the *Craven Case* itself, a person may claim to be the owner of movables by virtue of a transaction governed by some foreign law.

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School.

* * *

BAILMENT OR LICENSE — MOTOR CAR PARKING LOT — CONDITIONS ON TICKET.—Within the space of two weeks the Ontario Court of Appeal and the English Court of Appeal recently delivered judgments in cases involving the liability of the proprietors of car-parking-lots to car-owners for theft of their cars, in which they arrived independently at opposite conclusions. This result calls for the closest scrutiny of the facts of the cases, and the principles on which the two Courts proceeded.

In *Ashby* v. *Tolhurst*[1] the English Court of Appeal reached an unanimous decision. The plaintiff drove his car on to the defendants' "car park". An employee of the defendants who was furnished with a book containing tickets and counterfoils (the two being in the same form and in the same language), handed the plaintiff a ticket in return for 1s., retaining the counterfoil in the book. The plaintiff locked his car and departed, but access to the car could be obtained if anyone put his hand through the windscreen. It does not appear from the report whether or not the plaintiff purposely left the windscreen open to permit the movement of the car if necessary. On his return some time later, he found the car stolen, the attendant informing him that he had "given" it to a person representing himself as the plaintiff's friend.

The ticket bore a serial number, the words "Seaway Car Park" in large print, and then in smaller print, "Car Park Ticket", the word "Date" with a space, the words "Number of Vehicle" with a space, then "Received 1s.", and the following :

[1] [1937] 2 K.B. 242; [1937] 2 All E.R 387.

> The proprietors do not take any responsibility for the safe custody of any cars or articles there, nor for any damage to the cars or articles however caused, nor for any injuries to any persons, all cars being left in all respects entirely at their owners' risk. Owners are requested to show ticket when required.

The date and the number of the car had been inserted in the book but there was no signature.

On these facts the Court of Appeal, reversing the trial judge, held that the relationship between the plaintiff and the defendants was not that of bailor and bailee, but that of licensor and licensee, *and that the defendants were not liable to the plaintiff:* The pith of the judgment appears in a sentence from Sir Wilfrid Greene M.R.: "Parking a car is leaving a car and, I should have thought, nothing else." The Court found that there was no delivery of possession by the plaintiff and accordingly possession had not passed from him, though this was not treated by the Court as a conclusive answer to the claim.

Argument turned also on the words of the car-park attendant in advising the plaintiff that "he had just given" the car to the person whom he took to be the plaintiff's friend. It was held by the Court that the word "given" could not be regarded as having been accurately used by the attendant and that the remark could not be accepted as evidence of any such delivery by the attendant as the plaintiff admitted was essential to the success of his case.

The language of the car park ticket limiting liability was also held to be wide enough to absolve the car park proprietor from liability. It was further held that the mere fact of the proprietor having exacted such conditions from the plaintiff could not be regarded as indicating a contract of bailment, although Scott L.J. admitted some sympathy with the view of the trial judge that such clauses "might reasonably be assumed to be inserted on the basis of a contract of bailment being the substance of the relationship". On analysis, however, he agreed with both his colleagues that that view was erroneous. In view of the Ontario decision the following extract from the judgment of Romer L.J. is of interest: "It is true that, if the car had been left there for any particular purpose that required that the defendant should have possession of the car, a delivery would likely be inferred, and if the car had been left at the car park for the purpose of being sold or by way of pledge or for the purpose of being driven away to some other place or indeed for the purpose of safe custody, delivery of

the car, although not actually made, would readily be inferred. It is perfectly plain in this case that the car was not delivered to the defendants for safe custody."

Spooner v. *Starkman*[2] is a most interesting parallel case. The defendant was the proprietor of a car parking lot doing a substantial business. His area was divided into two parts. The operative parts of cars parked on the north and south sections were left locked; persons parking cars on the remainder of the lot were required to leave the operative parts of their cars unlocked, so that the cars might be subsequently moved into a more permanent parking space when the opportunity presented itself, and to permit the movement of other automobiles in and off the premises. Plaintiff left his car on the latter area, unlocked. The defendant and three employees were in charge of the lot, issuing tickets on reception of the cars, receiving payment of the 15c. charge, *taking custody of the cars generally*, and *delivering* them to the owners upon presentation of the ticket previously issued.

The plaintiff parked his car at 9 p.m. and received a ticket reading as follows :

DOWNTOWN AUTO WASH
Corner Bay & Louisa Sts.
PARKING 15c
Your Car Washed
and Vacuum for 75c

Complete Simonize $4.50
Not Responsible for Car or Contents
No. 2039

The words "not responsible for car or contents" were in very small type, much smaller than the type used for the remainder of the ticket.

The plaintiff returned about two hours later to find the car had been stolen. The thief had removed the car without producing a ticket and the trial judge found negligence on the part of the defendant and his servants accordingly. Although the plaintiff had parked his car on the same premises on four or five prior occasions, on each of which he had received a similar ticket, he testified that he had never read the ticket, was unaware of the presence of the words, "not responsible for car or contents", and was also unaware of either the presence or the contents of an illuminated sign erected on the

[2] [1937] O.R. 542.

premises reading, " Cars Left at Owners' Risk " in comparatively large letters.

Judge O'Connell, the trial judge, did not discuss the nature of the legal relationship subsisting between the plaintiff and defendant, but treated it as that of bailor and bailee. He then proceeded with a very illuminating review of the authorities on the question of bringing notice to the bailor of conditions limiting the liability of the bailee, and held on the law that it was unnecessary for the defendant to prove that he had given actual notice of the condition to the plaintiff, and further that he had performed all that was required of him by law in doing what was reasonably sufficient to give the plaintiff notice of the condition. He accordingly found that the defendant was entitled to the benefit of the conditions, and that they were a complete answer to the plaintiff's claim.

The Court of Appeal, however, unanimously reversed this judgment on the ground that the ticket given to the plaintiff, instead of being designed to inform him of the defendant's attempted limitation of his responsibility, was designed to conceal it. Henderson J.A., delivering the judgment of the Court, distinguished the many cases referred to by the trial judge, as follows: " The case, in my opinion, is not to be determined upon the same principle as the many cases governing the responsibility of railway companies issuing tickets, which to the common knowledge of everybody, contain conditions, and, I think, if the defendant desired to limit his responsibility as a bailee for hire, he must show that the attention of the plaintiff was called to such limitation, and, as I have said, it seems to me that the ticket in question is designed more to conceal than to display the limitation. "

The ground on which the original judgment was reversed was accordingly a very narrow one. The Court of Appeal like the trial judge assumed that the contract between the parties was one of bailment, and that the car was left in the defendant's custody. The Court of Appeal also appears to have assumed that if the conditions had been brought to the notice of the plaintiff, they would have been a sufficient answer to the action.

The only real ground for distinction between the two cases on their facts appears to be that in the Ontario case the car was left unlocked and delivered into the possession of the car park proprietor or his attendant, with full authority to him to move the car to another position within the parking lot. In the English case the car door was locked, but the window left open

(perhaps by inadvertence of the owner), so that the thief had no difficulty in reaching his hand through it and opening the door. In the Ontario case the key to the operative parts of the car was left in the car for the use of the car park attendant; in the English case it apparently was not intended that the car should be driven at all by the attendant.

Whether this dissimilarity of the facts of the two cases is sufficient to reconcile the two decisions in principle may not be free from doubt. It may be expected that the question whether the relationship between the owner of a car and the proprietor of a car parking lot is that of licensor or licensee, or that of bailor and bailee, will face the Ontario courts again.

DONALD M. FLEMING.

Toronto.