VANCOUVER MOTORS U-DRIVE LIMITED (DEFENDANT) ..... APPELLANT;

AND

CALVIN WALKER (DEFENDANT)

AND

EDWIN GORDON TERRY (PLAINTIFF). RESPONDENT.

1942
*May 7, 8
*Oct. 6.

VANCOUVER MOTORS U-DRIVE LIMITED (DEFENDANT) ..... APPELLANT;

AND

CALVIN WALKER (DEFENDANT)

AND

ROBERT L. MORROW (PLAINTIFF).... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Automobile—Negligence of driver of car rented to driver—Statutory liability of owner—Driver acquires car through false representation—"Consent express or implied" to driver's possession—Motor-vehicle Act, R.S.B.C., 1936, c. 195, s. 74A.*

The respondents were injured owing to the negligence of the defendant W. when driving an automobile which he had rented from the

(1) [1941] O.R. 90; [1941] 2 D.L.R. 663.

*PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc*.

1942

VANCOUVER MOTORS U-DRIVE LTD. v. TERRY.

VANCOUVER MOTORS U-DRIVE LTD. v. MORROW.

appellant company. W. rented a car, but he brought it back owing to engine trouble a few hours later and another car was given to him in substitution. He had no driver's licence, and was given the first car by falsely representing that he was one H., whose licence he had in his possession and in whose name he signed the rental contract. On bringing the car back, the appellant company's employee then on duty (not the same employee who carried out the original transaction) looked up the hire contract and asked W. if his name was H., and W. replied "Yes". The employee, being satisfied that W. was the individual who had rented the car brought in, delivered him the second car. Subsection 1 of section 74A of the *Motor Vehicle Act* deals with the civil responsibility of an owner for "loss or damage sustained * * * by reason of a motor-vehicle on any highway * * *" where the "person driving or operating the motor-vehicle * * * acquired possession of it with the consent, express or implied, of the owner * * *".

*Held,* affirming the judgment appealed from (57 B.C.R. 251), Taschereau J. dissenting, that W. acquired possession of the car with the express consent of the employees of the appellant company, within the meaning of s.s. 1 of section 74A of the *Motor Vehicle Act,* even though the action of these employees was induced by W.'s false statements: an express consent is given, within the meaning of the enactment, when possession was acquired as the result of the free exercise of the owner's will.

*Per* Taschereau J. dissenting.—There was no "consent" within the meaning of section 74A, s.s. 1.—In certain cases, a consent obtained through fraud is only voidable; but when one party, as in this case, is deceived as to the identity of the other party, there is no contract at all, there being no consent, no concurrence of the wills. There was a unilateral consent that H. should take possession of the car, but there was no consent that W. should. In order to obtain "possession" within the meaning of that section, which possession is not a mere physical possession but also the right to control, enjoy and manage it legally, it must be the result of a consent "unclouded by fraud, duress or sometimes even mistake". The consent given in this case did not confer such a possession to W.; it is as valueless as it would have been if extorted by threats or compulsion.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Murphy J. (2), and maintaining the respondent's actions for damages resulting from the negligence of the defendant Walker when driving an automobile rented to him from the appellant.

The material facts of the case and the questions at issue are stated in the above head-note and in this judgment now reported.

(1) (1942) 57 B.C.R. 251; [1942] 1 W.W.R. 503; [1942] 1 D. L.R. 407.
(2) (1941) 56 B.C.R. 460; [1941] 2 W.W.R. 402; [1941] 3 D.L.R. 752.

*J. R. Cartwright K.C.* and *L. St. M. DuMoulin* for the appellant.

*W. F. Schroeder K.C.* for the respondents.

The judgment of Rinfret, Kerwin and Hudson JJ. and of Gillanders J. *ad hoc* was delivered by

KERWIN J.—The question on this appeal is whether Walker had acquired possession of the appellant's motor vehicle with the express consent of the appellant. The facts in connection with the transaction between Walker and the appellant are stated by the trial judge and no quarrel is found with his statement. The proper inferences and conclusions from the facts, however, are the subject of dispute. My view is first, that all that transpired between Walker and the appellant's employees should be treated as one transaction, i.e., as if Walker had secured possession of but one car by falsely representing that he was Hindle and the possessor of a subsisting driver's licence. Second, these employees were not concerned with the identity of Walker but merely with the question whether he had such a licence. This is shown, I think, by the answer of Jardine, one of the employees, to a question asked him by counsel for the appellant:

> Q. If you had known that he was other than the James G. Hindle he said he was, and if you had known he was not the holder of a subsisting licence, would you have rented him a car?
> A. No.

I think it proper to state this latter conclusion although in my view it has no particular bearing upon the determination of the legal point as to whether there was express consent by the appellant. Our duty is to construe a subsection of a statute. This statute deals with motor vehicle traffic on highways and contains provisions dealing with licences, owners, drivers, and the responsibility for damage sustained by reason of motor vehicles being on a highway. Section 43, for instance, imposes a duty upon all who, as the appellant, carry on the business of letting motor vehicles for hire without drivers, of ascertaining by inspection of a licence or permit produced by the person to whom the motor vehicle is let that he is the holder of a subsisting driver's licence under the Act for the operation of that motor vehicle, or the holder of a subsisting driver's or operator's licence or permit referred to in another provision.

1942

VANCOUVER MOTORS U-DRIVE LTD. v. TERRY. VANCOUVER MOTORS U-DRIVE LTD. v. MORROW.

Kerwin J.

Section 74 makes the owner of a motor vehicle responsible for any violation of the Act by any person entrusted by the owner with the possession of that motor vehicle. It is not necessary to express an opinion but, for the purpose of determining whether a quasi criminal responsibility is imposed under that section, the word "entrusted" may conceivably be given a meaning different to that to be ascribed to the word "consent" in subsection 1 of section 74A. That subsection deals with the civil responsibility of an owner for loss or damage sustained by reason of the motor vehicle on a highway where the person driving the motor vehicle acquired possession of it with the consent, express or implied, of the owner.

In the present case, the appellant physically transferred the possession of the motor vehicle to Walker. Does the fact of Walker's false statement that he was Hindle and the holder of a subsisting driver's licence, accompanied by the forgery of Hindle's name, vitiate the consent that was in fact given? There may be no difficulty in two of the hypothetical cases put in argument, (1) where a motor vehicle is stolen from a garage, and (2) where possession is obtained from the owner by duress. In the first there would be no consent in fact and in the second the owner would not have been at liberty to exercise his free will. On the other hand, the class of owners under subsection 1 of section 74A is not restricted to those who carry on such a business as the appellant and circumstances may be imagined where an owner loaned his automobile to a friend on the latter's statement that he possessed a subsisting driver's licence, which statement might be false either because he never had possessed such a licence or because his current licence had been revoked; or again, where A secured possession of an automobile by falsely representing himself in a telephone conversation with the owner of the vehicle to be a neighbour's chauffeur. It is impossible to conceive all the various circumstances that might give rise to the question to be determined here but in my view an express consent is given, within the meaning of the enactment, when possession was acquired as the result of the free exercise of the owner's will.

As to the argument that the decision in *Lake* v. *Simmons* (1), or at least the speech of Viscount Haldane, is relevant,

(1) [1927] A.C. 487.

it should be noticed that that decision dealt with the meaning to be ascribed to the word "entrusted", in a policy of insurance. It was held that delivery of certain jewellery had been obtained by a trick and that there was no sale or bailment for want of real consent. Such a decision can, I think, have no bearing upon the construction of a statute. Viscount Sumner declined to consider what effect apparent consent obtained by a trick might have on the "consent" mentioned in a section of the *Imperial Factors Act,* 1889 (*see* R.S.B.C. 1936, c. 250, sec. 2, ss. 1). That Act, he states, "was framed for the benefit and protection of third persons, into whose hands commercial documents of title have passed for value and in good faith on their part. The action which prejudices them is action which only becomes possible because an unauthorized person has got the documents under circumstances that lead others to act in the belief that the true owner has given his consent. An argument may well arise in such circumstances that, as against the third party who has changed his position, the original owner cannot deny a consent which is not only apparent but is invested with this appearance by what he has done. What they have to be protected against is not confined to the results of his intelligent and consensual action but against the results of any action on his part at all."

These remarks, of course, are obiter and I quote them merely for the purpose of more fully explaining the reason that I think the decision in the case is of no assistance in this appeal. As Viscount Sumner pointed out, there has been a conflict of authoritative opinion in the decisions under the Factors Act but, in any event, I think it would only be confusing to endeavour to apply decisions under such a statute to the problem with which we are concerned. The victims of the negligence of the driver of a motor vehicle do not change their position because of the incidence of ownership of the vehicle.

The word "consent" may have different meanings in different statutes. In the present case it has, in my opinion, the meaning already indicated and, on that construction, express consent was given by the employees of the appellant to Walker's possession of the motor vehicle even though the action of the employees was induced by Walker's false statements.

The appeal should be dismissed with costs.

1942

VANCOUVER MOTORS U-DRIVE LTD. v. TERRY.

VANCOUVER MOTORS U-DRIVE LTD. v. MORROW.

Taschereau J.

TASCHEREAU J. (dissenting).—The appellant company operates the business of renting automobiles driven by those to whom they are rented.

The hirer of one of these cars, Calvin Walker, and the appellant have been sued together before the Supreme Court of British Columbia by the respondents Terry and Mr. and Mrs. Morrow for injury and damages sustained when struck on the sidewalk on the west side of Granville street, in the city of Vancouver, by an automobile belonging to the appellant but driven by Walker. The trial judge maintained the actions against both defendants with costs and awarded to Terry $1,242.50, and to Morrow and his wife respectively $2,783.33 and $4,000. The Court of Appeal confirmed this judgment. We are concerned only with the appeal of Vancouver Motors U-Drive Limited.

The facts which have given rise to this litigation are very simple and the narrative of events is briefly this:

On the 5th of February, 1941, at about three o'clock in the afternoon, Calvin Walker went to the office of the company and asked to rent a car. He was requested by an employee of the company named Jardine to show his driver's licence, and he produced a licence in the name of J. G. Hindle, the possession of which he had obtained probably by theft. Jardine being under the impression that the applicant was really J. G. Hindle, prepared the usual rental contract, which was signed by Walker who assumed the name of Hindle. Jardine compared the signature on the licence and on the contract and found that they looked alike; he further asked Walker if he had previously rented a car from the company, and having received an affirmative reply, he checked the records of the company and found that several months before a car had been rented to J. G. Hindle. Walker then made a deposit of $10 and was given a car bearing licence No. 91-006.

At about one o'clock a.m. during the night, Walker drove the car back to the garage and complained that the car was not in good running order and was giving him mechanical trouble. In exchange he was given a new car, a Ford Mercury, and the contract previously signed was slightly altered by putting in the licence number of the

Mercury car instead of the number of the car which had been returned. It was while driving this car that Walker injured the plaintiffs.

The liability of Walker is not contested, and the only question which is raised is as to the liability of the company in view of section 74 (*a*) of the *Motor Vehicles Act* of British Columbia which reads as follows:

> 74 (*a*). Every person driving or operating a motor vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor vehicle in the course of his employment.

The appellant submits that on the undisputed facts of the case Walker did not acquire the motor vehicle with the consent of the company within the meaning of section 74 (*a*) of the *Motor Vehicle Act*. It further alleges that Walker obtained possession of the motor vehicle by false and fraudulent misrepresentations of fact, namely, by representing that he was Hindle, that he was the individual named on the licence, that he had previously rented a car from the company, and by committing forgery when he signed Hindle's name to the contract.

The respondent's submission is that the consent required under section 74 (*a*) is consent in fact and not necessarily consent in law. They further argue that in any event, if the contract has to be considered, it is a voidable contract but not void *ab initio*, and that the personal identity of the hirer was not a fundamental element in the transaction.

In order to reach a proper judicial conclusion, it is of foremost importance to deal with two features of the case, which to my mind are the determining factors of the issue. The first one is that it cannot be seriously contended, and the respondents do not raise that point, that Walker in order to obtain possession of the car resorted to misrepresentations, personation, forgery and theft. He told the employee of the company, that he was Hindle; he signed Hindle's name on the contract, and his signature had such similarity that it induced the employee in error; he produced a licence stolen from Hindle and represented that he was the man who had previously rented a car. The fact that both Hindle and Walker were in the Air Force added to the confusion. There was a fraud of a

1942

VANCOUVER MOTORS U-DRIVE LTD. v. TERRY.
VANCOUVER MOTORS U-DRIVE LTD. v. MORROW.

Taschereau J.

very serious nature, and no negligence can be imputed to the appellant or its employee, for not having disbelieved these untrue but plausible representations.

The second feature is that it is these false representations that determined the appellant's employee to consent to the hiring of the car. An important factor why the "consent" was given is that Hindle was the owner of a driver's licence issued by the Government of British Columbia. It is an imperative section of the law that says:

> No person carrying on the business of letting motor vehicles for hire without drivers shall let for hire any motor vehicle without first having ascertained that the person to whom it is let is the holder of a driver's licence under this Act, or operator's licence or permit referred to in subsection (2) of section 20, and having him sign his name to an entry in a record-book to be kept by the person so carrying on business, showing the name and address of the person to whom the motor vehicle is let and the number of his licence or permit. Every person who is required to keep a record-book under this section shall produce the record-book for inspection at any time upon the demand of any police officer or constable.

It is, therefore, unlawful to hire a car to a driver who has no licence, and it cannot be presumed that the appellant would have done so if it had been aware of the true facts, and had not been tricked by Walker.

It is a protection for the company to know that the applicant is a licensed driver. His fitness and ability have already been tested, because under the *Motor Vehicle Act* of British Columbia (section 17, par. 5), no licence may be issued by the Provincial Government unless such fitness and ability have been demonstrated. In leasing a car to a licensed driver, the company deals with a man whose qualifications are to be presumed, and whose driving will not be a menace to the public.

I have no doubt that if Walker had said that he was personating Hindle and that he had no licence he would not have obtained possession of the automobile. Jardine says in his evidence:

> Q. If you had known that he was other than James Hindle he said he was, and if you had known he was not the holder of a subsisting licence, would you have rented him a car?
>
> A. No.

The appellant's manager Glinn Rhys corroborates him as follows:

Q. If a man has not got a subsisting driver's licence would you rent him an automobile?

A. Decidedly not. This is against the law.

The learned trial judge came to a similar finding and he says, dealing with the possession of the car:

True, Jardine would not have done so but for his mistaken belief caused by Walker's fraudulent misrepresentation that Walker had a driver's licence.

Taschereau J.

It is my opinion that the personal identity of the applicant was the fundamental element in the transaction, and that the consent was given to the possession of the car, because Walker represented himself as being Hindle.

Now what are the legal consequences that flow from these facts? Does an error respecting the person with whom another contracts, annul the agreement? If the person with whom the contract is to be entered into is an ingredient of the contract, I have no doubt that the contract is void, and void *ab initio,* because there has been no contract at all, there being no consent, no concurrence of the wills.

The law has been clearly laid down by Anson "On contracts" (18th Edition 1937). He writes at page 151:

Mistakes of this sort can only arise when A contracts with X, believing him to be M: that is, where the offeror has in contemplation a definite person with whom he intends to contract. It cannot arise in the case of general offers which any one may accept, such as offers by advertisement or sales for ready money. In such cases the personality of the acceptor is plainly a matter of indifference to the offeror.

Halsbury (Hailsham Ed.), Vol. 7, page 96:

Where an offer made by one person is accepted in the belief that it was made by another, or, conversely, an offer intended to be made to one person is accepted by another, there is no contract if the identity of the person with whom the agreement was intended to be made was an inducement to the other to enter into the agreement—but if the agreement is of such nature that the identity of the person is immaterial and it might, without prejudice to the other party, equally have been made with anybody the want of mutuality does not, in the absence of fraud, affect the validity of the transaction.

And in 1927 in the House of Lords (1), Viscount Haldane, citing Pothier (Traité des Obligations, Sec. 19), speaks as follows:

Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all, or as to whether there is an intention to contract with a *de facto* physical individual, which constitutes a contract

(1) *Lake* v. *Simmons* [1927] A.C. 487, at 501.

1942

VANCOUVER MOTORS U-DRIVE LTD. v. TERRY. VANCOUVER MOTORS U-DRIVE LTD. v. MORROW.

Taschereau J.

that may be induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. Pothier (Traité des Obligations, section 19) lays down the principle thus, in a passage adopted by Fry, J. in *Smith* v. *Wheatcroft* (1).

"Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract. * * * On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."

In this case it was surely not a "matter of indifference" as to with whom the appellant was dealing; the "identity of the person was not immaterial", on the contrary the consideration of the person entered as an "element into the contract". What determined the apparent consent but not the real assent, was the belief that Walker was really Hindle, and that possession of the automobile was given to the latter.

In the case of *Lake* v. *Simmons* (2), Viscount Haldane also says at page 500:

> The appellant thought that he was dealing with a different person, and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question. It was by a deliberate fraud and trick that she got possession.

And at page 505 of the same case, Viscount Haldane proceeds with the following words:

> As it is, there was no contract and nothing to avoid.

In certain cases, a consent obtained through fraud is only voidable, but when one party, as in the present case, is deceived as to the identity of the other party, there is no contract at all. The appellant, although it thought it was dealing with Hindle, did not enter into any agreement with him, and never intended to contract with Walker. There was a unilateral consent that Hindle should take possession of the car but there was no consent that Walker should.

The case of *Cundy* v. *Lindsay* (3) is very similar to the one at bar. Lindsay was a manufacturer in Ireland; Alfred Blenkarn, who occupied a room in a house looking into

(1) (1878) 9 ch. D. 223, at 230. (2) [1927] A.C. 487.
(3) (1878) 3 A.C. 459.

Wood Street, Cheapside, wrote to Lindsay, proposing a considerable purchase of Lindsay's goods, and in his letter used this address—"37, Wood Street, Cheapside," and signed the letters (without any initial for a christian name) with a name so written that it appeared to be Blenkiron & Co." There was a respectable firm of that name, "W. Blenkiron & Co.," carrying on business at 123, Wood Street. Lindsay sent letters, and afterwards supplied goods, the letters, the goods, and the invoices accompanying the goods, being all addressed to "Messrs. Blenkiron & Co., 37, Wood Street."

It was held that no contract was made with Blenkarn, that even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to the defendants, who were consequently liable to the plaintiffs for the value of the goods.

The Lord Chancellor said at page 465:

> Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the Respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required.

And at page 466 he adds:

> The result, therefore, my lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case namely in which the contract never comes into existence.

In the same case, at page 469 Lord Hatherley reaches exactly the same conclusion:

> The whole case, as represented here, is this: from beginning to end the Respondents believed they were dealing with Blenkiron & Co., they made out their invoices to Blenkiron & Co., they supposed they sold to Blenkiron & Co., they never sold in any way to Alfred Blenkarn; and therefore Alfred Blenkarn cannot, by so obtaining the goods, have by possibility made a good title to a purchaser, as against the owners of the goods, who had never in any shape or way parted with the property nor with anything more than the possession of it.

True, a consent was given to the applicant; Walker took physical possession of the automobile, but within the

1942

VANCOUVER MOTORS U-DRIVE LTD. v. TERRY. VANCOUVER MOTORS U-DRIVE LTD. v. MORROW.

Taschereau J.

meaning of section 74 (*a*), the word "possession" cannot be construed so restrictively. Possession implies a fact and a right—the fact of the real detention of the thing, and the right to control, enjoy and manage it legally. In order to obtain such a possession, it must be the result of a consent "unclouded by fraud, duress or sometimes even mistake". (Words & Phrases Judicially Defined, vol. 2, page 1438). The consent given here did not confer such a possession to Walker; it is as valueless as it would have been if extorted by threats or compulsion.

With deference, I would allow the appeals, and dismiss the actions against the appellant with costs throughout.

*Appeal dismissed with costs.*

Solicitor for the appellant: *L. St. M. DuMoulin.*

Solicitor for the respondent Terry: *W. W. Walsh.*

Solicitor for the respondent Morrow: *G. Roy Long.*