Excalibur — Dave Cooper

York Town driver hitches up another illegally-parked car while two security officers look on.

respect to its return that the person who parts with it may be unable to perform, or
(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or be moved, or begins to cause it to become movable.
(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
(4) For the purposes of this Act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
(5) For the purposes of this section a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity."

The magistrate before whom the trial took place, convicted the accused of theft.

The case then went to the Ontario Court of Appeal.

Six defenses were put forth. Four were based on an alleged right of the towing company to retain possession of the car. Three of these four are too legally complicated to relate herein.

The fourth argument was that the towing company, as *'agent'* of the property owner, had the right to hold the vehicle until the charges, properly owing to the property owner, were paid.

Justice Bora Laskin held that this was not so. The right to retain property until an obligation is met, known in legal jargon as a *lien*, must arise by statute or contract. Here there was neither statute nor contract.

In other words, if the property owner himself tows the car away, he is entitled to charge the vehicle operator the resonable cost of the towing, but he is not, by law, allowed to retain the car until said charge is paid. And the towing company, even if it were the property owner's agent, would stand in no better position.

The remaining two defenses were based on the phrase "fraudulently and without color of right" in section 269. The court held that "without color of right" meant that if the accused took or retained possession of another person's property under a mistaken belief of either fact or law, then he was not guilty of theft. In the Howson case, the mistake was as to law. Howson thought he had a legal right to retain the car until the charges were paid. Therefore, the Appeal Court squashed the conviction and directed an acquittal.

It is worth noting Justice Laskin's closing remarks: "but since there is no basis on which the accused in the circumstances herein could lawfully assert a lien or a right to distrain, the accused is put on notice as is the firm which employs him that 'color of right' can no longer be invoked to avoid a conviction for theft if another's car should be taken and detained as was that of the informant in this case."

Public Notice

One obvious question that arises from the Howson case is: "To what extent are other towing companies considered to have knowledge of the law on this matter?" This is very much a moot point. Certainly there is a cogent argument for acquitting anyone who is the same position as Howson was — namely, without knowledge that his acts were wrongful in law.

On the other hand, it might be argued that the Howson case is unique in that the law on the question was unknown until the case came before the Appeal Court. Now, citizens of Canada have a clear and well-reasoned explanation of the law. Howson's mistake of law was occasioned by a vague legal situation from a layman's standpoint; now the Ontario Court of Appeal has clarified the issue and all should be presumed to know this. The argument might be especially forceful with regard to a towing company since they should be particularly aware of judgments dealing with their realm of activities. Furthermore, it would be unsatisfactory from a policy standpoint to have to prosecute every towing company in order to teach them the law.

Where the law has been clarified and publicized (as it was in the Howson case) a person's actions should amount to theft even if he has a mistaken impression of the law. This latter attitude is consistent with Section 19 of the Criminal Code which reads:

"Ignorance of the law by a person who commits an offense is not an excuse for committing that offense."

The York Act

Three more questions remain to be considered. To what extent is the above altered by:

1) The powers conferred upon the university in the *York University Act, 1965*
2) the fact that the car operator or owner is a student of York University.
3) the fact that the vehicle operator or owner may have signed a York parking agreement.

Section 10 of the *York University Act, 1965* states, in part, ". . .the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board, and the Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the university. . ."

Since there exists an extreme paucity of judicial authority about the powers of: universities in general, and York University in particular, it is difficult to say exactly what power is conferred by a broad clause as the aforementioned.

However, this much seems certain, the university is part of Ontario and of Canada. It is not a country of its own immune to national and provincial enactments and capable of complete self-government.

To quote from the recent York discipline report, Freedom and Responsibility in the University: ". . .municipal bylaws, provincial and federal legislation and regulations are as fully applicable, according to their subject matter and scope, to the activities of the University and to those of individual faculty members and students, whether on the campus or off the campus, as they are to other corporations or persons."

It is therefore submitted that as between the university and a trespasser, the York University Act in no way varies legal relations. The university is entitled, as any land owner, to remove the trespassing vehicle and charge the reasonable cost for doing so. But it may not hold the car for ransom nor may it damage or destroy the vehicle.

The proper way for the university to proceed when a car is parked on private property without authority of its owner is found in two provincial acts.

The first is the Municipal Act, R.S.O. 1960, c.249, s. 379 (1), paragraph 108 (as amended in 1968), which states that the municipality may pass bylaws "for prohibiting the parking or leaving of motor vehicles on private property or on property of the municipality or any local board thereof where parking by the public is not authorized and providing for the removal and impounding of any vehicle so parked or left at the expense of the owner thereof."

It should be noted that a "written complaint of the occupant or any adult resident of the property" is necessary before the vehicle may be removed (s.279(1), paragraph 108 (d). The municipality of Toronto has passed a bylaw under this section.

The correct procedure is to call the police who then may ticket the car and have it towed away. In that situation, the pound operator may retain the car until the towing charges are paid. A similar power of removal is supplied under the Highway Traffic Act, R.S.O. 1960, c. 172, s. 89, as amended (1965, e.46, 2.12). Again, it is the police who must effect the removal.

The student trespasser

What happens when it is a York student whose car is parked illegally on the university property? Does the university student relationship affect the legality of the car's removal and rentention?

To quote the report, Freedom and Responsibility in the University, "faculty or student status means nothing to the civil law or to the criminal law." However, the contractual aspect of university-student relations may affect the matter. There is apparently no specific clause on the registration forms which stipulates or promises adherence to the university rules and regulations. The registrar of York, however, suggested that there may be an implicity agreement to abide by university rules.

Another possibility is that the total documents of the university — including the admissions applications, registration form, calendar — form the basis of the contract. This theory has been used in several U.S. cases.

The danger, of course, is the existence of general statements, such as "upon accepting admittance and registering at York University, a student acknowledges his willingness to abide by the rules and regulations of the University "or" students parking vehicles on University property are required to register them with the University, abide by the rules and regulations on parking and traffic control, and pay a parking fee." Both of the above statements are from York calendars.

It is difficult to see how the contractual analogy can be valid. The commercial notions of the 'market place' and 'bargain' are not applicable in the university-student situation where the latter is in a far weaker position. In fact, because the 'terms' of the 'contract' are in university publications, there is no negotiation; the dominant party dictates the terms.

It might be noted that the 'contractual' theory has been roundly criticized by U.S. legal scholars and several U.S. jurisdictions have made it plain that they will not enforce civil claims based upon private, primitive schemes. In fact, now the U.S. trend is to force the universities to afford the constitutional right of "due process" to students.

Within the context of the York parking problem, it is difficult to see how, in any case, a third party, such as York Town Towing, could derive any benefit from a contract between the university and a student.

The parking agreement

Lastly, we must consider the situation where a person with a York parking sticker parks in a no-parking zone on the campus.

Again, this person has entered a unilaterally — constructed contract. He must agree "to abide by the Parking and Traffic Regulations of York University" and further, "to a payroll deduction for fines assessed as the result of any violation of the regulations."

The "Parking and Traffic Regulations" were amended early in this academic year and now read: "Vehicles which are parked on Fire Access Routes, or illegally parked in reserved spaces, or which are obstructing the passage of emergency or service vehicles, or blocking entrances to residences will be towed away to an off-campus pound at the expense of the owner."

Even if the above clause is validly entailed in the parking contract, it is again difficult to see how York Town Towing can seek the sanctuary of it in a theft action. There is still no agreement between the vehicle owner and York Town Towing and the latter can not claim the benefit of the parking contract.

Opinion

On the basis of the above, it would appear that, if York Town Towing refuses to surrender to the owner a vehicle which has been towed away on the instructions of the university, then York Town Towing may be charged and convicted of theft.

Furthermore, the university, or its officers, by instigating and encouraging York Town Towing's actions may be guilty of Counselling an Offense, (s. 22 of the Criminal Code) or Conspiracy (s.408 (2)) or Theft itself (s. 269 and s. 21).

Apart from the criminal law consequences of their actions, York University, its officers and York Town Towing may be liable for conversion or detinue, which is approximately the civil law equivalent of theft.

Thus, anyone whose car is towed away from the university on the instructions of University officers, should consider laying an information against the towing company and the university, but should also bear in mind that in the case of a York student or a person with a York parking permit, it may be difficult to secure a conviction against the university.