

ing," but only for repairs. Another car broke down, and Smith, without the knowledge of Fisher or Whalen, took out Whalen's car, and was towing the disabled car into the garage, when, by his (Smith's) negligence in operating Whalen's car, the plaintiffs were injured. This was on the 13th November, 1913.

The plaintiffs, on the 18th February, 1914, began this action against Fisher alone. On the action coming down for trial, Whalen and Smith were added as defendants, and the plaintiffs amended by charging Whalen as the owner of the car, Smith as the servant of Fisher and the actual wrongdoer, and Fisher as his master. Each defended, and Whalen claimed indemnity over against Fisher and Smith. The question of indemnity was ordered to be tried at the trial of the action.

The trial took place before the District Court Judge, without a jury, and he gave judgment for the plaintiffs against the three defendants for \$500 and costs, with relief over in favour of Whalen against the other two.

Notice of appeal was given by all the defendants, but the appeals of the defendants Fisher and Smith were not proceeded with.

The appeal of the defendant Whalen was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. N. Tilley, for the appellant.

C. A. Moss, for the plaintiffs, respondent.

RIDDELL, J. (after setting out the facts as above):—The accident took place before the coming into force of the Act of 1914, 4 Geo. V. ch. 36, sec. 3, which adds to sec. 19 of the Motor Vehicles Act, R.S.O. 1914 ch. 207 (2 Geo. V. ch. 48) the words "unless at the time of such violation the motor vehicle was in possession of a person, not being in the employ of the owner, who had stolen it from the owner," and must be decided upon the law as it stood before that statute. . . .

[Reference to *Lowry v. Thompson* (1913), 29 O.L.R. 478; *Cillis v. Oakley* (1914), 31 O.L.R. 603.]

Remembering that the car in *Lowry v. Thompson* had not been "stolen by a thief," but had apparently been taken out by some one . . . and returned forthwith, both cases can stand; they are not at all inconsistent. It is, of course, our duty to follow both decisions. Certainly the former is not overruled, and could not be, and the latter stands unshaken.

The result will be that the law before the enactment of 4