Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Joseph Martin Samson v. *Louisa Mary Aitchison, from the Court of Appeal of New Zealand: delivered the 22nd July* 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD DUNEDIN.
LORD ATKINSON.
SIR CHARLES FITZPATRICK.

[DELIVERED BY LORD ATKINSON.]

This is an Appeal from a judgment of the Court of Appeal of New Zealand, dated the 9th of August 1911, affirming a judgment of the Supreme Court of New Zealand (Otago and Southland District) whereby the Respondent was awarded 750*l.* damages and 97*l.* 6*s.* 4*d.* costs in respect of personal injuries inflicted upon her through the negligent driving of the Appellant's motor car.

The person by whom the motor car was driven at the time of the accident, and who was guilty of the negligence, was one Albert Collins, the son of one Mrs. Collins, an intending purchaser of this car from the Defendant. And the sole question for decision is whether the majority of the Court of Appeal were right in holding that, having regard to the evidence, to the findings of the jury on the issues of fact left to them at the trial, and to those inferences of fact subsequently drawn by the Trial Judge in exercise of

the power, by the consent of the parties conferred upon him, the relation between Albert Collins and the Appellant at the time of the accident was such as to make the Appellant responsible for Collins' negligence. This again turned upon the question of fact, whether or not the Appellant had control over his car and over Collins, the driver of it, at the time the Respondent was struck and injured. The facts, so far as material, are as follows :—Mrs. Collins, who lives at Oamaru, some distance from Dunedin, was in the month of April 1910 minded to buy a Ford motor car, and desired to obtain a loan of 100*l.* from the Appellant to enable her to pay for it. On the 5th of April she came to Dunedin for the purpose of obtaining the loan, and next day had an interview with the Appellant, who lives there. The latter expressed disapproval of Ford cars, offered to sell her at a certain price his own car, which then happened to be standing in the street outside his rooms, and took her for a run in it, he himself driving. Mrs. Collins' son, Albert, lived with his mother at Oamaru. He had been a chauffeur for two years, and his mother was anxious to have his advice and opinion about this car of the Appellant's before purchasing it. She accordingly, after returning from the run in the car with the Appellant, telephoned from the latter's office to her son to come to Dunedin. He did so, arriving the same evening. She and he called upon the Appellant next morning, the morning of Thursday, 7th April, the Appellant took young Collins out for a run on this car, he, the Appellant, himself driving. Nothing was then concluded. Mrs. Collins and her son returned next day, Friday, the 8th of April. It was then arranged between the three that the car should be taken out and tested as a hill climber. Mrs. Collins and her son stated this

suggestion came from Samson, the Appellant The latter stated, on the contrary, that young Collins required that the car should be submitted to this test. At all events, the three went out in the car at about 12 o'clock on this Friday. The Appellant drove, young Collins sat beside him, Mrs. Collins sat behind. They drove through the town, over the cemetery hill, through a place called Caversham, and over a hill to another place called Green Island. About a third of the way up this latter hill, the Appellant and young Collins changed seats, the latter taking the wheel and driving. Mrs. Collins and her son stated positively that the Appellant on this occasion asked the young Collins to drive. The Appellant on the contrary alleged that the suggestion that young Collins should drive came from Collins himself. At all events, Collins did drive from the time the change was made till on the return journey they met with the accident in the town. On the day following the accident Mrs. Collins entered into an agreement in writing with the Appellant to buy this car. Both Mrs. Collins and her son in the course of their evidence stated most positively that the Appellant gave directions to young Collins while driving as to how and where he should drive, the rate he should proceed at, and the course he should take. To meet this proof of the exercise of control, the Appellant set up, what the Trial Judge, Mr. Justice Williams, has found to be an utterly false and dishonest case, to the effect that Mrs. Collins had in effect agreed verbally to purchase the car on Friday morning before they ever started on this trial run, that the car was in truth her property, that her son, acting on her behalf as owner, determined to take the car out for his own satisfaction, and invited the Appellant to accompany him as a passenger. The learned Judge having come to this con-

clusion, not unnaturally, considered that the Appellant's evidence was discredited by this incident, and accepted the account of each stage of the transaction given by Mrs. Collins or her son in preference to that given by the Appellant, where the two were in conflict. The learned Trial Judge was of opinion that there was no evidence given at the trial that the accident happened "through any actual personal negli- "gence" on the part of the Appellant, and left to the jury the question of negligence on the part of Albert Collins. The jury found for the Respondent (the Plaintiff in the action), the question of the responsibility of the Appellant for the negligence of young Collins being reserved for further consideration, the learned Judge to have power to draw all necessary inferences of fact. Counsel on behalf of the Appellant accordingly on the 16th of December 1910 moved before Mr. Justice Williams that judgment should be entered in the action for the Defendant on this ground amongst others, that "the Defendant was not answerable for the "negligence of the driver of the motor car." On the 1st of February 1911 the learned Judge delivered judgment refusing this motion and directing a verdict and judgment to be entered for the Plaintiff in the action for the damages found by the jury and costs. The learned Judge in the course of his judgment laid down the law upon this question, the only question now for decision, with, as it appears to their Lordships, perfect accuracy, in the following passage :—

"I think that where the owner of an equipage, whether "a carriage and horses or a motor, is riding in it while it is "being driven, and has thus not only the right to possession, "but the actual possession of it, he necessarily retains the "power and the right of controlling the manner in which it "is to be driven, unless he has in some way contracted "himself out of his right, or is shewn by conclusive "evidence to have in some way abandoned his right. If

" any injury happen to the equipage while it is being " driven, the owner is the sufferer. In order to protect his " own property if, in his opinion, the necessity arises, he " must be able to say to the driver, 'Do this,' or 'Don't do " that.' The driver would have to obey, and if he did not " the owner in possession would compel him to give up the " reins or the steering wheel. The owner, indeed, has a " duty to control the driver. If the driver is driving at a " speed known to the owner to be dangerous, and the owner " does not interfere to prevent him, the owner may become " responsible criminally (*Du Cros* v. *Lambourne*, 1907, " 1, K.B., 40). The duty to control postulates the exist- " ence of the right to control. If there was no right to " control there could be no duty to control. No doubt if " the actual possession of the equipage has been given by " the owner to a third person—that is to say, if there has " been a bailment by the owner to a third person—the " owner has given up his right of control."

And he then proceeded in the following passage to deal with the evidence in the case, and apply to it the principle of law he had thus laid down :—

" When, however, as in the present case, the owner " being himself in actual possession of the equipage, simply " hands over the reins or the wheel, he does not by so doing " give up the possession of the equipage or his right of " control of the way in which it is to be driven. Collins, " when he took the wheel, came under the control of the " Defendant. It was in the interest of the Defendant that " Collins should drive, in order that he might make a trial " of the car. If Collins drove in the ordinary way, the " Defendant, in his own interest, would not interfere with " the driving, but there is nothing to show or to suggest " that the Defendant had given up the right to control the " way in which the car was to be driven if an occasion " arose on which, in his opinion, it became necessary to " exercise that control, or if for any other reason he desired " to exercise it. If Collins had been going too quickly, " and Samson had told him to go slow, and Collins persisted " in going too quickly, Samson would have had the right to " say to him: 'If you wish to continue to drive my car you " 'must drive it as I direct, and if you will not do so you " 'must cease to drive it.' In such circumstances Collins " would have had to obey orders or cease driving. It does " not follow because in any particular case it had not been " found necessary to exercise a paramount authority, that " such authority did not exist."

In the opinion of their Lordships this amounts to a finding of fact that the Appellant had not abandoned the control which they think *primâ facie*, belonged to him. The mere fact that he had asked or permitted young Collins, while he sat beside him, to drive the car is in their Lordships' view not enough to establish *per se* that he had abandoned control of his car. And if the control of the car was not abandoned, then it is a matter of indifference whether Collins, while driving the car, be styled the agent, or the servant of the Appellant in performing that particular act, since it is the retention of the control which the Appellant would have in either case that makes him responsible for the negligence which caused the injury. It appears to their Lordships that there is abundant evidence to sustain the conclusion to which the learned Judge has come on this question of fact, the retention of control by the Appellant. They not only see no reason for disturbing it, but think it is the right conclusion, one at which they themselves would have arrived. Their Lordships cannot, with all respect to the learned Chief Justice, concur in the view of the evidence expressed in the following passage of his judgment in the Court of Appeal :—

" There was, therefore, nothing requiring the Appellant " to interfere with or intervene in the driving or control of " the car. Nor do I see that it can be said that this was " a driving on the business of the Appellant as in the case " of *Wheatley* v. *Patrick*. It was done for the purpose of " testing the car, and while the car was being tested the " accident occurred. It appears to me that to hold that " Collins was acting as a servant or an agent or under the " control of the Appellant would be going beyond what has " been decided in any of the cases referred to or that may " be referred to, or to what is laid down in the various " treatises on torts or negligence. The facts that he was " to have a trial of driving up a hill, that the car was " surrendered to his control for that purpose, and that his " mother was in the car as well as the Appellant, appears

" to me to differentiate this case from those relied on.
" Nor does it seem to me that assuming that Mrs. Collins
" and her son's evidence is true about the suggestions made
" as to driving by the Appellant, that it shows that the
" driving was under the Appellant's control."

They think that in this passage the very fact in controversy is assumed to be true, namely, that the car was surrendered to the control of Collins for the purpose of the trial. There was to be a trial of the car as a hill climber, no doubt, but if the evidence of Mrs. Collins and her son be true there was no stipulation whatever, express or implied, that Collins should drive during the trial, or should have the control of the car while he drove it. On the contrary, they state that the suggestion that he should drive it came from the Appellant during the progress of the run.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed, and the Appeal dismissed. And they will humbly advise His Majesty accordingly. The Appellant must pay the costs of the Appeal.

In the Privy Council.

JOSEPH MARTIN SAMSON

v.

LOUISA MARY AITCHISON.

DELIVERED BY LORD ATKINSON.

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