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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MAY 26TH, 1919.

*REX v. MERCIER.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41 (1)—Having Intoxicating Liquor upon Unlicensed Hotel Premises—Conviction as for Second Offence—Admission of Evidence of Previous Conviction during Course of Trial—Violation of sec. 96—Effect of, upon Conviction—Directory Provision.

Appeal by the Attorney-General for Ontario from the order of CLUTE, J., ante 33, quashing the conviction of the defendant.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. R. Cartwright, K.C., for the appellant.

J. M. Bullen, for the defendant, respondent.

THE COURT allowed the appeal, following Rex v. Coote (1910), 22 O.L.R. 269, and dismissed the motion to quash. Costs of the motion to be paid by the defendant; no costs of the appeal.

SECOND DIVISIONAL COURT. MAY 30TH, 1919.

*CANADA CYCLE AND MOTOR CO. LIMITED v. MEHR.

Contract—Sale of Goods—Construction of Document—Buyers Agreeing to Take Sellers' Scrap for one Year at Fixed Prices—Implied Agreement of Sellers to Furnish Scrap—Damages for Breach.

Appeal by the plaintiffs from the judgment of CLUTE, J., in favour of the defendants upon their counterclaim, declaring that

*This case and all others so marked to be reported in the Ontario Law Reports.

the defendants were entitled to damages for breach of a contract, and directing a reference to ascertain the amount.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

Shirley Denison, K.C., for the appellants.

G. S. Hodgson, for the defendants, respondents.

LATCHFORD, J., read a judgment in which he said that on the 12th April, 1917, the plaintiffs sent to the defendants a document headed "Contract between Canada Cycle and Motor Company Limited and J. Mehr & Son, Toronto, Ontario," in these words: "J. Mehr & Son hereby agree to take the accumulations of scrap from the Canada Cycle and Motor Company Limited for a period of one year from this date, that is, until April 12th, 1918, the prices to be as follows: No. 1 heavy meltings steel at $16 per g. t.; light steel at $7.50 per g. t.; bicycle turnings at $7.75 per g. t.—f.o.b. Canada Cycle yards at Weston, loading to be by J. Mehr & Son." This was signed in the name of the plaintiffs, by their purchasing agent, one Bell. The defendants wrote "accepted" under the signature of the plaintiffs, the document being in fact a proposal by the plaintiffs, and so regarded by both parties.

Under the contract so formed, the plaintiffs delivered to the defendants 10 car-loads of scrap of the descriptions stated, the last delivery being on the 27th August, 1917. On the 25th September, 1919, the plaintiffs notified the defendants that no more accumulations of scrap would be supplied.

The contention of the plaintiffs was that they were not bound by the contract to do more than sell to the defendants, at the prices stated, such scrap as, during the year from the 12th April, 1917, the plaintiffs chose to deliver to them.

When the plaintiffs brought this action for $1,870.51, the balance due on the scrap delivered before the 27th August, the defendants counterclaimed for damages for breach of the agreement. Judgment was entered in the plaintiffs' favour on the 2nd October, 1918, for the amount of the claim, and execution stayed until the trial of the counterclaim. That trial was had, and resulted as above.

The agreement created by the defendants' acceptance of the plaintiffs' proposal was what the plaintiffs called it—a "contract." On the part of the defendants it was a contract to purchase from the plaintiffs the plaintiffs' accumulation of specified scrap produced in their works at Weston during a period of one year.

Reference to Churchward v. The Queen (1865), L.R. 1 Q.B. 173, 195; Pordage v. Cole (1670), 1 Wms. Saund. 319 *h*; Hill v. Ingersoll Road Co. (1900), 32 O.R. 194.

The intention that the plaintiffs should sell was as clearly implied in this contract as the intention that the defendants should buy was clearly expressed.

Regina v. Demers, [1900] A.C. 103, distinguished.

The appeal should be dismissed.

BRITTON, RIDDELL, and MIDDLETON, JJ., agreed with LATCHFORD, J.

MEREDITH, C.J.C.P., read a dissenting judgment. He was of opinion that the contention of the plaintiffs was right, taking the words used in the writing, and construing it according to the law and the cases and according to common sense.

The appeal should be allowed.

Appeal dismissed with costs (MEREDITH, C.J.C.P., *dissenting*).

SECOND DIVISIONAL COURT. MAY 30TH, 1919.

*SCOTLAND v. CANADIAN CARTRIDGE CO.

Master and Servant—Injury to Health of Servant Working in Factory—Absence of Ventilation—Presence of Poisonous Gases—Proximate Cause of Ill-health—Findings of Jury—Absence of Evidence upon which Reasonable Men Could Make Findings in Favour of Plaintiff—Dismissal of Action.

Appeal by the defendants from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiff, in an action to recover damages for injury to the plaintiff's health by his being compelled to breathe gas fumes while at work for the defendants in their munitions factory, in a room said to be without ventilation.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

Strachan Johnston, K.C., and H. A. Burbidge, for the appellants.

W. S. MacBrayne, for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the action was based upon an alleged breach of duty under the common law and also under the Factories Act; at the trial an amendment was made extending the claim to one under the Public Health Act also.

The duty alleged by the plaintiff throughout was to ventilate the building in which he worked in such a manner as to keep the air reasonably pure so as to render harmless, so far as reasonably practicable, vapours generated in the course of the work done there; the breach alleged was a neglect of such duty; and the consequence the emission of strong, irritating, and poisonous gases, which, owing to the absence of such ventilation, permanently injured the plaintiff's helath. The gases or fumes were alleged to have arisen from small tanks into which hot metal, in the process of manufacture into ammunition shells, was dipped in a solution of prussic acid and a solution of sulphuric acid.

In order to succeed in the action, it was, therefore, necessary for the plaintiff to prove that these vapours or fumes did arise from the tanks; that, so arising, they were injurious to health; that the defendants were guilty of a breach of duty to ventilate the building; and that the plaintiff's health was injured, and to what extent, by such vapours, by reason of such absence of ventilation.

The jury found: that harmful gases were so generated, "the three fumes of gases combined sulphuric acid, cyanide of potassium, and natural gas;" that the building was not ventilated in such a manner as to keep the air reasonably pure and so as to render harmless, so far as reasonably practicable, all gases, vapours, or other impurities generated in the course of the manufacturing process carried on by the defendants while the plaintiff was in their employment; that the condition of the factory where the plaintiff worked caused his present and possibly future disability; that the injury complained of by the plaintiff was caused by the defendants' negligence; that the negligence was, "Sufficient ventilation was not provided while the plaintiff worked there;" and that the plaintiff was not guilty of contributory negligence; and they assessed the damages at $3,500 under the common law and at $3,664 under the Factories Act.

Judgment was properly directed to be entered for the lesser sum; and to that the plaintiff did not now object.

The plaintiff's claim was brought before the Workmen's Compensation Board: the Board rejected the claim on the ground that, if it could be supported in fact, it would not be a case of "a personal injury by accident," and so it could not be one within the Act; and, whether that conclusion was right or wrong, it was made final and conclusive by sec. 15 (2) of the Workmen's Compensation Act, 4 Geo. V. ch. 25, as enacted by sec. 8 of the Act to amend the Workmen's Compensation Act, 5 Geo. V. ch. 24. Therefore the Act did not stand in the way of this action.

The only ground upon which this appeal could be allowed was, that there was no evidence upon which reasonable men could find

in the plaintiff's favour; and, if that were so as to any one of the essential findings, the defendants should have judgment dismissing the action, notwithstanding the verdict.

The onus of proof was on the plaintiff: he must prove absence of ventilation, the presence of poisonous gas, that the two combined were the proximate cause of the plaintiff's ill-health; and he must prove the amount of damages.

After an examination of the evidence, the learned Chief Justice said that he was of opinion that the plaintiff had not made a prima facie case of neglect of duty towards him in any of the respects mentioned.

The appeal should be allowed and the action dismissed.

Appeal allowed.

SECOND DIVISIONAL COURT. MAY 30TH, 1919.

*OSBORNE v. CLARK.

Husband and Wife—Action by Husband against Wife's Parents—Alienation of Wife's Affections—Enticing and Harbouring—Verdict of Jury in Favour of Plaintiff—No Evidence to Support—Dismissal of Action.

Appeal by the defendants from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiff, in an action against his wife's father and mother to recover damages for alleged "misconduct and actions" of the defendants whereby his wife's affections had been alienated from him and he had suffered loss of consortium, and for that his wife had been "enticed away, received, and harboured by the defendants." The jury found a verdict for the plaintiff for $800 and damages, and for that amount and costs the trial Judge directed judgment to be entered.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

W. S. MacBrayne, for the appellants.

No one appeared for the plaintiff, respondent.

MIDDLETON, J., in a written judgment, after setting out the facts, said that at the trial the plaintiff admitted that there had been no alienation of his wife's affections.

The learned Judge referred to Bannister v. Thompson (1913-14), 29 O.L.R. 562, 32 O.L.R. 34; Winsmore v. Greenbank (1745), Willes 577; Quinn v. Leathem, [1901] A.C. 510; and other cases;

and said that in this case there was absolutely no evidence upon which any finding of malice on the part of the parents could be made. The course of action which they advised commended itself to the daughter and to the plaintiff. The taking of the daughter to her old home and placing her under the care of her mother relieved her from a great deal of domestic anxiety and was the best thing to be done to restore her to mental and physical health. There was no enticing and no harbouring: the wife was not detained against her own will.

Upon the undisputable facts, no cause of action had been shewn.

The appeal should be allowed and the action dismissed, both with costs.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

BRITTON, J., agreed with MIDDLETON, J.

RIDDELL, J., agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. MAY 20TH, 1919.

*RE NEW YORK LIFE INSURANCE CO. AND FULLERTON.

Insurance (Life)—Death of Assured—Rival Claims to Policy-moneys—Execution Creditors of Assured—Moneys Payable to Executors or Administrators or Assigns or to Designated Beneficiary of Assured—Designation of Sister as Beneficiary after Execution Placed in Sheriff's Hands—Alleged Fraud upon Creditors—Insurance Act, R.S.O. 1914 ch. 183, sec. 171 (1)—Effect of sub-sec. 2—Premiums Paid with Intent to Defraud Creditors—Right of Beneficiary to Policy-moneys Saved by Statute—Limited Relief as to Premiums if Fraud Established.

Appeal by W. L. McKinnon & Co. from the order of ROSE, J., ante 35.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

J. B. Clarke, K.C., for the appellants.

J. E. Lawson, for Elizabeth Fullerton, the respondent.

MIDDLETON, J., read a judgment in which he said that the Insurance Act, R.S.O. 1914 ch. 183, sec. 171 (1), permits an insurance by any person for the benefit of another, whether the beneficiary has or has not an insurable interest in the life of the assured. By sub-sec. 2, if the premiums paid are paid by the assured with intent to defraud his creditors, they shall be entitled to receive out of the insurance money an amount not exceeding the premiums so paid and interest thereon.

In Holt v. Everall (1876), 2 Ch. D. 266, it was held that the effect of similar legislation was to give to the beneficiary the right to the insurance money subject to the provision for payment to the creditors of the amount of any premium fraudulently paid.

Bunyon, Law of Life Assurance, 4th ed., pp. 564, 565, recognises this as the law.

If the statute had not made this provision, there is abundant authority for holding that an assignment or settlement of insurance money may be attacked as being a fraud upon creditors. The cases are collected in Bunyon, p. 525 et seq.

The appeal should be dismissed with costs.

BRITTON and RIDDELL, JJ., agreed with MIDDLETON, J.

MEREDITH, C.J.C.P., was also, for reasons stated in writing, in favour of dismissing the appeal, but only on the ground that the statute prevents the relief sought being given, relief which, but for the statute, the appellants should have if they proved their allegations of fraud; but subject to this that they should be at liberty to seek the limited relief afforded by sub-sec. 2 of sec. 171, though, in any case, they must pay the costs of this appeal.

Appeal dismissed with costs.

HIGH COURT DIVISION.

LENNOX, J. MAY 26TH, 1919.

RE McINTYRE.

Will—Construction—Devise—Description of Land by Lot and Concession without Mentioning Township—Proof by Affidavit to Supplement Description—Devise to Wife—Subsequent Clause in Will Disposing of Land in Event of Wife Dying without a Will—Estate of Wife—Power to Convey in Fee Simple—Will Made by Wife—Declaration as to.

Motion by Janet McIntyre, widow of Hugh McIntyre, upon originating notice, for an order declaring the applicant entitled in fee simple to land devised by her late husband and entitled to convey the same to a purchaser.

The motion was heard in the Weekly Court, London.

J. C. Elliott, for the applicant.

F. P. Betts, K.C., for the Official Guardian, representing the infant grandchildren of the testator.

LENNOX, J., in a written judgment, said that the testator, by his will, devised and bequeathed all his real and personal estate "in the manner following that is to say: to my beloved wife . . . my whole estate consisting of 100 acres more or less on concession 7 south half No. 2. . . . I also devise and bequeath that in the event of my wife . . . dying without a will the above real estate be equally divided among my youngest children," naming five of them.

The testator died on the 27th May, 1891, and probate of the will was granted to the executors named in it. The testator was survived by seven children, all of whom were dead at the time of this application. Five died unmarried and intestate; the other two were daughters, and they also died intestate, but each left a husband and a child or children. The children were infants. The debts of the testator had been paid and all the other provisions of the will complied with. The only matter remaining was the question of the construction of the will as to the real estate.

The will did not identify the land mentioned by township or county, but it purported to dispose of all the testator's real estate. The applicant's affidavit, although it referred to the township and county, did not say that "lot 2 in the 7th concession of the township of Moore" was the only real estate owned by the testator or

that he owned that lot. A supplementary affidavit, covering the point, should be filed.

The widow took an estate in fee simple in her own right in the land referred to in the will—her right or estate was not controlled or limited by the last paragraph of the will, which purported to dispose of the real estate in the event of her dying without a will: Halsbury's Laws of England, vol. 28, p. 679, para. 1295; p. 684 et seq., paras. 1303, 1305, 1307.

The last paragraph of the will was at most an indefinitely expressed attempt to annex an inconsistent and repugnant condition to the disposition or devolution of a fee definitely conferred upon the wife.

Comiskey v. Bowring-Hanbury, [1905] A.C. 84, distinguished.

It was said that the widow had made a will, and it was suggested that it should be declared irrevocable, as in In re Turner (1902), 4 O.L.R. 578. The learned Judge thought that procedure unworkable in this case.

There should be an order declaring that the land is the property of the widow in fee simple; the order not to issue until the affidavit required has been filed.

Costs out of the estate—$10 for the Official Guardian and $30 for the applicant.

SUTHERLAND, J. MAY 27TH, 1919.

MITCHELL v. THOMPSON.

Money Lent—Advance of Money upon Promissory Note Made in Name of Trader by Manager as Attorney—Authority of Attorney not Covering Transaction—Money Placed to Credit of Trader in Bank and Used for his Benefit—Liability to Repay—Quasi-contract—Action on Promissory Note—Amendment—Recovery for Money Len .

This action was brought against Thompson Brothers upon a promissory note for $1,500, dated the 5th September, 1918, to recover that sum and interest and also a further sum of $97.75 for interest on another promissory note.

William Thompson, in and before 1918, carried on business as a brickmaker, under the name of Thompson Brothers; on the 4th May, 1916, he gave his son Harold a limited power of attorney to do financial business for him with a specified bank. On the 21st January, 1918, he executed a new power of attorney by which he appointed his son Harold or one Wiers his attorney. Thompson Brothers, through Harold A. Thompson, borrowed

$3,000 from the plaintiff on the 14th January, 1918, and gave the plaintiff a promissory note therefor, signed "Thompson Brothers, by Harold A. Thompson, attorney." The $3,000 was paid in cash by the plaintiff to Wiers, who was apparently in charge of the business, and entries were made in the books of Thompson Brothers shewing a credit of $3,000 to the plaintiff and a note made by Thompson Brothers. The money was deposited to the credit of Thompson Brothers in a bank. There were other similar notes, loans, and entries. The $1,500 note sued upon was signed like the first one except that the name of Wiers was signed as attorney. Wiers was apparently the manager of Thompson's business. Before this action came on for trial Thompson Brothers made an assignment to C. N. Anderson for the benefit of creditors. Anderson was added as a defendant, and took upon himself the burden of contesting the plaintiff's claim.

The action was tried without a jury at Sandwich.
T. Mercer Morton, for the plaintiff.
J. H. Rodd, for the defendant Anderson.

SUTHERLAND, J., in a written judgment, said that at the trial the plaintiff was permitted to amend by claiming for money lent to and received by Thompson Brothers, and upon this claim he was entitled to succeed.

The plaintiff did not intend to give the money to Thompson Brothers, but to lend it with the expectation of being repaid. They received the money through their agent, it was placed by him to their credit in their account with the bank, and they had the benefit. In these circumstances, a right in quasi-contract arose. Even if Wiers had no authority to sign the notes, and the action would fail on that ground, it would be inequitable for Thompson Brothers to retain the money. Having regard to the apparent authority of Wiers, as manager of the business, the plaintiff might well be deceived into the belief that Wiers had authority to sign the notes and so be induced to part with his money to Wiers for Thompson.

Reference to Milnes v. Duncan (1827), 6 B. & C. 671; Kelly v. Solari (1841), 9 M. & W. 54, 58; Marriot v. Hampton (1797), 2 Sm. L.C., 12th ed., 403, at p. 428; Keener on Quasi-Contracts, pp. 326-331; Bond v. Aitkin (1843), 6 W. & S. (Penn.) 165; Rankin v. Emigh (1910), 218 U.S. 27; Bavins Junr. & Sims v. London and South Western Bank, [1900] 1 Q.B. 270, 275.

There should be judgment for the plaintiff against the defendants for $5,500, with appropriate interest and costs—the plaintiff being allowed to amend by adding a claim for the remainder of the moneys advanced by him.

LENNOX, J. MAY 27TH, 1919.

STOCK v. MEYERS AND COOK.

Sale of Goods—Conditional Sale—Agreement—Seizure of Goods under Execution—Pretended Seizure by Assignee of Vendor when in Possession of Bailiff under Execution—Conditional Sales Act, R.S.O. 1914 ch. 136, sec. 8—Retention of Goods for 20 Days—Tender of Balance Due within that Period—Right to Possession—Pretended Sale—Replevin—Damages.

Action to recover goods (shop-fittings) alleged to have been wrongfully taken by the defendants, and for damages.

The action was tried without a jury at a Toronto sittings.

R. S. Robertson, for the plaintiff.

J. M. Ferguson, for the defendant.

LENNOX, J., in a written judgment, said that one McHale was conditional owner of the shop-fittings, and purported to sell them, free of incumbrance, to the plaintiff. McHale got the fittings from one Roche; and, at the time the plaintiff purchased from McHale, there was at least a small sum (about $28) for interest unpaid and due to Roche. The plaintiff, in good faith and upon reasonable grounds, believed that the purchase-money due to Roche had been or would then be paid in full. Roche, however, asserted that more than the interest was due at this time. The fittings were transferred to the plaintiff by bill of sale, duly registered. The plaintiff became lessee of the premises upon which the fittings were, and paid rent. While the plaintiff was in possession of the fittings on these premises, the defendant Cook seized them under Division Court execution against McHale, on the 4th May, 1918; but on the 17th abandoned the seizure, saying that he had a claim prior to the execution. The defendant Meyers had possession of the goods when they were replevied by the plaintiff. Cook's prior claim was under an assignment of Roche's claim (referred to as a "lien"); Cook purchased Roche's claim and paid to Roche the balance alleged to be owing, $94.90, on the 10th May, 1918; and on that day purported to take the goods under his "lien."

The contract between McHale and Roche was in the form of a "lien-note," dated the 5th February, 1917—a promissory note for $729.82, on its face said to be given for the fittings, describing them, and providing that the property should not pass until payment of the note, and that Roche should be at liberty upon default to repossess and sell.

Roche had not, accurately speaking, a lien—liens arise not by contract but by operation of law: Carroll v. Beard (1896), 27 O.R. 349, 357, 358, 360. The transaction was a conditional sale and subject to the provisions of the Conditional Sales Act.

The defendant Cook did not on the 10th May or thereafter take legal possession of the goods under the Roche agreement or claim.

Cook said he sold the goods to Miss Whyte, his confidential clerk, for $143; Miss Whyte resold to the defendant Meyers for $500, one half of which was paid in cash and the other half secured by a "lien-note," which was overdue; payment of it had not been demanded. This transaction was closed and the goods removed on the 17th June.

It was urged that Miss Whyte, having a lien-note, was the owner and a necessary party to the action. But she had no substantial interest in the matter—on the evidence, she was a mere figurehead, representing the defendant Cook.

Applying essentially the same principle that has been often applied to land transactions, the learned Judge was of opinion, without reference to the Conditional Sales Act, that a new time for the performance of the contract by McHale and the plaintiff was substituted for the original provision as to payment, and that the right of possession and the right by payment to convert contingent into absolute ownership was vested in the plaintiff at the time the goods were removed by Meyers on the 17th June.

Before Roche could enforce forfeiture, he was bound to give notice, and such notice as would give a reasonable time for payment. The defendants had no higher rights than Roche had.

There is no direct statutory provision for notice of sale in this case. Sub-sections 2 and 3 of sec. 8 of the Conditional Sales Act, R.S.O. 1914 ch. 136, apply only where the vendor is looking to recover purchase-money beyond what the goods will bring. Subsection 1 of sec. 8 provides that when the seller retakes possession of the goods for breach of condition he shall retain them for 20 days, and the purchaser may redeem them within that time. The earliest act that could be regarded as a taking of possession was on the 17th June. A proper legal tender of a sufficient sum was made to each of the defendants within the 20 days.

There should be judgment declaring that the goods are the property of the plaintiff and that he was entitled to possession thereof before and at the date of the commencement of the action, and for $5 damages and the costs of the action—the amount tendered ($143.75) to be applied in reduction of the costs taxed to the plaintiff.

MASTEN, J. MAY 28TH, 1919.

WALKER v. TOWNSHIP OF SOUTHWOLD.

Highway—Nonrepair—Injury to Passenger in Motor Vehicle—Statutory Obligation of Township Corporation (Municipal Act, sec. 460)—Failure to Fulfill—Cause of Injury—Damages.

Action by Genevieve Walker against the Corporation of the Township of Southwold to recover damages for injury sustained by an accident to a motor vehicle in which she was a passenger, upon a highway in the township, which she alleged was out of repair and in a dangerous condition.

The action was tried without a jury at St. Thomas.

O. L. Lewis, K.C., and R. L. Gosnell, for the plaintiff.

W. K. Cameron, for the defendants.

MASTEN, J., in a written judgment, said that, in rounding a curve, the motor vehicle, though going at a very moderate rate of speed, in daylight, swerved slightly to the left off the via trita, and, returning to the track, got slightly too far to the right. At this point there was an embankment 14 feet high, and the road was very narrow, while the soil at the side of the beaten track was sandy and loose. When the car swerved to the right, the soil gave way, it became impossible to recover the via trita, and the car tipped over the embankment; the plaintiff was thrown out and injured.

The learned Judge found that the defendants had failed to fulfill the statutory obligation imposed upon them—sec. 460 of the Municipal Act, R.S.O. 1914 ch. 192. The highway was not maintained in a proper condition for the existing traffic over it. The breach of the statutory duty was the cause of the accident.

Damages assessed at $500, and judgment for the plaintiff for that amount, with costs.

MASTEN, J. MAY 28TH, 1919.

GOSNELL v. TOWNSHIP OF SOUTHWOLD.

Highway—Nonrepair—Injury to Passenger (Owner) in Motor Vehicle—Statutory Obligation of Township Corporation (Municipal Act, sec. 460)—Failure to Fulfill—Cause of Injury—Effect of Possible Negligence of Driver (Daughter of Owner)—Absence of Control—Competence of Driver—Damages.

This action was brought to recover damages for injury to the plaintiff, who was a passenger on the same occasion, in the motor vehicle referred to in Walker v. Township of Southwold, supra. The plaintiff in this action was the owner of the motor vehicle and the father of the girl who was driving it when the accident occurred.

The action was tried without a jury at St. Thomas.

O. L. Lewis, K.C., and R. L. Gosnell, for the plaintiff.

W. K. Cameron, for the defendants.

MASTEN, J., in a written judgment, said that the circumstances with regard to one issue, viz., the breach of statutory duty, were the same in this case as in the Walker case, and it was not necessary to repeat what had been said in that case. Even if there were contributory negligence on the part of the driver, Miss Gosnell, as to which the learned Judge expressed no opinion whatever, the plaintiff was not affected by it.

An occupant of a motor vehicle who has no right of control over the driver, and exercises no control over him, is not chargeable with the negligence of such driver: Foley v. Township of East Flamborough (1899), 26 A.R. 43; Mills v. Armstrong (1888), 13 App. Cas. 1; Berry on Automobiles, 2nd ed., sec. 318, note 1.

The fact that the occupant and driver of a motor-vehicle are closely related and members of the same family, does not affect the rule that the driver's negligence is not imputable to the occupant: Gaffney v. City of Dixon (1910), 157 Ill. App. 589; Henry v. Epstein (1912), 53 Ind. App. 265; Parmenter v. McDougall (1916), 156 Pac. Repr. 460.

If the occupant has the right of control over the operation of the motor vehicle and permits it to be negligently driven, he is chargeable with his negligent failure to exercise his right to require the driver to operate the car properly: Bryant v. Pacific Electric R. Co. (1917), 164 Pac. Repr. 385.

Here the car was owned by the plaintiff, and he was the father of the driver and sitting beside her, but the occurrence was a sudden emergency occupying no more than a second or two of

time before the motor vehicle was capsizing down the bank. In these circumstances, the plaintiff could have done no act to avert the accident. Had he attempted to intervene, it would only have disturbed the driver, who was distinctly competent. To do so might well have been harmful rather than helpful: Clarke v. Connecticut Co. (1910), 83 Conn. 219; Wilson v. Puget Sound Electric Railway (1909), 52 Wash. 522.

Damages assessed at $750, and judgment for the plaintiff for that amount, with costs.

RIDDELL, J. MAY 30TH, 1919.

RE CLINTON.

Will—Construction—Whole Estate Given to Executors in Trust for Support and Maintenance of Widow during Life—Right to Use any Portion "as she may See Fit and Desire"—Discretion—Reduction of Capital.

Motion by the widow and executors of Albert Prince Clinton, deceased, for an order determining a question arising upon the terms of the will.

The motion was heard in the Weekly Court, Toronto.

H. L. Barnes, for the applicants.

F. W. Harcourt, K.C., for beneficiaries under the will, including two infants.

RIDDELL, J., in a written judgment, said that the testator gave all his estate to his executors upon trust, "first, to hold the same for the support and maintenance of my . . . wife during her natural life and with the right to her to use any portion of said estate as she may see fit and desire; second, on the death of my said wife in case there be $5,000 or any less sum remaining it shall be paid to my adopted daughter Nellie Clinton; third, in case at the death of my wife there be more than . . . $5,000 then remaining of my said estate . . . the surplus beyond that sum shall be equally divided among my legal heirs."

The testator died on the 11th December, 1903, and the executors named in the will obtained letters probate thereof.

The real estate of which the testator died possessed realised $4,950, the personal estate amounted to $3,811—$8,761 in all.

The widow, finding it impossible to live upon the income derivable from this sum, claimed the right absolutely to any

part of the estate she might desire, under the first clause of the will. But that clause was ambiguous. It might mean that she was to have the right to live upon or lease the real estate, to have the personal estate turned into money, etc., etc.; and other meanings might be attached to the language employed.

Reference to Terry v. Terry (1863), 33 Beav. 232; In re Pounder (1886), 56 L.J. Ch. 113; Roman Catholic Episcopal Corporation of Toronto v. O'Connor (1907), 14 O.L.R. 666; In re Jones, [1898] 1 Ch. 438; In re Richards, [1902] 1 Ch. 76; In re Ryder, [1914] 1 Ch. 865.

It was obvious that the testator expected that the capital of the estate would or might be reduced—he had made provision for the event of the estate being reduced to $5,000 or less. The only person to whom discretion was given was the widow; and the testator, by the first clause, gave her the right to reduce the capital as she might see fit and desire.

Order declaring accordingly; costs of all parties to be paid out of the estate, those of the executors between solicitor and client.

MASTEN, J. MAY 30TH, 1919.

RE PRATT.

Will—Construction—Bequest of Money to Married Daughter—Direction for Settlement of Fund—Duty of Executors—Intention of Testator.

Motion by the executors of Joseph Sutton Pratt, deceased, for an order determining questions arising upon the will of the deceased.

The motion was heard in the Weekly Court, Toronto.

H. W. Mickle, for the executors.

John Shilton, for Emily Maria Buchanan, a beneficiary.

MASTEN, J., in a written judgment, said that by the will the testator gave all his estate to his executors "upon trust to realise upon the same and after payment of my debts testamentary and funeral expenses and the expenses of administration to divide the balance into equal portions and to pay one of the said portions to my daughter Emily Maria Buchanan and the other to my daughter Clara Hamilton. And I direct that the said money shall be held by them as their separate estate and free and independent of the debts obligations and control of any husband and that upon

receiving payment thereof they shall forthwith transfer the said amount to trustees for their benefit reserving only their testamentary power over the principal of the estate."

It appeared to have been the intention of the testator that the fund bequeathed to Emily M. Buchanan should at all times be impressed with the trusts and be subject to the conditions set forth in the will. The rule is, that the intentions of the testator shall be carried into effect unless some positive rule of interpretation stands in the way.

There should be an order declaring that the gift to Emily M. Buchanan is impressed with the trusts set forth in the will; that the executors are not bound to hand over the estate without any precaution as to the settlement directed by the will, but are bound to see that the fund is dealt with so as to effectuate completely the testator's intention; and that the executors are bound to hold the principal of Emily M. Buchanan's share until a proper settlement is made by her in accordance with the terms of the will.

Costs of the application to be paid out of the estate, those of the executors as between solicitor and client.

McPHADAN v. McPHADAN—KELLY, J.—MAY 27.

Husband and Wife—Alimony—Evidence—Cruelty—Failure to Establish—Dismissal of Action—Costs—Rule 388.]—An action for alimony, tried without a jury at Lindsay. KELLY, J., in a written judgment, said that the plaintiff and defendant were married on the 24th July, 1918; the plaintiff was 55 years of age, the defendant was 75; each had been previously married. They lived together at Sunderland from the time of their marriage until the 11th November, 1918, when she left him, and began this action on the following day. She made charges of cruelty against the defendant, and declined to go with him to the North-West, where he proposed to make his home. He was ready and willing to receive her if she would return to him, but was not willing to continue to live at Sunderland. She refused to accompany him elsewhere. In the learned Judge's opinion, the separation is due, chiefly, if not altogether, to the plaintiff's disregard of the feelings of affection which should exist between her and the defendant. On none of the grounds set up had she established a right to alimony. The action should be dismissed—the defendant to pay such costs as are payable under Rule 388. A. M. Fulton and T. E. Anderson, for the plaintiff. R. T. Harding and W. S. Ormiston, for the defendant.