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*Oct. 11, 12.
*Oct. 31.

THE VILLAGE OF GRANBY (DEFENDANT)..... ..... } APPELLANT;

AND

JULIE MÉNARD *ès qualite* (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Negligence—Trial by judge without a jury—Findings of fact—Evidence—Reversal by Appellate Court.

In an action for damages for personal injuries, the trial judge, who heard the case without a jury, and before whom the witnesses were examined, held that the evidence of the witnesses for the defence was best entitled to credit and dismissed the action. The judgment was reversed in the Court of Review and its decision affirmed on further appeal by the Court of Queen's Bench. On appeal to the Supreme Court:—

Held, that as the judgment at the trial was supported by evidence, it should not have been disturbed.

Judgment appealed from reversed and judgment of the trial judge restored.

* PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 106 U. S. R. 578.
(2) 108 U. S. R. 305.
(3) 108 U. S. R. 564.
(4) 21 Can. S. C. R. 69.
(5) 26 Can. S. C. R. 200.

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APPEAL from the judgment of the Court of Queen's Bench, appeal side, affirming a judgment of the Court of Review, at Montreal, which reversed the judgment of the Superior Court, District of Bedford, and maintained the plaintiff's action with costs.

A statement of the case will be found in the judgment of His Lordship Mr. Justice Girouard now reported.

Fitzpatrick Q.C. and *Duffy Q.C.* for the appellant. The findings of fact by the trial court judge, who saw and heard the witnesses, ought not to have been disturbed. His judgment is in this case equivalent to the verdict of a jury. Either one of these parties could have demanded trial by jury but they mutually decided to abide by the decision of the judge alone. We refer to *Gingras* v. *Desilets* (1); *North British and Mercantile Insurance Co.* v. *Tourville* (2); *Lefeuntéum* v. *Beaudoin* (3); *City of Montreal* v. *Cadieux* (4); *Home Life Insurance Co.* v. *Randall* (5); *Phœnix Insurance Co.* v. *McGhee* (6); arts. 498, 501, C. P. Q.

Lafleur Q.C. and *Giroux* for the respondent. The unanimous opinions of both the Court of Queen's Bench and the Court of Review, (eight judges), are with us as against the trial judge and their views are amply supported by the weight of evidence of record and their concurrent findings ought to stand in this court. See *Montreal Gas Co.* v. *St. Laurent* (7); *Sénésac* v. *Central Vermont Railway Co.* (8); *Demers* v. *Montreal Steam Laundry Co.* (9); *George Matthews Co.* v. *Bouchard* (10); *Paradis* v. *Municipality of Limoilou* (11).

(1) Cass. Dig. (2 ed.) 213.
(2) 25 S. C. R. 177.
(3) 28 S. C. R. 89.
(4) 29 S. C. R. 616.
(5) 30 S. C. R. 97.
(6) 18 S. C. R. 61.
(7) 26 S. C. R. 176.
(8) 26 S. C. R. 641.
(9) 27 S. C. R. 537.
(10) 28 S. C. R. 580.
(11) 30 S. C. R. 405.

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TASCHEREAU J.—The appeal is allowed with costs and the action dismissed with costs for the reasons stated by His Lordship Mr. Justice Girouard in the judgment of the court to be delivered by him in which I concur.

GWYNNE J.—While I concur in the judgment of my brother Girouard, I desire to add a few words.

In a case like the present where the trial judge, who has heard all the witnesses give their evidence before him and who has thus had an opportunity which no court of appeal can have of estimating the credibility of the several witnesses and the value of all their evidence, has rendered his judgment, no judge sitting in review of, or in appeal from that judgment, upon matters of fact, ought to reverse that judgment, unless it is shown to be clearly wrong upon the evidence so taken ; and, when an appeal is taken to this court from a judgment reversing such judgment of the trial judge (as in the present case), I must repeat an opinion I have expressed upon other occasions, that inasmuch as the statute which gives to this court its jurisdiction prescribes in express terms that this court shall hear the appeal and pronounce the judgment which, in our opinion, the court whose judgment is appealed from should have given, it seems to to me that in order to do so a duty is imposed upon us to exercise our judgment upon the evidence and, upon this question, namely, whether it discloses sufficient to show that the Court of Review was justified in pronouncing the judgment of the trial judge, upon the facts in issue, to be wrong, and in substituting in its stead the judgment pronounced by them. And, in the best exercise of my judgment, I must say, upon the evidence, that I think they were not. Had I been sitting in review, I could not have concurred in that

judgment and I am bound by the statute to give here the judgment which, in my opinion, that court should have given.

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SEDGEWICK and KING JJ. concurred in the judgment allowing the appeal and dismissing the action with costs, for the reasons stated by His Lordship Mr. Justice Girouard.

GIROUARD J.—This is an action of damages brought by the respondents, the widow and children of the late Joseph Coté, who met his death while engaged by the appellant as a common labourer in the excavation of a drain, in the Village of Granby, by the fault and negligence, it is alleged, of the appellant, in not using the necessary means to brace the trench where Coté was working. The corporation pleaded, among other things, that every precaution was taken to secure the safety of the workmen, and that the death of Coté was purely accidental, a fortuitous event which could not have been, and was not foreseen, inasmuch as at the spot where Coté was killed, the soil was hard-pan and did not require bracing.

It is admitted that the evidence is contradictory, four or five witnesses, principally co-workmen of Coté, testifying one way, and as many, chiefly the officers in charge and experts, flatly contradicting them. The trial was held before a judge without a jury, the parties not having exercised the option both had for a trial by jury. The learned judge saw and heard all the witnesses. True, he throws no suspicion, in words, upon the character or credibility of either of them in particular; in fact he makes no remark upon their competency, manner or demeanour, although his formal judgment is accompanied by a full and elaborate opinion. He finally comes to the conclusion that the

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witnesses for the defendant must be believed, rather than those for the plaintiff, and dismissed the latter's action with costs :

Considering that it is established that the men employed by the defendant to direct and superintend said work were well trained, experienced and competent, and that they were provided with the requisite materials to brace said walls of the trench had they deemed it necessary to have done so.

Considering that it is established that bracing is the usual and the ordinary means employed to prevent the caving in of the side of such trenches, and that it is not usual or necessary to resort to bracing when the soil of the sides of the trench is composed of hard-pan.

Considering that it is established that bracing was not used in the trench, at the plaee where Coté was killed, because in the opinion of the directors and superintendents of said work it was not necessarsy to do so, owing to the nature of the soil.

Considering that it is established that the cause of said accident was unexpected, unforeseen and extraordinary.

Considering that the defendant took all reasonable precautions and such as are usually employed on work of that kind, to prevent the occurrence of accidents, and that in consequence the death of Coté was due to causes which it could not reasonably be expected to foresee and provide against, doth, in consequence, dismiss plaintiff's action with costs

And in his notes, the learned judge remarks :

Were they, (the sides of the trench) reasonably, and according to the judgment and experience of men competent to judge, likely to cave in? For if they were, then the defendant was bound to take the usual precaution to prevent such an occurrence, which it is admitted was bracing. That such an eventuality was contemplated is apparent; the engineer in charge was informed by the consulting engineers that the foreman who had charge of the pipe laying would, among other things, have the direction of the bracing ; and it is explained that this refers to bracing whenever it was thought necessary in the opinion of the foreman. The defendant had provided within easy reach the requisite material for bracing ; and bracing had already been resorted to in a place where, from the nature of the soil, it had been judged necessary. The foreman says he did not brace at the place where the accident occurred because the soil there was what is known as "hard-pan," and that it is not necessary to brace in such soil, because from his experience hard-pan does not cave in. He is supported in this view by Mr. Horner, who lives near by, and who dug a well through

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the same kind of soil, and by Mr. Robertson, superintendent of municipal works of the Town of Westmount, who has had a large experience in connection with such work, who speaks very highly of the qualifications of the foreman, and who says he never does any bracing in a soil composed of hard-pan. With this evidence, and it has not been contradicted by plaintiff, can I say that defendant did not make use of the precautions ordinarily employed in such work? If, while working such soil, science, experience and judgment unite in saying that bracing is not necessary, can I say and ought I to say that defendant was imprudent and neglectful of its duty because it did not brace, and therefore responsible for the death of the unfortunate Cote? I cannot say so.

The respondent having appealed to the Court of Review these findings were set aside, and new ones, based upon the evidence of her witnesses, were entered against the appellants, who were condemned to pay $3,200 and all costs:

Considérant qu'il ressort de la preuve que la tranchée dans laquelle le dit Coté travaillait au moment de l'accident, avait une profondeur *de plus de* 15 *pieds;* que bien que cette tranchée eût été ouverte à travers un sol durci, on avait jugé nécessaire d'en boiser les parois à différents endroits; que cependant l'endroit où le dit Coté travaillait avait été laissé sans boisage sur une distance 70 pieds; que la veille de l'accident (un dimanche) il était tombé une pluie abondante et la terre avait été détrempée, ce qui détermina la chute de quelques morceaux de terre durant l'avant-midi du lundi; que le dit Coté a averti le contre-maître de la défenderesse de ce fait en lui exprimant des craintes pour sa propre sûreté, et celui-ci ne prit aucun souci de ces observations.

Considérant que durant l'après midi du même jour, un morceau de terre, dans lequel se trouvait une lourde roche se détacha de l'ouverture de la tranchée et tomba sur le dit Coté dont la tête fut broyée, renversant en outre le nommé Coiteux qui travaillait à ses côtés et qui perdit pendant quelques temps l'usage de ses sens.

Considérant que le dit accident est dû au fait que la défenderesse n'a pas suffisamment protégé le dit Coté et ses autres employés dans l'exécution des travaux qu'elle leur avait confiérs, etc.

The appellant then appealed to the Court of Appeal, but without success; the judgment of the Court of Review was unanimously maintained. Mr. Justice White, speaking for the whole court, observed in conclusion:

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We must hold that the evidence of these disinterested witnesses (for plaintiffs) must outweigh, upon that point, any evidence coming from either Grecco or Bradford, (witnesses for the defendants).

We are asked to restore the judgment of the trial judge. The respondent submits, on the contrary, that we should not disturb the findings of two courts upon mere questions of fact, supported by evidence, as undoubtedly they are in this instance, at least to a certain extent. Respondent refers to *Montreal Gas Co.* v. *St. Laurent* (1); *Sénésac* v. *Central Vermont Railway Co.* (2); *The George Matthews Co.* v. *Bouchard* (3); *Paradis* v. *Municipality of Limoilou* (4). But in every one of these cases the judgment of the first court was upheld. True, in *Demers* v. *Montreal Steam Laundry* (5), we dismissed an appeal from the Court of Appeal, which had reversed the judgment of the Superior Court, but it was because there was no evidence whatever to support it. For the same reason, this court, having to deal with the facts as well as the law involved in each case, and to render the judgment which should have been rendered in the first court, did not hesitate, on a few occasions, to reverse the judgments of both the trial judge and of the Court of Appeal, but it was only when they were clearly against the evidence adduced. *North British and Mercantile Ins. Co.* v. *Tourville* (6); *Lefeuntéum* v. *Beaudoin* (7); *City of Montreal* v. *Cadieux* (8). See also *Allen* v. *Quebec Warehouse Co.* (9).

The present case, however, differs from any of the cases above quoted, and I believe we never before had occasion to adjudicate upon a similar one. The two appellate courts proceeded as if they had to deal with an ordinary *enquête* case, where the witnesses are not

(1) 26 S. C. R. 176.
(2) 26 S. C. R. 641.
(3) 28 S. C. R. 580.
(4) 30 S. C. R. 405.
(5) 27 S. C. R. 537.
(6) 25 S. C. R. 177.
(7) 28 S. C. R. 89.
(8) 29 S. C. R. 616.
(9) 12 App. Cas. 101.

seen by the trial judge, and where the judges in appeal are in just as good a position as he was to weigh the evidence of record and arrive at a conclusion. Here, the trial judge alone saw and heard the witnesses; he tells us, both in his formal judgment and in his notes, that the witnesses for the appellant are to be believed, and gives judgment accordingly, entirely ignoring the witnesses against the appellant, evidently because, in his own opinion at least, they were unsatisfactory either from interest, prejudice, incompetence, ignorance, or other cause, not specified, but nevertheless clearly implied from the judgment he pronounces. The learned judge names the witnesses upon whom he relies. It is not pretended that the evidence is clearly against his findings. Both parties before this court, as well as the appellate courts, treated it as contradictory, and all proceeded to discuss it *pro* and *con*. We think that the judgment of the first court ought to prevail. The Court of Review should not, under the circumstances of the case, have interfered with it, and the judgment of the Court of Appeal refusing to restore it is clearly erroneous. See *Cook* v. *Patterson* (1).

I do not propose to apply to a case like this the principles which govern jury trials. It is a well established rule that no court would disturb the verdict of a jury, unless it be clearly against the weight of evidence, and that a verdict is not considered against the weight of evidence, unless it is one which the jury, viewing the whole of the evidence, could not reasonably find. (C. P. Q. Arts. 498, 501.)

So far, the courts of England and of this country have not given to the findings of a trial judge the effect of a verdict by a jury, because, it is argued, the latter is the result of a supposed agreement between the parties that the facts shall be decided by a jury. *Jones* v.

(1) 10 Ont. App. R. 645.

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Hough (1); *Metropolitan Railway Co.* v. *Wright* (2); *Phœnix Ins. Co.* v. *McGee* (3). I must confess that I fail to appreciate the force of this reasoning. Is it not likewise in consequence of such a presumed agreement that, as in the present instance especially, both parties waived their right to a trial by jury and instead elected to submit their differences, both of law and of fact, to a judge sitting also as a jury? Probably, we have not heard the last word from the English courts. Trials of actions at law by a judge without a jury are yet in their infancy, and it will not be surprising if, at no distant day, we see the rule—which has been adopted in all countries where findings of fact are left to the trial judge, as France and nearly all the States of the American Union, namely, that such findings stand in the place of the verdict of a jury—prevail likewise in England and in this country, as the most logical and practical. (Am. & Eng. Ency. of Pleading, 2 ed. vol. 2, p. 396). It is not without interest to observe the advance of the English jurisprudence in this regard within the last twenty years.

In *Jones* v. *Hough*, in 1879 (1), quoted with approbation by our learned Chief Justice in *Phœnix Insurance Co.* v. *McGhee* (3), Lord Bramwell said:

> A great difference exists between a finding by a judge and a finding by a jury. Where the jury find the facts, the court cannot be substituted for them because the parties have agreed that the facts shall be decided by a jury; but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like.

But Lord Cotton added:

> Of course I need not say in all questions of fact, especially where there has been *vivâ voce* evidence before the judge in the court below, the Court of Appeal ought to be most unwilling to interfere with the

(1) 5 Ex. D. 115. (2) 11 App. Cas. 152.
(3) 18 Can. S. C. R. 61.

conclusion which the judge has arrived at when he has had the opportunity, which the court have not, of seeing the witnesses, and judging of their demeanour.

In *Colonial Securities Trust Co.* v. *Massey* (1) which was an appeal from the judgment of a trial judge sitting without a jury, it was admitted that there was a con flict of evidence. Lord Esher M. R., speaking for the court, said:

I am of opinion that this appeal should be dismissed. We must see first of all what is the rule of conduct of the Court of Appeal when hearing an appeal on a question of fact from the judgment of a judge trying a case without a jury. It cannot be shaped according to the rule of conduct of the Courts of Common Law before the Judicature Acts, but must follow that adopted by the Courts of Appeal in Chancery, because before that court only could an appeal from a judge sitting without a jury have then come. In the Courts of Equity the matter appealed against was the decision of a judge, and for that reason such an appeal was called a rehearing, since the court could set aside the decree or judgment of the judge who had tried the case, and pronounce another decree or judgment. The Court of Appeal in Chancery acted upon this rule, that they would not allow an appeal unless they were satisfied that the judge was wrong. If they were in doubt at the end of the argument whether the judge was right or wrong, since the burden of proof was on the appellant and he had not satisfied them that the judge was wrong, they dismissed the appeal. That is the rule of conduct which we ought now to apply in this court. The judge in the court below may have heard witnesses; and if so the Court of Appeal would be more unwilling to set aside his judgment, especially if there was a conflict of evidence, than in a case tried on written evidence where the witnesses were not before the judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit. Where witnesses are not examined before the judge, but the case is determined on evidence taken on affidavit, or examination not before the judge, or partly on one and partly on the other, the Court of Appeal is not hampered by the consideration that the judge in the court below has seen the witnesses, whilst the Court of Appeal has not, and the rule of conduct would not apply so strongly, but still this court would not reverse the judgment and give a different one, unless satisfied that the judge was wrong.

(1) [1896] 1 Q. B. 38.

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In a still more recent case, *Coghlan* v. *Cumberland* (1), Lord Lindley said:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge even on a question of fact turning on the credibility of witnesses whom the court has not seen.

Finally, in the case of *The Home Life Association* v. *Randall* (2) which was decided by this court during the last October term, our learned Chief Justice, speaking for the whole court, said:

> It is true that the question as to the cause of death is entirely one of fact and that there was contradictory expert evidence, but having regard to the deliberate statement in the declaration of the medical attendant, the absence of any attempt to explain and correct this until the trial, and other surrounding circumstances, we are all of opinion that it would have been very difficult to come to any other conclusion than one at variance with the finding of the learned Chief Justice. And we should not have been precluded from entering upon an examination of the evidence upon this head by the rule that a second court of appeal will not interfere with the concurrent finding of two preceding courts on a question of fact, a rule well established and often acted upon here as well as in the Privy Council, and also in some late cases in the Supreme Court of the United States.

(1) [1898] 1 Ch. 704.

(2) 30 S. C. R. 97.

In order to apply the rule referred to, it must appear however that the question of evidence has undergone consideration in both the court of first instance and the first court of appeal. That does not appear to have been the case since the learned judges of the Court of Appeal did not deal with the question of evidence but decided on other grounds. We are therefore in the position as regards this question of a first court of appeal and as the court was in the case of *Jones* v. *Hough* (1), which authority establishes generally the right of an appellant if the question is open to have the evidence taken on a trial without a jury reviewed on appeal.

If it all depended on the credit to be given to witnesses I should be of the same opinion as Mr. Justice Osler, but it is not a case altogether dependent on such consideration, but rather on the inference to be drawn from surrounding facts not disputed and from documents, in other words a question of circumstantial evidence complicated with the opinions of experts. Although all the learned brothers agree on this view, we decide the appeal upon the first point.

For the purposes of this appeal, it is not necessary to dwell any longer upon this point of procedure, however important it may be. It is sufficient to say that there is ample evidence to warrant the findings of the trial court. Employers are not the insurers of the lives of their employees; they are only bound to take all and every means of precaution and protection generally used in similar establishments or occupations. *Brown* v. *Leclerc* (2); *Tooke* v. *Bergeron* (3); *George Matthews Co.* v. *Bouchard* (4): Cass. 5th April, 1894, P. F., '95, 1, 90; Cass. 13th June, 1899, P. F., '99, 1, 20.

We are therefore of opinion that the appeal should be allowed and the respondent's action dismissed with costs before all the courts.

Appeal allowed with costs.

Solicitors for the appellant: *Amyrault & Duffy.*

Solicitor for the respondent: *F. X. A. Giroux.*

(1) 5 Ex. D. 115.
(2) 22 S. C. R. 53.
(3) 27 S. C. R. 567.
(4) 28 S. C. R. 580.