1895

*Oct. 31.

WILLIAM H. MERRITT (DEFENDANT).. APPELLANT;

AND

REGINALD F. D. HEPENSTAL (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Master and servant—Negligence of servant—Deviation from employment—Resumption—Contributory negligence—Infant—Evidence.

A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work and in doing so he ran over and injured a child.

Held, affirming the decision of the Supreme Court of New Brunswick, that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to the master's store and made a fresh start.

The doctrine of contributory negligence does not apply to an infant of tender age. *Gardner* v. *Grace* (1 F. & F. 359) followed.

If in a case tried without a jury evidence has been improperly admitted a court of appeal may reject it and maintain the verdict if the remaining evidence warrants it.

APPEAL from a decision of the Supreme Court of New Brunswick (1) sustaining a verdict for the plaintiff and refusing a new trial.

The defendant Merritt is a grocer in St. John N.B., and his teamster, Gorman, having been sent out one day with parcels of goods for delivery to customers, delivered all but one and then went home to his supper; after supper he started out to finish his work and on the way ran over the infant child of the plaintiff who brought an action against Merritt for compensation. On the trial of the action it was shown

PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, King and Girouard JJ.

(1) 33 N. B. Rep. 91.

that the child ran out from the sidewalk to the middle of the street when the waggon was approaching and evidence was admitted of the nurse who attended the child after he was hurt to the effect that since the accident he was affected with urinary trouble. The trial judge, who tried the case without a jury, found that the action of the child in running out upon the street contributed to the accident, but that it could have been avoided by the exercise of reasonable care on Gorman's part, and he gave a verdict for the plaintiff. A judgment for defendant or a new trial was moved for on the grounds that Gorman, having abandoned defendant's business when he went to his supper, could only resume it by returning to the place where he had delivered the last parcel and that he had not, in fact, resumed it when the accident happened; that the negligence of the child caused the accident; and that the evidence of the nurse should not have been admitted, as she was not called as an expert and was contradicted by the physician who attended the child. The verdict having been sustained defendant appealed to this court.

C. A. Stockton for the appellant. Gorman was not in defendant's employ when the accident occurred. *Rayner* v. *Mitchell* (1); *Mitchell* v. *Crassweller* (2); *Storey* v. *Ashton* (3).

There was contradictory evidence as to the speed at which Gorman was driving, and the whole being consistent with the absence as well as with the existence of negligence a non-suit should have been granted. *Cotton* v. *Wood* (4).

Armstrong Q.C. for the respondent was not called upon.

The judgment of the court was delivered by:

(1) 2 C. P. D. 357.
(2) 13 C. B. 237.
(3) L. R. 4 Q. B. 476.
(4) 8 C. B. N. S. 568.

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MERRITT v. HEPENSTAL.

The Chief Justice.

THE CHIEF JUSTICE (Oral) :— We are all of opinion that this appeal should be dismissed. Negligence by the servant of the appellant is clearly proved, in fact there could not be a stronger case, and the defence as to contributory negligence entirely fails, not only on the authority of *Davies* v. *Mann* (1), but also on the opinions expressed in *Gardner* v. *Grace* (2), where the cause of action was an injury to a child of three years of age. In that case Channell B. said :

> The doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover, it must be shown that the injury was occasioned entirely by his own negligence.

This seems to be the result of the cases, English as well as American, though there may be some contradictory decisions.

A new trial is asked for on the ground of the improper admission of the evidence of the nurse who attended the plaintiff's child, that in her opinion a urinary trouble with which the child was affected resulted from the accident. I cannot find in the record that any such opinion was expressed by the nurse, but if it was, we could reject her evidence altogether and still maintain the verdict.

The case was tried by a judge without a jury, and the position of a Court of Appeal in such a case, as distinguished from a case tried with a jury, is clearly pointed out by Bramwell B. in the case of *Jones* v. *Hough* (3), in these words :

> A great difference exists between a finding by a judge and a finding by the 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.

(1) 10 M. & W. 546. (2) 1 F. & F. 359.
(3) 5 Ex. D. 122.

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Another point argued was that Gorman was not in the employ of the defendant when the accident happened. That he was in such employ at the time there can, in our opinion, be no doubt. *Whatman* v. *Pearson* (1) was a stronger case than the one before us, and I do not think the learned counsel has been successful in his attempt to distinguish it from the present. Though Gorman had for a time abandoned his master's business, he had resumed it when he started out to deliver the remaining parcel just as much as if he had returned to the store and made a fresh start.

As to damages Mr. Justice Hanington, in giving judgment in the court below on the motion for a new trial, says:

> This case comes clearly within the doctrine laid down in *Whatman* v. *Pearson* (1). If there is any cause for complaint it is that the damages are too small.

In this I entirely concur.

I think the learned judge who tried the case was right in his findings as to the facts, as well as in his ruling as to the law.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. A. Stockton.*

Solicitor for the respondent: *J. R. Armstrong.*

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(1) L.R. 3 C.P. 422