J. BUCKLEY PEERS (PLAINTIFF).. .....APPELLANT; 1892

AND *Feb. 18,19.

JAMES A. ELLIOTT AND JAMES N. BENJAMIN (DEFENDANTS)..... } RESPONDENTS. *May 2.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Practice—Misdirection—New trial ordered by court below—Interference with order for—Negligence—Damage by fire—Spark arrester.

On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of defendants in working a steam engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on said engine, and the learned judge directed the jury that "if there was no spark arrester in the engine that in itself would be negligence for which defendants would be liable." Plaintiff obtained a verdict which was set aside by the court *en banc* and a new trial ordered for misdirection. On appeal to the Supreme Court of Canada :

Held, Strong J. dissenting, that the judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence and such direction may have influenced them in giving their verdict; therefore the judgment ordering a new trial should not be interfered with.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) setting aside a verdict for the plaintiff and ordering a new trial.

The plaintiff had employed the defendants to press his hay by means of a steam engine, and while the defendants were engaged in doing the work the plaintiff's barn was set on fire, as he alleged, by sparks from said engine and was destroyed with the hay and other property in it at the time. The plaintiff brought an action for the loss of said property in which he charged

PRESENT :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

(1) 23 N. S. Rep. 276

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defendants with negligence in not having the engine provided with a spark arrester and in the manner of working it in pressing the hay. The defendants denied the negligence charged and on the trial the case mainly turned upon whether or not the spark arrester, which it was proved the defendants possessed, was in its place in the engine when the fire occurred, and if it was whether or not it was effective to prevent the escape of sparks. The judge directed the jury, among other things, that "if there was no spark arrester in the engine that in itself would be negligence for which defendants would be liable," and submitted to them certain questions, some of which, with the answers thereto, were as follows:—

"1. Did the fire which destroyed plaintiff's property originate from defendants' engine? Yes.

"2. Did defendants in the use of the engine take all such reasonable and necessary precautions against fire as prudent men should have done under the circumstances? No.

"3. Was defendants' engine fitted with appliances for preventing the escape of sparks from the engine, such as were most effective and approved generally for that purpose? No.

"4. Was the spark arrester made by Hewson in the engine at the time of the fire? No.

"5. Was the spark arrester made by Hewson effective for the purpose of preventing the escape of sparks? No.

Upon these findings a verdict was entered for the plaintiff. The defendants moved the full court to have such verdict set aside and judgment entered for them, or a new trial ordered. The court held that the learned judge at the jury had misdirected the jury in telling them that the want of a spark arrester was in itself negligence and ordered a new trial. From this decision the plaintiff appealed.

Dickie Q.C. for the appellant. As to what will constitute negligence see *Pickard* v. *Smith* (1); *Scott* v. *London Dock Co.* (2)

The findings of the jury fully warranted the verdict and they could not have been influenced by the direction of the judge. *Freemantle* v. *London & North Western Railway Co.* (3)

W. B. Ritchie for the respondent referred to *Nash* v. *Cunard Steamship Co.* (4); *New Brunswick Railway Co.* v. *Robinson* (5); *Canada Atlantic Railway Co.* v. *Moxley* (6); *North Shore Railway Co.* v. *Mc Willie* (7).

Sir W. J. RITCHIE C.J.—The judge stated that the want of a spark protector was in point of law negligence (8). It cannot be denied that this was misdirection which may have had an influence on the jury.

The court having granted a new trial we should not interfere. I am of opinion that the appeal should be dismissed.

STRONG J.—I am of opinion that this appeal should be allowed. I agree that if the court had been confined exclusively to the findings of the jury they would not warrant the entering of a judgment for the plaintiff; but it was competent for the court under the Judicature Act (9) to take the evidence into consideration, and if that clearly established a case of negligence to direct a verdict to be entered entirely irrespective of the findings of the jury. Having read the evidence I think it does establish a very clear case of negligence and that a new trial will probably not result in any other conclusion by a jury. Under these circumstances it seems to me useless to send the case to another trial because those findings are not sufficiently comprehensive or because

(1) 10 C. B. N.S. 470.
(2) 3 H. & C. 596.
(3) 2 F. & F. 337.
(4) 7 Times L.R. 597.
(5) 11 Can. S.C.R. 688.
(6) 15 Can. S.C.R. 145.
(7) 17 Can. S.C.R. 511.
(8) See *Nash* v. *Cunard S.S. Co.*, 7 Times L. R. 597.
(9) R.S.N.S. 5th Ser. c. 104.

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the judge is to be taken to have misdirected the jury by expressing himself too strongly on a question of fact which was for their consideration.

The case seems to be just one of those to which the provision of the Judicature Act before referred to was intended to apply.

For these reasons, which are the same as those of Mr. Justice Graham in the court below, I think the appeal should be allowed and judgment entered for the plaintiff in the Supreme Court of Nova Scotia.

TASCHEREAU J.—I am of opinion that we cannot interfere with the judgment of the court below ordering a new trial in this case for the reasons stated in Mr. Justice Meagher's judgment in the court below.

GWYNNE J.—I do not think we can interfere with the judgment of the court below in ordering a new trial. There was some evidence given pointing to the possibility of the fire having originated from fire escaping from the ash pan, in which case they might not, it may be, have found the defendants chargeable with negligence. The attention of the jury should, I think, have been drawn to this point. In view also of the divers alternative suggestions of negligence causing the fire alleged in the statement of claim it would have been better if the jury had been simply asked to say from what cause, in their opinion, the fire did in fact take place, and whether it was attributable to any, and if any, what negligence of the defendants.

PATTERSON J.—I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Townshend, Dickey & Rogers.*

Solicitor for respondents: *Charles R. Smith.*