JOHN H. FRASER (PLAINTIFF).....APPELLANT; 1900

AND *Feb. 20.

LEMUEL W. DREW (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

New trial—Verdict—Finding of jury—Question of fact—Misapprehension.

Where a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *en banc*, which refused a motion for a new trial with costs.

The material circumstances of the case are sufficiently shewn by the reasons for judgment of Mr. Justice Henry in the court below, which are as follows:

"This is a motion for a new trial. The plaintiff is assignee of the goods and estate of I. N. Mack and I. N. Mack & Co., under an assignment for the benefit of creditors made by I. N. Mack, who carried on business under the above firm name. The defendant is the sheriff of Queen's County, who under an execution against the assignor seized certain of the goods and chattels covered by the assignment. The defence was that the deed was fraudulent, as having been made to hinder and delay the creditors. The jury found a verdict for defendant, and an order for judgment in accordance with the verdict was granted

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

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by the learned trial judge. Notice of appeal from this order was given, but nothing was brought forward in support of the appeal at the argument of the motion for a new trial. We have a very full report of the charge of the learned trial judge to the jury, and it appears that he submitted to them a number of unquestionably material and important considerations based upon the evidence, for the purpose of aiding them in the determination of the question whether the deed was or was not fraudulent. It was not pretended at the argument that the case should have been withdrawn from the jury, and I am of the opinion that it is one which, having regard to the evidence as a whole, a detailed discussion of which would now serve no useful purpose, must be treated as absolutely in the control of the jury. In saying this I no not forget that the learned judge has reported that a verdict for the plaintiff would have commended itself more to his judgment."

"It appears by the learned judge's report that the jury had some difficulty in applying the view they took as to the question of fraud to the project of announcing their conclusion in the shape of a verdict for the plaintiff or the defendant. The foreman at first said that they found for plaintiff, whereupon he was interrupted by the juryman standing next to him who immediately went on to confer in an undertone with other members of the jury. The learned judge then said: 'Mr. Foreman, you say you find for the plaintiff, which means that you find in favour of the deed.' The foreman replied, 'Oh, no, we find there was fraud.' The learned judge reports that he then again addressed them, explaining the relation of the parties. It appears that some of the jury on their way back to the jury room spoke to the sheriff. The learned judge told the sheriff he must not converse

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with them and asked him what they said. He replied in their hearing that they desired to know of him who was the defendant. The learned judge gave them no further instructions, but in a very few minutes they returned and said they found a verdict for the defendant."

"It is not necessary to determine accurately the extent of the intelligence of this jury. It seems sufficient to say that, notwithstanding the difficulty which some of them, possibly only the foreman and one or two others, had in seeing the relation of the parties, plaintiff and defendant, in the cause to the only question upon which they had to pass, they do not seem to have had any difficulty in finding upon that question. Their verdict being in accordance with that finding it cannot be disturbed upon any reason based upon the circumstances under which it was rendered. I am of the opinion that the motion for a new trial should be refused with costs."

The trial court judge in his report, after referring to the conduct of the jury, said: "I concluded that all my efforts, as well as those of the counsel, to get them to understand the case intelligently, had been wasted, and that it was useless to say anything further to them. They returned in a very few minutes into court, and said they found for the defendant. A verdict for the plaintiff would have commended itself much more to my judgment."

Drysdale Q.C. for the appellant. There was no evidence upon which the jury could find fraud, and even assuming that they understood the question submitted to them, it is not such a verdict as reasonable men could find. There was a mistrial, and the jury never understood the issue upon which they were to render a verdict. The trial judge disapproved of the verdict and, under the latest authorities, this is a

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material factor in determining whether a new trial ought to be granted or refused. See *Aitkin* v. *McMeckan* (1), at page 316.

Harris Q.C. for the respondent. The jury entertained clear views as to the fraudulent character of the deed. That was the chief point, and their conclusions were reasonable and fully justified by the evidence. We rely upon *Municipality of Brisbane* v. *Martin* (2); *Phillips* v. *Martin* (3); *Metropolitan Railway Co.* v. *Wright* (4); *Solomon* v. *Bitton* (5); *Australian Newspaper Co.* v. *Bennett* (6). While fraud cannot be presumed without evidence, yet there are circumstances in this case from which the jury might infer it; *Riches* v. *Evans* (7); *Winchester* v. *Charter* (7).

THE CHIEF JUSTICE.—(Oral.) We are all of opinion that the appeal must be dismissed with costs. If some English decisions favour the appellant's case, the weight of Canadian and American decisions are the other way. We decide this appeal on the principle that the question of fact was left to and dealt with by the jury in such a manner that we cannot interfere with their findings. For precisely the same reasons as those given by Mr. Justice Henry, namely, that the finding of fraud by the jury was not an unreasonable finding upon the evidence, we think the verdict cannot be interfered with.

GWYNNE J.—(Oral.) I agree with the remarks of the learned Chief Justice. On the crucial point in issue the jury found fraud, and I agree with their finding.

(1) [1895] A. C. 310.
(2) [1894] A. C. 249.
(3) 15 App. Cas. 193.
(4) 11 App. Cas. 152.
(5) 8 Q. B. D. 176.
(6) [1894] A. C. 284.
(7) 9 Car. & P. 640.
(8) 102 Mass. 272.

SEDGEWICK, KING and GIROUARD JJ. concurred with His Lordship the Chief Justice.

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Appeal dismissed with costs.

Solicitor for the appellant: *Jason M. Mack.*

Solicitor for the respondent: *David A. Hearn.*