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JAMES H. BEATTY (DEFENDANT).....APPELLANT;

AND

*Dec. 7, 9.

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*Mar. 8.

LUCIUS S. OILLE AND JEROME OILLE, EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE N. OILLE, DECEASED (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

New trial—Verdict for plaintiff—Technical breach of contract—Defendant entitled to nominal damages for.

In an action to recover the balance of the contract price for work done for the defendant, the declaration also containing the

*PRESENT.—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

(1) 6 L. C. J. 139.

(2) Application was made to the Judicial Committee of the Privy Council for leave to appeal from this judgment and was granted.

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common count for work and labor, the evidence showed that there was a technical breach of the contract by which, however, the defendant had sustained no substantial damage. A verdict was found for the plaintiff and a rule for a new trial was refused by the Divisional Court, and also by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, that a verdict would not be set aside merely to enter a verdict for the other party for nominal damages.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court refusing to set aside a verdict for the plaintiffs and order a new trial.

This action was brought by the executors of the late George N. Oille, of St. Catharines, to recover from the appellant the sum of $14,500, being a balance alleged to be due by him under a contract in writing and under seal between the said George N. Oille and the appellant, executed on the 13th day of May, 1881.

Under the contract Oille agreed for the sum of $26,500 to build a compound engine "of the propor- "tions, quality, style and finish, with furnishings the "most complete and best, and to be provided with "cylinder boilers built of the best boiler steel, and "shall have all the requirements, furnishings and "attachments complete, according to the specifications "hereunto annexed, said specification to form and does "form part of this agreement, the engines and boilers "to be all finished in every particular, and furnished, "set up, and securely and amply fastened to the steamer "now building near the town of Sarnia, on or before "the 1st day of March, A.D. 1882."

The specifications which, as appears above, are made a part of the contract, commence as follows: "Specifi- "cations of a compound engine and two cylinder "boilers to be built by George N. Oille, of the city of "St. Catharines, for James H. Beatty, of the town of "Thorold, to be completed and set up in the vessel

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" now being constructed at the town of Sarnia, and to " be in every way finished and furnished with all " things necessary and required for such a style of " engine and boilers and description of steamer; the " material used in the engine and boilers shall be of the " very best quality and the work on the most improved " and approved plans and best workmanship."

The appellant's defence was that default was made in the completion of the engine; that Oille, in December, 1882, wholly abandoned the work; that the appellant was then obliged to finish it, and expended large sums of money in so doing; that by reason of the default of Oille the engine and boiler were not finished until the opening of navigation in 1883, and the appellant thus lost the profits which the boat would have earned in the season of 1882; that the work was performed by Oille in an unskilful, negligent and careless manner; that large sums had been expended by the appellant in remedying defects, and that it would be necessary to expend a still larger amount before the engine and boiler were brought to the standard called for by the contract; that the moneys expended by the appellant to complete the engine and boilers and remedy the defects and the loss by the delay and defective and negligent work were more than the amount of the plaintiff's claim, and the appellant counter-claimed for the balance.

The case came on before Mr. Justice Armour and a jury on the 17th and 18th January, 1885.

While the appellant was being examined at the trial the plaintiffs admitted his right to credit for the moneys expended by him in completing the work after it had been abandoned as aforesaid, and also a sum of between $200 and $300 which the appellant paid in replacing a portion of the machinery in which inferior material had been used, and the plaintiff's claim was thus reduced

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to the sum of $9,911.50, which sum, with interest to the date of the trial, making in all the sum of $10,329, was claimed by the plaintiffs when the case went to the jury.

The jury brought in a verdict for the plaintiffs for the sum of $10,329, being the full amount claimed, and wholly disallowed the claim and counter-claim of the appellant.

The defendants applied to the Divisional Court for a new trial, which was refused, and on appeal to the Court of Appeal the judgment of the Divisional Court refusing the new trial was sustained.

S. H. Blake Q.C. and *McDonald* Q.C. for the appellants.

The questions to be decided are: First—Was the work done according to contract? And secondly—If not, is the defendant entitled to damages for the non-completion and for the loss of what the vessel would have earned during the season?

The work was not finished until May, 1883. The season commences in May and ends in November. The date for completing the engine, namely, March 1st, was important, as it would leave two months to complete all arrangements and get the vessel ready by the first of May. The hull was ready to receive the boiler in December, 1881. The boiler was not commenced until June, and the engine until September, 1882.

Then the engine when finished was defective. The reason why the boat was not given a higher speed than 11 or 12 miles an hour is, that the port or opening into the high-pressure engine from the boiler was too small. The same mistake was made between the high-pressure and the low-pressure engine. The vacuum pipe also was too small and the hot well was so badly constructed that it burst. A large outlay would be required to remedy these defects and make the boat fit

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for her business. See *Thomson* v. *South Eastern Ry. Co.* (1).

It is clear that we are entitled to damages for loss of what would be the ordinary use of what the plaintiff contracted to supply us with. *Cory* v. *Thames Iron Works and Ship Building Co.* (2); *Ex parte Cambrian Steamship Co.* (3); *Elbinger Actien Gessellschafft* v. *Armstrong* (4); Roscoe's *Nisi Prius* (5); Benjamin on Sales (6); *Hadley* v. *Baxendale* (7).

Large profits might have been made out of this boat. See *Fletcher* v. *Tayleur* (8).

Then we are entitled to a new trial on the ground of misdirection. *White* v. *Crawford* (9) and *Hoyt* v. *Stockton* (10) show that the observations of the judge to the jury on matters of fact will form ground for a new trial if the jury have been misled by them. See also *Maddock* v. *Glass* (11).

Osler Q.C. and *Cox* for the respondents

The objections to the judge's charge were not made at the trial and should not be considered here.

As to the claim that the engine was defective it is only necessary to refer to the evidence, which shows that the appellant tested it on two trial trips and made no objection then nor at any time until he put in his counter claim in 1884. The vessel was kept running for a year, never losing a day, and was sold then for the full cost price, with $4,000 added for his personal superintendence in her construction.

In answer to the claim for damages for the non-completion according to contract, it is submitted that the defendant sustained no substantial injury thereby. The

(1) 9 Q. B. D. 320.
(2) L. R. 3 Q. B. 181.
(3) 4 Ch. App. 112.
(4) L. R. 9 Q. B. 473.
(5) 15 ed. p. 490.
(6) p. 873.
(7) 9 Ex. 341.
(8) 17 C. B. 21.
(9) 2 U. C. C. P. 352.
(10) 2 Han. (N. B.) 60.
(11) 5 U. C. Q. B. 229.

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contractor for the hull failed in March, 1882, with $45,000 of work yet to be done. There is no evidence that the vessel would have been ready for sea if the engine and boiler had been furnished. Defendant had no sale for the vessel until 1883, and could have done nothing with her before.

The following authorities were also cited: *Canada Central Ry.* v. *Murray* (1); *Connecticut Mutual Ins. Co.* v. *Moore* (2); *Cousins* v. *Merrill* (3); *Reg.* v. *Fick* (4); *Fitzpatrick* v. *Casselman* (5).

Sir W. J. RITCHIE C.J.—There does not appear to have been any misdirection in this case, and no objection was taken to the judge's charge. The questions raised were properly for the jury, who found in favor of the plaintiff with, evidently, the concurrence of the learned judge before whom the case was tried.

On a motion to the Divisional Court to set aside the verdict on the ground that the verdict, so far as it was in favor of the plaintiff on his statement of claim, was against law and evidence and the weight of evidence, and also so far as it related to the contention of the defendant, the court were of opinion that the finding of the jury ought not to be disturbed; that there was no miscarriage in the case upon any question of law; that there was no objection to the judge's charge nor any room for objection; that though the impression on the mind of the learned judge was favorable to the plaintiff he presented the evidence fairly to the jury, and that his comments thereon seem to have been fully warranted; that though there was a technical breach of contract which might have entitled the defendant to have recovered nominal damages, yet that that was not a ground for interfering with a verdict when the jury

(1) 8 Can. S. C. R. 315.
(2) 6 App. Cas. 644.
(3) 16 U. C. C. P. 114.
(4) 16 U. C. C. P. 379.
(5) 29 U. C. Q. B. 5.

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found, as they must be taken to have done in this case, that substantial damage had not flowed from the breach, at which conclusion the court thought the jury were fully warranted in arriving; therefore the court refused to interfere with the verdict.

The defendant appealed from this decision of the Divisional Court to the Court of Appeal. That court was unanimously of opinion that though on his counter claim the defendant was in strictness entitled to a finding in his favor for nominal damages for breach of contract as to the time appointed for finishing the work, yet the court would not disturb the verdict on that ground as "for a long series of years the courts have refused to disturb verdicts merely for the purpose or entering a nominal amount for either party, where no right was involved and the case sounded wholly in damages." The court could not see that there was any misdirection, and concurred generally in the reasons for judgment in the court below discharging the rule against the verdict. "The evidence" the court said "was, as usual, rather contradictory as to the character of the work done by plaintiff, but it was a fair question for the jury as to whether it fairly answered the contract and specifications," and the court would not say that the jury had arrived at an erroneous conclusion, and they thought it unlikely that any other jury to whom the case should be submitted would arrive at any different conclusion, and so dismissed the appeal, and so, I think, must we

I am far from being prepared to say that the jury and the courts below were wrong in the conclusions at which they arrived. On the contrary, had I been on the jury I think I should have arrived at the same conclusion that the jury did.

FOURNIER, HENRY and TASCHEREAU JJ.—Concurred.

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GWYNNE J.—This action is brought by the executors of one Oille to recover a balance alleged to be due to them as such executors upon a contract made by their testator with the defendant for the construction and fitting of composite engines and boilers in a vessel then being about to be built by the defendant. The plaintiffs in their statement of claim alleged the completion of the engines and boilers and the fitting the same in the vessel, and that after the completion of the vessel they were found, upon a trial trip, to work satisfactorily, whereupon, as the plaintiffs alleged, the balance of the contract price amounting to $14,500.00 ($12,000.00 having been paid during the progress of the work) became due and payable to the plaintiffs, as such executors, with interest. The defendant in his statement of defence set out the contract whereby it appeared that Oille, in the month of May, 1881, had agreed with the defendant to construct the engines and boilers according to specifications annexed to the contract and to set up the same in a steam vessel then being built by the defendant at the town of Sarnia, on or before the 1st day of March, 1882, and by the contract it was provided that the whole of the work on the engines and boilers should be pushed forward so as not to interfere with or delay the shipbuilders in their work, and that any change made in material, construction, and furnishing, required by the shipowner or the inspector, should be consistent with the said contract, and it was thereby agreed further that when the engines and boilers should be finished and set up in the vessel and everything finished and requirements met according to the contract and a satisfactory trial made by a round trip to Duluth and return, that then the shipowner should pay to the contractor in full of his contract the full sum of twenty-six thousand five hundred dollars, but that should the contractor desire it he could draw money during the

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time of completing the contract to the amount of twelve thousand dollars. The defendant then alleged that Oille failed in completing the work by the time specified in the contract, and that in the month of December, 1882, the work being still unfinished, he wholly abandoned the work and left the same in an unfinished state, and that the work then done was not done according to the contract, and was unskilfully and negligently done and performed, and that after the abandonment of the said work by Oille the defendant was obliged to complete the same, and thereupon employed men and obtained materials for the purpose of completing said work, and had expended in such work and materials the sum of $7,000; that the said steamer had since the opening of navigation in the year 1883, and during the seasons of 1883 and 1884, been employed in running between Sarnia and Duluth, yet that no satisfactory trip had yet been made by reason of the said engine not working properly or satisfactorily; that the defendant had expended large sums of money in investigating and endeavouring to ascertain the defect in the construction of the said engine, and had ascertained that certain work in the construction of the said engine in the interior thereof was performed by Oille not according to the specifications in the contract mentioned, but in an unskilful, careless and negligent manner, which work was, as the defendant alleged, recently and long after the opening of navigation for the year 1883, discovered by the defendant; and the defendant claimed that the plaintiffs' claim should be dismissed with costs. and by way of counter-claim the defendant claimed that he should be paid by the plaintiffs out of the assets of the estate of their testator, the said Oille, the damages which the defendant had sustained by reason of the default of the said Oille in not completing his said contract according to the terms thereof, and for

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the loss which the defendant had sustained in being deprived of the earnings of his said steam vessel for the season of 1882, and for the loss and damage which the defendant had sustained by reason of the unskilfulness, neglect and careless work performed on said engine, as aforesaid. The plaintiffs in their reply, among other things, alleged that the delay in completing the said contract was caused solely by the defendant and the persons employed by him to construct the hull of the said vessel, and they alleged further that during the progress of the said contract work the defendant made frequent changes therein and required the said Oille to alter the same in many particulars and vary from the said specifications, and also to do work not provided for by the said specifications, and thereby materially hindered and delayed the said Oille in his said contract work; and the plaintiffs submitted that by reason of such the conduct of the defendant, the said Oille was released from the obligation to complete the said work at the time specified in the contract; and the plaintiffs further alleged that the said specifications were prepared and the said engines and boilers and other work mentioned in the said contract were planned and designed by the defendant, and he personally superintended the said contract work during the progress thereof and that the same was done in all respects according to his instructions and directions, and they further alleged that a satisfactory trial trip was made after the completion of the said work, and that the defendant was satisfied therewith and made no complaints whatever respecting the same until shortly before the commencement of this action, and they denied that the defendant had suffered any damage whatever by reason of any default of the said Oille, or that he had sustained any loss whatever for which the said Oille was, or the plaintiffs as his executors are, respon-

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sible. At the trial before Armour J. it appeared that the inspector referred to in the contract to superintend for the defendant the performance of the work was not appointed by the defendant until the latter end of November, 1881. In a letter of the 21st of that month addressed by the defendant to Oille, he says:—"I have engaged "Mr. Thos. Pettigrew for one year at $1,000 and board, "he to take charge of the work in your shop till the "engine and boiler are completed and set up, and then "he is to take charge of and run the engine till the "close of navigation, and he will be ready to com- "mence work next week. Get your material and men "at once. Should the forging not be ready now, go to "Buffalo and see after it so that there may be no delay, "also all patterns and castings. In a word, the whole "work is to be shoved ahead. I hope you have ordered "the strap plates for the horizontal seams as they must "be triple riveted. We have taken measures of the "hold and find the distance from the top of the boiler "to the top of the main deck, allowing six inches for "the saddle, to be 23 inches, and the throw down "should stand about six inches above the deck, say "whole length, 30 inches between boiler and dome. "Now there is another thing I wish to call your atten- "tion to, that is, the absolute necessity of making pro- "vision for a receiver over engine working at right "angles; this could be dispensed with provided the "engine worked at opposite centres. This must be "provided without fail. How have you arranged in "regard to the small cylinder where the receiver was "intended to be? Can you give me the size of the "engine on which you intend to have the steam lap "and exhaust pipe, with the distance the exhaust pipe "will be from the centre of the engine, giving size of "exhaust pipe and the inside and outside measures from "centre. This we want, as we are laying our beams

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"and stringers. Please write at once, give the size and "distance of exhaust pipe from cylinder."

It appeared from the evidence of Pettigrew, who had thus been engaged by the defendant to superintend the construction of the engines and to run he vessel when completed, that the defendant himself was backwards and forwards at the workshop where they were constructed 80 per cent. of the time during which the work was in progress, and yet during all that time he does not appear to have ever complained of the delay which had occurred in the construction of the engines or that the contract therefor had thereby been broken. He also gave evidence that the vessel made a satisfactory trial trip when finished, and that she ran 16 trips during the year 1883, during all of which trips the engines ran very fairly and were successful during the season. In March, 1883, Oille, the contractor, died, and in June of that year, after the trial trip, one of the plaintiffs having written him a letter enquiring as to the working of the engines, the defendant in reply wrote the following letter, dated June 15th, 1883:—

DEAR SIR,—I have just returned from the East and found your letter, and beg to state I am not in a position to give you the desired information respecting the working of the engine of the "United Empire," but from the intimation I am inclined to think it does not work satisfactorily, but will write when I receive the engineer's full report. There are several parts that must be supplied with different material, which may affect the efficiency. It will be some two weeks before I can get this report from the engineer, when I will correspond with you fully respecting the efficiency of the engine.

The defendant, however, never did subsequently correspond with the plaintiffs, or either of them, upon the subject. Pettigrew, who was the engineer who ran the vessel in 1883, upon this point said that the defendant applied to him for a report of the working of the engines, and although he saw the defendant upon the occasion of every trip that the only thing which passed

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between them upon the subject of the engines was when laying up the vessel in the fall of the year 1883 the defendant came into the engine room and said that "there must be something wrong with the engine "because she was not coming up to his expectation, and "he asked me what was the matter. I told him that "the proportions of the engines were the same as the "Buffalo engines, and that they did as good work as "any boats that were going across the lakes."

He added, in his evidence, that he had got a speed of 11, 12 and 13 miles an hour out of the engines, and that he ran her at the speed which he found to be most economical for her, which was upon an average 11 ^{2} miles per hour. It appeared, also, in evidence that the persons who had contracted to build the hull for the defendant failed, and in March, 1882, wholly abandoned their contract, after which time the defendant had to take the work into his own hands and was obliged to lay out in workmanship and material the sum of $45,000 to complete the vessel, of which sum the material which the defendant was obliged to purchase to complete the vessel cost from $10,000 to $15,000. The contention of the defendant upon this point was that although the contractors for construction of the hull did abandon their contract in March, 1882, still that the vessel had been sufficiently advanced to receive the machinery in the fall of 1881. In answer to this contention the plaintiffs relied upon the defendant's letter of the 21st November, 1881; and, moreover, they contended that even if the jury should be of opinion that the hull was sufficiently advanced so as to receive the engines before the 1st March, 1882, still the non-completion of the vessel so as to engage in the navigation of 1882 was not to be attributed to the delay in the completion of the engines, but to the delay occasioned by the failure of the contractors for the construc-

tion of the hull, and in support of their contention that the defendant had not been damnified, as he claimed to be, by the delay in construction of the engines, from not having the use of the vessel during the period of navigation of 1882, the plaintiffs relied upon the following which appeared in evidence, namely, that the vessel was built by the defendant wholly upon the speculation of selling her to a certain company called the North-West Transport and Navigation Company, of which company the defendant was the principal stockholder, and that during the whole of the year 1882 that company refused to purchase or to have anything to do with the vessel, and so the plaintiff contended that it was for the jury to say whether the defendant had not for this reason taken the whole of the year 1882 to complete the vessel, and that he was in reality not damnified by the delay which had taken place in the construction of the engines. Much evidence was entered into upon the question whether or not the engines and boilers had been constructed in accordance with the specifications, and as to the sufficiency of the work to meet the requirements of the contract, by which it was stipulated that the engines were to be built, according to the specifications annexed, with furnishings most complete and with cylindrical boilers built of the best boiler steel. The specifications appeared to have been drawn by the defendant himself, and not to have been altogether perfect, many things which as was contended by the defendant were necessary to make the engine complete and perfect not being specifically mentioned therein. During the examination of one of the witnesses, an expert, the learned judge before whom the case was tried made the observation that: "The question is, did this engine fill the "specifications, to begin with, and as far as these speci-"fications do not specify, was it reasonably fit for the

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"purpose for which it was intended?" And he added: "If the man who ran the engine in 1883, says it is as "good an engine as ever went into a ship, that would "be evidence to go to a jury to show that it was rea- "sonably fit for the work." No objection appears to have been taken to the correctness of this view, as to the question before the jury as to the sufficiency or insufficiency of the engine to meet the contract, the main ground of insufficiency relied upon by the defendant, was that the speed of the vessel did not come up to what was expected by him, which was from 13 to 14 miles per hour, and the evidence he relied upon on this point was that of an expert who had examined the vessel after the close of navigation of the year 1884, and who suggested considerable changes at a very large outlay with the view of increasing the speed of the vessel. Whether the suggestions made by this witness were at all necessary and whether the alterations suggested were required by the contract was the subject of much criticism, and of evidence in contradiction offered by the plaintiffs, which latter evidence included that of the witness Pettigrew who inspected the whole of the work until the engines and boilers were fitted in the vessel, the part taken by the defendant in completing them being only to advance for materials and work a sum in excess of the $12,000 agreed to be paid during the progress of the work. The learned judge no doubt, formed an opinion which the jury perceived to be unfavorable to the defendant, but he left the case to the jury with charge to which no objection whatever was taken either for misdirection or non-direction or for any other cause. Nor was he asked to vary in any respect upon any point, the manner in which he left the case to the jury. His direction as to the rule of law as to the measure of damages applicable in cases of the nature of the present was not

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then nor has it since been objected to. The jury upon this charge rendered a verdict for the plaintiff of $10,329 00 allowing thus to the defendant $4,171.00, to cover all moneys which had been advanced by the defendant during the progress of the work and certain parts of the machinery which had proved defective and which had been supplied by the defendant, but disallowing the defendant's counter claim for damages for the delay complained of in the non-completion of the engines by the 1st of March, 1882, or otherwise. A rule *nisi* for a new trial upon the ground of the verdict being against law and evidence and the weight of evidence, having been obtained, was, on argument, discharged by the Divisional Court, whose judgment has been unanimously sustained by the Court of Appeal for Ontario, the defendant has appealed to this court, and in the argument before us the learned counsel for the defence undertook to establish, which he has failed to do, that these judgments are clearly erroneous. *Moore* v. *The Connecticut Ins. Co.* (1) before the Privy Council, is an authority that even where a verdict is unsatisfactory in the opinion of a court before which it is reviewed as against law and evidence and the weight of evidence, which the verdict in this case does not appear to me to be, that is not sufficient to justify a court in granting a new trial. That in order to be justified in granting a new trial they must be satisfied that the evidence so strongly preponderates in favor of the party as to lead to the conclusion that the jury in finding for the other party have either wilfully disregarded the evidence or failed to understand or appreciate it. Consistently with this ruling, which is conclusively binding upon this court, there does not appear to be any foundation for the contention that the unanimous judgments of two courts

(1) 6 Can. S. C. R. 706.

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upon the point in question should be reversed. The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Gwynne J.

Solicitors for appellants: *MacLaren, Mac Donald, Merritt and Shepley.*

Solicitors for the respondents: *Miller, Cox and Gale.*