MARGARET MILLICENT LAING (*Plaintiff*) ..... } APPELLANT;

AND

SAMUEL RICHMOND AND FRANKLIN PULVER (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Automobiles—Collision—Negligence—Plea of guilty to careless driving charge entered by counsel in criminal court—Whether evidence of plea admissible in civil court—Whether trial judge right in discharging jury and hearing case alone—Negligence Act, R.S.O. 1950, c. 252—Judicature Act, R.S.O. 1950, c. 190—Supreme Court Act, R.S.C. 1952, c. 259, s. 44.

Following a motor vehicle collision at an intersection, the appellant E. brought an action against the respondents for personal injuries and damages to his car.

A second action was brought by the appellant L. against the same respondents pursuant to the *Fatal Accidents Act* for the death of her husband who was a passenger in the car driven by the appellant E.

Both actions were tried together and were dismissed by the trial judge on the ground that the sole cause of the accident had been the negligence of the appellant E. This judgment was affirmed by the Court of Appeal.

At the trial, the judge, in the absence of the jury and without deciding as to its admissibility, heard evidence, subject to objection, of a plea of guilty which had been entered by counsel for the appellant E. in the latter's presence in a court of criminal jurisdiction on a charge of careless driving under the *Highway Traffic Act*. No conviction was tendered in evidence. Following the admission of this evidence, the trial judge, of his own motion and without hearing counsel, decided to discharge the jury and continue the trial himself. Counsel for the appellants did not take objection to that course, and the parties agreed that the evidence taken in the absence of the jury should be treated as evidence in the case. The trial judge, in his reasons for judgment, did not find it necessary to rule on the admissibility of the evidence. Before the Court of Appeal and this Court, the appellants contended that the jury should not have been discharged.

1956

ENGLISH AND LAING v. RICHMOND et al.

Held (Cartwright and Abbott JJ. dissenting): The appeals should be dismissed.

Per Kerwin C.J. and Taschereau J.: The trial judge's discretion to discharge the jury was properly exercised since the evidence of the plea of guilty was admissible. The contention that the plea was inadmissible because it had been entered by counsel and not by the appellant, that it was only for the purposes of the criminal proceedings and that counsel's authority did not extend to that fact being treated as an admission in the present trial, is not tenable.

The appellants failed to establish that the trial judge's finding of negligence, concurred in by the Court of Appeal, was wrong.

Per Locke J.: There were concurrent findings as to the negligent act which caused the accident, and no sufficient grounds have been shown for interference with that finding.

In view of the undoubted jurisdiction of the trial judge by virtue of the *Judicature Act* to discharge the jury, and in view of the fact that, as was found by the Court of Appeal, it was not shown that in so doing he proceeded upon a wrong principle, no appeal lies to this Court from that discretionary order by reason of s. 44 of the *Supreme Court Act*.

Furthermore, since the trial had proceeded on the footing that there was no objection by counsel for the appellants to what had been done, it was too late thereafter to raise the objection that the order dispensing with the jury had been improperly made (*Scott* v. *Fernie Lumber Co.* (1904) 11 B.C.R. 91 at 96 referred to).

The evidence of the charge and of the plea of guilty was relevant and admissible. Even if it were not so, there should not be a new trial as it would be impossible to find that any wrong or miscarriage had resulted: s. 28 of the *Judicature Act*.

Per Cartwright J. (dissenting): The rule that the trial judge should decide questions as to the admissibility of evidence as they arise applies not only to criminal but also to civil cases whether tried with or without a jury.

In the circumstances of this case, counsel should not be held to have acquiesced in the course taken at the trial simply because he did not attempt to argue against it after the trial judge had not merely stated that he proposed to follow such course but had announced his decision to do so, and consequently the rule in *Scott* v. *Fernie Lumber Co.* ((1904) 11 B.C.R. at 96) has no application.

The failure of the trial judge to rule as to the admissibility of the evidence at the time when it was his duty to do so, deprived the appellants of their substantial right to have the action tried by a jury and there should be a new trial before a jury.

Semble, for the reasons given by Abbott J., that the evidence in question was inadmissible.

Per Abbott J. (dissenting): The plea of guilty implied no more than a desire for peace, and as such was not an admission at all, had no probative value in the subsequent civil action and the evidence that it had been entered should have been rejected. Furthermore, an admission made by counsel on behalf of an accused in a criminal proceeding is not evidence in a civil matter unless the authority to

make such admission was an authority to make it for the purposes of a civil action as well (*Potter* v. *Swain and Swain* [1945] O.W.N. 514 referred to). In view of the inadmissibility of that evidence, there was in fact no reason for depriving the appellants of their prima facie right to a trial by jury. There was here a deprivation of a substantial right and not an exercise of discretion.

Even had the evidence been admissible, counsel should have been given full opportunity to be heard on the point as to whether the trial should proceed with or without a jury.

APPEALS from the judgment of the Court of Appeal for Ontario, affirming the judgment at trial and dismissing two actions arising out of a motor vehicle collision.

R. N. Starr, Q.C. for the appellants.

W. E. McLean, Q.C. for the respondents.

The judgment of Kerwin C.J. and Taschereau J. was delivered by:—

THE CHIEF JUSTICE:—These are appeals by the plaintiffs from the judgments of the Court of Appeal for Ontario affirming the judgments at the trial which dismissed two actions and awarded damages in a third action brought by one of the defendants in those two actions against one of the plaintiffs. Previously in a court of criminal jurisdiction an information charging the plaintiff English under the *Criminal Code* with the crime of dangerous driving had been withdrawn and a plea of guilty accepted to a charge of careless driving under the provisions of The Ontario Highway Traffic Act. This plea was entered by Counsel for English in the latter's presence. All this was admitted by English in his cross-examination at the trial of the three actions and certain alleged explanations were given as to the reason of the plea of guilty. This testimony was given in the absence of the jury. The trial judge decided to admit in evidence, subject to objection, the fact that the plea had been entered, but he considered that the trial of the actions should then continue before him alone, and the jury, already empanelled, was thereupon discharged.

Mr. Starr objected to the discharge of the jury on the ground that the plea of guilty was improperly admitted. It must be emphasized that no conviction was tendered in evidence. It has been held in this Court in a case from

1956

ENGLISH AND LAING v. RICHMOND et al.

Kerwin C.J.

the Province of Quebec, *La Foncière Compagnie d'Assurance de France* v. *Dame Blanche Perras and René Mongeau and Octave Daoust* (1), that a conviction registered by a court of criminal jurisdiction has not the effect of creating before the civil courts the presumption *juris et de jure* resulting from the authority of a final judgment, but several decisions in England on the common law were referred to, among them *Castrique* v. *Imrie* (2), in which Blackburn J., speaking for himself and Baron Bramwell, Mellor J., Brett J. and Baron Cleasby, stated as follows:—

> A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged.

Mr. Justice Davis, who wrote a separate judgment in the *Perras* case (1), referred to *In re Crippen* (3) and *Mash* v. *Darley* (4), and to the judgment at the trial in *Hollington* v. *Hewthorn & Co. Ltd.* (5). Subsequently, in the last mentioned case, the Court of Appeal (6), while affirming the judgment at the trial, in a judgment delivered by Lord Goddard considered the whole matter carefully and overruled the *Crippen* and *Mash* cases. Even there, however, Lord Goddard pointed out at pp. 599 and 600:—

> It may frequently happen that where bigamy or any other crime has to be proven in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof of the confession by a witness present at the trial is admissible because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial.

All that was proved in the present case was the fact that English had pleaded guilty through his Counsel and, while I understood Mr. Starr to admit that if English himself had pleaded guilty that fact would be admissible in evidence, in case I am wrong as to his position, I think such a statement would be admissible. Mr. Starr raised the narrow point that since here it was the Counsel for English who had entered the plea, that was only for the purpose of the particular proceedings before the Magistrate and that his

(1) [1943] S.C.R. 165.
(2) (1870) L.R. 4 H.L. 414.
(3) [1911] P. 108.
(4) [1914] 1 K.B. 1.
(5) [1943] K.B. 27.
(6) [1943] K.B. 587.

authority did not extend to that fact being treated as an admisison in the trial of these actions. He relied upon the decision of the Court of Appeal in Ontario in *Potter* v. *Swain* (1). The note of that decision is not a full report, but if it purports to decide that an admission by Counsel in the form of a plea of guilty to a charge of crime, or what is known as a provincial crime, in the presence of the accused is not admissible, I am unable to agree with it.

The statement in Wigmore on Evidence, 3rd ed., vol. 4, p. 24, also relied on, relates to offers of compromise and the cases referred to by Mr. Starr at p. 44 do not detract from the statement at p. 43 "but conversely all his (i.e. the attorney's) admissions during that managament including the utterances in the pleadings do affect the client". The statement in the 11th ed. of Bowstead's Digest of the Law of Agency, at p. 232, is as follows:—

> A solicitor or counsel is retained to conduct an action. Statements made by him in the conduct and for the purposes of the action are evidence against the client. But statements made by him in casual conversation, and not in the course and for the purposes of the action, are not. So, statements made by a solicitor for the purposes of one action cannot be used as evidence in another action which the solicitor is conducting on behalf of the same client; and admissions made by counsel at a trial have been held not to be binding at a new trial which had been ordered by the Court of Appeal (*d*).

The case referred to in note (*d*), *Dawson* v. *Great Central Railway* (2), is merely a decision that an admission by counsel at the first trial of an action is not binding on a new trial.

Mr. Starr's next contention that even if there were an admission by or on behalf of English it was not evidence as to the cause of the accident really goes to the question of weight and not admissibility.

These are the only grounds suggested as to the impropriety of the trial judge dispensing with the jury and, in my opinion, the trial judge's discretion was properly exercised.

Finally, it was argued that the judgment of the trial judge, although concurred in by the Court of Appeal, was wrong. As to this, it is sufficient to say that Mr. Starr has not persuaded me that this is so. The trial judge disregarded the evidence of the plea of guilty in coming to

(1) [1945] O.W.N. 514. (2) (1919) 88 L.J.K.B. 1177.

1956

ENGLISH AND LAING v. RICHMOND et al.

Kerwin C.J.

his conclusion and the reasons given by him for dismissing the two actions and awarding damages in the third appear to me to be well founded as it is admitted that the plaintiff Margaret Millicent Laing is in the same position as English.

The appeals should be dismissed with costs.

LOCKE J.:—These two actions were tried together by Wilson J., and dismissed upon the ground that the sole cause of the accident was the negligence of the appellant English. As Murray Gordon Laing, who died of the injuries sustained by him, was a passenger in the car driven by English, the action brought by his widow failed by reason of the provisions of s. 2(2) of the *Negligence Act* (R.S.O. 1950, c. 252).

The unanimous judgment of the Court of Appeal delivered by Hope J.A. dismissed the appeals taken from the judgment at the trial, the reasons delivered stating that no grounds had been shown upon which the court should interfere with the trial judge's finding of negligence. There are thus concurrent findings as to the negligent act which caused the accident.

The appellants appeal against this finding and alternatively ask for a new trial on the ground that evidence was improperly admitted at the hearing and upon the further ground that in discharging the jury during the course of the trial the learned trial judge had exceeded his jurisdiction.

It is necessary to consider with some care the record as to what took place upon this latter aspect of the matter at the hearing. The appellant English was the first witness called by the plaintiffs and gave evidence as to the manner in which the accident occurred. When cross-examined, counsel for the defendants asked him whether a charge had been laid against him in connection with the matter. The learned trial judge at once raised the question as to the relevancy of this and directed that the jury retire while the matter was argued. After hearing counsel for the respective parties, in the absence of the jury, he permitted the appellant English to answer the question as to whether it was a fact that a charge had been laid against him in the Police Court at Barrie arising out of the accident, charging him with unlawfully driving a motor vehicle without due

care and attention or without reasonable consideration for other persons using the highway, contrary to the provisions of the *Highway Traffic Act* (R.S.O. 1950, c. 167). This he admitted and, further, that the information was read to him and that, in his presence, counsel representing him pleaded guilty on his behalf. Following this, English was reexamined by counsel appearing for the plaintiffs and explained the circumstances under which this plea had been entered. This disclosed that a further charge had been laid against him under the *Criminal Code,* charging him with dangerous driving, and that, after this charge had been partially heard, counsel for the prosecution had informed the magistrate that he did not consider the evidence supported the charge and that he proposed to withdraw it and that, immediately afterwards, English pleaded guilty to the charge under the *Highway Traffic Act.* Counsel for English then called Mr. Thompson, the Crown Attorney for the County of Simcoe who had prosecuted the two charges, who said that before he withdrew the charge under the Code he had suggested to counsel for the accused that, if the latter would plead guilty to the charge under the Act, he would withdraw the charge under the Code and that this was done.

Following the taking of this evidence in the absence of the jury, the learned trial judge decided, without determining the question as to the admissibility of the evidence, that he would admit it subject to the objection but would discharge the jury. His reasons for adopting this course were explained in the following terms:—

> I think it is obvious that the question of the admissibility of the statement made by Mr. English on the occasion of his prosecution on the charge of dangerous driving is one which presents some difficulties. If the evidence is admitted the plaintiffs fear they may be adversely affected. On the other hand, the importance of such an admission to the defendant is not to be overlooked. I think the proper course in this case is to admit the evidence but I shall discharge the jury, which will mean that in the event of either side being dissatisfied with the judgment the Court of Appeal will be able to pronounce a final judgment without the necessity of sending this action back for another trial, which undoubtedly would be the case if it did not agree with the ruling which I should make concerning admissibility.
>
> As to the admissibility itself. I have still an open mind but I propose to take the evidence subject to objection and, of course, I shall have to reserve judgment.

The parties then agreed that the evidence taken in the absence of the jury should be treated as evidence in the

1956

ENGLISH AND LAING v. RICHMOND et al.

Locke J.

case and, without objection on the part of counsel for the plaintiffs, the trial proceeded before Wilson J. Seven witnesses in support of the plaintiffs' case gave evidence following the dismissal of the jury and six were called for the defence. The jury had been discharged early in the afternoon of November 23 and the balance of that day, all of the day following, and part of the morning of November 25 were taken up with the hearing of this evidence. The matter was then argued and judgment reserved.

As I have pointed out, counsel for the plaintiffs raised no objection to the order made dismissing the jury and, as the reasons for judgment thereafter delivered by Wilson J. make no mention of the matter, I assume that the propriety of that order was not questioned on the argument.

S-s. 3 of s. 57 of the *Judicature Act* (R.S.O. 1950, c. 190) provides that, notwithstanding the giving of the notice referred to in s-s. 1:—

> the issues of fact may be tried or the damages assessed without the intervention of a jury if the judge presiding at the sittings so directs or if it is so ordered by a judge.

For the reasons given in the passage above quoted, the learned trial judge evidently thought that, since he considered the admission of the evidence as to the plea of guilty upon the charge under the *Highway Traffic Act* might be injurious to the plaintiffs if improperly admitted before the jury and to the defendants if it were improperly excluded, and, being in doubt as to its admissibility, the proper course to pursue was to discharge the jury and try the issues of fact himself. The learned judges of the Court of Appeal have said that it had not been shown that the trial judge exercised his discretion either improperly or upon any wrong principle.

The trial judge's jurisdiction being undoubted and as it is not shown that he proceeded upon a wrong principle, in my opinion no appeal lies to this Court from the order dealing with this aspect of the mater by reason of s. 44 of the *Supreme Court Act*.

There is a further and equally fatal objection to this aspect of the appellant's claim. As I have stated, the trial, from the early afternoon of the second day, proceeded before the learned judge, the plaintiffs proceeding to put in their further evidence and that for the defendants being

taken, apparently on the footing that there was no objection to what had been done. It was too late thereafter, in my opinion, for the present appellants to raise the objection that the order dispensing with the jury had been improperly made.

To permit such a course would be to allow these plaintiffs, having decided to take their chances of success before the trial judge sitting alone and having lost, to have thereafter a second opportunity to recover damages. In *Scott* v. *Fernie Lumber Company* (1), Duff J. (as he then was) delivering the judgment of the full Court of British Columbia, referred to:—

> the rule long established, which holds a litigant to a position deliberately assumed by his counsel at the trial, . . . The rule is no mere technicality of practice; but the particular application of a sound and all-important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

An illustration of the practical application of this salutary rule may be found in the judgment of the Court of Appeal for British Columbia in *Elk River Timber Co.* v. *Bloedel, Stewart and Welch* (2). I refer particularly to the judgments of Macdonald C.J.B.C. at pp. 496-7 and that of McDonald J.A. (as he then was) at pp. 524-5. The rule is, in my opinion, applicable and should be invoked in the present case.

As to the evidence which, it was claimed, was improperly admitted, no ruling as to its admissibility was made in the judgment delivered following the trial. Dealing with the matter, the learned judge said:—

> In arriving at my conclusion I have disregarded evidence of English's conviction on a charge of driving without due care and attention which was admitted subject to objection because counsel for English admitted in the course of his argument that his client had been guilty of some negligence.

It may be noted that the evidence tendered was not as to the conviction but rather that the charge under the *Highway Traffic Act* had been laid and that counsel for English had, in his presence and on his behalf, pleaded guilty.

In the Court of Appeal the learned judges were of the opinion that evidence as to the plea made was admissible.

(1) (1904) 11 B.C.R. 91 at 96. (2) (1941) 56 B.C.R. 484.

1956

ENGLISH AND LAING v. RICHMOND et al.

Locke J.

In my opinion, since the learned judge did not consider the evidence in arriving at his conclusion, the question as to its admissibility is of academic interest only. As it was not considered, the situation does not differ from that which would have resulted had the evidence been tendered and rejected.

I think that the evidence was relevant and admissible as showing conduct of the appellant English which, on the face of it, was inconsistent with his evidence at the trial, directed to showing that he was not at fault. Its weight, however, was negligible in view of the evidence as to the circumstances in which the plea of guilty was made.

Had the evidence not been admissible, I cannot think that there should be a new trial in these circumstances. S. 28 of the *Judicature Act* provides that a new trial shall not be granted on the ground of the improper admission or rejection of evidence, unless some substantial wrong or miscarriage has been thereby occasioned. In my opinion, it would be impossible to find that either wrong or miscarriage resulted in the present matter.

Mr. Starr, who did not appear for the appellants at the trial, has in his able argument said everything that could properly be urged on behalf of the appellants against the concurrent findings that it was the negligent act of English alone which caused the accident. I am, however, of the opinion that no sufficient grounds have been shown for any interference with the judgment of the Court of Appeal.

I would dismiss the appeal, with costs if they are demanded.

CARTWRIGHT J. (dissenting):—The relevant facts out of which these appeals arise are sufficiently stated in the reasons of other members of the Court.

Two points were argued before us, but, because of the conclusion to which I have come on the second of these, it is unnecessary for me to deal with the first, which was that, on the evidence, the learned trial judge ought to have attributed part of the blame for the collision to the respondent Richmond.

The second point may be summarized as follows. It is said (i) that the learned judge erred in not rejecting evidence, sought to be brought out in cross-examination by

counsel for the respondents, that the appellant, English, had, through counsel, entered a plea of guilty to a charge of careless driving under the *Highway Traffic Act*, R.S.O. 1950 Ch. 167, (ii) that this error in law on the part of the learned trial judge was the sole reason for discharging the jury, and (iii) that we should therefore say that he was wrong in law in discharging the jury and should direct a new trial to be held before a jury.

The reasons of my brother Locke show that at the time when the learned judge decided to discharge the jury he had not yet decided the question of the admissibility of the evidence referred to, and that his only reason for discharging the jury was his decision to reserve this question. This is, I think, made clear by the passage quoted by my brother Locke and by what the learned trial judge said to the jury at the time of discharging them, as follows:—

> Members of the jury while you have been out I have been listening to some evidence and an argument on a difficult question of law. In the exercise of my discretion, and because the ruling which I shall have to give on an important point of law is one which I shall have to reserve for further consideration, I have come to the conclusion that I should finish this case without a jury being present. It is not possible to adjourn the trial until I should make up my mind with regard to what should be done with the matter I have been concerned with in your absence. The most practical, and in the long run I think the best interest of the litigants will be served by discharging you now and finishing this case myself.

With the greatest respect, I am of opinion that it was the duty of the learned trial judge to make his decision, as to whether the evidence should be admitted or rejected, at the conclusion of the evidence taken on the "voir dire" and the argument which followed. The law is, I think, correctly stated in Halsbury's Laws of England, 2nd Edition, Vol. 13 at page 530, where the learned author says:—

> . . . The admissibility of evidence must be decided, as a preliminary question, by the judge as such when it is tendered.

The rule that the trial judge must decide questions of the admissibility of evidence as they arise is, in my opinion, applicable to actions tried either with or without a jury. That it applies in criminal cases tried before a jury is put beyond question by the following passage from the unanimous decision of the Court delivered by Rinfret J., as he then was, in *Cloutier* v. *The King* (1):

> Nous n'ignorons pas combien il est difficile parfois de décider sur-le-champ certaines objections à l'enquête. D'autre part, il n'est pas néces-

(1) [1940] S.C.R. 131 at 133, 134.

1956

ENGLISH AND LAING v. RICHMOND et al.

saire d'insister pour démontrer le préjudice qui peut être causé à un accusé dans l'esprit du jury par certaine preuve qu'on laisse faire devant lui, même si, plus tard, le juge déclare qu'elle doit être rejetée et que le jury ne doit pas en tenir compte. Nous sommes d'avis que, dans une cause criminelle devant un jury, les objections à l'enquête ne devraient jamais être prises sous réserve.

Cartwright J.

The reasoning of the Court in the *Cloutier* case applies with equal force to a civil action tried with a jury.

While the necessity of the rule may be more obvious in a case tried with a jury, there are reasons in addition to those given in the *Cloutier* case which make it difficult to see how in a case tried with or without a jury counsel on either side can satisfactorily conduct the remainder of the trial unless it is known whether a piece of evidence already tendered and actually heard has or has not been received by the Court. Let us suppose, for example, that the evidence in question has been tendered on behalf of the plaintiff and, if admitted and not contradicted, is sufficient to establish an essential ingredient of his cause of action. Is counsel for the plaintiff to call further evidence on the point? If the evidence in question is admitted this is unnecessary but if it is rejected it is essential. Is counsel for the defendant to cross-examine? Can he do so "without prejudice to his objection"? If so, what becomes of the evidence elicited during the cross-examination in the event of the trial judge ultimately deciding to reject the evidence in question; is it to be treated as expunged from the record? Is counsel for the defence to call evidence to contradict the evidence in question? Once again if the evidence is admitted it is essential that he do so but if it is rejected it is unnecessary. What of the argument at the conclusion of the trial? Are there to be two sets of argument, one on the basis that the evidence in question is admitted and the other on the basis that it is rejected? The foregoing is not, I think, an exhaustive list of the difficulties which may arise in any trial in which the question of admissibility of a piece of evidence is not decided by the trial judge when it is tendered.

With some hesitation, I find myself unable to agree with the conclusion of my brother Locke that counsel who appeared for the appellants at the trial acquiesced in the course taken by the learned trial judge so as to be precluded from objecting thereto on appeal. As is pointed out by my brother Abbott, counsel really had little opportunity to

object. At the conclusion of the argument as to the admissibility of the evidence the learned trial judge announced his decision to discharge the jury. I do not say that it would have been improper for counsel to have raised an objection at that point and to have asked the learned judge to reconsider the matter; but I do not think that counsel must necessarily be regarded as having acquiesced in a course of action taken at the trial because he does not attempt to argue against it after the judge has not merely stated that he proposes to follow such course but has announced his decision to do so. Counsel may have had in mind the words of Lord Verulam:—

> And let not counsel at the bar . . . wind himself into the handling of the cause anew after the judge hath declared his sentence:

I wish to make it clear that I do not question the accuracy of the rule quoted by my brother Locke from the judgment in *Scott* v. *Fernie Lumber Company* (1), but only its application to the facts of the case before us.

For the reasons given by my brother Abbott I incline to agree with his conclusion that in the particular circumstances of this case the evidence in question was inadmissible and ought to have been rejected; but the basis of my judgment is not that the learned trial judge ruled wrongly as to whether the evidence should be admitted but rather that he did not rule at the time when he was bound to do so.

In the result I am of opinion that the appellants were deprived of the right to have their action tried by a jury, which was described by Kellock J. giving the unanimous judgment of this Court in *Telford* v. *Secord* (2), as "a substantial right", not by an order made by the learned trial judge in the exercise of his discretion as to how the case could best be tried but solely as the result of his erroneous decision that it was open to him to reserve the question of the admissibility of the evidence.

For these reasons I would allow the appeals, set aside the judgments in the courts below and direct that a new trial be had before a jury. The appellants are entitled to their costs in the Court of Appeal and to such costs in this Court as are provided under rule 142. There should be no order as to the costs of the first trial.

(1) (1904) 11 B.C.R. 91 at 96.
(2) [1947] S.C.R. 277 at 282.

1956

ENGLISH AND LAING v. RICHMOND et al.

ABBOTT J. (dissenting):—The facts which gave rise to these appeals can be briefly stated.

The appellant Margaret Millicent Laing brought an action on behalf of herself and of her infant children for damages for the loss of her husband, Murray Laing, killed in a motor vehicle accident which occurred on July 26, 1952, when he was a passenger in a car driven by his brother-in-law, the appellant English, which car was struck by a car owned by the respondent Richmond and alleged to have been driven by the respondent Pulver.

The appellant English brought another action for damages for the loss of his motor vehicle and for personal injuries arising out of the said accident.

These actions were tried together by Wilson J., sitting with a jury.

At the trial, subject to objection, the learned trial judge heard evidence of the circumstances under which a plea of guilty was made in the Magistrate's Court by the appellant English through his counsel, on a charge of "Driving without due care and attention or without reasonable consideration for other persons using the highway", under the provisions of the *Highway Traffic Act* of the Province of Ontario.

Having decided to accept this evidence under reserve, after taking evidence on *voir dire* and after argument as to its admissibility in the absence of the jury, the learned trial judge, on his own motion but without hearing counsel as to whether the actions should proceed with or without a jury, dismissed the jury and proceeded to try the actions himself. In the result, he dismissed both actions, and these judgments were confirmed by the Court of Appeal for Ontario.

The appellants appealed on two grounds. First that on the evidence the learned trial judge should have found the respondent Richmond partly responsible for the accident. As to this first ground, I agree with other members of the Court that no sufficient grounds have been shown for any interference with the concurrent findings of negligence by the Courts below.

As their second ground appellants submitted (i) that the plea of guilty was made expressly by agreement and for the purpose of buying peace and was not a concession of

wrong done, (ii) that an admission made by counsel on behalf of an accused in a criminal proceeding is not evidence in a civil matter unless the authority to make the admission upon the criminal proceeding was authority to make the admission for the purposes of the civil proceeding, (iii) that evidence on such plea should have been rejected and (iv) that in discharging the jury the judge had exceeded his jurisdiction.

After ordering the jury to withdraw, the learned trial judge took evidence as to the circumstances under which the plea of guilty, on the charge of careless driving, was entered. From this evidence it appears that the appellant English had been arraigned on a charge of dangerous driving under the *Criminal Code,* and after the prosecution had completed its case and some evidence had been heard on behalf of the defence, Crown counsel suggested that the evidence might not be sufficient to support the charge.

A brief adjournment was taken and counsel appear to have discussed the matter in the magistrate's chambers, following which, on the Court resuming, the charge of dangerous driving was withdrawn and the respondent English, through his counsel, pleaded guilty to the charge of careless driving under the *Highway Traffic Act.*

Mr. W. M. Thompson, Q.C., Crown Attorney for the County of Simcoe, testified as to the circumstances under which this plea was taken. His evidence is important and I quote it in full. It is as follows:—

Q. You are the Crown Attorney for the County of Simcoe?

A. Yes.

Q. Did you prosecute a charge of dangerous driving against John English on the 3rd day of September, 1952?

A. May I see the transcript? Yes, from the transcript it appears on the 3rd of September, 1952, I appeared for the prosecution on that charge.

Q. I believe that evidence—You proceeded first with a dangerous driving charge. Is that not correct?

A. Yes.

Q. Was evidence adduced on the dangerous driving charge?

A. Yes.

Q. And was defence evidence adduced on the part of Mr. English?

A. It appears from the transcript that two witnesses gave evidence for the defence. The prosecution appears to have been completed.

Q. Yes. During the trial of the dangerous driving charge did you make this statement to the court:

> If I may interrupt, I feel that on the evidence, including the evidence of Mr. English who must impress one to some extent at least, that the Prosecution might not be justified in saying there is

1956

ENGLISH AND LAING v. RICHMOND et al.

Abbott J.

sufficient wantonness to support a charge of dangerous driving and the result of the accident is no concern of the court. I feel under the circumstances—my friend is prepared, I understand, to make a plea to the other charge and I think I would ask the court to have this charge withdrawn or dismissed, whichever the Court thinks appropriate.

A. That is in the transcript and I am quite satisfied that is what took place, although I cannot remember word for word.

Q. Before you made that statement did you have an arrangement with counsel that if the plea of guilty be put in on the careless driving charge the dangerous driving charge would be withdrawn?

A. I think that is obvious from the situation. It is obvious there was some discussion beforehand and it was indicated the plea of guilty would be entered.

HIS LORDSHIP: Q. Who took the initiative on that?

A. My recollection is that I did, my Lord. At a certain stage in the proceedings I informed Mr. Weekes that I did not think there was enough evidence to support a dangerous driving charge and he might consider pleading guilty to careless driving. I am sorry, my Lord, my memory is not better but it is a year ago.

Mr. WEEKES: Q. Yes, I understand that. And my understanding is that the dangerous driving charge would have been continued and been prosecuted had there not been a plea of guilty to the careless driving charge.

A. Yes.

Q. There was an adjournment to the Magistrate's Chambers?

A. I see there was an adjournment but I do not recall what happened in that adjournment.

By agreement of the parties, after the jury had been dismissed, the evidence taken on *voir dire* was considered a part of the evidence at the trial.

It seems clear that the plea of guilty by English to the complaint under the *Highway Traffic Act* was entered by his counsel following an arrangement with the Crown Attorney made at the latter's suggestion, and by virtue of which the charge laid under the Criminal Code was withdrawn.

In my opinion the plea of guilty made by counsel in these circumstances, in the presence of English and with his concurrence, implied no more than a desire for peace and not a concession of wrong done. See Wigmore, 3rd Edition, Vol. 4 at pp. 28 and 29.

As such, in my opinion the plea was not an admission at all, had no probative value in the subsequent civil action, and evidence that such a plea had been entered should have been rejected.

Even if I am mistaken in my view that evidence as to the plea in question was inadmissible in the circumstances of this case for the reasons which I have given, I am also of opinion that an admission made by counsel on behalf of an accused in a criminal proceeding is not evidence in a civil matter unless the authority to make the admission in the criminal proceedings was an authority to make it for the purposes of a civil action as well. In this connection the decision of the Ontario Court of Appeal in *Potter* v. *Swain and Swain* (1), is in point, and I am in respectful agreement with the view expressed by McRuer J.A., as he then was, at p. 516 when, speaking for the Court, he said:—

> While an admission by an agent will bind the principal, if made within the scope of the authority of the agent, counsel appearing on behalf of the accused at a criminal trial has no implied authority to make an admission that would bind his client in subsequent civil proceedings.

As I have said, the learned trial judge heard evidence of the plea of guilty, under reserve of the objection taken to it, and stated in his reasons for judgment that he had disregarded such evidence in arriving at the conclusion which he did. He made it quite clear however in taking the case from the jury that he did so solely because he had decided to postpone ruling upon the admissibility of the evidence objected to.

Since in my view that evidence was inadmissible and should have been rejected, there was in fact no reason for depriving plaintiffs of their *prima facie* right to a trial by jury, and in the circumstances of this case, in my opinion, its denial was not an exercise of discretion by the learned trial judge but the deprivation of a substantial right.

In a case such as this (which is clearly one to be tried by a jury so long as the jury system prevails), even if the evidence objected to had been admissible, it would seem to me, that on the authorities, counsel for the parties should have been given a full opportunity to be heard on the point as to whether the trial should proceed with or without a jury, or be traversed for trial by another jury. See *Filion* v. *O'Neill* (2) and *Craig et al.* v. *Milligan* (3). In the instant case the learned trial judge announced his

(1) [1945] O.W.N. 514.
(2) [1934] O.R. 716.
(3) [1949] O.R. 806.

1956

ENGLISH AND LAING v. RICHMOND et al.

Abbott J.

decision to dismiss the jury without inviting the views of counsel, and in these circumstances there would seem to me little which counsel could do but accept such decision subject, of course, to a right to question it on appeal.

In the result, therefore, I would allow the appeal and direct a new trial.

Appeals dismissed with costs.

Solicitors for the appellants: *Allen, Weekes & Lawson.*

Solicitors for the respondents: *Fennell, McLean & Seed.*

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*PRESENT: Kerwin C.J., Taschereau, Cartwright, Fauteux and Abbott JJ.