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WATEROUS ENGINE WORKS v. KELLER.

Stuart, J.

On the other hand the defendant opposes the motion for a new trial and asks that the judgment dismissing the action be not disturbed. There is no doubt that under the decisions quoted we have power to consider whether any jury could reasonably give a verdict for the plaintiff.

Upon almost every point in the case there is conflicting evidence. It is true that as the trial Judge said to the jury the evidence is strongly in favour of the defendant as to the working of the machine but that I think is not sufficient to justify us in taking the matter in our own hands.

Even if we were bound to accept the jury's finding upon the first question and make no enquiry for ourselves at all upon the point involved in it, I do not think we ought simply to weigh the evidence referable to the second question and say that because it points strongly to the conclusion that the machine did not work satisfactorily therefore no reasonable jury could come to any other conclusion. There may be no doubt, indeed I have no doubt at all, as to what the jury who did answer the first question would have answered to the second. But another jury might possibly take another view and I cannot say that they would be unreasonable if they did so.

Whether the machine worked in fact with reasonable satisfaction was a question upon which the verdict of the jury should, I think, have been taken. See *Parsons* v. *Sexton et al.*, 16 L.J.C.P. 181; *Dallman* v. *King*, 7 L.J.C.P. 6.

Moreover, where it is clear that the jury has not found sufficient facts to base a verdict upon I think it is open to the Court to question the one finding that was made and on a new trial the whole case would be re-opened. It is quite possible in view of the peculiar form of the defendant's story and its obvious inconsistency with the written agreement that another jury might come to an entirely different conclusion even upon the first question. Indeed the same questions would not probably be asked. At least the first one should as I have indicated be modified so as to make its meaning more clear.

Ordinarily these reasons should be quite sufficient to justify the Court in ordering a new trial. The difficulty which, in the opinion of the other members of the Court, stands in the way of the appellants is that it was assumed at the trial that a negative answer to the second question had been given, that their counsel did not insist on an answer that in their factum they make the same assumption that in their notice of appeal they do not raise the point and did not do so on the argument. Notwithstanding all this, the fact remains that there is really no finding by the jury upon which a final verdict for the defendant can properly rest. I think that real justice would be done rather by ordering a new trial upon the condition that the plaintiffs pay the costs of the first trial and of the appeal.

Appeal dismissed, STUART, J., *dissenting*.