

be held to have accepted it notwithstanding his letter of rejection.

This being so I do not think a judgment founded merely upon the answer given to the first question ought to stand.

The only question is whether there should be a new trial or whether this Court sitting in appeal has not power to deal with the case and find the facts itself.

Rule 507 of the Judicature Ordinance, says in part:—

On appeal . . . the Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require.

This is taken from the English order 58, rule 4, which refers to the power of the Court of Appeal in England. The meaning of this rule has been much discussed. The latest decision is that of the House of Lords in *Paquin, Limited v. Beaucherk*, [1906] A.C. 148.

In that case, at page 160 of the report, Lord Loreburn, L.J., said:—

The proper construction of order 58, rule 4, had been the subject of criticism in *Miller v. Toulmin*, 17 Q.B.D. 603, 12 A.C. 746, and *Allcock v. Hall*, [1891] 1 Q.B.D. 444. In the latter case all the Judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter a judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence though not enough properly to be acted upon by a jury is a fine distinction and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value.

It is clear from this decision and from the expression of opinion in *Allcock v. Hall*, [1891] 1 Q.B.D. 444, to which the Lord Chancellor refers that we have no need to consider whether order 40, rule 10, is in force here. Our own rule 507 gives all the power given by order 40, rule 10, and more. It covers the whole field, and is the only rule to be considered.

Now if the appellants had asked for judgment or in the alternative for a new trial we should have had to consider whether any jury could, upon the evidence, reasonably give a verdict for the defendant and if we were of opinion that they could not I think we could have entered judgment for the plaintiff ourselves though we should also have to determine the question of the defendant's claim for damages. But as the appellants have not asked for judgment and the matter was not argued on that ground it is useless even to consider the case from that point of view.

ALTA.

S.C.

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WATEROUS
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v.

KELLER.

Stuart, J.