

Per HUNTER, C.J.:—Fraud was not alleged in the statement of claim.

Per MARTIN and MORRISON, JJ.: Fraud was alleged—but

Per MARTIN, J.: There was no positive averment of the recovery of judgment against the defendant, which was essential.

Where a judgment has been obtained by fraud, the court has jurisdiction in a subsequent action brought for that purpose to set it aside.

Decision of DRAKE, J., affirmed, MORRISON, J., dissenting.

W. J. Taylor, K.C., and Twigg, for appellant. Oliver, for respondent.

Full Court.]

[Nov. 22, 1904

SCOTT v. FERNIE LUMBER CO.

*Master and servant—Negligence—Inconclusive verdict—Course of trial—Parties bound by—Supreme Court Act, 1904, s. 66—Practice.*

In an action for damages for personal injuries sustained by a workman engaged in decking logs caused by the alleged negligence of defendants in supplying a team of horses unfit for the work the jury found that the team was unfit; that the accident was caused by reason of such unfitness and that plaintiff did not have a full knowledge and appreciation of the danger:—

*Held*, by the Full Court, affirming a judgment in plaintiff's favour that although the findings read alone did not establish any legal liability on the part of defendants, yet as the issues for the jury were limited to the questions submitted to them and as defendants' negligence was treated by all parties as an inference arising from the defect charged, a finding of the existence of the defect involved a finding of negligence.

The provisions of the Supreme Court Act, 1904, s. 66, are applicable to an appeal in an action tried and decided before the provisions were enacted.

The said section has not wholly repealed the rule that a litigant is bound by the way in which he conducts his case.

The proviso of said section giving a party the privilege of having his right to have the issues for trial submitted to the jury, enforced by appeal, without any exception having been taken at the trial, does not give a right of new trial in cases where counsel settle by express stipulation the issues of fact for the jury or when the issues submitted are accepted on both sides as the only issues on which the jury is to be asked to pass.

Joseph Martin, K.C., for appellants. W. A. Macdonald, K.C., for respondent.