

1 May, 1893.

## C. P. R. Co. v. COBBAN MANUFACTURING CO.

Ontario.]

*Practice—Trial—Disagreement of jury—Questions reserved by judge—Motion for judgment—Amendment of pleadings—New trial—Judicature Act., rule 799—Jurisdiction—Final judgment.*

In an action brought to recover damages for the loss of certain glass delivered to defendants for carriage, the judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. Defendant then moved in the Divisional Court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the Court amending the statement of claim, and charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial but was not tried before the Divisional Court pronounced judgment on the motion, dismissing plaintiffs' action. On appeal to the Court of Appeal from this judgment of the Divisional Court it was reversed. On appeal to the Supreme Court,

*Held*, affirming the judgment of the Court of Appeal, that the action having been disposed of before the issues involved in the case, whether under the original or amended pleadings, had ever been passed upon or considered by the trial judge or the jury, a new trial should be ordered, and that this was not a case for invoking the power of the Court, under rule 799, to finally put an end to the action.

*Held*, also, that the judgment of the Court of Appeal, ordering a new trial in this case was not a final judgment, nor did it come within any of the provisions of the Supreme Court Act authorising an appeal from judgments not final.

Appeal dismissed with costs.

*Nesbitt*, for appellants.

*J. Osler, Q. C.*, and *Holden*, for respondents.