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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MAY 30TH 1918.

*ROWAN v. TORONTO R.W. CO.

Interest—Action for Damages for Personal Injuries—Findings of Jury—"Verdict"—Judgment by Trial Judge and Court of Appeal in Favour of Defendants—Reversal by Supreme Court of Canada—Judgment for Amount of Damages Found by Jury—Interest from Date of Trial to Date of Judgment of Highest Appellate Court—Whether Recoverable—Judicature Act, secs. 35 (4), 61—Settlement of Minutes of Judgment.

An appeal by the plaintiff from the order of MIDDLETON, J., ante 173.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

N. Sommerville and V. H. Hattin, for the appellant.

J. W. Bain, K.C., for the defendants, respondents.

MULOCK, C.J.Ex., was of opinion that the order appealed from was right. The Judicature Act, R.S.O. 1914 ch. 56, sec. 35 (4), declares that, "unless otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceeding in the action including an appeal." For a plaintiff to be entitled to recover interest after trial, under the provisions of this enactment, upon the damages awarded by the jury, it must appear either that a verdict has been rendered or judgment given in favour of the plaintiff.

* This case and all others so marked to be reported in the Ontario Law Reports.

The plaintiff's counsel contended that the answers of the jury constituted a verdict. The learned Chief Justice was not able to accede to that view. Section 61 of the Judicature Act indicates that answers to questions and a verdict are not the same. Where questions are submitted to the jury to be answered, there never can be a verdict.

That having happened here, there was no verdict, nor was there any judgment in the plaintiff's favour until that of the Supreme Court of Canada, and the date of the order of that Court was the earliest moment from which the plaintiff was entitled to interest.

It was also argued that the order of the Supreme Court of Canada was the order which the trial Judge should have made on the 3rd June, 1897—the day of the trial—and therefore the plaintiff was entitled to amend the judgment entered below as of its date, by directing payment to the plaintiff of the $1,500 mentioned in the order of the Supreme Court. This argument was based upon the theory that the order of an appellate Court is the order which the Court below must necessarily have made. Such is not the law. The power of an appellate Court is not limited to correcting errors below. For example, where, pending an appeal, the law has been varied, the appellate Court may apply the new law, thus making an order which the Court below would not have been entitled to make: Quilter v. Mapleson (1882), 9 Q.B.D. 672; Borthwick v. Elderslie Steamship Co., [1905] 2 K.B. 516. It is the duty of an appellate Court to make such order, whether corrective or otherwise, as the case may require; and its order, when made, unless otherwise provided, must be interpreted as determining the rights of the parties as of the date of the order. Here the Supreme Court of Canada, by its order of the 3rd October, 1899, determined that on that day, not on an earlier day, the plaintiff was entitled to judgment for $1,500.

The Supreme Court, if it had seen fit, might have awarded interest to the plaintiff. It did not do so; and the proper inference was, not that the Court omitted to make the order which, the case called for, but that it did not consider the plaintiff, in all the circumstances, entitled to interest. Until the 3rd October, 1899, the plaintiff ws not entitled to damages. On that day, for the first time, he became entitled. The defendants' indebtedness to the plaintiff on that day, and no other day, was res judicata; and it was not competent for the Court below to increase the amount found due to the plaintiff by the Supreme Court.

The appeal should be dismissed with costs.

RIDDELL, J., reached the same conclusion. In a written judgment, he examined with care the statutes bearing on the subject of interest, and reviewed the history of the legislation and the decided cases. He said that the sole question for determination was, whether the jury's answers to questions submitted to them were "a verdict" within the meaning of sec. 35 (4) of the Judicature Act; and that question must be answered in the negative.

SUTHERLAND, J., agreed, adopting the reasoning of MIDDLETON, J.

KELLY, J., also agreed.

CLUTE, J., dissented, stating reasons in writing. He thought that it was wholly immaterial whether the finding of the jury might be said to amount to a verdict or not. Section 35 (4) provides that interest is to run, unless otherwise ordered, from the time of the rendering of the verdict or the giving of the judgment. The judgment was given on the 3rd June, 1897, but (by error) it was directed to be entered in favour of the defendants instead of the plaintiff. The Court considers that as done which ought to be done; and, when the Supreme Court of Canada reversed the judgment for the defendants and directed judgment in favour of the plaintiff, that judgment related back to the date of the findings of the jury and the judgment directed by the trial Judge, for it was upon the findings of the jury that the judgment was entered.

Reference to Gordon v. City of Victoria (1900), 7 B.C.R. 339.

Appeal dismissed; CLUTE, J., *dissenting*.

HIGH COURT DIVISION.

BRITTON, J. MAY 29TH, 1918.

WALT v. WRIGHT.

Contract—Agreement for Use of Chattels—Lease—Option of Purchase—Construction of Agreement—Rent of Chattels—Right to Return of Chattels—Damages—Injunction—Costs.

Action to recover possession of certain dental goods and equipment, pursuant to an agreement between the parties, dated the 2nd December, 1915.

The action was tried without a jury at Belleville.

W. D. M. Shorey, for the plaintiff.

W. C. Mikel, K.C., and D. E. K. Stewart, for the defendant.

BRITTON, J., in a written judgment, said that the plaintiff was a dental surgeon practising his profession in the village of Stirling, and the defendant, a dental surgeon, practising in the town of Trenton. In 1915, the plaintiff enlisted in the Canadian Army Dental Corps, and went overseas early in 1916. Preparatory to going and in view of the possibility of not returning, or of returning in a condition unfit for the practice of his profession, the plaintiff desired to make an arrangement in reference to his business so that it would be continued as a going concern; and, pursuant to that, he entered into an agreement with the defendant. The agreement made it clear that the plaintiff did not desire to sell out the business, but to keep it as a going concern until his return from overseas or until he should be disabled. By the agreement, the defendant, called "the lessee," agreed to pay $25 a month for the use of the "articles and equipment of a dentist." By the 4th paragraph, the parties agreed that "upon the payment of $1,000, either by rent or cash, during the term of this agreement and lease," the said equipment "shall become the property of the said lessee and he shall have the right to remove or dispose of said equipment without the permission of the said lessor" (the plaintiff).

The learned Judge was of the opinion that the true meaning of the agreement was, and that the intention of the parties was, that the acquiring of the property meant only acquiring it under the terms otherwise provided in the agreement. This meant an acquiring when the lessor or his representatives desired to sell.

There should be judgment for the plaintiff as follows:—

(*a*) Declaring that the plaintiff is entitled to possession of the equipment and goods leased to the defendant.

(*b*) For $50 rent for February and March, 1918, without prejudice to the plaintiff's right to recover additional rent from the 1st April, 1918.

(*c*) For $20 damages.

(*d*) For costs of the action.

The judgment should be without prejudice to an application by the plaintiff for an injunction, if that should become necessary by reason of the defendant failing to comply with the terms of the agreement as to practising within a certain distance of Stirling.

DOUGLAS v. BURY—BRITTON, J.—MAY 31.

Contract—Sale of Timber—Agreement in Writing—Prices of Different Kinds of Timber—Waiver of Objection to Contract—Ratification—"Mill-run."]—Action for $2,154.75, the balance alleged to be due of the price of certain tie-sidings and mill-culls sold by the plaintiff to the defendants with other timber. The agreement made between the plaintiff and one Thompson, agent for the defendants, was reduced to writing and signed by the parties. The plaintiff set up that the contract should not have excluded mill-culls—they should be considered as "mill-run," and should be paid for at the rate of $23.50 per thousand feet. The plaintiff in effect claimed the difference between $8.50 and $23.50 per thousand feet, both as to mill-culls and tie-sidings. The action was tried without a jury at Belleville. BRITTON, J., in a written judgment, after setting out the facts, said that the plaintiff, in consenting to the defendants taking possession of the timber and dealing with it by sale and otherwise, and by being a party to an agreement with the Northumberland Pulp Company Limited, waived his objection to the written contract, and in fact apparently ratified and confirmed it. Action dismissed without costs. E. G. Porter, K.C., for the plaintiff. W. J. Elliott, for the defendants.