Saskatchewan King's Bench, Chambers

[1921] 3 W.W.R. 130, 61 D.L.R. 405

Cleary et al v. Hite

McKay, J.

Judgment: May 24, 1921

Counsel: *T.D. Brown, K.C.*, for defendant, appellant.
D.A. McNiven, for plaintiffs, respondents.

***McKay, J.*:**

1 This is an appeal from the order of the learned District Court Judge of the Judicial District of Estevan whereby he ordered a new trial herein.

2 The action was brought to recover payment for damages alleged to have been done to plaintiffs' crop of flax by defendant's cattle.

3 After the trial at which evidence was heard but not argument the learned trial Judge adjourned the hearing of the argu ment *sine die*. Subsequently the argument was heard, and the counsel for defendant contended that the action should be dismissed as there was no evidence that there was a by-law in force in the municipality in which the alleged damage was done, restraining animals from running at large.

4 It appears that no evidence was submitted at the trial as to the existence of any by-law. The learned trial Judge thereupon intimated that, in his opinion, the plaintiffs could not recover unless there was a by-law in force in the municipality in which the damage was done restraining animals from running at large at the time such damage was done. Notwithstanding such intimation however the learned counsel for plaintiffs contended that in order for plaintiffs to succeed it was not necessary to prove any by-law, and the learned Judge adjourned the hearing of the said argument to permit plaintiffs' counsel to produce authorities in support of his contention.

5 Upon resuming the argument the plaintiffs' counsel applied for leave to tender evidence as to the existence of such a by-law as above referred to, and thereupon the learned trial Judge made the order appealed from.

6 Counsel for defendant, appellant, contends that the learned trial Judge had no jurisdiction to make the said order.

7 In his reasons for making the said order the learned Judge states:

> It appears to be within the discretion of the trial Judge at any period in a case to allow further evidence to be called for

his own satisfaction on application for leave by either party even though he is doubtful whether the party is entitled to put in such evidence as a matter of right. *Budd v. Davison*, 29 W.R. 192.

8 In this *Budd Case* the action was for the execution of a lease of a house. The defence set up was misrepresentation on the subject of drainage of the house which defendant said had been stated to him by the plaintiff to be very good, whereas the drainage was so bad and ineffective as to render the house unfit for residence. At the trial a large amount of evidence on the subject of drainage was given on each side and among others the defendant called several scientific witnesses in support of his case. On the conclusion of the defendant's case the counsel for the plaintiff applied for leave to adduce scientific evidence to rebut the evidence of the experts who had been called by the defendant's counsel. The application was opposed. In allowing the applications Malins, V.C. stated:

It is doubtful whether the plaintiffs are entitled to call further evidence or not, but that there is no doubt the judge may allow them to do so to assist himself.

9 It is to be noted this case is entirely different from the case at bar. In the *Budd Case* the issue to be tried was clearly set out in the pleadings and evidence was called on each side, and the application was made at the close of defendant's evidence to call scientific evidence to rebut the defendant's scientific evidence. But in the case at bar the application is to have a new trial on new issues, as the order appealed from allows certain amendments to be made to the claim, namely, the pleading of the existence of the by-law, etc.

10 The trial was held on the issues raised on the pleadings as they then stood, and the evidence was heard on these issues, and now when plaintiff is of the opinion he cannot succeed on said issues and evidence, he desires to amend and have a new trial. This, in my opinion, is altogether different from the question which arose in the *Budd Case*, and I do not think the principle or practice referred to by Malins, V.C. would apply in the case at bar.

11 Neither could the said order be made, in my opinion, under sec. 55 (1) of *The District Courts Act*, ch. 40, R.S.S., 1920. This section reads as follows:

Every judge of the district court, in any action at the trial of which he has presided, may on application set-aside all orders made by him at the trial, and review and set aside his judgment, and order a new trial and rehear all matters argued before him.

12 In *Murtagh v. Barry*, 24 Q.B.D. 632, 59 L.J.Q.B. 388, it was held that

The power to grant new trials conferred upon the Judges of County Courts by s. 93 of *The County Courts Act, 1888*, is not an absolute power to be exercised upon any grounds which the judge may think fit, but subject to the same limitations as to the grounds on which a new trial may be granted as are imposed upon Judges of the Supreme Court.

13 Sec. 93 of *The County Courts Act, 1888*, above referred to, is in part as follows:

The Judge shall in every case whatever have the power, if he shall think just, to order a new trial to be had upon such items as he shall think reasonable and in the meantime to stay proceedings.

14 In *Sklar v. Borys*, 10 Sask. L.R. 359, [1917] 3 W.W.R. 188, Elwood, J. held that above sec. 55 does not go any farther than the above-quoted section of *The County Courts Act, 1888*, and that, therefore, there would be the same limitations upon this power of the District Court Judges with regard to granting new trials as are upon the County Court Judges in England, and I agree with this.

15 The *Murtagh Case* was decided in 1890 and the same question again arose in *Brown v. Dean*, [1910] A.C. 373, 79 L.J.K.B. 690 , where the House of Lords held that the power given by said sec. 93 to a County Court Judge is a judicial not an arbitrary discretion and the Judge is bound by the Rules binding upon the High Court.

16 It seems to me that the effect of the decision in the *Murtagh Case* is that if the plaintiff could not succeed in appeal then the District Court Judge should not grant a new trial.

17 If the learned District Court Judge in the case at bar had dismissed the application and the plaintiffs appealed, I fail to see how he could succeed in getting a new trial; because what the plaintiffs now want is to amend their pleadings so as to raise new issues and thus be enabled to call new evidence. It is not a case of finding new evidence after the trial. The affidavit of counsel for plaintiffs clearly shows this. In *Brown v. Dean, supra*, Lord Loreburn, L.C. in refusing the application for a new trial stated in part:

> My lords, the chief effect of the argument which your Lordships have heard is to confirm in my mind the extreme value of the old doctrine "*interest reipublicae ut sit finis litium*" remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist.

18 In my opinion then the learned District Court Judge had no power to make the order appealed from, and the said order will be set aside, and there will be judgment for the defendant dismissing the plaintiffs' action with costs.

19 The defendant will be entitled to the costs of this appeal.