1904
*Nov. 28.
1905
*Jan. 31.

JULIUS G. SIEVERT (PLAINTIFF).....APPELLANT;

AND

SAMUEL M. BROOKFIELD (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Trespasser—Licensee—Master and servant.

A trespasser or bare licensee injured through negligence may maintain an action.

The workmen of a contractor for tearing down portions of a building in order to make alterations turned on a water tap in a room where they were working and neglected to turn it off whereby goods in the story below were damaged by water.

Held, Davies and Nesbitt JJ. dissenting, that the act of the workmen was done in course of their employment; that it was negligent; and that the owner of the goods could recover damages though he was in possession merely as an overholding tenant who had not been ejected.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a verdict for the plaintiff and ordering a new trial.

This is an action brought by the appellant, Julius G. Sievert, a tobacco merchant and manufacturer,

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1904

SIEVERT v. BROOKFIELD.

residing and doing business in Halifax, Nova Scotia, against Samuel M. Brookfield, a builder and contractor, residing and doing business in the same city, for injuries occasioned by the negligence of a servant of the respondent in carelessly and improperly leaving a water tap open and causing the shop and warehouse occupied by the appellant to be flooded with water and his stock in trade seriously injured.

The goods were contained in a four storied building, Nos. 187 and 189 Hollis street, in the City of Halifax, which was and had been for many years occupied by appellant as a yearly tenant, his year expiring May 1st.

On June 1st, 1882, one William M. Harrington was the owner of the building and premises, and on that date executed a mortgage thereof to one Brenton H. Collins. William M. Harrington subsequently died and the title to the property became vested in one Emily A. Piers, a trustee under the will of the said William M. Harrington. The Eastern Canada Savings & Loan Company arranged with the Harrington estate to purchase the property, and in consequence of some defect in the title this was carried out by means of a foreclosure sale. Shortly after the sale the loan company's solicitor wrote three letters to the appellant, endeavouring to make some arrangement with him in reference to his vacating the building. Finally, an agreement was arranged and executed, by which appellant was to vacate on 28th February, 1903, and was to be paid $510 and provided with new premises till the first of May at a rental of $55 per month.

The appellant did not vacate the premises on Saturday, the 28th of February, 1903, because the new premises to be provided for him under the terms of the agreement were not then ready for occupation, but on Monday the 2nd of March he commenced to move

1904

SIEVERT v. BROOKFIELD.

out of the building. He removed his property from the fourth floor on that day. The respondent had a contract with the loan company to remodel and repair the building, and his workmen had for some time previously, by leave of the appellant, been working in the cellar of the premises by preparing the foundation for a vault, and on Tuesday, the 3rd of March, respondent's workmen entered the fourth story for the purpose of tearing down the plaster and partitions. In the room where the work began there was a tap connected with the city water supply pipe, with a catch basin and waste pipe, and on Tuesday afternoon one of the workmen, named Moore, turned the tap for the purpose of cleaning out the basin and could not say that he turned it back again. The workmen, when working in the room where the basin was, covered it with a board to keep the plaster from dropping into the basin and when they had finished working in that room they removed the board and washed out the basin but did not turn off the water. Work was then proceeded with in the next room where the knocking down of the plaster upon the wall opposite the basin would drive plaster through into the first-mentioned room and into the basin. The second, third and fourth stories are entirely separate from the ground floor and basement and are reached by a separate street door. When the workmen left, on Tuesday evening, the door leading to the upper stories was locked and was not opened until Wednesday morning.

On Wednesday morning the plaintiff found the three lower stories of the building saturated with water which had flowed from the tap in question, and that his stock in trade, and tobacco in course of manufacture, had been very seriously injured. This action was accordingly brought and on the trial questions were

1904

SIEVERT v. BROOKFIELD.

submitted to the jury which, with their answers, are as follows:

"I. Q. What was the nature of the plaintiff's occupation of the building between the end of the last day of February and the time of the flooding? (Answer fully.)

"A. Tacit consent of the loan company.

"II. Q. If you say that he was in possession with the assent, tacit or otherwise, of the loan company state the grounds on which you base such finding?

"A. Because the store which was promised him in the agreement with Mrs. Piers was not ready for occupancy according to the evidence of Mr. Sievert, which was not contradicted, and the keys not delivered up.

"III. Q. Did the defendant's workmen enter the building for the purpose of taking possession of the whole premises or only of that part in which they intended to carry on the work?

"A. Not that day.

"IV. Q. Was the injury to plaintiff's goods caused by the negligence of defendant's servant?

"A. Yes.

"V. Q. If so, was the act or neglect of the defendant's servant in regard to a matter within the scope of his authority?

"A. Yes.

"VI. Q. What damages has plaintiff sustained in consequence of defendant's negligence?

"A. One thousand dollars."

Upon the findings of the jury, Mr. Justice Meagher directed judgment to be entered for the sum of $1,000 and costs.

The defendant moved before the Supreme Court of Nova Scotia *en banc* for a new trial of the action and the plaintiff also moved for a new trial as to damages

1904

SIEVERT v. BROOKFIELD.

alone. The defendant's motion was granted and the motion by the plaintiff was refused. The plaintiff now appeals from the order granting a new trial generally.

W. B. A. Ritchie K.C. and *Lovett* for the appellant. The verdict ought not to have been set aside as there was ample evidence in support of the findings. The jury were entitled and bound to draw all the necessary inferences and ought, in fact, to have given larger damages. See *Byrne* v. *Boadle* (1); *The Grand Trunk Railway Co.* v. *Rainville* (2), [affirmed by the Supreme Court of Canada (3) on appeal], remarks by Osler J. at page 249 and cases there refererred to; *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (4); *Davey* v. *London & South Western Railway Co.* (5), at page 76 *per* Bowen L. J.; *Re Leeds & Hanley Theatres* (6), at page 7. The negligent acts of respondent's servants were in regard to a matter within the scope of, or incident to, their employment, and the jury has made an express finding of fact to this effect. *Whiteley* v. *Pepper* (7); *Limpus* v. *London General Omnibus Co.* (8); *Ruddiman* v. *Smith* (9); *Abelson* v. *Brockman* (10); *Stevens* v. *Woodward* (11) at page 320; *Whitehead* v. *Reader* (12).

The appellant's occupancy of the building was lawful and as of right, or with the consent of the owner. The appellant, under his lease from the Harrington estate, had a good title to the property till May 1st.

Under all the circumstances it must be assumed that the owner consented to a delay of two or three days in vacating the premises in accordance with the

(1) 2 H. & C. 722.
(2) 25 Ont. App. R. 242.
(3) 29 Can. S. C. R. 201.
(4) 3 App. Cas. 1155.
(5) 12 Q. B. D. 70.
(6) 72 L. J. Ch. 1.
(7) 2 Q. B. D. 276.
(8) 1 H. & C 526.
(9) 60 L. T. 708.
(10) 54 J. P. 119.
(11) 6 Q. B. D. 318.
(12) [1901] 2 K. B. 48.

agreement of January 31st. There are other circumstances tending strongly to show this, besides the new premises not being ready. See *Gallagher* v. *Humphrey* (1); *Watkins* v. *Great Western Railway Co.* (2); *York* v. *Canada Atlantic Steamship Co.* (3), *per* Sedgewick J. at page 171; *Harris* v. *Perry & Co.* (4); *Holmes* v. *North Eastern Railway Co.* (5), at page 258, *per* Channell B.

If appellant was a mere licensee respondent is liable for damages caused by his negligent act although not wilful if such act be a wrongful act of commission, or the injury arose from a concealed cause of mischief. Beven on Negligence (2 ed.) p. 525 *et seq*; *Bolch* v. *Smith* (6), at page 742, *per* Wilde B.; *Gautret* v. *Egerton* (7); *Burchell* v. *Hickisson* (8). The turning on and leaving turned on the tap was a wrongful act of commission; it created a concealed cause of mischief. The duty to use ordinary care and skill in order to avoid danger was neglected. *Heaven* v. *Pender* (9), at page 509; *Hawley* v. *Wright* (10), at page 45, *per* Sedgewick J. See also *Barnes* v. *Ward* (11): *Bird* v. *Holbrook* (12). This is not a case for the question to be considered as to whether or not the respondent had good reason to suppose, or whether it was probable, that the goods of a trespasser would be on the premises or not, and likely to be injured by the water at the time of the injury. This is not a case of probability but of certainty. *The goods were there to the knowledge of the respondent.* The negligence complained of is not non-feasance but misfeasance. The injury arose from a concealed cause of mischief, that

(1) 6 L. T. 684.
(2) 46 L. J. C. P. 817.
(3) 22 Can. S. C. R. 167.
(4) [1903] 2 K. B. 219.
(5) L. R. 4 Ex. 254.
(6) 7 H. & N. 736.
(7) L. R. 2 C. P. 371.
(8) 50 L. J. Q. B. 101.
(9) 11 Q. B. D. 503.
(10) 32 Can. S. C. R. 40.
(11) 9 C. B. 392
(12) 4 Bing. 628.

1904

SIEVERT v. BROOKFIELD.

amounted to a trap. The existence of the basin and waste pipe sufficient to carry the water off, was an intimation to all in the building that no injury would arise from the escape of the water through the tap; it was unnecessary to examine every tap in the building to see that none were left running. The fact that the tap was left open and the basin clogged was concealed from the appellant and the source of the danger was not apparent.

The finding in answer to question VI. as to damages is against the weight of evidence. The only evidence as to damage to injured stock was offered by the appellant, was not broken down on cross-examination, and is absolutely uncontradicted. This evidence is amply sufficient to prove the damages to be $2153.86. A new trial may be ordered only as to the question of damages. Judicature Rules, Ord. 37, R. 7; *Commercial Bank* v. *Morrison* (1); *Hesse* v. *St. John Ry Co.* (2); *Marsh* v. *Isaacs* (3). We also refer to *Bayley* v. *Manchester, &c., Railway Co.* (4); *Milner* v. *Great Northern Railway Co.* (5); *Marble* v. *Ross* (6); *Herrick* v. *Wixom* (7); and the cases cited in Roberts & Wallace Employers' Liability Act (ed. 1895) at page 87.

Mellish K.C. and *Silver* for the respondent. The injury was simply the result of an accident, and was not caused by any wilful or wanton act. The plaintiff had no right whatever to be in the building, he was a trespasser, and the defendant owed to him no duty other than that of abstaining from the infliction of a wilful or wanton injury. This case is governed by the decision in *Jones* v. *Foley* (8), and the new trial was properly ordered. See also *Beddall* v. *Maitland*

(1) 32 Can. S. C. R. 98.
(2) 30 Can. S. C. R. 218.
(3) 45 L. J. C. P. 505.
(4) L. R. 8 C. P. 148.
(5) 50 L. T. 367.
(6) 124 Mass. 44.
(7) 121 Mich. 384.
(8) [1891] 1 Q. B. 730.

(1); *Stone* v. *Jackson* (2); *Jordin* v. *Crump* (3); *Murley* v. *Grove* (4); and *The Grand Trunk Railway Co.* v. *Anderson* (5).

Even if the first finding stands the plaintiff cannot recover, because he thereby becomes only a bare licensee upon the property; he is there without any allurement, inducement or invitation express or implied, on the part of the defendant, and the defendant owes him no duty other than that of abstaining from doing to him or his property a wilful or wanton injury. Beven on Negligence, page 767; *Gautret* v. *Egerton* (6); *Wilkinson* v. *Fairrie* (7); *Burchell* v. *Hickisson* (8); *Batchelor* v. *Fortescue* (9); *Ivay* v. *Hedges* (10); *Southcote* v. *Stanley* (11); *Rogers* v. *Toronto Public School Board* (12).

The plaintiff's license, if any, was subject to the risks incidental to the projected presence and work of the defendant's workmen, of which the uncontradicted evidence shews the plaintiff had notice, and therefore he cannot recover. *Castle* v. *Parker* (13); *Brooks* v. *Courtney* (14); *Southcote* v. *Stanley* (11), *Gautret* v. *Egerton* (6). Even if the defendant were gratuitous bailee of the plaintiff's goods, he would not be liable for their injury under the circumstances of this case. *Giblin* v. *McMullen* (15). And *a fortiori*, he is not liable when he assumed no trust in respect to the goods. The answer to the fourth question is not supported by affirmative evidence, and was properly set aside. The evidence is equally consistent with the absence as with the existence of negligence

(1) 17 Ch. D. 174.
(2) 32 Eng. Law. & Eq. 349.
(3) 8 M. & W. 782.
(4) 46 J. P. 360.
(5) 28 Can. S. C. R. 541.
(6) L. R. 2 C. P. 371.
(7) 1 H. & C. 633.
(8) 50 L. J. Q. B. 101.
(9) 11 Q. B. D. 474.
(10) 9 Q. B. D. 80.
(11) 1 H. & N. 247.
(12) 27 Can. S. C. R. 448.
(13) 18 L. T. 367.
(14) 20 L. T. 440.
(15) L. R. 2 P. C. 317.

1904

SIEVERT v. BROOKFIELD.

on the part of the defendant's servants. We rely on the reasons given by Ritchie J. and on *Cotton* v. *Wood* (1); *Lovegrove* v. *The London, Brighton etc. Railway Co.* (2), at page 692.

The answer to the fifth question was properly set aside; it is not supported by the evidence and the alleged act or neglect of the defendant's servant was not in regard to a matter within the scope of his authority. We rely on the reasons given by Ritchie J. and on the authorities he mentions. See also *McKenzie* v. *McLeod* (3); *Mitchell* v. *Crassweller* (4); *Storey* v. *Ashton* (5); *Lamb* v. *Palk* (6).

SEDGEWICK and GIROUARD JJ. concurred in the opinion of Mr. Justice Killam.

DAVIES J. (dissenting.)—I agree with the majority of the Court of Appeal for Nova Scotia and would, therefore, dismiss the appeal. The rights and liabilities of the parties as regards each other depend altogether upon the legal character of the occupancy of the premises by the plaintiff at the time his goods were injured. If occupying as of right as against the owner, the latter owed him a duty which involved taking care not to negligently destroy his goods. If there wrongfully it seems to me the duty was limited to the obligation not to do so recklessly, wantonly or wilfully. I agree with the judgment below that he was there as a trespasser or, at the most, as a bare licensee.

The defendant was a contractor employed under a contract with the owner, the Eastern Loan Company, in making an alteration in the upper story of the building in a portion of the lower part of which the

(1) 8 C. B. (N. S.) 568.
(2) 16 C. B. (N. S.) 669.
(3) 10 Bing. 385.
(4) 13 C. B. 237.
(5) L. R. 4 Q. B. 476.
(6) 9 C. & P. 629.

plaintiff's goods were at the time of the accident. The jury found that the accident was caused by one of the defendant's workmen negligently turning on the water-tap in the room where he was working and not turning it back, in consequence of which the water overflowed the basin and ran down through the floor upon the plaintiff's goods.

Now, the plaintiff was not there under any lease or agreement with or consent of the owner. As against him he had no right of possession or occupancy. He was, in point of fact, a trespasser in the sense that, after the end of February at any rate, he was unlawfully in possession as against the owner and as against the defendant, who was there as a contractor to carry out the alterations for the owner. He was not even a tenant at will but a tenant at sufferance, at the best. He entered, it is true, by a lawful lease, but held over by wrong. Co. Litt. 57*b*, cited 3 C. B. 229 note (*b*). See also Cole on Ejectment, p. 456. There was no contract between the plaintiff and the owner, the Eastern Loan Company, the defendant's employer. The company did not undertake with the plaintiff that their servants would not be guilty of negligence in carrying out the alterations. No duty was cast upon the defendant to take care of the plaintiff's goods, at any rate, none beyond that which a gratuitous bailee undertakes. For gross negligence there might be liability, but, for such negligence as was found in this case, there cannot be any liability unless arising from some duty which the defendant owed the plaintiff to protect his property.

I think the principle governing the case of *Jones* v. *Foley* (1) should apply to the facts here. The owner of the premises, there, was held not to be liable for unavoidable damages caused by his servants to the

(1) [1891] 1 Q. B. 730.

1905

SIEVERT v. BROOKFIELD.

Davies J.

goods of his overholding tenant in pulling down the roof of the building. The ground upon which this was held was that the defendant was perfectly justified in pulling down the house; that, although the plaintiff was in occupation of the house with his goods, he had no right whatever there as his tenancy had expired, and that, if he chose to remain improperly in the building with his goods, he did so at his own risk and could not prevent the defendant pulling down the house or exercising his rights as owner, even if such exercise of his rights necessarily and unavoidably injured the goods of the plaintiff. No doubt the defendant would, in that case, have been liable for the wilful, wanton or reckless conduct of his workmen, but it seems to me that, if not liable for such damage as was unavoidably caused to the plaintiff's goods in the removal of the roof, he cannot be held for that which was negligently caused, because there was no duty, on the part of the defendant, to protect the goods or property of the overholding tenant. The facts of this case seem to me very similar.

The defendant, as the contractor for the owner, was lawfully in possession of the premises and in actual occupancy of the upper story and also of the cellar. He had a perfectly legal right to carry out such alterations in the building as he pleased. He owed no duty to the plaintiff, who was wrongfully in occupation of part of the premises, to protect the latter's goods. By remaining improperly in occupation of certain rooms in the building and keeping his goods there he did so at his own risk. If in the exercise of his legal rights the defendant had entirely removed the upper story of the building and the rain had poured in and destroyed the plaintiff's goods, the defendant could not, under the principle on which *Jones* v. *Foley* (1) was decided,

(1) [1891] 1 Q. B. 730.

have been held liable for any damages caused thereby. And I take it, the principle on which he should be held not liable is that the plaintiff was there without right, that the defendant was merely exercising his legal rights in altering or removing part of the building, and that, while he must be liable for such gross negligence as is involved in reckless, wanton or wilful acts causing injury to the plaintiff's goods which were known to be in the premises, he cannot be liable for damages caused by the mere negligence of his servants in doing what he had a perfect right to do, because he owed no duty to the plaintiff under the circumstances, and the latter, by wilfully insisting upon remaining where he was, after his legal right to remain had ceased, must put up with the consequences of his own obstinacy. He could not, by his wrongful act of remaining in occupation of part of the premises, impose a duty upon the defendant.

I do not think there is any evidence to justify the finding of the jury that the plaintiff was in occupation of the premises with the tacit consent of the owner after the end of February. The evidence is all the other way. The defendant was, therefore, a trespasser, in the sense that he persisted in retaining the occupancy of the rooms after his right to do so had expired. He remained in such occupation with the full knowledge that the defendant's workmen were engaged in pulling the upper part of the premises to pieces, moving all the partitions, knocking down all the plaster, etc., and he must be taken to have elected to continue in his occupation subject to all the risks incident to such occupation while workmen were actually engaged, with his knowledge, in tearing down the walls and ceilings above him.

The learned equity judge, who dissented from the majority judgment in the court below, did so upon the

1905

SIEVERT v. BROOKFIELD.

Davies J.

ground that the plaintiff's possession was not that of a trespasser or even a bare licensee, but that he had "a *right* to possession as distinguished from mere possession." I am not able to reach that conclusion under the evidence and, of course, such a conclusion would, necessarily, make a marked difference in the rights and liabilities of the parties towards each other. But, even if the plaintiff was there by the "tacit consent" or mere acquiescence of the owner, I take it there would be no difference in the result.

In the case of *Ivay* v. *Hedges* (1), it was held that where a tenant has the mere privilege of using the roof of the tenement to dry linen on, which roof was flat with an iron rail round the edge, to the knowledge of the landlord out of repair, no duty arises on the landlord's part to protect such a place. The tenant, plaintiff, when going to the roof for the purpose of removing linen, slipped and caught at the rail which gave way so that he fell into the court yard. The landlord was held not liable as owing no duty to the tenant who, as regards the roof, was a mere licensee.

The same absence of legal duty is the ground for the decision in *Batchelor* v. *Fortescue* (2), and the learned judge, in this latter case, used expressions as to the absence of any such duty in the case of mere licensees which, if good law, would govern the case at bar. Smith J. says, at page 477:

> There was no duty cast upon the defendant to take due and reasonable care of him.

And Brett M. R. says, at page 479:

> There was no contract between the defendant and the deceased; the defendant did not undertake with the deceased that his servants should not be guilty of negligence.

In commenting on this latter decision, Mr. Beven points out that the existence or non-existence of a

(1) 9 Q. B. D. 80. (2) 11 Q. B. D. 474.

contract cannot be a wholly adequate measure of the responsibility of one man with reference to the safety of another and though

no duty was cast upon the defendants to take care that the deceased should not go to a dangerous place,

yet, if in full sight of defendants' servants, he were there, they were in a different position with regard to the continuance of operations known to them to be dangerous than if he were not there. This criticism obviously has reference, as I understand it, to the point that what might be mere negligence not involving liability in one set of circumstances might, in different circumstances and relations, amount to gross and wilful negligence for which liability would attach.

In *Sullivan* v. *Waters* (1) the law is succinctly summed up by Pigot C. B. at page 475, as follows:

A mere license given by the owner to enter and use premises which the licensee has full opportunity of inspecting which contained no concealed cause of mischief and in which any existing source of danger is apparent, creates no obligation in the owner to guard the licensee against danger.

In the case of *Sweeny* v. *Old Colony and Newport Railroad Co.* (2), Chief Justice Bigelow thus states the law, at page 374:

The true distinction is this; a mere passive acquiescence by the owner or occupier in a certain use of his land by others involves no liability, but, if he directly or by implication induces persons to enter or pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use and, for a breach of this obligation, he is liable in damages to a person injured thereby.

This, he adds, is the pivot on which the cases turn.

Under these principles and authorities, even if the plaintiff was in occupation by the "tacit consent" or mere acquiescence of the owner, I would still be of opinion that, for the negligence proved, there was no liability.

(1) 14 Ir. C. L. R. 60.

(2) 10 Allen (Mass.) 368.

1905

SIEVERT v. BROOKFIELD.

Nesbitt J.

NESBITT J. (dissenting). — I would dismiss this appeal upon two grounds; (1) that no duty was owed to the plaintiff except to avoid wilful injury; and (2) that the act of the servant was not within the scope of his employment.

KILLAM J.—I agree that the evidence did not warrant the finding of the jury, that, at the time of the doing of the injury complained of, the plaintiff was occupying the premises in question by the tacit consent of the loan society.

The plaintiff became a tenant of the premises under the mortgagor. Default having been made, the premises were sold under the mortgage and were purchased by the Eastern Canada Savings and Loan Society, Limited. By arrangement between the mortgagor and the plaintiff, the latter was to be allowed to continue in occupation until the 28th of February following the sale. There was evidence justifying the inference that the society consented to this continuation. Whatever equitable rights the plaintiff may have had, the society had, at law, after the 28th of February, the right to evict him. I take it that he must be treated, as regards his legal rights, as in the position of an overholding tenant whom the landlord has, so far, taken no active steps to evict.

The plaintiff moved his goods from the upper stories of the building and, with his knowledge and consent, the defendant, employed by the society, put in workmen to tear down some of the internal portions of these upper stories and to make alterations therein. The defendant and his workmen knew that the plaintiff was in occupation of the lower stories and had merchandise there. In my opinion they were bound, in carrying on their work, to exercise reasonable care not to do injury to the plaintiff's goods below, and it

1905

SIEVERT v. BROOKFIELD.

Killam J.

seems unimportant, so far as regards the liability of the defendant, whether the plaintiff had or had not a right to continue in occupation or to keep his goods upon the premises. In support of this view I think it necessary to refer only to the well known case of *Davies* v. *Mann* (1), the principle of which appears to me to directly apply. Cases with regard to the duty of the owner of lands or premises to make them safe for trespassers, known or unknown, expected or unexpected, or for mere licensees, do not appear to me to have any application, and the same may be said of the case of *Jones* v. *Foley* (2). The report of that case states explicitly that the act causing injury was done unavoidably. No question of negligence arose.

In my opinion, the act of the workmen which caused the injury should be considered to have been done in the course of their employment. They were employed to tear down the plaster. In doing so they obstructed the flow of water in the basin; they left it in that condition; one of them turned on the tap, either before or after the obstruction was caused, and in so leaving it obstructed, with the tap turned on, it appears to me that they were guilty of negligence for which the defendant was responsible. See *Ruddiman* v. *Smith* (3); *Abelson* v. *Brockman* (4); *Stevens* v. *Woodward* (5).

While the persons employed by the plaintiff to examine the goods and appraise the damage estimated it at a certain amount, the jury were not absolutely bound to accept their appraisement, even without other evidence. They did have the parties before them and were entitled to judge of the value of their estimate from the oral evidence. Although that evidence did not establish any other specific sum as represent-

(1) 10 M. & W. 546.
(2) [1891] 1 Q. B. 730.
(3) 60 L. T. 708.
(4) 54 J. P. 119.
(5) 6 Q. B. D. 318.

1905

SIEVERT v. BROOKFIELD.

Killam J.

ing the amount of damage done, yet the jury might act upon the view that they were not satisfied that damage to a greater amount than $1,000 was done. There seems to be no sufficient ground for allowing the case to go to a new trial upon the question of damages.

In my opinion the appeal should be allowed, the order for a new trial discharged and the original judgment affirmed.

Appeal allowed with costs.

Solicitor for the appellant: *Henry C. Borden.*

Solicitor for the respondent: *Alfred E. Silver.*