

Supreme Court of Canada
Bustin v. W. H. Thorne & Co. (1906) 37 SCR 532
Date: 1906-05-04

Bustin v. W. H. Thorne & Co., Ltd.

1906: May 3, 4.

Present:—Sedgewick, Girouard, Davies, Idington and MacLennan JJ.

New trial—Judgment in court below on motion—Equal division—Appeal—Jurisdiction—Charge to jury—Misdirection—Bias.

Appeal from a decision of the Supreme Court of New Brunswick¹ refusing, by equal division, to set aside a verdict for the plaintiffs and order a new trial.

The W. H. Thorne & Co. brought action to recover from Bustin the price of goods sold on his alleged guarantee to one Segee. Bustin had given a guarantee to pay for goods so sold to the extent of \$1,000 and had paid over \$900, thereunder. The first of the goods sued for were supplied some six months after those paid for by Bustin had been delivered and were charged in plaintiffs' books to Segee to whom all the accounts were rendered. On the trial the secretary of the W. H. Thorne & Co. swore that Bustin had authorized the further supply to Segee on his account and had requested that they be charged to Segee to keep them separate from his own account with the company. This the defendant denied and testified that he had notified the company that he would no longer be responsible but neither the notice nor a copy of it was produced nor any proof except a stenographer's notes on dictation by defendant.

The jury answered questions submitted by both counsel and the court on which a verdict was entered

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for the plaintiff company for the amount claimed. Motion was made for a new trial on numerous grounds of improper reception and rejection of evidence, misdirection and improper direction and remarks by the presiding judge. The court being equally divided the motion for a new trial failed and the defendant appealed to this court.

The formal rule or judgment appealed against drawn up by the clerk of the court on the motion for new trial, after the formal portion as to hearing counsel, stated that "the court having taken time to consider, and being equally divided, the said rule drops and the verdict entered for the plaintiff on the trial stands."

On the appeal being called *Hazen K.C.* and *W.H. Harrison* for the respondents

¹ 37 N.B. Rep. 163.

moved to quash on the ground that the said formal rule or order was not a judgment from which an appeal would lie.

Pugsley K.C., Attorney-General for New Brunswick, was not called upon to support the jurisdiction of the court and the motion to quash was overruled.

Counsel were then heard on the merits after which the court gave judgment ordering a new trial, on the ground that the charge of the trial judge to the jury shewed passion and bias and was improper. Davies J. dissented as follows:

DAVIES J. (dissenting).—I have carefully read the charge to the jury of Chief Justice Tuck and while some remarks relating to the several counsel engaged in the case might have been better unsaid I cannot

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find anything in the charge taken as a whole to justify a new trial being granted.

It is not now open to the Attorney-General to complain that a particular question was not put to the jury relating to the delivery of a letter from the defendant to the plaintiff company's manager terminating any further liability on his part for goods supplied to one Segee. It was open to him to have had the question put at the trial. He did not elect to do so and cannot now complain of its not having been put.

The evidence while conflicting was fully sufficient to justify the findings and the findings ample enough to justify the entering of the verdict.

I would dismiss the appeal.

Appeal allowed with costs.

Solicitor for the appellant: J. Joseph Porter.

Solicitor for the respondents: W. H. Harrison.