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*Mar. 13.

*May 1.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS).. } APPELLANTS;

AND

COBBAN MANUFACTURING COMPANY (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR 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 authorizing an appeal from judgments not final.

*PRESENT :—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

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APPEAL from the judgment of the Court of Appeal for Ontario reversing the judgment of the Divisional Court which dismissed the respondents' action.

This was an action brought by the respondent company, claiming $1,487.17 damages from the appellant company as the value of three cases of plate glass delivered to the appellants in Montreal for carriage to Toronto, alleging the same to have been so negligently loaded upon the appellants' cars, and the cars so negligently managed during transit, that the glass was thrown from the cars and destroyed.

The respondents' defence was denial of negligence and setting up a special contract exempting the carriers from liability in consideration of their accepting a reduced freight rate.

The facts and procedings are fully stated in the head note and in the judgment of Mr. Justice Sedgewick hereinafter given.

Nesbitt for appellants.

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

The case was not disposed of on the merits and consequently the cases and authorities relied on need not be referred to.

The rules of the judicature act referred to by counsel on the question of procedure were rules 219, 655 and 799.

The judgment of the court was delivered by

SEDGEWICK J.—This is an action brought by the plaintiff company against the Canadian Pacific Railway Company to recover damages by reason of the loss of a quantity of plate glass, while being carried from Montreal to Toronto on the defendant company's line of railway. The allegation in the statement of claim was that the loss was occasioned by the negligent

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loading of the glass, as well as by the careless and negligent management of the cars while the goods were in transit. The defendants' defence was the denial of negligence and the setting up of a special contract whereby, in consideration of obtaining a reduced freight rate, the plaintiff company agreed that the railway should not be responsible for loss even if caused by the negligence of its servants.

The case was brought on for trial at the Toronto Spring Assizes of 1891, before Mr. Justice Street and a jury. The only question left to the jury was that of negligence, upon which they failed to agree, the learned judge stating that if there were any other questions to be decided he would decide them himself. During the trial counsel for the defence made a motion for non-suit which was informally dismissed, but there was a general understanding before the jury returned that the other questions in the case, as for instance the effect of the release set up by the defence, were to be argued before the trial judge at a subsequent time.

It would seem, however, that no further argument took place nor were any of the questions involved ever again brought before the trial judge.

On the 8th of May following, the defendants gave notice that a motion would be made before the Divisional Court by way of appeal from Mr. Justice Street's decision refusing a non-suit, and for an order that the action be dismissed on the grounds (principally) that there was no evidence of negligence, and that the release pleaded was of itself a complete bar to the action.

Subsequently, and before the hearing of the appeal, an order was made in chambers allowing the plaintiffs to amend their statement of claim, and thereupon it was amended, the defendants filing an amended statement of defence. The appeal then came on to be heard, and the Divisional Court gave judgment ordering the

action to be dismissed, upon the sole ground that there was no evidence of negligence to go to the jury. No reference was made in the judgment to the fact that the pleadings had been amended since the abortive trial, although a new cause of action, or at least a different species of negligence, was therein set up, and questions were there raised that had not been and could not be dealt with at the trial.

From this judgment the plaintiff company appealed to the Court of Appeal.

That court allowed the appeal, upon the ground that the Divisional Court went too far in disposing of the case as they did 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.

I entirely concur in this view.

This case has never been tried; although standing for trial by a jury no jury has yet passed upon the issues of fact involved, nor has the judge who heard the evidence given a decision upon the remaining questions. The appeal court was, as well as this court, entitled to the aid of the judge and jury before whom the case previously came in their respective functions and should not have been asked to come to a judgment upon the merits of the case without it. In other words the case was not ripe for determination, and the Court of Appeal was right in so declaring.

When and under what circumstances resort may be had to the powers conferred upon the court by rule 799 of the Ontario rules need not now be determined. The facts in this case do not, I think, justify the exercise of those powers.

This appeal should be dismissed upon the ground stated. I may add that I have doubts as to the jurisdiction of this court.

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The judgment of the Appeal Court was clearly not a final judgment, nor does it, as I think, come under the other clauses of the statute defining our jurisdiction.

Appeal dismissed with costs.

Solicitors for appellant: *Wells & Macmurchy.*

Solicitors for respondents: *Thomson, Henderson & Bell.*