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* April 2,3.

* April 20.

JOHN DEMPSTER AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

F. W. LEWIS AND W. S. WAUGH (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of monument—Sample—Evidence—Questions of fact.

There is no rule of law or of procedure which prevents the Supreme Court or an intermediate court of appeal from reversing the deciaion at the trial on the facts.

In an action for the price of a tombstone the defence was that it was not of the design ordered. It had been ordered from photographic samples and an order form was filled in which, when produced at the trial, contained the words "E. M. Lewis R porter Design" which the defence claimed was not in it when it was signed by the purchaser but which was there two or three hours later when handed to one of the vendors by his foreman who had taken the order and filled in the form. The evidence at the trial was conflicting and the Chancellor, trying the case without a jury, decided for the defence and dismissed the action. His judgment was reversed by the Court of Appeal.

Hetd, per Taschereau C. J., that the evidence establishes that the words in dispute were on the order when it was signed and the plaintiffs were entitled to recover.

Held, per Sedgewick and Davies JJ., Mills J. *hesitante*, that even if these words were not originally on the order the circumstances disclosed in evidence show that the design supplied was substantally that ordered and the judgment appealed from should stand.

Held, per Girouard J., following *Village of Granby* v. *Ménard* (31 Can. S. C. R. 14) that the evidence being contradictory and the trial judge having found for the defendant, which finding the evidence warranted, his judgment should not have been reversed on appeal.

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* PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the defendants.

The material facts are sufficiently stated in the above head-note.

Watson K. C. and *Hislop* for the appellants.

The judgment of the trial judge, who saw and heard the witnesses, should not have been reversed. *Village of Granby* v. *Ménard* (1); *Soper* v. *Littlejohn* (2); *McKelvey* v. *Le Roi Mining Co.* (3); *Dominion Cartridge Co.* v. *McArthur* (4).

Aylesworth K. C. and *Fish* for the respondents, referred to *Hale* v. *Kennedy* (5); *North British & Mercantile Ins. Co.* v. *Tourville* (6).

THE CHIEF JUSTICE.—This is an appeal by the defendants from a judgment of the Court of Appeal for Ontario by which a judgment of the Chancellor, who had dismissed the respondents' action, was reversed and the conclusions of the action granted. None but questions of fact are involved in the case. The respondents by their action claimed the price of a monument or gravestone sold and delivered to the appellants by the firm of McIntyre & Gardiner, whose assignees they, the respondents, are. The appellants admit that they did order a monument from that firm for which they agreed to pay $1,500, but further say that the monument delivered is not of the design agreed upon. The respondents delivered one which is in accordance with what is known as "The E. M. Lewis Reporter Design," and they produced at the trial a document purporting to be an order in writing signed by the appellants (or the party they repre-

(1) 31 Can. S. C. R. 14.
(2) 31 Can. S. C. R. 572.
(3) 32 Can. S. C. R. 664.
(4) 31 Can. S. C. R. 392.
(5) 8 Ont. App. R. 157.
(6) 25 Can. S. C. R. 177.

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sent) for a monument of that special design, but the appellants assert that the words "The E. M. Lewis Reporter Design" in that writing were fraudulently inserted therein without their knowledge after the order had been signed. The judgment appealed from, however, finds as a fact that these words were in it when it was signed, and that finding is entirely supported by the evidence. The Chancellor at the trial, it is true, appears to have indirectly found the contrary in dismissing the action upon the ground that the monument delivered to the appellants, though it be in fact in accordance with the "E. M. Lewis design", is not of the design contracted for. Such a finding clearly imports that the respondents' witnesses were guilty of wilful perjury, added to a forgery by their agent who received the order. Now, there is nothing in the case to justify such a grave charge against them, and full credit must be given to their testimony. Their sworn statements must be reconciled with those of the appellants' witnesses, if possible, and there is not the least difficulty in doing so. It is not at all contended that the credibility of any of these witnesses depended upon their demeanour in the box at the trial, or anything of that kind. So that the Court of Appeal was, and we are here, in just as good a position to pass upon the evidence as the Chancellor was. As I view the case, full credit can be given to all the witnesses examined either on one side or the other. The appellants' witnesses, I have no doubt, swore to what they honestly and fairly believed to be the truth. They firmly believe that the monument as erected is not of the design selected by the appellants. But they are mistaken. The engraving from which they selected what they wanted failed to convey to their minds what it represented. It left them under a false impression and led them to expect an article different

from that which it really could not but be. But that is not the respondents' fault. They did nothing to mislead the appellants. A photograph, or plan or engraving as was exhibited to them to obtain their order is, we all know, very deceptive, and not many, outside of experts, are capable of grasping correctly from them what the executed article will be. That is what has happened with these people. They did order an "E. M. Lewis" monument. They did get an "E. M. Lewis" monument, but it does not come up to their expectations, and they are disappointed in not getting a monument according to the false impressions they had conceived from the engraving. That is the sole cause of the apparent contradictions in the evidence of the witnesses.

The appellants however, in their endeavours to impugn the judgment *a quo*, seemed to mainly rely at bar upon the ground that the Court of Appeal has thereby overruled the findings of the trial judge. A similar contention, in analogous cases, has so often been repeated before us lately that it is not inexpedient to specially notice it, though I will do so but briefly as there is not the least room for controversy upon the point. No one would contend that where a statute gives a right of appeal upon questions of fact to an intermediate court or to this court, it imposes upon the court appealed to the obligation to confirm the judgment appealed from, or that the Court of Appeal has jurisdiction in such cases only upon the condition that it shall not reverse. Yet that is virtually what the appellants' contentions amount to. In the case of *Grasett* v. *Carter* (1) relied upon by them, this court as subsequently remarked by Mr. Justice Patterson in the *North Perth Election Case* (2), did not hold that if an intermediate court reverses the decision of the

(1) 10 Can. S. C. R. 105. (2) 20 Can. S. C. R. 331-373.

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primary court on a question depending on conflicting evidence, its judgment is, for that reason alone, liable to be in its turn reversed by a second court of appeal. In cases where we sit as a first court of appeal, in election cases or in Exchequer appeals, we have not ourselves hesitated to reverse the findings of fact of the court appealed from when convinced that they were wrong. *Wheler* v. *Gibbs* (1); *Cimon* v. *Perrault* (2); *The King* v. *Likely* (3).

And in *Bell* v. *Macklin* (4) the trial judge had found the facts in the plaintiff's favour, and though a divisional Court had concurred in these findings yet the Court of Appeal had reversed the jugment in favour of the plaintiff. Upon an appeal to this Court, the Court of Appeal's judgment was affirmed, because we were of opinion with that Court that the trial judge's conclusions were wrong and that the Divisional Court's concurrence with him had not had the effect of making them right.

In the *The Queen* v. *Chesley* (5) we reversed, upon the weight of evidence, the decision of the Court in *banco*, which had affirmed the findings of the trial judge, because we were convinced that the evidence did not justify those findings.

In *Demers* v. *The Montreal Steam Laundry Co.* (6) we dismissed the appeal from a judgment of the Court of Appeal which had reversed the primary court upon questions of fact, because the appellant failed to convince us that the primary court was right.

Village of Granby v. *Ménard* (7) cited by the appellants lays down no new rule. In that case we allowed the appeal, and restored the trial judge's findings of fact, because we thought that they were right, and

(1) 4 Can. S. C. R. 430.
(2) 5 Can. S. C. R. 133.
(3) 32 Can. S. C. R. 47.
(4) 15 Can. S. C. R. 576.
(5) 16 Can. S. C. R. 306.
(6) 27 Can. S. C. R. 537.
(7) 31 Can. S. C. R. 14.

that the Court of Appeal should have held that the Court of Review had been wrong in interfering with them.

In England, two or three recent cases upon the same point re-assert what is the unquestionable duty of a Court of Appeal when called upon to review questions of fact.

The Master of the Rolls, in *Read* v. *Anderson* (1) remarked (repeating what has been so often said):

> The learned judge has found many of the questions in dispute as questions of fact and it seems to have been thought that the Court of Appeal cannot dispute his findings, but the Court of Appeal is not bound by the findings of fact by a judge who tries the case without a jury.

Even in cases tried by a jury, the Privy Council and the House of Lords have not hesitated to interfere with the findings of fact when the ends of justice required it.

In *Aitken* v. *McMeckan* (2) for instance, where in a suit to set aside a will the jury had found that the testator was of unsound mind at the date of its execution, the Privy Council, on the ground that the verdict was against the weight of evidence, reversed an order of the full court of Victoria, which had dismissed a motion for a new trial.

And in *Jones* v. *Spencer* (3) the House of Lords set aside the verdict of a jury as not justified by the evidence, though the court of Appeal had refused to interfere with it. I refer also to *Coghlan* v. *Cumberland* (4).

Even where an appeal is taken from the concurrent findings of facts by two Courts, whilst the general rule laid down in such cases as for instance, *Allen* v. *The Quebec Warehouse Co.* (5); *Hay* v. *Gordon* (6); *McIntyre Bros.* v. *McGavin* (7) cannot be disregarded, yet, it

(1) 13 Q. B. D. 779.
(2) [1895], A. C. 310.
(3) 77 L.T. 536.
(4) [1898] 1 Ch. D. 704.
(5) 12 App. Cas. 101.
(6) L.R. 4 P.C. 337.
(7) [1893], A. C. 268.

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unquestionably is, I will not say our right, but our duty, since the law gives an appeal from such findings, to review the evidence and allow the appeal if we are convinced that the first judgment was wrong and that the court appealed from should have reversed it. In *Bell* v. *The Corporation of Quebec* (1) their lordships of the Privy Council said :

> This tribunal usually accepts the concurrent findings of two courts upon questions of fact. and their lordships cannot say that sufficient reasons appear in the present case to warrant a departure from their rule ;—

clearly intimating that obviously there may be cases where their lordships would not feel warranted in adopting the findings of fact appealed from, even if concurred in by two courts.

This court likewise, has always fully recognised the wisdom of the general rule and seldom refused to give effect to it. Yet, in such cases as *The North British & Mercantile Ins. Co.* v. *Tourville* (2) and the *City of Montreal* v. *Cadieux* (3) we felt bound to depart from it.

The attempt in *Russell* v. *Lefrançois* (4) to introduce the doctrine of the inflexibility of the rule did not prevail and the Privy Council refused leave to appeal from the judgment of the court.

In the present case, we think that the Court of Appeal was right in holding that the court of first instance was wrong, so that we are bound to dismiss the appeal. That is our plain duty. We have no discretion in the matter. Mr. Justice Patterson's remarks in the *North Perth Election Case* (5) have here their full application : " For my own part " (said the learned judge.)

> I am not disposed to lay down or to acknowledge the authority or the value of rules or formulas for the decision of questions of fact.

(1) 5 App. Cas. 84-94.
(2) 25 Can. S. C. R. 177.
(3) 29 Can. S. C. R. 616.
(4) 8 Can. S. C. R. 335.
(5) 20 Can. S. C. R. 331.

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The Lord Chancellor said more recently in the same sense:

> I myself rather protest when one is dealing with questions of fact against laying down any rules that are not applicable to the particular case as it comes before us. *Smith & Co.* v. *Bedouin Steam Navigation Co.* (1).

The appeal is dismissed with costs.

SEDGEWICK J. — I concur in the opinion of Mr. Justice Davies on this appeal.

GIROUARD J. (dissenting)—I think that this case falls within the rule laid down in *The Village of Granby* v. *Ménard.* (2) The trial judge in disposing of it prefaces his judgment dismissing the action by remarking:

> There is a great deal of contradictory evidence in this case; but after consideration, I have continued to think as I thought at the close of the case, that credit is to be given to the evidence of the defendant.

There is not only some evidence in support of this view, but the preponderance of it is decidedly for the appellant. Five witnesses swore that the monument was not made according to the design selected, while the agent of the maker, who took the order, said quite the reverse. He is flatly contradicted by his own sister, having no interest in the matter, with whom he was staying on a visit, and on the best of terms. What design was selected was the point of contention between the parties, everything else being mere detail. All the witnesses for the appellant are unanimous upon it.

I am not prepared to ignore their story and accept instead that of the agent, because in immaterial or minor details they do not always agree. I would, therefore, allow the appeal with costs.

(1) [1896] A. C. 70. (2) 31 Can. S. C. R. 14.

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DAVIES J.—The questions to be determined in this appeal are altogether of fact and depend upon the appreciation given to the evidence taken on the trial, The Chancellor before whom the case was tried, after vainly recommending the parties to settle, found for the defendants upon the ground that, while there was much contradictory evidence, credit should, in his opinion, be given to that for the defendant. The Court of Appeal for Ontario unanimously reversed this judgment, largely upon the ground that the Chancellor had not made any express finding upon the important and crucial question whether the order for the monument, for the price of which the action was brought, contained at the time it was signed and given by the defendant the words now found in it as to the design, viz. 'E. M. Lewis reporter design'. The Court of Appeal having found the facts on this crucial point for the plaintiffs, reversed the Chancellor's judgement dismissing the action, and gave judgment for the plaintiffs.

I am of the opinion that the judgment ot the Court of Appeal is correct and for the reasons given by Chief Justice Moss for the court.

The facts may be given in a short compass. The firm of McIntyre & Gardiner, marble workers of Orangeville, had as their foreman one Ramsay, who being out of health was staying with his sister Mrs. Shingler in Toronto. She was friendly with the Dempster family having been for years one of their customers, and informed her brother of Mr. Dempster's desire to procure a handsome monument to mark his lately deceased wife's resting place and to serve as a family monument for himself and others of his family when they died. Ramsay at once wrote to his employers and having obtained from them all the designs of monuments which they had and which he thought suitable for

submission to Mr. Dempster, saw that gentleman in presence of several members of his family, submitted his designs, and obtained a written order for a monument to cost $1,500. This was on the 8th March 1900. The order was on a printed form but the date, the description of the material, the design, the place of delivery and the price were all written in Ramsay's handwriting in blanks contained in the printed form. No question arises as to Dempster's signature and although many collateral questions were raised at the trial and also in the Court of Appeal the only question argued before us was whether the monument set up in Prospect Cemetery was of the design ordered. If it was no other question as to defendant's liability was raised.

It was of course conceded that if the words describing the design, "E. M. Lewis reporter design" had been written in by Dempster himself no evidence showing that another and different design had been agreed upon at the time could have availed defendant or in fact could have been received to contradict the written contract. And this is equally true apart from questions of fraud, if the words had been written in by Ramsay and were there at the time of the signing. And so, in the presence of much conflicting evidence as to the specific design ordered between the members of the Dempster family supported by Mrs. Shingler on the one hand, and Ramsay, the foreman, supported indirectly at least and strongly, by his employer McIntyre, and the exhibits, on the other, the crucial question remained for determination: Was the character of the design in the order when Dempster signed it? There is no doubt it was there within at least three hours after it was signed, for it was handed then by Ramsay to McIntyre, his master, and by the latter

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forwarded a short time afterwards to Scotland to have the order filled.

Now, is there any internal evidence as to the time the words in dispute were written in? I think there is, and that such evidence is strong. All of the written part of the order outside of Dempster's signature is admittedly in Ramsay's writing. The colour of the ink and the character and style of the writing were exactly similar to those of the words "Prospect" and "Fifteen hundred" which were, it is conceded, written in the order by Ramsay just before Dempster signed it. If the disputed words had been afterwards inserted by Ramsay, either fraudulently or in furtherance of what he thought had been agreed to, the probabilities are that there would have been some difference shown unless indeed by some coincidence the pen and the ink used had been the same. The pen and ink were Dempster's, and the defendant's case was that the words were not in when Ramsay carried away the order.

It is conceded on both sides that all the cheaper designs were at once brushed aside by Dempster, and a $1,500 one agreed upon with little, if any, objection to the price. Ramsay swears he had no other $1,500 design with him than the one selected and delivered, and that the firm he represented had no other $1,500 design. The one next below it in cost was, he said, $1,100. McIntyre, his master, confirms him in this, and indirectly in other important points. The latter was in Toronto himself that day, had gone carefully with Ramsay over the designs just before Ramsay went up to see Dempster, and had marked on the picture or engraving of the E. M. Lewis Reporter Design the figure 15 which he swears now appears there to indicate its price.

There is no doubt that the general character of the design sworn to as having been ordered by Dempster by himself and his family and also by Mrs. Shingler is materially different from the one supplied. But comparing the engraving of the E. M. Lewis design from which the order was given with the photograph of the monument as erected, I am not surprised that witnesses of the apparent education and training of the defendant and his witnesses should have honestly convinced themselves that the article supplied was of a different design. The deep rich colour of the engraved design is entirely absent in the photograph of the monument supplied, and it must be remembered that it was from the photograph Dempster reached his conclusions. He only saw the monument in the cemetery for a single moment on a rainy day and he expressly says he formed his conclusion that the monument supplied was not the one he ordered from its appearance in the photograph. It is true he in common with the other witnesses indicates a material difference in the place where the pillars are placed, but he relies strongly upon the great difference in the colour which evidently made a deep impression upon him.

I entirely adopt the strong and convincing language used by the Chief Justice in the following paragraph of his judgment:

The defendant has deliberately charged Ramsay with forgery. The latter denies in the most emphatic way that he touched the paper with a pen or made any alteration after it was signed, and the circumstances as well as the probabilities are in his favour. That a design was selected and a price agreed upon ; that the paper was handed to McIntyre in its present condition within a short time after it was signed ; that the monument was ordered according to the design produced by Ramsay ; that a monument of that design was worth $1,500 ; that the actual outlay was $1,311 ; that the defendant has been unable, notwithstanding search and inquiry of monument dealers, to produce any design of the kind alleged to have been shown him by

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Ramsay; and that there is an entire absence of motive impelling Ramsay to commit forgery and support it by perjury, go to fortify his sworn testimony.

For these reasons, and notwithstanding the strong contradictory character of the evidence given for the defence, I have reached the conclusion that the appeal should be dismissed.

MILLS J.—I am inclined to agree with the chancellor that the evidence did not show the monument furnished to be in accordance with the design chosen by the purchaser, but I am not so strongly convinced of it as to dissent from the judgment of the majority of the court.

Appeal dismissed with costs.

Solicitor for the appellants: *Thomas Hislop.*

Solicitors for the respondents: *Walsh & Fish.*