IRENE TELFORD (PLAINTIFF) ..... APPELLANT;

AND

ALAN C. SECORD (DEFENDANT) ..... RESPONDENT.

1946

*Nov. 21, 22, 25, 26

1947

*Feb. 4

IRENE TELFORD (DEFENDANT) ..... APPELLANT;

AND

DONALD NASMITH (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trial—Evidence—Trial, with jury, of actions for damages caused by collision of motor cars—Questions by cross-examining counsel to party as to convictions on previous occasions under Highway Traffic Act—New trial—Right to jury.

The actions, tried together, with a jury, were for damages caused by a collision between a motor car owned and driven by appellant and one owned and driven by respondent S. The jury found negligence in each driver contributing to the accident, and apportioned the fault, against said respondent 75 per cent. and against appellant 25 per cent.; and, accordingly, judgments were given for damages, to appellant against said respondent, and to a passenger in the latter's car, now also a respondent, against appellant. On appeal by said respondents, the Court of Appeal for Ontario ordered a new trial ([1945] 4 D.L.R. 450). That order was now affirmed by this Court on the ground that, at the trial, appellant's counsel, in cross-examining the respondent driver (and following some explanatory remark by the latter that it was his "first occasion in court", and counsel indicating intention to attack credibility) elicited from him that on certain charges of speeding in previous years he had paid fines; but it was not established that he had himself committed the offences (he might, as owner of a car driven by others, have "incurred penalties" under *The Highway Traffic Act,* Ont., without having himself "violated" the Act; he stated that on none of the occasions had he appeared in court); and, assuming evidence as to the convictions was admissible at all, such evidence could only have been adduced if counsel were in a position to show that the witness had himself committed the offences; respondents had met the onus under s. 27(1) of *The Judicature Act,* R.S.O. 1937, c. 100 (of showing a "substantial wrong or miscarriage"). But this Court held that the direction by the Court of Appeal that the new trial should be without a jury should be set aside; as a jury is an eminently proper tribunal for trial of the matters in issue, sufficient ground had not been shown to deprive appellant, by said direction, of that right. (The Court found it unnecessary to decide whether, in view of s. 55 of *The Judicature Act,* and the authority thereby and by the Rules conferred upon the trial judge, the direction could be supported.)

*Present:—Kerwin, Rand, Kellock and Estey JJ. Hudson J. also sat at the hearing, but he died before judgment was delivered.

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APPEALS from judgments of the Court of Appeal for Ontario (1), which set aside judgments of Barlow J. on the findings of a jury, and ordered a new trial, to be had before a judge without a jury.

There were two actions, tried together before Barlow J., with a jury. They arose out of a collision on February 12, 1944, on Highway No. 2, near Highland Creek, Ontario, between a motor car owned and driven by the appellant and one owned and driven by the respondent Secord. The appellant sued Secord for damages for personal injuries and damage to her car, and the respondent Nasmith, a passenger in Secord's car, sued the appellant for damages for personal injuries. The jury found negligence on the part of both drivers causing or contributing to the cause of the accident, found the degrees of such negligence to be: respondent Secord 75 per cent., and appellant 25 per cent., and assessed appellant's total damages at $3,000 and respondent Nasmith's total damages at $5,000. In accordance with such findings, judgment was given in favour of the appellant for $2,250 against the respondent Secord and judgment was given in favour of the respondent Nasmith for $1,250 against the appellant. The said Secord and Nasmith appealed to the Court of Appeal for Ontario, which gave judgments as above stated (Laidlaw J.A. dissented, except that he would direct a new trial as between Nasmith and the present appellant, but confined to the ascertainment of the quantum of damages sustained by Nasmith). Appellant appealed to this Court.

D. L. McCarthy K.C. (in one appeal) and *J. R. Cartwright K.C.* (in the other appeal) for the appellant.

F. J. Hughes K.C. for the respondent Secord.

J. J. Robinette K.C. for the respondent Nasmith.

The judgment of the Court was delivered by

KELLOCK J.—These appeals are taken from orders of the Court of Appeal for Ontario, dated 6th July, 1945, which allowed appeals by the respondents from judgments of Barlow J., dated 24th February, 1945, entered pursuant to the verdict of a jury. The two actions arose out of a

(1) [1945] 4 D.L.R. 450.

collision on 12th February, 1944, between automobiles owned and driven by the appellant and the respondent Secord, respectively, the appellant Nasmith being a passenger in the Secord car. The actions were tried together. By the order in appeal a new trial was directed, Laidlaw J.A. dissenting. The view of the majority was that the trial was unsatisfactory by reason of conduct on the part of counsel representing the appellant at the trial and also on the ground that a jury acting judicially and with a proper appreciation of its duties must necessarily have arrived at a greater amount of damages than was awarded Nasmith. The majority were also of the view that the damages, in the absence of other explanation, might also be the result of the conduct of counsel already referred to. Laidlaw J.A. dissented on the ground that no sufficient or any objection had been made at trial and that the present respondents had failed to show any substantial wrong or miscarriage of justice. While a new trial was directed, that trial was directed to take place without a jury.

In our opinion, the appeal should be dismissed but the direction that the new trial shall take place without a jury must be deleted. We do not consider it necessary to deal with all the matters of which the respondents complain with regard to the conduct of the trial. We think it is sufficient to refer to one matter only which, in our opinion, makes it necessary that a new trial should be had.

Immediately before commencing his cross-examination of the respondent Secord, counsel for the appellant, in the absence of the jury, said, basing himself upon the provisions of section 18(1) of *The Evidence Act,* R.S.O. 1937, Chap. 119, that he proposed to cross-examine the witness with respect to previous convictions under *The Highway Traffic Act,* R.S.O. 1937, Chap. 288. He said: "I submit I have that right on purely a question of credibility; I am not submitting it on any other ground, it is on the ground of credibility." And again: "I am not trying to put the convictions in as evidence to show he is a bad driver on previous occasions or because he was convicted of speeding on previous occasions that he was speeding on this occasion, I am submitting it on credibility, * * *"

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Objection was made by counsel for both respondents and at the conclusion of argument with regard to the point the learned trial judge ruled as follows:

His Lordship: Mr. Levinter put his application for leave to introduce by way of cross-examination questions as to previous convictions of the defendant Dr. Secord, on the ground that he is entitled to cross-examine as to those by way of attacking the credibility of the witness; well, that might be so from a certain standpoint, yet in an action of this kind before a jury it would have a very different effect entirely, and for that reason alone, regardless of any other reasons that there may be, I must rule that the questions cannot be asked. If I am wrong and this goes farther, it will have to be corrected elsewhere. Bring the jury back.

The cross-examination proceeded and in the course of it the witness, in excusing himself for the way in which he had given some answers on discovery, made the statement: "This is my first occasion in court. I am not familiar with the proceeding." The following then occurred:

Mr. Levinter: It is your first occasion in court?

A. Yes, with the exception of giving expert evidence.

Q. Have you never been in court before?

A. No.

Q. Never in police court before?

A. No, sir.

Mr. Levinter: Am I entitled to now on the question of credibility?

His Lordship: No, I don't think so.

Mr. Walker: I object to these innuendoes my friend is constantly making.

Mr. Hughes: Do you mind if I say that after Your Lordship's ruling my friend has directly gone through it; now, My Lord, may I withdraw any objection and let the jury have whatever he has got in his head so that there will be no questions said to the jury afterwards that we endeavoured to keep anything back, let him put it in.

His Lordship: Very well.

Cross-examining counsel then elicited from the witness that on certain charges of speeding in 1938, 1939, 1940 and 1943 he paid fines, but the witness said that other persons drove his car as well as himself and he was unable to say whether on any of the occasions he himself had been driving. He also said that on none of the occasions had he appeared in court.

Somewhat inadvisedly counsel for the respondent Nasmith, who preceded counsel for the appellant, said in the course of his address to the jury:

By innuendo he gets it across to you people that this man is a speed fiend, a terrible fellow—just by innuendo—that he is full of convictions, that he must have been in court many times; then my learned friend fortunately brings out, "Well, let us hear all about

this", I had not heard about it, and we find over a period of driving as many miles as he does in a year, we find over the period of those years a certain number of fines for speeding; my friend does not bring forward and indicate who is fined.

Appellant's counsel followed in due course and the following occurred:

My friend bitterly complains that I brought out these convictions for speeding; gentlemen, I would have laughed, just as you laughed yesterday, if I had brought out that in 1938 *he* was speeding so much, we all laugh sometimes when these things happen, but you do not have two in 1938, and one in 1939, and you don't have another in 1940, you don't have another in 1943—

His Lordship: Mr. Levinter, just a moment; you brought that evidence as to credibility and nothing else, now you are using it for exactly the other purpose—

Mr. Levinter: My friend raised it in his argument at great length, and surely I am entitled to respond to my learned friend's argument.

His Lordship: Proceed.

Mr. Levinter: Those are the only times that he was convicted apparently, now was he putting on speed on this occasion?

By section 26 of *The Highway Traffic Act* it is provided that no vehicle shall be driven upon any highway within a city, town or village at a greater speed than thirty miles an hour except in certain special localities, and at fifty miles per hour outside such municipalities. By sub-section (4), any person "who violates" any of the provisions of the section is rendered liable to certain penalties, including certain fines.

By section 46 it is provided that the owner of a motor vehicle shall "incur the penalties" provided for any violation of the Act unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver not being the owner is also made liable for such penalties.

Accordingly, even assuming that a breach of the speed limit laid down by the statute would constitute a "crime" within the meaning of sub-section (1) of section 18 of *The Evidence Act,* which we do not consider it necessary to decide, the appellant did not establish, as to any of the convictions, that it was the witness who had "violated" the statute.

We are of the opinion that, assuming evidence as to these convictions was admissible at all, such evidence could only have been adduced if counsel were in a position to

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show that the witness had himself committed the offences. We think that the withdrawal of objection on the part of counsel for the respondents must be deemed to have proceeded on the assumption that this would be done. On this ground alone we think that the order for a new trial must be affirmed. We do not think it open to the appellant to contend that the course pursued did not have its intended effect. We therefore think that the onus resting upon the respondents under section 27 of *The Judicature Act,* R.S.O. 1937, Cap. 100, has been met.

With respect to the direction that the new trial should be without a jury, we think that, as a jury is an eminently proper tribunal for the trial of the matters that are in issue between the parties, sufficient ground has not been shown to deprive the appellant of that right. Whether, in view of the right to a jury given by section 55 of *The Judicature Act,* and the authority thereby and by the Rules conferred upon the trial judge, the order in appeal can be supported, need not be decided. There rests with the trial judge sufficient power and authority to conduct the trial as it should be conducted, and, should he see reason to try the action without a jury or to dispense with the jury at any stage, his discretion is not subject to review; *Currie* v. *Motor Union Insurance Co.* (1); *Wilson* v. *Kinnear* (2). We think that the course followed in *Reiffenstein* v. *Dey* (3) should be followed here and the direction complained of must therefore be set aside.

The appeal will therefore be allowed in part as indicated. The right to a trial by jury is a substantial right, and, as success is divided, we think there should be no costs of this appeal. The costs below will not be interfered with.

Appeals allowed in part.

Solicitors for the appellant: *Luxenberg, Levinter, Ciglen & Grossberg* (in one action) and *Smith, Rae, Greer & Cartwright* (in the other action).

Solicitors for the respondent Secord: *Hughes, Agar, Thompson & Amys.*

Solicitors for the respondent Nasmith: *David J. Walker.*

(1) (1924) 27 O.W.N. 99.
(2) (1925) 57 O.L.R. 679.
(3) (1913) 28 O.L.R. 491, at 498.