WILLIAM MIZINSKI (*Plaintiff*) .....APPELLANT;

AND

WILBERT ROBILLARD AND JACK McLAUGHLIN (*Defendants*) .... } RESPONDENTS.

1957

*Mar. 29
Apr. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trial judge dispensing with jury—Nature of order—Discretion—The Judicature Act, R.S.O. 1950, c. 190, s. 57(3)—The Supreme Court Act, R.S.C. 1952, c. 259, s. 44.

When a trial judge, in the course of a trial by jury, decides to discharge the jury and complete the trial himself, under s. 57(3) of the Ontario *Judicature Act*, his order is a discretionary one and was therefore not appealable to the Supreme Court of Canada under s. 44 of the Supreme Court Act as it was before its amendment in 1956.

1957

MIZINSKI v. ROBILLARD AND MCLAUGHLIN

APPEAL from a judgment of the Court of Appeal for Ontario affirming the judgment of Barlow J. at trial. Appeal dismissed.

A. Maloney, Q.C., for the plaintiff, appellant.

David J. Walker, Q.C., for the defendant McLaughlin, respondent.

W. Gibson Gray, for the defendant Robillard, respondent.

The judgment of the Chief Justice and Cartwright, Fauteux and Abbott JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario pronounced on May 12, 1954, dismissing an appeal from the judgment of Barlow J. dated October 1, 1953, whereby the appellant's action was dismissed with costs.

The appellant suffered serious injuries in an automobile accident which occurred on May 22, 1952. He brought action against the respondents alleging that each of them had been guilty of acts of negligence which had caused the accident. The action came on for trial before Barlow J. and a jury in September 1953. The respondents were separately represented. Evidence was called on behalf of the respondent McLaughlin but not on behalf of the respondent Robillard and consequently at the conclusion of the evidence Mr. Walker, counsel for McLaughlin, addressed the jury first followed by Mr. MacDonald, counsel for the appellant, who would in the ordinary course have been followed by counsel for Robillard.

At the conclusion of Mr. MacDonald's address Mr. Walker moved the learned trial judge to discharge the jury and continue the trial himself without a jury. Counsel for the respondent Robillard supported this motion. The motion, which was argued at length, was based on the allegations (i) that counsel for the appellant had mis-stated the effect of the evidence to the jury in several respects of which eight were specified, and (ii) that the address was inflammatory. In opposing the motion, Mr. MacDonald said in part:

> My address was not inflammatory in any sense of the word. All I tried to do was to discharge my duty as a plaintiff's counsel to his client. I would think that from the vast experience which your Lordship has had,

you would have stopped me if I had been delivering an inflammatory address. I am not prepared to take the quotations which Mr. Walker read to your Lordship as being my utterances, and if there is any doubt about it I think there should be a transcript.

To this the learned trial judge replied: "I took them down as Mr. Walker has stated them." But on the argument before us counsel for the appellant in a careful analysis of the transcript of Mr. MacDonald's address and of the complaints which had been made against it showed that a number of the alleged mis-statements of fact complained of before the learned trial judge had not in fact been made. In this connection it may be noted that in the factum of the respondent McLaughlin filed in this Court only four mis-statements are specified.

At the conclusion of the argument of the motion the learned trial judge said:

> Counsel for the defendants ask that I take this case from the jury on the ground of mis-statement of facts by counsel for the plaintiffs, and also that the address was inflammatory.
>
> It is the duty and the right of a trial judge to deal with such a motion, the purpose being that justice may be done between the parties. If, in the opinion of the trial judge, he considers that the address of counsel for the plaintiffs is of such a nature that it may lead to a verdict which is not warranted by the evidence, then it is quite proper for him to take the case from the jury.
>
> There is no doubt in my mind that the address was of an inflammatory nature, and there were also various mis-statements of fact made by counsel for the plaintiffs. I made a note of some of them, and I made a note of some of the inflammatory statements, such as, for example, "I suggest to you that there was guilt in his soul", meaning Mr. McLaughlin; "he knew in his heart that he had caused the accident"; "was that the act of a man who had something on his conscience?" Those are only some of the statements that are quite improper, in my opinion, so far as the inflammatory nature of it is concerned.
>
> For that reason, and also by reason of the mis-statements of facts which are of such a nature that I could never expect to correct them, and ought not to have to correct them in my charge to the jury, I think that I would only be doing what is right and proper in the administration of justice in taking this case from the jury and concluding it myself.

The learned judge then discharged the jury.

The appellant in his notice of appeal to the Court of Appeal set up only the following grounds:

> 1. His Lordship, the trial judge, erred in ruling that Counsel for the Plaintiffs had mis-stated evidence in his jury address and that the said jury address was of an inflammatory nature.

1957

MIZINSKI v. ROBILLARD AND MC-LAUGHLIN

Cartwright J.

2. His Lordship, the trial judge, erred in ordering the jury dismissed and concluding the trial himself, and his action, in so doing, was an improper exercise of his judicial discretion, and a denial to the Plaintiffs of their right to have their causes tried by a jury.

No other ground was advanced in the appellant's factum or in his argument in this Court.

At the opening of the argument before us Mr. Walker raised the preliminary objection that, the only ground of appeal being that the learned trial judge erred in taking the case from the jury, no appeal lies to this Court as the order discharging the jury was one made "in the exercise of judicial discretion", and the right of appeal is denied by s. 44 of the *Supreme Court Act*. The Court decided to delay consideration of this preliminary objection until after the argument of the appeal. It will be observed that if this preliminary objection is entitled to prevail this Court could not give leave to appeal as the action was commenced before the amendment of s. 41(1) by 4-5 Eliz. II (1956), c. 48, s. 3: see *La Cité de Verdun v. Viau* (1).

In Ontario the power of a judge presiding at a trial before a jury to discharge the jury and complete the trial himself is found in subs. (3) of s. 57 of *The Judicature Act*, R.S.O. 1950, c. 190, reading as follows:

(3) Notwithstanding the giving of the notice [*i.e.*, a jury notice] the issues of fact may be tried or the damages assessed without the intervention of a jury if the judge presiding at the sittings so directs or if it is so ordered by a judge.

The subsection has existed in its present form since 1913 when it appeared as sub. (3) of s. 56 of 3 and 4 Geo. V, c. 19.

Its predecessors were s. 18 of *The Administration of Justice Act* of 1873, 36 Vic., c. 8, and s. 255 of *The Common Law Procedure Act*, R.S.O. 1877, c. 50, which read respectively as follows:

18. All other issues shall be tried as heretofore, unless the court in which the action or proceeding is pending, or a judge thereof, upon application being made before trial, or unless the presiding judge upon the trial, directs or decides that the issue or issues shall be tried and damages assessed without the intervention of a jury.

255. Notwithstanding anything in the two next preceding sections contained, the Judge presiding at the trial may in his discretion direct that any such action shall be tried or the damages assessed by a jury; And upon application to the Court in which the action is pending, or to a Judge thereof, by an order made before the trial, or by the direction of the Judge presiding at the trial, the issues may be tried and damages assessed without the intervention of a jury.

(1) [1952] 1 S.C.R. 493.

The power given to the trial judge by the subsection in its present form does not appear to me to differ in kind from that conferred by the sections last quoted above. In Ontario, it has consistently been held that the exercise of this power is committed to the discretion of the judge at the trial.

In *Brown v. Wood* (1), Armour J. at the trial had struck out the jury notice and tried the case without a jury against the protests of counsel for the defendant. On appeal Boyd C., with whom Ferguson and Robertson JJ. concurred, said, at p. 200:

> The difficulty is to get over sec. 255 of the C.L.P. Act. If this were an appeal from the order of a Judge in Chambers striking out a jury notice, before the trial, the cases cited by Mr. Read would be overwhelming in his favour, but the discretion of a Judge at the trial is much larger . . . As no affidavit of merits has been filed, and the defendant has not brought and does not seek to bring the amount of the verdict into Court, and as the motion is against a discretion that the trial Judge undoubtedly has to determine the method of trial, it should be dismissed, with costs.

In *Wise v. Canadian Bank of Commerce* (2), Middleton J., as he then was, said at p. 345:

> It has been held that the discretion conferred upon the Judge presiding at the trial is an absolute discretion, not subject to review: *Brown v. Wood* (1887), 12 P.R. 198.

In *Currie v. Motor Union Insurance Co.* (3), Latchford C.J., giving the judgment of the Appellate Division in a case in which the trial judge had dispensed with the jury, said at pp. 99-100:

> Even before the enactment of sec. 56(3) the discretion of a trial Judge in dispensing with a jury was not interfered with by an appellate Court: *Brown v. Wood* (1887), 12 P.R. 198. It was within the power of the trial judge to determine the method of trial, and his determination was not open to review.

In *Owens v. Martindale* (4), Ferguson J.A. with whom the majority of the Court agreed left open the question whether such an order could be reviewed by the Court of Appeal. He said at p. 97:

> I am clearly of the opinion that the circumstances disclosed in evidence and particularly the situation pointed out by Mr. Slaght in his second proposition justified the learned trial Judge in exercising his discretion in the manner he did, and that it is therefore unnecessary to express an opinion as to our right to review an order made by a trial Judge striking out a jury notice.

(1) (1887), 12 P.R. 198.
(2) 52 O.L.R. 342, [1923] 3 D.L.R. 1163.
(3) (1924), 27 O.W.N. 99.
(4) 63 O.L.R. 87, [1928] 4 D.L.R. 932.

1957

MIZINSKI v. ROBILLARD AND MCLAUGHLIN

Cartwright J.

In *Telford v. Secord; Telford v. Nasmith* (1), judgment had been entered for the plaintiff at the trial pursuant to the verdict of a jury; the Court of Appeal set this judgment aside and directed that a new trial be had without a jury. This Court affirmed the judgment of the Court of Appeal in so far as it set aside the trial judgment but directed that the new trial should be before a jury. Kellock J. in giving the unanimous judgment of this Court said at p. 282:

> 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.

I have quoted from the above judgments, and there are many others containing expressions to the same effect, for the purpose of indicating that the order of a trial judge dispensing with a jury during the course of the trial is consistently treated as the exercise of a discretion vested in him by the statute. There may be cases in which the order could be shown to have been made otherwise, as for example if the judge in his reasons made it clear that he had discharged the jury only because he had erroneously decided that he was bound as a matter of law to do so. *Logan et al. v. Wilson et al.* (2) was a case of this sort.

In the case at bar counsel for the appellant contends that it has been shown (i) that in reaching his decision to discharge the jury the learned trial judge was proceeding, in part at least, on a mistaken view as to what had in fact been said by Mr. MacDonald in his address as to the evidence, and (ii) that there was nothing in that address which could properly be held to be inflammatory. From this he seeks to draw the conclusion that the order was not one made in the exercise of judicial discretion.

I am unable to reach that conclusion. The reasons of the learned trial judge quoted above show that he directed his mind to the question whether the address of the plaintiff's counsel was of a nature which might lead the jury to an unwarranted verdict and for that reason he should dispense with the jury. His conclusion that he should do so

(1) [1947] S.C.R. 277, [1947] 2 D.L.R. 474.

(2) [1943] 4 D.L.R. 512.

was based on some mis-statements actually, although no doubt unintentionally, made by the plaintiff's counsel and on several passages which in my opinion it was open to the learned judge to regard as "inflammatory". The circumstances that the learned judge mistakenly thought that there had been additional mis-statements and that on reading the written record an appellate tribunal might regard the passages said to be inflammatory as not going beyond the bounds permitted to counsel do not make the order one made otherwise than in the exercise of his discretion. At the most those circumstances, assuming their existence, would afford grounds for submitting that the learned judge had exercised his discretion mistakenly.

The decision which the learned trial judge was called upon to make appears to me to have required the exercise of discretion within the definition of that term in Bouvier's Law Dictionary which was adopted by Cannon J. in *Glesby v. Mitchell* (1):

> That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.
>
> The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

I have concluded that the order of the learned trial judge was made in the exercise of the judicial discretion given to him by s. 57(3) of *The Judicature Act* and that we have no jurisdiction to entertain the appeal, even if we should be of opinion that his discretion was exercised mistakenly.

I do not intend by anything I have said above to express an opinion as to whether the discretion of the learned judge was or was not rightly exercised in the particular circumstances of this case.

I would dismiss the appeal with costs as of a motion to quash.

(1) [1932] S.C.R. 260 at 276.

1957

MIZINSKI v. ROBILLARD AND MCLAUGHLIN

LOCKE J.:—In my opinion, the order complained of was made in the exercise of a judicial discretion within the meaning of s. 44 of the *Supreme Court Act* and, accordingly, we are without jurisdiction.

I would dismiss this appeal with costs.

Appeal dismissed.

Solicitor for the plaintiff, appellant: W. E. MacDonald, New Toronto.

Solicitors for the defendant Robillard, respondent: Borden, Elliot, Kelly, Palmer & Sankey, Toronto.

Solicitor for the defendant McLaughlin, respondent: David J. Walker, Toronto.

---

*PRESENT: Kerwin C.J. and Taschereau, Kellock, Abbott and Nolan JJ.