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* Oct. 21-23.
*Nov. 30.

JOAN OLIVE DUNSMUIR (DEFENDANT) ..... } APPELLANT;

AND

LOWENBERG, HARRIS AND COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Finding of jury—New trial—Principal and agent—Qualification of juror—Waiver of objection—Written contract—Collateral agreement by parol.

An agent employed to sell a mine for a commission failed to effect a sale but brought action based on a verbal collateral agreement by the owner to pay "expenses" or "expenses and compensation" in case of failure. The jury found in answer to a question by the judge that "we believe there was a promise of fair treatment in case of no sale."

Held, reversing the judgment in appeal (9 B. C Rep. 303), Taschereau C. J. and Killam J. dissenting, that this finding did not establish the collatlral agreement but was, if anything, opposed to it and the real issue not having been passed upon there must be a new trial.

If a juror on the trial of a cause is allowed without challenge to act as such on a subsequent trial, that is not *per se* a ground for setting aside the verdict on the latter.

APPEAL from a decision of the Supreme Court of British Columbia (1) refusing to set aside a verdict for the plaintiff and order a new trial.

The plaintiffs, whose action has been thrice tried, claimed from defendant their expenses and compensation for endeavouring to sell a coal mine for the latter who by a written agreement promised them five

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

(1) 9 B. C. Rep. 303 *sub nom. Harris* v. *Dunsmuir*.

per cent commission. He failed to effect a sale but based his action on the ground that his failure was caused by defendant's interference. He obtained a verdict which was set aside and a new trial ordered on which the claim was amended by adding a claim on an alleged collateral and verbal contract to pay expenses in case of no sale. This second trial resulted in a nonsuit which was set aside by the full court and a third trial ordered (1) which the Supreme Court of Canada affirmed (2). The third trial resulted in a verdict for plaintiff which the full court sustained and the defendant appealed.

The principal questions at issue on this appeal are stated in the judgment of His Lordship Mr. Justice Davies now reported.

Sir Charles Hibbert Tupper K.C. for the appellant. We contend that the fact that one of the jurors sat on a former trial is a good ground for challenge, and that this can be taken advantage of after verdict, because that ground of challenge was not known to the defendant at the time of the last trial. Archbold Q. B. Practice (ed. 1885) p. 619; 1 Coke, Littleton, p. 157*b*, "challenge *propter affectum*;" Blackstone (Lewis ed.) vol. 3, p. 363; Hawkins' Pleas of the Crown, vol. 2, p. 577; Thompson on Trials, vol. 1, sec. 68; *Argent* v. *Darrell* (3); Bacon's Abridgement, vol. 9, p. 598. There can be no waiver where the party had no knowledge of the ground of challenge; Thompson on Trials, sec. 114 (ed. 1399). *Herbert* v. *Shaw* (4); *Earl of Falmouth* v. *Roberts* (5); *Peermain* v. *Mackay* (6).

The finding of the jury upon the main point is really a finding in appellant's favour; or if that is too broad a statement, it is clear that the jury have dis-

(1) 6 B. C. Rep. 505.
(2) 30 Can. S. C. R. 334.
(3) 2 Salk, 648.
(4) 11 Mod. 118.
(5) 9 M. & W. 469.
(6) 5 Jur. 491.

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regarded what was the only evidence they could possibly have found upon. They expressly state that their verdict is founded upon evidence which did not and could not bear upon the issue found. They answered: "In view of concessions made subsequently, we believe there was a promise of fair treatment in case of no sale." On this all-important point they find their verdict, not because they believed the only real evidence upon the point, but in consequence of "subsequent concessions." The general verdict does not affect the question; the jury might have declined to answer questions, but they did not, and their answers are a part of the verdict. They find the general verdict because they have come to certain conclusions regardless of the evidence.

The special findings are incomplete, inconclusive and contradictory both to each other and to the verdict, and upon the findings, the defendant is entitled to have a verdict or judgment entered for her in spite of the added general verdict in plaintiffs' favour. The jury only give the plaintiffs compensation for expenses incurred by them and for nothing else, although they sued also for compensation for work and labour. The verdict must, therefore, be taken to negative the claim actually made by the plaintiff Harris in his evidence for work and services, although according to his evidence his whole claim depended on the one promise. *Cobban Manufacturing Co.* v. *Canadian Pacific Railway Co.* (1); *McQuay* v. *Eastwood* (2), at page 406. They do not find as a fact that there was a distinct agreement by the defendant to pay compensation made "some time in the middle of the year 1890." The jury did not credit the evidence of the plaintiff Harris, and a promise of "fair treatment" does not impose any legal

(1) 26 O. R. 732; 23 Ont. App. R. 115; 22 Can. S. C. R. 132.

(2) 12 O. R. 402.

responsibility upon the defendant. See the remarks of McColl C.J. in this case (1), at page 513 of the report on the trial, also *Taylor* v. *Brewer* (2); *In re Vince* (3); *Croasdaile* v. *Hall* (4); *Briggs* v. *Newswander* (5). Moreover, there is no evidence whatever of any promise of fair treatment. The evidence of the plaintiff, Harris, was directed to proving a different contract entirely, and the jury have not seen fit to believe him; nor is there any allegation in the pleadings of any such contract. The jury clearly ignore the evidence of Harris that he was promised compensation for his time spent in endeavouring to sell the mine. The special findings are not consistent with a general finding in plaintiffs' favour, and entitle the defendant at least to a new trial. Where, from their answers it can be seen that the jury proceeded wrongly in coming to their verdict, or have found without proper or sufficient evidence, the verdict cannot stand. *Yorkshire Banking Co.* v. *Beatson & Mycock* (6), per Denman J., at p. 206, and in 5 C. P. D. 109, at pp. 126, 127; *Hutchison* v. *Bowker* (7); *Gordon* v. *Denison* (8).

The evidence is such that the jury, viewing the whole of it reasonably could not properly find a verdict for the plaintiffs, and a verdict for the defendant or judgment for her should have been entered by the trial judge; or at all events a new trial should be directed. *Metropolitan Ry. Co.* v. *Wright* (9); *Webster* v. *Friedeberg* (10); *Ferrand* v. *Bingley Local Board* (11); *Allcock* v. *Hall* (12); *Hiddle* v. *National*

(1) 6 B. C. R. 504.
(2) 1 M. & Sel. 290.
(3) [1892] 1 Q.B. 587; 2 Q.B. 478.
(4) 3 B. C. R. 384 at p. 392.
(5) 8 B. C. R. 402; 32 Can. S. C. R. 405.
(6) 4 C. P. D. 204.
(7) 5 M. & W. 535.
(8) 24 O. R. 576; 22 Ont. App. R. 315.
(9) 11 App. Cas. 152.
(10) 17 Q. B. D. 736.
(11) 8 Times L. R. 70.
(12) [1891] 1 Q. B. 444.

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Fire &c. Ins. Co. (1); *Campbell* v. *Cole* (2); *Grieve* v. *Molsons Bank* (3). The right to a new trial is not confined to cases where the jury have been "perverse" or have "misconducted themseves." Per Morris L.J. in *Jones* v. *Spencer* (4) at p. 538. This right is not affected by the fact that two juries had found for plaintiff. *Daun* v. *Simmins* (5).

The following cases are in point respecting a mistrial by reason of a juror having sat on a former trial. *Barrett* v. *Long* (6), at pp. 405, 414-415; *Bailey* v. *Macaulay* (7) at page 829.

The rule respecting the Privy Council interfering with verdicts said to be against the weight of evidence is referred to in *Lambkin* v. *South Eastern Rway. Co.* (8); *Archambault* v. *Archambault* (9); and shews that the two courts referred to are appellate courts, and not the finding of the trial court and one appellate court. Compare *Black* v. *Walker* (10); *Headford* v. *McClary Mfg. Co.* (11); *North British Mercantile Insurance Co.* v. *Tourville* (12); *Lefeunteum* v. *Beaudoin* (13); *City of Montreal* v. *Cadieux* (14); *Russell* v. *Lefrancois* (15). It is the duty of the final court of appeal to review the decisions of the lower courts where they turn on proper inferences to be drawn from the evidence; *Arpin* v. *The Queen* (16); *Hunter* v. *Corbett* (17); *Sutherland* v. *Black* (18); and *Smith* v. *McKay* (19), at page 613.

Bodwell K.C. for the respondents. As to the juror who sat on the previous trial, the knowledge of his

(1) [1896] A. C. 372.
(2) 7 O. R. 127.
(3) 8 O. R. 162.
(4) 77 L. T. 536.
(5) 40 L. T. 556.
(6) 3 H. L. Cas. 395.
(7) 13 Q. B. 815.
(8) 5 App. Cas. 352.
(9) [1902] A. C. 575.
(10) Cass. Dig. 768.
(11) 24 Can. S. C. R. 291.
(12) 25 Can. S. C. R. 177.
(13) 28 Can. S. C. R. 89.
(14) 29 Can. S. C. R. 616.
(15) 8 Can. S. C. R. 335.
(16) 14 Can. S. C. R. 736.
(17) 7 U. C. Q. B. 75.
(18) 10 U. C. Q. B. 515; 11 U. C. Q. B. 243.
(19) 10 U. C. Q. B. 412.

disqualification must be imputed to the defendant and we must assume that she waived the objection. *Brown* v. *Sheppard* (1).

The question at issue was one for the jury altogether and rested entirely upon the credibility of the witnesses. The jury has chosen to believe Harris, and they are the sole judges. *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (2) at pages 1201 and 1202; *Commissioner of Railways* v. *Brown* (3); *Australian Newspaper Company* v. *Bennett* (4); *Dunsmuir* v. *Lowenberg, Harris & Co.* (5). The jury intended to give a general verdict; they answered the questions out of deference to the expressed opinion of the Judge that they should do so, but it is clear from all circumstances that they did not intend that these questions should constitute their verdict. To establish the contention by the other side that the questions are contradictory, and that the findings shew that the jury had gone upon the wrong principle, the appellant must shew that the answers are so framed as to to be destructive of the verdict as a matter of law. All the authorities cited by the appellant when examined establish this. But the answers are entirely consistent with the general verdict. The answer to the first question is simply a statement of the process of reasoning by which the jury arrived at their conclusion, and is, in fact, an adoption by the verdict of the exact case made by the plaintiff on his evidence. The alleged written contract was merely a written instruction which contained a statement of the proposed price and terms, but was intended to be subject to variations by Harris using his best endeavors to effect a sale, should he be unable to find a purchaser on those terms.

(1) 13 U. C. Q. B. 178 at p. 180.
(2) 3 App. Cas. 1155.
(3) 13 App. Cas. 133.
(4) [1894] A. C. 284.
(5) 30 Can. S.C.R. 334.

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Even if the court should think that a different inference might have been properly drawn by the jury from the facts in evidence, it should refuse a new trial on the ground that so many trials have taken place and so many juries have pronounced in the plaintiff's favor. *Wight* v. *Moody* (1) at pp. 502 and 506; *Pender* v. *War Eagle Con. M. & D. Co.* (2). New trials have been persistently refused against the opinions of the courts below. The latest of a long series of decisons in this direction being :— *Rowan* v. *Toronto Ry. Co.* (3) ; *Fraser* v. *Drew* (4). The only cases where contrary rulings have been made are easily distinguishable. They are *Hardman* v. *Putnam* (5), where there was gross misdirection, the judge charging on the question of fraud which had not been raised in the pleadings; and *Griffiths* v. *Boscowitz* (6) also a case of misdirection and refusal to make a direction. In *Cowans* v. *Marshall* (7), there was also a misdirection and the jury failed to make any finding and no proof was made as to the particular act of negligence charged against the defendant. In *Peters* v. *Hamilton* (8) the court below was reversed on an order for a new trial and blamed for it.

This court has consistently held that reversals on mere questions of fact should not be made in the appellate courts unless there were findings so clearly erroneous as to shock a reasonable mind. *Bellechase Election Case* (9) ; *Ryan* v. *Ryan* (10) ; *Arpin* v. *The Queen* (11), approved in *North British & Mercantile Ins. Co.* v. *Tourville* (12) at page 192; *Titus* v. *Colville* (13);

(1) 6 U. C. C. P. 506.
(2) 7 B. C. R. 162.
(3) 29 Can. S.C.R. 717.
(4) 30 Can. S.C.R. 241.
(5) 18 Can. S.C.R. 714.
(6) 18 Can. S.C.R. 718.
(7) 28 Can. S.C.R. 161.
(8) Cas. Dig. 763.
(9) 5 Can. S. C. R. 91.
(10) 5 Can. S. C. R. 387, 406.
(11) 14 Can. S. C. R. 736.
(12) 25 Can. S. C. R. 177.
(13) 18 Can. S. C. R. 709.

Town of Levis v. *The Queen* (1); *Black* v. *Walker* (2): *The Queen* v. *Murphy* (3); *Paradis* v. *Corporation of Limoilou* (4); *Hamelin* v. *Bannerman* (5); *London Street Railway Co.* v. *Brown* (6); *D'Avignon* v. *Jones* (7); *McKelvey* v. *LeRoi Mining Co.* (8). Concurrent findings must not be disturbed: *Warner* v. *Murray* (9); *Schwersenski* v. *Vineberg* (10), approved in *The North British Mercantile Insurance Co.* v. *Tourville* (11), at page 192; *Bickford* v. *Hawkins* (12); *Quebec, Montmorency & Charlevois Railway Co.* v. *Mathieu* (13); *Bowker* v. *Laumeister* (14); *Bickford* v. *Howard* (15), and cases there cited by Taschereau J. Where there is conflicting testimony the findings of the trial judge are decisive: *Grasett* v. *Carter* (16). In *Parker* v. *Montreal City Passenger Ry. Co.* (17), this court reversed the judgment appealed from and restored the findings of fact and the judgment of the trial court because such findings ought not to have been interfered with. This decision was affirmed by the Privy Council which refused leave to appeal precisely because the issues were upon the findings as to fact (18). In *The Santanderino* v. *VanVert* (19), followed in *The Reliance* v. *Conwell* (20), it was held that even in doubtful cases findings of fact ought not to be interfered with. In the *Village of Granby* v. *Ménard* (21), the evidence was contradictory, and Girouard J., with whom all the judges

(1) 21 Can. S. C. R. 31.
(2) Cass. Dig. 768.
(3) Cass. Dig. 314.
(4) 30 Can. S. C. R. 405.
(5) 31 Can. S. C. R. 534.
(6) 31 Can. S. C. R. 642.
(7) 32 Can. S. C. R. 650.
(8) 32 Can. S. C. R. 664.
(9) 16 Can. S. C. R. 720.
(10) 19 Can. S. C. R. 243.
(11) 25 Can. S. C. R. 177.
(12) 19 Can. S. C. R. 362.
(13) 19 Can. S. C. R. 426.
(14) 20 Can. S. C. B. 175.
(15) Cass. Dig. 286.
(16) 10 Can. S. C. R. 105.
(17) Cass. Dig. 731.
(18) 6 Can. Gaz. 174.
(19) 23 Can. S. C. R. 145.
(20) 31 Can. S. C. R. 653.
(21) 31 Can. S. C. R. 14.

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concurred, set out the jurisprudence very fully. The findings of fact by the trial judge were restored in the face of adverse holdings by two appellate courts. This case was followed in *The Reliance* v. *Conwell* (1). In *Grand Trunk Railway Co.* v. *Weegar* (2), all the judges (see texts) held that findings of jury supported on a first appeal ought not to be disturbed, King J. going so far as to say that the findings bound this court (at p. 427), and Gwynne J. stating the same thing practically in his remarks. In *Toronto Railway Co.* v. *Balfour* (3), this court refused to interfere in a matter of procedure as to whether a verdict was special or general and refused to disturb a verdict as against weight of evidence after affirmance by the first court of appeal.

We distinguish the following cases:—*North British and Mercantile Ins. Co.* v. *Tourville* (4), was a case of mixed law and fact depending on an inference of fraud to be drawn from evidence, but the rule as to finality on mere findings of fact is there specially approved, at page 191 by Taschereau J. *Lefeunteum* v. *Beaudoin* (5), depended upon the admissibility of evidence and its appreciation. In *The City of Montreal* v. *Cadieux* (6) an exorbitant rate of remuneration had been allowed based on a corrupt system previously in vogue and thus it appears a great injustice had been caused to the ratepayers. It was not a jury case. (See p. 623 of report.) Taschereau J. very strongly dissented, citing high authority at p 619. See also *Bentley* v. *Peppard* (7).

THE CHIEF JUSTICE dissented from the judgment allowing the appeal and ordering a new trial.

(1) 31 Can. S. C. R. 653.
(2) 23 Can. S. C. R. 422.
(3) 32 Can. S. C. R. 239.
(4) 25 Can. S. C. R. 177.
(5) 28 Can. S. C. R. 89.
(6) 29 Can. S. C. R. 616.
(7) 33 Can. S. C. R. 444.

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SEDGEWICK J.—I agree with the judgment prepared by my brother Davies, but I wish to add that in my view the evidence overwhelmingly preponderates in favour of the appellant, and that upon that ground also the judgment of the court below should be reversed.

DAVIES J.—This was an appeal from the judgment of the Supreme Court of British Columbia refusing an application made by the appellant for a new trial. The action was tried before Mr. Justice Walkem and a special jury who returned a verdict for the respondents for $9,667.62. The case has been long before the courts and is now for the second time on appeal before us. This appeal has been twice argued, the second argument becoming necessary owing to the deaths of two of the judges who sat during the first hearing. The action was begun in 1894 and was originally brought to recover damages for the alleged prevention by the appellant of the sale of her colleries in British Columbia which she had entrusted to Harris, a member of the plaintiffs' firm to dispose of on certain terms. Large damages were awarded plaintiffs by the jury, but on appeal the full court set aside the verdict and ordered a new trial. At the second trial before the late Chief Justice McColl, and after the plaintiffs' claim as originally formulated had been amended by adding a claim on the alleged supplemental contract to pay all expenses in case no sale was effected, a non-suit was entered, but this was reversed by the full Court of British Columbia and a new trial ordered. On appeal to this court by the present appellants it was held that there was legal and admissible evidence of a parol agreement supplemental to both the commissions to sell the colleries—to that of the 18th of January, 1892, as well as that of the 18th September, 1890—making

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provision for a case which the written agreement did not contemplate. The appeal, therefore, was dismissed and the order for a new trial confirmed, but upon this one ground alone. The then Chief Justice who delivered the judgment of this court expressed his own strong opinion that there was no evidence whatever of the original case made by the respondents, that of undue interference with them by the appellant in their efforts to make a sale, and stated that as the order for the new trial in the court below proceeded upon this ground exclusively, had there been nothing else in the case the appeal ought to have succeeded.

At the third trial a great mass of testimony was again given in support of the original case, but the verdict of the jury was limited to findings in plaintiffs' favour on the alleged collateral agreement. I am of the opinion that this is the only branch of his case on which under the evidence the plaintiffs could possibly succeed and I mention the fact because, if the cause is again tried before a jury, I think the evidence should be confined to that one branch of the case, and a large amount of irrelevant evidence bearing on the claim for damages for alleged undue interference with the respondents in their efforts to make a sale of the colleries eliminated.

The appellants seek to set aside the last verdict on several grounds. In the view I take of the case however it is unnecessary for me to do more than deal with one of them, though I am quite in accord with the judgment of the full Court of British Columbia in holding that the fact of one of the jurors at this hearing having also sat on one of the former trials, is not *per se* a ground for disturbing the verdict. Under the practice in British Columbia the appellant had a double opportunity of challenging this juror and not having exercised her right at the proper time or given

satisfactory reasons for her neglect cannot now, when the verdict has gone against her, be heard upon the point.

The main questions in the appeal however, are, first: Was there any evidence to go to the jury of the collateral agreement to pay the respondent Harris his "expenses" or "compensation and expenses" in case there was no sale of the collieries? And if so, have the jury found that there was such an agreement? I agree that there was evidence on the point which it was the duty of the judge to submit to the jury and am unable to concur in the contention of the appellant's counsel that the weight of the evidence was so strongly against the plaintiff that the defendant was entitled to have judgment entered for her *non obstante veredicto*. It is not a question of the preponderance of the testimony, nor is it a question of how this court would find if the matter was open to them. The conduct and demeanour of the witnesses and the credibility and weight to be attached to their statements together with the correspondence and other written testimony, were matters peculiarly within the exclusive province of the jury, and if they had found one way or the other upon the issue this court would not, under the circumstances, have entered a judgment against their finding. But in my opinion there has not been any finding upon the only substantial issue open to the jury to find upon. The real dispute has not been tried, or, if tried, has not been passed upon by the jury. The learned judge told the jury that they could bring in a general verdict, but that he would leave certain specific questions to them in order the more clearly to determine the actual facts. The jury were not bound under the laws of British Columbia to answer these questions, but they acted upon the

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advice of the judge and did so. The first question was:

Did the defendant, Mrs. Dunsmuir, authorize the plaintiff, say in the middle of 1890, to "do his best" to sell her mine, and if so, was any compensation mentioned at the time?

Their answer was:

In view of concessions made subsequently, we believe there was a promise of fair treatment in case of no sale.

The question might possibly have been more definite and clear and have asked the jury to answer whether there was any verbal promise made by Mrs. Dunsmuir to Harris, on either of the occasions when the written commissions to sell the collieries were given or after the giving of either of such commissions to pay or allow Harris any and what compensation in case he failed to effect a sale. That was the vital point of the case on the answer to which the verdict depended. The onus of proving any such supplemental contract lay upon the plaintiff. He cannot recover unless the jury first find that such a supplemental promise or contract was in fact made. Now reading the answer the jury gave to the question put to them it will be seen that they carefully refrain from finding the existence of the alleged supplemental agreement or promise. All they find is a promise of fair treatment and that finding they base upon certain expressed reasons. Reasons for their finding they were not bound to give, and indeed it would have been better if they had not given any, because those they have given have been the subject of much pertinent criticism. But apart from their reasons which may appear more or less cogent or relevant, they failed to give either an affirmative or a negative answer to the question, or indeed any answer from which the court could properly infer the existence of the agreement or promise relied upon.

The promise found of "fair treatment in case of no sale" has no evidence whatever to support it, and strictly speaking if it amounts to anything is a finding against the specific collateral agreement plaintiff alleged had been come to and which he had either to prove or in case of failure suffer defeat. Whether there was or was not a promise of fair treatment in case of no sale was not an issue between the parties at all. If it was, a serious question which was raised by appellant's counsel had to be answered, namely, whether such a promise is capable of being enforced or given effect to. What is fair treatment, and who is to determine it? Such a question however need not be discussed now. The plaintiff did not claim, and no evidence whatever pointed to, any such promise. The plaintiff, Harris, said in one place he was promised his "*expenses and a fair remuneration*", and in another place "*his expenses*" in case no sale was effected by him. The plaintiff's evidence was the only evidence offered in support of the agreement. The defendant denied it Much collateral evidence was given to shew that such a promise was not and could not have been made. But the issue was plain and square and the jury were bound to find one way or the other. They did not do so but on the contrary found the promise was one of "fair treatment" only. As I have already said neither party contended this was the promise and no evidence supported it. In fact, in my opinion, the evidence as a whole strongly preponderated in defendant's favour on the point at issue. The jury's general verdict was a sympathetic one, but not one which could be upheld on such a special finding as they made. If the general verdict had stood alone it might be supported possibly on the ground that the jury had preferred to believe Harris rather than accept the evidence against him.

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But no such contention can prevail in the face of the specific finding they have come to.

The real issue not having therefore been passed upon or found one way or the other, the verdict cannot stand and there must be a new trial.

In view of the strong expressions of opinion that we have felt bound to give of the uselessness of the mass of evidence given with reference to the claim as originally framed, and of the fact that the issue is a simple and square one, was the promise made by the defendant to Harris as he alleges in case there was no sale, it is to be hoped that the evidence on the new trial can be materially lessened.

The learned counsel for the appellant contended very strenuously that some evidence had been wrongfully admitted and some excluded, and also that sufficient proof had not been given by plaintiff of his actual expenditure. It is obvious however that these questions do not in view of our decision require treatment at our hands now. They may safely be left to the tribunal, which will now dispose, I hope finally, of this much litigated dispute.

The appeal will be allowed with costs in this Court and in the full Court of British Columbia.

NESBITT J.—I concur with the judgment prepared by my brother Davies, with the additional observations by my brother Sedgewick.

KILLAM J.—In my opinion the appeal should be dismissed.

While a perusal of the printed report of the case naturally leads one to seriously doubt the correctness of the verdict, I do not think that the court should interfere with it.

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Killam J.

This court has already decided that, upon practically the same evidence for the plaintiff, there was a case for the jury. It was still so after the evidence for the defence was given.

The jury's finding that there was a promise of fair treatment in case of no sale is, of course, not a finding of a fact raising a liability by implication of law, but such a promise would warrant, I think, the inference of an agreement to remunerate, justifying a verdict for the plaintiff.

In this case, it was not a question of entering a judgment upon special findings, but there was a verdict involving the necessary inference.

I am not prepared to say that the verdict is so clearly unreasonable as to warrant its being set aside.

Appeal allowed with costs.

Solicitors for the appellant: *Tupper, Peters & Griffin.*

Solicitors for the respondents: *Bodwell & Duff.*