

## RECENT ENGLISH CASES.

*In the Court of Common Pleas, January 15th, 1856.*

## WIELER vs. SCHILIZZI.

1. In an action for a breach of warranty, by the vendee against the vendor of goods, who has warranted them to be of a particular denomination, but not according to sample, it is a proper question for the jury whether the amount of adulteration in the goods supplied, be such as to alter their distinctive character.
2. A. undertook to supply B. with certain parcels of linseed, which he warranted should be "Calcutta linseed," and supplied him with linseed containing 15 per cent. of other seeds. It was proved that "Calcutta linseed," at the time the contract was made, contained usually from 2 to 3 per cent. of other seeds. The jury were asked whether this was such an adulteration or admixture of foreign substances as to alter the distinctive character of the article, and prevent its being saleable as Calcutta linseed; and whether this adulteration was such as might reasonably be expected:—*Held*, no misdirection.

The first count of the declaration stated, that the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy of the defendant, certain parcels of goods, and by the said agreement the defendant warranted the said goods respectively to be "Calcutta linseed"; that the defendant caused to be delivered to the plaintiff the said parcels of goods, but that he broke his said warranty in this, that the said parcels so delivered were not Calcutta linseed, and were respectively in great part composed of substances other than and inferior in value to Calcutta linseed, and the defendant never delivered to the plaintiff parcels of Calcutta linseed in pursuance of his said contract and warranty; and by reason of the premises part of the said goods so delivered were wholly valueless and unsaleable by the plaintiff, and as to and in respect of the residue thereof the plaintiff was unable to obtain the same prices as he otherwise would have done, and was obliged to and did, before the suit, sell the same at greatly reduced prices. The declaration contained also the common money counts.

Pleas to the first count—first, a denial of the warranty as alleged; second, a denial of the breaches of contract as alleged. Issue thereon.

At the trial, before Jervis, C. J., at the Guildhall, at the sittings after last Michaelmas term, it was proved that the sale was not by sample, and that 15 per cent. of the parcels of linseed delivered was mustard, and that from 2 to 3 per cent. was the usual amount of adulteration found in Calcutta linseed, but that the linseed supplied answered the description of Calcutta linseed. Two of the plaintiff's witnesses said, that it was linseed of an inferior quality; and two of the defendant's witnesses, to whom it was sold as Calcutta linseed, used it, and made cake of it. The Lord Chief Justice left it to the jury to say, "whether there was such an adulteration or admixture of foreign substances as to alter the distinctive character of the article, and to prevent its being saleable as Calcutta linseed; and whether the adulteration was such as might reasonably be expected." The jury returned a verdict for the plaintiff on the first count, and the amount of damages was referred to arbitration.

*M. Smith* now moved for a new trial, on the ground of misdirection. The action is for a breach of warranty. If the linseed supplied by the defendant was of the description (and it was proved that it was) known in the trade as "Calcutta linseed," there is no breach. The sale was not by sample. It was never intended that there should be any question as to the quality of the linseed, but it was to be taken "*tale quale*." It is submitted, that "the reasonable expectation" of the purchaser is not the true test. All that the purchaser under this contract had any right to expect was, that the article should be saleable in the market as Calcutta linseed. He referred to *Gardiner vs. Gray*, 4 Campb. 144.

CRESWELL, J.—I cannot discover any misdirection. It is suggested that the misdirection was in asking the jury whether the seed came with more foreign in it than was *expected*—and that the question ought to have been simply, whether it was or was not Calcutta linseed. But all that the Lord Chief Justice meant to ask was, whether the article was such as was usually known as Calcutta linseed; because, if it were, then the purchaser would have a right to *expect* a reasonable amount of adulteration only.

CROWDER, J.—I also think that the question was quite correctly left to the jury:—"Was the adulteration more than might reason-

ably be expected?" These words are not to be understood in the sense put upon them by Mr. Montagu Smith. The jury found that the adulteration was not reasonable, and the Chief Justice is satisfied with the verdict.

WILLES, J.—In effect, the question left to the jury was, "Was the linseed so mixed as to have lost its distinctive character?" If it was so mixed, the defendant was answerable for a breach of his contract. The purchaser's expectation was, that he would get Calcutta linseed of the quality known in the trade as Calcutta linseed. In this case he did not get what he bargained for. As if a man buys gold, bargaining for it to be of 24 carats of fineness, and he gets gold of one carat of fineness, no one can say that he has got what he bargained for.

JERVIS, C. J. concurred.

Rule refused.

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*In the Court of Exchequer—January 16, 1856.*

DAVIES vs. ROPER.<sup>1</sup>

In a case involving no question of law the plaintiff's claim was supported almost exclusively by his own testimony, and was encountered by circumstantial evidence on the part of the defendant. A common jury having found for the plaintiff, a new trial was granted on affidavits disclosing fresh evidence. At the second trial, this evidence was adduced, but the second jury (a special one) found for the plaintiff. The judge certifying to the court in writing that the verdict was "a very wrong verdict," the court granted a third trial, on the ground of its being against the weight of evidence.

This was an action for an illegal distress for rent, to which the defence was that the distress was lawful. The plaintiff, a poor man, had built a cottage on some waste land, and occupied it for several years; at the end of which time the defendant, a gentleman of fortune in the neighborhood, made the distress in question upon that land, on the ground that the plaintiff was his tenant, and had on former occasions paid rent to him for it. The cause was tried at Chester, before Williams, J., and a common jury, when a verdict

<sup>1</sup> London Jurist, vol. 20, p. 167.

was returned for the plaintiff. A rule was obtained to set aside this verdict as being against the weight of evidence, and on affidavits disclosing fresh evidence, which, after argument, was made absolute on the latter ground. The cause was tried a second time at the same place, before Jervis, C. J., and a special jury, when, notwithstanding this additional evidence, another verdict was found for the plaintiff. No question of law arose on either trial, the question at each simply being whether the plaintiff was a free occupier of the land in dispute, or held it as tenant to the defendant. The plaintiff's case on both occasions was supported almost exclusively by his own testimony; and was encountered on the part of the defendant by a mass of circumstantial evidence, consisting chiefly of statements at variance with it made by the plaintiff in the course of conversation with different persons. A rule was obtained to set aside this second verdict as against the weight of evidence, Jervis, C. J., on being applied to, certifying to the court in writing that the verdict was "a very wrong verdict."

*Grove and E. V. Williams* showed cause. Independently of the merits of this case, it raises an important constitutional question—whether, when two successive juries have found in favor of a litigant party on a mere question of conflicting testimony, with no matter of law involved, the court will set aside the second verdict because they deem it erroneous. The true principle on this subject is that stated in *Wood vs. Gunston*, (Sty. 466), "The discretion of the court to grant a new trial must be a judicial and not an arbitrary discretion." And in a case in the Queen's Bench, where the judge of a county court had granted several new trials, the court said he was wrong. [MARTIN, B.—Did you ever know an instance of the court having refused a new trial where the judge who tried the cause certified the verdict to be a very wrong one?] Frequently, when the application was for a *second* new trial. [MARTIN, B.—I never knew such an instance when the judge took the trouble of writing it down, as he has done here.] If parties are concluded by the mere opinion of the judge upon the evidence, trial by jury is at an end, and trial by judge substituted for it. [PLATT, B.—The reference which the court makes to the judge by whom the cause

is tried, is merely to inform their own conscience.] Will the court, then, grant new trials ad infinitum if the several successive judges by whom the cause is tried pronounce the several successive verdicts erroneous? [ALDERSON, B.—It is not correct to speak of the two verdicts in this case as similar, for fresh evidence was brought before the second jury.] No two verdicts can ever proceed on exactly the same evidence. [ALDERSON, B.—If this case had arisen under the old system, when the parties could not be examined, you would have had no witness at all. A man may now swear himself into an estate; besides which, the evidence of the plaintiff here is opposed by contrary testimony.] None contradicting him directly. [They likewise argued the case on its merits.]

*Walsby*, who appeared to support the rule, was not called on.

ALDERSON, B.—There must be a third trial—that is all. The case is not like the one we had this morning, where the judge merely reported that he should not have found as the jury did. Here we have the opinion of the judge, who saw the witnesses, and knows all the circumstances of the case better than we can, that the verdict is a very wrong verdict.

PLATT, B.—The judge by whom the cause is tried hears the addresses of counsel to the jury, who often form their opinion on topics addressed to their prejudice, such as one of the parties being a poor man and his antagonist a rich one. That is just this case.

MARTIN, B.—I believe judges are most careful not to interfere with the verdicts of juries, but if a verdict is to stand when the judge says it is a very wrong verdict, trial by jury will become a great evil.

The rule was then made absolute, costs to abide the event.<sup>1</sup>

<sup>1</sup> This case, so trivial in itself, has been reported for the sake of the constitutional principle it involves. The question divides itself into two parts—first, whether previous to the Evidence Act, 14 & 15 Vict. c. 99, the courts would set aside an indefinite series of verdicts given on a disputed fact, if the judges by whom the cause was tried expressed their opinion, either verbally or by writing, that those verdicts were very wrong ones; and, secondly whether any change in this respect has been effected by that statute. Where, indeed, a jury find what is called a “*perverse verdict*,” i. e. refuse to listen to the law as correctly laid down to them by the judge, (per Parke, B., in *Mould vs. Griffiths*, 8 Jur 1019; per Pollock, C. B., in *Saunders vs. Davies*, 16 Jur. 481), a new trial is grantable *ex debito justitiæ*; and if

any possible number of successive juries were to find in the same way, the verdicts would be set aside, for in such cases the jury everstep their province and invade that of the judge. And the same holds where a jury, or series of juries, disregard a *præsumptio juris*, i. e. a presumption of law which might be made by the court without their intervention; (1 Ph. Ev. 467, 10th ed.); for presumptions of this class are part of the law itself. So if they take on themselves to find a verdict where the judge tells them truly that there is no evidence, for whether there is *any* evidence is a question for him: (1 Ph. Ev. 3, 4, 10th ed.) But where a jury disregard a presumption of mixed law and fact, and a *fortiori* where they find in a particular way on a mere question of conflicting testimony, all the authorities agree, and the 35th section of the Common-Law Procedure Act, 1854, recognizes, that the granting a new trial is only matter for the discretion of the courts, which are moreover very cautious in the exercise of this power: (See Ph. & Am. Ev. 459, 460; Stark. Ev. 803, 4th ed.; *Swinnerton vs. The Marquis of Stafford*, 3 Taunt. 232; *Foster vs. Allenby*, 5 Dowl. 619). A strong illustration is afforded by the case of *Foster vs. Steele*, (2 Bing. N. C. 892). There two successive juries having found for the plaintiff on the question of the seaworthiness of a ship, the court of common pleas, though dissatisfied with the verdicts, was equally divided as to whether a third trial should be granted: Tindal, C. J., and Park, J., holding the negative, and Vaughan and Colman, JJ., the affirmative; but the whole court agreed that if a third jury were to find in the same way the proceedings should stop. The disregard by a jury of a presumption of mixed law and fact, affords much stronger ground for the interference of the court than where the question is only one of conflicting evidence, and we apprehend that the principle on which new trials are granted at all in the latter case is this—that although the jury are the constitutional judges of the facts in dispute, still if their verdict appears against the weight of the evidence, the court will presume that they have labored under some mistake or misapprehension, or been carried away by some prejudice, or influenced by some corrupt motive which cannot be detected, and in order to prevent a defeat of justice from any of these unascertained sources, sends the case to another jury. The reference usually made on such occasions to the judge by whom the cause was tried, for his judgment on the evidence, is merely, as observed by Platt, B., in the text, to inform the conscience of the court. But when a succession of juries find in the same way, not only would such a presumption be violent and unreasonable, but the very fact raises a presumption of an opposite kind, namely, that there must have been some ground for those findings which escaped the observation of the presiding judges; e. g. that the juries remembered some piece of evidence which the judges forgot, or saw something in the demeanour of the witnesses which eluded their observation—twenty-four eyes see more than two, especially when those two are already occupied in making a note. We once saw five men tried for a burglary, before a very accurate and painstaking judge, who summed up for a conviction as to three, and for an acquittal as to the fourth, and directed an acquittal of the fifth. The jury convicted all five, and being remonstrated with by the judge, it came out on inquiry that their verdict against the fourth and fifth prisoners was found on a piece of evidence affecting them.