Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Royal Mail Steampacket Company v. *George and Branday, from the Supreme Court of Judicature of Jamaica in Equity; delivered 2nd May* 1900.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.

[*Delivered by Lord Hobhouse.*]

The Respondents in this Appeal sued the Defendants, now Appellants, for damages in respect of a nuisance committed by the latter and for an injunction to restrain its continuance. The action was tried before Chief Justice Clarke and a special jury in October 1897. Certain questions were submitted to the jury, and upon their answers the learned Chief Justice entered verdict and judgment for the Defendants with costs. The Plaintiffs then moved the Full Court, consisting of the Chief Justice and Judges Northcote and Lumb, to have the judgment entered for themselves, or in the alternative for a new trial. The learned Judges all considered that the Plaintiffs were entitled to judgment which was entered accordingly on 3rd February 1898. From that judgment the present Appeal is brought.

The Defendants ask that the verdict and judgment entered for them at the trial may be restored, or at all events that the judgment of

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3rd February 1898 may be set aside, and a new trial ordered. It appears to their Lordships that the decision of this Appeal must be confined to the question whether the case has in effect been submitted to the jury; and for the purpose of deciding that question it is necessary to state with some particularity the issues raised on the Record and the proceedings at the trial.

The Plaintiffs and Defendants respectively are owners of wharves abutting on Kingston Harbour and separated only by the width of Duke Street which runs substantially north and south; the wharf of the Plaintiffs being on the west side and that of the Defendants on the east. From the year 1841 onwards the Defendants have kept stores of coals on their wharf, and it is common ground between the parties that the loading and the unloading of the coals has constituted an annoyance to the Plaintiffs or their predecessors in title which the Defendants have by more than 20 years' user acquired a prescriptive right to continue. The action is founded on allegations of alterations in the structure of the Defendants' works and in the conduct of their business which as the Plaintiffs contend produce injurious effects not covered by any prescriptive right.

In the fourth paragraph of their claim the Plaintiffs allege that within the last twenty years the Defendants have largely increased the quantities of coal stored on their wharf, and the quantities unloaded from and loaded into vessels lying at their pier and have extended the place of storage 200 ft. southwards. By paragraphs 5 and 6 the Plaintiffs allege that the Defendants have within the last twelve months viz. in the year 1896 extended the pier of their wharf 250 feet southwards and have since loaded and unloaded coal at points 250 feet further south than they did previously. In paragraphs 7, 8,

and 9 the Plaintiffs go on to state the consequences of this alteration. Instead of loading and unloading in baskets carrying small quantities the Defendants do it by trucks carrying large quantities emptied at a great height (paragraph 7). They have discontinued watering their coals, which they used to do previous to the extension (paragraph 8). They unload coal at a height of twenty feet above their previous level (paragraph 9). The grounds of action are summed up in paragraphs 10 and 11 which run as follows:—

"By reason of the matters stated in paragraphs 4 to 9 hereof "the Defendants from the 1st day of September 1896 to the "present time have wrongfully caused large quantities of coal "dust to issue and proceed from their said wharf premises "and the vessels lying thereat.

"The said coal dust spread itself over the Plaintiffs' wharf "premises, and destroyed and damaged the goods of the "Plaintiffs on their said wharf premises, and damaged the "buildings thereon and vessels lying thereat, and rendered and "render the house thereon unwholesome and uncomfortable to "live in and the said wharf premises unwholesome and uncom- "fortable to occupy and unfit for use."

In their defence the Defendants deny the statements in paragraphs 4, 7, 8 and 9. Paragraphs 5 and 6 are not denied. They meet the legal claim raised in paragraphs 10 and 11 as follows:—

"The Defendants deny each and every of the several allegations made by the Plaintiffs in paragraphs 10 and 11 "of the Statement of Claim, and say that, in the due per- "formance of their duty as wharfingers and as charterers and "owners of vessels loading and unloading coal on their wharf "the quantities of coal dust that issue from their wharf "premises are incidental to their said business, and is in "accordance with their right, enjoyed for a period of twenty "years and upwards in the loading and unloading of such "vessels, and the inconvenience suffered by the Plaintiffs (if "any) is not in the nature, extent, and character thereof other "than that heretofore suffered and allowed by the Plaintiffs and "their predecessors in title for twenty years and upwards, and "is of a character necessary to the incidents of the business "carried on by the Defendants."

In joining issue on this defence the Plaintiffs made admissions to the effect that the increases

of quantities alleged in paragraph 4 of the claim had not taken place (Rec., p. 7). Upon that admission there remained no express allegations of damage to the Plaintiffs by reason of the Defendants' extension of their pier, except those contained in paragraphs 7, 8, and 9.

It is not mentioned in the pleadings but it was shown by the evidence that in or about the year 1890 the Plaintiffs also enlarged their works, carrying them further to the south. The Chief Justice speaks of this as a fact which although disclosed was certainly not relied upon at the trial; viz., that the nuisance complained of in part falls upon the portion of the Plaintiffs' wharf and pier which were added by them since they purchased (Rec., p. 76).

It is rather unfortunate, especially with reference to the point on which the case ultimately turned, that no plan of the locality has been put in evidence. One was tendered but for some reason was not received; perhaps, as the Respondents' Counsel suggests, because it was not sufficiently accurate. A copy was shown to their Lordships during the argument and it helped them to understand some points in the case; but it is not evidence.

At the trial the course of the controversy seems to have been in accordance with the state of the pleadings. It resulted in the submission of four questions to the jury to which they returned separate answers. The first question was whether the Plaintiffs suffered substantial inconvenience and discomfort by reason of the coal dust raised by the Defendants; and the answer was in the affirmative. The second question was whether the Plaintiffs' inconvenience and discomfort had been materially increased by any of five specified causes, all relating to the injurious consequences alleged in the plaint to have resulted from the new pier;

and the answer to each was in the negative. The third question was whether the inconvenience and discomfort to the Plaintiffs at the date of the writ was substantially greater than in the preceding twenty years; and the answer was in the negative. The remaining question related to damage from increase in inconvenienee and discomfort; and the jury found there was none.

In his judgment on the Plaintiffs' motion to set aside the verdict the learned Chief Justice has given a full and clear account of the proceedings before him. Before stating it it will be convenient to show the grounds on which the Plaintiff moved the Court. Some heads refer to the evidence and need not be specified. Heads 2 to 6 rest entirely on the alteration in the legal position of the case caused by the erection of the Defendants' new pier. They are to this effect: that the prescriptive right acquired for the old pier does not extend to the new: that as the places of loading and unloading were changed there was necessarily a corresponding change in the incidence of the dust: and that, as the right attaching to the old pier was not extinguished, the *injuria* of the Plaintiffs has been increased, even though there has been no substantial increase of *damnum*. They also raise the point that the prescriptive right of the Defendants does not extend to the new pier of the Plaintiffs.

Their Lordships now proceed to extract the material passages from the judgment of the learned Chief Justice. He says:—

"The case opened for the Plaintiffs at the trial was, that
" since the Defendants' new pier came into use, the coal dust
" on their premises had increased to such an extent that
" what was previously a trifling inconvenience had become a
" serious nuisance. Their complaint was not confined to the
" dust coming from the new pier, but embraced the methods
" of handling and storing the coal pursued by the Defendants

"since the new pier was brought into use, nor was it limited
" to altered conditions on any particular part of their own
" premises. Not only was it alleged that there was more dust
" on their pier and new stores (Nos. 1 and 2) to the south,
" but the old stores (3 and 4 and 5), the office and residence,
" and the logwood yard were all said to have suffered by the
" change, and even Store No. 6, to the extreme north, was
" shown to the jury, as being subjected to the new nuisance.
" The jury were asked to give damages for a general increase
" in the inconvenience extending over the whole of the
" Plaintiffs' premises.

Then after showing that when the Defendants had ineffectually contended that there was no nuisance at all they satisfied the jury that there was no more than existed before the erection of their new pier, and that after a very lengthy hearing the Counsel agreed to forego their addresses to the jury, he proceeds:—

"Before summing up I stated the questions which seemed
" to me to involve everything in dispute, and which are those
" afterwards left in writing. It was not then suggested
" that there was any other separate question as regards the De-
" fendants' new pier, nor that, as the nuisance in part proceeded
" from it, there was no evidence to support the Defendants'
" plea of prescriptive right. Though the Plaintiffs' evidence
" seemed directed to prove an increase in the quantum of dust
" coming to all parts of their premises, the jury were told that,
" assuming the inconvenience amounted to a nuisance, if the
" Plaintiffs' premises were rendered less convenient by a
" change in the incidence of the dust since the alteration of
" the Defendants' premises, there would be an actionable
" wrong whether the amount of dust received were greater
" than before or not. They were not however directed that
" a change in the incidence, without reference to the question
" of inconvenience, would in itself constitute a new wrong"

At this stage then it was that the jury gave the answers which have been stated above; and nothing can be clearer than that the point to which their attention was confined was this, whether the Defendants' works taken as a whole were after the erection of their new pier more injurious than before to the Plaintiffs' works taken as a whole. The Judge and the Counsel were in accord on this point.

After this came the first indication of the point on which the judgment ultimately turned. The learned Chief Justice continues:—

"After the jury returned their answers, the Plaintiffs' "Counsel moved for judgment on the first finding, on the "ground that the Defendants' extension was a new structure, "and although no argument was submitted, I understood that "he then, generally speaking, took up the position expressed in "the second third and fourth grounds of the present Appeal."

That raised the question whether the prescriptive right acquired for the Defendants' old pier extended to the new. The learned Chief Justice referred to the statement in the Plaintiffs' claim in which the new pier was described as being part of the Defendants' wharf premises in which they had for many years carried on business and he concludes thus: "It seemed to me, that "it was not open to the Plaintiffs to treat the "new pier as not being upon the dominant "tenement, and no other question being raised I "gave judgment for the Defendants." (Rec., p. 75.)

The only point then raised at the trial after the disposal by the jury of the question of increase in the nuisance was whether the Defendants' extension was part of the dominant tenement. On the Appeal the Chief Justice adhered to his opinion that this question was not open on the pleadings. It is to be remarked however that Lumb J. (Rec., p. 87, 88) decides this question in favour of the Plaintiffs on the ground that the Defendants had only recently acquired the site of the new pier, and uses it in answer to the Defendants' contention that as regards the extent of the prescriptive right or of presumption of grant from user, no distinction can be taken between one part of the property and another. It is said at the Bar that the learned Judge was mistaken as to the Defendants' acquisition of the site. However that

may be, the question is one of fact, and it was not submitted to the jury nor was it the subject of controversy till the trial was practically finished. So that independently of the objection arising from the state of the pleadings, the fact which appears to be the candid point of Lumb J. decision has never been ascertained.

The reason given by the learned Chief Justice for his judgment on the Appeal was founded upon the 6th head of the Plaintiffs' grounds of appeal, viz., that there was necessarily a change in the incidence of the coal dust on to the Plaintiffs' premises. This as he considers so alters the nature of the easement that a new wrong was done to the Plaintiffs.

Northcote J. takes the same view. He agrees that the Defendants' extension was treated by the Plaintiffs as part of the pre-existing wharf and not as new premises creating a new nuisance, and that it was not open to them to treat it differently on appeal. He thinks that the issue raised by the 6th head of Appeal was sufficiently raised on the pleadings by the plea of the Defendants that the nature extent and character of the nuisance was not altered, and by the Plaintiffs joining issue thereon. He points out that the parties at the trial appear not to have known what were the precise issues they were fighting about; with the result that the jury had no question before them except that of increased damage. But he holds that in respect of the Plaintiffs' extension of their wharf a new wrong had arisen.

Lumb J., as before stated, takes a different view of the Defendants' extension. He rests his decision on the failure of the Defendants to prove a prescriptive right to load and unload at the new pier. He does not address himself

specially to the question whether it was open to the Plaintiffs to raise such a point in appeal and he decides for himself without evidence an incident which materially affects the question. Their Lordships consider that the view of the two other learned Judges on this part of the case is the sounder one.

With regard to the point on which they rest their judgment, viz., the incidence of coal dust on the new works of the Plaintiffs Mr. Pollock drew attention to several passages in the evidence with the view of showing that such new incidence was substantial and injurious. Whether the evidence does or does not lead to the inference that a substantial new wrong has been caused by the Plaintiffs is a point which ought to have been brought before the jury and decided at the trial; and as it was not so the question is reduced to this, whether the Court is justified in deciding it upon Appeal. They have answered that question in the affirmative on the construction of Section 438 of the Civil Procedure Code, by which the Court is allowed to draw all inferences of fact not inconsistent with the findings of the jury and if satisfied that it has before it the materials necessary for determination may give judgment. The findings of the Court in this case are not inconsistent with any of the findings of the jury. The question remains whether the Code enables the Court to decide questions of fact never submitted to the jury at all.

This matter was carefully examined in the case of *Millissich* v. *Lloyds* which was decided in the year 1877 and is reported in 36 L.T. p. 423. It turned on the construction of Order XL. Rule 10 made under the English Judicature Act of 1875. That rule corresponds with the Jamaica rule, and the same body of Common Law underlies both. The Plaintiff in the action claimed

damages for libel. The libel alleged was contained in a pamphlet published by Lloyds purporting to give a report of a trial in which the Plaintiff and another were charged with conspiracy. The Plaintiff was abroad; the other Defendant was tried and convicted. It was held that the report was in its nature privileged and the question then was whether it was fair or unfair. The complaint against it was that the Defendant had reported the speech of the prosecuting Counsel and the summing up of the Judge, but not the evidence, nor the speech of the Counsel for the defence. Chief Justice Coleridge who presided at the trial directed the jury that the report could not be fair because it did not present the case as a whole, but only gave part of it; and on that direction the jury found a verdict for the Plaintiff.

The Defendants moved to have judgment entered for themselves on the ground that there was no evidence to show that the report was unfair. The Court of Common Pleas of whom Lord Coleridge himself was one declined to enter a verdict for the Defendants; but they directed a new trial apparently on the ground that the Judge's direction to the jury could not be supported, and that the question of fairness or unfairness had not been submitted to the jury.

The Defendants then raised the same contention before the Court of Appeal, and they relied on the rule which has been referred to. Lord Justice Mellish said that though the terms of the order were very general "it was clearly "not intended by the Legislature that the Court "should take advantage of that general rule to "take away questions from the consideration of "the jury, which are questions of fact properly "for their consideration." It was argued that the evidence was all one way, and that a new trial would be useless because no jury could

reasonably findthe other way. But he answered that the jury are the judges of the credibility of witnesses and also of the general inference to be drawn from all the facts. Lord Justice Brett dealing with the argument that the Court ought not to send the case to trial again if satisfied that the evidence is so strong that no jury ought to find against it applies the rule thus: "If at " the trial the Judge according to law was bound " to direct the verdict to be entered for the " Plaintiff we are bound to direct it to be entered " in the same way." The appeal was dismissed.

In the present case the Plaintiffs support their injunction on the ground that owing to the extensions of the works there has been a variation in the kind of servitude which the Defendants claim to impose upon them, substantial enough to constitute a new wrong of appreciable amount. That is clearly a question for the jury. Owing to the way in which the works of each party were treated as a whole that question was never put to the jury; probably it was never suggested at all during the trial in any such way as to bring out the separate considerations relating to the new works. However that may be, the Defendants say they are entitled to have the opinion of a jury upon their liability. Their Lordships hold them to be so entitled, and for that purpose a new trial is necessary.

The Defendants ask for more, viz., to have judgment entered in their favour. They urge with some force that the Plaintiffs' claim is grounded on the increase of nuisance, and that if the Plaintiffs were dissatisfied with the questions put to the jury they ought to have objected. Their Lordships however think that there has been enough of common misapprehension to make it unreasonable to visit on the Plaintiffs the whole consequences of the miscarriage which has undoubtedly occurred. They think that the

proper decree will be to discharge the order of the 3rd February 1898 except so far as it directs that the judgment entered for the Defendants on the 8th October 1897 shall be rescinded and set aside, and instead of the portion discharged to direct a new trial of the cause with liberty for either party to apply for amendment of the pleadings as they may be advised. The costs of all the proceedings should abide the event of the new trial. Their Lordships will humbly advise Her Majesty to order to that effect. In this Appeal the Defendants have succeeded in discharging the judgment entered for the Plaintiffs and have failed in getting one entered for themselves. The Appeal, however, was necessary for the purpose of displacing the judgment entered up against them, and obtaining a new trial. There is nothing in the record which is not proper for that purpose; and it is difficult to suppose that the costs can have been in any way incurred by the not very long addition to the argument founded on the same materials. The case is one in which it is fair that the Respondents should pay the costs and their Lordships order accordingly.