JOHN R. BOOTH, PERLEY & PATTEE AND BRONSON & WESTON (DEFENDANTS) ..... } APPELLANTS;

AND

ANTOINE RATTÉ (PLAINTIFF)..... RESPONDENT.

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*Nov. 4.
*Dec. 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Practice—Judgment of court—Withdrawal of opinion—Master's report—Credibility of witnesses — Apportionment of damages — Irrelevant evidence.

The Court of Appeal for Ontario, composed of four judges, pronounced judgment in an appeal before the court, two of their Lordships being in favour of dismissing and the other two pronouncing no judgment. On an appeal from the judgment dismissing the appeal it was objected that there was no decision arrived at.

Held, that the Appellate Court should not go behind the formal judgment which stated that the appeal was dismissed; further, the position was the same as if the four judges had been equally divided in opinion in which case the appeal would have been properly dismissed.

In an action against several mill owners for obstructing the River Ottawa by throwing sawdust and refuse into it from their mills a reference was made to the master to ascertain the amount of damages.

Held, affirming the decision of the Court of Appeal, that the master rightly treated the defendants as joint tort feasors; that he was not called upon to apportion the damages according to the injury inflicted by each defendant; and he was not obliged to apportion them according to the different grounds of injury claimed by the plaintiff.

Held further, that the master was the final judge of the credibility of the witnesses and his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence.

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*PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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On a reference to a master the latter, provided he sufficiently follows the directions of the decree, is not obliged to give his reasons for, or enter into a detailed explanation of, his report to the court.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Chancellor who upheld the report of a master on a reference to assess damages.

The defendants are respectively proprietors of saw-mills on the Ottawa River, and the action is brought for damage to plaintiff's business by the sawdust and refuse from the mills being thrown into the river where it accumulated so as to obstruct the navigation thereon. The plaintiff claimed that he was not only prevented from running his boats on the river as formerly, but that his business as a letter of boats for hire was injured by reason of the sawdust and refuse accumulating in front of his boat-house. The defendants pleaded a prescriptive right to put sawdust in the river and that they should not have been joined as joint tort-feasors.

On the trial judgment was given for defendants, which was set aside by the Divisional Court and the decision of the latter affirmed by the Court of Appeal and the Privy Council. The case was then referred to a master to take an account and his report adjudged each of the defendants liable to pay $1,000. An appeal was taken against this report, defendants claiming that the master should have considered how much of the damage was caused by other mill-owners and apportioned the damages against defendants severally; also that he should have found how much was due on each head of damage claimed by plaintiff. The report was affirmed by the Chancellor and by the Court of Appea and defendants appealed to this court.

In addition to the objections made to the report it was argued on this appeal that the Court of Appeal

pronounced no judgment on the case, two of the four judges being in favour of dismissing the appeal and the other two withholding their opinion.

Gormully Q.C. for the appellant. As to the court interfering in matters of evidence affecting the quantum of damage see *Bigsby* v. *Dickinson* (1).

The loss of custom should have been proved. *Fritz* v. *Hobson* (2). *Iveson* v. *Moore* (3).

Appellants were entitled to the decision of all the judges in the Court of Appeal.

O'Gara Q.C. for the respondent. It was sufficient for plaintiff to prove general loss of custom. *Ratcliffe* v. *Evans* (4). *McArthur* v. *Cornwall* (5).

The formal judgment of the appeal court is all this court can look at for the decision.

Gormully Q.C. in reply. All the cases are collected in *Benjamin* v. *Storr* (6).

The judgment of the court was delivered by

STRONG J.—This is an appeal from the judgment of the Court of Appeal for Ontario, dismissing the appeal of the present appellants from the judgment of the Chancellor, who had dismissed an appeal against the master's report.

This action was commenced on the 9th September, 1884.

The respondent claimed damages against each of the appellants for throwing into the Ottawa River sawdust and refuse from their mills at the Chaudière Falls, which formed a bank in front of the respondent's property fronting on the river on which he resided and carried on the business of a boatman, and thereby injured the respondent and his business by destroying

(1) 4 Ch. D. 28.
(2) 14 Ch. D. 542.
(3) 1 Ld. Raym. 486.
(4) (1892) 2 Q. B. 524.
(5) (1892) A. C. 75.
(6) L. R. 9 C. P. 400.

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access to his property to and from the river, and polluting the water of the river.

The defences set up by the appellants to the action are not printed by them in the case. They only pleaded that they had the right by prescription to put sawdust into the Ottawa River, and that they ought not to be joined together in the same action.

Mr. Justice Proudfoot at the trial gave judgment in favour of the appellants, on a technical ground as to the respondent's title to the land, but this judgment was set aside by the Divisional Court.

The appellants then appealed to the Court of Appeal for Ontario, but that court dismissed the appeal and confirmed the judgment in favour of the respondent.

The appellants then appealed direct to the Privy Council and that appeal was also dismissed.

In pursuance of these judgments the decree was carried into the master's office to determine the amount of the respondent's damages and the amounts respectively that the appellants should pay.

The particulars of the respondent's account brought into the master's office are set forth in the case before us.

The appellants objected before the master that the particulars were not sufficient, but the master overruled the objection.

From this ruling the appellants appealed, alleging that the particulars were too vague, and because one amount only was claimed for the injury complained of instead of several amounts under the various aspects in which the respondent's injury was presented.

This appeal came on before Mr. Justice Ferguson, who held that the particulars followed the judgment and were sufficient, and he dismissed the appeal.

The reference then proceeded before the master and he awarded one thousand dollars damages against each

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of the appellants, and five hundred dollars against the defendant Gordon, who does not now appeal.

The appellants then started a fresh series of appeals against the report on the ground that the amount allowed was too large and against the weight of evidence, and that it should be subdivided under various heads, and that the master did not take into account damages from sawdust thrown into the river by other mill owners on the north side of the river.

This appeal was dismissed by the Chancellor.

The appellants then appealed to the Court of Appeal on the same grounds. The Court of Appeal also dismissed this appeal, Chief Justice Hagarty and Mr. Justice Osler holding with the Chancellor that the evidence clearly supported the master's finding, and that, after the several appeals already had, the objection as to the want of particularity in the pleadings, and that respecting the non-distribution of the damages, ought not to prevail, especially as the report of the master was according to the statement of the claim and the form of particulars carried in before the master and approved of by Mr. Justice Ferguson, whose decision the appellants did not appeal against. Mr. Justice Burton and Mr. Justice Meredith agreed that the evidence warranted the findings as to amount, but that the report ought to have stated how much was allowed under each aspect of the claim.

The appellants now appeal from the last mentioned judgment to this court.

It thus appears that the present is the seventh appeal in the cause.

The preliminary objection urged by the learned counsel for the appellants, that by reason of two of the learned judges of the Court of Appeal having withheld their opinions no judgment could properly have been pronounced, is not well founded for two reasons:

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first, we have before us the formal judgment of the Court of Appeal dismissing the appeal, and we ought not to look behind that judgment; secondly, because the respondent ought to be in no worse position than if the two learned judges had dissented (if indeed the judgments they pronounced in favour of sending the case back to the master does not amount to a dissent), and in case of their dissent the court would have been equally divided, and in that event the proper order to have been made would have been that which was actually made, namely, one dismissing the appeal.

As regards the merits I entirely agree in the judgment of the learned Chancellor and of the Chief Justice and Mr. Justice Osler affirming it.

The original decree declared that the defendants were guilty of, and that the plaintiff was entitled to recover damages from the defendants for, the wrongful acts and grievances in the pleadings mentioned, and it was referred to the master to inquire and state the amount of damages which the plaintiff had sustained by reason of the wrongful acts and grievances aforesaid, and the amount of such damages for which the said defendants were respectively liable to the plaintiff.

The wrongful act in the pleadings mentioned was the causing a public nuisance in the Ottawa River by creating an obstruction in that river consisting of a solid mass formed by sawdust, slabs, edgings and refuse thrown into the channels of the river by the defendants. and which obstruction caused peculiar damage to the plaintiff. The wrongful act was thus, not the mere throwing this refuse matter into the river, but the formation by means of such refuse of the mass of sawdust and matter causing the obstruction and pollution of the river, which was complained of. This must have been sufficiently proved before decree, sa

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the Privy Council affirmed the judgment (though the record before us does not contain the evidence taken at the trial), and it has been also proved again in the evidence before the master. The defendants were, therefore, properly treated by the master as joint tort-feasors, and the master was not, strictly speaking, called upon to apportion the damages so as to restrict the liability of each defendant to the proportion in which he may have contributed to the nuisance. Neither was it incumbent on the master to have distinguished between the heads of damage under which he found apportioning so much to the head of injury to the plaintiff's personal enjoyment as a riparian proprietor, caused by the pollution of the water and otherwise, and so much to the injury to his business as a letter of boats, caused by the state of the river produced by the conjoint acts of the appellants.

The damages found are entirely warranted by the evidence, and I have never understood it to be the duty of the master, provided he sufficiently follows the directions of the decree, to give his reasons or to enter into a detailed explanation of his report.

That the evidence sufficiently warrants the master's finding is apparent when we read the evidence of the plaintiff's witnesses, including, particularly, the plaintiff, Ratté, himself, Lett, Maingy, Emile Asselin, Josephine Asselin and Gisbourne. These witnesses show that damages not too remote were sustained by the plaintiff under both the heads of inquiry referred to in Mr. Justice Burton's judgment. The master was, of course, according to the well established practice in Ontario, the final judge of the credibility of these witnesses and he gave credit to their testimony. The defendants met this case by endeavouring to show that the loss of custom was attributable, not to the obstructions in the river caused by the deposit of mill rubbish,

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but in consequence of the public taste having undergone a change which induced persons boating for pleasure to resort to the Rideau Canal instead of to the Ottawa River. This led the plaintiff, in reply, to give evidence in rebuttal of the defendant's line of evidence. As could scarcely have been avoided some irrelevant evidence crept in, but I am bound to say, after reading the depositions, that this was but trifling, and not such as was likely to have affected the master's judgment. At all events the defendants might have objected to it *in limine*, and if they chose they could have appealed from the master's ruling, but this they did not do. I think it would be monstrous now to send this report back and thus further to prolong this litigation, which has already lasted upwards of eight years and in the course of which there have been no less than seven appeals, four of these by the defendants, all of which latter have been unsuccessful, merely because some evidence not strictly admissible may possibly have found its way into the depositions.

It is clear that the master has not erred in principle, and that, if we are to believe the witnesses he has accredited, there was ample evidence to warrant the amount of damages he has reported. Had I myself now to deal with this evidence I should be disposed to award much larger damages than the master has given.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants, Booth and Perley & Pattie: *Christie, Christie & Greene.*

Solicitors for appellants, Bronson & Weston: *Gormully and Sinclair.*

Solicitors for respondent: *O'Gara, MacTavish and Gemmill.*