1903.
August 13 and September 1.

ATTORNEY-GENERAL *v.* DE MEL.

D. C., Kalutara, 2,420.

Mines—Adjoining plumbago lands—Wrongful working—Damages—Compensation—Principle of assessment.

The defendants wrongfully broke through the limits of their plumbago mine into the adjoining mine belonging to the plaintiff and got therefrom a quantity of the plaintiff's plumbago.

In an action to recover the value of the plumbago wrongfully dug and removed,—

Held, the defendants were bound to make compensation *in solido* to the plaintiff, and that the right estimate of the plaintiff's loss, which was the measure of his damages, would be to ascertain the market value of the plumbago at the pit's mouth on an average of prices which ruled between the dates of the beginning and end of the wrongful working, and to deduct from it the actual cost per ton of severing the plumbago and raising it to the surface.

If the parties were unable to agree about the disbursements to be deducted, an account should be ordered and taken.

THIS was an action by the Attorney-General against the defendants (of whom the first was the owner of the land, the second and third were his lessees, and the fourth and fifth were persons who assisted in the works) for the value of plumbago said to have been wrongfully dug from Crown land.

The District Judge found that the mouth of the pit lay partly on the first defendant's land and partly on Crown land; that the shaft of the pit sloped towards the Crown land; that all the plumbago raised came from this shaft and its tunnels; that the Crown was entitled to claim the value of the plumbago brought up, after deducting expenses; and that the total quantity of plumbago brought up was worth Rs. 29,960, and the expenses incurred Rs. 25,000. The Court gave judgment for the plaintiff against all the defendants for the balance sum of Rs. 4,960. As the Crown claimed Rs. 45,000 for 150 tons of plumbago, but got judgment only for Rs. 4,960, the District Judge ordered that parties should bear their own costs.

The plaintiff appealed.

The case was argued on 13th August, 1903.

Fernando, C. C., for the appellant.—The Court below holds that 83 tons were removed of the value of Rs. 29,000. It asked a witness incidentally what the cost would be to bring plumbago up to the surface, and though no issue had been framed on the point it deducted the cost of mining and raising and gave the Crown

1903.
August 13 and September 1.

judgment for Rs. 4,960 only. The Judge had no right to go into the cost of mining at all. That was not one of the issues in the case. The Judge holds that the digging on the part of the first defendant was *bonâ fide*, but it is necessary to determine whether there was negligence. The first defendant sent men out to dig on the land without any plan or survey. It was found that the mouth of the pit was partly on Crown land, and that Crown land had been undermined. In such a case no compensation was allowable for the cost of mining. In *Van Cuylenberg v. Harmanis Vedarala* working expenses were allowed, because there was *bonâ fides* on the part of the defendant. (*Rámanáthan, 1875, p. 127.*) But that judgment rests upon English Law, which distinguishes between a man acting *bonâ fide* and a man acting *mala fide* or with negligence. In cases of good faith, the general trend of authority is that one will be entitled to set off, not the cost of severing and raising the mineral, but simply the expenses involved in converting it into chattel: that is, the bare cost of lifting it out of the ground. In the case of negligence or *mala fides* he is liable in the whole amount of damages. The Roman-Dutch Law should guide us in the present case, but the books available here contain nothing on the point. *Martin v. Porter* (*5 M. & W. 351*); *Morgan v. Powell* (*3 Q. B. 278, 440*); *Lynor Coal & Iron Co. v. Brogden* (*40 L. J. Ch D. 46*). It has not been proved what the expenses of quarrying were. The District Judge has awarded Rs. 25,000 on this account upon the mere statement of the second defendant. There ought to be satisfactory proof.

Dornhorst, K.C. (with him *J. Pieris*).—Plaintiff did not prove his measure of damages. Defendant need not have opened his defence at all. It was plaintiff's duty to have proved actual damages suffered by the Crown. In the case of *United Merthyr Collieries Co.* (*15 L. R. Eq. 46*), the Vice-Chancellor allowed a deduction of the working expenses, including the cost of severing. *Van Cuylenberg v. Harmanis Vedarala*, reported in *Rámanáthan, 1875, p. 127*, is a Full Court decision, and binds the present Supreme Court. Even if the first defendant is liable in damages, his liability would not exceed the ground share of rent he received from the two lessees. *Lindsay v. O. B. C.* (*Rámanáthan, 1860, p. 64*). The lessees may be liable for the rest (*1 Lorenz, pp. 31, 37, 90*). The first defendant cannot be made liable for the conduct of the lessees. He exercised a legal right in leasing land which contained plumbago, and there is no proof of complicity on his part as regards excavations in Crown land. As soon as it was

1903. *August 13 and Sepbember 1.*

intimated to him that there was trespass on Crown land he caused the work to be stopped. It is true that in the declaration required by the Mines Ordinance, No. 2 of 1896, the person who intends to open and work the mine was bound to give certain particulars, but as Bonser, C.J., held in *Wace v. Lewishamy* (*3 N. L. R. 260*) that such declarant should be the owner of the mine and no one else, the first defendant had to make a declaration and became liable under that Ordinance, but in the civil case the lessees are responsible for their own acts.

Fernando, in reply.—The landlord is responsible for the value of the plumbago taken by his authority. He is responsible to these persons in a civil suit for all *malfeasances*, even if he did not know or forbid them.

Dornhorst.—No case has been cited to show that the landlord is responsible for the torts of his tenants. This is not a case of principal and agent. The first defendant did not know that the mouth of the pit was partly on Crown land.

Cur. adv. vult.

1st September, 1903. MIDDLETON J.—

This was an action by the Crown to recover the value of certain plumbago wrongfully dug and removed from Crown lands called Humbuluwedandehena and Thunhawulhena, situated in the village of Migahatenna in the Maha pattu of Pasdun korale. The first defendant was the owner of a land adjoining this land in the west, and the second and third defendants were said to be his lessees for the purpose of mining on the first defendant's land.

The fourth and fifth defendants were alleged to be agents of the first defendant for the purpose of receiving and removing the ground share of the first defendant.

The District Judge held that the defendants did dig and remove from the Crown land in question some 83 tons 15 cwt. of plumbago to a value of Rs. 29,960.24, but, on a statement of the second defendant that the expenses incurred by the defendant amounted to Rs. 25,960.24, deducted this sum and gave judgment for the difference amounting to Rs. 4,960.24. The plaintiff appealed from this judgment on several grounds, but the main one relied on was that the Crown was entitled to judgment for the whole amount claimed in the plaint upon the third issue agreed upon, which did not raise the question whether defendants were entitled to deduct their working expenses, and that the evidence of

1903.
August 13 and September 1.

MIDDLETON, J.

the second defendant in regard thereto was inconclusive, and that the basis of assessment should follow that adopted in *Martin v. Porter* (*5 Meeson & Welsby 351*).

There was a cross appeal by the first, fourth, and fifth defendants on the grounds (*a*) that it was not proved that any plumbago had been taken by the defendants from Crown land; (*b*) that, even if it had, the first defendant was not liable at any rate beyond the extent of his ground share, inasmuch as the second and third defendants were his lessees, and there was no proof that the first defendant authorized them to commit acts of trespass or derived benefit from it; (*c*) that the liability of the fourth and fifth defendants had not been shown; (*d*) as to the principle on which the damages, if any, should be assessed.

In the course of the argument counsel for the Crown conceded that it could not be shown that defendants had acted otherwise than *bonâ fide*, and dropped the question of culpable negligence raised in the petition of appeal.

In reply to this Court also Crown Counsel deferred to its opinion that there was no evidence to show any liability by the fourth and fifth defendants, who are accordingly dismissed from the suit.

The main point, as counsel for defence puts it, is whether it has been proved that defendants have dug and removed any plumbago from the Crown land adjoining the first defendant's land. Speaking as a juryman and looking at the survey and at the evidence on both sides, I am of opinion that it points so strongly to the conclusion that plumbago must necessarily have been extracted by the defendants by means of the shafts now filled with water on the land of the Crown, and from the land of the Crown, that I hold that the District Judge was right in his finding on that point.

Following on this was the question, What was the amount of plumbago extracted ?

In the nature of things it was impossible for the Crown either to have proved this or what were the working expenses. All that could be done was to prove that some plumbago had been extracted, and then to have an account from the defendants as prayed in the plaint.

The District Judge has, however, taken the first defendant's acknowledgment as to the amount he received, as his ground share of one-eighth as a basis for estimation of the whole. The Crown makes no serious objection to this nor to the value per ton allowed, but opposes the acceptance of the second defendant's estimate of the working expenses on his bare statement as inconclusive.

1903.
August 13 and September 1.
MIDDLETON, J.

I agree that the bare statement of the second defendant that the working expenses were Rs. 25,000 was not sufficient for the Judge to act on without further inquiry, and I think that an account should have been ordered and taken.

As, however, the Crown has not really objected to the Judge's estimate of the amount extracted on the evidence of the first defendant, I think that this amount—*i.e.*, 83 tons 15 cwt. at a value of Rs. 29,960.24—may very well be taken as a basis on which the assessment of damage may proceed.

We then come to the question of liability.

The first defendant puts the second and third defendants in the position of his tenants or lessees, which they acknowledge, and alleges that by lteter (B) he informed the Government on November 22, 1898, that he had leased certain mines, including one at Mahagalpatala to Vitanege Appusinno, which is the name of the third defendant. It appears that first defendant neglected to follow the direction of the Government Agent to make a formal declaration in conformity with section 3 of Ordinance No. 2 of 1896, but left his declaration (A) standing in the Kachcheri as if it were still in force as a true statement of the condition of things at this time.

There is no notarial lease in existence but a document (D 11),—mentioned in the notes as (D *b*),—the admission of which as a lease was rightly objected to on the trial.

In my opinion it is not proved that the second and third defendants were tenants of the first defendant, but that they were rather in the position of working in shares as a sort of partnership, an arrangement which is by no means uncommon in this country: the fourth and fifth defendants being appointed by the first to supervise the second and third and to see that all the plumbago was accounted for and duly divided.

The first, second, and third defendants having therefore all been shown to have participated in the removal and sharing of the plumbago, and first defendant having failed to establish the status of landlord and tenant as existing between him and second and third defendants, I am of opinion that the District Judge was right in holding the first, second, and third defendants bound to make compensation *in solido* to the Crown.

We now come to the question on what principle the compensation due to the Government for the loss of its plumbago is to be assessed.

Mr. Fernando, for the Crown, does not put forward any basis on which we should proceed, but invites our attention to *Rámanáthan, 1872, p. 127*; *Martin v. Porter* (*5 M. & W. 351*);

1903.
August 13 and September 1.

MIDDLETON, J.

Attorney-General v. Tomlin (*L. R. 5, Ch. D. 750*); *Hilton v. Woods* (*36 L. J. Ch. D. 941*); *Llynor Coal and Iron Co. v. Brogden* (*40 L. J. 46*).

It is not suggested that English Law governs this case, but as there is nothing in the Roman-Dutch Law to guide us we are at liberty to act upon the principles relied on in analogous English cases. It was subsequently conceded by counsel for the Crown that the defendants cannot be shown to have acted otherwise than on good faith in regard to their action in abstracting the plumbago. Counsel for the defence refers us to the case of *In re United Merthyr v. Collieries Co.* (*15 L. R. Eq. 46*) decided in 1872, in which the principle adopted in *Hilton v. Woods* decided in 1867 was followed of allowing all disbursements.

I do not think it would be right or even possible for us to take as a basis the fair price per acre of a bed of plumbago, as I am under the impression that plumbago is not like coal, but lies in pockets, and it is not usual as it is with coal in the United Kingdom to sell it by the acre.

It would be difficult therefore, if not impossible, to value plumbago by the acre so as to ascertain the value in the ground, as if the plumbago field had been purchased from the Crown.

Under these circumstances I think the right estimate of the Crown's loss, which is really the measure of damages, would be to ascertain the market value of the plumbago at the pit's mouth on an average of prices between August, 1898, and July, 1899, the date on which it is admitted that the mining ceased, and to deduct from this the actual cost per ton of severing the plumbago and carrying or raising it to the surface. This was the principle followed in the case reported in *Rámanáthan, p. 127*, and decided by the Supreme Court on 11th November, 1875.

The parties ought to be able to come to an agreement as to the amount of the disbursements to be deducted, but if they are unable to do so within a month the case must go back to the District Judge that they may be ascertained by evidence in the usual course.

Upon this being agreed to or ascertained, judgment for the plaintiff will be entered for the amount, but I would leave the order as to costs in the District Court undisturbed.

As the plaintiff has practically succeeded in appeal, the Crown must have its costs of the appeal.

GRENIER, A. J.—

I agree with my brother Middleton in holding that the first, second, and third defendants did dig and remove from the Crown land in question about 83 tons and 15 cwt. of plumbago to the

1903.
August 13 and September 1.

GRENIER, A.J.

value of Rs. 29,960.24. The evidence appears to my mind to be reasonably conclusive that the plumbago was not taken from the first defendant's land, but from the adjoining Crown land.

The only difficulty I felt was in regard to the assessment of damages. We were not referred to any authorities from the Roman-Dutch Law, but a case was cited to us from *Rámanáthan's Reports for 1872, p. 127*, in which this Court indicated the principles upon which damages have to be assessed in a case of this kind, and which we are bound to follow in the absence of any later decision over-ruling that case.

I agree with the order as to costs proposed by my brother, and with the suggestion made by him that the parties should come to an agreement as to the amount of the disbursements to be deducted.

I also agree that on the parties failing to come to such an agreement, the case must go back for evidence as to the disbursements.