1906. *October* 2.

Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Middleton.

PIERIS *et al.* *v.* PABILIS APPU *et al.*

D.C., Kalutara, 3,204.

Injunction, improperly obtaining—Damages—Principle of assessment.

Where a plaintiff obtains an injunction on insufficient grounds, he is liable in damages to the party affected by such injunction. In awarding such damages the real damage suffered ought to be ascertained. The plaintiff should not be punished for any breach of duty, and no extraordinary presumption should be made against him.

The principle laid down by Romer J. in *Mansell v. British Linen Co. Bank* (1) followed.

THE first plaintiff, alleging that by agreement between himself and the defendants he allowed the defendants to prospect for plumbago in a land called Pelpitigodakelle on certain terms and conditions; that the defendants were put in possession of the land in pursuance of the said agreement; and complaining that the defendants were working the mines in an unskilful and unworkmanlike manner to the loss and damage of the plaintiff, prayed that the defendants be ejected from the land, and for an injunction restraining the defendants, their servants, agents, and workmen from mining on the land and from removing and disposing of the plumbago already dug, until the hearing and determination of the action.

The District Judge granted the injunction prayed for. The second plaintiff claimed to be entitled to a share of all plumbago dug under the said agreement.

The defendants denied that they worked the mines in the unskilful and unworkmanlike manner alleged in the plaint, and stated that they had delivered possession of the land to the plaintiff on 25th October, 1905. The defendants claimed a sum of Rs. 5,000 in reconvention as damages suffered by them by reason of the plaintiff having unlawfully obtained the injunction and stopped them from working the mines.

On 18th December, 1905, the defendants moved that the injunction be dissolved; the District Judge, by his order dated the 12th January, 1906, disallowed the motion. The case came on for trial subsequently, and the District Judge (C.R. Cumberland, Esq.)

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dismissed the plaintiffs' action, set aside the injunction, and, being of opinion that the plaintiff was not justified in obtaining the injunction, awarded the second and third defendants Rs. 1,000 each as damages (14th March, 1906).

The plaintiff appealed.

H. J. C. Pereira (with him *Schneider*), for the plaintiff, appellant.

H. A. Jayewardene, for the defendants, respondents.

Cur. adv. vult.

2nd October, 1906. LASCELLES A.C.J.—

The principal ground of this appeal is the decision of the District Judge with regard to the claim in reconvention, but it will be convenient to deal first with two points raised in the petition of appeal but not, I think, very strenuously pressed by the appellant's counsel.

The first plaintiff, appellant, contends that, inasmuch as the defendants did not restore possession of the plumbago pits to him on the 25th October, 1905, the 32 tons extracted between that date and the 7th December, when working was stopped by injunction, should be apportioned between him and defendants in accordance with the original agreement of 10th June. With regard to this, I need only say that I am satisfied with the finding of the Court below on the second issue. I think defendants, so far as circumstances permitted, did in fact restore possession to the first plaintiff's agent.

The first appellant further contends that he is at any rate entitled to recover his one-sixth share in the owners' share in this plumbago from the defendants. But this is a mere matter of distributing between himself and his co-heirs of the ground share in the plumbago lying at the petitioner's house. To condemn the defendants, who have never refused to pay the owners' ground share in respect of the plaintiff's one-sixth share in the ground share, would be as absurd as it would be unjust.

The principal ground of appeal is the decision on the claim in reconvention. It is urged by the appellants that the injunction was not improperly obtained, and that there is no evidence to support the damages awarded. The affidavit sworn by Don Abraham Andradi on 5th December alleged two grounds for the issue of an injunction, namely: (1) That the defendants were mining and tunnelling in an unworkmanlike manner so as to injure the pits permanently; and (2) that defendants were preparing to remove and dispose of the plumbago which they had already extracted

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without paying the plaintiffs their share or selling the balance to them in accordance with the lease of 25th October. It is obvious that the first only of those allegations afforded ground for an injunction to stop work at the pits. The danger indicated by the latter allegation could have been met by an order for the safe custody of all plumbago extracted from the pits pending the judgment of the Court.

Now, the District Judge has found that the plaintiffs have failed to prove that the pits were worked so as to cause permanent damage, and I do not see how, on the evidence before him, he could have come to a different conclusion. The only question therefore is the amount of damages to be awarded.

This is not a case to quote the words of Romer J. in *Mansell v. British Linen Co. Bank* (1), " where the plaintiff is to be punished for any breach of duty, or where any extraordinary presumption is to be made against him. It is simply a case of ascertaining the real damage sustained. " The direct effect of the injunction was to curtail by about nine weeks the term of five years for which the defendants are entitled to work the pits. If the rent had been payable in money, it would have been easier to assess the damage represented by the loss of the period. But the rent, as is usual in the leases of plumbago, consists of a ground share or proportion of the plumbago brought to the pit's mouth. The pits, when the work was stopped, were producing 3 to 3½ tons of plumbago, worth from Rs. 300 to Rs. 350 per ton, but owing to the uncertainty which attends plumbago mining, it would not be fair to presume against the plaintiff that the defendants would continue to the end of their lease, or indeed for any long period, to obtain the same quantity of plumbago, or that plumbago would command the same prices.

It may be taken as certain that second and third defendants did sustain damage by being prevented from working at a time when the pit was being worked so successfully, and the mere operation of stopping work of this kind and re-commencing it after the lapse of some weeks must in itself have entailed considerable cost.

Though it is difficult to estimate the damages with any precision, I think the amount awarded by the Judge is fair, and certainly does not err on the side of excess. I would dismiss the appeal with costs.

MIDDLETON J.—I agree. *Appeal dismissed.*

(1) *L. R.* (1892) 3 *Ch.* 159. *at p.* 163.