Present : Bertram C.J. and De Sampayo J. 1918.

WIJEKOON *v.* PANDITA *et al.*

211—D. C. Galle, 15,249.

Onus of proof—English law to supplement the Evidence Act.

Where a plaintiff comes before a Court alleging that a wrong has been committed and claiming damages in respect of the wrong, he should put his case before the Court and prove his damages before the defendant is called upon, even though the defendant puts in a plea which it is for him to substantiate.

THE facts appear from the judgment.

A. St. V. Jayawardene and *Samarawickreme*, for the appellants.

Bawa, K.C., for the respondent.

November 1, 1918. BERTRAM C.J.—

This is a case in which the present position is extremely unsatisfactory. A judgment has been given upon imperfect material, and the merits of the case have not really been inquired into. The reason of this is that in the Court below a dispute arose as to the onus of proof. The claim was a claim of what used to be called trespass. It was made in respect of the unlawful extraction of plumbago. The defendants pleaded, in effect, leave and license. There was also in the nature of the case a claim for damages, and the question as to the amount of these damages. In the plaint the plaintiff expressly alleged a forcible possession. When the case came on for hearing, the plaintiff claimed that it was for the defendants, as they had alleged leave and license, to begin. The defendants, on the other side, urged that, as the essence of the case of the plaintiff was forcible and wrongful possession, it was for him to show the force and the wrong complained of.

The learned District Judge came to the conclusion that it was for the defendants, as they alleged leave and license, to make out their plea, and called upon them to begin. He appears to have appreciated the difficulty of his ruling, and its application to the

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question of damages. He apparently anticipated that the defendants would observe his ruling, and would call evidence of the leave and license; that, having their witnesses in the box, and being peculiarly in possession of information as to the real amount of the damages, if any, would lead evidence on that point also, and that it would only be necessary for the plaintiff to lead evidence on the question of damages, if the evidence led by the defendants was found to be inadequate or unsatisfactory. Events, however, did not take this turn. Instead of observing the ruling of the District Judge, the defendants contested its validity and desired to appeal, but the Judge thought it better that the case should proceed. The difficulty of the matter then became apparent, because the question of damages had to be determined, and it was necessary to have evidence on the question of damages. Evidence was given by the plaintiff, and this evidence was not cross-examined, and, finally, the District Judge entered up judgment for the plaintiff on the basis of the plaintiff's evidence.

It appears that the substantial ground on which the order of the District Judge was contested, both here and in the Court below, was not the fact that it was necessary to decide the issue as to damages as well as the issue as to leave and license, but that the plaintiff having alleged forcible possession was bound to prove it. I do not think myself that this was a sound objection. It was the only objection the District Judge had before him, and I think that on that particular point his decision was right. On looking into the authorities here to-day, however, a line of cases has been observed in which the question was discussed as to what should be the procedure where a plaintiff brought a claim in trespass, and the defendant pleaded such a plea as the present—leave and license—but where it was also necessary for the plaintiff to substantiate the amount of his damages. That question was very fully discussed in the case of *Mercer v. Whall.*[1] That case has always been taken as laying down the rule of practice in the matter, and I think it indicates a convenient rule, which should be observed in this Colony. It may be taken to be a point in which we are entitled to look at the English law of evidence for the purpose of supplementing the provisions of the Evidence Act. There, however, the question arose, not where two counsel were each endeavouring to shift the onus of proof on to the other, but where each was contending for the right to begin so as to be in a position to address the jury on the facts of the case. It is very difficult to apply this decision to a case like the present, where both counsel were strenuously endeavouring to impose the burden of beginning on to the other. Nevertheless, I think it is practically impossible to draw any distinction between the considerations which govern the onus of proof and the considerations which govern the right to begin. It clearly is desirable that

[1] *(1845) E. R. 5 Q. B. 477.*

where a plaintiff comes before a Court alleging that a wrong has been committed and claiming damages in respect of the wrong, he should put his case before the Court and prove his damages before the defendant is called upon, even though the defendant puts in a plea which it is for him to substantiate.

I do not think, however, that that principle has ever been enunciated expressly in this Colony before, and under all the circumstances of the case, the present position being unsatisfactory, and the merits of the case not having been fully inquired into, I am of opinion that the right order would be that the judgment of the District Judge should be set aside, and the case sent back for a new trial. The costs both here and below should be costs in the cause.

DE SAMPAYO J.—I agree.

Set aside.