1954 *Present :* Gunasekara, J., and Fernando, A.J.

M. J. W. COOREY, Appellant, *and* J. S. JAYAWICKREMA, Respondent

S. C. 355—D. C. Panadura, 2,565

Delict—Malicious abuse of process—Necessary elements—Trespass—Injuria—*Exemplary damages—Civil Procedure Code, ss. 287, 288.*

Wrongful entry into premises made in purported pursuance of a writ improperly obtained and the attempt to oust the occupants even without force constitutes trespass amounting to an *injuria*. In such a case the award of exemplary damages is justified.

APPEAL from a judgment of the District Court, Panadura.

Sam P. C. Fernando, with *G. C. Niles*, for the plaintiff appellant.

A. C. Gunaratne, for the defendant respondent.

Cur. adv. vult.

August 6, 1954. FERNANDO, A.J.—

The plaintiff-appellant sued the defendant-respondent for damages for the latter's alleged wrongful interference with appellant's possession of certain residential premises in the town of Moratuwa and for damages for pain of mind, humiliation and expenses arising from the defendant's conduct. The action was dismissed by the learned District Judge.

The following facts were established by evidence which stood uncontradicted. The appellant had for many years been the tenant of the house and garden No. 484 and 486 at Main Street, Rawatawatte, Moratuwa, under successive landlords, the last of whom was one Eric Fernando. The premises were sold in execution of a mortgage decree entered against Eric Fernando in an action in the District Court of Colombo and purchased by the respondent on 28th January, 1950, at the execution sale. On 28th January, 1950, the respondent informed the plaintiff by letter (P1) that he had purchased the house and property " on which you now reside " . . . . " as I have no place to stay " ; after referring to the need for considerable repair and renovation, the letter ends with the remarks :— " As there are lots of things to be attended to please sympathise with me and discuss with the brothers and give me the house. Do not harass me but give me the house with good means. Please consult good Laas whether this work can be done when people are there. We all like to safeguard our respect. " The Proctor who had represented the respondent in the mortgage action then wrote (P2) to the appellant on 17th March, 1950, informing him of the purchase by the respondent and requesting him " as the tenant of the house " to " pay my client the rent " as from 1st March, 1950. The respondent obtained a conveyance

in his favour through the Court on 1st April, 1950, and he moved (apparently in person and not through his Proctor) on 12th May, 1950, for an order of delivery of possession. In the affidavit filed for this purpose the respondent averred that Eric Fernando (the defendant in the mortgage action) " is still in occupation and possession of the property purchased and it is necessary that an order for delivery of possession be issued to have the said defendant ejected from the said property ".

From this stage onwards the evidence is contradictory and I shall state first the narrative contained in the evidence given for the defence.

The Fiscal's officer (who was called in the present action by the respondent) stated in evidence that after he got the writ he went to the premises on 22nd May, 1950, and requested the appellant to deliver up possession of the land, but to remain in the house for any length of time ; the appellant declining to agree, the officer left the premises. Prior to this visit on 22nd May, the Fiscal's officer had been informed by the respondent that owing to a mistake by the latter's Proctor, he could get possession of the land only, and not of the house. (I shall refer presently to the different version given by the appellant as to the visit on 22nd May.) The officer returned to the premises on the morning of 24th May accompanied on this occasion by the respondent, 2 Police Constables and one Hendrick, alleged to be a tree-climber. The officer's intention was to give symbolic possession of the land only, by having one coconut plucked, and he alleged that he had no intention of ejecting people from the house. The appellant was away at the time (on duty at Angulana Railway Station), but his interests were effectively protected despite his absence from home. His relatives, including his wife and sister, threatened the Fiscal's party with knives and effectively prevented them from even completing a symbolic delivery of possession.

The appellant's version of the visit by the Fiscal's officer on May 22nd is that the latter came together with the respondent who told the appellant " to clear out " of the premises. When shown the writ the appellant stated that the respondent had deceived the District Judge. He then produced the Proctor's letter P2 and in turn asked the respondent " to clear out ", whereupon the latter threatened to return with the Police. The appellant took urgent steps to protect his occupation and on the very next day (23rd May) filed in the District Court an affidavit D2 which contains a version of the incident of the 22nd very similar to that which he subsequently gave in Court. The allegation in D2 that the respondent had threatened to throw the appellant out with Police assistance was (in the light of the second visit on May 24th) either true or prophetic.

In regard to the events of the morning of May 24th, the appellant called his wife and sister who alleged that the respondent and the Fiscal asked them to leave the house, and threatened to throw their things out of the house as well as to drag them out by force. The witnesses fully admitted the action they took to defend their home. They alleged that a large crowd had collected, and the crowd could no doubt see and hear what was going on.

The learned Judge has accepted the version spoken to by the defence and rejected the evidence of the appellant and his witnesses. He relies strongly on the evidence given by the Fiscal's officer to the effect that on both occasions his intention was to deliver possession, not of the house, but of the land only, and that in regard to the latter his purpose was to give symbolic delivery by having a coconut plucked. He points to the corroboration afforded to the officer's evidence by an affidavit D6 which the officer had submitted to his superior on 5th June, 1950. But the learned Judge takes no account of the fact that the affidavit was submitted only 12 days after the incident, and that the complaint alleged to have been made by the officer to the Police on 24th May was not produced in Court. It is at least strange that a case of such violent resistance to execution of a writ was not immediately brought to the notice of the superior officer. (I note here by way of contrast the speed with which the appellant made his complaints P6C to the Court and P7 to the Police and the fact that both were produced in evidence.) Nor has the learned Judge tested the Fiscal's officer's evidence by reference to the affidavit D 2 which the appellant filed in the District Court on 23rd May : If he did so, he might well have doubted the story that the visit on 22nd May was a peaceful one and unaccompanied by threats to return in force.

Moreover, the learned Judge in accepting the evidence given by the respondent has paid little or no regard to the significance of the documents produced by the appellant. He construes the letter P1 of 28th February as merely evidence of an intention to repair the house and ignores those points of it which clearly constitute a request for restoration of possession and he too easily accepts the respondent's explanation that the Proctor's letter P2 was written without instructions. More serious yet is the failure of the learned Judge to refer to the affidavit P6C of 11th May, 1950, upon which the District Court was moved to issue the writ. The uncontradicted evidence in this case establishes beyond doubt that the respondent deliberately made a false statement when he averred that Eric Fernando was still *in occupation and possession* and that a writ was necessary in order to eject him.

In my opinion the appellant has successfully proved :—

(*a*) that the respondents purchased the premises in question (because "he had no place to stay") with the object of entering into occupation, and that he failed to persuade the appellant to surrender possession peacefully ;

(*b*) that the appellant actually paid rent for two months to the respondent either directly or through his Proctor, and at the latter's written request ;

(*c*) that the respondent deceived the Court into issuing the writ for ejectment by making false statements in his affidavit of 10th May, 1950 ;

(*d*) that the respondent accompanied the Fiscal's officer on May 22nd and attempted by production of the writ to induce the appellant to surrender possession of both house and land, and that he thereafter threatened to return with Police assistance ;

(e) that the threat was carried out on May 24th when the Fiscal's party, assisted and encouraged by the respondent, entered the land with the object of ejecting the occupants by force or by a show of force.

The defence version, that the appellant was requested to surrender the land but to remain in occupation of the house, even if it be true, does not assist the respondent. The appellant had been the tenant of the land and of the house standing thereon, and his right to continue in occupation of both was unaffected by the sale in execution. The only order which the respondent could properly have obtained was one under s. 288 of the Code for symbolic delivery of the land and buildings, and *an order under s. 287 could not properly have been made even in respect of the land alone*—a circumstance which must be presumed to have been within the knowledge of the Fiscal's officer, and which casts grave doubt on the truth of his evidence. Moreover, having regard to the fact that the appellant had already acknowledged the title of the appellant by paying rent to him and to his Proctor, it is doubtful whether the respondent could in good faith have believed it necessary to obtain even an order under s. 288, which serves only to give the occupant notice of the conveyance to the execution-purchaser. Respondent had recourse to judicial process, not in the due exercise of his rights as the purchaser, but with some other object; and the only reasonable inference, in view of the other evidence in the case, is that he was attempting to obtain physical possession of the land and building otherwise than by the appropriate legal procedure.

I have little hesitation in reversing the findings in favour of the respondent, because the learned Judge apparently reached those findings without due regard to the documentary evidence, in the face of which considerations of demeanour or credibility are of little importance. In the absence, however, of a finding in that behalf, the allegations of physical violence made against the Fiscal's officer and the respondent must be regarded as not having been proved. Nevertheless, the entry by itself made in purported pursuance of a writ improperly obtained and the attempt to oust the occupants even without force, was a trespass amounting to an *injuria* proper. (Maasdorp, Vol. 3, p. 38.)

In an action for malicious abuse of process, the plaintiff must prove (1) that the defendant instituted the proceedings, (2) that the defendant acted without reasonable and probable cause and (3) that the defendant was actuated by malice (McKerron, Law of Delict 4th Ed. pp. 304, 305). By "reasonable and probable cause" is meant an honest belief founded on reasonable grounds that the institution of the proceedings was justified (*idem* p. 306). The question to be decided in a civil matter is whether the defendant in putting the law into motion acted as a discreet and prudent man would have done (Maasdorp 1909, Vol. 3, p. 87). As to the proof of malice, Maasdorp (p. 84) says that "If a man acts in a grossly negligent and reckless manner, acting in the furtherance of his own interests without due regard to the rights of others, and careless as to whether he interferes with the liberty of another person or not, the

natural inference is that he is influenced by improper motives, a fact which will in law be regarded as equivalent to malice ". The following dicta of this Court in similar cases bear out the statement in Maasdorp :—

> " As regards the element of malice, it is, of course, well known that it does not mean ill-will. It has the import of *mala fides*, an intention to cause wrongful injury, or such reckless action that the party must be held responsible for the consequences. It is generally expressed as *animus injuriandi*, but the intention need not be express ". (de Sampayo J. in *21 N. L. R. at p. 430*). " But intent to obtain an object by means that cannot be justified is a wrong and improper intent, and what the law calls malicious ". (MacDonell C.J. in *33 N. L. R. at p. 329*).

The appellant in this case has in my opinion successfully established these three essential elements.

The writ granted by the Court did not in fact authorise the ejectment of the appellant and therfore the Fiscal's officer in attempting to eject the appellant was acting beyond the powers authorised by the writ. For this reason Counsel for the respondent invited us to take the view that the respondent cannot be held liable for the unauthorised act of the Fiscal's officer. Having regard, however, to the part played by the respondent personally, both in obtaining the writ and in the subsequent events, there is no doubt that he actively encouraged and assisted the Fiscal's officer to act in excess of the authority conferred by the writ and thus rendered himself liable for the latter's wrongful act.

A plaintiff in such a case as the present one has to show that the act of the defendant either caused him actual pecuniary loss or was of such a nature as to be calculated to injure his reputation. In regard to the first of these matters, the plaintiff's evidence was that he incurred expenditure amounting to Rs. 800 in his very proper efforts to protect his right to continued occupation of the property. But although it was open to him to recover the costs of his intervention in the proceedings in the mortgage action, he was content instead to agree in that action to a settlement of consent, and those costs cannot now be recovered in this action. In regard to the second ground for damages, there has been no satisfactory evidence to prove any serious prejudice to the appellant's reputation. *But where the defendant's conduct involves an element of injuria*, e.g., where the conduct has been high-handed, insolent, vindictive or malicious, the award of exemplary damages is justified. (McKerron p. 150).

I consider that in this case an award of Rs. 250 would be appropriate.

The decree dismissing the plaintiff's action must be set aside, and decree entered in favour of the plaintiff in a sum of Rs. 250 as damages together with the costs of this appeal and of the action in the District Court

GUNASEKARA, J.—I agree.

Appeal allowed.