
(1926) 04 CAL CK 0011
In the Calcutta High Court

Panna Lal Ghose	Vs	APPELLANT
The Adjai Coal Co. and Others		RESPONDENT

Date of Decision : 30-04-1926

Acts Referred:

Limitation Act, 1963 — Section 18

Citation : AIR 1927 Cal 117 : 101 Ind. Cas. 62

Hon'ble Judges : Mukerji, J;Greaves, J

Bench : Full Bench

Judgement

Mukerji, J.—This appeal arises out of a suit for damages for underground trespass committed and coal extracted by the Defendants Nos. 1 to 6, and for a permanent as well as a temporary injunction and for other reliefs. The facts which led up to the institution of the suit are these:

The plaintiffs are the Adjai Coal Co., Ltd. Before the Company was incorporated as a joint stock company with limited liability, some of the members thereof had formed a syndicate known as the Adjai Coal Syndicate. On the 6th August 1891 the syndicate obtained an amalnambah from the patnidars of village Raipur Nandi by which the latter agreed to grant the syndicate a mining lease in respect of 500 bighas of coal lands in the village and within certain boundaries and upon certain terms and conditions. The patnidars were divided into 2 groups, namely, the Laiks and the Chakrabartis, the former having a 12 annas share and the latter the remaining 4 annas. Of the Laiks Kaliprasanna had a 6 annas share, Bejoy Gobinda 1 anna 6 pies, Earn Sankar and Ram Bishnu 1 anna 6 pies, Khetramani 1 anna 6 pies and Bimala Sankar, Gouri Sankar and Durga Sankar 1 anna 6 pies. Of the Chakrabartis Sib Narain had a 2 annas share and Khudiram the remaining 2 annas.

2. The patnidars subsequently refused to execute the mining lease and upon that the syndicate instituted a suit for specific performance, being Suit No. 339 of 1892. Certain petitions of compromise were filed in the said suit by which the patnidarg consented to have a survey and demarcation made by a civil Court

Amin in respect of such lands amounting to 500 bighas in area, as would be selected by the syndicate, out of the lands of the amalnamah, to have a plan made thereof and to grant the syndicate a mining lease in respect of the same; and on the 11th July 1893 the Court ordered a decree to be drawn up embodying those terms. The civil Court Amin, who was deputed to do the work in pursuance of the above agreement, filed his report on the 5th September 1893, and on the 16th September 1893 the Court disposed of certain objections to the report and drew up a decree which bore both the dates, viz., 11th July 1893 and 16th September 1893. The decree stated that in accordance with the terms of the petitions of compromise the syndicate would get settlement from the patnidars in respect of 500 bighas of land out of the lands in the schedule to the plaint as demarcated by the black lines in the Amin's map, and further that out of the said 500 bighas of land. 253 bighas 11 cottas was cultivated land and the remainder, namely, 246 bighas 9 cottas was pat it land.

3. On the 20th March 1897 an amendment was made in the decree by inserting therein that the plan prepared by the civil Court Amin should be considered a, part of the decree. In accordance with the aforesaid decree, the Court, on the 24th September 1897, executed leases in favour of the syndicate on behalf of the patnidars Guru Prasanna Chakraborty, the son of Sib Narain Chakraborty (owner of 2 annas share), Bimala Sankar, Gouri Sankar and Durga Sankar Laiks (owners of 1 anna 6 pies share), Bejoy Gobind Laik (owner of 1 anna 6 pies share), Ram Sankar and Ram Bishnu Laiks (owners of 1 anna 6 pies share) and Khudiram Chakraborty (owner of 2 annas share). Khetramani Debi (owner of 1 anna 6 pies share) having died, her three daughters executed similar leases in respect of her share, two of the daughters on the 9th January 1900 and the third daughter on the 26th February 1900. Kali Prasanna Laik (owner of 6 annas share) had died before the decree was drawn up and certain proceedings took place between his sons Kristodhan and Sudhakrishna on the one hand and the syndicate on the other, the result of which was that the suit in so far as it was against them was revived, and on the 31st December 1901 a decree was passed from which it appears that there was a compromise between the parties under which the syndicate had obtained leases from the said Kristodhan and Sudhakrishna according to the plan of the civil Court Amin. This lease appears to have been executed on the 23rd September 1901 and it was in respect of the 6 annas share of the executants in the 500 bighas of land demarcated in the Amin's map as aforesaid.

4. The final decree disposing of the suit in this way was drawn up and signed by the Subordinate Judge on the 4th January 1902, and it was also stated therein that the report and the map of the civil Court Amin would be considered as a part of the decree. It should be mentioned here that in the meantime by an Indenture, dated the such September 1893, the syndicate transferred and assigned to the plaintiff company all their interest in, amongst others, the 500 bighas of land to be selected by them in accordance with the compromise decree which had been passed shortly before.

5. It appears that some time before the 23rd April 1894 the patnidars had promised a settlement of some coal lands to Dr. Radharaman Ghose, who was the Defendant No. 1 in the present suit, but who died some time after its institution. In the course of these negotiations two surveys were made, the last one of which was by an Amin named Madhusudan Dutt who prepared a map of the land to be settled. As a result of these negotiations the patnidars granted leases to the said Radharaman Ghose and his co-sharers in respect of about 74 bighas of land out of an area of 101 bighas and also in respect of their demarcated lakheraj lands lying within the said area. These leases bear different dates; the lease by Bejoy Gobinda Laik (owner of 1 anna 6 pies share) was on the 11th March 1895, by Khetramani Debi (owner of 1 anna 6 pies share) on the 10th April 1895, by Earn Sankar and Earn Bisbnu Laiks (owners of 1 anna 6 pies share) on the 9th May 1895, by Kristodhan and Sudhakrishna Laiks (owners of 6 annas share) on the 13th May 1895, by Guru Prasanna Chakraborty (owner of 2 annas share) on the 19th January 1897, and by Bimala Sankar, Gouri Sankar and Durga Sankar Laiks (owners of 1 anna 6 pies share) on the 27th April 1897. Khetramani's daughters executed a further lease on her death on the 30th January 1899, evidently as there was some question as to whether Khetramani had only a widow's interest in the property or not.

6. Khudirain Chakraborty did not execute a lease in respect of his 2 annas share. Badharaman Ghose thereupon instituted Suit No. 114 of 1897 against Khudiram Chakraborty for specific performance of an alleged contract for granting a lease in respect of his share. This suit was instituted on the 24th March 1897 and it; appears that the map prepared by the Amin Madhu Sudhan Dutt was filed with the plaint in this suit. The suit, however, was dismissed on compromise on the 1st February 1900, Khudiram Chakraborty having on the day before executed a lease in favour of Badharam Ghose and his co-sharers on lines similar to the leases executed by the other co-sharers.

7. On the 5th February 1901 the Nandi Coal Association, which is a firm at present constituted by the Defendants Nos. 1 to 6 in this suit, and at that time was composed of Badharaman Ghose and the predecessors of the Defendants Nos. 2 to 6, commenced an action for damages for underground trespass alleged to have been committed in respect of lands acquired as aforesaid by Badharaman Ghose and his co-sharers and for other consequential reliefs against a Company known as the Nandi Coal Company, Limited. This suit was Suit No. 37 of 1901. In this suit a pleader named Babn Bakhal Chandra Das, who was deputed to ascertain the boundaries of the lands of the Nandi Coal Association and of the Nandi Coal Company, Limited, surveyed the lands, prepared a map and field book and also submitted a report. With the result of this suit we are not concerned here.

8. In April 1901 the plaintiff company instituted two suits being Nos. 173 and 174 of 1901, the former against the Nandi Coal Company and the patnidars and the latter against the Defendants Nos. 1 to 6 in this suit or their predecessors as

well as the patnidars, on the basis of a clause in the amalnamah dated the 6th Angus; 1891, which provided that if any land other than the aforesaid 500 bighas of land was wanted by anybody the syndicate would have a preferential right to obtain settlement thereof if they agreed to pay the rent offered by such other person and upon the allegation that the patnidars had granted settlement to the Nandi Coal Company and to the Defendants in the present suit or their predecessors in respect of the lands of those two suits in contravention of the condition embodied in the aforesaid clause. Suit No. 173 ended in a compromise, the plaintiff company giving up their right of pre-emption under the amalnamah, and Suit No. 174 was dismissed, the plaintiff company having withdrawn their claim. Some controversy has arisen as to the exact circumstances connected with the withdrawal of the claim as the predecessors of the Defendants Nos. 1 to 6 appear to have been ordered to pay the costs of the patnidars in the suit but I do not think it matters much, for, so far as our present purposes are concerned it may be taken that the claim of the plaintiff company was dismissed, no permission having been granted to them to institute a fresh suit on the same cause of action.

9. It appears, however, that in 1901 Mr. Mitchell, the then manager of the plaintiff company, obtained leases from some, if not all, of the co-sharers of the patni in respect of the whole mouzah Rajpur Nandi with the exception of the lands which had been already let out to the plaintiff company, the lands in respect of which Radharaman Ghose and his co-sharers had obtained leases and some other lands. On the 28th August 1917 the Maharajadhiraj Bahadur of Burdwan granted a lease of underground rights in all coal and fireclay in the entire mouzah Rajpur Nandi, except in such portion of the mouzah as was in the possession of the Nandi Coal Association. The respondents Messrs. Andrew Yule & Co., it should be stated, are the managing agents of the plaintiff company.

10. The present suit was instituted by the plaintiff company on the 22nd September 1919 against the defendants, who, as I have said, constitute a firm carrying on business in coal under the name and style of the Nandi Coal Association. The plaintiffs' allegation, shortly stated, was that the defendants, taking advantage of the fact that their lands lay contiguous to those of the plaintiffs, secretly, fraudulently and furtively trespassed into the plaintiffs' underground land and extracted a large quantity of coal therefrom; that the Defendants manipulated their trespass in such a way that it was not perceptible from outside and the plaintiff company remained unaware of the same until only about six months before the suit. In the written statement originally filed by the defendants various defences were taken, amongst which may be mentioned the plea of limitation, the plea that the underground land from which coal was taken lay within the defendants' title and not within the leases under which the plaintiff company claim, the plea that in any event the Defendants' title should prevail and other objections dealing with the question of the damages claimed. Two other facts need be mentioned here. The defendant No. 1, Radharaman Ghose, died after the written statement was filed as aforesaid; and on his death his son

Panna Lal Ghose was substituted in his place and he filed an additional written statement on the 8th December 1921 to which reference will have to be made hereafter. Thereafter, on the 17th January 1922, on the application of the plaintiffs Messrs. Andrew Yule & Co., who, as I have said, are the managing agents of the plaintiff company, were added as the Defendant No. 7 and they filed a written statement on the 16th February 1922.

11. The learned Subordinate Judge granted the plaintiffs a decree for Rs. 56,018, as damages for the coal extracted by the defendants and Rs. 18,223 as costs for constructing an artificial barrier which in his opinion was necessary to ensure the safety of the plaintiffs' mines, the same having been endangered by the extraction of coal by the Defendants Nos. 1 to 6; the said amount of Rs. 74,241, together with interest and cost was decreed against the Defendants Nos. 1 to 6 to the extent of the assets of the deceased partners of the defendant firm, namely, the Nandi Coal Association in their hands. He also granted the plaintiff company a decree for a permanent injunction restraining the said defendants from committing any further trespass into the plaintiff company's land as demarcated by the civil Court Amin in Suit No. 339 of 1892 and relayed and shown by the commissioner appointed in the present suit in the surface and underground plans prepared by him and he also directed the said plans with the field book, Part I, to form part of the decree. From this decree, the Defendants Nos. 1 to 6 have preferred this appeal and the plaintiff company as well as the Defendant No. 7 have also filed certain cross-objections. (After dealing with certain questions of fact and finding them against the defendants his Lordship proceeded with defendants' plea of adverse possession and continued). As regards adverse possession I am not prepared to hold that assertion in a written statement that one is in possession, in the absence of anything else, can be regarded as actual possession of the land itself which may go to constitute adverse possession.

12. On the whole I do not find on the record any sufficient materials on which the defendants may be held to have acquired a title by adverse possession to the portion of the underground with which we are concerned in this case. If in point of fact the defendants took coal from any particular spot within this portion, their possession was that of trespassers and must be deemed to have been limited to that particular spot only and no more. (His Lordship then dealt with the plea of defendants that the plaintiff had not acquired any title to the underground and deciding against the defendants proceeded). Before dealing with the other questions that have been raised before us, it would be convenient to deal with two of the matters upon which there has been a good deal of controversy before us. They relate to the time when the acts of trespass took place and the exact character of that trespass. It will be convenient to deal with these two questions at this stage, because on the result of our investigation into these two matters will largely depend the solution of the other problems that have been raised. The learned Subordinate Judge has found as a fact that the coal was extracted before 1915. (After examining the evidence the Judgment proceeded). I find myself

unable to disagree with the view which the learned Subordinate Judge has taken. In agreement with him I find that it is reasonable to hold that the extraction took place before 1915 or, to put it more accurately, before the end of that year. As regards the time when the acts of trespass began, there is hardly any data to go upon, but I am not prepared to hold that this portion of the underground was worked when Mr. Mitchell was the Receiver. It seems to me altogether improbable that if it was worked at that time, Mr. Mitchell would not have known of it. It is reasonably certain therefore that the acts of trespass commenced some time after the middle of the year 1904.

13. As regards the character of the trespass in the plaint it was stated that the trespass was committed fraudulently, secretly and furtively and the defendants had carefully manipulated it in such a way as not to be perceptible from outside and had taken systematic steps to conceal the same. Underground trespass must in its very nature be secret and not perceptible from outside; but I have not been able to discover anything either in the evidence or in the circumstances suggesting that there was any fraud on the part of the defendants or that they had taken any steps to conceal their workings. The workings do not seem to have been carried on otherwise than in the usual way in which coal is worked in everywhere. (After dealing with evidence the judgment continued). The trespass was in my opinion inadvertent and I am prepared to go further and say that it was due to want of reasonable care which the circumstances of the case called for, the two premises being contiguous; but it was not intentional, wilful and fraudulent.

14. The next contention of the appellants relates to the question of limitation. The learned Subordinate Judge has observed in his judgment that this was a question about which he experienced considerable difficulty in coming to a decision which would satisfy both law and equitable considerations. He has held, though not without some diffidence as he has put it in his judgment, that Article 96 of the Limitation Act applies to the case. As to the applicability of this article he has observed thus in his judgment:

The trespass in the present case appears to me to be due to mistake regarding the actual boundary line between the collieries of the plaintiff company and the defendants the trespass was due to inadvertence caused by mistake and confusion created by the circumstances already discussed. The Article 96 relates to relief on the ground of mistake. The wordings are perfectly general and would seem to apply equally to the case of mistake on the part of the plaintiff and the case of mistake on the part of the defendant.

I hold that the plaintiff is entitled to get three years from the time when the mistake became known to the plaintiff. On the evidence I find that the mistake was discovered by the plaintiff in 1919 and not earlier. There might have been some suspicion before, if I should take the letter, Ex. P., to be genuine. But suspicion is not knowledge.

15. He has also recorded his opinion that if Article 36 or Article 39 applied, as appears to have been urged on behalf of the defendants before him, the plaintiff company were not entitled to take advantage of Section 18 of the Limitation Act. He, however, appears to have been of opinion that the Court was not merely a Court of law but of equity and good conscience, and that fraud was not the only circumstance which would prevent the statute running, and that in the present case, in view of certain equitable considerations which arose in favour of the plaintiffs, limitation should run from the date of the plaintiffs' knowledge, even if Article 36 or Article 39 applied.

16. Now, as regards the date of the plaintiffs' knowledge I entirely agree with the learned Subordinate Judge in holding that the plaintiffs were not aware of the trespass before, 1919, and in this connexion I am of opinion that although I do not see any good reason to doubt the genuineness of the letter of which Ex. P is the copy, I do not find that the defendants have proved that the said letter ever reached the plaintiffs, a fact which the plaintiffs deny, and I am also unable to hold that there is any such presumption, either in law or in fact that, the said letter must have reached its destination, when in point of fact there is nothing to show that it was ever despatched. I am, however, clearly of opinion that the learned Subordinate Judge was in error in importing considerations of equity in the application of such a statute as the statute of limitation. I agree with him in holding that nothing has been proved which may enable the plaintiff company to avail themselves of the provisions of Section 18 of the Limitation Act. The simple question then remains as to the article to be applied.

17. To answer this question the main reliefs claimed by the plaintiffs have got to be separated. They may be taken to be three in number : (1) Damages for the coal taken, (2) costs of a barrier, and (3) a permanent injunction restraining the defendants from overstepping the boundary. So far as the last of these reliefs is concerned there is no period of limitation prescribed for it in the Limitation Act, and the claim is within time if there is a cause of action. In view of the facts which have been already found there is no question as to the propriety of the relief that has been granted under this head, and it is not necessary to refer to it again. As regards the damages for the coal taken, the law is well settled in England. The following passage giving a summary of the law may be usefully quoted from Lightwood on the Time Limit on Actions. p. 300:

Fraud which will exclude the statute is frequently referred to as "concealed fraud." It has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own.

18. Per Lord James of Hereford in Privy Council in *Bulli Coal Mining Co. v. Osborne* [1899] A.C. 351. This, however, does not, imply that there must be active concealment. It is no more than an assertion: that the fraud, which in its

nature is secret, is also undiscovered. Thus in case of fraudulent taking of minerals by underground trespass, it is not necessary, as was suggested in *Dean v. Thwaite* [1855] 21 Bear 621 and held in *Re : Asthy, etc., Goal Co. and Tyldeshy Coal Co.* [1899] 80 L.T. 116, that steps should have been taken to conceal the fact. And although the mere breaking of bounds into a neighbour's colliery is not to be regarded as fraudulent for the purpose of the statute as - was suggested by Mallins, V.C. in *Ecclesiastical Commissioners v. N.E. Railway Co.* [1877] 4 Ch. D. 845, yet the fact that the taking of coal is in pursuance of a wilful trespass and is secret, makes the taking fraudulent, and an account will be directed of the whole coal taken and will not be limited to six years; *Bitlli Coal Mining Company v. Osborne* [1899] A.C. 351. In cases of inadvertent trespass the account is limited to six years; *Llynvi Co. v. Brogden* [1870] 11 Eq. 188, *Hilton v. Woods* [1867] 4 Eq. 432, *Trotter v. Maclean* [1879] 23 Ch. D. 574 and *Dames v. Bagall* [1875] 23 W.R. 690.

19. It is plain, therefore, that under the English Law the limit of time runs from inadvertent wrongful taking and from discovery of fraudulent taking. If this principle be applied to the present case in view of the facts found the statute would begin to run from the last act of trespass, that is to say, from the end of 1915. As regards the article of the Limitation Act applicable to the case I am of opinion that Article 96 is limited in its application to cases of mistake committed in transactions arising in the course of relations which are more or less contractual in character and the article in any event has no application to a case where, as here, there is no question of mistake on the part of the plaintiff. Article 3C obviously has no application if any other article applies. One of the other articles to which we were referred was Article 48 but that also has no application as "conversion" therein referred to in my opinion should be held to mean dishonest conversion ejusdem generis with the words that precede it and the article, in view of the words in the third column, presupposes the existence of the property in the possession of some person. The claim for damages for trespass indicate not merely damages for the unlawful entry but also damages for the mischief which the trespasser commits after entry on the land. The claim in the present case is very much like a claim for damages for crops cut and carried away from the plaintiffs' land and to such a claim it has been held by a Full Bench of this Court that Article 39 or Article 49 is applicable : *Mangun Jha v. Dolhin Golab Koer* [1898] 25 Cal. 692.

20. Three years having already expired from the last act of trespass the claim for damages for the trespass including the price of the claim for the coal taker, is barred under the law. As regards the costs for the barrier, if the claim in respect of it is regarded as a claim for damages for the trespass it is equally barred by the three years' rule but it is possible to take the view that the claim might be put forward in the shape of a prayer for a mandatory injunction calling upon the defendants to erect a barrier and in the alternative to the cost thereof. It is therefore necessary to consider the merits of that claim and I propose to do so hereafter.

21. The next contention of the appellants turns upon the provisions of Act 12 of 1855, and the application of the rule *actio personale moritur cum persona*. As far as I have been able to appreciate this contention it is this - that Radharam Ghose and his partners who are now dead are the persons who committed the tree-pass and as more than a year has elapsed from the date thereof and as they are dead the claim is barred, and the cause of action has not survived as against their heirs and legal representatives. Act 12 of 1855 relates to those wrongs which did not survive to or against the executors, administrators or representatives of a deceased person. Section 89 of the Probate and Administration Act and Section 268 of the Succession Act have been referred to on behalf of the respondents as suggesting that the cause of action in a case like this survives. As regards the question whether the plaintiffs' claim is affected by the rule *actio personale moritur cum persona*, the following remarks of Bowen, L.J., may be quoted from *Phillips v. Homfray* [1883] 24 Ch. D. 439:

The only cases in which apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be these in which property or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property or its proceeds or value and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which in the lifetime of the wrongdoer could have been recovered from him, can be traced after his death, to his assets and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff and the damages which have been done to him are unliquidated and uncertain, the executor of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to cannot be the act which is complained of, and an indirect benefit may have been reaped thereby.

As long as the maxim *actio personale moritur cum persona* is preserved by the law of this country the rule drawn is neither inconvenient nor unreasonable. If every wrongful act which was attended consequently and indirectly with advantage to the wrongdoer or his pocket were to warrant an action against executors, it would be impossible to know when executors were liable or not and the maxim would, in fact, become a mere source of litigation. We have not now to consider the policy of the maxim. It is part of the law and while it is so ought not to be frittered away.

22. So far as the claim for damages for trespass is concerned the estate of the deceased partners must be presumed to have increased the assets of the firm of

Nandi Coal Association and benefited the estate of the deceased partners, and the defendants as their heirs and legal representatives are liable to the extent of the assets including the assets of the firm received by them. As regards the claim for the cost of the barrier, if it is regarded as a claim for damages for the negligent manner in which the underground was worked by the deceased partners such indirect benefit as may have accrued by the tortious act of the deceased partners cannot, on the principle laid down in *Phillips v. Homfray* [1883] 24 Ch. D. 439, be taken to have increased the assets and if this principle has not been abrogated by the provisions of the Probate and Administration Act and the Succession Act to which reference has been made, it is doubtful if the claim under this head may be enforced against the defendants, such as they are at present. It is not necessary, however, to pursue the matter further because as I have already stated the claim with regard to the barrier may not unreasonably be regarded as one relating to a mandatory injunction and in the alternative for recovery of costs and may be enforced against the defendants if there is a proper foundation for the claim on the facts. (Then his Lordship proceeded to deal with the question of assessment of damages and continued.) The rule however, as to assessment of damages in cases of this description is well settled. In the case of *Livingstone v. The Rawyards Coal Co.* [1880] 5 A.C. 25, it was laid down that the value of the coal taken must be the value of the coal to the person from whom it is taken and at the time it is taken. Lord Hatherley in his judgment in that case said that:

if a man furtively and in bad faith robs his neighbour of property and because it is underground, is not for sometime detected the Court of equity will punish fraud by fixing the person with the value of the whole of the property which he has furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement or if they had been the one working and the other permitting the working through a mistake.

23. Further on his Lordship observed thus:

Each case must stand upon its own particular foundation in that respect; but regard being had to the rule *vigilantibus non dormientibus* it requires to be carefully considered in each particular case how far the principle is just which deals with property under such circumstances as property which has been acquired by one person from another without payment and by inadvertence. But when we once arrive at the fact that an inadvertence has been the cause of the misfortune, the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.

24. The case of *Livingstone v. The Rawyards Coal Co.* [1880] 5 A.C. 25 was a very peculiar case and one singularly free from difficulty, for both the parties there were under a mistake and there was no wilful trespass or wilful taking of

the coal and the defendant did not know that what he was taking did not belong to him. For the purpose of allowances to be made, fraudulent, negligent and wilful trespass have often been treated on the same footing and only the cost of bringing to bank is allowed : Wood v. Morewood [1841] 3 Q.B. 440n; Trotter v. Maclean [1879] 13 Ch. D. 574 and Ecclesiastical Commissioners of England v. North Eastern Railway Co. [1877] 4 Ch. D. 845. In the first of these cases Parke, B, directed the jury that if there was fraud or negligence on the part of the defendants they might give as damages under the count of trover the value of the coals at the time when they first became chattels on the principle laid down in Martin v. Porter [1889] 5 M. & W. 352, and in the last of the aforesaid cases the same measure of damages was applied though it was a case of inadvertent working. In the present case upon the finding at which I have arrived. I am disposed to take the view that there was negligence on the part of the defendants, though they acted honestly. I am therefore of opinion that the severer rule for damages should be applied, namely, that the plaintiffs should be awarded, if their claim is not barred, the market value of the coal at the pits mouth less only the cost of bringing the coal to bank and not the cost of hewing such value to be calculated at the time when the coal was cut and reduced to possession. As the actual dates of such cutting are not as certainable the plaintiffs in my opinion are entitled to the most advantageous rates between the middle of 1904 and the end of 1915 during which the coal must have been taken by the defendants. The burden being on the defendants to prove what coal was taken at any particular point of time Dean v. Thwaite [1855] 21 Bear 621, and all that they have succeeded in proving being that the coal was taken during the above period, this is the proper order to be passed in the circumstances. I am also of opinion that in a case like this the plaintiffs are entitled to interest on the amount of damages which may be awarded on this footing from the beginning of 1916 and calculated at the rate of 6 per cent, per annum. That damages may in the shape of interest be awarded in an action for trespass cannot be disputed and the case, in my opinion, is of in which it should be awarded if the plaintiffs succeeded in recovering any decree for damages at all.

25. The only other question that remains for consideration is that relating to the cost of the barrier. The claim in this respect may, as I have said, be treated as within time if the prayer be taken as one for a mandatory injunction and in the alternative for recovery of costs. The allegation of the plaintiff company in their plaint upon which this claim is based runs in these words:

To prevent further and future trespass and to prevent the water and foul gases, if any, coining from the defendants' mines to the plaintiffs' mines it is absolutely necessary to erect barriers at the boundary or at some other convenient place.

26. The commissioner in his report observed that water was seen to have accumulated here and there in the galleries at certain places and water was also seen leaking out in small quantities at certain other places. Judging from the distance of these places on the Commissioner's underground plan from the

working faces of the defendants" working, it is unreasonable to hold the defendants responsible for this leakage. The learned Subordinate Judge has observed thus in his judgment:

The evidence in this case does not show that" there is any present risk of fire, water or foul gas coming to the plaintiffs" colliery from the defendants" colliery even if the plaintiffs by working up to the encroached portion happen to establish connexion between the two mines, I mean that there is no present risk, on the assumption that the defendants will work their colliery properly.

27. It is not necessary for our present purposes to go so far and enquire what might or might not happen if the plaintiff company establish a connexion between the two mines, but it is, in my opinion, enough that¹ it has been found by the learned Judge - and this is a finding with which I entirely agree as being the only reasonable finding on the evidence such as it is on the record - that at present there is no risk of fire, water or foul gas coming to the plaintiffs" colliery from the defendants" colliery. This finding, in my opinion, is enough to put the plaintiff company out of Court in so far as their claim for the costs of the barrier is concerned. It is urged on behalf of the respondents that the arrangement between the defendants and the patnidars was that a margin was to be left of 10 bighas of land between the plaintiffs" lands and the defendants" lands but I am of opinion that the plaintiffs are not entitled to take-advantage of that arrangement in the absence of any stipulation on the part of the patnidars in the leases granted" to the syndicate, that such a margin would be left. It is true that in the absence of any regulation making the keeping of a barrier as between two neighbouring; mines compulsory, the plaintiffs are entitled to work right up to the limits of their lands. It is also true that rent was not to be paid for the 10 bighas of margin by the defendants and if the defendants worked in that region they might incur liability to the patnidar for use and occupation or perhaps for damages. But it : was to the patnidars alone and not to the plaintiff that the defendants were answerable for the use of the margin.

28. In my opinion the plaintiffs, if they want to ensure the safety of their own mine, are bound to look to themselves for leaving a barrier of reasonable magnitude at the extremities. That means that they lose the quantity of coal which they cannot take if a barrier is to be left. They may still keep such a barrier if they like out of the coal that is loft between the two mines. The quantity of coal they lose, if they keep such a barrier, is evidently much less than what they would have to lose if they had to keep a barrier on the east and south of their boundary at the encroached portion the difference being that between the lengths of two sides and the hypotenuse of a right-angled triangle.

29. I entirely dissent from the view of the learned Subordinate Judge that the defendants are liable to pay the costs of a barrier, because, as the learned Judge put it in his judgment, he cannot ask the plaintiff to rely on the good sense and competency of the defendants in the further working of their mines. I may state here also that if the plaintiffs are entitled to have a barrier the cost awarded by

the learned Judge on that head appears to be reasonable; only the form of the decree should be altered by granting a mandatory injunction on the defendants, and providing further that if they fail to carry it out then the plaintiffs would be entitled to recover the costs aforesaid on erecting the barrier in question.

30. The result then is that in my judgment, if I could hold that the plaintiffs' claim for damages was not barred by limitation I would have set aside the decree of the learned Subordinate Judge and ordered a decree to be entered in favour of the plaintiffs granting a permanent injunction restraining the Defendants Nos. 1 to 6 from committing any further trespass underground into the plaintiff company's land to the west of and beyond the black line of the Amin's map in Suit No. 339 of 1892 as relaid in the surface and underground plans prepared by the commissioner in the present suit and declaring that the said plans and field book, Part I, do form a part of the decree, and would have directed a further investigation with liberty to the parties to adduce such evidence as they may desire, in order to ascertain the most advantageous market-value of coal at the pits' month between the years 1903 and 1915 and the cost of carriage of the said coal to the bank at the most advantageous rate to the plaintiff and then to award a decree on the lines indicated above. I would have dismissed the plaintiffs' claim for the costs of a barrier and decreed the appeal and the plaintiffs' cross-appeal with costs proportionate to the respective successes of the parties in this Court and also in the Court below.

31. In view, however, of the opinion I have formed on the question of limitation, I do not see my way to do anything else than set aside the decree of the learned Subordinate Judge except as to the permanent injunction that he has granted and dismiss the rest of the plaintiffs' suit. Having regard to the fact that the defendants are wrongdoers whom the law, as it stands, is unable to reach, I would not allow them any costs in this Court and would allow the decree as to costs passed by the Court below to stand as the plaintiffs have succeeded in their main contention, namely, that as regards the position of the eastern boundary of their land both in that Court and here. The plaintiffs' cross-appeal should also be dismissed, but without any order as to costs; and the cross-appeal of the Defendant No. 7 which relates to costs not awarded to him by the Court below is similarly dismissed.

Greaves, J.

32. I agree.