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Now it may be vexatious on many grounds. It may be so utterly absurd that the Judge sees it cannot possibly succeed, and that it is brought only for annoyance, and then the Judge has jurisdiction to stay the action. That is pure vexation. Or it may be vexatious in another way; that is, the plaintiff not intending to annoy or harass the defendant, but thinking he would get some fanciful advantage, sues him in two Courts at the same time under the same jurisdiction—two of the Queen's Courts. That is vexatious, because whatever the intention ofthe plaintiff may be, he cannot get any benefit in that way, and the defendant is harassed by two suits."

Now in this case there is no question of vexing the same defendant with double litigation. In the two suits brought by the plaintiff the defendants are different, the causes of action are [183] different, the questions raised between the parties are different. It would, no doubt, be much more convenient to the defendant to have the case against him tried at Wardha. Nearly all his evidence and probably a large portion of the plaintiff's evidence is only obtainable there. But is that a ground for depriving the plaintiff of his right to bring his suit in this Court? The injury and damage of which he complains have been inflicted in Bombay, and many of his witnesses (he says) are resident here. He desires to vindicate his character in the place where he alleges it has been defamed. I can find no authority for preventing him doing so. I am not satisfied (to use the words of the section) that justice is more likely to be done at Wardha or elsewhere than in this Court, and I must, therefore, discharge this summons.

Summons discharged.

Attorneys for the plaintiff:—Messrs. *Payne, Gilbert, and Sayani.*

Attorneys for the defendant:—Messrs. *Jefferson, Bhaishanker and Dinsha.*

NOTE.—See also *Levy* v. *Rice*, L. R. 5 C. P. 119; and *Church* v. *Barnett*, L. R. 6 C. P. 116.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

JAMSETJI BURJORJI BAHADURJI (*Plaintiff*) *v.* EBRAHIM VYDINA AND ARDESIR BURJORJI BAHADURJI (*Defendants*).*

[5th and 13th October and 10th December, 1888.]

Vendor and purchaser—Sale set aside—Decree in favour of vendor—Possession—Purchaser in possession after decree and pending appeal—Accident—Loss by fire—Liability for damage.

The plaintiff and the second defendant Ardesir were brothers, and worked a cotton press in partnership. In August, 1884, the second defendant sold the press for Rs. 35,000 to Vydina, (the first defendant), who paid the second defendant Rs. 5,000 earnest, and was put into possession. The plaintiff then brought a suit (No. 327 of 1884) against his brother, (the second defendant), praying for a dissolution of the partnership. Vydina was also a party defendant to that suit. The plaintiff alleged that Rs. 35,000 was much too low a price for the press, and he objected to the sale. He prayed that Vydina might be restrained from continuing in possession of the press and working it, and that a receiver might be appointed to take possession of it until further order. On the 21st April, 1885, on a

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motion the Court refused to grant an injunction and receiver, but ordered Vydina to pay [184] Rs. 30,000 (*i. e.* the balance of the purchase-money), to the solicitors of the parties for investment until the hearing of the suit, and directed that if that sum was not paid by the 21st May, 1885, a receiver should be appointed to take possession of the press. The suit, (*i. e.* No. 327 of 1884), was heard on the 15th February, 1887, when it was held by the Court that the sale by Ardesir to Vydina was without authority; that the defendant Vydina took nothing under it, and that the plaintiff was entitled to have it set aside. Certain matters still remained to be decided; but on the 28th February 1887, the decree in the suit was made, giving effect to the findings already arrived at on the 15th February. The decree by consent directed various accounts to be taken, and, among others, an account of the profits realized by the working of the press by the defendant Vydina since his possession thereof, credit being given to him for all sums expended by him in the repairs, maintenance, and working of the said press and for the management thereof by him. The decree further ordered that the defendant Vydina should be repaid the Rs. 30,000 which he had paid under the order of the 21st April 1885, and directed "that on such payment the said defendant Vydina do forthwith give over possession of the press to the plaintiff and the defendant Ardesir." The defendant Vydina at once gave notice of his intention to appeal. There was some delay in drawing up the decree. The minutes were spoken to on the 31st March, 1887; the decree was sealed on the 13th April, 1887. Meantime, on the 6th April, 1887, and while the defendant Vydina was still in possession, a fire broke out in the press, and much damage was done. Subsequently to the sealing of the decree as above stated, the press in its damaged condition was handed over to the plaintiff's firm by Vydina who also desisted from prosecuting his appeal, the injury to the press having made it contrary to his interest to appeal. In May, 1887 the plaintiff filed the present suit claiming to recover Rs. 50,000 from the defendant Vydina as the value of the press, or such further sum as might be necessary to rebuild and restore it. He alleged that the fire was caused by the working of the press, and contended that the working of the press by the defendant Vydina after the decree of the 28th February was an act of trespass by him, and that, therefore, independently of the question whether the fire was caused by the negligence of Vydina and his servants, the said Vydina was liable fot the loss occasioned by the fire.

Held, that, independently of negligence, the defendant Vydina was not liable to the plaintiff for the loss occasioned by the fire. Down to the decree of the 28th February, 1887, the defendant in keeping possession of the press and working it, was, no doubt, a trespasser, but subsequently to that decree he remained in possession and worked the press with the consent of the plaintiff. The maxim *volenti non fit injuria* applied to the circumstances of the case.

Held, also, that no negligence having been proved against the defendant, the suit must be dismissed.

APPEAL from a decree of Farran, J, dated the 27th September, 1887, passed in favour of the plaintiffs, whereby the first defendant was found liable to the plaintiff for damages sustained by reason of a fire which took place on the 6th April, 1887, in a cotton press [185] at Indore, of which the said defendant was then in possssion and which his servants were working.

The said cotton press had, previously to the month of August, 1884, belonged to the plaintiff and his brother Ardesir, (defendant No. 2), who worked in partnership. In August. 1884, Ardesir, (defendant No. 2), contracted to sell the said press to Vydina, (defendant No. 1) for Bs. 35,000. Vydina paid Ardesir Rs. 5,000 of this amount, and was put in possession.

In September, 1884, the plaintiff Jamsetji filed a suit (No. 327 of 1884) against his brother Ardesir (defendant No. 2), for dissolution of the partnership. Vydina was a party defendant to that suit. The plaint in that suit, as originally framed, stated that the plaintiff had heard that Ardesir had sold the press to Vydina for Rs. 60,000, and that the plaintiff did not object to the sale at that price, and it prayed that the price might be paid into Court.

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On the 17th November, 1884, the plaintiff obtained a *rule nisi* for an injunction restraining Vydina from paying the balance of the purchase-money (*i.e.* of the Rs. 60,000) to Ardesir, and for the appointment of a receiver to receive it and other sums of money.

On the 1st December, 1884, the plaintiff amended his plaint in suit No. 327 of 1884, and stated that he had, since the institution of the suit, discovered that Ardesir had agreed to sell the press to Vydina for Rs. 35,000 and not Rs. 60,000 as before alleged; that such a price was much too low: that he objected to the sale, and that he believed that Ardesir was interested in the purchase. He prayed that Vydina might be restrained from continuing in possession of the press and working the same, and that a receiver might be appointed to take possession of it and work it until further order.

Having thus amended his plaint, the plaintiff on the 3rd December, 1884, gave notice to the defendants that he would move for an injunction restraining Vydina from continuing in the possession of and working the press, and for the appointment of a receiver. On the 21st April, 1885, the above rule and notice were adjudicated on. The Court refused to grant an injunction and receiver in terms of the notice of the 3rd December, **[186]** 1884, but ordered Vydina to pay Rs. 30,000, to the respective solicitors of the parties for investment until the hearing of the suit (instead of to a receiver or into Court), and directed that if that sum was not paid by the 21st May, 1885, a receiver should be appointed to take possession of the press.

That suit (*viz.*, No. 327 of 1884) came on for hearing before Hart, J., on the 15th February, 1887. That learned Judge found, on the issues,

(1). That the sale to Vydina was not fraudulent and collusive, *i.e.*, that it was not proved that Ardesir had a share in the purchase.

(2). That the plaintiff did not, expressly or impliedly, authorise the sale, nor did he ratify it, and that consequently the sale to Vydina was without authority, and *that the defendant Vydina took nothing under it, and that the plaintiff was entitled to have it set aside.*

(3). That the defendant Vydina must account to the firm (of which the plaintiff and the defendant Ardesir were members) for the earnings of the press, taking credit for all moneys properly expended by him in it and its working.

(4). That the price of Rs. 35,000 was not so low as to be indicative of fraud.

The above judgment having been delivered, the plaintiff on the 18th February, 1887, through his solicitors, wrote the following letter to the defendant Vydina, requesting him to stop working the press, and give up possession to the firm or to some nominee on the firm's behalf:—

"*Bombay, 18th February 1887.*

"To Messrs. WADIA AND GHANDY.

"Dear Sirs,—Now that the sale of the press to your client Ebrahim has been set aside, and as he has been directed to give up possession, we are instructed to request your client Ebrahim to stop working the said press forthwith, and make an early appointment to deliver possession thereof to our client.

[187] "If your client Ardesir objects to possession being given to our client alone, we shall have no objection to possession being given to your and our client jointly, or to some third person on their behalf to be named by them.

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"To prevent any further loss to the parties, our client offers to work the said press on the joint account of your client Ardesir and our client until they are sold, and to account for his working when called upon to do so.

"The favour of an early reply is requested.

"Yours truly,

"(Signed) LITTLE, SMITH, FRERE, AND NICHOLSON."

Possession, however, was not given, and Vydina continued to work the press.

On the 28th February, 1887, the decree in the suit was made, giving effect to the findings upon the issues above stated and determining certain other matters which had stood over for decision. The defendant Vydina at once gave notice of his intention to appeal. There was some delay in drawing up the decree. The minutes were spoken to on the 31st March, 1887, and the decree was sealed on the 13th April, 1887. The following is the material part of it :—

".....Such further hearing having beeen resumed on the 26th and this 28th day of February, 1887, and the plaintiff and the first defendant by their advocates agreeing to this decretal order, and the second defendant agreeing to the account fourthly hereinafter ordered, and the defendant Ardesir Burjorji Bahadurji by his advocate undertaking not to apply for stay of execution of so much of this decree as relates to the determination of the shares of the plaintiff and of the said defendant Ardesir Burjorji Bahadurji in the said partnership and the ownership of the 203 bales of cotton hereinafter mentioned; this Court doth order that it be referred to Mr. Rustomji Merwanji Patell, as special Commissioner appointed for that purpose in pursuance of the Code of Civil Procedure, ss. 394 and 395, to take the accounts and make the inquiries following, namely: (1) An account of the partnership dealings between the plaintiff and the first defendant Ardesir Burjorji Bahadurji at Bombay and Indore. (2) An inquiry as to the respective shares of the plaintiff and of the said defendant Ardesir Burjorji Bahadurji in the said partnership. (3) An inquiry as to whether 203 bales of cotton in the pleading mentioned are the property of the said partnership. (4) *An account of the profits realized by the working of the press at Indore by the second defendant Ebrahim Vydina since his possession thereof, credit being given in the taking of* [188] *such account to the said second defendant as against the plaintiff for interest on the sum of Rs. 30,000 deposited by him with the attorneys to the parties hereto from the date of such deposit till the date of payment at the rate of 9 per cent per annum, and also for all sums expended by the second defendant in the repairs, maintenance, and working of the said press and for the management thereof by the said second defendant* on a salary to be fixed by the said special Commissioner: and this Court doth further order that in taking the said partnership accounts the said special Commissioner is to have regard to all settled accounts, (if any), between the plaintiff and the first defendant and Dinshah Framji Wadia, deceased: and this Court doth further order that the parties to this suit do appear in person or by advocate or attorneys, before the said special Commissioner, and the said special Commissioner is to report to this Honourable Court with all convenient despatch upon the matters hereby referred after making all just allowances; and for the better taking of such accounts this Court doth further order that the plaintiff and the defendants do produce before the said Commissioner all books, papers, and documents in their or any or

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either of their custody, possession or power relating thereto, and that the said special Commissioner be at liberty to obtain the process of this Court to compel the attendance of any witnesses and for the production of any document which he may desire to inspect; and to examine on oath or solemn affirmation touching the matters in question as he shall think proper. And this Court doth further order that, if either of the said parties shall delay or otherwise wilfully neglect to proceed in the said reference, the said Commissioner shall be at liberty to proceed therewith *ex parte* and this Court doth further order that this reference is to be without prejudice to any question raised in this suit or to the rights of the parties to appeal against or object to his decree: and this Court doth further order that the attorneys to the parties do sell forthwith the Government Promissory Notes in which they invested the said sum of Rs. 30,000 which was ordered to be paid into Court by the said second defendant Ebrahim Vydina, and that out of the proceeds of such sale and of the interest accrued thereon they do pay to the said second defendant Ebrahim Vydina the said sum of Rs. 30,000, and that they do pay the balance to the plaintiff, *and that on such payment the said second defendant Ebrahim Vydina do forthwith give over possession of the press to the plaintiff and to the said first defendant Ardesir Burjorji Bahadurji;* and this Court doth reserve the costs other than those hereby awarded and further directions until the said Commissioner shall have made his report: and any of the parties is to be at liberty to apply to the Court as there may be occasion."

On the 15th March, 1887, the plaintiff's solicitors wrote the following letter to the solicitors of the second defendant."

"*Bombay, 15th March 1887.*

"To Messrs. WADIA AND GHANDY,

"Dear Sirs,—We are instructed by our client to address you on the subject of carrying out the decree in this suit. You will observe that the Court has directed that the Government paper representing the Rs. 30,000 deposited by your client, the second defendant, should be sold, and the sum of Rs. 30,000 refunded [189] to the second defendant out of the proceeds of sale and interest on such notes, and that the balance thereof should be paid to our client the plaintiff. Our client states that Government paper has considerably fallen since the investment was made, and he is afraid that the rates will go down still further. He is, therefore, anxious to avoid the loss which will fall upon the partnership by a further depreciation, and we are, therefore, instructed to ask for your consent to dispose of the said paper at once, and we are instructed to give your client, the first defendant, notice that, unless we hear from you consenting to such sale before 4 P.M. to-morrow, our client will seek to hold your client, the first defendant, personally responsible for any loss which may be occasioned by reason of any further fall in Government paper after 4 P.M. to-morrow.

"Our client is desirous of having the Rs. 30,000 refunded to your client, the second defendant, without loss of time, and to take possession of the presses from him.

"Our client states that the present is a very busy season, and he is informed that the presses turn out about 150 bales *per* day, which yields Rs. 600 *per* day, being net profits to the partnership of Rs. 300 *per* day. Our client is anxious to see that the presses are kept working up to the end of the present busy and profitable season, and for such purposes will have no objection to consent to your client, the first defendant, being

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allowed to receive possession of the said presses, on behalf and on account of the partnership, from the second defendant, and to continue to work the same on account of the partnership until further order, on the distinct understanding that your client will account to our client in this suit for such working from the time he may enter into possession, and pay to the credit of this suit to the joint account of your Mr. Wadia and our Mr. Nicholson the net profits on the 1st and 15th of each month. We think this to be a very reasonable proposal and advantageous to the partnership, and we hope your client will not hesitate to accede to the same. We may state that our client will undertake to work the presses on the above terms if your client should consent to his doing so.

"You will remember that there is also invested in Government paper and deposited in the joint names of Mr. Nicholson and Mr. Wadia about Rs. 14,000 Government paper, the proceeds of sale of certain bales of cotton. This sum belongs to the partnership, and we have to propose that a sum of Rs. 2,000 should be transferred to ourselves on account of costs, and the like sum to yourselves on account of costs, such sums to be accounted for by the parties in the partnership account referred to the Commissioner.

"Yours truly,

"(Signed), LITTLE, SMITH, FRERE, AND NICHOLSON."

In the meantime, *viz.*, on the 6th April, 1887, while the defendant Vydina was still in possession, a fire broke out in the press, and much damage was done.

[190] Subsequently to the sealing of the decree, as above stated, the press in its damaged condition was handed over to the plaintiff's firm by Vydina, who then also desisted from further prosecuting his appeal against the decree of the 28th February, 1887, the injury to the press having made it contrary to his interest to appeal.

On the 5th May, 1887, the plaintiff filed the present suit against the defendants claiming Rs. 50,000 from the defendant Vydina as the value of the said press, or such further sum as might be necessary to rebuild and restore the press. In his plaint he set forth the facts above stated, and alleged that the fire was caused by the working of the press; that it would not have occurred if the press had not been worked by the defendant; and he submitted that, under the circumstances and independently of the question whether the fire was caused by the negligence of the first defendant and his servants, the first defendant was liable to compensate the plaintiff and the second defendant for the loss occasioned by the fire. The plaintiff further alleged as follows :—

"(8). The plaintiff further says that the said fire was caused by the negligence of the first defendant and his servants and agents.

"(9). The plaintiff further says that immediately upon the said decree being passed (*i.e.*, the decree of the 28th February, 1887), the plaintiff requested the first defendant to have the said Government Promissory Notes sold and to deliver up possession of the said press, but the first defendant delayed and put off doing so, alleging that he was about to appeal against the said decree and to apply for a stay of execution.

"(10). The plaintiff says that the said press before the said fire was worth Rs. 50,000, or thereabouts, and is now almost valueless, and in addition thereto the plaintiff and the second defendant have lost the large profits which would have been made by the working of the press, which they estimate at about Rs. 30,000 *per annum*.

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"(11). By an order made in chamber on the 3rd May, 1887, in execution of the said decree it was ordered that the said Government Promissory Notes should be sold, and out of the proceeds the said sum of Rs. 30,000 paid to the first defendant.

"(12). The plaintiff submits that under the circumstances aforesaid he is entitled to a lien or charge upon the Government Promissory Notes, and that the defendant was not entitled to have the said Government Promissory Notes paid over to him until he restores the said press to the condition it was in before the said fire, or makes good to the plaintiff and the second defendant the damages sustained by them by reason of the said fire.

[191] "(13). The plaintiff says that the first defendant is possessed of no immoveable property and of hardly any means except the profits he has made by the working of the said press: and, unless the first defendant is restrained from receiving the said sum of Rs. 30,000 the plaintiff will be unable to recover any portion of the value of the said press from the first defendant.

"(14). The second defendant, who is on friendly terms with the first defendant and in collusion with him, is unwilling to join with the plaintiff in bringing this suit."

The prayer of the plaint was as follows:—

"(*a*) That the plaintiff and the second defendant may be declared entitled to have the said press delivered up to them by the first defendant in the same order and condition as the first defendant received the same, and that the first defendant may be ordered to rebuild and repair the said press.

"(*b*) That, in the alternative, the first defendant may be decreed to pay to the plaintiff and the second defendant, as damages, the sum of Rs. 50,000, being the value of the said press, or such further sum as may be necessary to rebuild and restore the said press.

"(*c*) That the first defendant may also be decreed to pay to the plaintiff and the second defendant the sum of Rs. 20,000 as the damages sustained by them by reason of the loss of the profits by the working of the said press.

"(*d*) That in the meantime the first defendant may be restrained by the order and injunction of this Honourable Court from receiving the said sum of Rs. 30,000 or any part thereof, from the said Messrs. Nicholson and Wadia, and that the said Messrs. Nicholson and Wadia may be appointed receivers to retain and take charge of the said notes and the proceeds of the sale thereof."

The case was heard by Farran, J., in September, 1887. At the hearing the following issues were raised:—

1st. Whether, apart from negligence on the part of the defendant Vydina, he is liable to the plaintiff for any loss occasioned by the fire on the 16th April?

2nd. Whether the said fire was caused by the negligence of the defendant Vydina or his servants or agent?

3rd. Whether the plaintiff is entitled to any or what relief?

The following judgment was delivered on the 27th September, 1887:—

FARRAN, J.:—The plaintiff claims in this suit to render the defendant Vydina liable for the consequences of a fire which took place on the 6th April last in a cotton press at Indore, of which the defendant Vydina was then in possession, and which his servants were working. The fire orginated in a part of the [192] press called the opener, and was probably caused

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by a stone passing into it along with the cotton. The press belonged to a firm the partners in which were the plaintiff Jamsetji and his brother the defendant Ardesir.

On the 7th August, 1884, Ardesir entered into a contract with Vydina to sell the press and certain rights connected with it to Vydina for Rs. 35,000, of which sum Vydina paid Rs. 5,000 to Ardesir and was then put in possession of the press. On the 5th September, 1884, Jamsetji filed a suit for dissolution of partnership and to have its accounts taken against Ardesir, and in the plaint he states that he had heard that Ardesir had on or about the 1st September, 1884, sold the press for Rs. 60,000 to Vydina, and that he did not object to the sale at that price and asked to have the price paid into Court. He made Vydina a party-defendant to that suit. It was suit No. 327 of 1884. On the 1st December, 1884, Jamsetji amended his plaint by stating that after the institution of the suit he had found out that Ardesir had agreed to sell the press to Vydina for Rs. 35,000 and that he repudiated and objected to the sale altogether. He objected to the sale, because he considered the price too low, and stated that he was informed and believed that Ardesir was the real purchaser, or at least was interested in the purchase. He further stated that Vydina had been put in possession of the press and was working, or about to work, it on his own account or on account of himself and Ardesir. He prayed that Vydina might be restrained from continuing in possession of the press and working the same, and that a receiver might be appointed to take possession of it and work it until further order.

When that suit was heard, it was found, on the 15th February, 1887:—

(1) That the sale to Vydina was not fraudulent and collusive, *i.e.*, that it was not proved that Ardesir had a share in the purchase.

(2) That the plaintiff did not, expressly or impliedly, authorise the sale, nor did he ratify it, and that, consequently, the sale was without authority, and that the defendant Vydina took nothing under it, and that the plaintiff was entitled to have it set aside.

[193] (3) That the defendant Vydina must account to the firm for the earnings of the press, taking credit for all moneys properly expended by him in it and its working.

(4) That the price of Rs. 35,000 was not so low a price as to be indicative of a fraud. This last finding the learned Judge considered to be immaterial, as he had found the sale to be without authority.

These findings have not been set aside on appeal, and are binding between the parties to the present suit. They must form the basis of my judgment. I have first to determine in what capacity the defendant Vydina held and worked the press, and then to consider whether the orders made in the suit No. 327 of 1884 altered or varied the legal liabilities which that possession and working imposed upon him.

The press was the property of the firm, but its only property. Ardesir, it is found, was not for that reason in law, the agent of the firm to sell and deliver possession of it to Vydina. In doing so he acted without authority, and Vydina in taking possession of the press did so without authority. He was, therefore, a trespasser upon its property. Having regard to the peculiar wording of the agreement under which he purchased, I think he must have known in fact, or at least suspected, that the sale was made without the authority of Jamsetji, and, therefore, as a matter of law, that Ardesir had not power to effect the sale. It is, however,

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immaterial to consider in what position he would have stood had he *bona fide* believed that Ardesir sold with the authority of Jamsetji; for, on the 1st December he had express notice that Jamsetji repudiated and objected to the sale altogether and to his continuing in possession of and working the press. He was not thenceforward, at any rate, either the contractor or licensee of the firm. I cannot hold him to have been then, in law, other than a trespasser upon its property. If as a trespasser he introduced fire on the premises which injured them, as a trespasser he would be liable for the consequences of that fact. The working of a press is admittedly an operation accompanied with considerable risk from fire. A fire arising from working it is a consequence for which a person working it [194] without authority is directly responsible. It does not seem to be material whether the motive which actuated him in his unauthorised act is good or bad—*Ancaster* v. *Milling* (1) and Pollock on Torts, p. 9.

The present case is analogous to that of a man who takes a hunter out of its owner's stable under colour of a contract of sale entered into with the owner's groom. He is informed by the owner that the groom had no authority to sell, and is asked to return the horse, but refuses to do so on the chance of establishing that the groom had his master's authority to sell, and he then rides the horse to hounds and the horse is injured. I cannot doubt his liability to the owner to recoup the latter for his loss. I do not think that the contrary was really contested in this case, but it seems desirable to ascertain with precision the exact legal relations between the parties at the time when the orders of Court on which the defendant relies were made before determining the scope and effect of these orders. On the 17th November, 1884, the plaintiff obtained in suit No. 327 of 1884 a rule *nisi* before the amendment of his plaint, that the defendant Vydina should be restrained from paying the balance of the purchase-money, Rs. 60,000, to Ardesir and that a receiver should be appointed to receive it and other sums. After the plaint was amended the plaintiff on the 3rd December, 1884, gave notice to the defendants that he would move for an injunction to restrain the defendant Vydina from continuing in possession of and working the press and for the appointment of a receiver. The defendant Vydina opposed that application, alleging: (1) that the sale was not fraudulent and colourable or at such a low price as to indicate fraud: (these allegations have been found to be true), and (2) that the plaintiff expressly authorised the sale and ratified and confirmed it (these allegations have been found to be untrue).

On the 21st April, 1885, the rule and notice were adjudicated on, and in effect the Judge refused to grant an injunction and receiver in terms of the notice of the 3rd December, 1884; but he ordered the defendant Vydina to pay Rs. 30,000 to the [195] respective solicitors of the parties for investment until the hearing (instead of to a receiver or into Court), and directed that if that sum was not paid by the 21st May following, a receiver should be appointed to take possession of the press. He also provided for the interest which Vydina was to receive on that sum in the event of the sale being set aside.

It is argued that the defendant Vydina held and worked the press under this order at the time when the fire occurred, and that the order exempts him from liability for the effects of the fire unless occasioned by his neglience. I am unable to accede to that argument, even assuming

(1) 2 D. & R. 714.

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that the order continued unaffected by the subsequent proceedings in the suit at the date of the fire. The order simply refused to disturb the *status quo*, provided that Vydina paid the balance of the purchase-money into Court. I do not know why that proviso was added, nor do I think it to be material to inquire. The plaintiff said: "The defendant Vydina is wrongfully in possession of the property of the firm which I represent. Take it out of his possession at once as a matter of precaution, lest I be eventually damnified by his being allowed to continue in such possession." The defendant Vydina said: "I am rightfully in possession, and under a contract made with the plaintiff's sanction, he is trying to repudiate his own contract." The Judge at that stage gave credence to the defendant Vydina rather than to the plaintiff, and refused to take the press out of the control of Vydina, provided he made it certain that he would fulfil the contract he relied on.

The defendant Vydina paid the Rs. 30,000 and remained in possession. I am quite unable to see how an interlocutory order refusing to turn a trespasser out of possession before the hearing can convert his wrongful into a rightful possession, even though it imposes such a condition as I have referred to upon the trespasser. I pursue the analogy of the hunter one step further. The owner files a suit to recover his horse, and asks that the man in possession of it may be restrained from hunting, and may place his horse under the care of the Court. The defendant insists upon his contract with the groom and (untruly) that the [196] latter had the owner's authority to sell. The Judge at that stage crediting the defendant's untrue story refuses to make an order, if the defendant brings the price he has agreed to pay the groom into Court. Does that justify the defendant in himself hunting or letting out the horse to another to hunt? I must decline altogether to establish such a precedent.

The issues determining that the contract was without authority were found, as I have stated, on the 15th February, 1887. On the 18th February, 1887, the plaintiff referring to that finding wrote, through his solicitor, to the defendant asking the defendant Vydina to stop working the presses and to give possession of them to the firm or to some nominee on its behalf. Possession was not given, and the defendant Vydina continued working the presses. His possession at this time was certainly not changed for the better. On the 28th February, 1887, the decree in the suit was made giving effect to the finding upon the issues and determining certain matters between the parties. Mr. Jardine contends that it was under this decree that Vydina was working when the fire took place, though it was not drawn up and sealed until after that time, and I am inclined to this view.

The decree orders the sale to be set aside, and by consent certain questions between the plaintiff and the defendant Ardesir are dealt with; then by consent of them and also of the defendant Vydina it is referred to a special Commissioner to take an account of the profits realised by the working of the press by Vydina since his possession thereof, credit being given in such account for interest at 9 *per cent.* on the sum of Rs. 30,000 from the date of its deposit till payment and for all sums duly expended by him on the press and its working and for a salary for its management; and it is ordered that the attorneys to the parties shall sell the Government Promissory Notes in which the Rs. 30,000 were invested, and out of the proceeds thereof pay Rs. 30,000 to Vydina, and that on such payment Vydina do forthwith give possession of the press to the plaintiff

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and Ardesir. The last order is not expressed to be by consent of the defendant Vydina; all he consented to was the mode of taking the account. The whole decree is without prejudice to questions [197] raised in the suit and to the parties' right to appeal. There is no provision for the defendant Vydina either working or ceasing to work the press. There was some delay in drawing up this decree: the minutes of it were spoken to on the 31st March. The fire took place on the 6th April. The decree was sealed on the 13th April, and subsequently the Rs. 30,000 were paid to Vydina, and the press in a damaged condition was restored to the firm.

Mr. Jardine contends that by consenting to a decree in this form in so far as he assented to it and, by not insisting on or even asking for an order that Vydina should cease to work the press, the plaintiff impliedly consented to Vydina working it and so after the 28th February that the press was worked by Vydina at the risk of the firm. The liability of the defendant cannot depend on the greater or less expedition with which the decree was drawn up. The exhibits put in on this point seem to me to be quite beside the question. That question is:—Was the position of the defendant Vydina altered by the order made on the 28th February? Down to that time I have held he was a trespasser.

It is admitted when the decree was made on the 28th February, Vydina gave notice of his intention to appeal from it. He desisted from appealing when the fire made it contrary to his interest to prosecute an appeal.

It was not material to inquire in that suit on what ground Vydina was bound to account for the profits of the press. In fact it appears that it was assumed that he was bound so to account. Hart, J., says that no argument was addressed to him on the subject. I can see no ground for Vydina being ordered to do so, except that he was a trespasser. The loss of these profits was the actual damage the firm sustained in being deprived of their press. To these damages the firm would have been entitled whether Vydina worked the press or not, but a different mode of ascertaining their amount must have in the latter case been resorted to. By the decree the parties agreed to a particular mode of assessing them; that does not, I think, alter their position. It is, however, said that under the terms of the [198] decree the defendant Vydina was bound to account for the profits down to the time when delivery should be given. That is probably so, but it is the usual decree to make against a trespasser, *viz.*, for damages in the shape of mesne profits down to decree and after decree till possession is rendered. If the mesne profits to decree are not awarded by it, they can be recovered by separate suit. The mere fact that damages after decree are given, if in fact they are given, does not alter the defendant's legal position. On the basis, however, on which they are assessed by the decree, none would have been recoverable after decree if Vydina had then ceased to work the press.

The strongest argument in favour of the defendant's immunity was that founded on the last stated fact and urged by Mr. Jardine when he said that at the time the decree was passed the plaintiff knew that Vydina was working the press; and the basis on which his own damages were to be calculated, and in not asking for an order to stop the working, he impliedly assented to its continuance, as it would have been against his interest to stop it.

If the defendant Vydina was really working the mill to swell the plaintiff's damages or as his *quasi*-manager, this argument would have been very cogent, but even after decree Vydina did not recognise the

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plaintiff's rights. He gave notice of appeal; he could not well have stopped working, as he had personally engaged to press a large amount of cotton. He worked the press in his own interest. If he had been asked to work it for the firm he would, no doubt, having regard to his appeal, have refused to do so. He was not working it for the plaintiff, though the fact of his continuing working would have ensued for the plaintiff's benefit had the appeal failed.

The plaintiff did not ask for an order stopping the working. Is an assent to the continuance of its working to be implied from that? I think not. On the 18th February he had written to Vydina to stop working. Vydina in effect refused and continued to work. It may be assumed that, under the circumstances I have just referred to, he would have refused to have consented to an order in the decree that he should at once cease. Was it necessary **[199]** for the plaintiff in order to emphasise his dissent to ask for such an order? Having regard to Vydina's right of appeal I doubt whether the Court would have granted it without consent. Was it necessary for the plaintiff to make an application which might have been refused with costs? He had already protested against the working; that, in my opinion, is as much as he was bound to do, if he was bound to do any thing at all. It would have probably been to the plaintiff's interest to have stopped the work peremptorily; he could in that case have dictated his terms to Vydina. Cotton was lying at the mill which Vydina had contracted to press. It was the busy season, the plaintiff might have refused to press it except at an increased rate, he would have been complete master of the situation. I cannot under these circumstances assume an assent which the plaintiff never gave, or which if asked to give he would probably have refused.

The last part of the decree, which is not by consent as between Vydina and the plaintiff, directs that Vydina on being repaid the Rs. 30,000 shall forthwith give possession of the press. It is contended that in consequence of that direction Vydina cannot after its date be treated as a trespasser, but as a person having a lien on the press till his purchase-money was repaid. I doubt whether that is the true meaning of the decree. The Court had ordered the Rs. 30,000 to be paid in, and consequently I presume the Court considered that it should not order the press to be restored until it had vacated the effect of its own order. I cannot think that it altered the legal position of Vydina with reference to the plaintiff. It is, however, unnecessary to pursue the enquiry, as the mere fact of Vydina having a lien on the press would not justify him in working it. I must, therefore, find the first issue in favour of the plaintiff.

On the second issue I am unable to find that any particular negligence on the part of the defendant Vydina or his servants was the cause of the fire. The press seems to have been worked in the usual manner.

It is customary for the merchant's men to feed the opener—to ensure the cotton being properly mixed, and the absence of supervision does not seem to have occasioned the fire.

[200] The defendant Vydina appealed from this decision.

Inverarity and *Jardine*, for the appellant.—We contend that (1) Vydina was not in possession as a trespasser, but with the consent of the plaintiff and the second defendant, who were the partners of the firm which owned the press; (2) he was in possession as *quasi*-receiver under the order of Court, made on the rule; (3) the decree gave him a right to remain in possession until he was paid the Rs. 30,000; (4) the consent

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decree did not treat him as a trespasser; (5) the order in the decree directing him to account for profits up to date of delivery of possession of the press shows he was intending to work the press until he handed it over.

Latham (Advocate-General) and *Telang*, for the respondent.—They cited Pollock on Torts, pp. 9 and 10, 407; *Hicks* v. *Sallitt* (1).

JUDGMENT.

SARGENT, C. J.. [after stating the facts above set forth continued]:—Such being the main facts of the case, we entirely agree with the learned Judge of the Division Court that the defendant Vydina was a trespasser down to the decree of 28th February. The decree of the 15th February, declaring that the contract entered into with the defendant Vydina by the plaintiff's partner Ardesir Burjorji was without authority, was tantamount to a declaration that the defendant's possession and use of the press had been throughout, or, at any rate, since 11th December 1886, when he received plaintiff's notice repudiating the sale to him, that of a trespasser. The circumstance that the Court had refused to remove the defendant during the litigation and appoint a receiver cannot affect the real character in which he was in possession which was the question virtually for determination in the suit itself. However, by the order made on the 28th February the defendant, notwithstanding the decree of 15th February, was authorised to remain in possession and not to give delivery until the Rs. 30,000 which had been deposited by him in Court should be repaid to him; and, therefore, during such interval as might elapse before the payment the defendant could not be regarded as a trespasser so far as his possession was concerned. This, of course, would not of itself entitle the defendant [201] to use the press, and his using would, therefore, be an act of trespass, unless it was done with the express or implied assent of the plaintiff. It was contended for the defendant that this assent was to be implied from plaintiff's consenting to the particular mode of assessing his damages provided by the decree, and also by not asking for an order that Vydina should cease to work the press or express any disapproval of his doing so up to the very time of the fire. As to this we agree with the Division Court that there is nothing in the mere circumstance of damages being given after decree which could change the character in which Vydina had been previously working the press.

But the question is, must not the plaintiff by assenting to his damages being assessed in the way they were, be deemed to have contemplated the defendant's continuing to work the press till delivery? It was necessary that the defendant should continue to work the mill. Otherwise, as the Judge of the Division Court himself remarks, no damages would have been recoverable by the plaintiff after the decree; and the question is, whether under these circumstances, and no sign having been made by the plaintiff that he dissented from defendant's working of the press, and that, too, although he himself took no step to carry out the decree until 15th March, is not his assent to be inferred? The Judge of the Division Court held that it was not to be inferred, principally, as it would appear, on the ground that the plaintiff had already protested against the working of the press by defendant by his letter of 18th February; and that "that was as much as he was bound to do, if he was bound to do anything at

(1) 3 DeG. M. & G. 782.

all. "The letter of the 18th February was as follows :—(His Lordship read the letter above set forth and continued) :—It is plain, therefore, that the letter was written by the plaintiff's solicitors on the supposition that after the decision of the 15th February had set aside the sale to the defendant, the plaintiff was entitled to immediate possession, whereas after the passing of the decree on the 28th February the plaintiff was of course aware that he could not get possession until the Rs. 30,000 were paid to the second defendant. The circumstances were, therefore, materially changed, and the letter of the 18th February cannot, in our opinion, be regarded as a protest against the defendant's **[202]** working of the press after the decree of the 28th February. By that decree the defendant was to account for the profit he received from the working of the press up to the payment of the Rs. 30,000. It was upon this basis that his damages were assessed and with his consent; and although the last part of the decree directing that Vydina should retain possession until he was repaid the Rs. 30,000 is not by consent, the plaintiff was aware that the defendant having the right to remain in possession was also continuing to work the press, and that the profit he made by so doing would by the decree enure to his benefit if the defendant's appeal failed; and he himself took no step to carry out his part of the decree until the letter of 15th March.

Doubtless the defendant continued to work the press in his own interest trusting that his appeal would be successful, but the reasonable conclusion to be drawn from the plaintiff's not taking any active steps by the application to the Court or otherwise to prevent the defendant's doing so, or even to show his disapproval of it—for, as we have pointed out, the letter of the 18th February cannot be regarded in that light—is that he tacitly assented to the working as being obviously for his own benefit. That it was with his approval, derives corroboration from the tone of his solicitors' letter of the 15th March. (His Lordship read the letter above set forth, and continued :—) This letter shows that the plaintiff was anxious to continue the working, in order that the partnership might have the full benefit of the entire season, and is scarcely consistent with any other supposition than that when it was written, the defendant was working the press with the plaintiff's tacit approval. It is also worthy of remark, in the correspondence which took place between the solicitors immediately after the fire, the only ground upon which it was sought to make the defendant liable was that the fire had been caused by his gross negligence and carelessness.

Upon the whole we think that the maxim *volenti non fit injuria* applies to the circumstances of this case, and are unable to come to the conclusion that the plaintiff is entitled to treat the working of the press by the defendant after the decree of the 28th February as an act of trespass, or to hold the defendant **[203]** liable for the consequences of the fire independently of the question of negligence: as to which we entirely agree with the learned Judge of the Division Court that the evidence does not support the charge.

We must, therefore, reverse the decree of the Division Court, and dismiss the plaint, with costs on the plaintiff throughout.

Decree reversed.

Attorneys for the appellant :— Messrs. *Ardasir, Hormusji, and Dinsha.*
Attorney for the respondent :—Mr. *D.S. Garud.*