

SAIBO v. JAMES APPU *et al.*

*C. R., Matara, 887.*

1899.

*December 5.*

*Adjoining house owners—Overhanging eaves of plaintiff's roof—Right of defendants to have it cut off—Long use of eaves by plaintiff over defendants' land—Condition on which defendants' right to cut off plaintiff's eaves may be exercised.*

Where the defendants built a house adjoining the plaintiff's by fixing their beam and wall plates at the end of the eaves of the plaintiff's which overhung the defendants' land, and afterwards, desiring to build a taller house, notified to the plaintiff that they would remove his eaves—

*Held*, that the plaintiff was bound to remove the overhanging eaves, notwithstanding that they have existed in that position for thirty years, and that if the defendants build a house on their own land they should so finish and roof their houses that the plaintiff's wall would not suffer in consequence of the removal of the eaves.

**T**HIS was an action for restraining the defendants, who were owners of a house adjoining the plaintiff's house, from cutting and removing the eaves of the plaintiff's house and raising the eastern wall thereof as a common wall for defendants' purposes.

The Commissioner, Mr. H. W. Brodhurst, found as follows:—

“ The plaintiff's house was built, with the present eaves, at least thirty years ago. The plaintiff bought it in 1884.

“ Soon afterwards the defendants bought the adjoining land, over which plaintiff's eaves projected. They built a house adjoining plaintiff's house, and they fixed their ridge beam and wall plates on to the plaintiff's ridge beam and wall plates at the end of plaintiff's eaves. The plaintiff's eaves therefore projected about three feet over defendant's house and formed a part of their roof.

“ The defendants occupied their house for some twelve years, and they pulled it down about three years ago. When they did so they removed their roof, leaving plaintiff's eaves intact.

“ They now wish to build a larger house with a roof higher than plaintiff's roof, and as their wall touches plaintiff's wall they

1899. cannot raise it to the required height without removing plaintiff's  
*December 5.* eaves. Plaintiff brings this action to prevent his eaves from being removed.

“ It is contended for defendants that, as they had the use of plaintiff's eaves for some twelve years, they acquired a title to them by prescription, and therefore have a right to remove them. It seems to me that, even if they acquired a prescriptive right the defendants cannot now claim the eaves, because they gave up the possession of them three years ago.

“ But I think it is clear that, if defendants acquired any prescriptive title at all, it was only a right to the joint use of the eaves with plaintiff. I cannot uphold the argument that plaintiff lost his rights by allowing the defendants to use his eaves. The eaves remained attached to plaintiff's house, and continued to perform their function of protecting plaintiff's wall. The fact that the eaves also protected defendants' house in no way ousts plaintiff from the possession of the eaves.

“ It is clear that defendants recognized this fact when they removed their house but did not remove plaintiff's eaves.

“ I am certainly of opinion that defendants have not acquired any title to plaintiff's eaves independent of and adverse to the plaintiff, and as they have had no possession for three years I doubt if they could now even claim the right to use the eaves jointly with plaintiff. I consider that defendants have no right to remove plaintiff's eaves, and that if they wish to build a wall higher than plaintiff's roof they must either build it beyond his eaves, or pay him any compensation that he may demand for the loss of his eaves.

“ The evidence shows that defendants have removed the tiles from plaintiff's eaves and cut some of his roof timber. It would probably cost about Rs. 20 to repair the damage.

“ I find on the second issue that plaintiff's eaves have existed in their present position for thirty years. I find on the third issue that defendants have damaged the eaves, and that they had no right to do so. I find on the fourth issue that defendants are liable to pay Rs. 20 as damages. I give judgment in favour of plaintiff for the eaves in dispute with damages Rs. 20 and costs.”

The defendants appealed.

•The case was heard in appeal on the 27th and 28th November, 1899, by Lawrie, J.

*Van Langenberg*, for appellants.

*Maartensz*, for respondent.

*Cur. adv. vult.*

5th December, 1899. LAWRIE, J.—

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LAWRIE, J.

I understand the plaintiff's case is a claim for a right to occupy a space over the defendants' land.

To quote from *Hunter's Roman Law* (p. 419): "The rule of law was that to the owner of the soil belonged all the space above the soil, and therefore anything overhanging from a neighbour's house above his land would be, in the absence of a servitude, an infringement of his rights. The projections here referred to are balconies (*mæniana*) and the eaves of houses (*suggrunda*), which do not rest on the wall of the neighbouring proprietor, but simply overhang his land." (Edition of 1897.)

The right to have such projections constituted the *jus projiciendi* (*D. 50, 16, 242, 1*).

Burge (*Vol. 3, pp. 402 and 403*) says that the *jus projiciendi* by which the part of a building projected towards the adjoining house without resting on the latter, merely over the ground, is to be found in the jurisprudence of Holland.

It appears that it was not adopted in all the countries which found their law on the Civil Law; for instance, it is not (I think) known in Scotland.

Gale, in his *Law of Easements*, says: "To place things projecting into the air over another's head is actionable." He quotes *Pickering v. Rudd* and *Fay v. Prentice*. Addison, *On Torts*, p 362, says: "A man may become responsible for a nuisance by erecting a building which overhangs the house or land of his neighbour, or by constructing a cornice, or fixing a spout or any projection which causes or has a tendency to cause an unnatural quantity of rain water to fall on his neighbour's house or land." Addison there refers to *Fay v. Prentice*, which case is also referred to as an authority in Smith's *Leading Cases* (*Vol I., pp. 318 and 319*).

It has often been held in Ceylon that a landowner cannot acquire a right to have his trees overhang his neighbour's land. Such a *jus projiciendi* in the case of trees has frequently been negatived, and the law gives to the owner over whose land the trees hang the right to require his neighbour to remove the overhanging branch. I think it has been held that mere length of time will not bar the demand. I think it is difficult to distinguish between the owner of trees and the owner of eaves. Of course this servitude, *jus projiciendi*, can be created by grant, by a notarial instrument; but here there is no suggestion of grant to the plaintiff. He relies only on the length of time his eaves have projected. There is another principle which I think must govern this case. It is the fundamental rule that

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LAWRIE, J.

Here, if the defendants build their house higher than the eaves of the plaintiff's house, they will not cause the plaintiff an injury. the higher house will supply the place of the eaves. The defendants must so complete and finish their wall as to protect the plaintiff's wall as well as the present eaves do. It would not be just to prevent the defendants from building a house as high as the plaintiff's house is, or even much higher, provided they so perfect the wall and roof as to cover and protect the plaintiff's wall.

I set aside the judgment. The action for injunction and damages is dismissed, and it is declared that the plaintiff is bound to remove the overhanging eaves so as not to prevent the defendants from building a house on their own land, it being declared that the defendants must so finish and roof their house that the plaintiff's wall will not suffer in consequence of the removal of the eaves.

The plaintiff to pay the defendants' costs.

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