Present: Jayewardene and Garvin A.JJ.

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PEDRIS *et al.* *v.* BATCHA *et al.*

439—D. C. Colombo, 2,388.

Excavation by adjoining landowner—Right to lateral support—Buildings —Prescription—Housing Ordinance, No. 19 of 1915—English law—Roman-Dutch law.

Plaintiff and defendant were adjoining landowners. The most reasonable use to which plaintiff's land could be put was for buildings on it. The defendant dug up his land to a depth of 15 feet up to and along plaintiff's boundary. The plaintiff alleged that his land had become unfit to support a building if put up within 7 feet of his boundary and claimed damages.

Held, that plaintiff was not entitled to damages.

APPEAL from a judgment of the Additional District Judge, Colombo (W. S. de Saram, Esq.):—

The facts are set out in the judgment of Jayewardene A.J.

Hayley (with him *L. H. de Alwis*), for appellants.—The District Judge has found that the first defendant, respondent, as lessee under the second and third defendants, respondents, has deprived the appellant's land of lateral support, but he has held that the respondents are not liable in damages, following the English law as laid down in *Dalton v. Angus* [1] and *Bonomi v. Backhouse*.[2] Although this point has not been decided by any previous decision of this Court, it is the Roman-Dutch law principles that are applicable to the present case. The natural use to which the appellant's land can be put is to build on it. An adjoining neighbour has no right to excavate his land in such a manner as to deprive his adjoining landowner of the natural use of his land. The English law grants a remedy only after actual damage has been caused to the land of the adjoining owner, but under the Roman-Dutch law a cause of action arises as soon as the excavation is made. Under the Roman-Dutch law the right of lateral support extends to the support of the neighbour's land burdened with buildings, which under the English law is treated as an easement acquirable only by grant or prescription. Counsel cited *Nathan, vol. I., section 704; London and South African Exploration Co. v. Rouliot* [3]*; Voet 10, 1, 12; Maasdorp Institutes of Cape Law, vol. II., p. 98,* and *Johannesberg Board of Executors and Trust Co. v. Victoria Buildings.*[4]

Samarawickrema, for first defendant, respondent.—The principles of English law are applicable in the present case. See *Weerasiri v. Sanchihamy.*[5] It was held in that case that the plaintiff had not

[1] *(1881) 6 A. C. 740.*
[2] *9. H. L. C. 503.*
[3] *8 S. C. 74.*
[4] *1 Off Rapp. 49.*
[5] *(1892) 2 S. C. R., 96.*

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proved that he had acquired a right to lateral support by prescription. *Voet 10, 1, 12* does not contain any general principles. He merely shows that according to the Roman law certain distances should be kept between buildings and neighbouring boundaries according to particular local regulations. *Nathan, vol. I., section 704*, is not an authority for the proposition that the right to lateral support attaches to buildings. It is doubtful if this right is recognized even in South Africa. The maxim *Sic utere tuo, &c.*, applies to a case like this, and a landowner may lawfully dig upon his own ground to any depth, provided he causes no damage to his neighbour's land. Under the local Housing of People and Improvement of Towns Ordinance, No. 19 of 1915, in cases like this, it is required that an open space of 7½ feet at least should intervene between a building and an abutting wall. The experts called in this case have given evidence to the effect that the appellant could safely put up a building within 7 feet of his boundary. Counsel also cited *West Leigh Colliery Co. v. Tunnicliffe and Hampson, Ltd.*[1]; *10 Halsbury, section 310; and 11 Halsbury, sections 319 and 325.*

M. B. A. Cader, for second and third defendants, respondents.—In any case, the lessors are not liable. They are not joint tort feasors. A lessee is not the agent of his lessor. The principles of the Roman-Dutch law and the English law are identical on this point. *Wille on Landlord and Tenant, p. 24, et seq.*

Hayley, for appellants, in reply.

July 3, 1924. JAYEWARDENE A.J.—

This is an uncommon sort of action. The plaintiffs and defendants are adjoining landowners. The plaintiffs claim damages from the defendants for loss of lateral support to their land. The lands are situated in Colombo, and both extend from Silversmith street to Quarry road—the frontages abutting on Quarry road being hilly. The first defendant gave a building lease to the second defendant to build on the space fronting Quarry road after cutting down the hill. The defendant cut down the hill right up to the plaintiffs' boundary to a depth of about 15 feet and to a length of 42½ feet along the boundary. The plaintiffs land adjacent to this excavation is bare land, and although two years have elapsed since the excavation, there has been no subsidence or landslip. But the plaintiffs have proved that this part of their land has become unfit to support a building, if a building be put up within seven feet of their boundary. The most reasonable use and the only use to which the plaintiffs' land can be put is to build on it.

The learned District Judge has held, following the English decisions, the most important of which is *Dalton v. Angus (supra)*; that an adjacent landowner is only entitled to the lateral support of his land

[1] *(1908) A. C. 27.*

unburdened with any buildings. He has also held that if the plaintiffs' land so unburdened suffers from the absence of lateral support, he could bring an action if, and when, any damage arises: *Bonomi v. Backhouse* (*supra*). As there had been no such damage yet, he has dismissed the action. The plaintiffs appeal, and it is contended for them that the right of the parties should be decided according to the Roman-Dutch law, and that under that law the right of lateral support extends to the support of the neighbour's land burdened with buildings, and that inasmuch as their land has become insecure for building purposes, they are entitled to damages and to obtain security against any damages they may sustain hereafter.

The right of lateral support is one of the natural incidents of ownership of land. It is not a right in the nature of a servitude or an easement, but a natural right—a part of the right of property itself—each adjoining owner being entitled to lateral support of his land and bound to respect that right on the part of the other: *Humphries v. Brogden* [1] and *Howley Park Coal and Cannel Co. v. London and North-Western Railway Co.* [2]

This principle of lateral support is according to Lord Cranworth "common to every system of jurisprudence." There is, however, very little authority, if any at all, in the Roman-Dutch law recognizing this right. This is attributed to the absence of hilly lands and mines, and consequently of the necessity for deep excavations in Holland.

But the South African Courts, relying on the Roman law and authorities from countries whose laws are derived from the Roman law, viz., the *Code Civile* of France, the law of Scotland, &c., have held that the right to lateral support from adjacent land is recognized by the Roman-Dutch law (*Nathan, vol 1., section 704*).

The principal case in which this point was decided: *London and South African Exploration Co. v. Rouliot* (*supra*) is not available locally. The Roman law (*Digest 10, 1, 13*) reproduced in *Voet 10, 1, 12* required that certain specified distances should be kept between buildings, walls, fences, and plantations, and neighbouring boundaries, but these distances have been altered according to Voet by rules passed in different places in Holland. Under the old French law (*Domat's Civil Law, book 2, section 21*):—

> "The proprietor or other possessor of lands in making a plantation, or building, or other work ought to keep the distances between his work and the confines, according as they are regulated by custom or usage. And if he transgresses therein he will be obliged to demolish his building, pluck up his plantation, and restore things to the condition in which they ought to be, and to make good the damages which his undertaking shall have occasioned."

[1] *(1850) 12 Q. B. 739.*

[2] *(1913) L. R. A. C. 11.*

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The *Code Civile*, section 674, embodies the same principles and obliges a neighbour to leave the distances prescribed by particular regulations and usages to avoid injury to his neighbour. These rules, it is to be noted, do not proceed upon the recognition of the right of lateral support as a right which imposes reciprocal obligations, but upon usages, and customs, or local regulations brought into existence by the necessities of circumstances. They do not assist us to decide on principle the claim put forward here by the plaintiffs. But the law of Scotland which is an off-shoot in many respects of the Roman law, and has been invoked as authoritative in South Africa, affords us valuable guidance. The law of Scotland and that of England on this point are said to be the same. Thus in *Howley Park Coal and Cannel Co. v. London and North-Western Railway Co.* (*supra*), Lord Shaw of Dunfermline, a great Scotch lawyer, said:—

> " So far as Scotland is concerned (and the laws of the two countries on this particular point are the same) the whole of this doctrine is brought to a focus in the passage as re-adjusted by that very learned editor, Mr. Guthrie, in his latest edition of *Bell's Principles, s. 965:* ' A proprietor's absolute use of his land is limited by neighbourhood, so far as he is obliged to afford to his neighbour's property such support as its natural situation in relation to his requires. So far at least as the natural soil is concerned, the reciprocal right of support exists as a common law right, incident to the ownership of land both in England and Scotland; the rules of law in both countries being the same, whether the support required is lateral as in the ordinary case of adjoining superficial estates or vertical when the mineral strata are separated from the estate in the surface.' "

Now, what is the law of England on the point ? It may be shortly stated thus:—

(1) As between co-owners of coterminous properties there is a reciprocal right to lateral support for their respective lands unburdened with any buildings.

(2) An owner of land has no natural right to support for buildings or for the additional weight which the buildings cause.

(3) But when buildings have stood on a land for over twenty years—the prescriptive period—the owner of the building acquires a right of support in respect of the building also.

This distinction between " ancient buildings, " that is, buildings that have stood for over twenty years and " modern buildings;" that is, buildings that have stood less than twenty years, is not easy to appreciate. It was the subject of much discussion in the leading case of *Dalton v. Angus* (*supra*) before the House of Lords. But it

has always been maintained, and is justified on the ground that by reason of the building having stood for over twenty years its owner acquires a right by way of easement by prescription. The effect of this decision was thus stated by Lord Penzance in that case: " It is the law I believe, I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away and allow his neighbour's house, if supported by it, to fall in ruins to the ground."

The same principle has however been held applicable in India. If the law of Scotland is the same as the English law, which I have stated above, there is no reason why the English law should not be held applicable in Ceylon. There is one decision to be found in our reports in which the principle of the English law on this point has been applied: *Weerasiri v. Sanchihamy* (*supra*). In that case the plaintiff alleged that his right to lateral support for his land, which had a building constructed on it, had been interfered with by the defendants' intestate wrongfully cutting away the earth immediately adjoining the plaintiff's land without leaving proper and sufficient support for the plaintiff's premises, and claimed damages. Lawrie J. said:—" The plaintiff alleges that he had a right to lateral support for his land by the deceased intestate's land, and also that he had gained by prescriptive possession an easement of support for buildings.

" It was urged that the plaintiff had not proved that he had acquired this easement by prescription. It seems to me that the plaintiff proved that a wall and a flight of steps on his land were in existence for at least fifteen years prior to the committing of the wrong complained of, and I am of opinion that the plaintiff acquired the prescriptive right alleged;" but he dismissed the plaintiff's action on the ground that the defendant, as administratrix, was not liable for a *tort* of the deceased.

Withers J. said:—"I prefer to rest my opinion on the other point pressed upon us by Mr. Wendt, viz., that plaintiff has not proved what he averred, that he had acquired a prescriptive right to the lateral support of the wall which, according to the learned Judge, fell in consequence of the intestate's dealing with the adjacent soil of his own property,"

This case is, in my opinion, a clear authority for the principle that lateral support for a wall or building can only be acquired by prescription as under the English law. But Mr. Hayley contends that the Roman-Dutch law as prevailing in South Africa, which ought to be accepted here, is different, and (1) that the right of lateral support of a land burdened with a building is acquired as soon as the building is constructed; and (2) that this natural right includes the right of support of any buildings which may at some

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future time be constructed on it, if such building is the proper and reasonable use of the land.

He relies on a passage in *Maasdorp Institutes of Cape Law, vol. II., p. 98,* which is as follows:—

> " Whether this right to lateral support is restricted to the land in a state of nature merely, or whether it is extended also to land which has been built upon, has not been decided by the Courts of this Colony; but it was decided by the High Court of the South African Republic in one case that the right to lateral support attaches also to buildings erected by a man close to the boundary of his ground, the decision being based mainly upon *Voet 39, 1, 1* and *D 39 ; 2, 14, 12.*

The report of the South African case referred to in this passage, *Johannesberg Board of Executors and Trust Co. v. Victoria Buildings* (*supra*) is not available locally, and the short note of it in *Bisset and Smith's " Digest of South African Case Law "* is not very helpful. *Nathan, vol. I., section 704,* refers to this case, but does not say it is an authority for the proposition that the right to lateral support attaches to buildings. However that may be, it does not, at any rate, support Mr. Hayley's second proposition that the right to lateral support extends to any buildings that might be constructed in the future. Such a right would be of a very variable character, and its burden would increase or decrease according to the weight of the building.

For what kind of building is the landowner to make allowance in cutting down his own ground ? It would be, to say the least of it, very unreasonable to impose such an obligation. No authority whatever can be adduced in support of such a claim, and no authority could be expected to exist, as the cause of action in such actions arises only where any damage takes place.

That such is the English law is perfectly clear (*Bonomi v. Backhouse* (*supra*)), and this seems to be the case under Roman-Dutch law also, for in the passage from the judgment in the *London and South African Exploration Co. v. Rouliot* (*supra*) De Villiers C. J. said: " The principle as to the right of support being once admitted, the removal of such support, *followed by damages,* must have been a wrong for which the action *in factum* lay." The underlying principle being that a landowner may lawfully dig upon his own ground to any depth he pleases, provided he causes no damage to his neighbour.

In *The Darley Main Colliery Co. v. Mitchell* [1] Lord Halsbury said: " It is clear no action would lie for excavation. It is not, therefore, a cause of action; that case *Bonomi v. Backhouse* (*supra*) established that it is the damage and not excavation which is the cause of action."

As Lord Macnaghton said in *West Leigh Colliery Co. v. Tunnicliffe and Hampson, Ltd.* (*supra*) when dealing with a similar point: " The damage, not the withdrawal of support, is the cause of action . . . . " If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action. In the same case Lord Ashbourne said:—

> " The excavations in themselves give no right of action. It is only the damage caused to the respondent's right of enjoyment of their property by a subsidence caused by the excavations that gives any right of action. Before any subsidence it might be that the known axcavations and the fears resulting therefrom would cause a depreciation in the value of the property for which no action would lie. The fear of a subsidence, although founded on the known fact of extensive excavations, cannot give any cause of action even although there may have already a subsidence."

But Mr. Hayley strongly relies on the concluding passage in *Voet 39, 1, 11*, intituled " *De operis novi nunciatione* " (an information lodged respecting a work undertaken by another to one's injury), which he says supports the plaintiffs' claim for damages not yet sustained. That passage runs as follows: " *Plane si quis tam alte fodiat in suo, ut paries vicini propter labefactatum fundamentum stare non possit, damni infecti nomine cavere compellitur; eo quod publici aspectus ratio ac favor non patitur, ita ruinis urben deformari.*" Whatever support this passage might give to the first part of Mr. Hayley's contention, it lends no support whatever to his second contention, for the wall there referred to was in existence at the time the neighbour dug out his soil, and there is no passage in this title which warrants its extension to walls or buildings still to come into existence.

There is a further point which is fatal to the claim of the plaintiff. According to *Voet* (*X., 1, 12*) the Roman-Dutch law did not adopt the rules laid down in the Roman law as to the extent of spaces between buildings, but this depended on the Municipal regulations of the town in which the buildings were and partly on judicial decisions. In Ceylon there are no customs or usages regulating these distances, but there are building laws which regulate them.

The effect of rule 4 of the schedule to the Housing of People and Improvement of Towns Ordinance, No. 19 of 1915, which provides a standard for buildings, rooms, and streets, is to require an external open space of not less than 7½ feet in width from the external wall abutting on the open air. The result is that the plaintiff cannot build within 7½ feet of their boundary. By reason of the defendants'

[1] *11 A. C. 127.*

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excavations any building on the plaintiffs' land within 7 feet of his boundary would be insecure. Any building outside the 7-foot space would not be effected by the diminution of lateral support caused by the excavations.

Therefore, no building that the plaintiffs can construct according to the building laws would be affected by what the defendants have done. The plaintiffs can, consequently, suffer no damage, and can have no cause of action against the defendants. This action has, in my opinion, been rightly dismissed, and the appeal is also dismissed, with costs.

GARVIN A.J.—

The law on the point with which we are here concerned has been well settled in England by a long series of judicial decisions. The underlying principle is the principle of the Civil law " *Sic utere tuo ut alienum non lœdas.*" This principle has been applied and developed by the Judges of the English Courts. Unfortunately, no such development appears to have taken place in the countries governed by the Roman-Dutch law, though the principle applicable to cases such as this is the same as in England. The plaintiffs' land has not as yet sustained any damage. Nor is there any reason to suppose that any damage will be sustained if the land is left in its natural state. What the plaintiff fears is that he will not be able to erect a building on so much of the land as lies within 7 feet of the boundary.

It is quite clear that the English law recognizes no right to lateral support for any building which an owner may desire to erect on his land. I agree with my brother that this is a case to which the principles of the English law should be applied. Whether we should follow the English law where actual damage has been caused to an existing building by works of excavation carried out at the instance of an adjacent landowner is a question which does not arise.

Appeal dismissed.