1927.

Present: Dalton and Garvin JJ.

SUBAIDA UMMA *et al.* *v.* WADOOD.

277—D. C. Colombo, 21,200.

Nuisance—Discharge of foul water—Absolute duty—Adjoining owners—Damages.

Plaintiff was the owner of premises No. 35 and defendant the owner of premises No. 99, which abutted on each other at the back. There was a right of drainage for No. 99 through No. 36. Owing to an obstruction placed by the tenant of No. 36, the foul water from defendant's premises drained into plaintiff's and caused a nuisance.

Held, that the defendant owed an absolute duty towards adjoining owners in respect of foul water collected in his premises and that he was liable in damages.

APPEAL from a judgment of the District Judge of Colombo. The facts are set out in the argument and the judgment.

Tisseverasinghe (with *H. E. Garvin*), for plaintiff, appellants.—The facts admitted or proved in this case are that the foul water and sewage in question originated and accumulated in 2nd defendant's premises, that the 2nd defendant had a right of drainage for them through premises No. 36, that the foul water found its way through the partition wall into plaintiff's premises No. 35 and damage was caused to the plaintiff. The case therefore comes within the ruling of *Fletcher v. Rylands*,[1] as the 2nd defendant is responsible for the damage unless he can bring himself within

[1] *(1868) L. R. 3, H. L. 330.*

the exceptions set out in that case. One of them material to this case is " the act of a stranger which there was no duty on the part of the defendant to foresee and guard against." If the owner of the servient tenement was the offender and the act was his, then he was not a stranger and it was the duty of the defendant to foresee or guard against his acts. If he failed in his duty he would be guilty of negligence.

Apart from the question of negligence the facts constitute a nuisance in the eye of the law. In a case of nuisance the question of negligence or even knowledge is immaterial. Every occupier is bound to prevent filth from his drain from filtering through the ground into the neighbour's land. (*Addison on Torts, c. IV., s. 1, Nuisance, pp. 156 and 333; 21 Hals., s. 894, p. 528.*)

Every man should keep his own filth on his own ground (*Tenant v. Goldwin* [1]). He is liable even when leaking drains were not known to be so (*Humphries v. Cousins*[2]); where moisture escapes (*Alston v. Grant*[3]; *Billard v. Toulvson*[4]); escape of water from a cellar (*Snow v. Whiteheal*[5]).

On the question of nuisance our law is the same as the English law (*The Colombo Electric Tramways Co. v. The Colombo Gas and Water Co. Ltd.*[6]).

H. V. Perera, for 2nd defendant, respondent.—Negligence on the part of the defendant has been negatived by the Judge in the Court below and the evidence justifies his finding. The damage, if any, was caused by the occupier of No. 36. If there is no negligence, there is no liability. The question of nuisance was not raised in the Court below. The respondent, the evidence shows, had done everything in his power to abate the nuisance as soon as he had knowledge of it. The occupier, not the owner, should have been sued.

Tisseverasinghe, in reply.—The respondent had accepted responsibility and it is too late to raise the question.

December 8, 1927. DALTON J.—

Plaintiff is the owner of No. 35, Old Moor street, Colombo. Defendant is the owner of No. 99, New Moor street. The backs of these premises abut on each other, being separated by a wall which plaintiff states is his property, No. 99 being considerably higher, the premises in New Moor street draining down through the premises in Old Moor street. There is a right of drainage for No. 99 through No. 36, New Moor street. That way appears to have been blocked by the owner or tenant of No. 36, with the

[1] *1 Salk 21, 360.*
[2] *(1877) 2 C. P. D. 239.*
[3] *(154) 3 E. & B. 128.*
[4] *(1885) 29 Ch. D. 115 C. A.*
[5] *(1884) 27 Ch. D. 588.*
[6] *(1915) 18) N. L. R. 385.*

1927.

DALTON J.

Subaida Umma v. Wadood

result that damage has been caused to No. 35 by dirty drainage water coming from No. 99 through the partition wall into plaintiff's compound, kitchen, and bath room. Plaintiff, as the owner of No. 35, therefore claims damages from the owner of No. 99. No. 99 is occupied by a tenant, and not by the owner himself.

Upon the evidence the trial Judge finds that there has been no negligence on the part of the defendant, who seems to have done all he possibly could to remedy the state of affairs caused by the blocking of the drain on No. 36. With that finding it is, it seems to me, impossible to disagree. It is urged however that, inasmuch as a nuisance has been caused and damage therefore has resulted to the plaintiff by the accumulation of foul drainage water upon the premises of the defendant, there is an absolute liability upon the defendant, whatever remedy he may have against any other person, to see that no dirty water is discharged from his premises on to other property. The trial Judge finds that the water did flow on to plaintiff's premises from defendant's lot as a result of some obstruction on the adjoining premises No. 36, but that, inasmuch as the nuisance was not caused by him nor by one for whose action he was responsible, plaintiff could not succeed. He accordingly dismissed plaintiff's action. The question of absolute liability does not appear to have been raised in the issues framed, and the trial Judge does not deal with that aspect of the case. It may be noted here that defendant has commenced an action (exhibit D 2) against the owner of No. 36 in respect of the alleged obstruction which is said to be responsible for all the damage, claiming the sum of Rs. 300 as damages.

Upon the facts it is in my opinion impossible to contend that the injury caused to plaintiff did not amount to a nuisance. The only question arising now for decision is this, namely, Is the defendant responsible?

Mr. Tisseverasinghe, for the appellant, referred to the law as laid down in *Vol XXI., Halsbury's Laws, paragraph 894.* He argued that inasmuch as the dirty water was collected on defendant's property, escaped from that property, and damaged the plaintiff, defendant was liable to the plaintiff in damages. It was immaterial whether there was any negligence on defendant's part or not, and it was equally immaterial whether or not defendant had any knowledge of the water so collected and escaping. It is laid down, however, that defendant can excuse himself in certain circumstances; one of those circumstances is, if the act complained of is the act of a stranger which there was no duty on the part of the defendant to foresee or guard against.

Can it however here be said that the act complained of was the act of the owner or occupier of No. 36? The foul and dirty water on No. 99 was brought there by the tenant. The owner of

No. 36 played no part in its presence there in the first case. It is stated however that, inasmuch as he prevented its flow through the drain on his premises, it collected on No. 99 and soaked through on to No. 35. It seems to me that the plaintiff had a right to enjoy his premises free from all invasion of foul and dirty drainage water coming through the wall from defendant's premises above and adjoining him. This right, as pointed out in the case of *Humphries v. Cousins*,[1] which was cited in the course of the argument, was an incident of his possession and did not depend upon the acts and omissions of other persons. The plaintiff's rights therefore have been infringed. It seems to me that it is no answer to the plaintiff's claim for the defendant to say, " the foul and dirty water did accumulate upon my land, but it would not have so accumulated if some third party had not wrongfully blocked up a drain." It is not a case of surface or sub-soil water coming naturally from defendant's land, but of water taken there for domestic purposes coming from bath room, kitchen, or closet, and allowed to flow and overflow in his compound or in surface drains upon his premises.

This case, it seems to me, comes within the principle laid down in *Fletcher v. Rylands*.[2] The defendant, or the person for whom he accepts responsibility, has caused to come into existence on his premises the foul and dirty water which has caused the nuisance, percolating and draining through into No. 35 below him. The escape was not the consequence of *vis major* or the act of God. The act of the owner of No. 36 has nothing to do with the creation or with the bringing of that water upon No. 99, although it may be that it would not have drained through into No. 35 had no obstruction been made to the drainage on No. 36. Defendant may have his remedy against the owner of No. 36, but in my opinion, on the facts here, inasmuch as he owned an absolute duty to adjoining owners in respect of that "unusual matter," foul and dirty water, upon his premises, he is liable to the plaintiff as a result of his default. It has been held that the doctrine of *Fletcher v. Rylands* (*supra*) is not inconsistent with the principle of the Roman law upon which our Common law is based (*Eastern and South African Telegraph Co. v. Cape Town Tramways*,[3]) although it has also been held (*Samed v. Segutamby* [4]), in the case of fire brought on to one's land for an agricultural operation common to this country, having regard to the fact that the law in England as to the use of fire for agricultural operations had an independent development, the doctrine of *Fletcher v. Rylands* (*supra*) does not apply. The foundation of that doctrine is derived, as pointed out by Mellor J. in *Wilson v. Newberry*,[5] from the old case of *Tenant v. Goldwin*,[6] in which it was

[1] *2 C. P. D. 239.*
[2] *L. R. 3 H. L. 330.*
[3] *(1902) A. C. 381.*
[4] *25 N. L. R. 481.*
[5] *L. R. 7 Q. B. 31.*
[6] *1 Salk 360.*

1927.

DALTON J.

Subaida Umma v. Wadood

determined that it was the duty of a man " to keep his own filth on his own ground." On the facts of this case I am of opinion that defendant is liable for the damage caused, having failed to bring himself within any of the three exceptions set out above. The facts here are clearly distinguishable from those in *Box v. Jubb*[1] referred to in the course of the argument, for there the water had not been accumulated by the defendants but had come from a point considerably above the defendants' premises.

At the end of this argument, Mr. Perera, for the defendant, raised a question as to the liability of the defendant, as he stated the defendant was not in occupation of No. 99, which was leased to a tenant. He urged that the tenant was responsible for the nuisance, if there was any, and that no liability could be attached to the defendant. This was not raised either in the pleadings or in the issues framed in the lower Court. Throughout the proceedings defendant acted as if he was responsible for whatever was done on No. 99. From the evidence it is clear that the plaintiff dealt with the defendant throughout the proceedings which led up to the action being brought, and it is equally clear that the defendant himself took all the steps he could to abate the nuisance when it was brought to his notice after the damage was done. He never suggested and has never suggested that anyone else was responsible. He admitted his responsibility, and must be taken to have adopted the act of his tenant. There is nothing to show the nature of the tenancy, but one may gather from the facts proved that, as between himself and the tenant, he accepted responsibility for the presence of the water on his premises, although for other reasons he denies his legal liability for the damage.

Although the learned trial Judge has come to the conclusion that the defendant was not liable to the plaintiff, in the event of this conclusion being reversed on appeal, he has gone on to consider the damages suffered, which he assesses in the sum of Rs. 150. I see no reason to differ from his conclusions on this point. In the result therefore the plaintiff is entitled to succeed. The decree dismissing his action will therefore be set aside and judgment will be entered in his favour in the sum of Rs. 150 and costs. No question of issuing an injunction arises. He is also entitled to the costs of this appeal.

GARVIN J.—I agree.

Appeal allowed.

[1] *4 Ex. Div. 76.*