1909.
March 9.

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice.

SOYSA *v.* WIJESEKERA.

C. R., Colombo, 8,240.

Newspaper subscription — Prescription — Ordinance No. 22 of 1871, ss. 8 and 9.

A claim for the price of newspapers supplied to a person on a verbal agreement falls under section 9 of Ordinance No. 22 of 1871, and is prescribed in one year.

APPEAL by the plaintiff from a judgment dismissing his action on the ground that it was barred by prescription.

Van Langenberg, for the plaintiff, appellant.

A. St. V. Jayewardene, for the defendant, respondent.

Cur. adv. vult.

March 9, 1909. HUTCHINSON C.J.—

The plaint is dated February 22, 1908, and says that the plaintiff's predecessor in title at the request of the defendant agreed to supply the defendant regularly with a copy of a newspaper on the defendant paying the subscription for it, and that in accordance with the agreement he regularly supplied the defendant with a copy from July 1, 1904, to March 6, 1906, for which the defendant is liable to pay Rs. 42·75. It does not say that the agreement was in writing. The defendant in his answer denied the agreement, and also said that the claim was prescribed. He admitted the receipt of the paper. The Commissioner found that the defendant had requested that the paper should be supplied to him and impliedly promised to pay for it, but held that the claim was prescribed. By section 8 of the Prescriptive Ordinance, No. 22 of 1871, a claim " for money due on any written contract " is barred after three years ; and by section 9 a claim " for or in respect of any goods sold or delivered " is barred after one year. Reference was made to *2 N. L. R. 218* and *1 Browne's Reports 151.* In my opinion the papers delivered were goods. The case differs in no way from a claim for the price of boots made and delivered by the maker to the buyer on his verbal order ; it falls within section 9, and the ruling of the Commissioner was right.

The appeal is dismissed with costs.

Appeal dismissed.

Present : Mr. Justice Wood Renton and Mr. Justice Grenier.

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SAMUEL APPU *et al. v.* LORD ELPHINSTONE *et al.*

D. C., Kalutara, 3,799.

Natural servitude—Action by lower proprietor against upper proprietor for damage caused by interfering with the natural drainage of the upper land—Negligence.

An upper proprietor who alters the natural drainage of his land and concentrates the water into specific channels and then discharges it on to his neighbour's land in a more forcible and destructive manner than it would otherwise have got there naturally is liable in damages, though he may have made the alteration for the purpose of cultivating his land, and though he may not be guilty of negligence.

APPEAL from a judgment of the District Judge of Kalutara (P. E. Pieris, Esq.).

The appellants, the proprietor and superintendent of Geekiyana-kanda estate, cleared their land for the purposes of cultivation, and altered the natural drainage of their land by cutting drains across it, emptying into an ela and natural ravines coming right up to the boundary of the lower lands belonging to the respondents, and thus caused a large quantity of silt created by the clearance to be washed down and deposited over respondents' fields. The respondents brought this action for damages caused by the deposit of silt, and obtained judgment against the appellants for Rs. 2,400.

Sampayo, K.C. (with him *F. J. de Saram, jr.*), for the appellants.—The appellants are not guilty of negligence. They have cleared their land for purposes of cultivation. The case of *Rylands v. Fletcher* has no application. Here, there is no dangerous substance which the appellants have stored up on their land. Pulverized earth cannot be said to be a dangerous substance, nor was it brought on to the land from outside.

The upper proprietors have a right to cultivate their lands in the ordinary course. It was impossible to prevent the silt being washed down to the respondents' fields. The District Judge himself holds that silt traps would be valueless. There was no obligation on the part of the appellants to reserve a belt of forest 4 chains in breadth all along, nor is there proof that such a belt of forest would have prevented the silt from being washed down.

The District Judge is wrong in thinking that the feeder drains intensified the volume of water flowing down.

Counsel cited *1 Nathan's Common Law of South Africa, pp. 434–486; 3 Nathan, pp. 1528, 1530, and 1531; Rylands v. Fletcher, (1868) L. R. 3 H. L. 330.*

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H. A. Jayewardene (with him *D. Obeyesekere*), for the respondents, relied on *C. R., Matale, 8,247 ; S. C. Minutes, September 2, 1909 ; Addison on Torts, p. 338 ; Hurdman v. The North Eastern Railway Coy., 3 C. P. Div. 168.*

Sampayo, K.C., in reply.

Cur. adv. vult.

November 25, 1909. WOOD RENTON J.—

The respondents are the owners of two paddy fields, Paraowita and Delgahakumbura, situated at Mahalla, in the District of Kalutara. The first defendant-appellant, Lord Elphinstone, is the proprietor, the second defendant-appellant, Mr. Golledge, is the superintendent, of Geekiyanakanda estate, a property of about 3,200 acres, adjoining Paraowita on the north and east, and separated from Delgahakumbura by an ela leading from the estate into and across the respondents' fields. The estate is on a higher level than the fields. In the year 1905 certain lots of Geekiyanakanda estate, adjoining these fields, were cleared by Mr. Golledge for rubber cultivation. For the purpose of carrying out this clearance, feeder drains were cut into the ela and into certain natural ravines coming right up to the boundary of one of the fields in question. It is not suggested that any part of this work was done otherwise than skilfully. But its practical results, according to the evidence, were to concentrate the rain water into the ela and the ravines, by the defined channels of the feeder drains, to intensify the volume of water passing down from the slopes of Geekiyanakanda to the lower lands, including the respondents' fields, to carry down along with it great quantities of the silt created by the clearance, and to pour into the respondents' fields a deposit of silt, some 3 feet deep, which it would admittedly cost about Rs. 2,000 to remove, in order to render them once more fit for cultivation.

Under these circumstances, the question arises whether the appellants are liable to make good that damage. Both the pleadings and the issues on which the case went to trial turned on the presence or the absence of negligence on the part of the appellants, in this sense, that, while it was not alleged that the actual work of drainage had been unskilfully done, it was contended by the respondents on the one hand, and denied by the appellants on the other, that the damage could have been prevented by the adoption of reasonable precautions. On the day of trial the respondents' counsel suggested the following amendment to one of the issues : " Even if there was no negligence, are the defendants liable ? " The learned District Judge, however, held that there was no necessity for the amendment. In my opinion, for reasons that I will give later, it ought to have been accepted.

The only precautions by which the respondents themselves suggested that the damage could have been averted were the preparation of silt traps and the cutting of a boundary drain to

catch the whole flow of water. The District Judge held, and I think rightly held, on the evidence of Mr. Golledge and of Mr. Graham Clarke, that these suggested precautions were impracticable. He himself, however, put to the witnesses for the appellants the suggestion that the mischief could have been prevented if they had reserved an extent of 4 chains, *i.e.*, 88 yards, of jungle, for the purpose of arresting the wash. Mr. Golledge met this suggestion by replying that the land was so steep that he did not think any trees serviceable for the purpose of making such a reservation would grow there. Mr. Graham Clarke, however, went further. He was examined, cross-examined, and re-examined on the point. In his examination-in-chief he stated that where there was a big gorge, as in this case, it was impossible to prevent silting, and that even if there were a reservation, the silt would overflow in some years. In cross-examination he said that in some estates there were reservations made by the Crown, but that he was not aware of any made by private owners; that he himself never left reservations, as they became a nuisance. In re-examination he said: "I swear that in my opinion no steps could have been taken to prevent the silt." Finally, he was questioned by the Court, and made use of the following language, which I quote in terms, because of the importance assigned to it by the District Judge: "A reservation of about 4 chains would be effective for some years; the ela could not have been cleared, as it began to be silted; the quantity is too great."

On the evidence the District Judge held (1) that the appellants by their process of clearing had altered the nature of the soil, and accumulated, on the surface of the land cleared, "a most dangerous substance," namely, pulverized earth, which it was their duty to prevent from so escaping as to injure the property of their neighbours, if any remedy was possible; (2) that while silt traps and boundary drains were valueless, the damage could have been avoided by a reservation of 4 chains, at least for a period of some years, during which the new plantation effected would once more have given firmness to the soil. "If, humanly speaking," said the District Judge, "no remedies are possible, it would appear that the law cannot help the plaintiffs, and that they must in the most approved Oriental fashion resign themselves to their *karma*." The method of making a reservation was, however, so simple and so inexpensive, and would apparently have been so efficacious, that the appellants have been guilty of "gross negligence" in failing to adopt it. On these findings the District Judge awarded to the respondents Rs. 2,400 damages and costs of suit. I do not think that the accumulation of the pulverized earth on the appellants' land brings the case within the principle of *Rylands v. Fletcher*,[1] which, by the way, has been held by the Privy Council (*Eastern and*

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

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South African Telegraph Co. v. Cape Town Tramways Co.[1]) to be not inconsistent with Roman Law, or with legal systems founded on that law. The making of a reservoir for the purpose of keeping and storing water in one piece of land to be used about a mill upon another is not a natural user of the former land. The clearing of land for purposes of cultivation is a natural use of the land so cleared. The appellants, therefore, in such a case as this, do not become insurers in any event, of the safety of their neighbours, particularly of lower proprietors, who by a servitude, *loci natura*, are bound to receive the ordinary waterflow from the higher lands by virtue of that servitude. Moreover, the earth in question here was not brought on to the appellants' land by their clearing operations. It was there already, and all that the appellants did was to loosen it for ordinary and proper purposes of cultivation. This very point was raised in the case of *Wilson v. Waddell*.[2] In the course of proper mineral workings by the defender, the soil above the coal, which was stiff and impervious to water, so that, whilst it was undisturbed, the greater part of the rainfall flowed away over the surface, was cracked into open fissures, through which the rainfall flowed freely down into the defender's workings, towards the pursuer's holding, out of which it had to be pumped at additional expense. The House of Lords held that the case was one of *damnum absque injuria*, giving rise to no claim for damages.

I should not be prepared on the evidence as it stands to uphold the findings of the District Judge that a reservation of 4 chains would have been effectual to prevent the damage complained of in this action, and that the appellants were guilty of gross negligence in failing to make one. As I have already pointed out, it was the Court itself, and not the parties, who brought forward this suggestion, and I am not by any means satisfied on the evidence that Mr. Graham Clarke was referring, in what he said on the subject, to the possibility of making such a reservation effectively on the land here in question. If it had been necessary to decide the point, I should have been disposed to hold that both sides should be allowed a further opportunity of giving evidence in regard to it.

I have come, however, to the conclusion that the decision of the District Judge should be affirmed on the ground involved in the issue that he rejected, and that, under the circumstances of the present case, the appellants are liable for the damage done to the respondents' fields, irrespective of the question of negligence. The District Judge has found that the effect of the appellants' draining operations was to concentrate the water in specific channels, instead of allowing it to find its own course; that that concentration greatly increased the force of the flow, with the result that the loose soil washed into the drains was hurried down into the leaders and thence into the ela with a degree of force which baffled restraint, and which covered

[1] (*1902*) *A. C. 386.* [2] (*1876*) *2 A. C. 95.*

the respondents' fields under 3 feet of silt. The evidence supports these findings. Mr. Golledge admits that the wash was heavier. Mr. Graham Clarke says that the damage was all caused by the silt brought down by the leading drains of about 300 acres; that the rush of water concentrated in these drains must have been great, and that, although if there had been no drains, the silt was bound to come down to the fields in the same direction, and probably in the same or greater quantities ultimately, it would not have been concentrated. Mr. Golledge corroborates Mr. Graham Clarke on these points. I may quote the following passages from his evidence: "I saw the fields covered with silt; the accumulation was great. To my knowledge, before I opened the drains, there had been no complaint of silting ..... The leaders are cut 6 inches deep and 2 feet wide. From my experience, when the drains were opened, I knew that the silt was bound to be carried down. I expected the silt to accumulate on the paddy fields at the bottom, and that the quantity of silt would be very large." Mr. Golledge adds that the object of cutting the drains was to save the top soil for the estate, and that if such drains had not been cut, the accumulation would have been greater. He does not, however, dispute the allegation that it would have been more gradual, and, therefore, in all probability, more capable of being guarded against. It becomes necessary, therefore, to ascertain the law applicable to these facts. I do not think that there is any substantial difference between English law and Roman-Dutch law on the point. Both recognize the servitude *loci natura*, which lower proprietors owe to upper proprietors in such cases as this. Both adopt the maxim *sic utere tuo ut alienum non lædas*, and in my opinion, under both, the appellants are liable in damages to the respondents on the evidence before us. The Roman-Dutch Law is defined by Maasdorp (*Institutes of Cape Law, vol. II., pp. 123 and 124*) in the following terms:—

"No action will lie either against an upper or lower proprietor for damage due to an alteration in the natural drainage, if such alteration is due not to any work expressly constructed with that object, but merely in consequence of the enjoyment of his property and the cultivation of his land in a fair and reasonable manner in the ordinary way, *e.g.*, by making irrigation furrows where there can be no cultivation without them, or by cutting ditches for the drainage of his land, provided he does not collect the water into one united stream and then discharge it on to his neighbour's land in a more forcible and destructive manner than it would otherwise have got there naturally, for every one ought to improve his own land in such a way that he does not thereby deteriorate the land of his neighbour. But where an upper proprietor is entitled to use a particular channel for the discharge of his surplus or rain water, he will be entitled also to increase the ordinary flow into such

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channel, even to the prejudice of the lower proprietor, if such increase be occasioned in the ordinary course of draining, ploughing, or irrigating his lands, and be not greater than is reasonable under the circumstances."

I have carefully examined the texts of the Digest (39, 3) and of Voet (39, 3) on which this passage is founded, and they clearly support the language that Chief Justice Maasdorp has used. Unfortunately we have not access, in Ceylon, to the actual text of South African decisions on this point, but I see no reason to doubt that the distinguished Judge, whose words I have just quoted, has stated the effect of them correctly. The law of England on the subject is practically identical. In the leading case of *Baird v. Williamson*,[1] it was held by Erle C.J., and Williams, Byles, and Keating JJ., that the owner of the upper of two adjoining mines is not liable for injury by water flowing by gravitation into the lower mine from works constructed by him in the usual and proper manner for the purpose of getting mineral from any part of his mine, but that he must not interfere with such gravitation so as to make it more injurious to the lower mine or advantageous to himself. "The plaintiffs," said Erle C.J., "as occupiers of the lower mine, are subject to no servitude of receiving water conducted by man from the higher mine." I find the same principle running through all the English decisions. In particular, the case of *Baird v. Williamson* was expressly adopted by the House of Lords in *Young & Co. v. Bankier Distillery Co.*[2] as a correct exposition of the law both of England and of Scotland. In the present case the damage was caused by artificial drainage, and I am not prepared on the evidence before me, whatever impressions I might have apart from that evidence, to differ from the learned District Judge in holding that the effect of that artificial drainage was to increase the transport of silt into the respondents' fields to an unreasonable extent. Although the issue on which I propose that we should decide the present case was not accepted by the District Judge, it is an issue of law, and we have before us all the materials necessary for its decision. I may add that the law of Ceylon has recently been defined in the same sense by Sir Joseph Hutchinson C.J. in S. C. 185, C. R., Matale, 8,247.[3]

I would dismiss this appeal with costs.

GRENIER J.—

The facts are fully set out in the judgment of my brother, which I have had the advantage of reading. I shall therefore address myself solely to the law which should govern the case.

The plaintiffs' action, as I understand it, is the action known both to the Roman Law and the Roman-Dutch Law as the action

[1] (1863) 33 *L. J. C. P.* 101. [2] (1893) *A. C.* 691.
[3] *S. C. Minutes, September 2, 1909.*

aquæ pluviæ arcendæ. In the Law of the Twelve Tables there is special provision made for it in Table VII.: *Si per publicum locum rivus acqueductus privato nocebit, erit actio privato ex lege XII. Tabularum, ut noxa domino caveatur—Digest 43, 8, Ne quid in loc. pub. S. F. Paul.* A suit of this nature was decided by an arbitrator (*arbiter acquæ pluviæ arcendæ*).—*Digest 39, 3; De aq. et aq. pluv. arc. 23 S. 2. f. Paul; and 24 f. Alfen.* (See note and references in Ortolan's History of Roman Law, p. 91, to Table VII.)

An upper proprietor of land has under the Roman-Dutch Law a right similar to that obtained under the urban *servitus cloacæ*, to which I shall presently refer. There was a servitude known to the Roman-Dutch authorities as the *goot-recht*, and which Grotius (*2, 34, 24; Maasdorp, p. 149*) defines as the right to have a gutter or spout lying upon or discharging itself into the property of another. Van Leeuwen (*Cens. For. 1, 2, 14, 22; R. D. L. 2, 20 10; 1 Kotze, p. 290*) treats of it more fully. He says that this servitude of *goot-recht*, or water-course, is the right to let one's clean water produced by rainfall or some other natural cause run over the ground of another, who is bound to lead it off over his own land or in a gutter, but the duty was cast on the dominant owner to place at the outlet from his property a grating to prevent stones or rubbish from passing into the servient tenement. The servitude was an urban one, but it appears that the underlying principle was that although the dominant tenement was entitled to let water pass through a gutter or spout into the servient tenement, the right was to be exercised in such a way as to prevent any damage being done to the latter, or any substantial inconvenience caused to the owner of it, by the passing of stones and rubbish with the water. The servitude *cloacæ* was the right of driving a drain through another man's property, or, in other words, a right of sewer running through or discharging itself into another's ground (*1 Grotius, bk. II., ch. 34, sec. 24*). The interest of the servient tenement was safeguarded by the obligation being imposed on the dominant tenement to keep the sewer clean and under repair. Both these servitudes are urban, but I have referred to them because the rights and liabilities arising under either are not dissimilar to those which attach to the rural servitude known to the Roman-Dutch Law as the right of drainage or *water-loozing* (*Grotius, bk. II., ch. 35, sec. 18*). Grotius defines it as "the right of permitting the water to escape, independently of its natural order." This brings me to an explanation of the real scope and object of the action *aquæ pluviæ arcendæ.* The foundation of the action, according to the authorities I have consulted, is the rule that no one can, without a servitude, let his water fall upon the property of another, and if no right to pass such water to the lower property has been established, a person who lets his water flow in such manner, whether by erecting mechanical works, or by plantations of trees, or who when the

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water flows down naturally increases the volume or speed of the flow, or alters it in any way so as to damage the lower proprietor, is liable in damages. It is also stated by the text writers that the action only lies where the water does harm to the lower property, but not where it is of advantage to it. It was held in the case of *Meyer v. Johannesberg Waterworks Co.*[1] that where a person turns off the water which, after heavy rainfall, is wont to overflow his pond or reservoir and injure his own property, in such a manner as to divert it to the neighbour's property and cause injury thereto, he will be liable in an action. In *Ludolph and others v. Wagner and others*,[2] it was held as follows: "The action *aquæ pluviæ arcendæ* is as old as the law of the Twelve Tables, and rests upon the broad principle that no one has a right to do any acts for the improvement or benefit of his own land, unless there is an obligation in the nature of a servitude to submit to such acts. There are three modes, according to Paulus (*Digest 39, 3, 2*), in which such an obligation may be established: *lex, natura loci, vetustas*. By *lex* he meant a covenant between the neighbouring owners giving the upper proprietor a right to discharge water upon the land of the lower proprietor, but of such a covenant there is no question in the present case. Under this term may also be included such an obligation as the law imposes upon one tenement to submit to the discharge of water from another tenement after thirty or more years' uninterrupted user by the upper proprietors upon the land of the lower proprietors without any resistance on the part of the latter. Such a servitude is not, however, acquired without proof of acts done in assertion of rights claimed on the part of the upper proprietors. The second mode in which the obligation to receive water in a defined channel may be established is by proof that the situation of the locality—*natura loci*—is such that rain falling from the dominant upon the servient tenement would naturally flow into the latter through such channel. If the locality is such that it is difficult to ascertain from the nature of the surface what is the natural channel, a third mode of proof comes in, and that is *vetustas*, or ancient custom."

The cardinal principles of the law relating to the action in question having thus been clearly enunciated, the following rules as to the right of an upper proprietor to drain water into the property of a lower proprietor were laid down by the Court, and I cannot do better than state them *in extenso*:—

"(1) A right to discharge water upon a neighbour's land may exist by virtue of a duly created servitude, or by virtue of the natural situation of the locality.

"(2) If it be difficult from the nature of the surface to ascertain what is the natural channel, then the course in which the water has immemorially flowed will be considered as having had a natural and legitimate origin.

[1] *Hertzog 17.* [2] *6 S. C. C. 197.*

" (3) Where water has flowed in an artificial channel for thirty years or more, it may be presumed, in the absence of evidence to the contrary, to have flowed thus immemorially.

" (4) When once the right to discharge water into such a channel has been established, the person entitled to the right may increase the ordinary flow to the prejudice of the lower proprietor, if such increase be occasioned in the ordinary course of draining, ploughing, or irrigating the upper land, and be not greater than is reasonable under the circumstances. If the channel becomes choked through neglect, he may compel the lower proprietor to clean it himself or to allow him—the upper proprietor—to do so." *Nathan's Common Law of South Africa, vol. I., p. 484 et seq.*

We have here in a crystallized form the whole of the Roman-Dutch Law relating to the right in question. There was no pretence in this case that the defendants were entitled to claim this right by convention (*lex*) or by immemorial custom (*vetustas*). They could only rely on the third mode by which the obligation could be established: *natura loci*. Admittedly, the defendants' land is higher than plaintiffs' fields, and if rain water naturally found its way or along a recognized channel, whether in large or small quantities, into the latter and flooded them so as to prevent the plaintiffs from temporarily engaging in the ordinary productive cultivation of them, the law would, in my opinion, have been on the side of the defendants. But here the evidence conclusively shows that the defendants were not entitled to the use of any particular channel, but had constructed only quite recently several channels or drains which served to carry the water, charged with large quantities of silt, with great force and volume into plaintiffs' fields, rendering them in the result totally unfit for cultivation until the removal of the silt. Two of these drains actually emptied themselves into plaintiffs' fields.

I think the maxim *sic utere tuo ut alienum non lædas*..... clearly applies, and the defendants were liable in damages, even if no negligence had been proved. There is no difference that I know of between the English Law and the Roman-Dutch Law on the question before us, but certainly there is overwhelming authority in the latter to support the judgment of the District Judge, independently of the reasons given by him.

I agree to dismiss this appeal with costs.

Appeal dismissed.