July 15, 1910

Present : Wood Renton J.

COWELL *v.* CASIE CHITTY.

3—*C. R. Colombo*, 11,854.

*Servitude—Interfering with the natural drainage of the upper tenement—Building a cement drain—*De minimis non curat lex.

Defendant owned a land to the north of the plaintiff's land. Just outside the northern boundary of the defendant's land stood a "bathing-well" for forty-seven years, from which the waste water flowed into the defendant's premises and on into the plaintiff's premises. The plaintiff raised the level of his land to prevent the flow of water into his premises. The defendant thereupon cemented his drain after raising its level.

Held, that as the building of the cement drain had not sensibly increased the flow of water into the plaintiff's premises, he was not entitled to any damages.

WOOD RENTON J.—Where the servient owner himself acts in a way which affects the exercise of the dominant owner's rights, and the dominant owner takes steps with a view to protecting himself against that conduct on the part of the servient owner and to secure the enjoyment of his servitude, and where no substantial damage has been caused from the protective steps so taken, the legal maxim *de minimis non curat lex* should be held to apply.

THE facts of this case are fully set out in the judgment of the Commissioner of Requests (M. S. Pinto, Esq.) :—

The plaintiff is the owner of the land bearing assessment Nos. 24 and 25, situated at Pickerings road. The defendant is the owner of the land adjoining it in the north. Immediately to the north of the defendant's land is a well, which has stood there for about forty-seven years.

The plaintiff complains that on August 27, 1908, the defendant built a cement drain across his land to carry off the water from the well across his own land into the defendant's land. It has been proved beyond doubt that this water is the waste water resulting from the use of this well for bathing purposes. This well is what is called a bathing well. No sewage comes along the drain.....

The lay of the land is in the defendant's favour. The land slopes down from the well down the defendant's land to the plaintiff's land. There are the remains of a bridge at the site of the drain in question, showing that there was a water-course there. Unless there are any obstacles, I would expect water from the well to flow down to the plaintiff's land.....

I found on my visit to the spot that the level of the defendant's land appeared to have been raised. No explanation of this has been given

unless the plaintiff's statement that she "put some earth" over the mess caused by the water "which had come along the drain from the well" is to be regarded as an explanation.

I do not know what drain the plaintiff referred to; if it was the cement drain, her statement is not true; for I am satisfied that the level was raised before the cement drain was built (see Inspector Serasinghe's evidence). If she meant a water-course on the site of the cement drain, then she practically admits there was a water-course on the site of the cement drain, unless her case is that this water-course was specially constructed. There is no doubt that the plaintiff had the level of her land raised to prevent the flow of water into her land.....

The next question, is whether the defendant was entitled to build a cement drain to carry off the water which previously flowed along a water-course. The decision of this question gave me considerable difficulty, for no law was quoted to me covering the facts of this case. This case has to be decided by the application of principles deducible from the decided cases.

If the water came down the slope, along every incline of the slope, the defendant could not confine the flow of water to a defined course, for by so doing he would increase the volume of water along that particular course, and might increase the burden of the servient tenement less able to receive the overflow at a particular part of the boundary than all along the boundary. I am doubtful whether, if it is proved that the burden of the servient is not sensibly increased by such an alteration of the flow, the alteration cannot be effected. Again, the narrower the space over which the flow takes place, the less of absorption there is; and the narrowing of the water-course would increase the burden of the servient tenement by increasing the quantity of the overflow.

But here the flow was mostly along a defined water-course. I appreciate the fact that there will be a certain amount of absorption when the drain is uncemented, and that the cementing of the drain will affect the volume of the overflow to a certain extent. But *de minimis non curat lex*. The defendant had a right to send the waste water into the plaintiff's land. The defendant had to cement the drain, after raising its level, as the plaintiff had raised the level of the land.....

Case dismissed with costs, and defendant is declared entitled to a servitude in terms of the 2nd clause of his prayer.

Sampayo, K.C. (with him *Aserappa*), for appellant.

Van Langenberg, for respondent.

July 15, 1910. WOOD RENTON J.—

For the purpose of the present appeal, I must take the findings of facts by the learned Commissioner of Requests on two points: in the first place, that the defendant-respondent had to cement his drain after raising its level, as the plaintiff-appellant had himself raised the level of his land; in the second place, that the damage done is practically nil. I do not think that the passage from *Maasdorp II., p.* 123, which Mr. Sampayo cited in support of the appeal here to-day, and which I have also had to consider some time

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ago in another case, is applicable to the circumstances with which we have here to deal. It merely deals with the relative rights and duties of upper and lower proprietors under normal conditions. It does not show, and no authority has been cited to me showing, that where the servient owner himself acts in a way which affect the exercise of the dominant owner's rights, where the dominan. owner takes steps with a view to protecting himself against th: . conduct on the part of the servient owner and to secure the enjoyment of his servitude, and where no substantial damage has been caused from the protective steps so taken, the legal maxi:. *de minimis non curat lex*, which the learned Commissioner ha. quoted in this case, should not be held to apply. On these grounds I would dismiss the appeal with costs.

Appeal dismissed