Present: De Sampayo J.

1917.

THE BAPTIST MISSIONARY SOCIETY *v.* WIJEKOON.

3—C. R. Matale, 11,075.

Servitude—Jus cloacæ—*Sewage flowing into neighbour's premises.*

The defendant had water service laid to his house and property, built and partly extended his old drains, with the result that a greater volume of water and filth was brought down the drains, and a larger quantity of it escaped into plaintiff's premises.

Held, that the defendant could not increase the volume of such matter or discharge it in a concentrated form to the prejudice of the plaintiff.

IN this case the plaintiff complained that the defendant, who is a neighbouring and upper proprietor, had by means of artificial drains concentrated the rain water that fell on to his premises and diverted it on to the plaintiff's premises; and, further, that by means of the said drains he wrongfully discharged sewage on to the plaintiff's compound. The learned Commissioner (W. J. L. Rogerson, Esq.) held as follows:—

". . . . . Now, the real trouble in this case started when a water service was laid on in defendant's premises; until then bathing was apparently unpopular, and such water as was used by defendant's tenants for bathing was not sufficient in volume to find its way into the servient tenement. When there was heavy rain, clean rain water, of course, flowed into the tenement, and plaintiff could not object. But once the water service was laid on, every one, including Mr. Benjamin, made use of the bathroom, the tap was undoubtedly left running, washing operations of all kinds took place, and volumes of dirty water entered plaintiff's premises. It is quite clear that he objected to this immediately (*vide* Mr. Pearce's letter and Mr. Benjamin's evidence).

It was the extension of drain Y to the fence that first caused trouble, as previous to this the small quantity of water used was absorbed in defendant's compound and did not reach plaintiff, certainly not in sufficient quantity to be noticeable.

Defendant quotes to me a case in *14 N. L. R.* 340, arguing that it was only the extension of Y to the fence that caused plaintiff to complain; that this is a small alteration, and *de minimis not curat lex* should apply. A perusal of the judgment in that case shows that it does not apply. That was a case where the servient owner acted in such a way as to affect the dominant owner's right, and the dominant owner took counter steps to secure the enjoyment of his servitude. In this case, on the contrary, it was the extension of Y to the fence that

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The Baptist Missionary Society v. Wijekoon

first caused the defendant's filthy water to reach plaintiff's land at all, and then it only came in moderately small quantity, sufficient, however, to cause a nuisance. After the water service was laid on, the flow was much greater, and the nuisance became acute. It was then that plaintiff took steps which culminated in this action being brought. I have no doubt whatever as to the accuracy of these statements, for they clearly represent what must actually have occurred.

I find that, even if defendant had acquired a prescriptive right to carry his dirty water on to plaintiff's premises, he would have been bound to carry it through those premises by a *locus cavus*. I find that he has acquired no such right, that the only right he possesses is the *jus fluminis*, *i.e.*, the right to discharge clean water on to plaintiff's premises. I answer issue No. 2 in the negative.

No. 3 in the affirmative, subject to the proviso relating to the *locus cavus*. Plaintiff has waived damages. I declare plaintiff free from the burden of receiving filthy water from defendant's premises, and I order defendant to pay to plaintiff the costs of this action.

Wadsworth, for defendant, appellant.

J. W. de Silva, for plaintiff, respondent.

Cur. adv. vult.

March 2, 1917. DE SAMPAYO J.—

This action is brought by the Baptist Missionary Society Corporation for the purpose of abating a nuisance. The defendant is the owner of two houses situated in Trincomalee street, Matale, and known as the Matale Hotel and Guard's Quarters. At the back of these houses are premises belonging to the Baptist Missionary Society, and occupied by the Pastor of the Baptist Chapel. It may be taken as established that the washings and sewage from the defendant's house used to flow down the back compound along some partly built drains. Most of the stuff got absorbed within the compound, but some of it no doubt found its way into the Mission premises. But the nuisance which is complained of has been caused recently. The defendant appears to have had a water service laid on, and to have properly built and partly extended the old drains, the consequence of which was that a greater volume of water and filth was brought down the drains, and a larger quantity of it escaped into the Mission premises. The defendant set up what is known as *jus cloacæ* by prescription, and depended on the decision in *Samahin v. Saravanamuttu.*[1] It is not necessary to consider in this case whether in the exercise of such a right the owner of the dominant tenement ought not at his own expense make artificial passages in the servient tenement in order that sewage may flow in the least objectionable manner. For it is quite clear that he, at all events, cannot increase the volume of such matter or

1 *3 Bal. 104.*

discharge it in a concentrated form to the prejudice of the owner of the servient tenement. This is what has happened in the present case, and the action is therefore well founded. I postponed the delivery of this judgment in the hope that some settlement would be arrived at between the parties, but there having been no such settlement, I have no alternative but to dismiss the appeal, with costs.

Appeal dismissed.