1914.

Present : Wood Renton C.J. and De Sampayo A.J.

THE ATTORNEY-GENERAL *v.* SILVA.

386—D. C. Badulla, 2,774.

Opening up land adjoining public road—Damage caused to road by flow of water—Action by Crown for damages—Thoroughfares Ordinance, No. 10 of 1861, s. 91 (5).

The defendant purchased a land from the Crown adjoining a public road (with a strip of Crown land said to be a road reservation intervening between the two) and opened up the land and planted it with tea. Water and silt with stones flowed down to the road, whereby the road was damaged.

The Attorney-General claimed damages from the defendant.

Held, that, as the acts of the defendant amounted to no more than what might be lawfully allowed to an owner in the ordinary course of cultivation, he was free from liability for damage caused to the road.

The principles expounded in *Samuel Appu v. Lord Elphinstone* [1] were not confined to a natural servitude which one landowner had over another, but applied to the case of a public road as well.

In regard to obligations attaching to the ownership of land, the Crown is in no better position than a private individual.

Section 91 (5) of the Thoroughfares Ordinance, No. 10 of 1861, contemplates nuisances such as those provided against in the numerous other sub-sections of the same section. It penalizes both the owner and occupier of the land or house, and seems to me to have in view personal acts or omissions, and the flowing of water, filth, &c., through preventable causes.

DE SAMPAYO A.J.—"I confess I feel some doubt as to whether a civil action for damages is the proper remedy for injury caused to a public road."

THE facts are set out in the judgment.

Bawa, K.C. (with him *Dias*), for defendant, appellant.

van Langenberg, S.-G., K.C. (with him *V. M. Fernando, C.C.*), for the Attorney-General, respondent.

Cur. adv. vult.

November 20, 1914. DE SAMPAYO A.J.—

The defendant is the owner by purchase from the Crown of a piece of land at Koslanda. The land is near the Koslanda-Possagala road, with only a portion of Crown land, said to be a reservation, intervening between the two. In 1912 the defendant opened up

[1] *(1909) 12 N. L. R. 321.*

the land and planted it with tea. The plaint alleges that in the months of January and April, 1913, the defendant suffered water, silt, and stones to flow and run from his land on to the road, whereby the side drains and culverts of the said road were choked and the road damaged, and the Attorney-General on behalf of the Crown claims as damages the sum of Rs. 1,515.02. which was expended by the Crown in repairing and restoring the road. The District Judge has given judgment as claimed, and the defendant appeals.

The evidence shows that the defendant's land is hilly and slopes down towards the road, with a ravine which constitutes the main passage for rain water. The defendant in opening up and planting the land does not seem to have done anything more than is required in the ordinary course of agricultural operations, and in view of the evidence for the plaintiff, the only thing that need be specially mentioned is a drain which the defendant cut along the lower boundary of his land above the reservation and leading into the ravine. I may say that the evidence is very meagre and vague in respect of any other act on the defendant's part, which may be depended on as contributing to the damage, except that it is said that the defendant allowed his drains to be filled with silt at the time of the rains and did not clear them. So far as I can see, the cutting of the drains is made no ground of complaint, nor is there any thing said as to the defendant having directed the water in an improper manner. On the contrary, the plaintiff's case appears to be that, while the defendant rightly led the water into the ravine, he did not do so more effectually. The complaint appears practically to be that he opened up the land at all. The following are the relevant passages in the evidence of the witnesses for the Crown: " The defendant's drain along the top of the reservation was fully silted up, with the result that water was flowing down all along instead of running along the drain to the natural ravine." " The clearing of jungle, opening drains, and planting turned all the soil up and removed stones and earth from the drain. The whole surface was thereby loosened, and every shower caused this loose soil to fill up the drains on defendant's land, so that they overflowed and stones and earth were washed down to the road. This could have been prevented if the drains had been kept open and the water led to the natural ravine." " The natural flow of water could not have caused the damage without the clearing." " The clearing would necessarily bring the water down faster. Till the clearing there was no need for drains. These drains were not properly connected with the ravine." The defendant, on the other hand, in effect, says that he opened up the land in the ordinary manner, and that owing to the heavy and continual rains at the time the silting of the drains was unavoidable.

In this state of facts, what are the rights of the Crown and the liabilities of the defendant? At the argument of this appeal some

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question was raised as to the right of the Attorney-General to maintain this action. I confess I feel some doubt as to whether a civil action for damages is the proper remedy for injury caused to a public road. But as the case was fought out on other grounds in the District Court, I do not think that we need decide this point.

The defence is that the acts of the defendant amount to no more than what may be lawfully allowed to an owner of land in the ordinary course of cultivation. As I have already indicated, this conclusion of fact appears to be justified by the evidence. By cutting a drain or drains on his land the defendant may in a sense be said to have altered the natural drainage, but the evidence negatives the idea of the water being thereby concentrated and discharged in a more forcible and destructive manner. On the contrary, what is said is that the drains did not more effectually carry the water into the ravine, with the result that the water flowed all along the slope of the land. The latter course of water would have been the natural drainage, and, if the drains were not deep or large enough or were filled up with silt, that circumstance can at most only have had the effect of restoring the natural drainage. As to the earth which was loosened by the agricultural operations and carried down by the rain water, the evidence does not show that the defendant did not do what might be reasonably expected in order to retain the same within his land. The drains have that object in view, and, I should say, must have answered the purpose at least in some measure. At the end of the argument for the defendant-appellant I was inclined to the opinion that, in the above circumstances, the defendant was free from legal liability for the damage caused to the road, in view of the principles of law which are fully expounded in *Samuel Appu v. Lord Elphinstone*.[1] The learned Solicitor-General for the respondent could not on the materials in the case successfully combat the conclusion of fact above mentioned, nor did he question the authority of the decision just referred to. But he argued that that decision did not apply to the present case, because he said that the law there laid down had reference to a natural servitude which one landowner had over another, and did not apply to the case of a public road. It seems to me that this argument either goes too far or does not go far enough. In the first place, the learned Solicitor-General was not able to cite any authority for the distinction he sought to make. Moreover, the very basis of this claim for damages is that the Crown is the proprietor of the road, that is to say, the owner of the land over which the road passes and of the surface of the road itself, and in regard to obligations attaching to the ownership of land, I think the Crown is in no better position than a private individual. The side drains along the road and the culverts are intended to

[1] *(1909) 12 N. L. R. 321.*

receive the water which flows from the upper lands, and are, I take it, an acknowledgment of the right of the owners or owner of those lands to allow the water to flow according to natural drainage into and through such side drains and culverts. Indeed, I cannot conceive of a more important duty on the part of any road authority than to provide for contingencies that may arise from the operation of the laws of nature or from the lawful user of private lands in the neighbourhood. If the argument is pushed to its logical conclusion, it would mean that, even if the defendant had not cleared and planted his land, but allowed it to remain as he had bought it from the Crown, he would still be liable if the water flowed from the land in its natural state and damaged the road. In this connection we were referred to the provision of section 91 (5) of the Thoroughfares Ordinance, No. 10 of 1861. That provision makes it an offence for the owner or occupier of any land or house adjoining a road to " suffer any water, filth, or other substance or thing to flow or run from such land or house into or upon any such road, " and the argument is that, such an act being penalized, a civil action may also be brought for damage done thereby. I do not think that that provision applies to such a case as this. It obviously contemplates nuisances such as those provided against in the numerous other sub-sections of the same section. It penalizes both the owner and occupier of the land or house, and seems to me to have in view personal acts or omissions, and the flowing of water, filth, &c., through preventable causes. Moreover, the defendant's land cannot well be said to adjoin the road. There intervenes between them a stretch of Crown land, which, however, the Solicitor-General says is a reservation for the protection of the road, and is therefore a part of the road as defined in section 4 of the Ordinance. On looking into the plans filed in this case, however, I find that this intervening land is not of any defined character: a part of it is a large block of land consisting of several acres, and other parts of it have been sold by the Crown. I can hardly consider it as a road reservation in the ordinary sense. Be that as it may, the provision in question does not, as I have said, apply to the circumstances of this case, nor do I think, even if it did, it necessarily follows that the defendant is precluded in this action from setting up in defence a right which is otherwise given him by law. The argument on this head may be put in the words of the Crown Counsel at the trial: " The exercise of the right of the servitude claimed is a criminal offence, " and in that form it does not in my view bear examination.

For these reasons I would set aside the decree appealed against, and dismiss the action with costs in both Courts.

WOOD RENTON C.J.—I agree.

Set aside.