## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.*

A. MINUS

*v.*

E. DAVEY.*

1932

*Dec.* 16

*Support of land—Nature of right—Right when infringed—Actual damage essential—Imminent damage—Injunction, remedy of.*

The owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state, but a right to have the benefit of support therefrom which is infringed as soon as, but not until damage is sustained in consequence of the withdrawal of the support.

*Backhouse* v. *Bonomi*, 9 H.L.C. 503; *Bonomi* v. *Backhouse*, E. B. & E. 622; *Dalton* v. *Angus & Co.*, 6 Ap. Ca. 740; *Darley Main Colliery Company* v. *Mitchell*, 11 Ap. Ca. 127—*referred to*.

But if the plaintiff proves that owing to the action of his neighbour there is imminent danger to his land, or that the apprehended injury, if it does occur, will be irreparable, he is entitled to an injunction, though no actual damage has occurred.

*Chowdhrani* v. *Chowdhrani*, I.L.R. 24 Cal. 260; *Corporation of Birmingham* v. *Allen*, 6 Ch. Div. 284; *Paltisson* v. *Gilford*, 18 Eq. Ca. 259—*referred to*.

*Doctor* for the appellant.

*Vertannes* for the respondent.

PAGE, C.J.—I have had the advantage of considering the judgment of my learned brother Mya Bu in this case. In my opinion the law is well settled in the sense expressed by Mya Bu J., and in his careful judgment Shaw J. has marshalled the facts disclosed in the evidence from which, in my opinion, he has drawn the right conclusion. Our visit to the site has confirmed the view that we had already formed upon a consideration of the evidence adduced at the hearing, and for the

* Civil First Appeal No. 114 of 1932 from the judgment of this Court on the Original Side in Civil Regular No. 314 of 1931.

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reasons given by my learned brother the appeal (except as indicated in his judgment) fails, and must be dismissed with costs.

MYA BU, J.—The plaintiff and the defendant are owners of adjoining lands situated on the slope of a hillock in University Avenue, Rangoon. Both pieces of land have their frontages on University Avenue. The plaintiff's land is on the east of the defendant's and occupies the higher part of the slope. The common boundary line between the two pieces of land is about 332 feet.

Early in 1931 the defendant in the course of levelling his land excavated the earth at the higher regions within his own area with the result that about the end of May 1931 the earth within the defendant's own area but very near the boundary line between the two pieces of land was cut down along the entire length of the boundary line. For about the first 120 feet from University Avenue, the height of the cutting varied from about 13 feet at the highest to 12 feet 6 inches at the lowest, vertical. After this section of 120 feet the height of the cutting decreased gradually towards the other end of the boundary line and at about 320 feet from University Avenue the height is 3 feet 9 inches while at the very end of the common boundary line (*i.e.* at 332 feet) the height is negligible for practical purposes. The top of the bank of the cutting lay from the boundary line which is represented by a fence at distances varying from 1 foot 9 inches to 6 inches, the greatest of these distances being at about 120 feet from University Avenue. The slope of the cutting also varies. The best is a little more than three-quarters to one and the worst one-quarter to one, the former being for about 200 feet from

University Avenue and the latter occurring in the section between 240 feet and 260 feet from University Avenue.

The plaintiff complained that by this excavation the defendant deprived his (the plaintiff's) land of sufficient lateral support, and rendered that portion of his land lying alongside the boundary line unsafe and liable to slide down at any time, and sued for a perpetual injunction restraining the defendant from removing the necessary lateral support to which the plaintiff's land is entitled, and for a mandatory injunction compelling the defendant to restore the necessary lateral support to his land.

The case gave rise to disputed questions of fact, namely, the nature and the strength of the soil, and the amount of lateral support needed to prevent injury to the plaintiff's land.

Besides, it was contended on behalf of the defendant that no action would lie unless there has been actual damage, and that the suit was in the nature of a *quia timet* action and in order to succeed the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does occur, will be irreparable.

Upon the disputed questions of fact referred to above, the learned trial Judge has found that the soil is not solid laterite earth as alleged on behalf of the defendant, but is of a kind known as laterite clay as stated by the plaintiff's witnesses, the latter being of a lower degree of strength than the former, and that to give the necessary lateral support to the plaintiff's land the angle of repose to be represented by the slope of the cutting is to be 45 degrees or one to one.

On the question as to the plaintiff's right of suit the learned trial Judge held that "the plaintiff's suit

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does lie, although no damage to his land has yet occurred and although it is not alleged that damage is imminent of a substantial or irreparable nature, because it is alleged that there has been an invasion of the right of enjoyment of his land by the removal of lateral support which is an actionable injury". The learned trial Judge has accordingly held that the plaintiff is entitled to the injunctions prayed for by him.

In this appeal the learned counsel for the appellant does not contest the finding that the soil is not solid laterite earth, but has urged that the suit is in the nature of a *quia timet* action in which the plaintiff in order to succeed must prove imminent danger of a substantial kind, or that the apprehended injury if it does occur will be irreparable, neither of which, the learned advocate contends, has been proved in this case.

In my opinion the proposition of law advanced by the learned advocate should be upheld, but the appeal fails inasmuch as there is overwhelming proof of the existence of imminent danger of a substantial kind to the plaintiff's land unless the injunctions prayed for be granted.

The learned trial Judge's findings that the plaintiff has a right of action though there has occurred no actual injury to his own land, and that the suit is not in the nature of a *quia timet* action, are based upon the notion that the defendant by excavating his own land withdrew the lateral support afforded by it to the plaintiff's land and thereby committed an invasion of the plaintiff's right to such support.

It is settled law that the right to the support of land in its natural state, vertically by the subjacent strata, and laterally by the adjacent soil, is a right to which the owner of the surface is of common right

*primâ facie* entitled. The right to lateral support of land is explained in the judgment of the Court of Exchequer Chamber in *Bonomi* v. *Backhouse* (1) as follows :

"The question in this case depends upon what is the character of the right; *viz.* whether the support must be afforded by the neighbouring soil itself, or such a portion of it as would be beyond all question sufficient for present and future support, or whether it is competent for the owner to abstract the minerals without liability to an action unless and until actual damage is thereby caused to his neighbour. The most ordinary case of withdrawal of support is in town property, where persons buy small pieces of land, frequently by the yard or foot, and occupy the whole of it with buildings. They generally excavate for cellars and in all cases make foundations, and, in lieu of support given to their neighbour's land by the natural soil substitute a wall. We are not aware that it has ever been considered that the mere excavation of the land for this purpose gives a right of action to the adjoining owner and is itself an unlawful act, although it is certain that if damage ensued a right of action would accrue. So also we are not aware that, until the case of *Nicklin* v. *Williams* (10 Exch. 259) it had ever been supposed that the getting coal or minerals to whatever extent, in a man's own land was an unlawful act, although, if he thereby caused damage to his neighbour he was undoubtedly responsible for it. The right of action was supposed to arise from the damage, not from the act of the adjoining owner in his own land. The law favours the exercise of dominion by every one upon his own land and his using it for the most beneficial purpose to himself."

The decision of the Court of Exchequer Chamber in this case was upheld by the House of Lords in *Backhouse* v. *Bonomi* (2) in which Lord Cranworth observed :

"I think the error in the view which has sometimes been taken upon this subject, is this : It has been supposed that the right of the party, whose land is interfered with, is a right to what is called the pillars or the support. In truth his

(1) (1858) E. B. & E. 622 at p. 655.
(2) (1861) 9 H.L.C. 503.

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right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with, he has nothing of which to complain."

This decision of the House of Lords was referred to by Lord Blackburn in the House of Lords' case of *Charles Dalton* v. *Henry Angus & Co.* (1) in these words :

"It is, I think, conclusively settled by the decision in this House in *Backhouse* v. *Bonomi* (2) that the owner of land has a right to support from the adjoining soil ; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it) ; but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support."

In a still later House of Lords' case relating to an excavation whereby the adjoining owner's soil was subsequently let down—*The Darley Main Colliery Company* v. *Thomas Wilfred Howe Mitchell* (3)—Lord Bramwell observed :

"It cannot be said that the act of excavation is unlawful. A contract to do it could be enforced. No injunction against it could be obtained unless injury was imminent and certain."

In the same case Lord FitzGerald stated the following propositions as what he considered to have been settled by authorities :

"1. That the owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary.

2. That the owner of the subjacent minerals may excavate and remove them to the utmost extent, but should exercise that right so as not to disturb the lawful enjoyment of the owner of the surface.

3. That the excavation and removal of the minerals does not, *per se*, constitute any actionable invasion of the right of the owner of the surface, although subsequent events show

(1) (1881) 6. Ap. Ca. 740 at p. 808. (2) (1861) 9 H.L.C. 503.
(3) (1886) 11 Ap. Ca. 127 at p. 145.

that no adequate supports have been left to sustain the surface.

4. But that, when, in consequence of not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface, and constitutes his cause of action."

and came to the conclusion that

"it is the disturbance then, when it arises, that is the cause of action, and not the prior legitimate acts of the owners of the minerals in the lawful enjoyment of their own property".

These pronouncements of the law as to the right of support of land show that the right of an owner of land to the support from adjacent or subjacent soil is not that the substance supporting his soil shall not be removed, but that the enjoyment of his land be not disturbed by the removal of its support.

Therefore, excavation and removal of the earth on his own land by a person, without leaving sufficient support to the adjoining owner's land to enable it to remain in its natural state, does not, *per se*, constitute an actionable invasion of the latter's right ; and such an act to constitute a valid foundation for a claim by the adjoining owner for damages must be coupled with actual damage or injury to his property.

On the other hand it is, in my opinion, clear that in such a case the Court may and should restrain the apprehended injury by injunction under certain circumstances. I have already pointed out that the right of an owner to the support from adjacent or subjacent soil is that the enjoyment of his land be not disturbed by the removal of its support, and as Lord Wensleydale observed in *Backhouse* v. *Bonomi* (1)

"an obligation is cast upon the owner of the neighbouring property not to interrupt that enjoyment"

(1) (1861) 9 H.L.C. 503 at p. 513.

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In *Corporation of Birmingham* v. *Allen* (1) Sir George Jessel, M.R. observed

"if the plaintiff's land had been in its natural state no doubt the defendants must not do anything to let that land slip, or go down or subside. If they were doing an act which, it could be proved to me by satisfactory expert evidence, would necessarily have that effect, I have no doubt this Court would interfere by injunction on the ground upon which it always interferes, namely to prevent irreparable damage when the damage is only threatened".

In view of this dictum, there can be no doubt of the correctness of the decision in *Bindu Basini Chowdhrani and another* v. *Jahnabi Chowdhrani* (2), which is to the effect that where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit.

The learned trial Judge has found on the evidence that the defendant cut down the land near the common boundary line without leaving such a slope as would form an angle of repose adequate for the support of the portion of the plaintiff's land lying alongside the boundary line. I have no doubt of the correctness of this finding. By this act the defendant withdrew the lateral support which his land in its natural state had till then afforded to the plaintiff's land to enable it to remain in its natural state. The effect of the evidence of experts called on both sides, except that of Mr. Lecun whose testimony the learned trial Judge for very good reasons found to be unreliable, is that if the cutting were left as it was there would be landslips in the monsoons until the slope reaches the adequate angle of repose, that is, an angle

(1) (1877) 6 Ch. Dn. 284. (2) (1896) I.L.R. 24 Cal. 260.

of 45 degrees. Neither the veracity of these witnesses nor the correctness of their opinions has been assailed on behalf of the appellant before us. The necessary conclusion to be drawn from the evidence is that considering the nearness of the top of the bank of the cutting to the common boundary line, if the land goes on slipping till the restoration of the angle of repose is reached, a strip of the plaintiff's land alongside the common boundary line of varying width will be involved in the landslip. Thus the defendant has by his act threatened danger to the plaintiff's land, and the danger is of a substantial kind.

Now, the question that falls for determination is whether the defendant's act has been such that injury to the plaintiff's property will inevitably follow, and it turns on the evidence in the case. Although the learned trial Judge, in consequence of the view he took of the law as to the maintainability of the suit, did not give a finding on this point, evidence touching this point was adduced by both sides, and upon such evidence we are in a position to decide the question.

Such evidence appears in the depositions of Messrs. Rowland, Dumont and Ghosh, witnesses for the plaintiff, and Messrs. Lecun and Butler who were called by the defendant. These witnesses are civil engineers. The evidence of these witnesses was recorded towards the end of June and the beginning of July this year. Mr. Rowland considered that parts of the cutting would fall, some during the ensuing rainy season and some in other rainy seasons, if nothing was done to the cutting. He estimated the degree of probability of this result to be great for the back 135 feet, and to be reasonable for the first 200 feet. Mr. Dumont is certain that the cutting must fall in course of time till it reaches an angle of repose. The evidence of Mr. Ghosh may be left out of consideration by reason

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of the fact that he considered a much better slope than is spoken to by Messrs. Rowland and Dumont to be requisite to prevent danger to the plaintiff's land. For the reasons given by the learned trial Judge as to the unreliability of Mr. Lecun's evidence on certain other relevant points, we leave his evidence also out of consideration. Although in Mr. Butler's opinion a slope forming an angle of 60 degrees, *i.e.* not so good as an angle of 45 degrees, would be sufficient to maintain the plaintiff's land in its natural state, he admitted that the bank in the southern portion of the cutting would fall away as it stood at the time he gave evidence. He, however, found it difficult to say whether in small quantities or in large quantities this bank would fall.

From the evidence of Messrs. Rowland and Dumont, supported in part by the evidence of Mr. Butler, as pointed out above, it follows, in my opinion, that the bank of the cutting is bound to slip sooner or later. It is, of course, difficult to say when exactly the bank will fall, or in what quantities, and how long it will take before the angle of repose is reached ; but I am unable to view the evidence as indicating that the slipping of the bank will take place only in the distant future, or that the slipping will be so slow as to unreasonably postpone the throwing into the plaintiff's area of the top of the cutting. After hearing the arguments of the learned advocates in this appeal, the Court granted the pressing request of the learned advocate for the appellant (assented to by the learned advocate for the respondent) to visit the locale. The result of this visit is to help me to be confirmed in the view that I had taken of the evidence, *i.e.* that there is such a great probability of a landslip that in the view of ordinary men, using ordinary sense, injury to

the plaintiff's land would necessarily follow. Adopting the meaning in which Sir George Jessel, Master of the Rolls, used the word "inevitably" in *Pattisson* v. *Gilford* (1) in which I respectfully agree, I hold that in this case it is proved that, if the bank of the cutting be left as it is, injury to the plaintiff's land will inevitably follow.

Moreover, there has actually occurred since the institution of the suit a slipping of land of a small dimension at the worst section of the cutting, and upon the evidence I agree with the trial Judge in attributing the slip to the steepness of the slope at the place where it occurred. I also agree with the learned trial Judge that the plaintiff's action in banking up the plinth of his house did not make any appreciable difference to the flow of water over the bank, and I do not think the plaintiff's construction of a road in his compound has so altered the contour of the land as to add to the volume of water which would ordinarily flow towards the defendant's land, or to the speed of the flow.

In the result I consider that the plaintiff is entitled to the injunctions which the trial Court has granted to him save that the decree will be varied by deleting the words "right of" before the words "lateral support" and the words from "and what laterite" to the words "1 to 1" in the first paragraph of its operative part, and that otherwise the decree passed by the trial Court is just and appropriate.

The appeal fails and I would dismiss it with costs. In lieu of the order that the expert fees be taxed by the Taxing Master we assess the expert witnesses' fees at and in connection with the trial Court at Rs. 1,000.

(1) L.R. (1874) 18 Eq. Cases 259 at p. 264.