1887.
August 10 and 19.

MUTTIAH *v.* DIAS.

C. R., Colombo, 48,701.

Overhanging tree—Compensation for cutting it down—Prescription.

Under the Roman-Dutch Law no right of servitude can be claimed in respect of an overhanging tree. The owner of a land which a tree overhangs has, therefore, a right to have the tree cut down without paying compensation for it to its owner.

THE plaintiff in this case claimed to have cut down five trees which stood on the defendant's land and overhung the plaintiff's land. The defendant pleaded that the trees had stood in the position in which they were for twenty years, and that she had acquired a right by prescription to have them in that same position. The Commissioner held that three of the trees overhung the plaintiff's land, but that the defendant had acquired a prescriptive right to have those trees in the position in which they were. Accordingly, while directing that those trees be cut down, he ordered that the plaintiff should pay the defendant compensation therefor. The plaintiff appealed from the part of the order condemning him in compensation.

Browne and *Dornhorst*, for appellant.

Withers, for respondent.

Cur. adv. vult.

19th August, 1887. BURNSIDE, C.J.—

In this case the libel of the plaintiff disclosed no cause of action. The object of the suit was to have some cocoanut trees on the adjoining premises of the defendant cut down. It is nowhere stated that they overhung the plaintiff's property. The cause of action alleged is the position of the trees, "the constant falling of "branches, and the frequent dropping and plucking of nuts "therefrom on the plaintiff's land." This would not give the plaintiff the right he claimed unless the trees overhung his land. However, the defendant seems to have observed this defect, and has generously come to the rescue and corrected it for the plaintiff by admitting, what he never averred, that one cocoanut tree overhangs the neighbouring premises on which the plaintiff resides. This tree she says she was always ready to cut down if paid for, but she denies that the plaintiff has the right to have any of her trees cut down. She says that for twenty years she enjoyed the right of having the trees stand in their present position,

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and she pleads prescription under the 2nd clause of Ordinance No. 8 of 1834, and 3rd clause of Ordinance No. 22 of 1871.

There seems to have been some negotiation between the parties rather than a regular trial of issues, which has resulted in judgment being given that the defendant cut down three trees and that the plaintiff pay defendant Rs. 50. The plaintiff has appealed. Some objection was made by the counsel for the defence to the jurisdiction of the Court of Requests to order the trees to be cut down. I do not find that the defendant has appealed, and I find that she consented to cut down the trees if plaintiff paid for them. Had she appealed, jurisdiction, prescription, and other legal questions would have arisen, but she has not; and as I have said, the only question for me to decide is, Had the Court the right to order the trees to be paid for, and I unhesitatingly say I can find no authority for it. I have carefully read the judgment in *Rámanáthan, 1867, p. 234*, cited at the Bar. That does not touch the question; and on other points connected with the law of the subject it is so manifestly judge-made-law that I should not feel myself bound by it.

I do not think Sir Edward Creasy himself wished that it should be considered an authority. I may refer especially to that part of it which decides that because an easement had been enjoyed, *nec clam nec precario*, under an agreement for ten years, that thereby a title to it had been gained by prescription, as contravening every principle upon which the doctrine of adverse possession to obtain prescriptive title rests.

Then, again, that the branches of the tree should be cut down and not the trunk, as if it were the former only that grew and not the latter, does not appear to have any common sense to support it. The case itself, however, is valuable for the learned research it displays and the authorities cited, which establish as clearly as possible that by the Roman-Dutch Law no right of servitude can be claimed in respect of an overhanging tree. The reason for it is plain, because the alleged servitude is not a fixed and defined one like that of an overhanging beam, but an ever-varying one with every moment of time and every change of position and bulk. I am therefore, I am glad to find, to decide this case upon the well-recognized principles of English Law, by which if a trespass is committed or a nuisance is created the right to damages or to have the nuisance abated is not dependent upon compensation to the wrongdoer. I therefore set aside the judgment of the Commissioner, in which he orders the plaintiff to pay the worth of the trees ordered to be cut down. The plaintiff will have the costs of this appeal.