Present: Pereira J. and Shaw J. **1914.**

SAMARAWEERA *et al.* v. MOHOTTI *et al.*

414—D. C. Matara, 6,097.

Encroachment by a person in the course of erection of a building—Right of party building on another's land to retain encroachment on paying compensation.

In the case of an encroachment by a person in the course of the erection of a building on the land of his neighbour, there is no authority in the Roman-Dutch law to support an order permitting the offending party to retain the encroachment, paying compensation therefor. It is usual in South Africa to give the offending party the option of buying the portion of land encroached upon, paying the aggrieved party an adequate price for it, and damages. This course may in suitable cases be adopted with advantage in Ceylon.

THE facts are set out in the judgment of the District Judge (J. C. W. Rock, Esq.):—

The defendant purchased on two deeds (D 1 and D 2) from first plaintiff and his late mother-in-law (deceased, third plaintiff) a piece of land 68 feet long by 40 feet broad, shown as C in Mr Perera's plan dated March 14, 1914, with four boutiques standing thereon.

Defendant pulled down these boutiques and built on the site a substantial two-storied building. The cause of action is two-fold: first, that defendant in building encroached on plaintiffs' land to the north and south by the manner in which the eaves were constructed (these are the encroachments D, E, F, G); and secondly, that he without permission filled up the space A at the back of the new building. The defendant also caused rain water to fall from his drain pipes or gutters on to plaintiffs' land; but this matter has been remedied, and plaintiffs do not press for damages on this account.

After the first survey defendant got a second survey made by Mr. Roosmalecocq on September 21, 1914, and after that shifted his ground. There he claims the ground which was specially disclaimed by him in paragraph 4 of his answer. He also claims part of the ground covered by boutique No. 4 in Mr. Perera's plan. But this is clearly an afterthought, and represents an utterly false claim. No. 4 is the cadjan building in which the oven actually stands, 5 is the part where sales are conducted. Because the deeds give the oven as the boundary, he now claims the extra ground; but what the deed means is that the southern boundary is the ground where it stands, and his limits are clearly defined by the extent (58 by 40 feet) which was sold to him. The most remarkable *feature is* the accuracy shown by the carpenters or masons (who knew their business) in measuring out the grounds. The roof over the oven clearly indicates what ground is covered by the oven—that goes right up to the wall of C. This roof is necessary in order to protect the oven from inclement weather. It would be useless if it stopped at the point indicated by the defendant, who is in respect of this claim clearly proved to be lying.

The long and short of it is that defendant having purchased a piece of ground of a certain extent, built his foundations exactly up to the utmost limit of the space he had purchased, with the result that his eaves project over plaintiffs' land.................

On the eastern side the defendant has encroached by the building of steps and by *means of* sunshades. This *slight* encroachment seems to be necessary to the defendant for the appearance and finish of his building. The filling up of earth at H is also necessary as a protection from wet weather and damp.

The questions to be decided now are:—

(1) What are the extent of the encroachments ?
(2) Whether they were acquiesced in or not ?
(3) How far defendant is liable in damages ?
(4) What other remedy is applicable ?

I hold (issue 1) that by means of the eaves at D, E, F, G, defendant has encroached to the extent of 1 foot, and to a similar extent by the steps at the back of the house. I will deal with this encroachment separately.

First plaintiff does not live on the land, but his mother-in-law, an old woman, did. These encroachments, being a matter of a foot, are not of the kind that a woman at any rate would readily discern. It cannot, therefore, be said that they were acquiesced in by the plaintiffs (issue 2).

Next, the ground was filled up at the back; this encroachment, I hold, was acquiesced in (issue 4). He filled up the ground under the eye of (though probably not with the express permission of) third

plaintiff. She saw him doing it, and probably saw the object of it, but this does not mean that defendant has a right to this ground, or that plaintiffs are estopped from claiming it. He had only a permissive user of it, and used it to suit his own purposes. I should strongly advise him to buy it at a reasonable figure from plaintiffs. It is absurd for defendant to say that it is too late for plaintiffs to cry out against the encroachments; he has not acquired any prescriptive title to them, and it can be no hardship to him to surrender what is not his nor extravagant on the part of plaintiffs to claim what is their own (issue 3).

As to the damages, I consider they are only nominal. The encroachments, if continued or established, would, of course, limit the space available to plaintiffs either for sale or for building a house similar to C but the actual damage to plaintiffs can only be regarded as slight. I estimate past and future damages at Rs. 35 a year till the present grievances complained of are remedied (issue 7).

As to remedy, I consider it would be most equitable if defendant either cut off a foot of the eaves of his house and removed the steps and sunshades, or paid compensation therefor. I assess the compensation at Rs. 120 (issue 5).

Enter decree ordering defendant (1) to pay to plaintiffs Rs. 35 a year from the date of encroachment till either encroachments are removed or compensation is paid; (2) to remove the encroachments within one month from date, or to pay Rs. 120 to plaintiffs for the strips D, E, F, G, M; (3) to be ejected from the use of the portion H (minus M, if he pays for M); (4, to pay half the costs of suit of plaintiffs.

Bawa, K.C., and *Cooray*, for plaintiffs, appellants.

Grenier, K.C., and *D. B. Jayatileke*, for defendant, respondent.

Cur. adv. vult.

December 18, 1914. PEREIRA J.—

The maxim *cujus est solum ejus est usque ad cælum et infernos* is as much a maxim of the Roman and Roman-Dutch laws as it is of the English law, and certain parts of the eaves of the defendant's house marked D, E, F, G in the plan are therefore as much an encroachment on the plaintiffs' land as the steps marked M. Most clearly the defendant has made these encroachments deliberately, and, although possibly he had no definite intention of vexing the plaintiffs, his object was stealthily to gain for himself as much advantage from his neighbour's property as possible in building his house. He thus made the encroachments in the hope, no doubt, that his act might remain unnoticed and undetected. The case is similar to that of *Miguel Appuhamy v. Thamel.*[1] The defendant is clearly bound to remove the encroachments. Is he entitled to claim that the plaintiffs be allowed and compelled to take advantage

[1] *2 Cur. L. R. 209.*

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of any alternative relief? In the case cited it was held that the offending party, in a case like this, might be allowed to buy the portions of land encroached upon, paying the party aggrieved an adequate price for them, and damages. The authority for this proposition is in *Maasdorp's Institutes of Cape Law, vol. II., p. 50.* Maasdorp bases it on certain decisions of the South African Courts, and the proposition may, I think, in suitable cases, be given effect to in this Colony also; but although, in the case cited above, Hutchinson C.J. observes: "And perhaps there may also be a power to order the defendant to pay compensation as an alternative to removing the encroachments." I am aware of no authority whatever in the Roman-Dutch law to support this proposition, and the learned counsel for the respondent has not been able to cite any. Anyway, the circumstances of this case do not, in my opinion, entitle the defendant to the benefit of any alternative. As in the case of *Miguel Appuhamy v. Thamel* [1] cited above, I think that the defendant should be ordered to remove the encroachments, which he can no doubt do without substantially impairing the use of the house, although its appearance may to some extent be prejudicially affected. I think that the defendant should be condemned to remove the encroachments at D, E, F, G, and M, and to surrender possession of H to the plaintiffs, and to pay the plaintiffs costs in both Courts, and, in default, that the Court should enforce this order by issue of execution. The judgment appealed from should be varied accordingly.

Shaw J.—I agree.

Varied.

[1] *2 Cur. L. R. 209.*