Present: De Sampayo and Schneider JJ. 1922.

PUNCHIAMMA *et al.* *v.* THEOBOLD.

2—D. C. Kandy, 29,108.

Damage caused by silting—Damage paid to ande *cultivator—Action to recover damage by owner—Legal position of* ande *cultivator.*

The first plaintiff, who was the owner, and the second plaintiff, who was usufructuary mortgagee of a field, sued the defendant for damages caused to the field by silting The defendant pleaded payment of damages to a person who was *ande* cultivator under the second plaintiff.

Held, that the plaintiffs were entitled to claim damages.

"The *ande* cultivator is, after all, only a cultivator under a man in possession. No doubt Ordinance No. 21 of 1887 legalized the *ande* cultivation system without notarial documents being required, but the possession of the cultivator was not improved so far as the law is concerned. It is possible that Ukku Banda as cultivator may be entitled to some compensation for the crop which was standing at the time of the damage, and if damages are given to the person under whom he cultivated he could receive that compensation from him."

THE facts appear from the judgment of the District Judge.

H. J. C. Pereira, K.C. (with him *H. V. Perera*), for defendant, appellant.

Soertsz (with him *M. W. H. de Silva*), for plaintiffs, respondents.

June 30, 1922. DE SAMPAYO J.—

This is an action for damages occasioned by silting of a field by the washing down of earth and silt from a higher land. The first plaintiff is the owner of the field shown in the plan A made by Mr. Trowell. The second plaintiff is usufructuary mortgagee of the field under the first plaintiff. The defendant is the owner of an estate to the east of a stretch of fields. It appears that the defendant made a new clearing in the year 1916, and in that connection made a certain alteration in the water-course, in which the rain water was to flow down the slope and into the fields. It would appear that before the new clearing was made, the water found its way along the line AB and then took an easterly direction along BB, E, and F which plaintiffs called Pitaella, but the defendant blocked the course, otherwise called Malaelle, at the point B and cut a drain from B to C, with the result that the water, instead of going in a natural way along the

1922.

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Pitaella, had to take a more direct course and disgorge itself at point C. In the year 1919 when there were heavy rains, the plaintiffs' field was badly silted up to a depth of between 1 and 1½ ft., and at the same time the standing crop was damaged. One point which has been submitted to us strongly is that neither of the plaintiffs has a right to claim any damage in respect of the silting. It appears that the second plaintiff has a usufructuary mortgage. Instead of cultivating the land himself, he had given the field for *ande* cultivation to one Ukku Banda who happens to be the husband of the first plaintiff, and the crop at the time of the damage had been raised by Ukku Banda. It is contended, in these circumstances, that Ukku Banda was the only person in possession, and he could sue, if at all, for any damage done, but not the plaintiffs. It seems to me that there is some misconception about the possession of an *ande* cultivator. He is after all only a cultivator under a man in possession. No doubt the Ordinance No. 21 of 1887 legalized the *ande* cultivation system without notarial documents being required, but the possession of a cultivator was not improved so far as the law is concerned. It is possible that Ukku Banda as cultivator may be entitled to some compensation for the crop which was standing at the time of the damage, but if damages are given to the person under whom he cultivated he could receive that compensation from him. The difficulty has arisen by an attempt on the part of the defendant to satisfy the field owners who had suffered damage by the silting of their fields. It appears that he went round and saw the various owners of the fields and paid them small sums as compensation for the damage done, and, among others, he saw Ukku Banda, the husband of the first plaintiff and cultivator under the second plaintiff, and he appears to have paid Ukku Banda Rs. 32. It is argued in those circumstances that full compensation had been paid to the right person by the defendant. I have already stated that in my opinion Ukku Banda was not the right person to receive compensation for all the damage done and the plaintiffs as the owner; and usufructuary mortgagee may claim to be compensated, as Ukku Banda in no way represented them. The remaining question is as regards damages and the relief to be granted to the plaintiffs. The District Judge has accepted the evidence of the Korala who estimated the crop of this field at 25 bushels, and stated the value of a bushel to be Rs. 3. On that basis the District Judge was right in estimating the value of a crop at Rs. 50. In the actual decree entered the District Judge ordered the defendant to remove the silt, and in default of doing so to pay damages at the rate of Rs. 50 per crop. So far the decree appears to me to be right, but the District Judge, in ordering the defendant to remove the silt, said that he would be at liberty to bury the silt in the field itself. The plaintiffs object to this part of the decree and has given a cross notice, and it is argued for them, and I think, reasonably, that burying the silt in

the field will be a further source of damage to the field, and such an order should not have been included in the decree. I think this is not unfair. I therefore, while affirming the decree, would strike out the portion which gives liberty to the defendant to bury the silt in the field itself.

The appeal should otherwise be dismissed, with costs.

SCHNEIDER J —I agree.

Varied.