IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Hunter and Company Limited,

No. 130, Front Street,

Colombo 11.

Plaintiff

CA Appeal No. 411 / 1997 (F)

DC Colombo Case No.
14792 / MR

-Vs-

Delmege Forsyth and Company Limited,

No. 101, Vinayalankara Mawatha,

Colombo 10.

Defendant

Hunter and Company Limited,

No. 130, Front Street,

Colombo 11.

Plaintiff - Appellant

-Vs-

Delmege Forsyth and Company Limited,

No. 101, Vinayalankara Mawatha,

Colombo 10.

Defendant - Respondent

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Ikram Mohamed P.C. with Rohana Sahabandu P.C. and Nilanga Udalagama instructed by Julius & Creasy for the Plaintiff-Appellant.
		Romesh de Silva P.C. with Harsha Amerasekera P.C. instructed by Dissanayake Amaratunga Associates for the Defendant-Respondent.
Argued on	:	20.03.2015
Written Submissions on	:	22.07.2015
Decided on	:	18.01.2016

A.H.M.D. NAWAZ, J,

The Plaintiff-Appellant (hereinafter referred to as "the Plaintiff") instituted this action by its plaint dated 09th March, 1994, against the Defendant-Respondent (hereinafter referred to as "the Defendant") seeking the following reliefs:-

(a) That an injunction be issued restraining the defendant from discharging sewage and/or water containing sewage and/or other noxious matter, and/or sending water and/or other matter in excess of the natural flow of the defendant's upper land to the plaintiff's land,

(b) That an injunction be issued restraining the defendant from discharging water to the plaintiff's land.

(c) For a declaration that the defendant is not entitled to discharge sewage and/or water containing sewage and/or other noxious matter and/or water in excess of the water flow in view of the natural drainage of the upper land to the plaintiff's land,

(d) For damages in a sum of Rs.1,527,925/- together with interest thereon at 24% from date of action till decree and on the aggregate amount till payment in full;

(e) For costs; etc.

The Defendant filed answer on 15th August 1994 denying the averments in the plaint and stating that:

(a) Due to the situation of the land and or premises in question and the gradient thereof, the natural flow of rainwater of the defendant's land is through the land of the plaintiff and that the defendant has the right to discharge the rainwater through the plaintiff's land;

(b) The defendant has been discharging rainwater to the said land as far back as from 1906 and the defendant has been permitted to do so since the year 1906 and that there had been no protest from the plaintiff and/or its predecessors in respect of the flow of rainwater until the year 1991;

(c) The defendant in any event has acquired by prescription the right by reason of long use without protest to discharge rainwater to the land of the plaintiff,

In the premises the Defendant moved to have the Plaintiff's action dismissed with costs.

At the trial six admissions were recorded, of which the 6th admission reads as follows:-

6.(a). The defendant has been *discharging rainwater to the land* described in the schedule to the plaint as far back as 1906 (paragraph 8(a) of the answer).

(b). The defendant has been *permitted to do so from the year 1906* (Paragraph 8(b) of the answer).

(c). There has been no protest from the plaintiff and/or its predecessors, until the year 1991, (paragraph 8(c) of the answer).

Both parties had tendered their issues in writing. The Plaintiff's issues were from Issue No. 1 to 6 whilst the Defendant's issues were 7 to 21. On 18th July 1996, the trial Judge accepted these issues and commenced the trial. On behalf of the Plaintiff, two witnesses namely; the factory Manager of the Plaintiff's company, Balasingham Sundararaj and an officer from the Municipal Engineer's Department Lionel Amarasinghe gave evidence. It has to be observed that whilst the Plaintiff tendered documents P1 to P6 and closed its case, the Defendant did not summon anyone to give evidence but closed its case having marked two documents, namely; D1 and D2. The learned District Judge of Colombo by his judgment dated 31st July 1997, dismissed the Plaintiff's action with costs.

It is against this judgment dated 31st July 1997 that the Plaintiff has preferred this appeal. Both parties filed their written submissions and submitted that this matter

could be disposed of on those submissions. It is pertinent to observe that an interesting issue arises in the instant appeal namely the right of an upper tenement to discharge water into a lower tenement or *ius fluminis* or *servitus fluminis recipiendi* as is known to the common law and both President's Counsel have ably assisted Court in the consideration of the issues arising in the case. I must place on record that the case record teems with comprehensive written submissions filed before my predecessors as well.

It must be noted that the Plaintiff's Counsel in his written submission (at para 32) whilst seeking to have the judgment of the District Court set aside, asserts that judgment be entered in favour of the Plaintiff as prayed for in prayer (a) and (c) of the plaint with costs. Therefore, it is necessary for this Court to see whether the Plaintiff is entitled to obtain the reliefs which it has prayed for namely:-

a) an injunction restraining the defendant from discharging sewage and/or water containing sewage and/or other noxious matter, and/or sending water and/or other matter in excess of the natural flow of the defendant's upper land to the plaintiff's land,

b) a declaration that the defendant is not entitled to discharge sewage and/or water containing sewage and/or other noxious matter and/or water in excess of the water flow in view of the natural drainage of the upper land to the plaintiff's land,

This is an action in connection with the discharge of water by the owner of an upper tenement on to a lower tenement which is adjacent to it. The law relating to the exercise of this right is governed by the common law of this country-the Roman-Dutch Law. The common law posits that the upper tenement has a right to discharge

its ordinary rainwater on to the lower tenement which abuts the upper tenement, but subject to certain limitations, namely:(1) the two lands, namely, the dominant tenement and the servient tenement must be contiguous, (2) the dominant tenement must establish that it has a servitude over the servient tenement, (3) that servitude is proved to be a servitude of ***ius fluminis***. In this case the Defendant's land, which is the dominant tenement, is situated adjoining the Plaintiff's land, the servient tenement, which happens to be situated at a lower gradient. In the leading South African case of ***Ludolph v Wegner***[1] de Villiers, C.J quite poignantly alluded to two modes of creation of the right of the upper tenement to discharge water on to the lower tenement:

> *"A right to discharge water upon a neighbour's land may exist by virtue of a duly created servitude, or by virtue of the natural situation of the locality."*

In addition to the aforesaid two modes of acquisition of the right to discharge water to the low-lying neighbour's land namely, agreement, ie servitude (*lex*) and creation owing to natural location (*natura loci*), the learned Chief Justice of South Africa also alluded to the other modes of acquiring a drainage right viz by prescription or *vetustas*. He explained *vetustas* thus:

> *"Where water has flowed in an artificial channel for thirty years or more* ***it may be presumed,*** *in the absence of evidence to the contrary, to have flowed immemorially."*[2]

In fact the learned authors of the book *"Servitudes"* **C.G. Hall & E.A. Kellaway,**[3] explain the law relating to the servitude of discharging of water by an upper tenement onto a lower tenement as follows:

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[1] (1888), 6 S.C 193

[2] See *Ludolph v Wegneribid*; also see Servitudes by Hall and Kellaway

Drainage Rights: "The liability of a lower-lying land to receive water draining from the property above it, can originate in three different ways; viz:

(a) Owing to its natural situation (*natura loci*),

(b) By agreement, i.e., servitude (*lex),* and

(c) By prescription or *vetustas.*

With regard to enjoyment of this servitude by the owner of the upper tenement for a long period of time, the above authors state[4]:

> *"If the upper owner has discharged his drainage water onto the lower property by means of an artificial channel for the period of prescription, and he can prove that he has done so adversely to the rights of the lower owner, he is entitled to continue to do so. If it is shown that water has been discharged from the neighbouring land by means of an artificial water course for thirty years and upwards, the Court may apply the doctrine of vetustas and, in the absence of evidence to prove when it was originally constructed, may find that it existed from time immemorial and that the upper owner is entitled to continue to use it as if it were a natural water course".*[5]

Vetustas or Presumption of Prescription by Immemorial Usage

The Defendant's position is that since the year 1906 it has been discharging rainwater from its land to the Plaintiff's land without any protest, and therefore the Defendant has acquired prescriptive right thereto. In the premises the contention of the Defendant has been that the long user without any protest since 1906 conferred on it both a prescriptive right to discharge water and *vetustas* (presumption of

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[3]C.G. Hall & E.A. Kellawe, *"Servitude"* (3rd Edition) pp 98-99 *Jute & Co. Johannesburg,*
[4]ibid p99
[5] Cited from *Ludolph v Wegner, ibid.*

prescription by immemorial usage). In fact the court *a quo* the District Court of Colombo specifically classified this as a case of *vetustas.*

I hold the view that the court *a quo* was in error when it held that the presumption of *vetustas* applied having regard to the exercise of this right since 1906. The argument of the Defendant that much water flowed down under the channel so to speak from the year 1906 and such long user created *vetustas* does not hold water in the teeth of the contrary evidence i.e water began to flow from 1906 only because of an agreement between the parties. Thus admittedly the originating terminal was fixed in the form of an agreement in 1906 and as I refer to it presently in the judgment the parties admitted to the 1906 origin of the right in their admissions at the trial. Inasmuch as it is not impossible to show when the right to discharge water began the doctrine of *vetustas* or immemorial usage has no application. It is nobody's contention that water began to flow from time immemorial. So the learned District Judge misapplied the presumption when there was good enough evidence before him to disapply it.

Having thus disposed of *vetustas* I would proceed to consider the next question whether prescription of an incorporeal right such as is claimed by the Defendant in the cases arises from the exercise and user of this right for ten years or upwards. The defence of prescription must fail for the same reasons. I have to assert at the inception that the Defendant has not adduced any evidence to establish that it acquired a prescriptive right to discharge water since 1906. The admission made at the trial puts paid to this defence.

Effect of Admission of parties

It was admitted by both parties at the trial that the defendant company commenced to enjoy the right to let rainwater on to the plaintiff's land, as a "permissive right" since 1906. This admission on the part of both parties to the suit connotes that the grant of a servitude was agreed upon as far back as 1906 but the evidence led in the case does not support the contention that this servitutal right to discharge water turned adverse at some point of time to the detriment of the Plaintiff in such a way as to confer a prescriptive right on the Defendant. If the commencement of the servitutal right is referable to a consensual agreement as admitted by parties, it is founded on sufferance. Such user cannot be construed as adverse to the interest of the owner of the servient tenement-the Plaintiff in the case.

Basnayake C.J (with Pulle J. agreeing) succinctly elucidated the quantum of evidence necessary in regard to proof of prescriptive user in ***de Soysa v Fonseka***[6]

> *"Servitudes are onerous and the law does not favour them, and it is incumbent on a person who claims a servitude to establish his claim by clear and satisfactory evidence of the strongest kind. There is no evidence that the user which commenced with the leave and licence of the owner was at any time converted to an adverse user. When a user commences with leave and licence, the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescribed period is necessary to entitle the claimant to a decree in his favour."*

[6] (1957) 58 N.L.R 501

If at all any semblance of adversity was displayed it manifested itself, as has been spoken to by the Plaintiff's witness, in the form of an increased volume of water which lashed on to the land of the Plaintiff, in 1991 when water flooded the servient tenement and damaged the walls of the Plaintiff's stores. There were exchanges of correspondence over this overflow and consequent damage between the parties as evidenced by the marked documents P2, P3, P4 and P5 and the evidence indicates that after a site inspection, the Water Supply and Drainage Division of the Municipal Engineers Department, Maligakanda also intervened to write to the chairman of the Defendant on 15th January 1993 highlighting the fact that *wastewater* had been discharged through the open rainwater drain and it was not intended for the purpose (*sic*). This letter dated 15th January 1993 has been marked as P6. The Defendant gave no evidence and there is nothing on record that admits of prescriptive user.

On the other hand the documentary evidence in P2, P4 and P5 marked and produced on behalf of the Plaintiff establishes the fact that there had been continuous flow of wastewater and consequent damage to the Plaintiff's premises. The document marked as P2 dated 11th February 1992 which was written by the Stores Manager of the Plaintiff to the Managing Director of the Defendant addresses the discharge of *waste water* as a continuing process in the following manner-

> *"We invite your attention to our letter of 21/5/1991 and regret to inform that waste water from your premises continues to flow into our premises."* (first paragraph of the body of the letter).

Whilst the oral testimony referred to increased rainwater which caused damage, the documentary evidence in the form of P2 and P6 highlighted the continuous discharge of waste water. The document marked P3 which was a reply by the Defendant to P2 is quite explicit in that it only refers to an arrangement in 1906 to let rainwater drain into the Plaintiff's premises. There was no arrangement to drain off waste water to the neighbor's land. Thus the story of discharge of waste water as confirmed by P6 remains uncontradicted.

At this stage it has to be borne in mind that the servitude claimed if at all was in respect of discharging rainwater through the premises of the Plaintiff. Does it extend to the imposition of a more onerous burden of subjecting the land of the Plaintiff to injury or occasioning a discharge of waste water? These are issues that this case throws up but the learned District Judge does not seem to have appreciated them.

Before I embark upon a survey of the law relating to the matters in issue, I deem it apposite to refer to the oral testimony led in the case which goes towards determining the rights of the parties. The important question in this type of cases that arises for determination is in what circumstances the Defendant enjoys a right of letting normal rainwater from his land on to the Plaintiff's land and whether the Defendant caused any alterations for the natural flow of the water and thereby increased the volume of water from his land on to the Plaintiff's land. Or regardless of the question of human interference on the dominant tenement which would cause an overflow, whether the overflow and consequent damage to the property of the Plaintiff would be reasonable in the facts and circumstances of this case is another issue that the Court has to engage with. If there was no evidence to indicate that the increase of flow of water was owing to human interference, was the

flooding of the Plaintiff's land authorized within the servitude that the Defendant enjoyed?

In the instant appeal before me, I have already commented as to how the Plaintiff and his predecessors in title permitted the natural flow of rainwater from the Defendant's land to the Plaintiff's land for a long time. To this right the Plaintiff has had no objection. But in 1991, the Plaintiff began to protest against this right, because the overflow of water was so substantial that it caused damage to the Plaintiff's store.

The Plaintiff's witness Balasingham Sunderaraj in his evidence has stated that "the water coming from the Defendant's land goes to the drain and thereafter comes to our land and thence it goes out". (pages 61, 62 and 66 of Appeal Brief). There is no dispute that as a consequence of the overflow the Plaintiff sustained damage. From the evidence of Sunderaraj, it is apparent that although the Defendant had been letting its rainwater through the Plaintiff's land, the volume of water increased in 1991 causing damage to his property and this made the Plaintiff make a formal complaint to the defendant company in 1991. It was followed up by P2, P4 and P5 in 1992. In 1993 the Municipal Engineer wrote to the chairman of the Defendant.

Although before the institution of this action in 1994 both parties had communicated with each other to settle this dispute with the help of the Municipal Council Engineer's Department, these attempts proved abortive and were of no avail. Even after the site inspection made by the officials of Municipal Council Engineer's Department, the dispute appears not to have been settled. The document marked P6, (which is not a document among the documents rejected by the District Judge, see page 9 of the judgment and page 84 of the Appeal Brief), is a letter sent by the Municipal Engineer to the Chairman of the defendant company,

after inspection of the place on 12th January, 1993. The second paragraph of this latter states as follows:

> *"It is observed that you are discharging waste water through the open rainwater drain which is not intended for the purpose. Hence, you are advised to connect this waste water into your sewer system after obtaining approval from this Division".*

The evidence given on behalf of the Plaintiff demonstrates that the Defendant exceeded the scope and extent of the right granted, in or about 1991, that finally resulted in the Plaintiff sustaining damage. (See Sunderaraj's evidence at page 61). These matters are clearly established by Plaintiff's witness Sunderaraj and the documents marked P3 to P6. (See Sunderaraj's evidence at page 69 of Appeal brief).

Having examined the facts, let me now turn to the law concerning drainage rights and as the natural flow of rainwater is in dispute it is pertinent to begin with the rules of law which have evolved in this connection.

Natural flow of rainwater

It is axiomatic that at best for the upper owner, his right extends so far as to require the lower neighbor to accept the "natural flow."[7] The term "natural" is inherently confusing for it has two distinct meanings. In its primary sense it signifies "that which exists in or by nature and is not artificial". It also means, however, "that which is ordinary and usual, even though it may be artificial". In the instant case before me if there was no protest for a long time against the discharge of water from the higher lying owner to the land of the low lying owner, parties must be taken to have appreciated the quantum of water and its original pattern of flow. The dispute

[7] See *Williams v Harris* 1998 (3) SA 970 (SCA)

seems to have begun in 1991 when there was an excessive discharge that not only flooded the land of the Plaintiff but also damaged its stores. It becomes incumbent upon the learned District Judge in the circumstances to consider whether this excessive burden could be imposed on the servient tenement over and above the obligation which it admittedly took upon itself in 1906.

The Roman-Dutch law recognizes the natural flow of clean rainwater from the upper tenement to the lower tenement, but it does not recognize letting of water with stones and rubbish. The interest of the servient tenement was safeguarded by the obligation being imposed on the dominant tenement to keep the sewer clean and under repair-see *Grotius.*[8]

Admittedly the Defendant's land is at a higher elevation than that of the Plaintiff's land and therefore there would be a natural flow of water from the Defendant's land to the Plaintiff's land. What has been relied upon as the source of the servitude is the existence of the agreement in 1906 though I have already referred to the judgment of de Villiers, C.J in ***Ludolph v Wegner***[9] wherein the other modes of creation of drainage rights were elaborated *in extensor* thus:

> (1) A right to discharge water upon a neighbour's land may exist by virtue of a duly created servitude, or by virtue of the natural situation of the locality.
>
> (2) If it be difficult from the nature of the surface to ascertain what is the natural channel, then the course in which the water has immemorially flowed will be considered as having had a natural and legitimate origin.

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[8] 1 *Grotius, bk.*11.,*ch.*34, *sec*24.
[9] (1888), 6 S.C 193

(3) Where water has flowed in an artificial channel for thirty years or more, it may be presumed, in the absence of evidence to the contrary, to have flowed thus immemorially.

(4) When once the right to discharge water into such a channel has been established the person entitled to the right may increase the ordinary flow to the prejudice of the lower proprietor, if such increase be occasioned in the ordinary course of draining, ploughing, or irrigating the upper land, and be not greater than is reasonable under circumstances. If the channel becomes choked through neglect, he may compel the lower proprietor to clean it himself or to allow him – the upper proprietor – to do so".[10]

All these elements were restated in the same tenor by Grenier J in the case of ***Samuel Appu et al v. Lord Elphinstone et al.***[11]

Natural Servitude

The Roman-Dutch law of the servitude, known as *ius fluminis,* is also defined by Maasdorp[12] in the following terms:

> *"No action will lie either against an upper or lower proprietor for damage due to an alteration in the natural drainage, if such alteration is due not to any work expressly constructed with that object, but merely in consequence of the enjoyment of his property and the cultivation of his land in a* ***fair and reasonable manner in the ordinary way****. E.g., by making irrigation furrows where there can be no cultivation without them, or by cutting ditches for the*

[10] Nathan's *Common Law of South Africa, Vol. 1, p. 484 et seq*
[11] 12 N.L.R 321 at 328-329.
[12] *Institute of Cape Law, Vol. II, pp. 123 and 124*

drainage of his land, provided he does not collect the water into one united stream and then discharge it on to his neighbour's land in a more forcible and destructive manner than it would otherwise have got there naturally, for every one ought to improve his own land in such a way that ***he does not thereby deteriorate the land of his neighbour****. But where an upper proprietor is entitled to use a particular channel for the discharge of his surplus or rain water he will be entitled also to increase the ordinary flow into such channel, even to the prejudice of the lower proprietor, if such increase be occasioned in the ordinary course of draining, ploughing, or irrigating his lands, and be not greater than is reasonable under the circumstances".*

Chief Justice Maasdorp further elaborated that,

"A natural servitude of this nature is, of course, limited in its extent. The lower proprietor is obliged only to receive such water as flows in the ordinary course of nature from the upper tenement. ***He is not bound to receive water which the upper proprietor has discharged into his premises by any artificial means which alters the natural drainage of the land, such as a ditch or channel".***[13]

Whilst setting out the qualifications attached to the servitude, the above passages also demonstrate the scope and extent of the servitude.

Actio acquae pluviae arcendae (actio a.p.a)

Even though the Plaintiff pleaded in the alternative that the Defendant wrongfully and unlawfully from about 1992 carried out alterations to the natural drainage to the land and/or caused alterations to the land which increased the volume of water and/or other matter to flow on to the Plaintiff's land, I must state that this act on

[13] Maasdorp, *Institute of Cape Law,* Vol. II, p. 172

the part of the Defendant was not established having regard to the evidence. This brings me to the form of action known as *actio acquae pluviae arcendae* (actio a.p.a or the action 'for keeping off rainwater') which usually forms the foundation of the action to compel an owner to remove any works erected on his land which diverted the natural flow, and restore the land to its previous condition.[14] So the essential requirement of the action was that by the work of man the natural flow of the water had been diverted. Cicero pointed out that there were two species of rainwater that had to be considered: "One which does damage because of a fault in the land, and the other because of the work of man."[15] Only in respect of this latter species of harmful rainwater did liability arise under this action. Absent evidence of human interference, Ulpian said that the action will "never lie where the nature of the ground causes the damage."[16]

In a nutshell the claim of the Plaintiff is not based on *actio a.p.a.* There is no positive proof of a construction of a structure on the part of the Defendant and abatement thereof. The following passage from the judgment of Solomon J A in ***Cape Town Council v Benning***[17] brings out the point:

> "*It would appear, therefore, according to these authorities, that the owner of land upon which some work has been done, the effect of which was to divert rainwater from its natural course and to discharge it onto the property of a third person, was liable under the actio aquae pluviae arcendae at most to abate the mischief and to make good any damage sustained after litis contestatio; and further that the person who had actually done the work,*

[14] See D.39.3.3.3.4.
[15] *Topiza*, 9.39
[16] D.39.3.1.14
[17] 1917 AD 315 at 321

whether he was the owner himself or a tenant or other person, was liable for the damage suffered before litis contestatio under an entirely different form of action."

If *actio a.p.a* is not the action that was instituted by the Plaintiff in the case, then what form has it taken? Certainly the Plaintiff cannot be restricted to *actio a.p.a.* The pleadings and issues No. 1(a), 1 (b), 2 (a) and 2 (b) which go as follows determine the form of action.

1(a). *Did the defendant* ***wrongfully and unlawfully,*** *from about 1992 discharge sewage and/or water containing sewage and/or noxious matter on to the plaintiff's land? (vide paragraph 6 of the plaint).*

1(b). *If so, is the plaintiff entitled to judgment as prayed for in prayer (b) to the plaint?*

2(a). *Did the defendant* ***wrongfully and unlawfully*** *from about 1992 cause water to flow into the plaintiff's land?*

2(b). *If so, is the plaintiff entitled to judgment as prayed for in prayer (a) to the plaint?*

Issues call in question the discharge of sewage and water that would amount to wrongful and unlawful invasion of the private rights of enjoyment of the Plaintiff's property. I have referred to the evidence that consequent to the deluge that submerged the Plaintiff's land, the original pattern of flow was disturbed and there began a series of correspondence between the parties as reflected in both the oral and documentary evidence.

This brings me to the issue of wrongfulness and unlawfulness that is alleged by the Plaintiff. Is it wrongful and unlawful to discharge excess water over and above the

scope and extent of servitutal right enjoyed by the Defendant? Is it wrongful and unlawful to discharge sewage or wastewater as P2, P4 and P6 allege? It is the substantive law that has to regulate the right-duty relationship between the parties and I will presently turn to it. In other words a consideration of these questions also surfaces to the fore the question of whether in the process of permitting the natural flow of rainwater to pass through his land the owner of the servient tenement is limited in his duty to accept excessive water on to his land.

Limitations on the Lower Holder's Obligations

The Defendant has no right to let his excess water, other than the natural rainwater, on to the Plaintiff's land, without the Plaintiff's consent. The Defendant has the right to do so only to the same extent as he was permitted in the past. If the Defendant has excess water, he must have other means to let it go without causing any damage to the Plaintiff's land. He must make other channels or way out to drain the water from his land without letting the excess water into the Plaintiff's land.

The Defendant could initiate this process in consultation with the Municipal Engineers whose technical advice would be material. No evidence has been led as to the steps the Defendant took in order to relieve the Plaintiff from the excessive burden, more particularly since the inspection of the site of dispute by the Municipal Engineers in 1993.

As to the obligation on the part of the Plaintiff-the owner of the servient tenement, it is my respectful view that by the common law of drainage, the Plaintiff possesses a jus nature as owner of land to demand that the natural drainage which served his land, be not disturbed to his detriment. The onus would be strictly on the Defendant

to justify such disturbance. In the South African case of ***Pappalardo v Hau***[18] Hurt AJC emphasized that 'natural flow' referred to the manner in which the water would have flowed, both as to quantity and locality, from the one property to the other over the land in its undisturbed state and I must state that the court *a quo* paid no heed to what may be called the 'original pattern of flow' from the Defendant's to the Plaintiff's land.

The pertinent holding in the case is worthy of repetition:

> *"Although the quantity of water thus discharged may equal the quantity of water flowing down from undisturbed land, the lower owner could still be called upon to cope with a pattern of flow which would not naturally have occurred,* ***but only if the higher lying owner had acquired an express servitude to this effect by registration, prescription or by agreement."***

The learned District Judge in the court *a quo* did not bear in mind the all important consideration that the Defendant had not acquired any express servitude by the recognized modes to let in excessive water that went on to cause damage, quite contrary to agreement which applied only to natural flow. It is also pertinent to observe that the allegation of waste water had been continuing till 1992. In this connection it is useful to recall the dicta that every occupier is bound to prevent filth from his drain from filtering through the ground into neighbour's land.[19] That is to say, every man should keep his own filth on his own ground. ***Tenant vs. Goldwin.***[20] He is liable even when leaking drains were not known to be so. ***Humphries vs.***

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[18] (2009) ZASCA 160

[19] Addison on *Torts, c. IV, s. 1 Nuisance pp. 156 and 333*

[20] 1 Salk 21, 360

Cousins;[21] where moisture escapes - ***Alston vs. Grant;***[22] ***Billard vs. Toulvson;***[23] or escape of water from a cellar. ***Show vs. Whiteheal.***[24]

The above principle was followed in the case of ***Siyadoris vs. Silva,***[25] where a large quantity of silt was carried along the drains in the Defendant's land which he had cleared and planted with rubber into a water channel in the Plaintiff's field, the channel was blocked and eventually breached, and the silt overflowed into the field and rendered it unfit for cultivation as a field. The Plaintiff sued the Defendant for damages. The District Judge held that the Plaintiff should have kept the channel clear as it was in his field, and that as he had failed to do so, he was not entitled to damages. But Schneider J. in appeal, held that the Defendant was liable in damages on the basis of the principle *"sic utere tuo ut alienum non laedas".*

So much for the substantive law on both the limitations on the sevitutal obligation to receive natural flow and the duty on the part of a dominant tenement not to dispatch sewage or waste.

The substantive law on both these aspects confirms that one need not put a label on the Plaintiff's right of action but in my view the terms of the pleadings and the declaration sought also embody the suit under the Roman Law actions based on *immissiones.* The *immissio* of a corporeal thing on to another's property was actionable under the Roman Law. This is referred to by Professor Schultens in his 1956 Annual Survey at page 133 in which he gives the translation of Digest 8.5.8.5 as follows:-

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[21] (1877) 2 C.P.D. 239
[22] (154) 3 E. 7. B. 128
[23] (1885) 29 Ch. D 115 C.A.
[24] (1884) 27 Ch. D. 588
[25] 24 N.L.R.197

"Aristo says in an opinion given to Gerellius Vitalis that he does not think that smoke can lawfully be discharged from a cheese factory on to buildings which are overhead, unless the buildings are subject to a servitude of that particular kind that such a servitude be recognized. The same author declares that it is not lawful to discharge water or anything else from the building above to the building below as a man is at liberty to carry on operations within his own premises in such a manner only as not to discharge anything on those of anyone else; and it is, he adds, just as possible to discharge smoke as it is to discharge water; accordingly he says the upper owner can bring an action against the lower owner in which he asserts that the latter has no right to act in the way described." (see also Voet 8.5.5).

In my view the English law relating to nuisance insofar as discharge of water is concerned is very much like the Roman Law relating to *immissiones*, and the Plaintiff's action could be based on nuisance as well.

As I have stated it is not necessary to place a label on Plaintiff's right of action. The evidence has come across that an "excessive and unnatural quantity of water" was discharged from the Defendant's land and such discharge resulted in damage to the Plaintiff's land. The Defendant could have shown by evidence that in discharging such water he was acting reasonably in the use of his own land.

In this case having analyzed the law and the evidence led on behalf of the Plaintiff, against which the Defendant has not adduced any evidence, I hold the view that the Plaintiff has established a cause of action.

The learned District Judge has not gone into the ingredients of the law relating to *jus fluminis* and the right - duty relationship between the Plaintiff and the Defendant in

regard to this servitude. He has not borne in mind the limitations on the lower-lying neighbor's obligations in regard to this right. In the circumstances I hold that the judgment of the District Judge has failed to look into all aspects of law and facts engulfed in the issues raised in this case.

In the circumstances, I set aside the judgment entered in this case and enter judgment in favour of the Plaintiff as prayed for in the prayer (a) and (c) of the plaint.

Judge of the Court of Appeal