Privy Council Appeal No. 106 *of* 1924.

Maung Bya and another - - - - - - *Appellants*

v.

Maung Kyi Nyo and others - - - - - - *Respondents*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JUNE, 1925.

Present at the Hearing:

LORD ATKINSON.
LORD SHAW
LORD DARLING.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment of the Chief Court of Lower Burma (Maung Kin and Duckworth JJ.) dated 31st May, 1921, allowing the appeal of the respondents against a Decree of the District Court of Pyapon (Po Bye District Judge) dated 27th September, 1919, by which the said District Judge ordered the respondents to pay the appellants the sum of Rs. 8.821–48 by way of damages and the costs of the suit.

The appellants in the second paragraph of their case allege that the question raised is whether in Burma a lower agricultural owner is liable to compensate a higher agricultural owner for damage to crops by inundation caused by the blocking of a canal running through the lands of the lower owner by which the water would otherwise have been drained from the land of the higher owner.

In a sense, but only in a limited sense, is that statement accurate. Save in the second and third of the reasons for their appeal it is put forward that the law applicable in Lower Burma to the flow of and flooding by fresh-water rivers or watercourses,

whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is different from the law as applied to similar subjects in England. A little consideration of the two cases cited will show that there is no conflict between the two systems of law, and it was not contended in argument on the hearing of the appeal that the general principles of the laws of England touching the matters above mentioned did not apply to Lower Burma.

The action out of which the appeal has arisen was brought by the two appellants (who are husband and wife) in the District Court of Pyapon, Lower Burma, to recover damages amounting to Rs. 13,448 for the wrongful flooding by the acts and procurement of the respondents of a large tract of paddy lands 68,541 acres in extent, belonging to the appellants, whereby the productivity of these lands was, in the season in which the acts were done, so reduced that they only yielded 3,867 baskets of paddy instead of their normal yield of about 17,300. The District Judge decided in favour of the appellants and awarded them Rs. 8,821·48 damages. The Chief Court on appeal reversed the decree of the District Judge, and on grounds which appear to the Board strange, and are indeed unsound, decided in the respondents' favour.

Several maps of the locality were given in evidence; the two most intelligible and useful were the first, a map marked exhibit A, and the second, dated in the year 1906–7, described as exhibit 2A. With almost perverted ingenuity the draftsman of these and, indeed, of many other maps, has omitted to place upon the face of them any indication of the points of the compass, so that in dealing with them one is obliged to use the words left and right, and top and bottom of the maps in order to endeavour to fix any point or object. A study of these two maps, however, enables one to get an idea of the terrain, especially as the map of 1906 represents what was the nature of the tract of country with which the case is conversant before any of the works were executed, the misuse of which is alleged to have caused the flooding, and as the second map, exhibit A, shows what were the features of that tract after these works had been executed. The map of 1906–7 purports to be a plan 126 of Sakangyi circle, Bogale township. It corresponded closely with the map exhibit A.

Many rivulets or watercourses are depicted upon it. They correspond with those depicted upon exhibit A. The main difference between them is that on the latter a prolongation of the watercourse from Singu Chaung is to be found which is absent from 2A of 1906–7.

The watercourse, styled extravagantly the canal, represented on A, and lettered A, B, C, D, G, H, emptying into the sea creek at A is precisely the same watercourse as is represented on the map of 1906–7, coming from Singu Chaung and debouching into the same sea creek at the same place. No doubt the so-called canal is represented as being something broader than the corresponding stretch of watercourse on the map of 1906, but the

fact of vital importance is that all the rivulets or watercourses are depicted as of the same width and kind, and resemble each other in all respects. There could be no object in depicting on this map a watercourse as existing where none, in fact, existed when the map was made. The map therefore absolutely refutes the contention put forward with some hardihood on behalf of the respondents, that before the canal was made its site was a mere depression in the earth surface through which no stream ran; but in which, after heavy rain, stagnant water for a time accumulated. Now what was done in 1913–14 was, in their Lordships' view, the widening a little, and deepening a little, possibly trimming the banks a little, of an existing ancient fresh-water natural watercourse, not in their view the making by excavation and such work of a watercourse, styled a canal, where none such theretofore existed.

The lands of the first respondent lie to the left-hand side of the map, between the lands of the appellant and the sea creek Kyonkan Chaung. On the map exhibit A they are numbered 17, 18, 30, 31, 32. The other respondents are merely cultivators in the village of Kamakalu. The lands of the appellants are comprised in three kwins lying to the right of the first respondent's lands and named respectively Kasaung Ngotto (both marked on exhibit A), and Sakangyi South and Kasaung Ngotto (both marked on map B). They are numbered separately 1–14 on map marked B. In addition to the refutation of the respondents' suggestion as to there never having been formerly a rivulet or watercourse where the canal exists now, one finds that several witnesses depose to there having been a small Yo where the bridge was afterwards erected, that a jungle log was placed across the Yo before the bridge was built, which certainly suggests to their Lordships that this log was designed to fulfil the function of stepping stones to enable people to cross the stream, possibly dry-shodded and in safety.

In the present case the early history of this *locus in quo*, this large tract of paddy land intersected with rivulets of water, large or small, is very vague. The evidence as to what were the rights and obligations which the inhabitants owed to each other in reference to these watercourses, the local law as to their regulation, their enjoyment and protection, is so confused and contradictory that it has occurred to the Board that it would possibly be better to reverse the usual order of procedure and, before dealing with the evidence of the witnesses, the facts proved, and the rulings of the judges, to demonstrate, by reference to four or five well-known English cases, what the well-established law is touching the flow of and flooding by rivers and watercourses, the diminution of their currents or the diversion of their course, the trespass upon their beds, the incursion of the sea upon one's land, and the measures the owner may take to protect himself, and then by applying a coherent and consistent body of principles to the facts proved, thus endeavouring to solve in harmony with English law the issues raised, considering any local law which may modify the English law.

The first of these cases is *Bickett* v. *Morris*, L.R. 1 H.L. (47).

It deals with trespass on the alveus or bed of a fresh water watercourse.

The appellant obtained, in consideration of £10 paid by him, permission from a riparian owner on the river Kilmarnock, in Ayrshire, to extend a certain wall then standing on the respondents' premises on to the alveus of the river as far as was indicated by a red line drawn on an identified ordnance map. The appellant proceeded to build the wall, but, as the respondents alleged, not in the direction indicated. The respondents accordingly applied for an interdict against him, and brought an action for a declaration that the appellant had no right to erect buildings on the solum of the river beyond the red line aforesaid. Lord Cranworth, in delivering judgment, dealt at length with the legal points raised in the discussion. At page 58 of the report he said:

> "By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the soil of the alveus or bed of the river *ad medium filum aquæ*. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus, each of them, up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land. The appellant contended that as a consequence of this right every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the alveus so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think that is a true exposition of the law."

Lord Cranworth then dealt with the difficulty, almost the impossibility, of determining in anticipation what damage may result in flood time by the erection of buildings on the alveus of a stream, and speaking of the riparian proprietors, put their case succintly in these words.

> "They are entitled to say 'We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.' This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure."

Lord Westbury, at page 61 of the report, thus expresses himself:

> "When, however, it is said that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow that that property is capable of being used in the ordinary way, in which so much land uncovered with water might be used; but it must be used in such a manner as not to affect the interest of riparian proprietors of the stream. Now the interest of a riparian proprietor in the stream is not only to the extent of preventing it being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor."

So much as to interference with the alveus which is stated in the head note of this case to be *sacred*.

In *Menzies* v. *Breadalbane* (*Earl of*), 3 Bligh N.S. 414, it was held that a proprietor on the bank of a river, having com-

menced the building of a mound, which, according to the opinion and report of an engineer, would, if completed, in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank so as to overflow and injure them, should be restrained by perpetual interdict from the further erection of any bulwark or other work which might have the effect of diverting the stream of the river in time of floods, *i.e.*, ordinary flood, from its accustomed course and throwing the same upon the lands of the appellant. Lord Eldon, in delivering the judgment of the House (at page 418) said :—

> "It is unnecessary to trouble your Lordships with any observations on the law of England . . . because it is clear beyond a possibility of doubt that by the law of England such an operation" (*i.e.*, as that complained of) "could not be carried on . . ."

At p. 419 he then said :—

> "But let us see what is said on this subject by the institutional writers on the law of Scotland."

He then quotes with approval the following passage from Erskine's Institutes :

> "When a river threatens an alteration of the present channel by which damage may arise to the proprietor of the adjacent or opposite ground it is lawful for him to build a bulwark *ripæ muniendæ causa* to prevent the loss of ground that is threatened by that encroachment."

Lord Eldon then proceeds :—

> "so that the proprietor whose lands are threatened to be washed away, may, for the purpose of protecting his own property in a case of that description, raise a bank for his own security ; but this bulwark must be so executed as to prejudice neither the navigation nor the grounds on the opposite of the river."

This right of navigation, however, is not a right of property. It is simply a right of way which must not be interfered with. (*Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839, 846.)

In *Nield* v. *The London and North-Western Railway Company*, L.R. 10, Ex. 4, the defendants owned a canal which was threatened with an overflow into it of flood water from a neighbouring river, and, fearing damages to their premises situated on the banks of the canal, placed across the canal some planks rising up higher than the level of the water in the canal, which, being obstructed when the flood increased, rose till it flooded the plaintiff's premises. In an action brought by the plaintiff to recover damages for this injury, it was held that the defendants were not liable on the ground that they had not brought on to the plaintiff's premises the water which did the injury, and that there was no duty on the owners of a canal analogous to that resting on the owners of a natural watercourse not to impede the flow of the water down it.

So much as regards fresh water streams. As regards the right of an owner of land whose land is exposed to the inroads of the sea, the case of *The King* v. *The Commissioners of Sewers for Pagham*, 8 B. & C. 355, many times approved of, is a distinct authority. In delivering his judgment that most able and learned Judge, Bayley J., stated the rule of law in these words :—

> "Every land owner exposed to an inroad of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose, and the Commissioners (*i.e.*, the defendants) may erect such defences as are necessary for the land entrusted to their superintendence. If, indeed, they make unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment for an abuse of the powers vested in them. But if they act *bona fide*, doing no more than they honestly think necessary for the protection of the level (*i.e.*, the land they superintend) their acts are justifiable, and those who sustain damage therefrom must protect themselves."

The last English case necessary to refer to on this subject is that of *Whaley* v. *The Lancashire and Yorkshire Railway Company*, 13 Q.B.D. 131. It is somewhat peculiar in its features. The defendants were proprietors of a railway which ran along from east to west over a flat country on a low embankment. A ditch ran along on each side of this embankment for the purpose of draining the railway. The surrounding land sloped from south-east to north-west, so that the land on the north-west side of the railway embankment, where the damage occurred, was at a lower level than on the south-east side of the embankment. The plaintiff was a farmer occupying lands on the north-west side, the lower side of the railway, but separated from it by other lands belonging to other persons. By reason of an unprecedented rainfall a quantity of water which accumulated on the south-eastern side of the embankment, was dammed up against it, and ultimately rose to such a height as to expose the embankment to danger. This water, it was apparently considered, might possibly have percolated through the embankment, and in no sense did the Company, as did the defendant in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, bring the water upon or up to the Company's lands, but when the water had risen to such a height that the defendants thought it was necessary for the protection of their embankment, they caused trenches to be cut in the embankment, through which the water was enabled to escape to the north-west side of the railway and from thence to flow into the adjoining lands and ultimately to the plaintiff's land, damaging his crops. The case was tried before Mr. Justice Day and a jury. The jury found that the cutting of the trenches through which the water flowed was reasonably necessary for the protection of the defendants' property, that it was not done negligently, and that the plaintiff was injured by the water that so came through the trenches to the extent of £138 beyond what it would have been if the trenches had not been cut. On these findings the learned Judge gave judgment for the plaintiff for £130. Brett, M.R., deals in his judgment with the facts of the case and the principles applicable to it. At page 137 he said :—

> "But then it is suggested that if a person has brought the danger on his land, it makes a difference. So it does. If he has not brought the danger there, and without any act of his it breaks through his land on to his neighbour's land, I take it he is not liable. In that case both have suffered from a common extraordinary danger, but one has suffered before the other ;

that is all. . . . In this case the water endangered the embankment and, moreover, it would have gone on to the plaintiff's land in any event; but then if it had been left alone and allowed simply to percolate through the embankment, even though all of it would have gone on the plaintiffs' land, it would have gone without doing the injury which was done by reason of its pushing through the cuttings which the defendants made. The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and therefore it seems to me that they are liable."

Lord Justice Lindley, at page 140 of the report, says :—

"It appears to me that this case is more analogous to the Scotch case of *Menzies* v. *Earl of Breadalbane* and *Nield* v. *L.N.W.R. Company*.

"It seems to me established by those cases that if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away without being responsible for the consequences, although his neighbours may be injured by it."

"*Rex* v. *Pagham* Commissioners is another step in the same direction. . . . We must look at the broad question, which is whether a land owner on whose land there is a sudden accumulation of water, brought there without any fault or act of his, is at liberty actively to let it off on the land of his neighbour without making that neighbour any compensation for damages, because the landowner by doing so has been able to save his own property from injury? I can see no authority for that, and it appears to me the general rights and duties of landowners are decidedly against it."

Some point was made in this case to the effect that the stream alleged to have been stopped up was at best merely an artificial watercourse and not a natural one. In the latter case the successive riparian owners have been each entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land as a natural incident of the ownership of his land. In the former case, however, any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought. (*Rameshur Pershad Narain Singh* v. *Koonji Behari Pattuk*, 4 App. Cas. 121; *Kensit* v. *Great Eastern Railway Company*, 27 C.D. 122, 134.)

There is, however, a well-established principle of law directly bearing upon this case and vitally affecting it, namely, that a watercourse originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream. (*Sutcliffe* v. *Booth*, 32 L.J., Q.B. 136; *Holker* v. *Porilt*, L.R., 8 Ex., 107; *Baily & Co.* v. *Clark, Son and Morland* [1902], 1 Ch. 649, 664, 669, 673.)

It is not necessary in order to apply the principles of these decisions to analyse the evidence in detail. It was proved by a Public Officer, the Superintendent of Land Records, and not contradicted, that this so-called canal went right up to the boundary of the appellants' land; while on the following five paragraphs of the written statement of the respondents they practically admitted the facts founding the charge against them, though at

the same time they misrepresent the conduct and action of the appellants. These paragraphs run thus :—

> 6. The said channel became wider and longer through erosion, with the result that the salt water from Kyonkan Chaung overflowed on the lands of this defendant and of adjoining cultivators and caused damage thereto.
>
> 7. In order to prevent such damage in or before the year 1914 the first defendant admits there was a bund erected across the said channel at a point where it flows through the land of this defendant and others. Such erection was said to be by the permission of Maung Thi Hla, the then Township Officer of Bogale.
>
> 8. The said bund gave away in or about the year 1916–17, and this defendant with his assistants repaired the bund formerly erected at the same place where the original bund was erected without any objection on the part of the plaintiffs or any one else.
>
> 9. On the 1st July, 1917, the first plaintiff and others illegally trespassed on the first defendant's lands originally acquired and lands purchased afterwards and opened the said bund, but the bund was erected again as there was no legal order and report that effect was made to Thugyi Maung Shwe Loon.
>
> 10. On or about the 25th August, 1917, in pursuance of an order of the Deputy Commissioner of Pyapon, the said bund was opened, and after such date it has not been closed.

The evidence and findings of the Judges upon these statements establish, as will presently be shown, that the defendants themselves erected the bund referred to in the second as well as in the third of these paragraphs. To effect this work they must have gone in upon the alveus of the canal, closed up with this bund, the eye of the bridge what was the outfall of the canal into the sea, and thus have offended against the law as laid down in the English cases. The District Judge framed for himself certain issues and answered them thus : To the second issue he gave the answer that the canal was not a Government constructed work, but was for a long time before 1906–1907 a naturally-formed channel. The third issue so framed ran, " Did this canal facilitate the free outflow of rain water from the plaintiffs' (appellants') paddy lands ? " His answer ran thus : " There cannot be any doubt that as all the parties admitted the canal takes the water into the Kwin from the Kyonkan Creek at flood tide, and takes the water out from the Kwin into the creek at ebb tide, therefore a certain extent of rain water must find its way into the Kyonkan Creek as a natural consequence." And, again, " there cannot be any doubt as to the motive of the defendants that they erected the bund and closed the canal to protect their own fields from salt water ; but there cannot also be any doubt that the stoppage of the outflow at ebb tide caused the excess water to remain in the fields of both the parties." He answers the fifth issue in the following words : the " weight of evidence is clearly in favour of the plaintiffs," and I would [thus] answer the fifth issue.

He further finds that Map 2A makes it clear that the channel had been in existence before the year 1906–1907, and that there was no canal construction by any one. He ultimately gave a decree in favour of the appellants for Rs. 8,821–48. No case has

been made that these damages were excessive in amount if the legal wrong complained of had been actually committed. There was ample evidence in the case to sustain the findings of the District Judge if he believed the witnesses who gave it, as apparently he did, having seen and heard them. It appears to their Lordships plain that the access of some salt water from the creek through the eye of the bridge into the canal twice in the twenty-four hours in flood tide does not resemble in any way those incursions of the sea dealt with in *The King* v. *The Commissioners of Sewers for Pagham*, and still less did the closing up of the eye of the bridge, by this bund, and in seasons of heavy rain the ponding up of the fresh water in the canal, so that lands higher up that stream were flooded resemble those necessary precautions which a landowner whose land is at the mercy of these incursions of the sea is entitled to take to protect his property. If the stopping up of the outfall of the canal was justifiable by reason of this access of some salt water at flood then every freshwater tributary to a tidal river could be closed up at its mouth to prevent the like consequences.

Both the cases referred to in the third reason for the appellants' appeal deal with surface water, the rain which falls on agricultural land not with watercourses of any kind. They are irrelevant therefore to the questions in controversy in this case, and are not in conflict it appears to their Lordships with any of the English cases cited.

The respondents appealed, and on the appeal the learned Judges of the Chief Court of Appeal seem to have taken a course as unwise as it was extraordinary. The appellants had undoubtedly in paragraph 4 of their plaint stated that the Government had in the year 1913 dug this canal, shown by letters A, B, C, D, on Exhibit "A." That was no doubt found to be untrue, but no evidence whatever was given to show that the Government had any jurisdiction or authority to do such a thing, and what is much more important that if they had such authority an action could not be brought for any injurious consequence resulting to individuals from its execution.

That paragraph of the plaint is followed by two others, Nos. 5 and 9.

> 5. The said canal thus facilitated the free outflow of the rain water from the plaintiff's paddy lands aforesaid into the said Kyonkan Chaung and rendered cultivable all the lands situate in Kasaung Ngotto West Kwin and Sakangyi South (A) and (B) Kwins, which adjoin the said Kamakalu Kwin.
>
> 9. The plaintiffs have been informed and verily believe that during the month of Kason or Nayon, 1279 B. E., the first defendant's tenants and servants by order of the first defendant and the defendants Nos. 2 to 8, closed the said canal at the point B shown in red ink in the plan Exhibit A.

The alleged wrong for which the plaintiffs claim damages was the stopping up by a bund of the outfall of the canal, by which means the water of the canal, having been denied escape at the proper place, was ponded up, flowed back, and flooded their lands. The identity of the body or person which or who actually formed the canal was a matter wholly irrelevant to the matters in issue.

It did not form even an ingredient in the cause of action, and there is not an averment in the plaint to show that the plaintiffs did not rely upon the canal being an old natural watercourse enlarged, but new or artificial. The plaint is entirely consistent with their relying upon the one thing or the other, as suited them best.

Yet, strange to say, one of the learned Judges in the Chief Court (Mr. Justice Duckworth) considered that this statement as to the digging of the canal by the Government was a matter of such vital importance, that the judgment of the District Judge should be reversed, and his decision in the plaintiffs' favour be over-ruled because this allegation had not been proved.

In justice to Mr. Justice Duckworth, the following passages from his judgment should be quoted :—

> " I have only to add a few remarks. It appears to me that the plaintiff-respondent Maung Bya set up a certain case in his pleadings, by which he must either stand or fall. It is clear, from his plaint, that his case was that, until Government made a canal, the lands which belong to him were unworkable, but that, after Government made a canal connecting the Fishery creeks with the Kyonkan Chaung, his fields became culturable. Further, he contended that owing to the appellant Maung Tet closing this canal, at the Kyonkan Chaung end, by a bund, in 1917 he suffered certain damage through his fields becoming inundated."

It does not appear to their Lordships that this is at all an accurate or fair construction of the plaint of the appellants.

The learned Judge then proceeds :—

> " In fact, treating this channel, as I think we must, as a natural watercourse (see *Kaw La* v. *Maung Ke*, 8 L.B.R. p. 556), we find that appellant is a riparian proprietor, whereas the respondent is not.
>
> " This is the only view of the case which can be inferred from the evidence."

This would go to show that the map of 1906 was right, and that what was done in 1913 was to clean up flooded areas and deepen a natural watercourse, and not to create a new one, involving the forfeiture of the riparian owners' rights.

The last paragraph, the different portions of which seem scarcely consistent with each other, runs thus :—

> " It is quite unnecessary to consider any other points. The respondent set up a case, which he failed to prove, and obtained a decree before the District Court on a case which he had not pleaded. It is settled law that a plaintiff must not be permitted to succeed on a case which he has not put forward directly or indirectly in his plaint. Further, it is apparent that the learned Judge of the District Court took a mistaken view of the facts, his chief error being his overlooking the fact that respondents' lands drew no advantage whatever from this channel until it had opened a way through the road bund into the Kyongkan Chaung, and that only some four years prior to any cause of action having arisen.
>
> " I concur with my learned brother in allowing the appeal with costs, and in the decree passed by him, including special costs to Messrs. Leach and Lentaigne Junior."

The passage appears to suggest that a defendant who diverts or stops the flow of a natural watercourse and thereby floods the lands of a riparian owner is not to be held responsible

in damages for the wrong unless he, the defendant, has made a profit by it. In their Lordships' opinion such a doctrine is unsound.

The other learned Judge, Mr. Justice Maung Kin, deals with this point somewhat differently. He says :—

> " The finding that the canal was not one made by the Government is not contested before us. It is, however, contended that plaintiff had the right to the undisturbed flow of water from his land through the canal into the Kyonkan Chaung on the ground that the canal is a natural waterway.
>
> " It is doubtful whether the learned District Judge was right in giving a decree upon a case not set up by plaintiff in his plaint. The basis of the suit as described in the plaint is that the canal was dug by the Government for the benefit of the cultivators, and that it, in fact, benefited them, because it drained the surplus rain water from plaintiff's land."

This, as has been already pointed out, is not a true construction of the appellants' case and contention.

The learned Judge then proceeds to add :—

> " I may add that there is no equity in favour of plaintiff. He had not derived any benefit before the depression became sufficiently wide and deep to allow of its carrying water coming from the direction of his land, and when the bund was built by Government, there was no reason for thinking that that water would flow in the direction of the bund. But the defendants have all along enjoyed the benefit of the existence of the bund, because it has prevented blackish water coming to defendants' lands from the Kyonkan Chaung. I do not see any justice in allowing plaintiff's claim to remove the bund for the benefit of his land, unless he has a natural or prescriptive right to make it. I have held that he has no natural right, and sufficient time has not elapsed for a prescriptive right to ripen.
>
> " For the above reasons I would allow the appeals Nos. 183 and 188 of 1919, with costs."

It appears to their Lordships difficult to understand what the learned Judge meant by the first of these paragraphs.

Their Lordships are quite unable to concur with the learned Judges of the Chief Court in the views they have taken of the rights and liabilities of the parties litigant in this case. They think these views are conflicting *inter se*, unsound and misleading. To gather together the points fully dealt with above it may be said that in their Lordships' view it is clearly established (1) that a raised road or bund ran transversely across the depressed ground through which flowed the channel of water, and was properly provided with a gap for the flow and a bridge over the channel, (2) that the bund thus provided with an eye and a bridge to permit the inflow and outflow of water was interfered with by the respondent, who filled up the eye and channel course thereat, and converted an innocuous bund into a dam, which dammed back the water on to the appellant's land, and that in law (3) the respondents are responsible for the damage thus caused to the appellant's property. They think the judgment appealed from was erroneous and ought to be set aside, that the decision of the District Judge was right and should be restored, and will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants in the hearing of the Chief Court and of this appeal.

In the Privy Council.

MAUNG BYA AND ANOTHER

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