[JACKSON, C.J., AND GRIFFITH WILLIAMS, J.]
(June 2, 1951)

MANOLIS CHARALAMBOU, *Appellant*,

v.

THE HEIRS OF THE DECEASED KYRIACOS ELIA, *Respondents.*

(*Civil Appeal No.* 3892)

Adjoining property owners—Damage by water—Artificial erection—Natural user of land—Rylands v. Fletcher—Injunction.

Appellant and the deceased Kyriacos Elia owned adjacent plots of land on the side of a steep hill, the house of the appellant being situated on the lower plot and that of Kyriacos Elia on the upper one. Part of the appellant's house was built into the side and it was two storeys in height, and the level of Kyriacos yard where it touched the appellant's wall was above the height of the plaintiff's first storey.

The rain water which fell in Kyriacos' yard escaped by percolating into the ground, or flowing downwards towards and against the wall of appellant's house.

About the year 1940 Kyriacos paved about half of his yard, and this caused a great increase in the amount of rain water flowing down to that part of the yard immediately below on which the appellant's house stood.

The laying down of the pavement and increase in amount of rain water flowing to the other part of the yard caused damage to the appellant's house.

The District Court found that the paving of the yard had caused the damage but that it was a natural user of the land and the plaintiff could not recover.

Held: that as this was not mining land natural user was not the criterion. That the increase in the flow of water and the damage consequent thereon was solely due to an artificial erection, i.e., the pavement in the land of Kyriacos and that in consequence the action for damages lay and this appellant should succeed.

Z. Rossides for the appellant.

J. Potamitis for the respondents.

Hurdman v. *North Eastern Railway Co.*, 1878 L.R.C.P. 168 followed.

Judgment was delivered by the Chief Justice:

JACKSON, C.J.: This is an appeal from a decision of the District Court of Limassol dismissing a claim for an injunction and damages in respect of injury to a building caused by rain water flowing and seeping against a wall from the yard of adjoining premises at a higher level.

The facts are as follows: Both the parties live in the village of Lophou, which is about five miles below Platres and is built on a steep slope. The house of the plaintiff-appellant adjoins the yard of the defendants and is immediately below it on the hill-side. Part of the plaintiff's house is two storeys in height and the level of the defendant's

yard, where it touches the plaintiff's wall, is above the top of the plaintiff's first storey. When the plaintiff's house was built it was necessary to cut into the side of the hill and the wall of the house, up to the height of the first storey, was built against the vertical face then cut in the hill-side.

The defendants are the heirs of their deceased father, but since the events which led to this case happened in their father's time, we shall, for convenience, refer to them in the singular.

The defendant's house is at the higher end of his yard, and the yard intervenes between the two houses and follows the downward slope of the hill towards the plaintiff's house. Consequently, when rain falls on the yard, it naturally tends to flow downwards towards the wall of the plaintiff's house to the extent to which it is not absorbed by the soil. Even the rain which is absorbed tends to seep in the same direction. According to one of the exhibits in the case, the area of the yard appears to be, roughly, 60 feet long by 40 feet broad. From those measurements some idea may be gained of the amount of rain which might fall on the yard during a heavy downpour.

The yard has a double slope. It not only slopes down its length of 60 feet, from west to east, but also across its breadth of 40 feet from south to north. The plaintiff's house is immediately below the north-east corner of the yard and consequently in the position in which its walls must receive the maximum quantity of rain water flowing or seeping down from the defendant's yard.

Nothing in the argument on either side turned on the relative ages of the plaintiff's house and of the defendant's. At some time which is not stated the plaintiff added an upper room on top of one of the two ground-floor rooms of his house. The wall of this upper room projected above the level of the defendant's yard and so prevented the water from flowing from the yard over the roof of that part of the plaintiff's house, as it had apparently done before the upper room was built. This heightening of the plaintiff's wall seems, in fact, to have trapped the water flowing from the defendant's yard at the extreme corner towards which the double slope of the yard leads.

The evidence suggests that in the village of Lophou a rush of rain water down the hill-side, coming up against the walls of the lower houses, or flowing over their roofs, is an occurrence which the inhabitants take fairly philosophically. They are used to it, and it appears that a number of houses in the village are built against cuttings in the side of the hill, as the lower rooms of the plaintiff's house were in this case, and that their roofs are at a lower level than the hill-side behind them.

However that may be, no dispute seems to have arisen between the parties in this case, about rain water flowing from the yard of one against the house of the other, until, somewhere about the year 1940, the defendant paved a part of his yard, roughly about half. Up to that time the surface of the whole of the yard had been in its natural state. This paving ran down the length of the yard from the defendant's house at the top to the entrance of a house at the bottom which was occupied by his son. The son was originally one of the defendants in this case but the plaintiff's claim against him was withdrawn in the Court below.

We have mentioned earlier that the defendant's yard sloped, not only down its length, from west to east, but also across its breadth, from south to north. The paving laid down by the defendant covered the southern, or higher, half of his yard and, consequently, rain which fell on it, and could no longer soak into the soil below, tended naturally to flow to the lower and unpaved half of the yard immediately below which the plaintiff's house was situated.

The laying down of that pavement by the defendant, and the increase in the amount of rain water which it caused to flow on to the half of the defendant's yard immediately above the plaintiff's house, were the causes which led, after a considerable interval, to the action in the lower court. In that interval there were the usual disputes between the parties and appeals to the mukhtar of the village to intervene.

There were also disputes about a gutter which had led the water from the defendant's roof into the village road, but which had fallen into disrepair, with the result that the water flowed on to the pavement and thence to the part of the defendant's yard above the plaintiff's house. Fortunately the gutter disappeared from the case in the lower court and we are now concerned only with the pavement and with its consequences.

The District Court, having inspected the premises concerned, found, as a fact, that damage had been caused to the walls and certain other parts of the plaintiff's house by water flowing from the defendant's yard. The court also found that the quantity of water flowing against the defendant's wall had been substantially increased by the paving of half the yard. The Court then had the very difficult task of estimating the proportion of the total damage proved which was due to the increase, caused by the paving of half the defendant's yard, in the total quantity of water which the plaintiff's house had had to resist.

Some of the damage found might have been expected to have been due to age, for the walls of the lower rooms were said to be possibly a hundred years old; and some of the damage must have been caused by water flowing or seeping

against the walls in the long period before the defendant's paving was laid down. As we have said, the lower walls were built against a cutting in the side of a hill. And there might possibly have been some increase of damage when the plaintiff had built his upper room and so had trapped the water against his wall in that corner of the yard.

There might also have been a question whether the plaintiff's wall, being supported by the cutting in the hill-side against which it was built, had been as strongly built as a wall usually is when it has to stand alone. There was some evidence on this point, but it does not appear to have been suggested, for the defendants, that the plaintiff's claim for damages, if he had any, should be reduced by his failure to build his wall up to normal strength.

In spite of these difficulties, the Court accepted the evidence of a witness, called as an expert, who said that, in his opinion, three quarters of the total damage found was due to the result of the paving of half the defendant's yard and the witness appears to have put the cost of repairing the total damage at between £80 and £90.

In view of the conclusion at which the trial judge arrived, he may have felt it unnecessary to go into this extremely difficult question in detail. In any event, his finding on the question of damage is not disputed in this appeal, so we are entitled to accept it.

The conclusion of the trial court was that the defendant was not liable for the damage caused to the plaintiff's house by rain water flowing from his yard, notwithstanding that he had greatly increased the flow by paving half this yard. The Court was of the opinion that the laying down of the paving by the defendant was no more than a natural use of his land and, consequently, that the plaintiff had no right of action for injury resulting from it.

The authority upon which the trial judge seems to have mainly relied to support his opinion was a passage from the judgment of Lord Chancellor Cairns in the case of *Rylands* v. *Fletcher* (1868, L.R. 3, H.L. 330). The judge took that passage from the judgment of Slesser L.J. in the case, heard by the Court of Appeal in 1939, of *Rouse* and *Gravel Works, Ltd.* (A.E.R. 1940, I. p. 26) in which the passage was quoted and followed. It was in these terms :—

> " (The occupiers of a close) might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used ; and if, in what I may term the natural user of that land, there had been an accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place."

In the case before us the trial judge also relied on the following passage from the judgment of Viscount Simon in the case of *Reed* v. *J. Lyons and Co. Ltd.* (1947 L.J. page 39) which came before the House of Lords in 1946 :—

> "It has not always been sufficiently observed that in the House of Lords, when the appeal from *Fletcher* v. *Rylands* was dismissed, and Blackburn J's pronouncement was expressly approved, Lord Cairns, L.C., emphasized another condition which must be satisfied before liability attaches without proof of negligence. That is that the use to which the defendant is putting his land is a 'non-natural' use."

Having quoted those two passages, the trial judge expressed his view that when the defendant in this case paved his yard, he was doing no more than making a natural use of his land. The pavement enabled him to pass more conveniently from one room of his house to another, and to visit his son at the lower end of the yard, especially when the yard was muddy. What, asked the Judge, could be more natural than that ?

The passages quoted would certainly seem, when taken by themselves, to support the Judge's view. But before one applies a part of a judgment in some decided case to the particular case with which one happens to be dealing, it is necessary to compare most carefully the facts in both cases in order to see how far the passage upon which one wishes to rely is really applicable to the case before one, even though the passage may appear to be of quite general application. Every judgment is given upon a particular set of facts and even when the judge goes outside them for the purpose of distinguishing other situations, possibly hypothetical, the facts in the case before him are those which he has always in mind. In the case of *Rouse* v. *Gravel Works Ltd.* Lord Simon remarked, when speaking of the wide extension of the principle of *Rylands* v. *Fletcher* in other cases: "It seems better, therefore, when plaintiff relies on *Rylands* v. *Fletcher* to take the conditions declared by this House to be essential for liability in that case and to ascertain whether those conditions exist in the actual case." (Report cited at page 42).

In the case of *Rylands* v. *Fletcher*, as everyone knows, the defendant had built a reservoir on his land and had accumulated a large quantity of water in it. The reservoir gave way and the water overflowed his neighbour's mines. The principles of the decision in that case have no application to the case before us.

The case of *Rouse* v. *Gravel Works Ltd.* was one of the class of mining cases and to that class special considerations apply. The defendants quarried for gravel and, in so doing, made a large open pit which extended to the boundary of the land of the plaintiff, who was a farmer. The pit

became filled with water in the ordinary course of nature and the water was blown by the wind over the plaintiff's land and caused erosion of his soil. The principle upon which it was held that the defendants were not liable was the well-established rule that the owner of minerals has the right to take away the whole of what is in his land according to the natural course of user. The mining operations of the defendants had been carried on in the ordinary way and the use which they had made of their land was a natural use of mining land.

The case of *Reed* v. *J. Lyons and Co.* was a case in which a Government inspector, a woman, whose duty it was to inspect factories in which shell-cases were filled with high explosive, was injured by an explosion in a factory of that kind carried on by the defendants during the war. The decision in that case was in no way based on the question of the natural use of premises or land and indeed, the judgment of Lord Simon contains, in a passage following very shortly after the passage quoted by the trial judge in the case before us, an admission of the difficulty which his Lordship felt in applying the test of "non-natural" as used by Blackburn J. in *Fletcher* v. *Rylands.* (Report cited at p.41). Later passages in Lord Simon's judgment elaborate those difficulties.

In our opinion the case before us is distinguished, on the facts, from all three of the cases to which we have referred and on which the judgment of the District Court appears to be based. There is nothing in any of those cases to support the view that natural user is the test in this particular case.

The trial judge referred to a passage from Clerk and Lindsell on Torts (10th Edition, p. 605) which had, he said, given him some difficulty. The passage, as the Judge observed, included a quotation from the judgment of Cotton L.J. in the case of *Hurdman* v. *North Eastern Railway* which was tried by the Court of Appeal in 1878, (L.R. 1878, 3 C.P.D. 168). The passage quoted by the trial judge from Clerk and Lindsell reads as follows :—

> "Where the occupier placed a quantity of earth against the wall of his building so as to cause rain water to percolate through the wall of his neighbour, he was held liable on the ground that if any one by *artificial erection* on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured."

The trial judge went on to say that he had been unable to refer to the report of the case of *Hurdman* v. *North Eastern Railway* or, consequently, to ascertain the facts in that case, but he concluded, from the passage in the

text book, that the defendants, in placing the earth against their wall, were not considered by the Court to have made a natural use of their land.

It is a pity that the trial judge was unable to refer to a report of that case. The Law Journal report of it appears to have been cited for the plaintiff at the trial and Mr. Rossides made repeated reference to the point of " artificial erection " in his final address. The case cited by Mr. Rossides, would, we feel sure, have thrown an entirely different light on the questions to be determined.

The ground of the decision in Hurdman's case was not that a non-natural use had been made of the land, but that the damage caused by rainfall to the plaintiff's wall was the result of an artificial erection placed by the defendant on his land. The defendant was held liable for that reason and apart from the question whether he had made a natural use of his land or not.

The facts were very simple. The defendants had placed an apparently large heap of soil, clay and other material against their own wall. This wall abutted against the wall of the plaintiff's house and the heap of soil was above the level on which the plaintiff's house stood. This heap of soil collected rain-water and this water percolated, first through the defendant's wall and then through the plaintiff's and so caused damage.

The judgment was delivered by Cotton L.J. on behalf of himself, Bramwell and Brett L.J.J. and a long passage from it was quoted by Slesser L.J. in the case of *Rouse* and *Gravel Works Ltd.* The judgment distinguished the position of mine-owners and included the passage which the trial judge quoted in this case from Clerk and Lindsell. We have already given that passage and need not repeat it. The important words in it are " artificial erection ".

Another authority on the same point is the case of *Broder* v. *Saillard* (L.R. 2, Ch. Div. p. 692) which was heard in 1876, two years before Hurdman's case. Cotton L.J. referred to it in his judgment in Hurdman's case which, he said, agreed with it.

In *Broder* v. *Saillard*, the parties were neighbours in the Regents Park district of London. They had separate walls but the walls were almost touching. The defendant's predecessors in title had built a stable in the back yard of his house against the wall of the house, and the defendant continued to use it as a stable. It was built on a mound of earth which was placed in the yard when the stable was built and was therefore held by the Judge, Sir George Jessel M.R., to be an artificial erection, or artificial work, " a work made by man ". This mound of earth collected water, mainly, the Judge thought, and from water used for washing the horses. It also collected some moisture from a leak in the soil pipe which drained the stable. The

moisture from the mound percolated through the defendant's wall and then through the wall of the plaintiff's house and caused damage. The defendant was held liable because the damage resulted from an artificial work. There was no question as to whether the defendant's maintenance of a stable in his back-yard was a natural use of his premises or not.

A third authority on the point now before us is the case of *Sedleigh Denfield* v. *O'Callaghan* which came before the House of Lords in 1940 (L.R. 1940, A.C. 880). Several questions arose in that case, but for our purpose it is enough to refer to one of them.

There was a ditch running between the land of the plaintiff and that of the defendant through which rain water from the defendant's land had, for a long time, drained away. Later, a culvert, having a wide pipe in it, was built in part of the ditch and the top was covered over with soil. The pipe became blocked with debris and the rain water overflowed on to the plaintiff's land. The action was one for nuisance and the defendant was held liable.

Viscount Maugham observed in his judgment that " the distinction between a natural use of land or of water flowing through it and the consequences of constructing some artificial work on land which alters the flow of water and causes damage to a neighbour has been drawn in a number of cases." (Report cited at p. 889). Lord Maugham went on to refer to the cases of *Broder* and *Saillard* and *Hurdman* v. *North Eastern Railway Co.* and he quoted the passage from the judgment of Cotton L.J. in the latter case which the trial judge quoted in the case before us and which we have already repeated. It is clear that Lord Maugham adopted the principle of both the decisions to which he referred. He spoke of the culvert in the case before him as a " brick contrivance " and as " an artificial water-course " and it was upon that principle that he decided against the defendant on that particular point.

It seems to us clear from the last three authorities that we have cited that when a claim is made in respect of damage arising as it did in this case, and when the damage is shown to have been caused, or increased, by what must be regarded as an artificial construction, liability cannot be avoided by proof that the artificial construction represents no more than a natural use of the land on which it was placed. In effect, the question of natural use becomes irrelevant.

It would seem that this distinction must have been at least at the back of the trial judge's mind when he considered that part of the plaintiff's claim which was based on the failure of the defendant's gutter. The plaintiff alleged that the injury caused to his house by water flowing from the defendant's land had been

increased, not only by the construction of the defendant's pavement, but also by the failure of the gutter which, while in disrepair, had allowed water from the defendant's roof to fall on the pavement, instead of being led into the village road, and so had increased the quantity of water which reached the plaintiff's walls. The District Judge was not obliged to make any order on this issue, for the gutter had been repaired after the action had begun. But it is clear that the Judge would otherwise have upheld the plaintiff's claim on this particular point, for he deprived the successful defendant of his costs because of it. Yet the defendant's land was a building site and the building of a house on it was no more than a natural use of the land.

When the question is one of damage to land, or to property upon it, from the entry of water from adjoining land, it may not be entirely easy to see the essential difference between a case in which the damage results from an alteration of the surface of land by digging a pit in the normal course of mining operations and a case in which the damage results from an alteration of the surface of land by placing an artificial construction upon it in the course of a natural use of the land. But it is clear from the authorities that mining cases stand by themselves. It is equally clear, in our opinion, from the authorities that we have cited, that the defendant in this case must be held liable for damage caused to the plaintiff's house by the increase in the flow of rain water from his yard which resulted from the pavement which he had laid on part of it. There can be no doubt that the pavement was an artificial construction.

On the question of liability for damage caused by an increase in the quantity of water which had previously flowed from one property to another, we refer briefly to the case of *West Cumberland Iron and Steel Co.* v. *Kenyon* (L.R. 1879, 2 Ch. Div. p. 789). Both parties carried on mining operations on adjoining land but the interest of the case for us is in the plaintiffs' claim that the defendants had caused an increase in the normal flow of water from their mines to the plaintiffs' by digging a borehole otherwise than in the course of normal mining operations. It was admitted by the defendants that the borehole was of that character, but the trial court found that the plaintiffs' land received no greater quantity of water than it had received before the borehole was dug. On that ground the Court of Appeal held that the defendants were not liable, no additional burden having been imposed upon the plaintiffs. It is clear, however, from the judgments that if the borehole had increased the quantity of water flowing into the plaintiffs' mines, the decision would have gone the other way.

We take the following passage from the judgment of James L.J. (p. 786 of report cited.) Though it goes beyond the particular facts with which he was dealing, it has a bearing on the case before us:

"A man receives the rain water from his roof, he does not allow it to settle upon the surface, but he receives it on his roof, and collects it into the pipes and then lets it go down upon his own land, and from his own land it gets into his neighbour's land. But unless his neighbour receives that water in some different way or quantity from what he had done before, there is no legal right of action."

Having reached the conclusion that the appellant must succeed in this appeal, we have now to decide what order we should make against the respondents, who are the heirs of the former owner of the paved yard.

The action was brought for a private nuisance under section 42 of the Civil Wrongs Law and we can see nothing incorrect in that procedure. The appellant claimed damages and an injunction and we think that he is entitled to both.

Damages must be given only in respect of the additional injury caused to the walls of the appellant's house by the increase in the flow of rain water against them resulting from the paving of part of the respondent's yard. We have already commented on the very great difficulty of assessing those damages in the circumstances of this case, but the trial judge made an assessment and it is not disputed in this appeal. We can therefore adopt it; indeed we have no other course.

If three quarters of the total injury to the appellant's walls can be attributed to the increase in the flow of rain water resulting from the respondent's pavement, and if the cost of repairing the total injury can be put at between £80 and £90, we can take the lower figure of £80 and award the appellant £60. This we accordingly do.

An injunction is more difficult to frame, but we think it will be sufficient if the respondents are ordered to remove, as soon as possible, the paving from their yard, to the extent necessary to prevent any increase in the natural flow of rain water from their yard to the walls of the appellant's house, above the quantity flowing before the pavement was laid down.

Judgment will accordingly be entered in the District Court for a sum of £60 to be paid to the appellant by the respondent and for a mandatory injunction in the above terms.

In case of disagreement between the parties as to the extent of paving to be removed, or in case of complaint as to delay in removal, application can be made to the District Court, which will thereupon make such order as that Court thinks necessary.

The appellant must have costs in this Court and in the Court below.