IN THE SWAZILAND COURT OF APPEAL

In the matter between: Civil App. No. 2/80

MICHAEL FARRAR JOHNSON Appellant

and

COMMONWEALTH DEVELOPMENT CORPORATION Respondent

CORAM: Maisels P

Dendy Young J.A.

Isaacs J.A.

JUDGMENT

(Handed down 6th May, 1981)

MAISELS P.

I have had the advantage of reading the judgments in draft prepared by Dendy Young J.A. and Isaacs J.A. I agree with the Order proposed by my brethren but prefer to base my judgment on the reasons given by Isaacs J.A.

The following Order is made:

1. The Appeal is allowed with costs, such costs to include those occasioned by the employment of two counsel.

2. The Order of the Court a quo is altered to read:

"Application for absolution refused. The defendant is to pay all wasted costs occasioned as a result of such application, such costs to include those incurred as a result of the employment of two counsel."

(signed)

I. A. MAISELS 16.3.1981.

PRESIDENT OF COURT OF APPEAL

DENDY YOUNG J.A. .

This is an appeal from a judgment of Cohen J in the High Court in which, at the conclusion of the Plaintiff's case, he granted absolution from the instance, costs to stand over. For the sake of convenience I shall refer to the Appellant as the Plaintiff and the Respondent as the Defendant .

Summons was issued in October 1978 and issue was joined in July 1979. The case made by the Plaintiff is contained in paragraphs 2 to 7 of the Particulars of Claim annexed to the summons;

"3. At all material times:

(a) Plaintiff has been the registered owner of certain portion 14 of farm No. 860 situate in the district of

Lubombo, Swaziland.

(b) The Defendant has been the registered owner of the remaining extent of the said farm No. 869 situate in the said district.

(c) The Plaintiff has cultivated sugar cane on his land.

4. (a) The Plaintiff's said land and in particular
that portion on which sugar cane is cultivated is adjacent to and adjoins the Defendant's said land and is separated from it by an earthern irrigation canal which forms part of the Defendant's irrigation system.

(b) The said earthern canal is traversed at one corner of the Plaintiff's land by a by-pass over the canal which takes excess flood waters into the natural drainage land which runs into the Volindi River and there is also an irrigation spillway constructed in the canal to take excess water in times of flood.

3

5. (a) During or about 1972, the Defendant commenced planting sugar cane on its land adjacent to the Plaintiff's land and has been irrigating the sugar cane intensively since that time.

(b) As a result a large volume of water in addition to the natural rainfall has been and is being applied to the land on which the sugar cane is planted, thereby casuing excessive and unnatural quantities of water to seep onto the Plaintiff's lower lying land.

(c) In addition, the Defendant constructed or caused to be constructed, a number of new drainage ditches which have greatly increased the size of the catchment area which discharges run-offs across the bypass over the canal into the watercourse which runs alongside the Plaintiff's land down to the Volindi River.

(d) The resulting increased volume of runoff discharge down the watercourse has caused marshy conditions to spread alongside it to the extent of encroaching onto Plaintiff's land.

6. (a) The excessive and unnatural quantity of water so discharged and/or seeping on to Plaintiff's land has resulted in an area of approximately 20 acres thereof becoming completely waterlogged and brackish, and the sugar cane which was planted thereon dying off.

(b) The said area of approximately 20 acres has now become entirely useless for the purpose of planting sugar cane thereon or for any other purpose.

4

7. In the premises the Plaintiff has suffered damage in an amount of E39 000, in which amount the Defendant is liable to compensate Plaintiff."

It will be observed that there is no allegation of dolus or culpa on the part of the Defendant. In this court counsel refrained from formulating any principle or category of liability which could function as a general proposition. He claimed that he had pleaded the facts and on those the Plaintiff was entitled to the relief he sought. It is not even alleged that the conduct complained of was unlawful. In its plea the Defendant raised a number of defences, the onus of proof whereof rests on the Defendant. However, at the conclusion of the case for the Plaintiff, the Defendant took the point that the Plaintiff was restricted to certain ancient remedies which (it was said) still form part of the Roman-Dutch common law and in terms of which the Plaintiff had failed to establish his claim for damages. These remedies are the actio aquae pluvias arcendae ('actio A P A') and the interdictum quod vi aut clam ('interdictum Q V A C'). The learned judge in the court a quo held that these remedies form part of Roman-Dutch law as that law applies in Swaziland and that the Plaintiff was bound by them; further that the Plaintiff had indeed failed to prove a case for relief in terms thereof. Before us, it was conceded by counsel for the Plaintiff that, if the plaintiff's case is governed by the two remedies, the application for absolution was rightly granted. On the pleadings and the evidence led for the Plaintiff, the facts are shortly as follows: The Plaintiff acquired his land in 1970 and planted it to sugar cane. The land is a sub-division of a

large tract of land belonging to the Defendant. The Plaintiff's land and the Defendant's adjoining land lie on a mountain slope with the latter's land higher at every point than the former's land, so that surplus rainwater falling on the Defendant's land would naturally flow onto the Plaintiff's land. At the time of acquisition there existed (and still exists) an earthern canal running along the lower perimeter of the Defendant's land. This canal, to all intents and purposes, intercepts surface runoff from entering the Plaintiff's land.

5

The canal empties into a dry wash or a natural drainage channel ("the natural water course") which takes the water down to the Volindi River. The natural water course by -passes the Plaintiff.'s land on the southern side, but does not abut on it. In the Lubombo district, sugar cane cannot be grown without irrigation. The Plaintiff, therefore, established an irrigation scheme on his land with the necessary drainage system. The works conform, to normal sound irrigation practice. The drainage system empties into the natural water course. At this point the natural water course is no longer even on the Defendant's land. No part of it is, be it recalled, on the Plaintiff's land.

In 1972 the Defendant, to the Plaintiff's knowledge, began sugar cane growing on a large scale on land upwards of the Plaintiff's cane fields. Bush was cleared and an irrigation and drainage system established. The works conform to normal sound irrigation practice. New drains above the canal and above the irrigated lands serve to protect the canal and the lands by deflecting surface run-off to an overpass which takes the water into the natural watercourse. However, included in the Defendant's drainage system is a ditch or drain called the southern drainage ditch ("SDD") built in 1974, which brings surface run-off to the natural watercourse. The special feature of the SDD is that it brings water from a catchment area or drainage basin extraneous to that served by the natural watercourse. That is to say, but for the SDD, that surface run-off would take a different direction on its way to the Volindi River. From about 1975 it became evident that the natural watercourse was not functioning efficiently to drain the surface run-off being fed into it and on into the Volindi River. The natural watercourse slowly became silted up and choked with vegetation, damming back the water. Vet conditions developed over a wide front below the canal. A high water table emerged in a portion of the Plaintiff's land known as Field 5; the soil became waterlogged and brackish; the cane began to deteriorate and die; the Plaintiff lost his crop. The process is progressive - further fields may be affected in the same way. In the opinion of the Plaintiff's expert, the basic diagnosis of the unexpected problem is (in his words):

6

"The surface drainage pattern above the canal has been changed and drain SDD is introducing a large volume of water from another catchment which would normally not have flowed down (the natural) watercourse."

The Plaintiff's land is afflicted with drainage and seepage problems. It can be accepted that the Plaintiff was at all material times acquainted with the Defendant's irrigation and drainage works; but he had no idea of the impact on the natural water course. It is not suggested that the Plaintiff knew or ought to have known of such consequences.

Returning now to the grounds upon which the court a quo dismissed the Plaintiff's action: As the learned Judge saw it, the Plaintiff, having elected to claim damages only was bound to bring his case within one or other of the Actio APA and the Interdictum QVAC. He held that under the former only damages which accrued after joinder of issue were recoverable; under the latter relief by way of damages could only be granted if the Plaintiff's irrigation and drainage works were established "vi aut clam", that is (as expounded by the jurists) "against his will or without his consent." The learned trial judge held that on the pleadings and evidence led, the Plaintiff failed on both counts.

I turn to the law in Swaziland. By section 2 of the General Administration Act, 1905, it is provided that:

"The Roman-Dutch law, save insofar as the same has been heretofore or may from time to time hereafter be modified by statute, shall be the law of Swaziland."

It is not suggested that there has been any relevant statutory modification of the Roman-Dutch law touching the issues between the parties in this case. It is as well to emphasise two matters. First, because the concepts, principles and doctrines of the Roman-Dutch law form the authoritative basis of the common law of Swaziland,

and also of the Republic of South Africa, it does not follow that the exposition and development of the Roman-Dutch law by the courts of South Africa determine the Swazi common law. It can, of

7

course, readily be accepted that the decisions of the courts in South Africa are of high persuasive value in Swaziland, more especially decisions prior to the year 1905. Since that year it has been primarily the function of the Swazi legislature and courts to continue that development. The resultant common law will not necessarily be the same in both countries. It must be borne in mind that, whether a particular rule of Roman-Dutch law is part of the Swazi common law also depends upon its suitability to the conditions in Swaziland.

Second, I do not think that this case is governed by neighbour law or nuisance law in the usual context. In my view, we are concerned here with the wider field of irrigation and drainage of agricultural land; the dispute falls therefore to be decided in terms of common law of water rights and duties. The difficulties which have developed are a common phenomenon in many countries. In Union Government v Marais & Others, 1920 AD 240 (a case involving percolating water feeding a stream) Maasdorp J A examined English and USA decisons on the common law of water rights. He noted that in Chasemore v Richards (1859) HL 349 Lord Wensleydale had applied the principles of the Civil law as set out in the Digest. Maasdorp J A then cited a passage from the judgment of Harwell J in Bradford Corporation v Ferrand (1902) 2 Ch.D 655: After saying that the foundation of water rights possessed by owners of land in jus naturae, Farwell J went on:

"What is jus naturae? I have come to the conclusion that jus naturae is used in these cases as expressing that principle in English law which is akin to, if not derived from, the jus naturale of the Roman law. English law is, of course, quite independent of Roman law, but the conception of aeguum et bonum and the rights flowing therefrom which are included in the jus naturale underlie a great part of English Common Law, although it is not usual for find "the law of nature" or "natural law" referred to in so many words in English cases.

8

I am, therefore, introducing no novel principle if I regard jus naturae on which the right of running water rests, as meaning that which is aequum et bonum between the upper and lower proprietors. Each has his rights jus naturae. "

Maasdorp J.A. concluded (p. 268)

"Having ascertained that the principles of the English and American law on this subject are identical with those of our law and the English and American cases afford us valuable assistance, I turn to our own authorities on the law."

There is no reason to think that those dicta do not apply to the common law of Swaziland.

I turn then to the Swazi common law. In Ludolph v Wegner (1888) 6 Juta 193, De Villiers C J, Smith and Buchanan J. J. held that -

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

In Van der Merwe v Zak River Estates Ltd 1913 CPD 1053 Searle J referred to Luddph v Wegner and remarked at p. 1072:

"In the present case there is no servitude and the defendant falls back upon the natura loci, endeavouring to establish the proposition that no more water came down to plaintiff's land through the Rooiwal breach than would have come down if there was no dam in the river. But where the natural state of things has been completely altered by the upper proprietor's acts the onus is strictly upon him to prove this proposition....".

At page 1073 Searle J continued:

"Grotius, in his introduction (2.35.17) says: 'By-common law, everyone may allow his water to flow as it flows naturally or by itself; hence the old proverb, 'that person is responsible who obstructs or diverts water'. The maxim, 'Aqua currit et debet currere ut currere solebat', may be applied, in my opinion, both to the case of a stream which, under our law, prior to Act 12 of 1912, would be called perennial, and to that of one which has only an intermittent flow, where that flow is in a regular and defined channel; it may be applied both to prevent the upper proprietor from taking out of the channel more than his reasonable share of the perennial stream, and to prevent him from discharging in a non-natural manner from his land onto the land of the lower proprietor an excessive or unreasonable quantity of the flow of an intermittent one, to the damage of the lower proprietor."

Searle J cites the English case of Rex v Trafford where Tenterden C J said:

"It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another."

Earlier in his judgment, Searle J refers to Farnham, an American authority on water right where the author says (Vol 2 sec 490) that the liability for negligently effecting a change in the channel of a stream is as great as though the change is effected intentionally.

In regard to the content of the rights and duties under water law in a particular locality, the principle of reasonable user is clearly recognised. This is so in the area of drainage rights as well as running water. Rights of drainage seem to me to be correctly expounded in an article (anonymous) which appears in the South African Law Journal Vol 20 (1903) P 43. The article has this (so far as relevant):

"In order to complete the subject it will be necessary to add a few words as to the rights of drainage, for, if upper properties are subject to certain duties towards lower with respect to water flowing on or across the former, lower properties in their turn are subject to certain corresponding duties towards the upper. If upper properties are in certain cases bound to allow water to run down for the use of the lower in accordance with the rules laid down above, lower properties are bound to receive water flowing to them from higher ground in obedience to the laws of gravitation, being subject to a sort of natural servitude in that respect. To put it another way, the upper proprietor is entitled to demand that the natural surroundings of his land and the natural laws, to which they are subject, shall be left undisturbed in so far as their continuance is essential to the proper and reasonable enjoyment of his rights of ownership. And, though the lower proprietor is entitled to demand that no water or any other substance shall be discharged on to his ground by the upper, which would not have come there in the ordinary course of nature, unless he is bound by some servitude to receive the same, yet he will be bound to receive water flowing down to his ground not in consequence os some act of an upper proprietor but in accordance with natural laws, and if he obstructs such flow and damage is thereby caused to the upper proprietor, he will be liable to an action. It follows that the upper proprietor in his turn will not be entitled to interfere with the laws of nature affecting his land or that of his lower neighbour to the injury of the latter, and will therefore not be allowed to alter the natural drainage, of his ground in such a manner as to discharge or divert water on to his neighbour's ground which would not have flowed there naturally, nor by means of some artificial structure such as embankments, watercourses, plantations and such like, to cause water, which would have flowed there naturally, to flow down differently from what it would naturally have done, that is, in increased volume or in a more rapid or stronger or more compressed stream or in a polluted confition, if injury is thereby caused to the neighbour. A man is not even allowed to let the rainwater drip from his roof on to a neighbour's ground, unless he has a servitus stillicidii recipiendi over it, nor may he discharge his rainwater by means of a down pipe and spout into a neighbour's property, unless he has a servitus fluminis recipiendii over it. No action however, will lie either against an upper or a 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 the rights of property and the cultivation of 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 drainage of one's land, provided the water is not c collected into one united stream and then discharged on to a neighbour's land in a more forcible and destructive manner than it would otherwise have got there naturally

for everyone ought to improve his own land in such a way that he does not thereby deteriorate the land of his neighbours. But where an upper proprietor is entitled to use a particular channel for the discharge of his surplus rainwater, 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."

In the USA the reasonable use theory has recently been stated by Frank J Trelese, Professor of Law, University of Wyoming, in his work on Water Law (194-7) (American Case Book Series) pp 265-6: He is dealing with reasonable user among riparian owners, but there is no reason to think that the theory does not apply to drainage rights as well. He says:

"The reasonable use theory. Under the reasonable use theory the primary or fundamental right of each riparian proprietor on a watercourse or lake is merely to be free from unreasonable uses which cause harm to his own reasonable use of the water. Emphasis is placed on a full and beneficial use of the advantages of the stream of lake, and each riparian proprietor has a privilege to make a reasonable use of water for any purpose, provided only that such use does not cause harm to the reasonable use of others. Each riparian must make his use in a manner which will accomodate as many other uses as possible ... The major advantage of this theory is that it tends to be entirely-utilitarian and tends to promote the beneficial use of water resources. ... The rule of reasonableness came to be applied in two quite different senses. The courts lumped together two distinct torts under the heading of riparian rights. One is the interference with the water supply of riparians who build dam3 to create a head for water power and store the water until needed... The other is an interference with the quality of water to the injury of lower riparians, where waters are used to carry away the waste of human activity or are otherwise polluted. The distinction between the two types of cases has not often been made explicit. In both situations the courts have been purported to apply the same rule of reasonable use, but the application of the rule has been different in each and the distinction can be found in the results. In the water quality cases, reasonableness depends upon a balancing of the interests of the plaintiff and the defendant in each case, in a manner identical to the process used in the law of nuisance. Indeed, in many water pollution cases the courts have employed the nuisance formulae In some cases, therefore, a defendant's pollution has been held to be justified because the utility of the defendant's conduct out-wighs the gravity of the harm imposed upon the plaintiffs.

In the water quantity cases, the rule of reasonableness is applied quite differently. Each use is required to be beneficial, suitable to the watercourse, and to have economic and social value. If these requirements are met, reasonableness may require each riparian to put up with minor inconveniences and to adjust the quantity of water used or the method of its use so that both uses can co-exist. If they cannot be reconciled in this fashion, because the interference is caused by the defendant taking himself, resolution of the conflict involves consideration of the reciprocal factors of whether the first user's investments and other values are entitled to protection and whether the new user ought to compensate the former user for the loss of that which the later user has gained. In most of the cases in which the plaintiff has suffered substantial harm through his water supply for a reasonable use being taken, the decision has been that the taking is unreasonable."

So, in the USA the basic test is reasonable user.

That the theory of reasonable user applies in England emerges from the case of Sedleigh-Denfield v St Joseph's Missions (1940) 3 All ER 349 at 364 in which Lord Wright said (dealing with interference by owners of property with the use or enjoyment of neighbouring property):

"A balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interefered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind in society, or, more accurately, in a particular society."

In the light of the above discussion, I am clearly of opinion that, where there has, as here, been an interference

with the natural drainage of a locality by one landowner to the detriment of another, the test of reasonable user applies. I have not overlooked the fact that the natural watercourse is not on the plaintiff's land. In my view, this fact is not an obstacle. The natural watercourse is part of the natural drainage system of the locality in which the plaintiff as landowner has rights jure naturali.

13

What then is the plaintiff's remedy? The court a quo thought that the plaintiff is restricted to the actio APA and the interdictum QVAC. It can be accepted that those two remedies still form part of the Swazi common law; but I am entirely satisfied that neither is relevant in the present context.

First as to the actio APA; It is obvious that the claim here is not based on the actio. A perusal of Voet 39.3.2 (Krause's translation) makes it, I think, abundantly clear that the actio APA is wholly inappropriate. As the name implies, it is an action for "warding off" rain water. Voet says that -

"the object of the action is that the construction shall be removed and that the damage which has been occasioned after joining of issue, from a construction made before, shall be repaired."

Such is clearly not the object of the plaintiff's action. He is not asking that a structure be removed and that damage subsequent to litis contestatio be made good. The plaintiff's claim is for damages resulting from interference with the natural drainage of the area. The following passage from the judgment of Solomon J A in Cape Town Council v Benning 1917 AD 315 at 321 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 rain water from its natural course and to discharge it onto the property of a third person, was liable to the owner under the action 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, whether he was the owner himself or a tenanat or other person, was liable for the damage suffered before litis contestatio under an entirely different form of action."

Next, as to the interdictum QVAC: The "entirely different form of action" contemplated by Solomon JA in Benning's case, is, in my view, certainly not the interdictum QVAC The interdict is granted against violent and secretive acts generally and is not special to water law. It is directed against spoliation in respect of immovables. Thus Voet XLIII Title 24.1 (Krause) says:

14

"By means of the interdict quod vi aut clam the praetor frustrates the cunning and malice of those who do anything by violence or secretly in making or remaking some new work; for he commands that what has been done by violence or clandestinely shall be put back into its former condition (D.43.24.1); whether the construction be made in a private, public, sacred or religious place (D.43.24.20); whether he who makes it has or has not the legal right to execute it, as long as he has acted contrary to the prohibition, and has not secured its withdrawal (D.43.24.1.2.); just as is the case when notice has been given objecting to the erection of a new construction, as has been stated in the title de operis novi nuntiatione (Voet 39.1.7; Holl. Cons. 3.2.97.2). Now a person is held to act secretly (clam) who, when he ought to have given notice to another, has not given such notice becasue he fears opposition or ought to apprehend it by reason, it may be, of his ignorance due to his negligent heedlessness; lest otherwise the condition of the foolish and ignorant should be better than that of persons who knwo their legal rights (D.43.24.3.7 and 8).....".

Voet then deals with examples of violent acts coming within the interdict. There is no restriction to water rights. In Section 2 Voet points, out that the interdict is confined to immovables. He deals with those who can employ it, against whom it lies and then turns to damages. In regard to damages he says:

"The damages must be estimated by the judge, or be fixed by judicial oath, provided that the circumstances are such as to allow of such procedure (D.43.24.15.9). And the wrongdoers must also make good what the plaintiff has lost by reason of the wrongful acts; for instance, if by reason of the construction some right attached to the immovable property has been destroyed (D.43.24.21.3). In fact, and generally, the function of the judge is that restitution should be made in such a manner that the condition of the plaintiff shall be the same in every respect

as it would have been if that construction, concerning which the action is brought, had not been made either violently or clandestinely (D.43.24.15. 7). But if the defendants indeed constructed the works without having possession, they must be condemned to pay the plaintiff the cost of restitution, in addition to damage. If they do possess, but the work is constructed by another without their consent, they are not liable further than that they must suffer the removal of the construction at the cost of him to put it up. And, to summarise, he who constructs the work violently or clandestinely and who is in possession must stand by and permit the removal and pay the cost thereof; and he who constructs and does not possess pays the cost; he who possesses but did not construct must only permit the removal (D.43.24. 16. 2; D.39.3.4.3; do.5; read with D.39.3.7 and D.43.24.7)."

15

In Section 3 Voet tells us when the interdict fails:

"But the interdict ceases to be operative after one year, to be calculated from the time the work was completed, or ceased to be carried on, although at that time the work was not completed (D.43.24.15. 3 to 6). Or if the act is done but no work of construction results from it (D.43.24.22.3). Or, if the plaintiff consented to the work after its completion or during the course of construction (D.43.24.3.2.). Or, if there be a just cause the work, for instance, agricultural operations (D.43.24.7.7). Or, if the operations are undertaken for the sake of checking a conflagration, and the the fire would have reached the house which was demolished in order to check its course, For if the fire would not have reached it, then this interdict would be available, but not also the mixed penal action under the Lex Aquilia (D.45.24.7.4 read with D.9.2.49.1; add Voet 9.2.28.). It likewise fails in the case of him who ordered the work to be constructed not on his own but on another's account (D.43.24.5.12). Or, where the work has been done to a ship, or other movable property, although of the greatest possible value (D.43. 24.20,4). But if I have violently or clandestinely demolished that which another has constructed violently or secretary, then as a general rule, the interdict does not cease to operate; since the demolition ought to take place under the authority of the judge. Unless an urgent and very cogent reason exists to excuse a demolition made by private authority (D.43.24.7.3.)."

(Emphasis added)

It is quite evident, therefore, that the plaintiff's action was not formulated in terms of the interdictum QVAC and that the relief sought (consequential damages only) is not appropriate to the interdictum QVAC.

In my judgment, the plaintiff's case is baded on the Lex Aquilia, But that is not to say that a claim for an interdict based on the interdictum QVAC could not have been advanced as well as a claim for damages under the Lex Aquilia, I say nothing about that possibility in this case. In Digest 9.2.50 (Lawson's translation in Negligence in the Civil Law, p. 129) the following opinion of Ulpian on the Lex Aquilia appears:

16

"If a person demolishes another's house without the owner's consent and builds baths on the site, then apart altogether from the rule of natural law that erections belong to the owner of the soil, he is also exposed to an action on the ground of damage done."

It may be that the owner in that case might well have claimed an interdict by the Interdictum QVAC as well, provided the circumstances did not exclude that remedy.

In my opinion the pleadings and the evidence in the present case being the matter within the ambit of the Lex Aquilia. It appears from the Digest 9.2.49.1 that it was Ulpian's opinion that.-

"The saying that in the Aquilian action one can sue for damage done wrongfully must be taken to mean that damage is held to be done wrongfully when it inflicts wrong along with the damage."

It is true that there is no allegation of wrongfulness in the plaintiff's particulars of claim, but the facts are pleaded. An averment of "wrongfulness" would then be tautologous. If the facts disclose a wrongful act, that suffices.

whilst it is true that relief under the Lex Aquilia requires "dolus or culpa"it appears from Salkowski's Roman Private Law (E E Whitfiedl) P.515 that -

"Culpa as a ground of obligation to make amends for damage comes into account only -

(1) in respect of damage to property by the wrongdoer, which engenders an independent obligation ex delicto (damnum injuria datum ex 1 aquilia) -the so-called aquilian culpa. It here consists in illegal positive action (culpa in faciendo), which already exhibits itself as the violation of the general duty of citizens alterum non laedere;

(2) in obligatory relations in which one violates the special positive duty incumbent upon him to take some course of action on behalf of another, or to avert damage (diligentia custodia).

17

It follows, to my mind, given an invasion of a positive right conferred by the common law or by statute that under Salkowski's first category aquilian culpa is prima facie present. In the instant case, by the common law of drainage, the plaintiff possessed a jus naturae 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; see the Zak River case (supra). In this connection, the case of Bloemfontein Town Council v Richter 1938 AD 195 is instructive. There the plaintiff claimed damages and an interdict in respect of damage caused to his land (which was riparian to the river) by the water works of the defendant municipality. The defence of statutory authority was raised. The defendant municipality proved that damage was an inevitable consequence of the work carried out under statutory authority. In answer to the plea of statutory authority, the plaintiff put forward the case that the defendant had exceeded its statutory or servitudal rights or had exercised its statutory rights unreasonably and negligently. These defences had not been raised in the replication in answer to the plea of statutory aurhority; but were considered by the court; see the judgment of Curlewis CJ at p. 236. It was held that the plaintiff had not discharged the onus of proving those defences. It is important to note, however, that the matter of negligence was canvassed only in relation to the plea of statutory authority. Negligence was not the basis of, nor an element in, the plaintiff's original cause of action which was simply that "the defendants have unlawfully caused the water to be discharged onto and from the plaintiff's property with greater rapidity, violence and volume, in a non-natural flow and more concentrated form than was the case prior to the opening of the said sluice gates." At pages 229-30 Stratford J A remarked:

"The term (nuisance) though not used by Roman-Dutch writers has been introduced into South Africa from the English law and is often used in judicial decisions and in legislative enactments. The idea underlying the term is, of course, well known to our law: we merely do not use the term in relation to the disturbance of a person's right to the enjoyment of his land. The counterpart of an English statement of claim founded on nuisance would, in our law, be a declaration by the plaintiff that he is the owner (or occupier) of land and that

18

his legal rights of enjoyment of it are being infringed by another. And on this pattern the present action is framed and, I think, correctly f framed. No allegation of negligence is made since the action is not based on it."

(Emphasis added).

A similar view of the law appears to have been taken for granted in the cases of Reddy v Durbank Corporation 1939 AD 293 and in Johannesburg City Council v Vucinovich 1940 AD 365. In Reddy the plaintiff claimed damages, alleging that the defendant had constructed a road and culvert in such a way that storm water accumulated at the culvert and discharged onto the plaintiff's property in a volume and at a velocity greater than would have been the case had the works not been constructed, with consequent erosion and destruction of crops. The works were carried out by the Durban Corporation under statutory powers and, recognising this, the plaintiffs fornulated their claim for damages in negligence. At page 296 Watermeyer J A noted:

"Plaintiffs recognise this (statutory authority) and accordingly they do not claim that the defendant's acts of

road construction and diversion of storm water per se give rise to a cause of action. They base heir case on negligence. They pick out faults in the method adopted by the defendant to dispose of the stormwater. They say that these faulty methods constitute actionable negligence causing damage, which they seek to recover."

But earlier on the same page, Watermeyer J A remarked (obiter):

"Now clearly, the construction of a road by the defendant which entailed those consequences (increased volume and velocity) would be an invastion of plaintiff's rights of ownership and would be actionable unless authorised by Parliament."

There is no suggestion in those remarks that liability for damages in the absence of statutory authority would depend on proof of negligence.

In Vucinovich the plaintiff's cause of action was formulated as follows:

19

"... in the course of carrying on sewage disposal on the said site the defendant wrongfully and unlawfully caused, allowed and permitted, and still is wrongfully and unlawfully causing, allowing and permitting sewage effluent and/or water to drain and percolate into plaintiff's farm in such quantities and in such manner as to cause the nuisance."

In the plea the defences raised were (in the words of Ramsbottom J in the court below:

"(a) That at common law the defendant was not liable for injury sustained by the plaintiff through the percolation of water which the defendant had put on his land for the purpose of irrigation.

(b) That the defendant was, in all the circumstances of the case, not liable to the plaintiff for the damage suffered because of the immunity conferred by section 161 of Ordinance 11 of 1926."

The plaintiff claimed both an interdict and damages, and succeeded. On appeal the only issue argued was the statutory defence. However, at page 383 Feetham J A, who delivered the judgment of the court which included De Wet CJ, Watermeyer, Tindall, Centlivres J J A, noted:

+It is established that in this case substantial injury has been done to the plaintiff's property by the percolation of underground water from the defendant's sewage farm, and it clear that, apart from the provision of (the statute), the plaintiff would have a common law right to recover damages for such injury and to claim protection from continuance of such injury in future." (Emphasis added).

Again there is no suggestion that fault in the sense of negligence was an element in the plaintiff's cause of action. Negligence became an issue in the case only as a defence to the defendant's plea of statutory authority. There can, in my opinion, be no doubt that these cases recognise quilian culpa in a wider sense than ordinary negligence. In negligence the tests are foreseeability and remoteness:-

Santam Insurance v Nkosi 1978 (2) (A); Dutton v Bognor Regis United Building Co (1972) 1 ALL ER, 462 (CA) at 481.

20

The case of Regal v African Superslate 1963 (1) S A 102 (AD) is also helpful. This is not a case on water law. The result turned on the discretionary power of the court to grant an interdict; but there are dicta which are relevant here. The problem was that material deposited in the bed of a river by a previous owner of a farm was a threat to an adjoining farm owned by the plaintiff. He sued for an interdict. Negligence was not averred. The action failed on the ground that the plaintiff had not shown that the removal or containment of the material was reasonably practicable for the purpose of discretionary interdictal relied. The court was unanimous in holding that the English law of nuisance was no part of the Roman-Dutch law, but it would seem that in the relevant

area, the results are the same, Steyn CJ, Hoexter, van Blerk and Ogilvie Thompson, J J A treated the case as one of neighbour law. As will appear from the judgments, neighbour law is a field in which a number of praetorian remedies, each with its own special content and limitations, still apply. Only Rumpff, J A struck a discordant note., He thought that, if damage did result, the plaintiff's claim for compensation would have to be founded in dolus or culpa - culpa being understood as "negligence" (onagsaamheid), "the culpa of to-day." See generally the very helpful analysis of the Regal case in an article by A. J. E. Jaffey in Vol 87 (1970) SALJ 436. I have derived much assistance from the article, although, with respect, I think the conclusions reached (in my view) suffer from the unjustified assumption that aquilian culpa is to be equated to the "negligence of today."

At page 111 B C, Steyn CJ concluded that:

"Against the previous owner (who had created the danger) the appellant would in all probability have been entitled at least to recover damages suffered or anticipated" (my translation).

There is no suggestion that the negligence of today would be a prerequisite.

At page 114 C - D, Hoexter J A said:

21

"In the present case the defendant is the owner of property on which there is an opus jam factum which threatens to cause damage to (plaintiff's farm). As a result of this opus slate waste is being carried from (defendant's farm) on to (plaintiff's farm) whenever the Elands River is in flood. In effect, therefore, the defendant is (as it were passively) using the Elands River as a conduit pipe to carry slate waste from (his) farm on the (plaintiff's farm). That is an unusual and unreasonable user of (his farm) by the defendant, and, in terms of the judgment of this court in the case of Malherbe v Ceres Municipality 1951 (4) SA 510 (A), the defendant is liable for any damage caused to (plaintiff's fa farm) by such user,"

Again there is no suggestion that liability would require the presence of the negligence of today. Indeed the learned judge of appeal went on to say at 114 H:

"(The defendant's) liability is not based on any negligent act or omission but simply on the wrongful user of his property to the detriment of that of his neighbour. I am unable to see the relevance, in the present case, of any doctrine relating to the law of negligence...."

Malherbe's case concerned an application for an interdict in respect of nuisance under neighbour law; but as pointed out by Jaffey (p 444) the implication is that the same principle applies to a claim for damages.

To the like effect is the dictum of Van Blerk, J A at page 115 A - B:

"My view is, however, that the respondent as owner of the property will be responsible, during the existence of his ownership, to the appellant for damage caused by the wash of slate waste onto the latter's ground." (my translation).

The judgment of Ogilvie Thompson J A has this passage (116 C - D):

22

"The situation thus created by respondent's predecessor continues to exist. That the law ought, under circumstances such as those, to attach some liability to respondent, as the owner occupying land whence the invading slate debouches, and will continue to debouch, upon appellant's land appears to me to be eminently reasonable. The vital question for decision, however, is the extent and scope of that liability, which does not, in my view, depend on negligence." (emphasis added).

It is significant to note that the English law would, in like circumstances, also attach liability even without negligence. Thus in Rapier v London Transport Co (1895) 2 Ch 588 at 599, Lindley LJ said that it was no

defence to claim in nuisance that the defendant has taken all reasonable precautions to prevent a nuisance. And in Wagon Mound (No. 2) (1966) 2 All ER 709, Lord Reid giving the judgment of the Privy Council said, at page 716 D - F:

"Comparing nuisance with negligence, the main argument for the respondent was that in negligence foreseeability is an essential element in determining liability, and therefore it is logical that foreseeability should also be an essential element in determining the amount of damages: but negligence is not an essential element in determining liability for nuisance, and therefore it is illogical to bring in foreseeability when determining the amount of damages. Nuisance is a term used to cover a wide variety of tortious acts or omissions, and in many negligence in the narrow sense is not essential. An occupier may incur liability for the emission of noxious fumes or noise, although he has used the utmost care in building and using his premises. The amount of fumes or noise which he can lawfully emit is a question of degree, and he and his advisers may have miscalculated what can be justified,, Or he may deliberately obstruct the highway adjoining his premises to a greater degree then is permissible hoping that no one will object. On the other hand the emission of fumes or noise or the obstruction of the adjoining highway may often be the result of pure negligence on his part."

To summarise: In my opinion, this case falls within the first category of Salkowski's definition of aquilian culpa and that negligence (in which the tests are foreseeability and remoteness) is not an essential element. Of course, aquilian culpa includes that kind of negligence. In the present case there is no allegation of such negligence, but there is an allegation and evidence that the defendant has

interfered with the natural drainage of the locality to the detriment of the plaintiff. This is prima facie a breach of the plaintiff's jus natura. It is then for the defendant to justify such interference on the basis of reasonable user or otherwise. Although the theory of strict liability nay well apply to certain of the praetorian remedies for the protection of property, I do not think it has any relevance in the present case. The plaintiff did not found his case on the actio APA nor on the interdietum QVAC and he was not obliged to do so; those remedies have no relevance here.

Accordingly, in my judgment, the learned judge a quo erred in granting absolution from the instance.

The appeal should be allowed, the order of the High Court set aside and the following order substituted: The application for absolution from the instance is dismissed. The defendant is to pay all wasted costs occasioned as a result of such application, such costs to include those incurred as a result of the employment of two counsel. The plaintiff should have his costs of appeal, such costs to include the fees of two counsel.

Since writing the above judgment I have had the opportunity of reading the judgment of Isaacs, J A, I think some comment from me is called for. I did not overlook the fact that senior counsel for the plaintiff on a appeal conceded that the claim did not fall within the principles of the Lex aquilia. Hoever, he was unable to suggest an alternative cause of action and the concession was thus of little assistance. It seems that he was equating the culpa of the aquilian action with negligence in the modern sense - "the culpa of today."

Mr, HA Millner in his book "Negligence in Modern Law" (1967) says at pp 9-10:

"In other words the lex aquilia (especially the third

chapter) contained the germs of a general remedy for damage wrongfully caused by the defendant' s fault , By Justinian's time an extended aquilian remedy exists side by side with the other delicts and quasi-delicbs of the classical law, must as the tort of negligence exists side by side with the nominate torts of English law. But its capacity for expansion had by no means been exhausted and during the reception of Roman law in Europe the civilians took over and emulated the aquilian action, stripped of its penal characteristics as a general and well-nigh exhaustive remedy for damage caused dolo aut culpa. In short, the tendency of the evolution of the generalised fault principle was to assimilate the individual delicts and quasi-delicts of Roman law. However, the social necessity for retaining a strict liability in certain classes of case continued, so that neither in those systems in which the ,jus commune continued in face (e.g. South Africa) nor in those in which the jus

commune gave way to a code (France, Germany, Italy), is strict liability eliminated.... The growth of the fault principle latent in the lex aquilia thus culminates in the 19th century in the continually expanding generalisation of dolus culpa which submerges the bulk of the separate delicts which once companioned it on terms of equality."

And at p. 27 Millner continues:

"The Roman law, as Buckland points out, made no reference to a precedent duty of care in the aquilian action, which is a remedy somewhat analogous to the negligence action of the common law (England), Culpa, unlike negligence, was not defined with reference to a particular person or class. Failure to take that care which a reasonable man, the bonus paterfamilias or paterfamilias diligens would take was culpa; and if damage to property resulted there was liability (subject only to a causal nexus)."

If that is a correct analysis (as I think it is) there is, in my view, no objection to the present action falling under the lex aqulia. The defendant deliberately interfered with the natural drainage of the locality; in so doing he caused damage to the plaintiff's land, Prima facie the plaintiff's rights in the natural drainage were breached. Ignorance of the law would be no excuse. To my mind, the case clearly falls under the lex aquilia, just as if the defendant had wrongfully killed the plaintiff's slave. The paterfamilias diligens does not deliberately act wrongfully,

25

I do not find anything in Voet 9.2.3 (relied upon by Isaacs, J A) to the contrary. It is true that the original culpa is rendered in Gane's translation as "negligence", but there would appear to be no ground for reading "negligence" in the narrow sense which implies forseeability, Isaacs, J A takes the view that the case falls under the praetorian edicts relating to the discharge of something (e.g. water, smoke) onto the property of another. I do not find it necessary to go into the question whether the plaintiff's claim for damages could have been formulated under a praetorian edict. The fact is that it was not so formulated. But, even assuming that an appropriate edict can be found, that does not mean that action under the lex aquilia is ousted. As pointed out by Millner (supra) by Justinian's time the aquilian remedy existed side by side with the other delicts and quasi-delicts. Presumably a praetorian edict would only be selected as the basis for an action if it provided a special advantage (e.g. no-fault liability) and was otherwise co-extensive with the aquilian remedy.

Finally, Isaacs, J A holds the view that the action here is based on nuisance. Of course, as was unanimously held in Regal's case, the English law of nuisance as a cause of action is no part of the Roman-Dutch law. As to the use of the the term "nuisance" in South Africa, the dicta of Stratford, J A in Richter's case at 229-30 (recited above) are to the effect that the term was not used by Roman-Dutch writers and is not used in South Africa in relation to the disturbance of a person's right to the enjoyment of his land.

For the above reasons I do not find any reason to alter my position.

(signed)

DENDY YOUNG

JUDGE OF APPEAL

25th March 1981,

26.

ISAACS J.A.

I agree with my brother Dendy-Young that the appeal in this natter should be upheld. I agree also with the order proposed by him.

I cannot, however, agree with that portion of his judgment in which he states that plaintiff's case is based on the Lex Aquilia. In fact plaintiff's counsel, Mr. Schutz, in his heads of argument and in his address to this Court specifically conceded that neither dolus nor culpa was pleaded and that the Aquilian action does not apply. This was also common cause between counsel. I am of the view that under the Lex Aquilia liability was based on either dolus or culpa and that culpa meant negligence.(cf. Grueber Commentary on the Lex Aquilia p. 7). But whether or not Roman law required negligence as an element to be proved in an action under the lex aquilia, in my opinion Roman Dutch law does require this element. Thus Voet 9-2-3 states (Gane's Translation Book 2, page 54-7):-

"Two kinds of negligence are however known in our law, namely of commission and omission, or consisting in doing and in not doing or leaving undone. We should therefore bear in mind that only all damage caused by commission or doing or by commission and omission together was punished by the Aquilian Law, and not also that which arises from omission alone for the reason that it would be too harsh for a person to be held liable on wrongdoing for the slightest fault or omission."

The above passage shows, in my view, that Voet considered negligence to be an essential element under the Aquilian action.

There is no doubt that in South Africa negligence has been an essential element in the Aquilian action and I think in all countries which have adopted the Roman Dutch Law, Negligence must be pleaded to establish a cause of action and this has not been done in the present case,

27

I agree with my brother Dendy Young in his statement that the dispute in the present case must be decided in terms of the common law of water rights and duties. There is no need to put a label on the plaintiff's right of action but in my view on the terms of his declaration (which are set out in the judgment of my learned brother) his action would fall 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 1956 Annual Survey at page 133 in which he gives the translation of Digest 8.5.8.5 as follows'-

"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 and such a servitude be recognised. 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 plaintiff's action could be based on nuisance. It seems to me also that the extracts from the case of Bloemfonterin Town Council v. Richter 1918 AD 195 quoted bymmy learned brother in his judgment in respect of his view that plaintiff's action

28

is based on the Lex Aquilia is relevant in support of my view that the action is based on nuisance. The extract from the case of Johannesburg City Council v. Vucinovitch 1940 AD 365 also quoted by my learned brother is also relevant. I agree entirely with my learned brother that it was not necessary for the plaintiff to allege or to prove negligence.

As I have stated it is not necessary to place a label on plaintiff's right of action. He has alleged in his declaration that an "excessive and unnatural quantity of water" was discharged from defendant's land and that such discharge had resulted in damage to his land. The fact that the water was not discharged directly on to plaintiff's land does not, in my view, affect the question of whether or not the discharge of such water caused damage to the plaintiff as there is prima facie evidence that damage has been caused to him by such discharge. The defendant may, of course, show by evidence that in discharging such water he was acting reasonably in the use

of his own land, but this appeal is only on the question of whether absolution from the instance should have been granted at the end of plaintiff's case and, as I have indicated, I am in agreement with my brother Dendy Young that it should not have been granted and that therefore the appeal should succeed. Apart from what I have said above as to my disagreement with him as to his reference to the Lex Aquilia. I agree with the rest of the dicta in his judgment and more particularly with his view that in Roman Dutch Law the actio aquae pluvius arcendae and the interdictum quod vi aut clam are not the only remedies that are available when water is discharged from one person's land in such a way as to cause damage to the land of another and in my opinion any South African cases which may seem to show the contrary are, with all due respect, not binding on Swaziland Courts.

(signed)

I ISAACS

JUDGE OF APPEAL