Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Samuel Jacobus Greyvensteyn v. *Daniel Wilhelmus Hattingh and others, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 28th March* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ROBSON.
SIR ARTHUR WILSON.

[DELIVERED BY LORD ROBSON.]

This is an Appeal by the Plaintiff in the action from a Judgment of the Supreme Court of the Cape of Good Hope which affirmed the decision of a Divisional Court (Mr. Justice Buchanan) dismissing the action with costs.

The parties are all farmers in the district of Molteno, in the Cape of Good Hope.

On the 25th November 1907 the Appellant's farm was entered from the north by a swarm of locusts. They were "voetgangers," *i.e.*, young insects who had not yet acquired the use of their wings, and who trekked across the country on foot, eating the grass and crops on their way. The farms of the Respondents lay to the south of the farm thus invaded, and were separated from it only by a comparatively narrow strip of veldt belonging to various persons. The locusts trekked across the Appellant's farm in a direction

which made the Respondents reasonably apprehensive for the safety of their own lands, and the steps they took to avert the anticipated danger have given rise to the complaint of the Appellant. He alleged firstly that the Respondents wrongfully and maliciously trespassed on his lands and drove the locusts back on to the cultivated portions thereof, so as greatly to increase his damage. On this point there was a sharp conflict of testimony. The Respondents allege that they went on the Appellant's farm at his request or with his approval in order to repel a common danger, and that if any trespass was, at any time, in fact committed, it was of a trivial character and without either the effect or the intention of doing the Appellant any material harm. Mr. Justice Buchanan, who heard the evidence, has made clear findings of fact on this part of the case, and their Lordships see no reason why those findings should not be fully accepted. The learned Judge did not believe that there was any wilful or malicious driving of the locusts on to the Appellant's cultivated land, and he accepts the Respondents' story as to how they came to enter his farm and what they did there. He further finds that the sums paid into Court by the Respondents to meet any damage they may have caused by the alleged trespass, apart from the damage done by the locusts, was more than sufficient. There was ample evidence to support all these conclusions, and the Appellant's case on this head fails.

But the alleged trespass was not the main issue in the case. When the Respondents were forbidden to remain on the Appellant's land, they, with the consent of the adjacent proprietors, took up positions on the veldt outside his boundary and drove the locusts back on to his farm and in various directions away from the direction in which their own farms lay. The

result of this proceeding was, of course, detrimental to the Appellant's land. It is contended on his behalf that such action on the part of the Respondents was wrongful. His case is that locusts are like flood water and that their natural course must not be diverted, even in self-defence, if injury is thereby caused to a neighbouring proprietor.

According to this argument the Respondents were bound to receive the locusts. In support of this proposition the Appellant's counsel cited a number of cases which, in the view of their Lordships, have little or no analogy to the present case.

In *Menzies* v. *Breadalbane* (3 Bligh, N.S. 418), the Defendant was erecting an embankment which would have the effect of throwing the ordinary flood stream of the River Tay off his lands and entirely on the lands of his neighbour. The House of Lords held, on the facts of that case, that the embankment was an obstruction and diversion of the natural and ancient course of the stream in times of flood and that the natural course of a river could not legally be altered by one proprietor so as to create a new water way to the prejudice of other proprietors. The same principle was illustrated in another aspect by the decision in *Farquharson* v. *Farquharson*, an unreported case cited by the Lord Chancellor in *Menzies* v. *Breadalbane*. In that case it was held that a riparian proprietor might erect a mound to prevent the river from encroaching on his land and creating a new water way for itself.

Great reliance was placed by the Appellant on the decision in the first-mentioned case, but the principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners, are not necessarily appropriate to the course of an insect pest, which it is

the interest of everyone concerned to repel or destroy. The supposed analogy between the two things is wholly fallacious. The pest has no settled course, and whatever its course may be, no one is bound to respect it. Indeed, the progress of a fire would be a much nearer analogy to the moving horde of locusts than the course of a river.

The case of *Smith* v. *Kenrick* (7 M. G. and S. 515) was also cited by the Appellant. That was a case of adjacent mine owners. The Defendant's mine was on a higher level than that of the Plaintiff, and was subject to no servitude in favour of the latter. As the Defendant's mining operations proceeded, on his own property, in the manner most convenient to himself, the Plaintiff's mine was flooded by water from the workings of the Defendant. This was held to be no wrong on the part of the Defendant, for it took place in the ordinary and natural user of his property, but no one suggested that the Plaintiff was not entitled to protect himself by barriers which would have dammed the stream of water back on the Defendant's mine, where it had its origin. On the contrary, that was held to be his proper remedy, and such a remedy is fairly analogous to the conduct of the Defendants in the present case.

The Appellant, of course, admitted that an owner or occupier of land is entitled to defend or protect his property so far as he can, but he said they had no right to do so by transferring the mischief from their own land to that of their neighbour, and according to him that was what the Respondents did when they prevented the locusts from leaving his land in order to keep them from coming on their own. In support of this proposition the case of *Whalley* v. *Lancashire and Yorkshire Railway Company* (L.R., 13 Q.B.D. 131) was cited. In that case an abnormal rainfall caused

water to accumulate in large quantities against the Defendant's embankment, and they released it by making holes in the embankment so that the water flowed on to the land of the Plaintiff, and did much greater damage than if it had flowed there direct, without the temporary obstruction of the embankment. This was held to be wrong, but the decision does not help the Appellant. It cannot be said that the obligation of a landowner not actively to transfer to his neighbours a danger which he himself has created or increased, is inconsistent with the right of a landowner to repel some extraordinary misfortune which comes to him by way of his neighbour's land.

In Whalley's case, Cotton, L.J., points out that, if an extraordinary flood is seen to be coming, the owner may protect his land from it, and so turn it away without being responsible for the consequences. Visitations of locusts, though no doubt unpleasantly frequent, are in the nature of extraordinary and incalculable events, rather than a normal incident like the rise of a river in a rainy season.

On the facts as found in this case their Lordships are of opinion that the Respondents did no more than what Lord Justice Cotton has defined as being within their rights. But their conduct may be justified on a wider and simpler ground. Even if the invasion be regarded as a normal incident of agricultural industry in South Africa, the Respondents would be entitled, as an agricultural operation, to drive the locusts away just as they are entitled to scare crows, without regard to the direction they may take in leaving.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed with costs.

In the Privy Council.

SAMUEL JACOBUS GREYVENSTEYN

v.

DANIEL WILHELMUS HATTINGH AND OTHERS.

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