

*Judgment of the Lords of the Judicial Committee, of the Privy Council on the Consolidated Appeal and Cross-Appeal of Joseph Kieffer v. Les Ecclésiastiques du Séminaire des Missions Etrangères à Québec alias Le Séminaire de Québec and Les Ecclésiastiques du Séminaire des Missions Etrangères à Québec alias Le Séminaire de Québec v. Joseph Kieffer, from the Court of King's Bench for Lower Canada in the Province of Quebec (Appeal Side); delivered the 12th November 1902.*

Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

[*Delivered by Lord Davey.*]

The questions debated in this case arise out of a litigation between adjoining land owners in the City of Montreal. Both parties were dissatisfied with the Judgment of the Court of King's Bench in Quebec sitting in appeal and have appealed to the King in Council.

The material facts of the case are not now in dispute. Kieffer (the Appellant in the first Appeal) is the owner of a block of land with houses, outhouses and shops thereon situate in Ontario Street in the City of Montreal. Le Séminaire de Québec (Appellants in the Cross-Appeal) are or were at the time of the institution of the suit the owners of a large piece of vacant land with a frontage to Ontario Street and immediately adjacent to Kieffer's land. The

land of Le Séminaire in its natural condition appears to have risen abruptly from Ontario Street for some distance to a kind of plateau. But it is not now in dispute that the lower part of it sloped away from and was on a lower level than Kieffer's land, so that the natural drainage of water from the latter was over the land of Le Séminaire. Nor is it now in dispute that no water from the land of Le Séminaire (in its natural condition) was discharged on to Kieffer's land and Le Séminaire enjoyed no servitude over Kieffer's land in respect thereof.

Sometime prior to November 1893 Le Séminaire commenced levelling a portion of the higher part of their land with a view to the erection of some buildings thereon. This work was done by Le Séminaire itself and was concluded prior to the 9th of November 1893. It is now admitted that no appreciable damage was done to Kieffer's land by the works of Le Séminaire. Subsequently building operations were commenced on the lower portion of the land of Le Séminaire, and for the purpose thereof the level of the lowest part of the ground adjoining Ontario Street was raised with the effect of diverting the water which would otherwise have been discharged over the land of Le Séminaire on to Kieffer's land. It has been found by the Courts below and it is not now in dispute that the works executed subsequently to 9th November 1893 have caused damage to Kieffer and in fact the damages have been assessed at \$2,518. 50.

In these circumstances Kieffer on the 20th September 1894 commenced his action against Le Séminaire and by his declaration prayed that Le Séminaire might be ordered (1) to restore their land to its original condition, (2) to execute the works necessary to prevent the water flowing on to his land, (3) to pay damages. Le Séminaire

pleaded in substance that the works executed by them prior to 9th November 1893 had not caused any damage to Kieffer and that the works executed since that date were executed by one Bellew who was responsible therefor "vis-à-vis les Défendeurs." Bellew filed a petition in intervention whereby he alleged that the works since 9th November 1893 were executed by himself, he being in possession of the property and that consequently he was and acknowledged himself to be responsible for all the damages which Le Séminaire might sustain by reason of these works and specially for such as they might be ordered to pay in the action in consequence of those works.

It will be observed that neither the plea of Le Séminaire nor the petition of Bellew describes the character in which he was in possession of the land and had executed the works. Consistently with the language used Bellew might have been the contractor or the mandatory of Le Séminaire and acting under their orders. However, on the second day of the trial (the 27th October 1895) Le Séminaire obtained leave to amend their plea by alleging that Bellew had been and was then in possession of the lands in question by virtue of a deed of lease and promise of sale of the 9th November 1893 and another like deed of the 31st December 1894.

On this amended plea the questions arise whether Kieffer has any right to have the land restored to its natural condition or the nuisance abated by or at the expense of Le Séminaire and whether he has any right of action against Le Séminaire for damages.

What has to be considered is the relation between Le Séminaire and Bellew at the time of the construction of the works and at the commencement of the action. And for this purpose the deed of the 9th November 1893 is alone

directly material. By this deed Le Séminaire leased to Bellew for the term of a year from the previous 1st November certain parts of their land (being those on which the works complained of were executed) at a rent of \$2,500. Le Séminaire agreed to sell and Bellew agreed to purchase the same land within the year for a price named payable within five years from the 1st November 1893. The other terms of the deed were those of an ordinary building agreement. Bellew was to erect houses with liberty to sell them from time to time and the purchase moneys were to be paid to Le Séminaire in part payment of the price of the land with certain special stipulations as to the character of the houses to be erected, amounts of purchase money, and so forth. The term of one year thus created was unexpired at the date of the commencement of the action. It appears that Bellew did not fulfil his contract within the year and the arrangement between the parties was renewed with some variation for a further term by the deed of the 31st December 1894 executed *pendente lite*.

The deed of the 9th November 1893 contains no stipulation for the execution by Bellew of the particular works which have caused the nuisance complained of and no express authority to him for the execution thereof. Nor is there any evidence that the nuisance was necessarily consequent on the execution by Bellew of the authorised building operations. On the contrary it would seem that it might have been obviated by cutting sufficient drains to carry off the water from the high ground. Their Lordships therefore think that the legal questions in this case must be answered on the assumption that Bellew was in possession of the land as lessee and executed the works for his own benefit as intending purchaser and not as mandatory of or

by the direction of Le Séminaire. The learned Counsel for Kieffer contended that Bellew's levelling works were but a continuance of the similar works previously commenced by Le Séminaire on the top of the hill. But the evidence does not seem to bear out the contention in fact and their Lordships do not think the point material.

Mr. Justice Doherty in the Superior Court by his Judgment rendered the 12th April 1897 maintained Defendants' amended plea to Plaintiff's action and dismissed the action without costs, the Court reserving to Plaintiff such recourse as he might by law be entitled to and as it might be necessary for him to exercise against the Defendants to compel the latter to suffer the re-establishment of the original level of their property or the doing of such works on such property as might be necessary to prevent the change made in the level thereof from injuriously affecting Plaintiff's land at the expense of Plaintiff or of whatsoever person may be liable therefor. Bellew was ordered to pay the costs of his intervention, including one half of the costs of the *enquête*. He did not appeal and drops out of the subsequent proceedings.

By the Judgment of the Superior Court in Review dated the 30th June 1898 the Judgment of Mr. Justice Doherty was reversed and it was held that Le Séminaire was under an obligation to restore the original level of their lands and to execute the works necessary to prevent the water from flowing on Kieffer's property and also to pay damages up to action brought and it was referred to experts to assess the amount.

There was an appeal by Le Séminaire to the Court of King's Bench. By the Judgment of that Court dated the 29th May 1901 it was held that in the circumstances Kieffer could not obtain damages from Le Séminaire, but was entitled to an order upon Le Séminaire to cause

the cessation of the servitude of which he complained and to execute the works necessary for that purpose.

As has been said neither party is content with this Judgment and both have appealed against it.

Their Lordships are fully sensible of the weight to be attached to the opinion of the three Judges who were parties to the Judgment of the Superior Court sitting in Review and of the Chief Justice Lacoste and his four learned colleagues on a question of this kind. But on a consideration of the authorities to which they have been referred they must hold that the Appellant Kieffer has not made out his right to have the so-called servitude discontinued or the nuisance abated by or at the expense of Le Séminaire. They prefer the judgment on this point of Mr. Justice Doherty expressed in the following "considérant" of his judgment:—

"Considering that if the result of works done  
 " by persons other than Defendants and for  
 " whose acts the latter are not responsible has  
 " been to alter the level of Defendants' property  
 " in such manner as to cause water which pre-  
 " viously did not do so to flow from Defendants'  
 " on to Plaintiff's land, or to increase the natural  
 " flow of water from the land of the former on  
 " to that of the latter, Defendants are not by  
 " law bound at their own expense to cause their  
 " land to be replaced in its original condition or  
 " to make the works necessitated by said change  
 " of level to prevent water flowing from their  
 " land on to Plaintiff's nor to pay the damages  
 " resulting to Plaintiff from such flow or in-  
 " creased flow of water all as prayed for by  
 " Plaintiff's action, but that the sole obligation  
 " of Defendants, in connection with said works,  
 " would be to suffer that the original level  
 " of their said lands be restored, or effective  
 " works made upon their lands to prevent such

“ flow or increased flow of water on to Plaintiff’s  
 “ land at the expense of Plaintiff or of the  
 “ persons by whose acts the level of Defendants’  
 “ land was changed, against whom alone Plaintiff  
 “ has recourse to compel the remedying of the  
 “ consequences of such change, and for the  
 “ damages suffered by him in consequence  
 “ thereof (Pothier, Société, 2e. Appendice No.  
 “ 239; 11 Demolombe, No. 47-3; Toullier 510;  
 “ 5 Duranton 1709)”.

It is quite true as the learned Chief Justice says that “ the action is in its nature an ‘ action  
 “ ‘ négatoire ’ and consequently a real action  
 “ which ought to be taken against the actual  
 “ holder of a dominant tenement ” for the pur-  
 pose (that is) of negating the pretended  
 servitude and establishing the consequent right  
 to the cessation of its exercise. But that does  
 not touch the measure or extent of the relief to  
 which the Plaintiff is entitled as against the De-  
 fendants or the question whether his right is to  
 have the exercise of the pretended servitude  
 discontinued or the offending work removed by  
 or at the expense of the Defendants or merely  
 the right to enter upon the Defendants’ land  
 and himself to do what is necessary for the pur-  
 pose. The answer to this question must depend  
 on the requirements of the French law upon  
 which the Quebec Code is founded.

It is a little remarkable that neither the  
 Quebec Code nor the Code Napoléon contains  
 any express provision on this point. Article 501  
 of the Quebec Code (which corresponds to  
 Article 640 of the Code Napoléon) provides as  
 follows :—

“ Lands on a lower level are subject towards  
 “ those on a higher level to receive such waters  
 “ as flow from the latter naturally and without  
 “ the agency of man. The proprietor of the  
 “ lower land cannot raise any dam to prevent

“ this flow. The proprietor of the higher land  
 “ can do nothing to aggravate the servitude of  
 “ the lower land.”

Amongst the authorities which are quoted by the authors of the Code as the foundation of this Article is Pothier's treatise on Société, 2nd Appendix 235 to 239, under the title “ Des autres obligations que forme le voisinage.” Section 239 is as follows :—

“ Le demandeur conclut, par cette action, à  
 “ la destruction de l'ouvrage qui lui cause du  
 “ préjudice. La destruction doit se faire aux  
 “ frais du défendeur, si c'est de son ordre que  
 “ l'ouvrage a été fait, ou de quelqu'un dont il  
 “ soit l'héritier ; sinon il n'est tenu à autre  
 “ chose qu'à souffrir la destruction de l'ouvrage  
 “ aux frais du demandeur. Si ipse feci . . .  
 “ meâ impensâ tollere me cogendum ; si alius qui  
 “ ad me non pertinet, sufficere ut patiar te  
 “ tollere ; quod autem is cui hæres sum fecit,  
 “ perinde est ac si ipse fecissem.” The reference  
 to Pothier's latin quotation is Digest 39. 3. 6.  
 7. ff.

In like manner Dalloz commenting on the corresponding article in the Code Napoléon (Répertoire Alfabétique tit. Servitude, Art. 101, Edn. 1859, Vol 11, p. 83), says :—

“ La démolition des ouvrages nuisibles au  
 “ fonds inférieur, est aux frais du propriétaire  
 “ qui en profitait. Dans le doute, il en est  
 “ présumé l'auteur. Il ne serait tenu que de  
 “ laisser démolir si l'ouvrage émanait d'un  
 “ tiers.”

It is unnecessary for their Lordships to comment on the numerous other text writers who are referred to by Mr. Justice Doherty or were quoted by Counsel in the course of the argument. Their Lordships cannot hold that Bellew was acting under the control or direction of Le Séminaire or in the circumstances that the latter is responsible for his acts.



With regard to the claim for damages against Le Séminaire the short but sufficient answer is that given by the Chief Justice Lacoste:—  
“ Damages can result only from a fault; this is  
“ a personal demand which ought to be made  
“ against the author of the fault.”

The learned Counsel for the Appellant Kieffer quoted cases which have been decided in the Canadian Courts against owners of buildings for damage occasioned by some want of repairs or fault of construction, but they turned upon the express provision for such cases in Article 1055 of the Code and have no bearing on the present case.

The result is that Kieffer so far as his claim for the cessation of the pretended servitude and for damages is concerned has sued the wrong person, but this judgment will not preclude his taking any proceedings against Bellew or anybody else which may be still open to him.

Their Lordships will humbly advise His Majesty that Kieffer's appeal should be dismissed and the appeal of Le Séminaire de Québec should be allowed and that the Judgments or Decrees of the Superior Court in Review dated the 30th June 1898 and of the Court of King's Bench of the 29th May 1901 and all proceedings thereunder should be discharged and the Judgment of Mr. Justice Doherty of the 12th April 1897 restored and that the Appellant Kieffer should pay the costs of and consequent on the Appeal to the Superior Court in Review (including the costs of the enquiry as to damages and of the hearing before Mr. Justice Loranger) and of the Appeal to the King's Bench. The Appellant Kieffer will also pay the costs of these Consolidated Appeals.

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