1886 WILLIAM W. WHEELER, *et al.*.....APPELLANTS;

*Nov. 9.

AND

1887 JOHN BLACK *et al.*.....RESPONDENTS.

March 14.

ON APPEAL FROM THE COURT OF QUEENS BENCH FOR LOWER CANADA (APPEAL SIDE).

Servitude—Barn erected over alley subject to right of access to drain —Aggravation—Art 557 *C.C.—Damages.*

In 1843, B. *at al* (the plaintiffs) by deed obtained the right of draining their property by passing a good drain through an alley left open between two houses on another lot in the town of St. Johns. In 1880, W. *et al.* (defendants) built a barn covering the alley under which the drain was constructed and used it to store hay, &c., the flooring being loose and the barn resting on wooden posts. In 1881 the drain needing repairs the plaintiffs brought an action *confessoria* against defendants as proprietors of the servient land, praying that they (plaintiffs) may be declared to have a right to the servitude constituted by the deed of 1843, and that the defendants be ordered to demolish such a portion of the barn as diminished the use of the drain, and rendered its exercise more inconvenient, and claiming damages; the defendants pleaded *inter alia* that there was no change of condition of the servient land contrary to law, and prayed for the dismissal of plaintiffs' action.

Held, Gwynne J. dissenting, that by the building of the barn in question, the plaintiffs' means of access to the drain had been materially interfered with and rendered more expensive, and therefore that the judgment of the court below ordering the defendants to demolish a portion of their barn covering the said drain, in order to allow the plaintiffs to repair the drain as easily as they might have done in 1843, when said drain was not covered, and to pay $50 damages should be affirmed.

Per Gwynne J., That all plaintiffs were entitled to was a declaration of the right to free access to the land in question for the purpose of making all necessary repairs in the drain as occasion might require, without any impediment or obstruction to their so doing being caused by the barn which had been erected over the drain, and that the action for damages was premature.

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*PRESENT—Sir W. J. Ritchie C. J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

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APPEAL from the judgment of the Court of Queen's Beench for Lower Canada (appeal side) maintaining the respondents action (1).

The question which arose on this appeal was whether the appellants, by building a barn in an alley in the town of St. Johns through which the respondents had a right to have a good drain, had aggravated the servitude so as to entitle the respondents to a judgment of the court ordering the demolition of a portion of the barn and to pay $50 damages.

The facts and pleadings sufficiently appear in the head note, report of the case in the court below (1) and in the judgments hereinafter given.

Robertson Q.C. for appellants, contended that as the evidence proved there is no solid floor in the barn and that the drain could be raised up and repaired in the barn, just as well as, if not better than, outside the barn, there had been no change of the condition of the servient land as meant by law. Citing art 557 C. C. Demolombe (2); Laurent (3); Dalloz Vo. Servitude (4); Sirez Code Annoté (5); Curasson Action Possesoires (6); Lepage Lois des bâtiments (7); Pardessus Servitudes (8). He also contended that the appellants were never put *en demeure*.

Geoffrion Q.C. for respondents.

The right of access to repair the drain is an essential part of the servitude, and that being so and the evidence clearly establishing that the building as it stands tends to diminish the use of our servitude, or at least to render its exercise more inconvenient, we are entitled under art. 557 C. C. to the judgment we have obtained. In any case our action being an action

(1) M. L. R. 2 Q. B. 139.
(2) 12 vol. p. 415 No. 893.
(3) 8 vol. 328.
(4) Nos. 1172 & 1173.
(5) Art. 701 par. 4.
(6) Pp. 290, 291, 337.
(7) 2 Part. ch. 4 art. 3 & 5.
(8) Ed. 1823 No. 70.

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confessoire, the appellants cannot succeed in having it dismissed.

As to notice we protested when the barn was being built.

Sir W. J. RITCHIE C.J.—The present appellants in their factum say they desire to submit to this court but one question, namely: Admitting that the servitude in question exists and has been duly registered, does the record show, or is there any proof, that the present appellants, as owners of the servient land, have done any act tending to diminish the use of the servitude or render its exercise more inconvenient? This was the only question submitted to the court that rendered the judgment appealed from and the only one submitted to this court.

I think it clearly appears that the defendants have erected upon and over the site of this drain a building which, in my opinion, tends to diminish the use of the servitude and renders its exercise more inconvenient. It would seem that repairs are now necessary, and that the barn is an obstacle which actually interferes with making such repairs. If any damage was sustained by reason of the stoppage of this drain the person whose duty it was to repair it would be liable; at any rate, he has necessarily the right to enter and repair and is entitled to the opportunity and means of doing so whenever the necessity should arise, and, in my opinion, the erection of this barn over this drain, as the evidence shows it to have been constructed, necessarily obstructs the plaintiffs' right and deprives them of the same reasonable means of access that they would have had if the barn had not been erected. I cannot think the right to enter and repair this drain can, as is contended, depend on consent to be obtained for that purpose. Suppose the defendants or their tenant refused

leave, is the plaintiffs' cellar to remain full of water until the termination of a lengthy litigation? And where is the duty imposed on the plaintiffs to enter the defendants' barn, incur the expense of removing property that may be therein, taking up the floor, and generally removing all obstructions before being in a position to examine or open up the drain for repairs? Or, should repairs not be necessary for a lengthened period, and the plaintiffs allow the obstructions to remain for a sufficiently long time, are the defendants to be permitted to acquire by prescription or otherwise the right to maintain the barn as it is, and so to be in a position to resist any interference with it by the plaintiffs, or whoever may be the proprietor of the servitude?

Under these circumstances I think the appeal should be dismissed.

STRONG J.—I am also of opinion, for the reasons given by the majority of the court below, that the appeal should be dismissed. I cannot agree with the dissenting judgment of Mr. Justice Ramsay. The law governing this case is precisely identical with the law of England as appears by the case of *Goodhart* v. *Hyett* (1). That decision is entirely in point, and the law it lays down is precisely similar to that of the Province of Quebec.

FOURNIER, J.:—L'action *confessoria servitutis* intentée en cour inférieure par les présents Intimés, avait pour but de faire déclarer que le lot de terre des Appelants décrit en la déclaration en cette cause était assujéti au profit du lot des Intimés à une servitude d'égout, en vertu d'un acte de vente consenti en 1843 par Pierre Dubeau à feu John Black, créant cette servitude dans les termes suivants:

(1) 25 Ch. D. 182.

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Le droit de drainer la cave ou les caves du dit lot 171, en construisant et faisant passer un bon drain à travers le lot du dit Pierre Dubeau, situé dans la dite ville, entre les rues Richelieu et Champlain, connu sous la désignation du lot 'I', le dit drain devant passer au-dessous d'une allée entre les maisons sur le lot de Dubeau, allant d'une rue à l'autre.

Cet acte de vente, établissant la servitude en question, fut enregistré par sommaire le 6 octobre 1843, et le canal d'égout fut construit conformément à la stipulation contenue au dit acte, traversant la propriété de Pierre Dubeau pour aller déboucher dans le canal Chambly. Par acte de vente du 11 mars 1880, à eux consenti par un nommé John Hugh Wise, les Intimés achetèrent le lot de terre, pour le service duquel Pierre Dubeau avait créé la servitude en question en faveur de feu John Black. Cet acte fut aussi enregistré. Leur vendeur Wise était propriétaire en vertu de bons et valables titres.

Le 7 mars 1880, Louis Dubeau vendit aux Appelants le lot que Pierre Dubeau avait assujéti à la servitude d'égout en faveur de feu John Black. Les Intimés, depuis leur acquisition et leurs auteurs avant eux, ont toujours joui de leur droit de servitude sur ce dernier jusqu'à l'automne 1880, époque à laquelle les Appelants ont construit sur l'allée où passe l'égout une grange, qui les empêchait de faire au dit égout les réparations nécessaires. Ils ont conclu à des dommages et à la démolition de l'obstacle mis à leur paisible jouissance de la dite servitude.

Plusieurs plaidoyers ont été produits contre cette demande, mais les seuls qui méritent considération sont les suivants:—Que l'un des défendeurs, Coker, ayant cessé d'être l'un des propriétaires de l'immeuble servant, l'action ne pouvait être dirigée contre lui. 2o. Que l'acte de vente du 22 août 1843, n'avait pas créé une servitude réelle sur le lot des défendeurs, parce que les propriétés en question n'étaient pas con-

tiguës, mais, qu'au contraire, elles étaient séparées par un chemin public, et qu'en conséquence les Intimés et leurs auteurs n'avaient acquis qu'un droit personnel. 3o. Que la servitude en question étant un droit réel, elle devait être enregistrée, et l'enregistrement d'icelle renouvelée dans les délais fixés par la loi, mais que le renouvellement n'avait pas eu lieu, que le drain en question est inutile.

Les différentes questions soulevées par ces plaidoiries sont abandonnées par les Appelants, qui ont formellement déclaré ne soumettre à la considération de la cour que la seule question de savoir s'ils ont commis quelque acte tendant à diminuer la jouissance du droit de servitude ou à en rendre l'exercice plus incommode. Leur factum contient à ce sujet la déclaration suivante:—

The present appellant desires to submit to this court but one question:

Admitting that the servitude in question exists and has been duly registered, does the record show or is there any proof that the present appellants, as owners of the servient land have done any act tending to diminish the use of the servitude or render its exercise more inconvenient. This was the only question submitted to the court that rendered the judgment appealed from and the only one submitted to this honorable court.

La cause se trouve ainsi réduite à une seule question de fait, savoir, si la preuve a établi que le trouble apporté à la jouissance des Intimés par la construction d'une grange au-dessus du canal d'égout a eu l'effet de diminuer l'étendue de leur droit de servitude ou d'en rendre l'exercice plus incommode. Sur ce point de fait plusieurs témoins ont été entendus de part et d'autre.

Le passage dans lequel Pierre Dubeau avait accordé le droit de construire le canal d'égout est aujourd'hui entièrement obstrué par la construction d'une grange de 35½ pieds de largeur sur environ 90 à 100 pieds de longueur. Cette grange se trouve au-dessus du canal

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et doit partant nécessairement diminuer les facilités des Intimés pour la réparation et l'entretien de ce canal. Le témoin Oscame Prévost s'exprime ainsi à ce sujet :—

Il est possible qu'on pourrait lever le canal sous la grange en creusant en dessous de la grange, mais ce serait bien dispendieux ; il faudrait d'abord vider ce qu'il y avait dans cette partie de la grange qui couvre le canal ; ensuite il faudrait défaire le plancher, s'il y en a un, enlever la terre de surplus et la mettre en dehors de la grange, et refaire ensuite le plancher et remettre dans la grange les marchandises qui auraient pu en avoir été enlevées ; et c'est là le surcroit de dépense que la réparation de ce canal occasionnerait ; il faudrait renouveler ces dépenses là chaque fois que le canal viendrait en mauvais ordre.

Joseph Arpin dit :—

Si la grange était vide au moment où on aurait besoin de faire des réparations dans ce canal, je considère que cette grange n'apporterait aucun obstacle à ces réparations pourvu qu'on en permît l'entrée ainsi que l'ouvrage ; mais si le canal se trouvait à passer vis-à-vis une porte, sous une batterie, alors ce serait un obstacle sérieux à la confection de ces réparations."

François Dufour dit positivement que le canal d'égout de la maison de brique des Intimés passe sous la grange dans toute sa profondeur.

Les témoins des Appelants, parmi lesquels se trouve le père de Wheeler, disent qu'il serait facile, malgré cette construction, de réparer le canal. Wheeler dit :—

It would be very easy to take off that floor (le plancher de la grange). It would not cost more than ten cents.

Pierre Joubert dit :—

En ôtant le plancher de la grange, je pense qu'il serait facile de creuser en dessous de la grange pour y découvrir un canal qui serait là ; et il serait facile d'ôter le plancher.

Israël Daniel dit—

Qu'il serait facile suivant moi de creuser en dessous de la grange pour lever le canal d'égout, attendu qu'il n'y a pas sole et qu'il n'y a qu'une épaisseur de planche, et du moment qu'il n'y a pas de fourrage dans la grange ce ne sera pas plus difficile de creuser dans la grange que dehors.

C'est là toute la preuve offerte par les parties sur le seul point en contestation devant cette cour. Il en resort bien clairement qu'un changement considérable

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dans l'état du terrain sujet à la servitude d'égout a été fait par les Appelants. Au lieu d'exercer leur droit sur un terrain vacant, n'offrant aucun obstacle aux excavations à faire pour découvrir le canal au cas de réparations à y faire, les Intimés auraient maintenant à pénétrer dans la grange des Appelants—ce qu'ils ne pourraient jamais faire sans une permission spéciale—et avant de faire aucune excavation ils auraient à lever le plancher de la grange, et si alors la grange contenait du foin ou autres effets, il faudrait avant d'y déposer la terre provenant de l'excavation, enlever ces articles, et remettre les choses dans le même état après les réparations faites. Il est évident que l'ouvrage serait plus considérable et plus dispendieux fait dans cette bâtisse que s'il devait être fait sur un terrain vacant. L'exercice du droit de servitude a été certainement diminué et rendu plus difficile par la construction de la grange. Le droit des Intimés de faire disparaître les obstacles apportés à leur jouissance est établi par l'article 557, C. C. Demolombe (1) dit à ce ujet :—

Lorsque le propriétaire du fonds servant, a fait un ouvrage quelconque qui a rendu l'exercice de la servitude plus incommode ou moins complet, il est tenu évidemment de remettre les lieux dans leur premier état, sans préjudice des dommages-intérêts auxquels il pourrait en outre, être condamné suivant les circonstances. Et il ne nous paraît pas douteux, qu'il ne pourrait pas alors en abandonnant le fonds assujéti, d'après l'art. 699, s'affranchir de l'obligation personnelle, qu'il a contractée par son quasi-délit envers le propriétaire du fonds dominant.

Il ne me parait pas douteux que l'appel doit être renvoyé avec dépens.

HENRY J.—I am of the same opinion. It has been proved that the drain was stopped. There is a cross-street and it is true that the stoppage may have been on that street, but while the barn remained over the drain the plaintiffs were prevented from opening it so

(1) Tome 12, nº 894.

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as to ascertain where the stoppage really was, and I do not think it could be said that they were not entitled to damages, because it was not proved that the stoppage was in the drain.

The law is perfectly plain. The party would be entitled to remove the barn and everything in the way of opening the drain. But if he removed it he would have to do it at his own expense, and such a removal is very expensive. It makes no difference if the barn was so built as to be easily removed. That is not the question. We are trying the legal rights of the parties. They could agree on that themselves, but not having done so, the plaintiffs are entitled to the judgment of this court upon the legal question submitted.

Under all the circumstances, I think the plaintiffs are entitled to recover, because the use of the drain has been hindered. The only question is as to the amount of damages.

As to the demolition, I think the court had a right to make the order. There is no other way of getting at the drain until the barn is removed. The plaintiffs would have the right to remove it themselves, and if so, the court has a right to order its removal. It may be a hardship, but we have nothing to do with that. We must decide the case without regard to hardship. Although it was the defendants' own land, the record shows that the other party had the right of access without any interference whatever.

TASCHEREAU J.—The respondents, claiming to be the owners of immoveable property to which was attached a right of drainage through the property of the appellants, and to have been deprived of the enjoyment and possession of the said servitude by the construction of a large barn over the said drain, brought

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the present action against the appellants to recover the sum of $300 damages for the loss and injury sustained thereby, and to have the property of the appellants declared to have been, and to be still subject to the said servitude, and the said appellants ordered to demolish the portion of the said barn which tends to diminish the use of the servitude and to render its exercise more inconvenient. The judgment of the court below granted the prayer of the complaint against the defendant Wheeler, but the other defendant Coker having sold to said Wheeler his undivided half in the property before the commencement of the action, but after the construction of the barn, only that portion of the prayer of the complaint against Coker was granted which asked that the defendants be condemned jointly and severally to pay damages to plaintiffs, by reason of both having erected the building which deprived them of the said servitude.

The appellants appealed from this judgment to the Court of Queen's Bench, which confirmed it with a slight modification in the manner of executing it.

Only one question was submitted to this court by the appellants. Does the record show, or is there any proof that the appellants, as owners of the servient land, have done any act tending to diminish the use of the servitude or render its exercise more inconvenient? So that the appellants rest their case purely and simply on a question of fact, upon which they have against them the finding of the two courts below. The law of the case is so clear that they could not but admit it. "The proprietor of the servient land, (says art. 557 C. "C.,) can do nothing which tends to diminish the use of "the servitude or to render its exercise more inconve- "nient." Does the proof establish that by building the barn in question the appellants have rendered for the respondents the exercise of the servitude in question

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more inconvenient? The considérant of the Superior Court on this head is as follows:—

Considérant que dans l'espèce il appert par le preuve que les défendeurs ont dans l'automne 1880 érigé des constructions sur le fonds servant de manière à couvrir l'allée dont il était question dans le titre créatif de la dite servitude, ainsi que le canal d'égout s'y trouvant enfoui; et considérant que les défendeurs n'avaient pas le droit, dans les circonstances, de faire telle construction à l'endroit et de la manière sus indiquée, les demandeurs se trouvant dans l'impossibilité, à raison de la dite construction, de pourvoir à la réparation de leur canal d'égoût de la manière dont ils pouvaient le faire en vertu du titre créatif de la dite servitude, et de la manière dont les défendeurs devaient le souffrir en vertu du même acte.

This finding is entirely supported by the evidence, and I am of opinion that the appeal should be dismissed.

GWYNNE J.—The judgment of the Court of Appeal appears to me to go further than is warranted by the evidence. The evidence, in my opinion, fails to establish any right in the plaintiffs to have a judgment in their favor, ordering the demolition of any part of the barn which has been erected on the servient land.

It fails to establish that there has as yet arisen any necessity for the plaintiffs to open the drain under the barn for the purpose of repairing the drain in question. It may be that the obstruction in the drain which causes the damages to the plaintiffs' house of which they complain is, as it has been before found to be, in that part of the drain which is under the street, between the plaintiffs' tenement and that of the defendant Wheeler, so that there may have as yet arisen no necessity whatever for opening the drain under the barn; and if upon further investigation it should prove to be necessary to open and inspect that part of the drain, the evidence I think fails to establish that the barn, as it stands, would offer any obstruction which could not easily be overcome without the demolition of any part of it, or which could be said

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to abridge or impair the plaintiffs' power to exercise their right of servitude. The floor of the barn is said to be made of loose boards not nailed down, at least in that part which is over the drain, which boards could be easily removed; and if the barn should be empty, or that part of it which is over the drain, when the plaintiffs should require to repair the drain in that part which passes under the barn, the evidence seems to show that the barn would offer no obstruction to the plaintiffs making all necessary repairs. No case is, I think, established to warrant at present the demolition of any part of the barn. Nor has any case been made out, in my opinion, to support the judgment for damages against the defendants for the mere erection of the barn. These damages can only be sustained upon the assumption that the mere erection of the barn, although it should offer no obstruction to making repairs in the drain has caused and constitutes an abridgment of the plaintiffs' right of servitude. This appears to me to be erroneous. If, when a necessity arises for repairing the drain under the barn, it shall be found that all necessary repairs can be made, and so that the servitude which the plaintiffs claim a right to can be fully exercised with the barn as it stands, it cannot be said that the barn has diminished the plaintiff's use of the servitude or has rendered its exercise more inconvenient. The award of damages is, in my opinion, altogether premature. I am of opinion, therefore, that the defendant Coker was, and is entitled to judgment in his favor, dismissing the plaintiffs' action against him with costs; and as to defendant Wheeler, I am of opinion that the ends of justice would be satisfied by a judgment simply declaring that the plaintiffs are entitled to maintain the drain in question, and to have free access to the piece of land of the defendant Wheeler

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in question for the purpose of making all necessary repairs in the drain, as occasion may require, without any impediment or obstruction to their so doing being caused by the barn, which has been erected over the drain or otherwise; and as the defendant Wheeler has upon the record contested this right he should pay the costs of the action; but this appeal should be allowed, in my opinion, to the extent of making the above alteration in, and modification of, the judgment.

Appeal dismissed with costs.

Solicitors for appellants: *Robertson, Ritchie & Fleet.*

Solicitors for respondents: *Geoffrion, Dorion, Lafleur & Rinfret.*