Middlesex Co. v. McCue
Supreme Court of Massachusetts
149 Mass. 103 (1889)

1 Present: Morton, C. J., Field, Devens, W. Allen, & Holmes, JJ.

2 Holmes, J.

3 This is a bill brought to restrain the defendant from filling up the plaintiff's mill-pond. The master reports that the defendant's land is on the slope of a hill running down to the pond, and that the only acts of the defendant tending to fill the pond have been those of cultivating and manuring his own soil in the ordinary way, for the purpose of raising garden vegetables. The question is whether the defendant has a right to do these acts notwithstanding their effects upon the plaintiff's land and water rights.

4 The respective rights and liabilities of adjoining landowners cannot be determined in advance by a mathematical line or a general formula, certainly not by the simple test of whether the obvious and necessary consequence of a given act by one is to damage the other. The fact that the damage is foreseen, or even intended, is not decisive apart from statute. Some damage a man must put up with, however plainly his neighbor foresees it before bringing it to pass. Rideout v. Knox, 148 Mass. 868. Liability depends upon the nature of the act, and the kind and degree of harm done, considered in the light of expediency and usage. For certain kinds there is no liability, no matter what the extent of the harm. A man may lose half the value of his house by the obstruction of his view, and yet be without remedy. In other cases his rights depend upon the degree of the damage, or rather of its cause. He must endure a certain amount of noise, smells, shaking, percolation, surface drainage, and so forth. If the amount is greater, he may be able to stop it, and to recover compensation. As in other matters of degree, a case which is near the line might be sent to a jury to determine what is reasonable. In a clear case it is the duty of the court to rule upon the parties' rights.

5 The present case presents one of these questions of degree. If the plaintiff were complaining of offensive drainage from a vault, it would be entitled to recover upon proof of the fact. Ball v. Nye, 99 Mass. 582. If it complained that the surface drainage was made offensive by the nature of the substance spread by the defendant upon his land, the case would be nearer the line, and the right to recover possibly might depend upon further circumstances, such as whether the substances were usual and reasonable fertilizers, or refuse, etc. See Brown v. Illius, 27 Conn. 84, and 25 Conn. 583. In this case it complains, not that the substances brought down are offensive, but that the defendant causes any solid substance to be brought down at all. Practically it would forbid the defendant to dig his land, at least without putting up a guard, since the surface drainage necessarily carries more of the soil along with it if the earth is made friable by digging. This would cut down the defendant's right of surface drainage to a very small matter indeed. We are of opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may. The plaintiff says that a wall would stop the trouble. If so, it can build one upon its own land.

6 *Bill dismissed.*