DAME SOPHIE WINEBERG *et vir* (DEFENDANTS)..... } APPELLANTS ;

AND

ROBERT HAMPSON (PLAINTIFF).....RESPONDENT.

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*June 1.

*Nov. 17.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

*Jurisdiction—Appeal—Future rights—Title to lands—Servitude—Supreme and Exchequer Courts Act, sec. 29 (b).*

By a judgment of the Court of Queen's Bench for Lower Canada (appeal side) the defendants in the action were condemned to build and complete certain works and drains within a certain delay, in a lane separating the defendants' and plaintiff's properties on the west side of Peel street, Montreal, to prevent water from entering plaintiff's house which was on the slope below. The question of damages was reserved. On appeal to the Supreme Court of Canada.

*Held*, that the case was not appealable, there being no controversy as to $2,000 or over, and no title to lands or future rights in question within the meaning of sec. 29, sub-sec. (b) of the Supreme Court Act.

The words title to lands in this sub-section are only applicable in a case where a title to the property or a right to the title may be in question. The fact that a question of the right of servitude arises would not give jurisdiction.

*Wheeler* v. *Black* (14 Can. S.C.R. 242) referred to.

*Gilbert* v. *Gilman* (16 Can. S. C. R. 189) approved.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a judgment of the Superior Court.

The facts of the case are stated in the judgment of Mr. Justice Taschereau hereinafter given.

The appeal to this court was taken after the following order had been obtained by the appellant from a judge of the Court of Queen's Bench :

PRESENT :—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Patterson JJ.

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"Seeing that the judgment from which an appeal is sought disposes as a finality of real rights, and also that the rights in future of the parties may be bound by it, and seeing that the said appellants, Dame Sophie Wineberg *et vir*, have given security to the extent of five hundred dollars as required by the 46th section of chapter 135 of the Revised Statutes of Canada, (The Supreme and Exchequer Courts Act, 1886) that they will effectually prosecute their appeal and pay such costs and damages as may be awarded against them by the Supreme Court.

"The appeal to the Supreme Court is hereby allowed reserving to the respondent the right to urge before the said court his objection to said appeal by motion or otherwise."

*Bethune* Q.C. moved to quash the appeal for want of jurisdiction, the case not being appealable under section 29, of the Supreme and Exchequer Courts Act.

*Robertson* Q.C. *contra*.

The judgment of the court was delivered by:—

TASCHEREAU J.—The respondent moves to quash this appeal on the ground that the judgment is not appealable. I am of opinion that this motion should be allowed.

The parties own adjoining properties on the west side of Peel street. This street is at right angles to Sherbrooke street and has a general direction of north and south, the ground rising as you go northward. The properties are separated by a lane of ten feet in width which belongs to Wineberg. Hampson's property is to the south of Wineberg's and therefore on a lower level. The ground here is rock with a very slight covering of soil. The surface descends with a considerable inclination towards Sherbrooke street. It

also declines but with less angle towards Peel street, Wineberg's house was built before that of Hampson. It is the southern one of a block of four houses built originally by the same proprietor, and being on a higher level than Hampson's the natural flow of the surface water would be from Wineberg's to Hampson's. To drain the flow of water from the four houses there was constructed what is called a French drain of loose stones passing through the yards of these houses southward until it reached the lane between the two properties; it then turned eastward through the land until it reached the main corporation sewer in Peel street, at a depth of 4 to 6 feet underground in the lane.

Hampson, who built after Wineberg's houses were constructed and who excavated his foundations to a depth of from 4 to 5 feet below the level of the drain, found that his basement was inundated by a heavy flow of water proceeding, as he conceived, from the French drain. He consequently instituted the present action against the present appellants claiming that they should cease to use the French drain in such manner as to be a source of danger or damage to his, Hampson's, adjoining property, and should pay him $10,000 for his damages. The appellants by their plea contended that the drain was made for the protection of the properties from the natural descent of the water from the upper properties; that no part of it entering the French drain escaped into Hampson's house; and if any water came into his cellar it was from the natural flow from the higher to the lower ground escaping through fissures in the rocks, a servitude to which all like situate properties were liable, and to which Hampson especially exposed his property by digging his foundations so deep.

The Superior Court after various procedures and

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judgments finally appointed three scientific experts, Hannaford, Shanly and Brown. The last two reported adversely to the appellant in separate reports, and that he should make certain works to prevent the flow of water in the respondent's cellar. The Superior Court adopted this report, and ordered the appellant to make certain works and drains within fifteen days from the judgment, the court, however, reserving judgment as to the damages claimed. This judgment was confirmed in appeal. Now, there is no condemnation in that judgment to any damages; there is, consequently, no controversy on this appeal as to $2,000 or over; *Ontario* v. *Marcheterre* (1). And the controversy does not relate to any title to land, annual rent or such like matters or things, where the rights in future might be bound. We have often held that the words "where the rights in future might be bound" are governed by the preceding words "such like matters or things;" *Gilbert* v. *Gilman* (2). That is the difference between the right of appeal to the Privy Council and the right to appeal to this court, as art. 1178 of the code of procedure says "other matters" not "such like matters."

The appellant, in order to sustain his appeal, contended that a question of "real rights" arose in this suit. I cannot find such an expression in the Supreme Court Act. The fact that in this case a question of a right of servitude arose would not give us jurisdiction. In *Wheeler* v. *Black* (3) the objection to the jurisdiction of this court was not taken by the respondent and was not noticed by the court. The words "title to lands" are only applicable in a case where a title to the property or a right to the title are in question. Hypothec as well as a servitude can more or less affect a title. Nevertheless the jurisprudence has not recognized ap-

(1) 17 Can. S. C. R. 141. (2) 16 Can. S. C. R. 189.
(3) 14 Can. S. C. R. 242.

peals in a case in which the mortgage alone is in controversy, the amount of the mortgage being under $2,000. See *Bank of Toronto* v. *Le Curé, &c., de la paroisse de la Nativité* (1).

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I could also add that I doubt whether the judgment is final. It appears however that it was executed.

*Appeal quashed with costs.*

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

Solicitors for respondent: *Bethune & Bethune.*

(1) 12 Can. S. C. R. 25.