MICHEL SIMÉON DELISLE (PLAINTIFF) ..... APPELLANT;

AND

CLOVIS ARCAND (DEFENDANT) ..... RESPONDENT.

1905

*March 16.
*March 20.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Jurisdiction—Possessory action.

Possessory actions always invoke title to land in a secondary manner and consequently are appealable to the Supreme Court of Canada. *Pinsonneault* v. *Hébert* (13 Can. S.C.R. 450); *Gauthier* v. *Masson* (27 Can. S.C.R. 575); *Commune de Berthier* v. *Denis* (27 Can. S.C.R. 147); *Riou* v. *Riou* (28 Can. S.C.R. 52); *Couture* v. *Couture* (34 Can. S.C.R. 716) referred to. *Cully* v. *Ferdais* (30 Can. S.C.R. 330); *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works* (21 Can. S.C.R. 422), and *Davis* v. *Roy* (33 Can. S.C.R. 345) distinguished.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and dismissing the plaintiff's action with costs.

The action was brought *au possessoire* to eject the defendant from the possession of a portion of a lot of land of which the plaintiff alleged that he was owner *à titre de propriétaire,* for a decretal order that the defendant should deliver up the same in the condition it was before the trespass, for the demolition of a wall constructed thereon by the defendant and for $500 damages. The defence was that the works done by the defendant was done merely to prevent the piece of land in question caving into a drain which the defendant had constructed upon an adjoining lot and that there had been no trespass. By the judgment of

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt, and Idington JJ.

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the Superior Court the plaintiff's action was maintained, but this decision was reversed on appeal to the Court of King's Bench by the judgment now appealed from.

Belcourt K.C. for the motion. The action is really one for trespass and claiming $500 damages. It does not even ask for *bornage;* at the most it can be regarded simply as a possessory action and there is no question as to the title to land involved. This case is in all respects similar to *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works*(1). We also refer to *Cully* v. *Ferdais*(2), and *Davis* v. *Roy*(3).

Stuart K.C. contra. The action depends upon our possession *à titre de propriétaire* and involves the question whether or not the defendant has any right to enter upon the land in question and construct works thereon. It also effects future rights as between the parties. We rely upon the decisions of this court in *Blatchford* v. *McBain*(4); *McGoey* v. *Leamy*(5); *Gauthier* v. *Masson*(6); *Delorme* v. *Cusson*(7); and *Parent* v. *The Quebec North Shore Turnpike Road Trustees*(8).

The judgment of the court was delivered by:

GIROUARD J.—This is a motion to quash an appeal from a judgment rendered in a possessory action. Our uniform jurisprudence has been to entertain such an appeal in numerous cases and seldom, if ever, has our jurisdiction been questioned. The reason is that possessory actions always involve in a secondary manner the title to lands, for the plaintiff must possess *animo domini, à titre de propriétaire,* and the defendant

(1) 21 Can. S.C.R. 422.
(2) 30 Can. S.C.R. 330.
(3) 33 Can. S.C.R. 345.
(4) 19 Can. S.C.R. 42.
(5) 27 Can. S.C.R. 193.
(6) 27 Can. S.C.R. 575.
(7) 28 Can. S.C.R. 66.
(8) 31 Can. S.C.R. 556.

may plead, as the respondent did in this instance, that he is not such a proprietor. See *Pinsonnault* v. *Hébert* (1); *Gauthier* v. *Masson* (2); *Commune de Berthier* v. *Denis* (3); *Riou* v. *Riou* (4); *Couture* v. *Couture* (5).

In *Cully* v. *Ferdais* (6), Taschereau J. lays down the rule that an action *confessoire*, like actions *négatoires*, is appealable; the appeal was quashed because the action was not one of those actions.

Mr. Belcourt has referred us to *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works* (7). But I fail to see how he can find any comfort in tnat decision. First, it was not a case of possessory action, but one of injunction which is always purely personal. The last remarks of Taschereau J. are conclusive upon the point before us:

> Now, under the laws of the province the rights to the title of this lot, or the possession thereof, could not be determined on such a proceeding taken *ab initio*. No judgment *au possessoire* or *au pétitoire* could be given thereon.

The case of *Davis* v. *Roy* (8) does not apply, for there the question at issue before this court was not the possessory action, but the personal condemnation for $200 for rent.

The motion is rejected with costs.

Motion dismissed with costs.

Solicitors for the appellant: *Bédard & Chalout.*

Solicitors for the respondent: *Drouin, Pelletier & Baillargeon.*

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(1) 13 Can. S.C.R. 450.
(2) 27 Can. S.C.R. 575.
(3) 27 Can. S.C.R. 147.
(4) 28 Can. S.C.R. 53.
(5) 34 Can. S.C.R. 716.
(6) 30 Can. S.C.R. 330.
(7) 21 Can. S.C.R. 422.
(8) 33 Can. S.C.R. 345.