

THE CITY OF HULL (PLAINTIFF).....APPELLANT;

AND

JANET LOUISA SCOTT AND OTHERS }
 (DEFENDANTS) }

AND

MORLEY P. WALTERS AND OTHERS }
 (MIS EN CAUSE)..... }

RESPONDENTS.

1904

*March 30.

April 27.

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

*Appeal—Jurisdiction — Petitory action — Bornage — Surveyor's report—
 Costs—Order as to location of boundary line—Execution of judgment.*

Where, in an action *au pétitoire* and *en bornage*, the question as to title
 has been finally settled, a subsequent order defining the manner
 in which the boundary line between the respective properties shall
 be established is not appealable to the Supreme Court of Canada.
Cully v. Ferdaïs (30 Can. S. C. R. 330) followed.

MOTION to quash an appeal from the judgment of
 the Court of King's Bench, appeal side, pronounced
 on the 25th of November, 1903, affirming the judg-
 ment of the Superior Court, District of Ottawa (Archibald J.) by which a motion, on behalf of the respond-
 ents, to have a surveyor's report as to a boundary line
 varied in part and homologated was allowed, and a
 motion, on behalf of the appellant, to have the report
 rejected in part and a different boundary line estab-
 lished was dismissed.

The action *au pétitoire* was instituted, in 1901, by
 the appellant for a declaration of its title to lands
 adjoining and lying in the bed of Brewery Creek, in
 the City of Hull, and for a *bornage* between said lands
 and the adjoining lands of the late Nancy Louisa.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies,
 Nesbitt and Killam JJ.

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Wright, (respondents' *auteur*) and also for an injunction to restrain the *mis en cause* from the construction of certain buildings and improvements upon the *locus in quo*. An interim injunction was granted, as prayed, by Lavergne J. and, on the commencement of other constructions at the point in dispute by the city, an injunction was also applied for by the respondents. Upon the hearing on the merits the interim injunction was dissolved and the respondents' application for an injunction maintained for costs only, the judgment on the merits deciding the question of the title in favour of the respondents. This judgment also ordered a *bornage* according to the lines defined and recognized by the said judgments, the question of costs being reserved. The Court of Review, at Montreal, affirmed these judgments and, on further appeal, the Supreme Court of Canada on 26th May, 1902, affirmed the decisions of the said courts with an addition to the *motifs* as well as to the *dispositif* of the judgment of the Superior Court (Archibald J.) of the 30th of November, 1901, to the effect that the present respondents, who were also defendants in that action, had, furthermore, "acquired the ownership of lot No. 95, (including the *locus in quo*) by the thirty years prescription."

Subsequently, a provincial land surveyor, appointed by the court, made a survey *in situ* of the properties in dispute and reported his proceedings to the court suggesting a boundary line. Thereupon, the respondents moved to reject portions of the surveyor's report as being inconsistent with his instructions for the location of the boundary and the findings in the judgments in respect to the title and, also, to have the report varied and the boundary line located in accordance with the judgments. The present appellant also moved to reject the line suggested in the report and to

have another boundary line adopted. On a re-inscription before Mr Justice Archibald, for the hearing of these motions and upon the issues as to costs which had been reserved, the appellant's motion was dismissed, the respondents' motion was maintained and it was ordered that the boundary line should be located as set out in detail in the judgment pursuant to the former judgments. This latter judgment also adjudicated finally as to the costs in respect to the injunctions and the principal action. On appeal, the judgment of Mr. Justice Archibald was affirmed by the Court of King's Bench and the City of Hull now asserts the present appeal.

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Aylen K.C. for the motion. The chief question at issue is in respect to the adjudication as to costs and, consequently, no appeal can lie. *Moir v. Village of Huntington* (1); *Schloman v. Dowker* (2); *McKay v. Township of Hinchinbrooke* (3). The other question at issue is simply as to the location of the boundary which had been finally settled by the judgments on the principal action, affirmed by this court on 26th May, 1902. There cannot be any appeal from the present judgment which is merely an order in execution of the former judgment of the court. *Cully v. Ferdais* (4).

Foran K.C. contra. The present appeal calls in question the title to all the land lying upon either side of the proposed location of the boundary line which may be claimed or held by either party. There can not be *chose jugée* on this point by the former judgment; it was not *in simili materiâ* and could not and did not make any final disposition as to the boundary line; that has been done now for the first

(1) 19 Can. S. C. R. 363.

(2) 30 Can. S. C. R. 323.

(3) 24 Can. S. C. R. 55.

(4) 30 Can. S. C. R. 330.

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time by the judgment appealed from. In the case of *Cully v. Ferdais* (1) the question was as to a servitude only, a right of way which had to be localized, therefore, that case does not apply. We rely upon the decisions in *Chamberland v. Fortier* (2); *McGoey v. Leamy* (3); and *Stuart v. Mott* (4). We also refer to 20 Laurent, no. 29; 3 Garconnais (1 ed.) p. 239, no. 13, and 8 Aubry & Rau, 369.

The judgment of the court was delivered by :

TASCHEREAU C.J.—(*Oral.*) For the reasons given in the case of *Cully v. Ferdais* (1) the motion to quash is granted with costs and the appeal is quashed with costs.

Appeal quashed with costs.

Solicitors for the appellant: *Foran & Champagne.*

Solicitors for the respondents: *Aylen & Duclos.*

(1) 30 Can. S. C. R. 330.
 (2) 23 Can. S. C. R. 371.

(3) 27 Can. S. C. R. 193.
 (4) 23 Can. S. C. R. 384.