JAMES McGOEY (PLAINTIFF).....APPELLANT; 1897

AND *Feb. 25.

SARAH ELIZABETH LEAMY (DEFENDANT)..... } RESPONDENT.

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

Appeal—Action en bornage—Future rights—Title to lands—R. S. C., c. 135, s. 29 s.s. (b)—54 & 55 V. c. 25, s. 3—56 V. c. 29, s. 1.

The parties executed a deed for the purpose of settling the boundary between contiguous lands of which they were respectively proprietors, and thereby named a provincial surveyor as their referee to run the line. The line thus run being disputed, M. brought an action to have this line declared the true boundary, and to revendicate a disputed strip of land lying upon his side of the line so run by the surveyor :

Held, that under R. S. C., c. 135, s. 29, s.s. (*b*), as amended by 56 V. c. 29, s. 1, (D), an appeal would lie to the Supreme Court of Canada, first, on the ground that the question involved was one relating to a title to lands, and second, on the ground that it involved matters or things where rights in future may be bound. *Chamberland* v. *Fortier* (23 Can. S. C. R., 371), referred to and approved.

APPEAL from the decision of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court in the District of Ottawa, which maintained the plaintiff's action with costs.

The circumstances giving rise to the action were as follows : The plaintiff and defendant being owners of contiguous lands in the Township of Hull, in the County of Ottawa, between which no regular division line appears to have existed, entered into an agreement in writing before a notary public to have the line

* PRESENT :—Sir Henry Strong C.J., and Gwynne, Sedgewick, King and Girouard JJ.

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established by a provincial land surveyor therein named, and thereby bound themselves to abide by the survey and report to be made by him in conformity with such agreement as indicating the boundary line between their respective lands.

The survey was made accordingly, and a line reported as the true line of delimitation between the lands which was agreeable to the plaintiff, but the defendants refused to acquiesce in the line so determined, or to sign the *procès-verbal* of the survey, and continued to occupy a strip of land on the plaintiff's side of the line so defined, which appeared by affidavits filed to be valued at less than $2,000.

The plaintiff brought his action to have the said line declared to be the true boundary between such lands, to enjoin the defendant against trespassing beyond it, and to be declared the owner and put into possession of the disputed strip of land, and further, to have boundary marks placed, and so forth.

The Superior Court adopted the surveyor's report and granted the conclusions of the plaintiff's action. On appeal the Court of Queen's Bench reversed the judgment and held that the report and *procès-verbal* of the surveyor did not bind the parties.

Geoffrion Q.C. and *L. N. Champagne* for the respondent moved to quash the appeal for want of jurisdiction on the grounds that the matter in controversy did not amount in value to $2,000; that the action was in the nature of an action merely to establish a boundary, and did not relate to a title to lands or tenements or otherwise come within the classes of actions appealable from the courts of the Province of Quebec under the provisions of the 29th section of The Supreme and Exchequer Courts Act as amended. *Hood* v. *Sangster* (1); *Wineberg* v. *Hampson* (2); and

(1) 16 Can. S. C. R. 723. (2) 19 Can. S. C. R. 369.

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The Emerald Phosphate Company v. *The Anglo-Continental Guano Works* (1); were cited in support of the motion.

Foran Q.C. *contra.* This court has frequently entertained appeals in actions *en bornage; McArthur* v. *Brown* (2); *The Bell's Asbestos Co.* v. *The Johnson's Co.* (3); *Mercier* v. *Barette* (4); *Grasett* v. *Carter* (5); Cass. Dig. 2 ed. *vo.* "*Boundary;*" and even in possessory actions (*en complainte*); *Pinsonnault* v. *Hébert* (6); *Chamberland* v. *Fortier* (7).

This action affects a title to lands, and by the decision rights in future may be bound within the meaning of the statute as amended. Actions *en bornage* may, and this action does, seek the revendication of lands; 6 Laurent, no. 167. It is a mixed action; Nouveau Denizart, Vo. "*Bornage;*" and the obligation to set boundaries strongly savours of the realty; 1 Mourlon, Code Civil, p. 835; 7 Laurent, no. 428; 8 Poullain du Parc, p. 12. We claim that the notarial agreement is to be read as including the surveyor's report, thus constituting a conveyance and part of a chain of title to the disputed strip of land. See 2 Aubry and Rau, section 199. We are a step in advance of the action under art. 971 C. C. P., and actually demand a declaration of our title, as well as to have boundary marks placed and fences constructed with the object of preventing *troubles* in the future. The judgment under appeal destroys our title and bars further action on our part. *Hood* v. *Sangster* (8) only affected personal rights of a value under $2,000, whilst in *The Emerald Phosphate Company* v. *The Anglo-Continental Guano Company* (1) no boundary line had been run and no real right to specific lands was affected.

(1) 21 Can. S. C. R. 422.
(2) 17 Can. S. C. R. 61.
(3) 23 Can. S. C. R. 225.
(4) 25 Can. S. C. R. 94.
(5) 10 Can. S. C. R. 105.
(6) 13 Can. S. C. R. 450.
(7) 23 Can. S. C. R. 371.
(8) 16 Can. S. C. R. 723.

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The judgment of the court was delivered by

THE CHIEF JUSTICE (*oral*).—The Supreme and Exchequer Courts Act, as amended by the statutes of 1891 and 1893, extends the jurisdiction of this court to controversies involving questions of "title to lands or tenements, annual rents, or other matters or things where rights in future may be bound," and it seems clear that this case comes within these provisions on two points.

First, the question is one which relates to a title to lands.

If the parties had agreed to the line in the first instance between themselves the plaintiff would have been entitled to a piece of land in possession of the defendant.

It appears that the parties executed a notarial deed for the purpose of settling the boundary between contiguous lands of which they were respectively proprietors, and thereby constituted a provincial land surveyor, therein named, their referee to run the line, and it is upon his report made in conformity with the agreement that the action is based. So far as the present motion is concerned the deed must be regarded as if it had in fact contained the report of the surveyor as subsequently made, and thus read it constitutes a title to lands and tenements.

The case of *Wineberg* v. *Hampson* (1) referred to on the motion depended on the jurisdiction as settled by the statute before the amendments mentioned, and is referred to and distinguished in *Chamberland* v. *Fortier* (2), as having been overruled by the amending Acts. This latter case determined that the court has jurisdiction in cases of servitude, and it must be followed in cases like the present.

(1) 19 Can. S. C. R. 369. (2) 23 Can. S. C. R. 371.

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On the other point, although the action is not actually in the form of an action *en bornage*, the plaintiff seeks such relief as is usually granted in such cases, which is in effect to have the boundaries established for the purpose of quieting the titles to the contiguous lands, and under the present practice the form of action is immaterial. In such a case the rights in future of the parties would certainly be bound by the judgment. Therefore, on this ground also the court has jurisdiction to hear the appeal. The motion must therefore be refused with costs.

Motion refused with costs.

Solicitor for the appellant: *T. P. Foran.*

Solicitors for the respondent: *Rochon & Champagne.*