PRICE BROTHERS & CO. (PLAINTIFFS) .... APPELLANTS;

AND

PIERRE TANGUAY AND ANOTHER (DEFENDANTS) .... RESPONDENTS.

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* March 10.
* May 4.

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

Appeal—Jurisdiction—Rivers and streams—Right of floating logs—Servitude—Faculty or license—Possessory action—Injunction—Matter in controversy—Practice—Costs.

In the Province of Quebec the privilege of floating timber down water-courses, in common with others, is not a predial servitude nor does it confer an exclusive right of property in respect of which a possessory action would lie, and, in a case where the only controversy relates to the exercise of such a privilege, the Supreme Court of Canada has no jurisdiction to entertain an appeal.

The appeal was quashed without costs as the objection to the jurisdiction was not taken by the respondents in the manner provided by the Rules of Practice.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montmagny, (Larue J.) and dismissing the plaintiffs' action with costs.

The plaintiffs complained that they were impeded in the right to drive logs down the course of a river and brought suit for a declaration of their right to do so, for an injunction and an order for the removal

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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of a movable boom placed across the river by the defendants. No claim was made for damages.

The final judgment on the merits of the case, delivered by Mr. Justice Larue at the trial, declared that the parties had, according to law, the common right of using the river for the transmission of timber, subject to the obligation, the one towards the other, of respecting the free exercise of that right, made absolute the interlocutory injunction issued in the case on the 8th of June, 1906, and ordered that the defendants should afford free passage down the river for the plaintiffs' timber. The plaintiffs' action was maintained with costs, and their right of further action to recover damages was reserved to them. By the judgment appealed from the Court of King's Bench reversed the judgment at the trial, set aside the injunction and order, and dismissed the action with costs, Bossé and Blanchet JJ. dissenting.

G. G. Stuart K.C. appeared for the appellants.

A. Lemieux K.C. and *Ernest Roy* for the respondents.

During the hearing of the appeal the court, of its own motion, raised a question as to its jurisdiction to entertain the appeal, and, after hearing counsel upon that question, reserved judgment and enlarged the hearing on the merits of the case until the question of jurisdiction had been disposed of. The question was whether or not, under the above circumstances, the court had jurisdiction to entertain the appeal.

At the following session of the court the appeal

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was quashed for want of jurisdiction, the judgment of the court being rendered by

THE CHIEF JUSTICE.—At the argument a question of jurisdiction was raised by the court. It appeared by the statement of counsel on the opening that the appellant company are the owners of timber limits and of a saw-mill on the Rivière du Sud in the County of Montmagny, Quebec; that they were prevented from exercising their right to drive logs cut on the limits to the mill (a distance of several miles) by a boom stretched across the river by the respondents, riparian proprietors on the same river, between the limits above and the mill below, and this action is brought complaining of this infringement of their rights. The appellants ask for a declaration that they are entitled to float their logs from the limits to the mill and for an order on the defendants to cease troubling them and for the removal of the obstruction, a movable boom. The appellants' right to float logs down the river is not denied by the respondents. The only question for us to decide is whether or not, on these facts, we have jurisdiction to hear this case. There is no question of future rights or of title to property at issue in my opinion. The right of the riparian owner to use the water which passes by or crosses over his property for the purposes mentioned in art. 503 C.C. is not involved either in this appeal. Appellants' counsel in answer to the objection made by the court put forward the contention that this is a possessory action and that we have jurisdiction to hear it and *Delisle* v. *Arcand*(1), was referred to. It was

(1) 36 Can. S.C.R. 23.

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held in that case that we have jurisdiction to hear a possessory action because in such an action titles are in issue in a secondary manner. In the same case it was decided, when the case was finally disposed of on the merits(1), that the possessory action lies only in favour of persons in exclusive possession *"à titre de propriétaire."*

This is not a possessory action; it is merely an action on the case for a nuisance infringing plaintiffs' rights and there is no claim made for actual ascertained damages. The plaintiffs have no exclusive right of property in the running waters of this natural stream and they have no right to the use of them beyond that enjoyed by the general public. This is not a right of use such as is provided for in arts. 487 and 381 C.C.

Curasson, "Action possessoire," p. 150:

L'action possessoire ne peut être exercée qu'autant que la prescription afin d'acquérir ou de perdre un droit immobilier peut résulter de la possession.

In France it is settled law that the waters of such a stream are of the class of things which have no owner and the use of which is common to all (*res communes*) and there can be no possession of the running waters of a stream in its natural state which could lead to prescription and give rise to a possessory action. Dalloz, 1891, 1, 291.

Pothier (ed. Buquet), vol. 9, p. 131:

Le fluide, l'eau prise comme élément, est une chose commune qui appartient à tous les hommes sans qu'aucun puisse s'en dire le propriétaire tant qu'elle reste en cet état.

Girard, "Droit Romain," p. 338:

(1) 37 Can. S.C.R. 668.

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Les *res communes* (v.g. l'air, l'eau) sont celles qui sont à l'usage de tous les hommes parce qu'elles échappent à toute appropriation privée,

and article 585 C.C.

In the Province of Quebec it has been held that the public have a right to all the advantages which a river in its natural state and its banks can afford but there can be no exclusive right of property or of user in the running waters of a natural stream which can only be appropriated by severance. M.C. arts. 868, 891. *McBean* v. *Carlisle*(1); *Tanguay* v. *Canadian Electric Light Co.*(2). This right, or rather this faculty or license which the public enjoy, because it is not properly a right, *non jus sed fas,* has been called at times a servitude; *Atkinson* v. *Couture*(3), and *Ward* v. *Township of Grenville*(4); but, I respectfully and with much deference submit, improperly. There can be no servitude over a thing which is not susceptible of becoming the object of a private right of property or the use of which can only be enjoyed by the individual claiming the right as one of the public.

This supposed right or privilege which is merely, I say, a faculty or license vested at common law in the general public has received formal legislative sanction in Quebec. Article 2972 R.S.Q.; 54 Vict. ch. 25, sec. 1; 4 Edw. VII. ch. 14, sec. 2. Subject to the right of the riparian owners to improve watercourses running or passing across their property these statutes authorise any person, firm or company, during the Spring, Summer or Autumn high waters to float and transmit timber, rafts, etc., down the rivers, lakes, ponds, streams and creeks in the Province of Quebec. But no

(1) 19 L.C. Jur. 276.
(2) 40 Can. S.C.R. 1.
(3) Q.R. 2 S.C. 46 at p. 49.
(4) 32 Can. S.C.R. 510.

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exclusive right of possession *à titre de propriétaire* is conferred by them upon those who use the waters to drive their timber which could be the foundation of a possessory action.

Carré, vol. 1, p. 91;

Il faut pouvoir maintenir qu'on possède la chose à titre de maître *non tanquam alienam, sed animo domini.* Il faut aussi que la chose possédée soit susceptible d'être acquise par la prescription, c'est-à-dire par la continuation de la possession durant le laps de temps fixé par la loi.

See arts. 2192, 2193 C.C.; 1064 C.P.Q.

The principle may be briefly stated:

Point de possession, point de possessoire; il faut une possession qui à la longue conduit à la propriété.

No public right can be acquired by private user.

There can be no possessory action where the plaintiff has not such possession as if enjoyed for a sufficient length of time would result in a title being acquired to the thing possessed by prescription. Running water is undoubtedly *res communes.* As there can be no exclusive possession of a thing that is at law the common property of all there can be no private right of property in the waters of this stream. The most interesting case on this subject is to be found reported in S.V. 1902, 2, 1, in a note to which Mr. Saleilles, the eminent French jurist, says (S.V. 1902, 2, 2):

Remarquons enfin que les riverains qui usaient de ce droit de circulation à travers les propriétés voisines ne l'exerçaient pas à titre de fait constitutif de servitude et susceptible de leur acquérir un droit spécial à l'encontre des droits des autres propriétaires riverains, mais à titre de simple faculté rentrant dans le droit d'usage général de la communauté, et ne pouvant fonder, à l'encontre d'autrui, ni possession ni prescription. Pour pouvoir donner lieu à prescription, il aurait fallu que les faits de circulation pussent constituer un empiètement sur le droit d'autrui, alors que, dans la pensée de celui qui les exerçait, et dans la réalité juridique elle-même, au moins dans le système de la jurisprudence, ils n'étaient que l'exercice d'un droit.

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Id. p. 3. En résumé, il n'est ni raisonnements ni fictions qui puissent porter atteinte à cette réalité de fait que les rivières sont par destination naturelle et sociale des moyens de circulation collective; et cela est vrai, même des petites rivières incapables de se prêter à une navigation régulière. Si peu d'importance qu'elles soient, elles peuvent rendre encore quelques services qui ne sont pas de pur agrément, et qui profitent au flottage de certains matériaux, ou facilitent la rentrée des récoltes. Il faut prendre ces agents naturels tel qu'ils sont, en tant qu'ils sont ouverts à tout le monde et qu'ils constituent un bien de la communauté. Les droits de la propriété individuelle ne peuvent prétendre à détruire la propriété commune.

See also M. Claro's note to same *arrêt* reported in Dalloz 1902, 2, 201.

The same principles, in almost the same words, are laid down in *Bell* v. *Corporation of Quebec*(1).

The appeal should be quashed but without costs as the objection was not taken by the respondent as provided by the Rules of Practice.

Appeal quashed without costs.

Solicitors for the appellants: *Pentland, Stuart & Brodie.*

Solicitors for the respondents: *Turgeon, Roy & Langlais.*

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(1) 5 App. Cas. 84 at p. 100.