THE CHICOUTIMI PULP COMPANY (DEFENDANTS) ..... } APPELLANTS; 1907

*May 13, 14.
*June 24.

AND

WILLIAM PRICE (PLAINTIFF) ..... RESPONDENT.

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

Appeal to the Court of King's Bench—Time limit—Appeal by opposite party to Court of Review — Arts. 957, 1203, 1209 C.P.Q.— Pleading and practice — Injunction — Discretionary order—Reversal on appeal—Possessory action—Trouble de possession— Right of action—Actio negatoria servitutis — Trespass—Interference with watercourse—Agreement as to user—Expiration of license by non use—Tacit renewal—Cancellation of agreement— Recourse for damages—Appeal as to question of costs only.

An appeal from a judgment of the Superior Court, rendered on the trial of a cause, will lie to the Court of King's Bench, appeal side, if taken within the time limited by article 1209 of the Code of Civil Procedure of Quebec, notwithstanding that, in the meantime, on an appeal by the opposite party, the Court of Review may have rendered a judgment affirming the judgment appealed from.

Although the granting of an order for injunction, under article 957 of the Code of Civil Procedure of Quebec, is an act dependent on the exercise of judicial discretion, the Supreme Court of Canada, on an appeal, reversed the order on the ground that it had been improperly made upon evidence which shewed that the plaintiff could, otherwise, have obtained such full and complete remedy as he was entitled to under the circumstances of the case. Davies and Idington JJ. dissenting, were of opinion that the order had been properly granted.

A possessory action will not lie in a case where the *trouble de possession* did not occur in consequence of the exercise of an adverse claim of right or title to the lands in question, and is not of a permanent or recurrent nature. Davies and Idington JJ. dis-

*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington, Maclennan and Duff JJ.

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senting, were of opinion that, under the circumstances of the case, a possessory action would lie.

P. brought an action *au possessoire* against the company for interference with his rights in a stream, for damages and for an injunction against the commission or continuance of the acts complained of. On service of process, the company ceased these acts, admitted the rights and title of P., alleged that they had so acted in the belief that a verbal agreement made with P. some years previously gave them permission to do so, that this license had never been cancelled but was renewed from year to year and that, although the privilege had not been exercised by them during the two years immediately preceding the alleged trespass in 1904, it was then still subsisting and in force, and tendered $40 in compensation for any damage caused by their interference with P.'s rights.

Held, reversing the judgment appealed from, Davies and Idington JJ. dissenting, that, as there had been no formal cancellation of the verbal agreement or withdrawal of the license thereby given, it had to be regarded, notwithstanding non user, as having been tacitly renewed, that it was still in force in 1904, at the time of the acts complained of and that P. could not recover in the action as instituted. The Chief Justice, on his view of the evidence, dissented from the opinion that the agreement had been tacitly renewed for the year 1904.

Per Davies and Idington JJ. (dissenting). As the appeal involved merely a question as to costs, it should not be entertained.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of His Lordship Mr. Justice Gagné, in the Superior Court, District of Chicoutimi, whereby the plaintiff's right to recover damages was reserved and an injunction made absolute in his favour with costs.

The circumstances of the case and questions at issue on the appeal sufficiently appear in the headnote and statements in the judgments now reported.

The dispositions of the formal judgments in the courts below, which are specially referred to are as follows:

GAGNÉ J. (8 mars, 1906).—"Considérant, etc., etc. "Maintient l'action en partie, rejette les dites

offres, ordonne à la défenderesse de cesser de troubler le demandeur dans la jouissance de son pouvoir d'eau et de son moulin ci-dessus mentionnés, et lui ordonne de cesser d'envoyer et de laisser tomber dans la dite rivière Chicoutimi des écorces, sciures de bois et autres déchets, et d'obstruer par les dites écorces et autres déchets, le pouvoir d'eau, le canal et le moulin du demandeur, le tout avec dépens, réservant au demandeur son recours pour tous dommages qu'il peut avoir soufferts, à raison des faits dont il se plaint; et adjugeant sur la requête pour injonction, maintient la dite requête, déclare l'injonction émanée en cette cause perpétuelle et finale, et ordonne à la défenderesse, à ses officiers, représentants et employés de cesser d'envoyer et laisser tomber dans la rivière Chicoutimi des écorces, sciures de bois et autres déchets, et d'obstruer par les dits déchets le pouvoir d'eau, la chaussée, le canal et le moulin du dit demandeur, avec dépens," etc.

COUR DE REVISION (31 mai, 1906).—"La cour, après avoir entendu les parties par leurs avocats sur le mérite en cette cause en conséquence de l'inscription en revision faite de la part du demandeur, examiné le dossier de la procédure et sur le tout mûrement délibéré:

"Confirme le jugement rendu par la cour supérieure siégeant en la ville de Chicoutimi, pour le district de Chicoutimi, le huitième jour de mars mil neuf cent six, en ce qui concerne le recours en dommages réservé au demandeur, avec dépens de la revision contre le demandeur en faveur de la défenderesse; et la cour donne acte à la défenderesse de sa déclaration qu'elle n'acquiesce pas au jugement relativement à l'action possessoire et à l'injonction."

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COUR BANC DU ROI (6 dec., 1906).—

"Considérant que la demande en injonction du demandeur intimé est bien fondée, et qu'il n'y a pas erreur dans le jugement de la cour de première instance qui l'a maintenue;

"Considérant que le demandeur, intimé, ayant inscrit en revision afin d'obtenir une adjudication sur sa demande en dommages qui avait été réservée l'appelante (intimée en revision) s'est opposée à la modification du jugement;

"Considérant que la cour of revision siégeant à Québec a, le 31 mai dernier, (1906), confirmé le jugement de la cour supérieure en ce qui concerne le recours en dommages réservé au demandeur et a simplement donné acte à l'appelante de sa déclaration qu'elle n'acquiesçait pas à ce jugement quant à la demande au possessoire et à l'injonction;

"Considérant qu'aux termes de l'article 1203 C.P.C. ce jugement de la cour de revision est devenu celui de la cour supérieure, qu'il remplace absolument, et que l'inscription en appel ne fait aucune mention de ce dernier;

"Cette cour rejette l'appel avec dépens contre l'appelante, savoir l'appel du jugement final rendu par la cour supérieure à Chicoutimi le 8 mars dernier. (1906)."

Belleau K.C. for the appellants.

G. G. Stuart K.C. for the respondent.

THE CHIEF JUSTICE.—The respondent, plaintiff in the court below, brought an action in the Superior Court at Chicoutimi against the appellants, in respect

of interferences with his rights, alleging that he and his predecessors had been for a great number of years in possession as proprietors of a water-power on the Chicoutimi River; that the defendants, now appellants, owned and operated a large pulp-mill situated a short distance above on the same river in connection with which they used several machines known as barking mills; that the refuse from these machines, consisting of bark, sawdust, etc., was dumped into the river and thence carried by the current into the flume and cistern of his mill thereby injuring the power, mill, and machinery, and generally causing the plaintiff damages for which he claims in compensation $2,000.

To this action the defendants filed a plea admitting the plaintiffs' title to the water-power alleged to have been interfered with and denying that they ever at any time claimed any right or title to the use or possession of any portion of it; and they alleged affirmatively that such refuse as did get into the river was put there as the result of a misunderstanding; that during previous years an agreement existed under which the bark and sawdust were thrown into the river and that portion that reached the plaintiff's premises was under agreement removed by the latter at the defendants' cost, and they undertook to prevent in future a recurrence of the trespass complained of.

An interlocutory injunction was applied for and granted when the action was first launched.

As I read the pleadings and evidence the plaintiffs' title was not in dispute. The trespass complained of is proved as is also the agreement alleged by the defendants to have existed during previous years. I do not find evidence to support the allegation that this

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agreement was renewed for 1904, and the evidence that defendants continued to dump their refuse into the river after being notified that the agreement was at an end in my opinion is far from conclusive.

A preliminary question of procedure raised for the first time by the judges in the court of appeal, though not argued there as stated by the appellants in their factum, is pressed on us here. I give the facts as they appear by the record.

In the Superior Court the plaintiff's pretensions were maintained except as to his claim for damages for which his recourse was reserved. The interlocutory injunction was declared permanent and the possessory conclusions of his declaration maintained. Both parties deeming themselves aggrieved by the judgment appealed, the respondent to the Court of Review and the appellants to the Court of King's Bench, as each had under the Quebec Code of Procedure the right to do. The case came on for hearing in review first and then the defendants made this formal declaration:

> Aussi sans aucunement acquiescer au jugement de première instance dont nous entendons appeler, en ce que nos offres auraient dû être déclarées valables, en ce que l'action comme l'injonction auraient dû être renvoyées avec dépens, nous soumettons humblement que le présent appel du demandeur doit être rejeté avec dépens.

The Court of Review held unanimously that as to the damages, which was the only point submitted, the judgment of the Superior Court was right. Then the appellants here, who had succeeded in review, being within the delay prosecuted their appeal to the Court of King's Bench and the majority of that court held that the injunction had been properly granted, but

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they said that the appellants should have appealed from the judgment of the Court of Review which had become, under article 1203 of the Code of Procedure, the judgment of the Superior Court. As I understand the *considérants* of their Lordships' judgment they contend that the judgment from which the appeal should have been taken was the judgment of the Superior Court sitting in review and not the judgment of the Superior Court sitting as the court of first instance, although both are absolutely the same in so far as the "*dispositifs*" go. In review the judgment of the Superior Court is confirmed purely and simply, and the technical point raised in appeal was merely as to the date of the judgment from which the appeal was taken. When, as I said before, the judgment was rendered in the Superior Court both parties had the right to appeal *instanter* from that judgment either to the Court of Review or the Court of King's Bench. One appeal must be taken within eight days and the other can be taken at any time within six months, but if at once after judgment rendered both parties appealed as they subsequently did, one to the Court of Review and the other to the Court of King's Bench, the judgment appealed from would necessarily have been the judgment of the Superior Court of date 8th March, 1906, and because by the judgment of the Court of Review that judgment must thereafter bear a different date, though it remained the same in substance and form, the appeal, in the opinion of their Lordships, must be refused. In this highly technical view I cannot concur.

It would be interesting to know what the position would be if in this case the judgment of the Court of Review had not been rendered until after the expiration of the six months within which the de-

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fendants were obliged to take their appeal. Which would then be the judgment appealed from, or when would the delay of six months expire?

Now, as to the merits.

By the judgment below the injunction was maintained, the conclusions of the possessory action were granted and the recourse of the respondent for the damages he alleges to have suffered is reserved to him.

I am of opinion that the injunction should not have been granted and that the possessory conclusions of the action should have been dismissed; and I would reform the judgment below to that extent and reserve the right of the respondent to claim such damages as he may have suffered, the two courts below having concurred in the opinion that on the pleadings and evidence it is impossible to determine the quantum of damages.

Article 957 Code of Procedure:

> Any judge of the Superior Court may grant an interlocutory order of injunction in any of the following cases:
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> 1. At the time of issuing the writ of summons:
>
> *a.* Whenever it appears by the petition that the plaintiff is entitled to the relief demanded, and that such relief consists, in whole or in part, in restraining the commission or continuance of any act or operation, either for a limited period or perpetually:
>
> *b.* Whenever the commission or continuance of any act or operation would produce waste, or would produce great or irreparable injury;
>
> 2. During the pendency of a suit:
>
> *a.* Whenever the commission or continuance of any act or operation during the suit would produce waste, or would produce great or irreparable injury;
>
> *b.* Whenever the opposite party is doing or is about to do some act in violation of the plaintiff's rights, or in contravention of law, respecting the subject of the action, which is of a nature to render the final judgment ineffectual.

By the plea to the action and the answer to the petition for an injunction defendants admit plain-

tiff's right to the water-power and deny that they ever had any intention to interfere with it. They further declare that the improper use which they admittedly made of the river had been so made under the belief that an agreement admitted to have previously existed between them and the plaintiffs was still in force and under which a mode of settling the damages complained of had been fixed.

It has been suggested that there is a difference between the case of the appellants as stated in their pleadings and as made by the evidence, and that in fact the trespass was continued after the suit was brought.

The only evidence to support the statement that the appellants continued to throw their refuse into the river after the injunction is to be found on page 36, lines 20 *et seq.*

Dubuc, at page 86, line 10, says that he forbade his employees to do this. On pages 87 and 88 Dubuc explains what occurred. Dubuc at page 90 denies having allowed any of the refuse to get into the river from the time the injunction was actually served, and no attempt is made to cross-examine him on that point.

To justify interfering by interlocutory injunction the court must be of opinion that there is a substantial question to be tried and some legal right as to property to be protected during the litigation. The granting of an injunction is, it is true, an act dependent on the discretion of the court, but in exercising this discretion the court must consider whether the act complained of will produce injury to the applicant or whether the injury can be condoned for by damages.

The only question here was whether the bark or

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refuse had been thrown into the river by the permission of the plaintiffs' employees. There was no attempt made to put in issue the legal right of the plaintiff to prevent the defendants from doing what was complained of. (See evidence by Racey, at page 38 of the case on appeal, lines 20 *et seq.*) If done without the permission of plaintiff's employees the defendants had incurred a liability for which there was a remedy full and complete by an action of damages. The plaintiffs had for a couple of years acquiesced in what defendants were doing and had accepted compensation from them, thus shewing that it was not impossible to fix compensation for future injury. *Omerod* v. *Todmorden Mill Co.*(1).

As to the possessory conclusions, which were maintained by the judgment of the Superior Court, the defendants admit plaintiffs' title as alleged—affirm they have no right or title to the use or possession of the water-power and say that what was done was under the erroneous impression that the previous existing agreement was renewed, and that the trespass complained of ceased when the action was brought, and for such damage as was caused they offer in compensation the sum of forty dollars.

On these facts would a possessory action lie? Leconte, No. 93, first paragraph:

> *Il ne suffit pas qu'un fait porte atteinte au droit de propriété,* même au droit de possession, pour qu'il donne lieu à une action possessoire, il faut que le possesseur soit empêché, ou de moins menacé dans sa possession même, que le trouble soit tel, *que l'intention de celui qui le cause, d'exercer un droit à la possession ou à la propriété, soit manifeste.*
>
> * * * * *

(1) 11 Q.B.D. 155, at p. 162.

94. On doit réputer trouble de possession, dit cet auteur, tout acte emportant prétention à la propriété ou à un droit de servitude.

* * * * *

Mais puisque le même acte peut, suivant l'intention de celui qui le commet, passer pour un trouble de possession ou pour un pur fait nuisible, comment le demandeur fera-t-il pour qualifier sa demande? Ne faut-il pas admettre que l'action possessoire sera régulièrement formée, toutes les fois qu'il sera possible d'interpréter le fait dénoncé à la justice comme un acte de possession? Sans doute, j'admets que dans ce cas la demande sera bien dirigée, en ce sens qu'aucune faute n'étant à impliquer au plaignant, les frais de citation devront être mis à la charge du défendeur. Mais je n'oserais pas dire que l'action sera toujours possessoire; *je crois au contraire que cela dépendra de la réponse que fera le défendeur. S'il déclare qu'il n'agissait pas jure domini,* qu'il n'a aucune prétention à répéter des actes semblables il me répugne de voir une action possessoire là où il n'y a nul débat sur la possession.

The same doctrine will be found in Dalloz, Repertoire de Jurisprudence, No. 53, *vo. "Action possessoire."* See also, Bioche "Actions possessoires" page 11, para. 32; Pothier, "Possession" No. 39; Boitard, "Procedure" page 425; *Price* v. *Girard* (Chronique Judiciaire de Beaubien); *Bertrand* v. *Levesque*(1). Both these cases were decided in review by a very strong bench.

The nature of the act complained of here was in itself sufficient to shew that the possessory action should not have been brought because evidently there was no intention manifested by the appellants to exercise any claim of right. Dalloz again, *loc. cit.* para. 59. And by their plea the defendants made it abundantly clear that they did not pretend to do the acts complained of *jure domini.*

I wish to repeat that I am clearly of opinion that under the Quebec Code the disturbance must be one of a permanent or recurrent nature; isolated acts of

(1) Q.R. 28 S.C. 460.

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interference give rise to an action for damages but do not constitute a ground of action to justify the plaintiff in having recourse to the *action négatoire* which corresponds to the Roman *actio negatoria*. The Roman *actio negatoria* applied principally in cases in which the defendant claimed to be entitled to do the act complained of by virtue of a servitude affecting the owner's land.

I would allow the appeal. The action of the respondent is dismissed and the injunction dissolved, with costs in all the courts *sauf recours* as to the damages suffered. I would add that this conclusion has been reached after much hesitation because I am obliged to differ from the trial judge, for whose great learning and impartiality I have always entertained the highest respect, if I may with proper deference be permitted to say this much.

GIROUARD J.—Il s'agit ici d'une action possessoire intentée le 30 mai, 1904, par le propriétaire inférieur d'un moulin à scie, situé sur la rivière Chicoutimi, contre le propriétaire supérieur d'un moulin à pulpe, qui, depuis le mois d'avril précédent, jetait à la riviére quantités d'écorces, de ripes, sciures de bois et d'autres déchets du même genre. Il allègue que ces matières, emportées par le courant, finissent par obstruer le canal et le pouvoir d'eau de son moulin et en arrêter la marche. Il conclut aussi à $2,000 de dommages-intérêts.

Cette action fut précédée d'un protêt notarié qui fut signifié à l'appelante le 4 mai, 1904, et fut suivie d'une injonction provisoirement accordée le 4 juin. Dans tous ces documents, il n'est fait aucune allusion à l'arrangement qui jusqu'alors avait reglé les rela-

tions de ces deux industriels, appuyées apparemment sur des motifs de bon voisinage.

Par sa défense produite le 9 juin, l'appelante nie d'abord qu'elle ait jamais voulu troubler l'intimé dans la libre jouissance de son pouvoir d'eau, puis elle allègue:

> Il a toujours été entendu entre la défenderesse et le demandeur représenté par son agent M. Blair d'abord et ensuite par son agent, M. Racey, et ce verbalement, que lorsque la défenderesse serait comme elle a été pendant quelques jours avant l'action en cette cause, obligée de laisser tomber quelques écorces dans la dite rivière Chicoutimi, par suite de réparations à ses machines, qu'elle paierait au demandeur les services d'un homme pour empêcher les dites écorces de passer dans les dalles et dans le moulin du demandeur, ce que le demandeur a toujours accepté et reconnu pour agréable, et ce par ses dits agents, le dit homme pour enlever les dites écorces devant être mis là par le demandeur et ses agents et la défenderesse devant payer son salaire.

Puis elle offre $40.00 et les frais d'une action de cette classe en tout $49.75, pour payer les frais d'enlèvement des écorces pour le printemps de 1904, sauf à parfaire.

L'arrangement est prouvé hors de tout doute, tant par l'agent de l'intimé, Blair, que par celui de l'appelante, Dubuc. Le juge de première instance (Gagné J.) est d'opinion qu'il n'était que pour l'année où il fut fait et qu'il ne s'applique pas à l'avenir. Il est admis que si c'est là le vrai sens de l'entente, l'action doit être maintenue; si, au contraire, elle liait les parties tant qu'elle n'était pas révoquée—point que le savant juge n'examine pas—elle doit être renvoyée.

La preuve établit que cet arrangement fut suivi et exécuté par les deux parties jusqu'au temps du protêt du 4 mai, l'intimé remettant ses comptes de charges qui furent invariablement payés par l'appelante. Etait-il encore en force le printemps de 1904 et de fait

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toute la saison de cette année là? Voici la nature de l'arrangement tel que défini par Blair, l'agent de l'intimé avec qui il fut fait:

Au commencement, (sans donnee de date précise) je me suis objecté à ce qu'il (l'agent de l'appelante Dubuc), envoie des ripes dans la riviére, par rapport que cela nous faisait un grand dommage et ensuite nous sommes venus à une entente, que l'on mettrait. * * * Je leur ai demandé premièrement de mettre un homme ou deux hommes pour tenir les ratelliers du moulin à scie clairs et monsieur Dubuc n'a pas voulu. Ils m'ont demandé de mettre des hommes moi-même et qu'ils paieraient le coût du nettoyage.

Q. C'est ce qui a été fait monsieur Blair?

R. Oui, c'est ce qui a été fait.

Q. Vous avez mis des hommes pour nettoyer les reteliers et la pulpe les payait?

R. Oui.

En transquestion, Blair ajoute:

Q. Les arrangements dont vous avez parlé, monsieur Blair, c'etait pour chaque année, n'est-ce pas?

R. Oui, chaque année.

Q. Vous n'avez jamais fait d'arrangements pour donner le droit à la compagnie de pulpe d'envoyer ses écorces dans l'avenir, indéfiniment, n'est-ce pas?

R. Non, jamais.

L'appelante prétend non pas que l'arrangement obligeait les parties pour toujours, mais qu'il les liait tant qu'il n'était pas révoqué, et qu'il ne pouvait l'être que pour les années futures et non pour celle qui était commencée.

Et d'abord, que comportait cet arrangement, sinon un louage d'ouvrage susceptible de la tacite reconduction aux termes de l'article 1667 du code civil, différent à cet égard de l'article 1780 du code Napoléon? Mais il y a plus.

Comme je lis l'arrangement, il fut stipulé qu'il durerait tant que l'une des parties n'y mettrait pas fin. C'est en effet de cette manière que les deux par-

ties l'ont interpreté par leur conduite. Il ne parait pas qu'il ait jamais été expressément renouvélé aprés avoir été fait. Il fut agréé avant ou vers la saison de 1900, et les reçus des frais d'enlèvement des déchets par l'intimé établissent qu'il fut suivi et exécuté à la lettre en 1900 et 1901, sans renouvellement pour cette dernière année. En 1902 et 1903, les écorces et déchets furent brûlés au brûleur que l'appelante venait de faire construire pour se conformer à la loi, et conséquemment l'intimé n'eut pas de comptes à envoyer pour ces deux années. En 1904, le brûleur se brisa et ce fut pendant que l'appelante le réparaît qu'une petite partie des écores et déchets dont se plaint l'intimé—un sixième de toute l'usine—furent jetés à l'eau. Mais à cette époque, l'ancien arrangement était en force:

Cet arrangement, dit Dubuc, a duré tout le temps que monsieur Blair a été ici, et ses successeurs ne l'ont jamais revoqué et tous les comptes qui nous ont été présentés de ce chef n'ont jamais été disputés, nous les avons payés.

Le protêt du 4 mai, 1904, peut bien être considéré comme un acte de révocation, mais il ne peut avoir d'effet quant au passé ni même pour l'année courante. L'action est donc mal fondée. L'intimé aurait dû faire enlever les déchets par ses hommes et envoyer son compte à l'appelante.

Ainsi que je l'entends, c'était encore la loi des parties le printemps de 1904, au dire même de l'agent de l'intimé. Voici ce que Dubuc représenta à l'agent nouveau de l'intimé, Racey:

Je suis toujours prêt à honorer votre compte d'aprés l'arrangement que nous avons avec votre maison, si vous jugez que ça vaut la peine de nous l'envoyer. Monsieur Racey m'a répondu: correct.

Ce fut aussi de cette façon que Racey comprit la situation après s'être renseigné:

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Q. Qu'est-ce que vous avez compris que cet arrangement-là était?

R. Je ne le savais pas dans le temps, mais plus tard je suis venu à bout de savoir quel était cet arrangement.

Q. Quel était cet arrangement?

R. Il payait des hommes pour faire faire l'ouvrage.

Q. Vos hommes faisaient l'ouvrage et la pulpe les payait?

R. Oui, et si j'avais compris cela, j'aurais accepté.

Q. Vous n'avez pas compris que c'était cela?

R. Non, jamais, quand je lui en ai parlé plus tard, dans le mois de mai, il riait de cela.

Q. Il vous a fait comprendre qu'il voulait payer?

R. Oui, et plus tard il n'a pas voulu.

De là l'institution de l'action possessoire et la demande d'une injonction.

Comment Racey a-t-il pu conclure que Dubuc ne voulait pas payer? C'est ce que je ne puis concevoir. Dubuc n'a jamais déclaré qu'il ne paierait pas. C'est tout le contraire qui apparait. Il envoya un de ses employés, Morrier, deniers en mains, lui offrir $40 pour les frais d'enlèvement et les dépens d'une action de cette classe que Racey ne voulut pas même prendre en considération. Il voulait évidemment avoir recours au possessoire, lorsque sa possession était même reconnue par Dubuc. Il ne réplique pas que le montant n'est pas suffisant. Il ne lui envoie pas de compte. Il est sous l'impression, sans raison, que Dubuc n'était pas sérieux et qu'il l'amusait. Au lieu de recourir au possessoire, il aurait dû faire enlever les déchets, lui envoyer un compte du coût de cet ouvrage et poursuivre en recouvrement, s'il n'était pas payé. Je considère que dans les circonstances, le recours au possessoire est un abus, la possession n'étant pas niée, mais même admise.

La cour de première instance et la cour d'appel ont décidé que l'arrangement n'était que pour une année; les savants juges ne le disent pas en toutes lettres,

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mais le résultat démontre que c'était là leur opinion, puisqu'ils maintiennent l'action possessoire et l'injonction. La cour de revision n'en dit rien, pour la raison toute simple que l'intimé avait inscrit seulement sur la demande des dommages qui fut rejetée par les deux cours quant à présent.

Je suis d'avis que le premier arrangement était encore en force en 1904 et qu'il fut même formellement renouvelé cette année là, bien que ce renouvellement n'était pas nécessaire.

Quant à l'objection technique, que l'appelante n'a pas appelé du jugement de la cour supérieure siégeant en revision, je crois qu'elle est mal fondée. C'était son droit d'appeler comme elle le fit. L'intimé ne souffre rien de ce que son inscription fut du jugement du juge Gagné, puis qu'il fut confirmé purement et simplement. Je la considére donc régulière.

Pour ces raisons, je suis d'opinion d'accorder l'appel et de renvoyer l'action et l'injonction de l'intimé avec dépens devant toutes les cours, sauf recours pour les frais d'enlèvement des écorces et déchets.

DAVIES J. (dissenting) concurred in the opinion of Mr. Justice Idington.

IDINGTON J. (dissenting).—There is really nothing but costs involved in this appeal and for that if no other reason we should refuse to interfere.

The appellants owned a pulp mill about a mile higher up the same stream as that on which the respondent owned and ran a planing mill.

In 1897, being forbidden by law from throwing into the stream the refuse of such mills, the appellant's manager says it was agreed that until his com-

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pany got a burner erected to burn the refuse, his company agreed to make their peace with the respondents by paying for the expenses of the removal of so much of the refuse as should lodge about and be detrimental to the respondent's mill and there were several payments made for that sort of service.

The facts are not put exactly thus by the respondents, but they admit some payments made for such a purpose. It is of little consequence which is exactly right, for appellant's burner was, in or before 1902, completed, and that ended any need or reasonable expectation for a continuation of any such arrangement.

In 1904, respondent desired to start up his mill and found not only a large quantity of old refuse from appellant's mill accumulated and needing removal, but also found further that appellants had renewed, in April of 1904, without asking permission their former practice of throwing refuse into the stream.

The manager of appellants did not when remonstrated with, stop this being done. After some time the respondent's manager caused a formal protest against this utterly unjustifiable conduct to be served on the other manager on the 4th of May, 1904.

It continued, however, from time to time and on the 2nd June, 1904, the respondent took steps to get, and on the 4th of June, 1904, got an injunction and sued for its continuation and also to recover damages.

At the trial the injunction was continued, but the right to recover damages in this action was refused and reserved to the respondent to be recovered by such means as the respondent found open to him.

The appellants' manager had after action tendered, he says, forty dollars to cover these damages. One is

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at a loss to know how, if honestly desirous of having damages assessed at the trial, the appellants could not bring it about when the respondent was pressing for it.

The respondent appealed unsuccessfully to have this done. The Court of Review dismissed this appeal, and a nice question of practice arises here, which I will not dwell upon, though, if the respondent's contention is right as to the effect of article 1203 of the Code of Procedure and the other things he urges, appellants ought not to have been heard here. I pass that and many other things that are or have been in the case to say that the court of appeal did not accept the contention of the respondent in this regard, but dismissed the appeal which the present appellants had carried there and upheld the judgment of the learned trial judge.

The appellants by way of appeal therefrom, come here asserting that they had never denied and do not now deny the rights of the respondent to enjoy his property, and use it free from such disturbances as the respondent complains of.

They in this case suffer nothing, by the judgment and injunction standing, but the costs they have been ordered to pay.

They have escaped paying damages they certainly ought to have paid and, as I understood counsel to state without contradiction, nothing further had been done and the respondent's right to damages had been thus prescribed. If the material damages really were as the court seems to think after action, though I might have thought otherwise, the appellants practically escape.

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It is said, however, this action is wrong in form by claiming an injunction that is not maintainable.

Even in this I do not agree. It is in the last analysis a question of fact whether it be so or not. It has been passed upon and upheld by two courts at least in the Province of Quebec, and according to one contention, by three, and yet respondent is not satisfied.

I do not think it is open to any one, in Quebec or elsewhere, by a continuous and persistent system of disturbing others in the enjoyment of their property, such as appellants were here guilty of, to say that because they do not do it in assertion of a right and in denial of the wronged party's title, the jurisdiction to enjoin cannot be exercised. It was continued even a day or two after the injunction. So persistent was appellants' manager.

In Martineau & Delfausse, annotated edition of the Code of Procedure(1), there is collected under section 1064 of the same, such a review of the authorities as leads me to come to the conclusion that this action was on the evidence here rightly brought and has been properly maintained.

It is said, however, there was an agreement between the parties regulating this practice, but the only one proven is the one that I have shewn ended in 1902, and it never was revived.

There is a loose sort of conversation given as taking place between the managers, but exactly when or how or where is not clear.

At best it seems to have taken place after at least a good deal of what is complained of was done. The evidence is very unsatisfactory unless we accept entirely, and discard all else, a sentence or two of the appellants' manager which I am not disposed to do.

(1) P. 691.

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I would infer, if anything in the way of assenting to it was done by the respondent, it was conditional upon settling for the past and ceasing to disturb, and that no such spirit of settling was ever shewn by appellants' manager, but rather a contemptuous treatment of the other manager, and a continuation of the disturbances which rendered an injunction necessary.

It rests on the evidence of appellants' manager and he swears that the protest and the suit for injunction were on one and the same day.

Q. *Monsieur Racey a dit qu'il vous avait téléphoné le quatorze mai qu'il allait vous protester et que vous auriez répondu en riant?*

R. *Je ne me rappelle pas de cela.*

Q. *Avez-vous reçu un protêt?*

R. *Je crois avoir reçu un protêt en même temps que l'action; une heure avant ou ensemble.*

If that is a fair specimen of the reliability of his evidence when we know from the record these two events were nearly a month apart, I want evidence of some one more credible to go upon than one so reckless, before I reverse the courts below.

Moreover, the story is not that which is pleaded. The pleading alleges only one bargain. The evidence of this man shews two. It is only the last that is applicable if at all to this case.

If it had in fact transpired as he puts it with nothing done after it, we would likely have seen it so pleaded.

The other manager's story clearly shews when read as a whole that so much of this story as he assents to was conditional upon getting together and settling as I have already said.

The only right bound or affected by the judgment below being one of costs, the cases of *Moir* v. *The Vil-*

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lage of Huntingdon (1), and *Schlomann* v. *Dowker* (2), ought, I submit, to be followed, and the appeal be dismissed with costs.

MACLENNAN and DUFF JJ. concurred with Mr. Justice Girouard.

Appeal allowed with costs.

Solicitors for the appellants: *Belleau, Belleau & Belleau.*

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

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

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