

1911
 *Nov. 7.
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THE BROMPTON PULP AND
 PAPER COMPANY (DEFEND-
 ANTS) } APPELLANTS;

AND

NARCISSE BUREAU (PLAINTIFF) ... RESPONDENT.

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

*Appeal—Jurisdiction—Matter in controversy—Damming watercourse
 —Flooding of lands—Servitude—Damages—Objection to jurisdic-
 tion—Practice—Costs.*

The plaintiff claimed \$300 (the amount awarded by arbitrators) for damages in consequence of the defendants' dam penning back the water of a stream in such a manner as to flood his lands; he also asked for the demolition of the dam and an order restraining the defendants from thereby causing further injury to his lands. By the judgment appealed from the award was declared irregular, but damages, once for all, were assessed in favour of the plaintiff for \$225, recourse being reserved to him in respect of any further right of action he might have for the demolition of the dam, etc. On an appeal being taken by the defendants the plaintiff did not move to quash, as provided by Supreme Court Rule No. 4, but took objection, in his factum, to the jurisdiction of the Supreme Court of Canada to entertain the appeal.

Held, that the only issue on the appeal was in respect of damages assessed at an amount below that limited for appeals from the Province of Quebec. The appeal was, consequently, quashed, but without costs, as objection to the jurisdiction of the court had not been taken by motion as provided by the Rules of Practice. *Price Brothers & Co. v. Tanguay* (42 Can. S.C.R. 133) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the

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

Superior Court, sitting in review, at Quebec, by which the judgment of the Superior Court, District of Beauce (H. C. Pelletier J.), was reversed and the plaintiff's action was maintained in respect of damages with costs.

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The conclusions of the plaintiff's *demande*, as amended, asked that an award of arbitrators, by which he was given \$300 for damages suffered on account of his lands being flooded in consequence of the defendants increasing the height of their dam at the outlet of Lake Saint Francis, in the County of Beauce, should be ratified; that the defendants should be condemned to pay him the amount of damages so awarded for the period between the 31st of October, 1907, and the date of the action (8th May, 1908); that the dam complained of should be demolished, and that the defendants should be enjoined from troubling him in the enjoyment of said lands and should cease using the right of servitude they had, under the statute, in regard to the use of improvements made in the water-course for industrial purposes. The action was dismissed at the trial, but, on an appeal by the plaintiff, the Court of Review reversed this judgment, declared the award irregular, assessed damages to the plaintiff in the amount of \$225, once for all, and entered judgment in his favour for that amount, with costs, at the same time reserving to him any recourse he might have in respect of demolition of the dam, etc. This judgment was affirmed by the judgment now appealed from.

The respondent, in his *factum*, took objection to the jurisdiction of the Supreme Court of Canada to entertain the appeal, but made no motion to quash, as provided by Supreme Court Rule No. 4, and, on the

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appeal coming on for hearing, the same objection was made.

J. H. Kelly for the respondent. This is an action solely for the recovery of damages awarded at \$300, and only \$225 have been allowed; the *demande* for demolition and in respect of *troubles de possession* are merely subsidiary and alternative in the event of the defendants refusing to pay damages. Undoubtedly the defendants have the right to the use permitted by the statutes relating to the improvement of watercourses, but that right cannot be exercised except upon compensation for injuries thereby caused. We simply deny the right unless compensation for injury is made. The respondent has accepted the award made by the judgment of the Court of Review, which has been affirmed by the judgment appealed from. The only question in issue is whether or not the amount of that award should be reduced. We refer to section 46 of the "Supreme Court Act," and to that part of the judgment under appeal which refuses adjudication in respect of the claims for demolition and injunction; as to which recourse has merely been reserved in the event of further action being taken.

Stuart K.C., for the appellants, contended that the form of the action was *negatoria servitutis*, and that some interest in real estate and the use thereof was involved in the appeal.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—In the respondent's *factum* objection is taken to the jurisdiction of this court.

The question in issue between the parties is with respect to the right of the appellants to build on their property a dam which backs up the water of a stream and floods the lands of the respondent. In the court below it was decided that the defendants, now appellants, had the right to erect the dam upon payment of such damages as might result, but the right to renew the demand, if the conditions were altered, was reserved to the respondent. The only question in issue in this court is as to the amount of the damages which are not within the appealable limit.

We are all of opinion that the court is not competent to hear this appeal. As to costs, I think we must follow the rule laid down in *Price Brothers & Co. v. Tanguay*(1). The appeal should be quashed 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 respondent: *Talbot & Guindon.*

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(1) 42 Can. S.C.R. 133.