

1892 THE EMERALD PHOSPHATE CO.....APPELLANT;
 *May 3. AND
 *June 3. THE ANGLO-CONTINENTAL (LATE } RESPONDENT.
 *Oct. 10. OHLENDORFF'S) GUANO WORKS... }

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

Mining lands—Bornage—Injunction—Appeal—Jurisdiction—R. S. C. ch.
 135 s. 29 (b).

In a case of a dispute between adjoining proprietors of mining lands where an encroachment was complained of, and it appeared that the limits of the respective properties had not been legally determined by a *bornage*, the Court of Queen's Bench (appeal side) held that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*.

On appeal to the Supreme Court of Canada :

Held, that as the matter in controversy did not put in issue any title to land where the rights in future might be bound the case was not appealable. R. S. C. ch. 135 s. 29 (b).

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) setting aside the judgment of the Superior Court granting an injunction to the appellant company.

The appellant company, proprietor of lot 19 in the 12th range of the township of Buckingham, by its petition for a writ of injunction, alleged that it had been in possession of the lot in question since November, 1875, and that the eastern bounds of the lot were marked by posts placed about the 3rd November, 1875, by one G. C. Rainboth and that the respondent company had trespassed on lot 19 underground, and was actually

* PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.
 (Sir W. J. Ritchie C.J. was present at the argument, but died before judgment was delivered.)

(1) M. L. R. 7 Q. B. 196

mining and carrying away large quantities of phosphate from the west side of the G. C. Rainboth line. The respondent company proprietor of lot 18 by its pleas denied that the G. C. Rainboth line was the true easterly limit of lot 19, and alleged that no steps had ever been taken to legally establish the true boundary between lots 18 and 19; that the petition or demand did not allege exposure to irreparable damage, or show that injunction was the proper remedy and that the petition was premature.

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Upon issue joined and evidence taken, the judgment of the Superior Court maintained the writ of injunction until a proper boundary should be fixed. The Court of Queen's Bench for Lower Canada (appeal side) on appeal held that the proper remedy being an action *en bornage* an injunction did not lie to prevent the alleged encroachment.

Laflamme Q.C. and *Cross* for respondent on the motion to quash: The ownership of lots 18 and 19 being admitted in this case the issue between the parties resolves itself into a mere question of trespass, alleged by the appellant and denied by the respondent, and we, therefore, submit that this court should declare itself without jurisdiction and dismiss the appeal as the case does not come within R. S. C. ch. 135 s. 29.

McCarthy Q.C., and *Foran*, for appellant, on motion to quash. We are in possession of the land for over a year, and under art. 946, C. C. P., are entitled to bring the present action for being disturbed, and therefore we come under section 29 (b) of the Supreme and Exchequer Courts Act, the title to the land of which we are in possession being in dispute. The court has heard possessory actions wherein no amount of damages were claimed. See *Hall v. Canada Land Co.* (1) and *Pinsonnault v. Hébert* (2.)

(1) 8 Can. S. C. R. 631.

(2) 13 Can. S. C. R. 450.

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The court reserved judgment on the question of jurisdiction and the counsel were heard on the merits, but the appeal was disposed of on the question of jurisdiction. The judgment of the court was delivered by :

TASCHEREAU J.—We have no jurisdiction to entertain this appeal, and the respondent's motion to quash it must be allowed.

The appellants are proprietors and in possession of lot 19, on the 12th range of Buckingham Township. The respondents are in possession of the adjoining lot no. 18. There is no controversy as to the parties' respective titles. The cause of the litigation between them is the want of boundaries between their lots. The appellants alleging that the respondents encroach upon lot 19, took out an injunction to restrain them from doing so. Now, under the laws of the province, the rights to the title to this lot, or to the possession thereof, could not be determined on such a proceeding taken *ab initio*. No judgment either *au possessoire* or *au pétitoire* could be given thereon as well held by the Court of Appeal. Consequently, no title to this land is in issue, and no appeal lies.

Appeal quashed with costs.

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

Solicitors for respondents: *Laflamme, Joseph & Cross.*