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*May 9.

*May 17.

WILLIAM CULLY (OPPOSANT).....APPELLANT;

AND

FRANÇOIS ALIAS FRANCIS FERDAIS (CONTESTANT) ..... } RESPONDENT.

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

Appeal—Jurisdiction—Servitude—Action confessoire—Execution of judgment therein—Localization of right of way—Opposition to writ of possession—Matter in controversy—Title to land—Future rights.

An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the Supreme Court of Canada has no jurisdiction to entertain an appeal. *O'Dell* v. *Gregory* (24 Can. S. C. R. 661) followed; *Chamberland* v. *Fortier* (23 Can. S. C. R. 371); and *McGoey* v. *Leamy* (27 Can. S. C. R. 193) distinguished.

If the jurisdiction of the court is doubtful the appeal must be quashed. *Langevin* v. *Les Commissaires d'École de St. Marc* (18 Can. S. C. R. 599) followed.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, reversing the judgment of the Supreme Court, District of Iberville, and dismissing the appellant's opposition with costs.

The circumstances under which this appeal was taken are stated in the judgment of the court by His Lordship Mr. Justice Taschereau on the motion to quash.

Lajoie for the respondent referred to the question of jurisdiction raised in the respondent's factum and moved to quash the appeal on the ground that the controversy did not relate to title to lands

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

where rights in the future might be bound, the only question being the location of a servitude, not the right or title to it. The dispute as to that was settled in the first case; *Macdonald* v. *Ferdais* (1). That dispute is not of a matter where rights in future of the parties might be bound. That the judgment appealed from, although it decides finally that the new road cannot, in its present state, be substituted for the old road, does not deprive the appellant of his right, at any time in the future, to offer another road, nor even of his right to offer the same road improved.

Lafleur Q.C. for the appellant cited Art. 557 C. C.; R. S. C. ch. 135, sec. 29 (*b*); *Chamberland* v. *Fortier* (2); and *McGoey* v. *Leamy* (3).

The judgment of the court was delivered by:

TASCHEREAU J.—An objection taken in the respondent's factum to the appellant's right of appeal has to be disposed of. In a former case between the parties, it was declared by the Superior Court's judgment, confirmed in this court on the first of May, 1893 (4), that the respondent had a certain right of way, therein described, over the appellant's land

le tout néanmoins sous la condition que le défendeur (present appellant) ou tout autre propriétaire du fond servant pourra offrir et assigner un autre chemin de voiture ou passage pour l'exercice de la dite servitude, que le demandeur (present respondent) ou tout autre propriétaire du fonds dominant sera obligé d'accepter, pourvu qu'il ne soit pas plus incommode que celui que a existé jusqu'à aujourd 'hui.

The respondent, in execution of that judgment issued a writ of possession ordering the sheriff to put him in possession of the road described in the said judgment. The appellant filed an opposition to that

(1) 22 Can. S. C. R. 260.
(2) 23 Can. S. C. R. 371.
(3) 27 Can. S. C. R. 193.
(4) 22 Can. S. C R. 260 *sub nom. Macdonald* v. *Ferdais.*

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writ of execution, alleging that he had duly offered and delivered to the respondent, present and accepting, a right of way upon his land (though not the one described in the judgment), in due compliance with and in execution of the judgment of the court, in virtue of the right to do so reserved to him in the said judgment. This opposition, upon contestation by respondent, was maintained and the writ of possession set aside by the Superior Court. The Court of Appeal reversed that judgment and dismissed the opposition.

The controversy between the parties is consequently merely as to the localisation of the road in question. It is admitted, if that could possibly affect here the question of jurisdiction, that this road is not worth $2,000, and conceded on the part of the appellant, at the hearing, that the only ground upon which his right to appeal can at all be supported is that the controversy relates to a title to land and to a matter where the rights in future may be bound. But there is here no controversy of the title to the appellant's land or to any part of it; *O'Dell* v. *Gregory* (1); and the respondent's right of way over that land is not now in controversy. That controversy is at an end. It was settled in 1893 by the judgment of this court upon the action above referred to.

That case being an action *confessoire* was, as actions *négatoires* also are, appealable. *Riou* v. *Riou* (2); *Chamberland* v. *Fortier* (3); *La Commune de Berthier* v. *Denis* (4). But this is merely a contestation on the execution of that judgment. Rights in future may be bound by the judgment *a quo*, but they are not rights relating to a title to land.

The appellant would contend that as this is a contestation on the execution of a judgment which was

(1) 24 Can. S. C. R. 661.
(2) 28 Can. S. C. R. 53.
(3) 23 Can. S. C. R. 371.
(4) 27 Can. S. C. R. 147.

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appealable, and, in fact, appealed, therefore the judgment upon this execution, or the contestation thereof, is likewise appealable. But such a contention cannot prevail. It would be opening the door to a multiplicity of appeals in the same case, not intended by the statute.

The case of *McGoey* v. *Leamy* (1) has been relied upon to support the right to this appeal. But in that case the controversy between the parties exclusively and directly related to the title to a strip of land. Neither does the case of *Chamberland* v. *Fortier* (2) help the appellant. All that was determined in that case is that an action *négatoire* is appealable.

The case may not be free from doubt. As forcibly pointed out by Mr. Lafleur, the judgment *a quo* determines the precise spot where this right of way will be exercised on the appellant's land. However, the right to appeal is not clear, and the rule as to appeals is that the court cannot assume jurisdiction in a doubtful case. I refer to the cases cited on that point in *Langevin* v. *Les Commissaires d'École de St. Marc* (3).

The appeal is quashed with costs of a motion.

Appeal quashed with costs.

Solicitors for the appellant: *Paradis & Paradis.*

Solicitors for the respondent: *Brosseau, Lajoie & Lacoste.*

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(1) 27 Can. S. C. R. 193. (2) 23 Can. S. C. R. 371.
(3) 18 Can. S. C. R. 599.