1889
*May 15.
*June 14.

THE EXCHANGE BANK OF CANADA, (PLAINTIFFS)..... } APPELLANTS;

AND

FRANCIS E. GILMAN, (DEFENDANT), RESPONDENT.

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

Article 451 *C.C.P.—Retraxit—Subsequent action—Document not proved at trial—Consideration of on appeal—Lis pendens and Res judicata —Pleas of.*

The Exchange Bank of Canada, in an action instituted by them against G. filed a withdrawal of a part of their demand in open court, reserving their right to institute a subsequent action for the amount so withdrawn. The court acted on this *retraxit*, and gave judgment for the balance. This judgment was not appealed from. In a subsequent action for the amount so reserved:

Held—reversing the judgment of the court below, Fournier J. dissenting, that the provisions of Art. 451 C.C.P. are applicable to a withdrawal made outside, and without the interference of, the court and cannot affect the validity of a withdrawal made in open court and with its permission.

2.—That it was too late in the second action to question the validity of the *retraxit* upon which the court had in the first action acted and rendered a judgment which was final and conclusive.

A document not proved at the trial but relied on in the Court of Queen's Bench for the first time cannot be relied on or made part of the case in appeal. *Montreal L. & M. Co.* v. *Fauteux* (3 Can. S. C. R. 433) and *Lyonnais* v. *Molson's Bank* (10 Can. S. C. R. 527) followed.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court.

The questions arising for adjudication in this appeal proceed from a former action between the parties in

*PRESENT: Sir W. J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

which the bank sought to recover some $50,000 from the defendant on three distinct causes of action, namely, a balance of $8,000 on a promissory note for $42,000, a promissory note for $15,000 and a running account for some $29,000. On the trial of this action the plaintiffs found themselves unable to prove the items of the open account and also the $15,000 note and they filed the following notice:

The plaintiffs hereby declare, in order to avoid difficulties and expedite and obtain a judgment, that they withdraw, in the present action, all portions of their demand except that in reference to the check for $42,000, under, however, express reserve of their rights to institute actions upon the note for $15,000; and upon all the vouchers, documents and claims contained in the Exhibit No. 1, herein filed, and upon all other claims or demands they may have against the defendant, the whole without prejudice.

And then proceeded on the $42,000 note and recovered a judgment for the balance claimed thereon. The court subsequently granted to the plaintiffs *acte* of their discontinuance and gave them leave to sue on the claims thereby withdrawn.

In the action brought pursuant to such leave on the $15,000 note and the running account the defendant pleaded, *inter alia*, *lis pendens* and *chose jugée*, and on the trial he contended that the discontinuance had no effect, as part of a plaintiff's claim could not be withdrawn and afterwards sued on, though the whole claim might; or, if the withdrawal could be allowed it could only have effect by the requirements of the code being observed, one of which is that the notice must be served on the defendant, which was not done in this case. The Court of Queen's Bench gave effect to this last objection and dismissed the action, reversing the judgment of the trial judge for the plaintiffs who then appealed to the Supreme Court of Canada.

Macmaster Q.C. for the appellants contended that

1889

THE EXCHANGE BANK OF CANADA v. GILMAN.

article 451 of the Civil Code of Procedure requiring notice of withdrawal to be served is only directory and merely points out one mode of effecting a withdrawal. That there is abundant authority to show that it can be done in open court and then no service is required. *Ryan* v. *Ward* (1); Dalloz Rep. Gén. (2); Carré et Chauveau Proc. Civ. (3); Thomine-Désmazures C.P.C. (4); Favard de Langlade (5); Pigeau Proc. Civ. (6); *Talansier* c. *Loyseau* (7); Bioche Proc. Civ. (8).

F. E. Gilman, respondent in person, contended that the authorities cited only applied to an abandonment of the whole cause of action. See articles 450, 451, 452, 453 C.P.C. That there was nothing to show that the discontinuance was filed in open court, and the whole claim was disposed of in the former action and so became *chose jugée* and barred to the plaintiffs in this suit.

Sir W. J. RITCHIE C. J.—I think this appeal should be allowed. I have been favoured with a perusal of Mr Justice Taschereau's notes with which I entirely concur. I think the *retraxit* was given in open court in the presence of the parties and did not require other notification, and was adjudicated on and allowed by the court and the judgment not appealed from.

FOURNIER J. was of opinion that the appeal should be dismissed for the reasons stated by the judges of the Court of Queen's Bench for Lower Canada (appeal side).

TASCHEREAU J.—The Bank in the present action

(1) 6 L.C.R. 201 at. p. 215.
(2) Vo. Désistement No. 56.
(3) 3 vol. Question 1458.
(4) 2 vol. pp. 628.
(5) Vo. Désistement p. 79.
(6) 1 vol. p. 455.
(7) Journal du Palais, 1832 p. 558.
(8) Vo. Désistement No. 83.

claims from Gilman $41,627.93 being, as they allege, due to them from Gilman as follows :—

Promissory Note, 12th July. 1882, $15,000.00.
Amount to balance Trust Account, 19,956.51.
Ordinary Account..... 6,671.42.

To this action, the defendant pleaded, as to the note, want of consideration, and as to the other two items a general denial, coupled with an allegation that all that he owed to the bank had long been paid and satisfied. The defendant further pleaded—1st. *Lis pendens*, that the causes of action in the present suit were part of the cause of action, by plaintiffs, against him in a previous suit, which, he alleged, was still pending; 2nd, that there was *chose jugée* in that first suit of the matters in issue in this suit.

Two more contradictory pleas than these last two, it is impossible to imagine. If the first action referred to in these pleas is still pending, how can it justify a plea of *res judicata*? If, on the contrary, it is determined, and *res judicata*, how can it justify a plea of *lis pendens*?

The Superior Court (Torrance J., June 26, 1886) dismissed all of the defendant's pleas, and gave judgment in favor of the bank for the full amount claimed, but the Court of Appeal reversed that judgment and dismissed the action on the ground of *lis pendens*, as appears by the following *considérant*:

Considering that the respondent's declaration of discontinuance of suit, alleged by the respondent, in his answer to the first and second pleas of the said appellant to the present action, was not served upon the said appellant, as required by article 451 of the Code of Civil Procedure, and consequently that the delivery of the same into court and its production in the prothonotary's office was of no effect against the appellant under said article, and the judgment granting *acte* of such declaration was not acquiesced in by the appellant, nor was it final, nor *chose jugée*, as regards him, and in fact was afterwards set aside and could not make said discontinuance effective, and said demand against the said appellant is still pending and undetermined in the court below.

1889

THE EXCHANGE BANK OF CANADA v. GILMAN.

Taschereau J.

From that judgment the bank now appeals. I am of opinion that this appeal should be allowed. There was, when this action was instituted, no *lis pendens* as invoked by the defendant. The facts which gave rise to that plea are as follows:—

The Exchange Bank, in January, 1884, sued Gilman for $52,317.92, the action being based—

1st. On a promissory note for $42,000, on which there remained unpaid a balance of $8,000.

2nd. A promissory note for $15,000, signed by Mr. Gilman and given the bank for a deposit receipt for $15,000, issued by the bank, to be deposited with the Dominion Government for the execution of a contract.

3rd. The balance due to the bank in connection with his trust and ordinary deposit accounts, $29,317.92.

To the action so brought, the defendant pleaded that the $42,000 note "was fully paid and satisfied." He pleaded special circumstances regarding the $15,000 which he pretended exempted him from the obligation to pay it, and denied that he was indebted to the bank for any portion of the accounts for $29,317.

3. The case came on for trial at *enquête and merits* on the 30th May, 1884, before Mr. Justice Mathieu. On that day and during the trial, the plaintiffs filed a withdrawal of a part of their claim as follows:

The plaintiffs hereby declare, in order to avoid difficulties and expedite and obtain a judgment, that they withdraw in the present action all portions of their demand, except that in reference to the check for $42,000, under, however, express reserve of their rights to institute an action upon the note for $15,000 and upon all the vouchers, documents and claims contained in the Exhibit "No. 1," herein fyled, and upon all other claims or orders they may have against the defendant, the whole without prejudice.

The case then went "*en delibéré*" with this withdrawal appearing on the face of the record, and on the 14th June following, 1884, Judge Mathieu gave judgment against Gilman for the $8,000 due on the note for

$42,000, granting *acte*, to the plaintiffs, of their withdrawal of the other items of their demand in the following terms :

The court having heard the parties by their counsel upon the merits of this cause, examined the proceedings, the evidence and proof of record, seen the declaration made and filed by plaintiffs on the thirtieth of May last past, whereby they withdraw in the present action all portions of their demand, except that in reference to the check (note) for forty-two thousand dollars, under, however, express reserve of their rights to reinstitute actions upon the note for fifteen thousand dollars, and upon all the vouchers, documents and claims contained in Exhibit No. 1. filed in this cause, and upon all other claims and demands they may have against the defendant, and upon the whole duly deliberated :

Doth grant *acte* to plaintiffs of their said declaration of withdrawal of portions of their demand as aforesaid.

From this judgment the defendant appealed to the Court of Review, but that court unanimously confirmed Judge Mathieu's decision. This judgment of the Court of Review was a final judgment, no appeal lay therefrom.

The bank on the 4th of December, 1884, instituted the present action for the recovery of the balance of that part of their claim against Gilman which they had withdrawn in the suit determined by Judge Mathieu, under express reserve of their right to institute their present action, as stated above.

It is on the case so determined by Judge Mathieu that the defendant grounds his plea of *litis pendens* upon which the Court of Appeal has dismissed the action.

It appears from the extracts of the registers of the court printed in the case, that the withdrawal by plaintiffs of part of their claims in the first action, was made at the trial and in presence of the court. If that is so, it is clear that the procedure is unimpeachable. Art. 451 of the Code of Procedure purports only to permit of a withdrawal outside and without the inter-

1889

THE EXCHANGE BANK OF CANADA v. GILMAN.

Taschereau J.

ference of the court and a reference to section 25, ch. 82, C.S.L.C. shows by the words therein "even in vacation" that the enactment was made only for the purpose of allowing a withdrawal outside of the court. A withdrawal in court and with permission of the court, was always legal without that enactment : See Pigeau Procédure Civile (1).

The commentators under the corresponding articles of the French Code of Civil Procedure, 402, 403, are all unanimous in the conclusion that these articles are permissive only. Carré et Chauveau, Procédure Civile, says (2) :

Le désistement et l'acceptation peuvent-ils être faits de toute autre manière que celle indiquée par l'article 402 ?

L'affirmative parait resulter de ce que l'article est conçu en termes facultatifs : "le désistement comme l'acceptation peut, etc., et non doit, etc." Il peut donc être fait de différentes manières, par exemple : à l'audience en présence du juge qui en peut décerner acte ; mais il faut que le demandeur et le défendeur se trouvent à l'audience en personne ou par des mandataires ; alors leur présence est constatée par le juge, et sans qu'il soit besoin de signatures.

Le contrat judiciaire est formé parce qu'aucune loi n'exigeant que les parties ou leurs fondés de pouvoir signent leurs dires ni les arrangements qu'ils font à l'audience, l'intervention du tribunal qui atteste et consacre ces arrangements supplée éminemment les signatures.

Thomine-Désmazures (3).

Il pourrait encore être fait à l'audience, par l'avoué qui demanderait acte du désistement de sa partie, en déposant des conclusions d'elle ou de son fondé de pouvoir.

La seconde condition est que l'acte de désistement soit signifié d'avoué à avoué. Cette seconde condition est indépendante de la validité de l'acte : elle ne doit évidement être observée que quand il y a avoué constitué de part et d'autre, et elle n'a pour but et pour effet que d'arrêter le cours de la procédure et les frais ultérieurs.

Journal des avoués (4).

Le désistement peut être accepté à l'audience, et les juges ont le droit d'en donner acte sans qu'il soit besoin d'une signification préalable d'avoué à avoué.

(1) 1st vol., p. 358.
(2) Vol. 3, question 1458.
(3) 1 vol., pp. 620-621.
(4) Vol. 10, p. 465, question 22.

1889

THE EXCHANGE BANK OF CANADA v. GILMAN.

Taschereau J.

C'est ce qui a été décidé par la cour de Rennes, le 31 janvier 1811 : Attendu que l'article 402 du code de procédure civile, portant que le désistement peut être fait et accepté par un simple acte, signifié d'avoué à avoué, il en résulte que les parties ont la faculté de faire et accepter le désistement de toute manière juridique.

Favard de Langlade, Vo. Désistement (1).

Quand il (le défendeur) a constitué avoué, le désistement peut être fait et accepté par de simples actes, signés des parties ou de leurs mandataires et signifiés d'avoué à avoué, (Code de Procédure, article 402). Il peut aussi être donné sur la barre à l'audience. Pour qu'il soit valable, il faut que le demandeur et le défendeur se trouvent à l'audience, et que leur consentement soient constatés par le juge.

Pigeau, Procédure Civile (2).

L'article 402 ne dit pas que le désistement *doit*, mais seulement qu'il *peut* être fait et accepté par acte signifié d'avoué à avoué. Ainsi il peut se faire valablement dans toute autre forme suffisante pour constater la volonté des parties ; il peut donc être fait à l'audience en présence du juge qui en donne acte.

Cour Royale de Paris. *Talansier* c. *Loyseau* (3).

Les juges peuvent valider un désistement régulier que la partie refuse d'accepter bien que ce refus soit fondé sur ce que le désistant s'est réservé d'intenter une nouvelle action.

I may also refer to Favard de Langlade (4). Boncenne (5) and to the case of *Ryan* v *Ward* (6) and to the remarks of the judges therein.

The respondent, however, contends that the withdrawal in question was not made in open court, and that consequently it has no effect against him, not having been served upon him under Art. 451 C. C. P.

I do not attach much importance to this, taking it for granted that it was so. Judgment has been passed upon it in that first action : that judgment is final and conclusive. The withdrawal of a portion of the demand, under reserve of the right of instituting a new action therefor, has been sanctioned and allowed by the

(1) T. 2, p. 79.
(2) T. 1, p. 455
(3) Journal du Palais 1832, p. 558.
(4) Vo. Désistement,
(5) Proc. Civ. 7 vol., p. 688.
(6) 6 L. C. R. 201.

1889

THE EXCHANGE BANK OF CANADA v. GILMAN.

Taschereau J.

court. In that case, and in that case alone, could that question be determined. The judgment of the court in that case cannot be reviewed in this case. The court in that former case might have refused to admit that conditional withdrawal and either remit the case for further evidence or dismiss the action for the part thereof not proved; but not having done so, and having allowed the plaintiffs' withdrawal, I do not see how, in this case, we can review that decision. That judgment stands, and to argue that there is *lis pendens* now because the plaintiffs demand from the defendant that portion of their claim which they withdrew on the first action seems to me untenable. How can a case upon which a final judgment has been passed be said to be pending? And, on the other hand, how can the defendant contend that there is *res judicata* in his favor as to the claim withdrawn in the first case by permission of the court, with reserve of the right by the plaintiffs to institute a new action thereof? That claim has not been dismissed, has never been adjudicated upon. The only claim determined in that first action was the one of $8,000.

The judgment of the Court of Appeal alludes to the fact that the judgment on the first action has since been set aside on a *requête civile* for want of stamps on the promissory note for which the plaintiffs had recovered. I think this fact was erroneously taken into consideration. There is no issue of that kind on the record, and the copy of the judgment as setting aside the first judgment was irregularly introduced in the record in the Court of Appeal. It could not have been invoked in the Superior Court for the good reason that it was rendered on the 22nd December, 1887, more than a year after the judgment of the said Superior Court. And the Court of Appeal could not give a judgment which the Superior Court could not have

given, or take into consideration, as a ground of their judgment, a fact which did not exist when the Superior Court pronounced its judgment (1). Moreover, by the judgment of the Court of Appeal on the *requête civile*, the only case remitted to the court below was the case on the $8,000. The withdrawal as to the other items of the plaintiffs' claim remained in full force. The plaintiffs having instituted the present action as to these items, could not have been allowed, in the Superior Court, to desist from that withdrawal.

As to the evidence of the plaintiffs' claims, the Superior Court, as I have remarked, has granted them the full amount demanded by the action, $41,627. At the argument, the plaintiffs, however, agreed to take a judgment for $25,000. I think that the evidence fully justifies a judgment for that amount with interest from 4th December, 1884, and costs *distraits*.

Gwynne and Patterson JJ. concurred with Taschereau J.

Appeal allowed with costs.

Solicitors for appellants: *Macmaster, Hutchinson & MacLennan.*

Solicitor for respondent: *J. D. Cameron.*

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(1) Montreal L. and M. Co. *v.* Fauteux 3 Can. S. C. R. 433; Lyonnais *v.* Molson's Bank 10 Can. S. C. R. 527.