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THE NORWICH UNION FIRE INSURANCE SOCIETY (PLAINTIFFS) } APPELLANTS;

*March 14.
*March 20.

AND

WALTER KAVANAGH (DEFENDANT)...RESPONDENT.

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

Revendication—Statement of claim—Pleadings—Procedure—Arts. 110 and 339 C. P. Q.—Evidence—Judgment secundum allegata et probata—Ultra petita—Surprise.

In an action for revendication of books, documents and records retained by a fire insurance agent after his dismissal and for damages in default of delivery thereof, several policy copy books, which could not be found at the time of the seizure, were delivered up in a mutilated condition by the defendant during the pendency of the action, the defendant being unaware of such mutilation. Some time afterwards the answers to defendant's pleas were filed and contained no reference to the mutilated and incomplete condition in which these books were returned. At the trial plaintiffs were allowed to give evidence as to the cost of replacing these books in proper condition, although defendant objected to the adduction of such proof, and the trial court judge assessed damages in this respect at $200, and at $2000 in respect of certain mutilated plans, at the same time declaring the revendication valid, etc. On appeal by the plaintiffs from the judgment of the Court of King's Bench, reversing the trial court judgment in regard to the pecuniary condemnation :—

Held, affirming the judgment appealed from, that, as the defendant had been surprised, in so far as the issues affecting the policy copy books were concerned, he was entitled to relief as to the item of $200 for damages in respect thereof. With regard to the item of $2000 damages, however, as the defendant could not have been taken by surprise, he himself having mutilated the plans, the Supreme Court of Canada reversed the judgment appealed from and restored the trial court judgment as to that item of the damages assessed.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing, in part, the judgment of

* PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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the Superior Court, District of Montreal, by which the plaintiffs' action had been maintained with costs.

The circumstances of the case and the questions in issue on this appeal are stated in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

Martin K. C. and *Beaudin K. C.* for the appellants.

Kavanagh K. C. for the respondent.

The judgment of the court was delivered by

GIROUARD J.—This appeal involves merely a question of local practice.

In 1900 the appellants caused to be issued a writ of revendication to seize and attach in the hands of the respondent all the books, documents and records of the company and, among others, copies or records of all policies issued by him and also all maps, whether issued by Goad or others, which they alleged to be illegally detained by the respondent, who for several years had been their chief agent in the Province of Quebec but had recently been dismissed from office.

By the conclusions of their demand, they pray first that the said seizure be declared good and valid, that they be declared proprietors of the said books, documents and records and that the respondent be ordered to give up the possession of the same to the appellants forthwith; and finally,

that in the event of the said defendant having secreted or made away with the said books, papers and documents or any part or portion thereof, which are the property of the said plaintiffs, and to the possession of which they are entitled, that he be adjudged and condemned to pay plaintiffs the value of the same, to wit, the sum of ten thousand dollars ($10,000), the said plaintiffs expressly reserving all their rights and recourse against the said defendant for any and all damages suffered and sustained or which may hereafter be suffered and sustained by them by reason of the failure and refusal of the said defendant to hand over to said plaintiffs the said books, papers and documents the whole with costs.

The trial judge maintained the *saisie revendication* and in this respect his judgment was confirmed by the Court of Appeal. The respondent not having appealed from this judgment it is *chose jugée* between the parties, and its soundness cannot be questioned before this court, as contended for by the respondent.

The difficulty before us turns upon a point of practice which arose at the trial when the witnesses were examined. The plaintiffs proved first that eighteen policy copy books—which could not be found when the seizure was made, but had been delivered up, pending the case, in January, 1901, and also the Goad plans which although seized were not delivered till November, 1901, under a judgment of the court—had been returned in a mutilated and incomplete condition, some 500 slips or wordings having been torn out of the policy copy books and numerous pencil memoranda and notes having been erased from the Goad plans, which slips and memoranda were proved to be very valuable and indispensable in the conduct of their insurance business. Next, the plaintiffs endeavoured to establish and did establish that it would cost $2,000 to replace the Goad maps and $200 to replace the slips in the policy copy books.

The respondent objected to this evidence but the trial judge (Lavergne J.) allowed it and on the 19th January, 1903, he delivered the following judgment upon this branch of the case :—

Considering that even at the time of the attachment the defendant had secreted part of plaintiffs' property to wit, eighteen policy copy books, and had even destroyed, by erasing it, all information inscribed on Goad's plans ;

Considering that on the 14th of January, 1901, defendant was not in a position to and did not deliver up to plaintiffs all the property claimed and of which the plaintiffs were the lawful owners ;

Considering that even now the defendant has not and cannot deliver to plaintiffs their property in its entirety and integrity ;

Considering that whilst the Goad plans belonging to plaintiffs were in the defendant's possession, and when said defendant was threatened to

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be sued, said defendant caused all the valuable information gathered since several years respecting insurance risks and which had been inscribed and annotated on said Goad's plans to be removed, erased and rubbed off;

Considering also that about 500 policy wordings were removed from the policy copy books by tearing off the leaves of said books, whilst they were in defendant's possession, which removal and destruction were not explained and justified in any way whatever;

Considering that the value of plaintiff's property so destroyed, to wit, the information on Goad's plans and the policy wording, is at least the sum of $2,200;

Considering that plaintiffs have established the essential allegations of their demand;

Doth declare the said plaintiffs to be the only true and lawful owners and proprietors of said books, papers and documents claimed and demanded from the defendant, and the said plaintiffs entitled to the possession thereof; condemns the defendant to pay plaintiffs the said sum of $2,200, the whole with interest from this date and costs against said defendant.

On the appeal of the respondent the money condemnation was rejected with costs, upon the ground that the mutilation and erasures were not in issue.

The respondent invokes article 110 of the Code of Civil Procedure:

Every fact which, if not alleged, is of a nature to take the opposite party by surprise or to raise an issue not arising from the pleadings, must be expressly pleaded. See also art. 339 C. P. Q.

The trial judge has considered that the mutilations and erasures had been sufficiently alleged in the plaintiffs' conclusions, which pray

that in the event of the said defendant having secreted or made away with the said books, papers and documents or any part or any portion thereof, (he be condemned to pay) the value of the same, to wit, the sum of $10,000.

The slips on the eighteen policy copy books and the memoranda and notes on the Goad plans had been either secreted or made away with, and it was for that reason that the sum of $2,200 were allowed as representing in part the value of the property revendicated, and not as damages to plaintiffs for the privation of the papers and documents in the conduct of their business, a fact which could not be fully ascer-

tained except in the distant future and induced them to reserve their remedy. We are not prepared to revise the ruling of the learned judge, except to the extent it may have caused injury. *Lambe* v. *Armstrong* (1); *Eastern Townships Bank* v. *Swan* (2); *Finnie* v. *City of Montreal* (3).

The defendant contends that he has been taken by surprise, at least as to the eighteen policy books, which had been delivered by him long before plaintiffs' answers to his pleas, without any allegation on their part that they were mutilated and incomplete, although fully aware of the fact. He swears that they were not made by him, nor by any one at his request or to his knowledge. We believe that he had reason to complain that, with regard to this item of $200, the evidence adduced was of a nature to take him by surprise and cause him injury and for that reason we are inclined to deduct that amount from the judgment of the Superior Court, although we admit that he could have prevented any possible injury, if, upon a proper affidavit, he had moved for an adjournment. The appellants have, however, assented to this deduction of $200, and it is not necessary to say any more about it.

With regard to the larger sum of $2,000, for necessary work to replace the Goad plans, which were discovered for the first time when they were delivered in November, 1901, under order of the court granted with the consent of the respondent, the judgment of the Superior Court is restored. The respondent cannot here allege surprise or any possible injustice, for he admits that the erasures were done by himself and a staff of clerks working day and night for two or three days preceding the seizure and to defeat the object of

(1) 27 Can. S. C. R. 309, at p. 312. (2) 29 Can. S. C. R. 193.
(3) 32 Can. S. C. R. 335 at p. 342.

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that seizure, he being dismissed at the time. The reason he advanced in his evidence for acting in this manner was that the pencil notes were made by himself and were his property. He sadly misunderstood his rights. All the courts are against him in this contention which is repeated in his factum, but was not pressed at the argument before us. Chief Justice Lacoste has dealt very lightly with this item, except that he finds the amount exaggerated. We are not willing to interfere in this respect with the judgment of the trial judge, unless there was no evidence to support his finding: but it is admitted that there is precise evidence given by a competent witness, one Laidlaw, and we are not going to inquire why the learned judge, who saw the witnesses, adopted his appreciation of the cost of restoring the property to its original value.

The appeal is, therefore, allowed and the judgment of the Superior Court is restored for $2,000 with costs in all the courts.

Appeal allowed with costs.

Solicitors for the appellants: *Foster, Martin, Archibald & Mann.*

Solicitors for the respondent: *Branchaud & Kavanagh.*