ARTHUR TURCOTTE (DEFENDANT AND OPPOSANT)..... } APPELLANT;

AND

JUSTINE DELPHINE DANSEREAU (PLAINTIFF)..... } RESPONDENT.

1897

*May 15.

*June 7.

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

Action—Service of—Judgment by default—Opposition to judgment—Reasons of—"Rescissoire" joined with "Rescindant"—Arts. 16, 89 *et seq.*, 483, 489, *C. C. P.—False return of service.*

No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.

The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment, and have it set aside notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.

An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* has thus been improperly joined with the *rescindant.*

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), which affirmed the judgment of the Superior Court, District of Three Rivers, dismissing the appellant's opposition with costs.

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*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

TURCOTTE v. DANSEREAU.

The action is based upon promissory notes. The writ of summons and declaration were handed by the bailiff charged with the service to a person whom he met on the street outside of the defendant's residence. It appeared that the papers were mailed to the defendant and received by him at the city of Quebec, but he paid no attention to the action. Upon the bailiff's return that the service had been made by leaving the papers with a reasonable person of the defendant's family at his domicile in the city of Three Rivers, default was entered for non-appearance, and about a year later, (in 1889,) upon the application of the plaintiff, the prothonotary rendered judgment *ex parte* against the defendant under the provisions of articles 89 and following of the Code of Civil Procedure. In 1892 the defendant sought relief against this judgment by opposition on the ground that he had not been duly served with the action and setting forth also grounds of a defence to the merits. The plaintiff contested and the opposition was dismissed by the Superior Court, (Bourgeois J.) for reasons stated as follows:—

"Considérant que le dit défendeur et opposant ne s'est pas pourvu dans le délai de l'an et jour fixé par l'article 483 du Code de Procédure Civile pour faire reviser le jugement qui a été rendu contre lui en cette cause;

"Considérant que le défendeur et opposant a cumulé dans sa dite opposition des moyens d'exception à la forme à l'encontre de l'assignation en cette cause et des moyens de défense au mérite à la demande de la demanderesse.

"Considérant que les informalités dans l'assignation dont se plaint le dit défendeur et opposant pouvaient tout au plus faire présumer la fraude, de manière à permettre au dit défendeur et opposant de fair valoir,

par opposition à jugement, en vertu de l'article 484 du Code de Procédure Civile, les moyens qu'il pouvait avoir à opposer au mérite de la demande de la dite demanderesse, mais n'auraient pu à elles seules donner ouverture à une opposition à jugement."

This judgment was affirmed by the Court of Queen's Bench by the judgment now appealed against.

Languedoc Q.C. for the appellant. Oppositions like the present may be founded on grounds of exception to the form or resulting from irregularities and on grounds of defence to the merits, or both (1); without modifying the law then existing of which it was merely an extension. In respect to oppositions the rule laid down by Loysel has always prevailed: "*le rescindant et le rescissoire sont accumulables.*" Article 492 C. C. P. puts this beyond matter of doubt. The irregularity in this case is so fundamental that the appellant was never before the court, and can never be said to have been in default at any time. The rule as to filing oppositions within the year and a day (1) only applies where a defendant is lawfully placed in default. We refer to *Hall* v. *Harrison* (2); *Jubinville* v. *The Bank of British North America* (3); *Brunet* v. *Colfer* (4); *Eastern Townships Bank* v. *Wright* (5). See also 2 Carré & Chauveau, pp. 3 and 177.

Lajoie for the respondent. The defendant has no substantial grievance and has waived the irregularity of the service by his failure to oppose within the year and a day (6), and allowing four years to elapse without taking proceedings, although he was aware that he had been sued and had the suit papers in his possession; *Ross* v. *Leprohon* (7); *Goulet* v. *McCraw* (8);

(1) Arts. 483-489 C. C. P. [art. 5905 R. S. Q. as amended by 52 Vict. ch. 49 alters art. 483*a* C. C. P.]
(2) 4 Legal News, 325.
(3) 18 L. C. Jur. 237.
(4) 11 Q. L. R. 208.
(5) M. L. R. 3 S. C. 206.
(6) Arts. 119 & 483 C. C. P.
(7) M. L. R. 3 S. C. 137.
(8) 19 R. L. 214.

1897

TURCOTTE v. DANSEREAU.

Any such irregularity must be set up by exception to the form (1); and cannot be entertained when set up in a plea to the merits as has been practically done in this case. *Jubinville* v. *The Bank of British North America* (2). This appeal raises merely a question of practice and the decision of the court below should not be interfered with; *The Mayor of Montreal* v. *Brown & Springle* (3); *Arpin* v. *The Merchants Bank of Canada* (4); *Dawson* v. *The Union Bank of Canada* (5); *Kellond* v. *Reed* (6).

The judgment of the court was delivered by:

TASCHEREAU J.—The appellant was the defendant in the Superior Court at Three Rivers in an action by the respondent on two promissory notes instituted on September 26th, 1888. The service of this action on the appellant, it is conceded, was absolutely illegal. It was served upon a third party, not at the appellant's domicile, and though the documents eventually reached the appellant, (when and whether before or after the return of the writ does not appear) yet he had the right to disregard it and treat it as a nullity.

Over a year afterwards, on 19th October, 1889, the respondent had a judgment entered *ex parte* against the appellant. The respondent never attempted to execute her judgment, and on the 25th April, 1892, the appellant filed an opposition to the judgment, asking, *inter alia*, that the said judgment be set aside, on the ground that he, the appellant, had never been duly served with the action; art. 16 C. C. P. He, however, went further in the opposition and alleged his grounds of defence to the merits on the action; and it is on this ground, because he had joined the *rescissoire*

(1) Arts. 116 & 119 C. C. P.
(2) 18 L. C. Jur. 237.
(3) 2 App. Cas. 184.
(4) 24 Can. S. C. R. 142.
(5) Cass. Dig. 2 ed. 428.
(6) 18 L. C. Jur. 309.

to the *rescindant*, that the court below has dismissed the opposition.

The other ground relied upon by the Superior Court, that the opposition had not been filed within a year and a day after the judgment as required by article 483 of the Code of Procedure, is clearly untenable. The law cannot be so unjust as to peremptorily bind any one to exercise a right before he is in a position to be possibly aware of that right. 1 Pigeau, (ed. 1787) p. 490; 1 Poncet, "*Des Jugements*," nos. 152, *et seq.*

Now as to the ground on which the respondent mainly relied to support the judgment of the court below, the joining of the *rescissoire* with the *rescindant*, to which I have already referred, I am of opinion that the appellant must succeed, and that the judgment must be reversed. I fail to see any reason whatever for the rule which must have been the one followed by the court below, that if an opposant to judgment wrongfully mixes up the *rescissoire* with the *rescindant*, his opposition must, on that ground alone, be dismissed. The insufficiency of a litigant's allegations may be fatal to his claim, but if he alleges more than is necessary, or adds to a legitimate demand conclusions which he is not entitled to, that is no reason to reject the whole of his demand. It is a contradiction in any one to ask that a judgment be set aside because he has not been served with the action, and at the same time, to conclude by a plea to the merits of the action. He is not bound to plead at all to an action which has not been served upon him. He may certainly waive the want of service but the appellant here has not done so.

The articles 483 and following of the Code of Procedure have no application. They are enactments on cases where judgment has been rendered by default, where the defendant was in default to appear or to

1897

TURCOTTE v. DANSEREAU.

Taschereau J.

plead. But how can a party who has not been summoned be said to be in default for non-appearance? Merlin, Rep. vo. "*Opposition*," §I, par. 1. The judgment here was rendered against the respondent, only because he appeared by the return of the bailiff to have been summoned, but now that, as it is conceded, this was a false return, a return *soufflé* (1), the judgment falls to the ground as an inevitable consequence, the moment at any time, were it ten years or twenty years afterwards, that the defendant invokes that nullity, not having waived it in any way. The respondent obtained a judgment against the appellant upon false representations upon her bailiff's return which now turns out to have been untrue. Can such a judgment be supported? She would vainly rely on the merits of her claim. That is not in question here. It is not on her claim, or on the appellant's liabilities, that we have to adjudicate here, but exclusively on the judgment she has obtained against the appellant. And that judgment cannot stand. This appellant's opposition should not be defeated on technicalities and it is on technicalities exclusively that the courts below have found reasons to dismiss it.

No judgment can be legally entered on promissory notes under articles 89 and following of the Code of Procedure, as this one assumes to have been, if the defendant is not in default to appear or to plead, and he cannot be in default if he has not been summoned. The plaintiff, respondent, has obtained this judgment against the appellant upon a false bailiff's return; that falsity now being established that judgment must be set aside. And the appellant has the right to have it set aside, without alleging or establishing that he has a good defence to the action; the respondent is not entitled to ask that from him, not having served the

(1) 1 Poncet, "*Des Jugements*," no. 190.

1897

TURCOTTE v. DANSEREAU.

Taschereau J.

action upon him. His having alleged a defence does not disentitle the appellant from invoking the nullity of the judgment, as he does in his opposition. I repeat it, the appellant is not, and never has been in default. The judgment against him is not only voidable, but it is void as an absolute nullity.

Appeal allowed with costs.

Solicitor for appellant: *W. C. Languedoc.*

Solicitors for respondent: *Bisaillon, Brosseau & Lajoie.*