1912

*Nov. 4.
*Nov. 26.

EDOUARD R. DUFRESNE (DEFENDANT) ..... APPELLANT;

AND

PIERRE DESFORGES (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Action—Public officer—Notice—Notary public—Principal and agent—Mandate—Pleadings—Practice—New objections on appeal—Case on appeal—Notes of reasons by judges—Findings of fact—Art. 88 C.P.Q.

If a defendant has not, in the courts below, taken exception to want of notice of action, as required by article 88 of the Code of Civil Procedure of Quebec, it is doubtful whether the objection can be urged on an appeal to the Supreme Court of Canada. *Devine* v. *Holloway* (14 Moo. P.C. 290) referred to.

Where the defendant has not been sued in an action for damages by reason of an act done in the exercise of a public function or duty, the provision of article 88 C.P.Q., as to notice of action against a public officer, has no application.

The Supreme Court of Canada ought not, in ordinary cases, to take into consideration the notes of reasons for judgments in the courts below which have not been delivered before the settling of the case on the appeal: *Mayhew* v. *Stone* (26 Can. S.C.R. 58) followed. In a proper case, however, when the non-delivery of such notes is satisfactorily accounted for, the court may permit them to be filed and made use of as part of the record on the appeal: *Canadian Fire Insurance Co.* v. *Robinson* (Cout. Dig. 1105) referred to.

The court refused to reverse the concurrent findings of fact by the courts below.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, which affirmed the judg-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

ment of Demers J., in the Superior Court, District of Montreal, maintaining the respondent's action with costs.

The respondent, plaintiff, brought the action against the appellant, defendant, to recover $5,000, with interest, which, it was alleged, had been placed by him in the hands of the defendant, who was his notary, with instructions to invest the amount on loan secured by a second mortgage upon certain real estate in Montreal. It was charged that the defendant had not followed the instructions given by the plaintiff in regard to the security to be obtained, but that he had, without authorization, made new terms and that, in consequence, the money had been lost. No notice of action was given according to the provision of article 88 of the Code of Procedure of Quebec respecting suits against public officers. The effect of the defendant's pleadings and of his contentions in the courts below was that the plaintiff had been kept informed of all that transpired during the transaction of the business relating to the making of the loan and that he had acquiesced in all that had been done in the matter, and that, therefore, the loss of the money was not due to anything which he had done in the matter, but that it was the result of neglect and delay for which the plaintiff himself was responsible. The question of want of notice was not raised.

At the trial, Demers J. found that the defendant had not fulfilled his mandate, that he had acted contrary to explicit instructions of the plaintiff, and rendered judgment maintaining the plaintiff's action for the sum claimed with interest and costs. This judgment was affirmed, on appeal, by the Court of Review, Mr. Justice Tellier dissenting.

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Proceedings were commenced upon an appeal to the Supreme Court of Canada by the defendant and, on 19th June, 1912, an order was made by the Court of Review settling the contents of the "case" on the appeal, and the certified case, as settled, was filed in the office of the Supreme Court on the 11th September, 1912. Up to this latter date no notes of reasons for judgment had been delivered by Mr. Justice Tellier, but on the 20th of September, 1912, the learned judge delivered notes of his reasons for dissent from the judgment rendered in the Court of Review, and these notes were printed as an appendix to the case as filed and were deposited in the office of the Supreme Court on the 26th of October, 1912, during the session of the court at which the appeal was to come on for hearing.

Upon the appeal coming on for hearing before the court, Mr. Rinfret, of counsel for the respondent, moved the court to strike out from the record on the appeal the document purporting to contain the reasons of Mr. Justice Tellier on the ground that it had been irregularly filed after the appeal had been taken, that it did not form part of the record in the court below, and that it had the effect of prejudicing the respondent, who was not aware of the contents of the document. On behalf of the appellant, Aimé Geoffrion K.C. shewed cause, stating that similar reasons had been verbally delivered by Mr. Justice Tellier for his dissent at the time the judgment of the Court of Review had been rendered, but, owing to certain circumstances, that he had been unable to deliver the written notes until a later date.

The court referred to the case of *Mayhew* v. *Stone* (1), and *Canadian Fire Insurance Co.* v. *Robinson* (2),

(1) 26 Can. S.C.R. 58. (2) Cout. Dig. 1105.

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and expressed the opinion that the rule laid down in *Mayhew* v. *Stone*(1) was the correct one to apply in cases where reasons for judgment were delivered subsequent to the launching of the proceedings on an appeal to the Supreme Court of Canada, although there could be no objection to making use of reasons where their non-delivery was accounted for on the ground of illness, absence, etc.; that, by the statute and the rules, appeals were to be heard on the case as settled and that no additional material should be considered in ordinary cases. At the same time, the court did not preclude itself, in a proper case and upon a proper application, from receiving reasons for judgment which have been delivered by judges after the appeal has been taken. In the present case leave was granted to counsel for the appellant to make a subsequent application, supported by affidavits, etc., shewing the circumstances which, in the view of counsel, might justify the court in receiving the notes in question.

In the meantime the appeal was heard upon the merits.

Aimé Geoffrion K.C. and *Richard Beaudry* for the appellant. The contract of agency was not proved by the plaintiff; no mandate can result from the receipt of the cheque merely. Any instruction which may have been given as to the investment of the money was modified subsequently by conversations over the telephone; this parol evidence can be legally received under article 4585 of the Revised Statutes of Quebec, 1909, which has full and unrestricted application in

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the circumstances of this case; it is, moreover, supported by a *commencement de preuve par écrit,* the letter from the plaintiff.

We also submit that the action ought to be dismissed because it was not preceded by the necessary notice of action required by article 88 of the Code of Civil Procedure; the appellant, being a notary public, and having been employed in this matter to act for the plaintiff as such, is a "public officer"; art. 4575, R.S.Q., 1909; the article 88, C.P.Q., gives him this protection. Although not pleaded it is a provision of which the court is obliged to take judicial notice in this case; on the face of the proceedings it appears that the defendant is charged with the responsibility, if any, for which it is sought to make him liable, in his capacity as the notary and professional adviser of the plaintiff. We rely upon the following authorities: *Lasnier* v. *Dozois*(1), *per* Lynch J. at pages 604-5; *Gervais* v. *Nadeau*(2), confirmed on appeal, and arts. 1065 and 1709, C.C. The action, in any event, is based on liability for damages; the plaintiff was bound to allege notice in his statement of claim and to prove such notice, and, having failed to do so, his action must fail.

Rinfret and *Genest,* for the respondent. As to the facts we have the findings of both courts below in our favour; these findings ought not to be reversed on appeal. The respondent has acknowledged the receipt of the plaintiff's letter instructing him in respect to the investment of the money; the proof has failed as to the alleged modification of the mandate; parol evidence is not admissible to contradict the terms of the

(1) Q.R. 15 S.C. 604. (2) 3 Que. P.R. 18.

letter and, moreover, the verbal evidence as to the alleged change has been denied and that denial accepted in favour of the plaintiff. We refer to Gouillard, no. 45; Fuzier-Herman, art. 1985, nos. 57, 59; Rolland de Villargues, Rep. du Notariat, no. 211, *vo.* "Responsabilité des Notaires"; *O'Malley* v. *Ryan*(1); *Brownlee* v. *Hyde*(2); Langelier, "Preuve," p. 246, *et seq.* The provisions of art. 4585, R.S.Q., 1909, can have no application in a case such as this; it is governed by arts. 1233 and 1234, C.C., which preclude parol testimony for an amount such as is in dispute in this case. See also Taylor on Evidence, vol. 2 (9 ed.), p. 742, par. 1132; Greenleaf, Evidence (16 ed.), vol. 1, pp. 404, 405; Phipson, Evidence (5 ed.), p. 536; Best, Evidence (11 ed.), p. 218; 8 Aubry & Rau, p. 320, note 2 to sec. 763; Pand. Fr. vol. 45, "Preuve," *nn.* 165, 424-430, 432, 448, 451, 454-456; *Gillchrist* v. *Lachaud* (3), confirmed in review; *West* v. *Fleck*(4); *Hamel* v. *Smith*(5); Laurent, vol. 19, *nn.* 558, 559, 564; *Moody* v. *Jones*(6).

No notice of action was necessary; the present action is not for damages by reason of any act done by defendant in the exercise of his functions as a notary, but for an omission to do what he was bound to do, as a simple mandatary: *Lachance* v, *Casault*(7); *Price* v. *Perceval*(8); *Jodoin* v. *Archambault*(9); *Chagnon* v. *Quesnel*(10); *Irvin* v. *Boston*(11). Notice is not necessary where the action is for breach of contract:

(1) Q.R. 21 S.C. 566.
(2) Q.R. 15 K.B. 221.
(3) 14 Q.L.R. 278.
(4) 15 L.C.R. 422.
(5) 17 Rev. de Jur. 490.
(6) 19 R.L. 516; 19 Can. S.C.R. 266.
(7) Q.R. 12 K.B. 179.
(8) Stu. K.B. 179.
(9) M.L.R. 3 Q.B. 1.
(10) 2 Que. P.R. 509.
(11) 2 L.C. Jur. 171.

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Davis v. *Curling*(1); *Fletcher* v. *Greenwell*(2); *Davies* v. *Mayor of Swansea*(3). This objection should have been raised by way of exception, or in the plea to the merits, and not for the first time before the Supreme Court: *Gale* v. *Bureau*(4); *Davey* v. *Warne*(5); *Richards* v. *Easto*(6); *Law* v. *Dodd*(7); *Bédard* v. *Corp. Comté de Québec*(8); *Kelly* v. *Montreal Street Railway Co.*(9); *Gauthier* v. *Municipalité de St. Louis*(10); *Sullivan* v. *Ville de Magog*(11); *Pageau* v. *Corp. St. Ambroise*(12); *Corp. de Douglas* v. *Maher*(13); *Legault* v. *Lee*(14); *Turner* v. *Corp. de St. Louis du Ha! Ha!*(15); *Laurin* v. *Corp. du Sault au Récollet*(16); *Boulay* v. *Saucier*(17); *Harrison* v. *Brega*(18); *Harold* v. *Corp. of Simcoe*(19).

In *Gervais* v. *Nadeau*(20) the defendant was sued in damages for a deed improperly drawn, against the law, and the question of notice had been raised in the plea.

THE CHIEF JUSTICE.—This is an appeal from a judgment in an action brought to recover the sum of five thousand dollars which the plaintiff, respondent here, says was given by him to the defendant, appellant here, to be applied to the purchase of a piece of property, the case turned in both courts below on the nature of the instructions subject to which the

(1) 8 Q.B. 286.
(2) 4 Dowl. 166.
(3) 8 Ex. 808.
(4) 44 Can. S.C.R. 305.
(5) 14 M. & W. 199.
(6) 15 M. & W. 244.
(7) 1 Ex. 845, at p. 848.
(8) Q.R. 33 S.C. 188.
(9) Q.R. 13 S.C. 385.
(10) Q.R. 9 S.C. 453.
(11) Q.R. 18 S.C. 107.
(12) 10 Que. P.R. 208.
(13) 11 Q.L.R. 294.
(14) 26 L.C. Jur. 28.
(15) 16 Q.L.R. 260.
(16) 7 Legal News 318.
(17) 7 Que. P.R. 344.
(18) 20 U.C.Q.B. 324.
(19) 18 U.C.C.P. 9.
(20) 3 Que. P.R. 18.

money was deposited with the defendant. Both courts found on that issue of fact against the defendant, and he was condemned to refund the money.

Here, for the first time, the defendant raises the point that he being a notary public and, consequently, "a public officer," was by virtue of article 88 of the Code of Civil Procedure entitled to notice of this action, and that notice not having been given that the action must fail. It is doubtful whether such an objection, even if well founded, should be allowed to prevail here. *Devine* v. *Holloway* (1).

The complete answer to the objection, however, is that this is not an action in the form of an answer for damages. It may be that it is difficult to find a distinction in substance between such an action as this and one simply for negligence; but the case has been treated throughout as an action *"en repetition"* pure and simple and we cannot change its nature here, even to allow the defendant to take advantage of this highly technical objection. Of course it was open to the plaintiff to sue for damages (art. 1709, C.C.), in which case he might have recovered a sum in excess of the amount now claimed. If he chose, however, to limit his recourse, without prejudice to the defendant, and to adopt an action in this form — how can this right be denied to him ?

It is further to be observed that the defendant in his plea to the action takes pains to deny that he acted as a notary public in this transaction.

For these reasons I am of opinion that the objection of want of notice cannot be allowed to prevail.

On the merits I can see no reason to reverse the concurrent judgments of the courts below. The money

(1) 14 Moo. P.C. 290.

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in question was advanced in the form of a bank cheque made by the plaintiff to the order of the defendant, and it is found as a fact that the cheque was given with definite instructions as to the conditions under which it was to be used and that the defendant accepted it subject to those instructions. He subsequently parted with the cheque in violation of those instructions and without the most elementary regard for the interest of his principal, to whom the money was, in consequence, lost. On these facts also we have the concurrent findings of the two courts below. How in these circumstances can the appellant hope to escape liability ?

I would dismiss the appeal with costs.

DAVIES J. concurred with the Chief Justice.

IDINGTON J.—I think this appeal should be dismissed with costs. And, as to the proposed defence of want of notice of action, I think it cannot be permitted to raise such a defence at this stage for the first time.

Besides, even if a notary public, as such, is entitled to a notice of action (as to which I say nothing) the facts in this case do not seem such as to have enabled the appelant to avail himself of it if he had pleaded it.

DUFF J.—I concur in dismissing the appeal. The highly technical objection based upon article 88 of the Code of Civil Procedure ought not, in my opinion, to be entertained. The objection was not taken in the pleadings nor at the trial nor before the Court of King's Bench. In his defence the appellant alleged that in the transactions out of which the respondent's

claim arose he was not acting in his capacity as a notary public. There can be no risk of injustice in refusing to permit it to be raised now. In these circumstances I think the objection based upon the absence of notice of action, if it ever had any substance, comes too late.

ANGLIN and BRODEUR JJ. concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Beaudry & Beaudry.*
Solicitors for the respondent: *Perron, Taschereau, Rinfret & Genest.*