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*May 19.

*June 22.

W. L'HEUREUX (PLAINTIFF)..... APPELLANT;

AND

A. LAMARCHE, *et al.*, (DEFENDANTS)....RESPONDENTS.

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

Action en reddition de compte—Contradictory averments in plea—Effect of—Unsworn account.

In an action *en reddition de compte* by an assignor against his assignee to which the assignee by his plea answered that he was not bound to render an account, and at the same time alleged that he had already accounted for the moneys as garnishee in another suit, produced an unsworn account, asked the court to declare the same to be a true and faithful account of his administration; and prayed for the dismissal of the plaintiff's action:

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

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Held, reversing the judgment of the Court of Queen's Bench dismissing the plaintiff's action, and restoring the judgment of the Court of Review, that although the parties had joined issue and heard witnesses to prove certain items of the unsworn account produced, the plaintiff was first entitled to a judgment of the court ordering the defendant to produce a sworn account supported by vouchers and therefore his action had been improperly dismissed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing a judgment of the Court of Review and dismissing the plaintiff's action.

The appellant was a trader in the parish of Ste Geneviève de Batiscan, when, on the 23rd September, 1882, the respondents, who were his creditors, obtained an abandonment of all his property, and proceeded to the liquidation thereof. The appellant in June, 1883, sued the respondents claiming from them an account of their administration of his estate.

To this action the respondents demurred and also pleaded:

1. That the facts alleged in the plaintiff's declaration are false and insufficient in law;

2. That they should not have been sued personally but in their quality of trustees;

3. That they are not bound to render any account to the plaintiff but to his creditors only:

4. That by virtue of the deed of abandonment they became the absolute owners of appellant's property, and are not bound to account to him for it;

5. That the Superior Court, in the district of Three Rivers, has no jurisdiction over them;

6. That they have already accounted by their declarations, in a case C. C. No. 234, Guillet, plaintiff, L'Heureux, defendant, and Lamarche *et al.*, garnishees;

7. That the plaintiff's action is unfounded as well in fact as in law;

(1) 11 Q. L. R. 342.

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8. That without being bound to do so, they, in their quality of trustees (to wit: not under their present liability) set forth for the information of plaintiff, in lieu and stead of an account (here followed an account relative to their administration). And they concluded as follows: "that without admitting that they are bound to render any account to the plaintiff, the hereabove rendering of account be received, and the plaintiff's action dismissed with costs."

By his general answer to the plea to the merits, the appellant says: "That the facts, matters and things pleaded in the plea or exception (except the admissions therein contained) are all and each of them false, unfounded in fact and insufficient in law. Wherefore the plaintiff, persisting in the conclusions of his declaration, prays that the said plea or exception be dismissed with costs."

After the filing of that general answer the appellant inscribed the case for proof and final hearing upon the merits at the same time, the said appellant declaring by his said inscription that he had no evidence to produce.

The parties then proceeded to proof, the appellant cross-examining the respondent's witnesses without making any objection.

The appellant gave a consent and an admission at *enquête* to be used as evidence.

The Superior Court, sitting at Three Rivers, the sixteenth day of September, 1884, dismissed the respondents' demurrer, but maintained their exceptions and dismissed the appellant's action.

The case was then inscribed before the Court of Review at Quebec and that court reversed the judgment of the Superior Court.

On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reinstated.

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Laflamme Q.C. for appellant.

According to law, the respondents' plea cannot certainly be considered as an account.

That plea can be summed up as follows: "The respondents not being bound to account, for such and such reasons, consent as a favor to give to the plaintiff certain informations, and they ask that such informations be declared sufficient, and the plaintiff's action dismissed with costs."

It is a denial of the plaintiff's right of action, and a refusal to render him an account.

How could a tribunal under such circumstances hold there was an account rendered, when the respondents themselves made no such pretention? See C. P. C. art. 522, 523. Ord. 1667, tit. 29. Pothier (1).

A defendant sued to render account cannot avoid the obligation to file an account duly sworn to, containing under separate heads the receipts, expenditure, etc., etc., by giving in lieu thereof some statements on his administration in a plea by which he prays that the plaintiff's action be dismissed.

Until now the jurisprudence has been always in conformity with the provisions of the law.

Les Curé et Marguillers v. *Robillard* (2); *Wood et al.* v. *Wilson* (3).

F. Langelier Q.C. for respondent.

The whole case depends upon the joint question whether under the circumstances in this case the accounts produced should have been sworn to. There had been no previous demand for an account and therefore no costs. If the plea is singularly worded the proper course for the appellant was to have the account set aside because it was not sworn, but as stated by Mr. Justice Tessier in the court below the appellant has

(1) Proc. Civ., 2 part, ch. 2 p. 98. (2) 21 L. C. J. 122.
(3) 26 L. C. J. 149.

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chosen to join issue on the pleadings and it is too late now to complain.

The learned counsel cited Dalloz, (1); Carré Proc. Civ. (2); Thomine Desmazures (C. P.) (3)

TASCHEREAU J. delivered the judgment of the court.—In 1882 the plaintiff, now appellant, assigned his estate to the defendants, present respondents, for the benefit of his creditors. By his present action he claims from the defendants an account of their administration of his estate. By their plea, the defendants first allege that they are not bound to account to the plaintiff, wherefore they ask the dismissal of the action.

2nd. They allege that they have already accounted to him before the institution of this action—and this as garnishees in a suit between one Guillet and the plaintiff—so therefore they pray for the dismissal of the action. 3rd. They plead the general issue. 4th. They produce a statement which they ask the court to declare to be a true and faithful account of their administration, and that the action be consequently dismissed.

To this extraordinary plea the plaintiffs' filed a general answer. The defendants produced evidence to establish their account.

The Superior Court dismissed the plaintiff's action, on the ground that the account produced was a true and faithful one. The *considerants* refer to the garnishment pleaded, but the *dispositif* clearly shows that the court was of opinion that the account therein given by the present defendants was not sufficient alone to entitle them to ask for the dismissal of the present action.

The Court of Review unanimously reversed that judgment on the ground that the issue to be first determined in the case is as to the right of the plaintiff

(1) 11 Vol. No. 44, pp. 531 & 534.

(2) 3 Vol. p. 667.

(3) Vol. 11, p. 20.

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to ask for an account from the defendants, and that, till that point has been adjudicated upon, he, the plaintiff, is not bound to contest or admit the account filed with the plea.

The Court of Queen's Bench reversed the judgment of the Court of Review, and restored the first judgment by which the plaintiff's action had been dismissed. The plaintiff now appeals from that last judgment.

I am of opinion that the judgment of the Court of Review is the right one, and that the plaintiff's action was wrongly dismissed by the Superior Court.

The defendants first denied the plaintiff's right of action, and asked the dismissal of his action. The plaintiff joined issue with them on this point. Was it not the first one to be determined? The plaintiff says: "I am entitled to an answer." The defendants say: "No, you are not." Is this not a clear and distinct issue upon which the court must first pronounce? It seems to me that there can be no doubt on this point. Mr. Justice Casault, in the Court of Review, has gone so fully into the case that I can add nothing to it. I entirely concur in all that he says. I would confirm the judgment of the Court of Review in its entirety, thus allowing the appeal with costs against the respondents, costs in Queen's Bench to be also against present respondents, *distraction* of costs in all the courts to L. P. Guillet Esq., plaintiff and appellant's attorney; one-third of cost of printing cannot be taxed against respondent, in consequence of the unnecessary and useless paper printed.

Appeal allowed with costs.

Solicitor for appellant: *L. P. Guillet.*

Solicitor for respondents: *E. Gerin.*