THE EASTERN TOWNSHIPS BANK (DEFENDANT PAR REPRISE D'INSTANCE)..... APPELLANT;

1898

*Oct. 7.

*Nov. 21.

AND

SUSANNAH H. SWAN *et al.* (PLAINTIFFS PAR REPRISE D'INSTANCE)..... RESPONDENTS.

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

Appeal—Question of local practice—Inscription for proof and hearing—Peremptory list—Notice — Surprise — Artifice—Requête civile—Arts. 234, 235, 505, *C. C. P. (old text)—R. of P. (S. C.) LV.*

Where a grave injustice has been inflicted upon a party to a suit, the Supreme Court of Canada will interfere for the purpose of granting appropriate relief although the question involved upon the appeal may be one of mere local practice only. *Lambe* v. *Armstrong* (27 Can. S. C. R. 390) followed.

Under a local practice prevailing in the Superior Court, in the District of Montreal, the plaintiffs obtained an order from a judge fixing a day peremptorily for the adduction of evidence and hearing on the merits of a case by precedence over other cases previously inscribed on the roll and without notice to the defendants. The defendants did not appear when the cases was taken up for proof and hearing and judgment by default was entered in favour of the plaintiffs. The defendant filed a *requête civile* asking for the revocation of the judgment to which the plaintiffs demurred. On appeal to the Supreme Court of Canada against the judgment maintaining the demurrer and dismissing the *requête* with costs;—

Held, reversing the decision of the Court of Queen's Bench, that the order was improperly made for want of notice to the adverse party as required by the Rules of Practice of the Superior Court, and that the defendant was entitled to have the judgment revoked upon *requête civile*.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), affirming the decision of the Superior Court, District of Montreal,

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

1898

THE EASTERN TOWNSHIPS BANK v. SWAN.

which maintained the plaintiffs' demurrer to a *requête civile* filed by the defendant asking for the revocation of the judgment by default and dismissed the *requête* with costs.

The circumstances under which the *requête civile* was filed and questions at issue upon the appeal sufficiently appear from the judgment reported.

Atwater Q.C. for the appellant. The judgment maintaining the demurrer gives as its sole reason that "the petition in revocation of judgment (*requête civile*) presented by the defendant does not disclose reasons which give rise to such a petition (*requête civile*)." In considering the demurrer, the allegations of the petition must be taken as admitted, and Art. 505, C. C. P. (old text) is designed to apply to cases where the parties might suffer from causes beyond their control, and an effective remedy could not be gained by appeal to a higher court, which would, of course, be bound by the record as it then stood. *Cooke* v. *Caron* (1); *Kellond* v. *Reed* (2).

The *requête* alleges that the judgment was obtained by surprise and artifice; that the defendant was in ignorance of the issue on the supplementary demand, was not represented by counsel, and had no opportunity of properly pleading to the action, or of setting up facts, which would entitle it to have the action and the supplementary demand dismissed. The article only states three of the cases where the petition is admissible. These have been held not to be restrictive of the cases where the petition will lie, but are merely indicative. The cases of *Lusk* v. *Riddell* (3), *Neil* v. *Champoux* (4), *Marcotte* v. *Guévremont* (5), *Marcotte* v. *Cour des Commissaires, de St. Casimir* (6),

(1) 10 Q. L. R. 152.
(2) 18 L. C. Jur. 309.
(3) 19 L. C. Jur. 104.
(4) 7 Q. L. R. 210; 11 R. L. 143.
(5) 33 L. C. Jur. 261.
(6) Q. R. 7 S. C. 236.

1898

THE EASTERN TOWNSHIPS BANK v. SWAN.

Doutre v. *Bradley* (1), *Bayliss* v. *Leddy* (2), all go to shew the unanimity of the jurisprudence in this respect, and the facts in many of them are very similar to those in the present case.

The remedy in law exists; the allegations of the petition and defence are sufficient to allow of its being exercised and the injustice which would be done to the appellant by the judgment now standing against it, and to which it was condemned unheard, should be remedied by the admission of the defence and allowing the issues to go to trial.

We refer your Lordships also to the special observations upon the fourth report of the Commission for the revision of the Code of Civil Procedure, chap. 58, which will be found at page lxviii of Mitchell's Manual of Procedure, (ed. 1897), and to the decisions in *Leet* v. *Lee Chu* (3); *Durocher* v. *Durocher* (4); *King* v. *Sandeman* (5); and *Mitchell* v. *Wilson* (6). See also Rule of Practice LV, (Superior Court,) Foran's Code of Civil Procedure (ed. 1879) p. 651.

Brousseau for the respondent. The petition in revocation does not disclose reasons which could give rise to such proceeding, and in the Court of Queen's Bench, Bossé, Blanchet, Würtele, Ouimet and Tellier JJ. unanimously affirmed the judgment of the Superior Court dismissing it. Then the judgment of the Superior Court in the original demand praying for the annulation of the deed of sale was susceptible of appeal as was also the judgment on the incidental demand, for the recovery of moneys paid on account and omitted in the principal demand. The appellant had appeared and pleaded to the principal demand, the Court of Appeal had ordered that the record be

(1) 17 L. C. Jur 42.
(2) 17 R. L. 408.
(3) 1 Que. P. R. 332.
(4) Q. R. 12 S. C. 373.
(5) 38 L. T. 461.
(6) 25 W. R. 380.

1898

THE EASTERN TOWNSHIPS BANK v. SWAN.

sent back to the Superior Court to pronounce a judgment annulling the sale, after the filing of the judgment in *Fairbanks* v. *The Eastern Townships Bank*, and *McDougall et al. mis-en-cause*. There was no new appearance, no new demand of plea and no certificate of default or foreclosure required to proceed to judgment. The filing of the judgment in *Fairbanks* v. *The Eastern Townships Banks* and an inscription of the case upon the roll were the only documents required for the court to adjudicate finally on the principal demand, and when the case was called parties had a right to be heard. The appellant actually appeared by counsel who asked for an enlargement of the case, but on the day fixed did not appear and judgment was rendered accordingly. If appellants were not satisfied they had an appeal, and they did inscribe the case before the Court of Review but desisted from their inscription.

If this can be considered a judgment rendered by default to appear or plead it may be opposed according to articles 483a and 484 C. C. P, as amended by the R. S. Q., art. 5905 and 52 Vict. ch. 49 (Que). Petitions in revocation of judgment can be made only against judgments not susceptible of being appealed or opposed and as this judgment could both be appealed from and opposed, the appellant cannot petition in revocation.

Again the facts alleged in the petition do not constitute the fraud or deceit intended in article 505 of the Code of Procedure. There is no rule forbidding a judge to order a case to be added to the roll or put on in place of another case. There is a rule providing for eight days notice to the opposite party, but the appellant does not complain of the want of that notice. Yet he would have even in that case the remedy of opposition. There is no complaint that the judgment was rendered upon documents subsequently dis-

covered to be false, nor upon any unauthorized consent disavowed after judgment, nor that since the judgment documents of a conclusive nature have been discovered which had been withheld or concealed by the respondents. There is not, in fact, any complaint that brings the case within the operation of article 505 of the Code of Civil Procedure.

The following authorities are in point;—*Dawson* v. *Macdonald* (1); *Dow* v. *Dickinson* (2); Arts. 149, 152, 153, 192, 234, 235, 266; Dal. Rep. Gen. *vo.* Requête Civile, nos. 1, 2, 3, 4 and notes 16 & 17; nos. 6, 60, 63-70.

The judgment of the court was delivered by:

GIROUARD J.—The present appeal is from a judgment of the Court of Queen's Bench of the Province of Quebec, appeal side, which confirmed a judgment of the Superior Court sitting at Montreal maintaining a demurrer to a *requête civile*. It involves a mere question of local practice, and were it not for the grave injustice inflicted upon the appellant, we would not interfere. *Lambe* v. *Armstrong* (3).

The petitioners, defendants in the court below and present appellants, by their attorneys, Messrs. Atwater & Mackie, allege in their *requête civile*, that the respondents, plaintiffs

served a demand of plea upon the defendants' attorneys on the first day of June, 1896, and on the fifth day of June presented an inscription for proof and final hearing on the merits, as well upon the original action as upon a supplementary incidental demand, to Mr. Justice Curran and that the said judge, at the request of the plaintiffs *par reprise d'instance*, thereupon immediately fixed the said case upon the roll for proof and final hearing on both the said issues, for the sixteenth day of June, although the said role had been completed and prepared and no notice was given to the defendants, nor to their attorneys, of such application.

(1) Cass. Dig. (2 ed.) 586. (2) [1881] W. N. 52.
(3) 27 Can. S. C. R. 309.

1898

THE EASTERN TOWNSHIPS BANK v. SWAN.

Girouard J.

The *requête civile* further alleges :

That on the said sixteenth day of June, Mr. Mackie, one of the attorneys of record for the defendants, but who really was not conversant or familiar with the case or with the details thereof, appeared and protested against proceeding, but in spite of such protest, the plaintiffs *par reprise d'instance* were allowed to proceed and examine a witness who pretended to prove the items of the plaintiffs' supplementary incidental demand.

That the court continued the said case for the purpose only of allowing the cross-examination of the said witness until the nineteenth of June then instant.

That on the said nineteenth day of June, it being impossible, on the ground of public business, for the said A. W. Atwater to attend the trial of the said case, and it being practically useless to cross-examine the said witness or properly to present the defendants' case without a special answer or plea to the said supplementary incidental demand, the court nevertheless took the said case *en delibéré*.

On the twenty-fifth day of June, 1896, judgment was rendered for a large amount against the appellants, who finally set forth in their *requête civile :*

That the said judgment was obtained by the means aforesaid and by surprise and artifice with regard to the defendants, who were in ignorance of the issue of the supplementary demand, and who were not represented by counsel and had no opportunity of properly pleading to the action or of setting up the facts which, they are advised, would have entitled them to a dismissal of the action and of the supplementary demand. * * * * * *

That the undue haste and artifice made use of by the plaintiffs *par reprise d'instance*, in endeavouring to obtain the judgment complained of was prompted by the desire on their part to prevent, in bad faith, the bank from being able to carry out its obligations towards the plaintiffs and to enable them to escape from their obligation towards the bank to pay the price of the property which they had purchased and which was sold to them in good faith by the defendants, and of which they have had possession and the use since January, eighteen hundred and ninety-three.

Article 505 of the Code of Civil Procedure in force when the said petition was filed, provides that ;

Judgments which are not susceptible of being appealed or opposed, as herein above provided, may be revoked, upon a petition presented

to the same court, by any person who was a party to, or was summoned to be a party to the suit in the following cases;

1. Where fraud or artifice has been made use of by the opposite party. [See Art. 1177 C. P. Q.]

The judgment rendered against the appellants can be attacked only by a *requête civile*, if sufficient grounds be shown.

It is not necessary to decide the much vexed question as to whether or not article 505 of the Code of Civil procedure is limitative or simply illustrative. The appellants allege "artifice" and even "bad faith." True, articles 234 and 235 gave the respondents the right to inscribe the case for hearing upon giving to the opposite party at least eight days notice "before that fixed for the proof." But how is the day for the proof to be fixed? The Code does not say. At all events, article 235 does not authorize any one party in a pending suit to have a precedence or a preference over other cases previously inscribed. It is admitted that to avoid confusion and expense, the practice prevailing at the time, was to file inscriptions for proof and hearing in blank and leave them with the prothonotary to be set down for hearing in turn, notice to be given of the setting down at least eight days before trial. Under that course of practice, sanctioned both by the Bench and the Bar, it is conceded that the appellants' case could not have been called or heard before the September term. The appellants' counsel had therefore every reason to presume that he should not have to prepare for his case, or to summon his witnesses before that term, as it is alleged in the *requête civile*, that the June roll had been completed and there being no court to sit in the months of July and August.

But even if this view of the proceedure be wrong, the case should not have been set down by the judge

1898

THE EASTERN TOWNSHIPS BANK v. SWAN.

Girouard J.

for hearing on the sixteenth of June, without hearing the appellants.

Under the rules of practice of the Superior Court, (Rule LV)

no motion can be received or heard unless previous notice thereof, of at least one day, be given to the adverse party,

and this rule is one of common justice.

The application for a "day fixed" was a most important motion. Under articles 234 and 235 of the Code of Civil Procedure, the respondents were entitled to inscribe for hearing upon giving eight days notice, but they had to run their chance of being heard or not. These articles did not give them the privilege of securing a hearing on a fixed day without the order of the court and notice to the opposite party.

We are unanimously of opinion that notice should have been given, and, for that reason, the appeal is allowed with costs and the judgment of the Court of Queen's Bench as well as that of the Superior Court maintaining the said demurrer, are reversed and set aside and the said demurrer dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Atwater, Duclos & Mackie.*

Solicitors for the respondents: *Brosseau, Lajoie & Lacoste.*