1964
*Nov. 30
1965
Jan. 26

GEORGES FILION (*Plaintiff*) ..... APPELANT;

AND

RAYMONDE MAGNAN AND L'HOPITAL ST-JUSTINE (*Defendants*) RESPONDENTS.

APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Actions—Peremption—Action inscribed for proof and hearing—Action placed on roll of ordinary cases—Application for jury trial granted—No further proceedings for two years—Action never struck off roll of ordinary cases—Code of Civil Procedure, arts. 282, 421, 423, 433.

The plaintiff sued the respondents for damages. On March 15, 1961, the action was inscribed for proof and hearing and was placed on the roll of ordinary cases to await its turn for hearing. It remained on the roll and in the ordinary course would have come up for hearing in the month of November 1963. Following the inscription, the plaintiff applied for a trial by jury and to have the case entered on the special roll of trials by jury. This application was granted on April 13, 1961. No further proceedings were made and in particular no application to strike a panel of jurors and fix a date for trial. On April 26, 1963, the respondents made a motion for peremption asking that the action be dismissed on the ground that no useful proceeding had been taken within two years. The motion was dismissed by the trial judge, but his judgment was reversed by a majority judgment in the Court of Appeal. The plaintiff appeals to this Court.

Held: The appeal should be allowed.

When an action has been inscribed and is awaiting its turn for hearing, the period required for peremption runs only from the day on which it is struck from the roll. The inscription for proof and hearing filed in March 1961 did not lapse when the application for

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Judson and Ritchie JJ.

a trial by jury was made in April 1961. That inscription continued in full force and effect and the delays for peremption would not commence to run until the day the case had been struck from the roll.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Ouimet J. Appeal allowed.

Gilles Godin, Q.C., for the plaintiff, appellant.

Roger Lacoste, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant, as tutor to his minor son Alain Filion, sued respondents for the sum of $67,055.59 as damages resulting from the amputation of the right leg of his son, then five years of age, alleging that the amputation was necessitated by reason of the fault and negligence of the respondents.

The respondent l'Hôpital Sainte-Justine pleaded to the action and issue was joined between it and the appellant ès qualité. The respondent Raymonde Magnan appeared but did not plead.

On March 15, 1961, appellant inscribed the action for proof and hearing on the merits against l'Hôpital Sainte-Justine and for proof and hearing *ex parte* against Raymonde Magnan. The inscription was filed with the Master of the Rolls of the Superior Court on March 24, 1961, and the action was placed by him on the roll of ordinary cases to await its turn for hearing. It remained on the roll and in the ordinary course would have come up for hearing in the month of November 1963.

Following this inscription appellant made option under arts. 421 *et seq.* of the *Code of Civil Procedure* for a trial by jury and applied under art. 423 C.C.P. to have the case entered on the special roll of trials by jury. That application was granted on April 13, 1961. Thereafter appellant took no further proceedings and in particular he did not apply under art. 433 C.C.P. to strike a panel of jurors and fix a date for trial.

On April 26, 1963, respondents served on appellant a motion for peremption under art. 282 C.C.P. asking that the action be dismissed on the ground that no useful pro-

[1] [1964] Que. Q.B. 772.

1965

FILION
v.
MAGNAN
et al.

Abbott J.

ceeding had been taken within two years. That motion was dismissed by Ouimet J. but his judgment was reversed by the Court of Queen's Bench[1], Bissonnette and Owen JJ. dissenting, and appellant's action was dismissed with costs. The present appeal is from that judgment.

The jurisprudence has established beyond question that when an action has been inscribed and is awaiting its turn for hearing the period required for peremption runs only from the day on which it is struck from the roll. *Caron Signs Regd.* v. *Montreal Tramways Co.*[2]; *Commercial Acceptance Corporation v. Clark*[3].

The sole question in issue here therefore is whether the inscription for proof and hearing filed on March 24, 1961, lapsed when in April 1961 appellant made application for a trial by jury. I share the opinion expressed by Bissonnette and Owen JJ. that it did not lapse.

The right to a trial by jury in civil matters is an exceptional right and is subject to special formalities. Like any other such right it can be renounced either expressly or tacitly. It may be that in failing to make the application called for under art. 433 C.C.P. appellant lost his right to a trial by jury but I do not find it necessary to express any view as to this.

In my opinion however the inscription for proof and hearing before a judge alone filed on March 24, 1961, continued in full force and effect and the delays for peremption would not commence to run until the day the case had been struck from the roll.

I would allow the appeal and restore the judgment at trial. The appellant is entitled to his costs throughout.

Appeal allowed with costs.

Attorneys for the plaintiff, appellant: Chaussé & Godin, Montreal.

Attorneys for the defendants, respondents: Lacoste, Lacoste, Savoie & Laniel, Montreal.

[1] [1964] Que. Q.B. 772.
[2] [1952] Que. R.L. 1 at 5.
[3] [1953] Que. P.R. 205.