COURT OF REVIEW.

MONTREAL, May 31, 1882.

JOHNSON, TORRANCE & RAINVILLE, JJ.

[From S. C., Beauharnois.

BOURDON v. PICARD et al.

Procedure—C. C. P. 118—Furnishing correct copy of writ to defendant.

JOHNSON, J. There are several defendants in this case, and among them two who appeared and pleaded *exceptions à la forme* grounded on the allegation that true copies of the writ of summons had not been served upon them as required by law. The writ was signed in due course by Mr. Baudry, the Prothonotary, and the copies served upon these two excipient defendants were certified by the plaintiff's attorney; but he certified that the writ had been signed not by the Prothonotary, but by Mr. Brossoit, the plaintiff's attorney, that is to say, the copies served said on the face of them "signed, T. Brossoit, plaintiff's attorney," instead of "signed, J. U. Baudry, Prothonotary;" and then came the signature of the plaintiff's attorney, saying that was a true copy, whereas, and of course, it was not true that the original writ had been signed by the plaintiff's attorney, for it had, as a matter of course, been signed by the prothonotary; and Her Majesty's writ could not have issued from her Court signed by anyone else. So the extent to which these two defendants could possibly be misled or misinformed did not reach to the body or to the exigency of the writ itself, but only to the fact as to who was the person who had signed the original writ. Whether such an evident and insignificant mistake as this could, under any circumstances, be successfully set up by exception to the form, the Court will not now discuss. However this may be, the plaintiff came forward and in one case made two motions: 1st. to be allowed to serve a correct copy, and secondly, to correct and amend the error in the copy served. In the second case he moved only to correct the copy in which the error as to the name had been made. The judgment of the Court in the cases of both these defendants maintained the *exceptions*, and denied the plaintiff's motions; and the plaintiff inscribes as well against the judgments which had the effect of dismissing her action, as against the interlocutory judgments on the motions. The judgment which maintained the exceptions and dismissed the action, was of course a final judgment, and brings before us the incident of the motions to amend and to serve correct copies.

We are unanimously of opinion to reverse these final judgments, and also the interlocutories, and to grant the motions of the plaintiff. We consider Art. 118 of the Code of Procedure decisive of the whole matter: "If the copy of the writ or declaration is incorrect, or different from the original, the plaintiff may, upon leave of the Court, and on payment of costs, furnish the defendant with a correct copy." This is precisely what the plaintiff did here, and his motions ought, in our opinion, to have been allowed. There is a case mentioned in the 3rd vol. Rev. de Leg., *Montmigny* v. *Tappin*, decided in the K. B., A.D. 1820, in which it was held that if the defendant appears, the non-service of the copy of the declaration will only authorize the defendant to move for a copy, and the right to plead should date from the service of such copy. I can find no full report of that case; but it is cited in the note to Art. 118 in Mr. Foran's Code de Procedure, and also in Stephens' digest; and the reason of that decision would seem to apply here. We were appealed to by the learned counsel for these two defendants to preserve intact a strict and unreasoning adherence to forms which he assured us prevailed in his district. We are not aware that the practice in that district is in this respect different from any other of the districts included for purposes of review in the District of Montreal. We take this case as if it had occurred in Montreal, and we apply to it the principles laid down by Pigeau, Proc. Civ. du Chatelet, vol. 1, p. 161. We have to consider the abuses known to have arisen from delays thus obtained, and which may in some instances even cause the acquisition of prescription. We adopt Pigeau's language, and we say that it is the "*impossibilité de répondre qui est le seul motif que les ordonnances supposent à celui qui argumente d'une nullité.*" We find also under the Louisiana Code, that in amendments which are merely formal, the defendant is not allowed further time to answer.

Judgment reversed, and plaintiff's motions granted; costs in both Courts against defendants.

T. Brossoit for the plaintiff.

L. A. Seers for the defendant.