

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 16, 1879.

Sir A. A. DORION, C.J., MONK, RAMSAY, TESSIER,
& CROSS, JJ.ROSS (deflt. below), Appellant; and MARCEAU,
(plff. below), Respondent.*Procedure—Return of Action—Proof made by the
Register of the Court.*

SIR A. A. DORION, C. J. In this case there were contradictory affidavits and the Court had suggested to counsel the desirability of coming to an arrangement. This had not been done, and it was necessary to give judgment. The appellant complained that the writ was returned into Court after the return day. The action was returnable on the 12th September, 1877, but was not really returned, according to the endorsement and the register, till the 13th, and the stamps were not cancelled till the 16th, as appeared by inspection of the cancellation. Judgment was obtained by default, and appellant alleged that the judgment under the circumstances should be set aside. The respondent replied that the writ was lodged with the Prothonotary's clerk, with the requisite amount of stamps, on the return day, but as defendant's counsel had declared that the case would be settled that day, and wished to avoid further costs, the clerk had been asked to hold the papers until the usual hour for closing the office, with the understanding that the return would be made, if he were not previously informed that the case had been settled. However, the register showed that the return had been made on the 13th, and the register could not be contradicted by affidavits. The judgment must, therefore, be reversed, but no costs would be allowed, because the defendant had an opportunity of pleading, but preferred to appeal.

The judgment was as follows :—

“Considérant qu'il appert par les registres de la Cour Supérieure que cette action n'a été rapportée en cour que le 13 Septembre, 1877, tandis qu'elle aurait dû être rapportée le 12, jour auquel la défenderesse était assignée à comparaitre ;

“Et considérant que cette entrée aux registres ne peut être contredite par des affidavits produits devant cette cour ;

“Mais considérant qu'il appert par les circonstances de la cause que l'appellante défenderesse en cour inférieure, a été informée de cette irrégularité à temps pour en prendre avantage en cour inférieure, si elle eut voulu comparaitre ainsi que l'offre lui en a été faite ;

“Cette cour casse et annule le jugement rendu par la Cour Supérieure le 29 Septembre, 1877, et procédant à rendre le jugement que la Cour Supérieure aurait dû rendre, renvoie l'action de l'intimée sauf recours, et ordonne que chaque partie paie ses frais tant ceux encourus en cour inférieure que sur le présent appel.”

Abbott, Tait, Woltherspoon & Abbott for Appellant.

Lareau & Lebeuf for Respondent.

O'BRIEN (plff. below), Appellant; and MOLSON (deflt. below), Respondent.

THE SAME, Appellant, and THOMAS, Respondent.

Annexes ou faits et articles, Divisibility of.

O'Brien instituted two actions in the Superior Court, one against Thomas and the other against Molson, to recover the price of certain lots which the defendants had bought at an auction sale of real estate, but had not paid for. In the deeds of sale, O'Brien acknowledged that the price had been paid in cash; but he now declared that this was untrue, and that the price had never been paid. The only evidence consisted of the answers of the defendants on *faits et articles*, and the admissions in the pleadings. From these it appeared that the defendant's pretension in each case was that the land was conveyed as a gift. Molson said :—“I did not pay \$2160 at the time of signing the deed or afterwards, because the plaintiff insisted on my accepting the lots as a donation. He had bought a farm, of which said lots formed part, in which he had promised me an interest, but he took the deed in his own name. And I understood from him at the time that he was giving me the lots, not selling them to me; and that he did so to make up for not giving me my share of the property he purchased.”

The Court below (Torrance, J.) held that the answer or admission of the defendant could not be divided, and the action was dismissed.

(21 L. C. Jurist, p. 287.)