Montreal

No.

QUEEN'S BENCH

APPEAL SIDE.

THE TRUST & LOAN COMPANY OF UPPER CANADA,

(Plaintiffs in the Court below,)

— Appellants;

AND

CHRISTINA MACKAY, ET AL,

(Defendants in the Court below,)

Respondents.

RESPONDENTS' CASE.

Fyled,

A. H. LUNN,
Atty. for Respondents.

J. Starke & Co., Printers, Montreal.

PROVINCE OF CANADA.
District of Montreal.

IN THE QUEEN'S BENCH.

(Appeal Side.) 1859.

THE TRUST & LOAN COMPANY OF UPPER CANADA,

(Plaintiffs in the Court below),

Appellants;

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CHRISTINA MACKAY, ET AL,

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RESPONDENTS' CASE.

This Appeal is from a Judgment of the Superior Court, Montreal, which maintained an *Exception à la Forme*, pleaded by Christina Mackay, (wife of the other Respondent and *separée de biens*), and dismissed the Appellants' Action.

The question now, of course, is: Did the Court below err in rendering *that* Judgment, and in holding, thereby, that the Bailiffs' return (of service of process) which was proved to be untrue, was *not to be approved*!

That return stated service on the Defendant, Christina Mackay, by "leaving a true "copy of Writ and Declaration *with* a grown person of her family."

No such service, in fact, was made. The said Defendant was in Upper Canada at the time, and has never seen copy of process whatever.

Under common circumstances, the Respondents would have waived *any* objection to *any* irregularity of service; but a sense of what the Trust & Loan Company deserved, forbade them waiving any objection to this service of process. The Appellants' name was, in this case, used and their suit waged avowedly to vex the male Respondent, and their Action was returned, notwithstanding that, before the pretended service of process, offer had been made by Respondents to pay the Plaintiffs, in terms of an open agreement, interest up to first of May *next*. The Appellants had, therefore, no favors to expect. The original Action was instituted on the ninth of November last. On the tenth, service of process was made on the male Respondent, by *Martin*, Bailiff, who, in his deposition afterwards made, describes what passed. Mr. Mackay informed him that Mrs. Mackay was absent from Lower Canada, and pointed out the various modes by which the Plaintiffs could proceed against her. "Mr. Mackay was perfectly civil," says *Martin*. He was; and he had right to expect that, afterwards, his privacy would not be vexatiously intruded upon. But, although Martin reported everything, another Bailiff, McCormick, was sent to Respondent's house on the next day, to whom Mr. Mackay (particularly as he had previously told *Martin* all that he could, and all he knew) declined speaking, but simply shut the door "as soon as he saw him." What passed outside of that door no human eye saw, nor ear heard, except the Bailiff's, McCormick's; yet he made return upon the Writ, that he had served Christina Mackay with process, and had left copy *with* a grown person of her family!

After return of the Action, the Respondent pleaded *Exception à la Forme*, and alleged that the Bailiff's return was untrue, that no legal service of process had been made on *Christina* Mackay, (the only real Defendant), that no *remise* of copy of process, as required, had ever been made, as pretended, &c.

The Appellants fyled no answer.

At the *Enquête*, (which the Appellants would not attend,) the Respondents proved all their allegations.

The Appellants inscribed the cause for final hearing on the exception, and the Judgment followed from which the present Appeal has been instituted.

That Judgment needs no long defence. It is warranted by the law, and the facts proved.

It is time that the Courts should mark with their disfavor false returns by their Officers; these are too common, and lead to enormous oppressions and injustices. In the present case the Bailiff had to pronounce his condemnation out of his own mouth. Instead of having left copy of process *with* a grown person of Respondent's family, he left it with nobody; he says he left it *on the floor of the porch*; outside of Respondent's house, nobody seeing him.

The Trust & Loan Company persists in defending such a service and return, and would use it. It has also to demonstrate, as its Reasons of Appeal seem to say it undertakes to, that the Judgment appealed from "is contrary to law, and against the evidence adduced and of record in the said cause."

The Respondent would add a few words on the subject of the evidence. As said before, it is conclusive; but, were it weak, we have a Rule of Practice, (XXXIII) under which the Appellants cannot hope to succeed in the face of their own inscription of the cause, for hearing on the exception, without answer to it. Under this rule, a party acting so, (as the Plaintiffs in the Court below did), is to be "held to confess the allegations contained in such exception."

Can anybody doubt that the allegations of the *Exception à la Forme* in this cause, if true, are sufficient to justify the Judgment rendered?

A. H. LUNN,
Atty. for Respondents.

MONTREAL, April 29, 1859.