Privy Council Appeal No. 4 of 1916.

The Montreal Street Railway Company and Another - - - - - - - *Appellants,*

v.

Roch Normandin - - - - - - *Respondent,*

FROM

THE SUPERIOR COURT SITTING IN REVIEW FOR THE DISTRICT OF MONTREAL, PROVINCE OF QUEBEC.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. DELIVERED THE 23RD JANUARY, 1917.

Present at the Hearing:

THE LORD CHANCELLOR (LORD BUCKMASTER).
VISCOUNT HALDANE.
LORD DUNEDIN.
LORD PARKER OF WADDINGTON.
SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

The respondent in this case was plaintiff in an action against the appellant company in the Superior Court at Quebec to recover damages for personal injuries sustained by him when travelling in a tramcar of the appellants' by a collision with another tramcar of the same company. The action was tried before a special jury, who gave a verdict for the plaintiff for 12,000 dollars on the 12th December, 1912, and judgment was given for the plaintiff for that amount. The appellants on the 10th January, 1913, took proceedings to have the judgment set aside on the ground that the jury had not been duly constituted and was without jurisdiction, and also that one of the jurors was relative to and was connected by affinity with the plaintiff and was not indifferent between the parties, and also that in the course of the trial communications in reference to the case passed between the plaintiff, his relatives, and those who were conducting his case, and that juror and other jurors. At the trial there had been no challenge either to the array or to any individual juror.

These proceedings ultimately failed, and by a judgment of the Court of Review of Quebec the judgment in favour of the

plaintiff was upheld. From the judgment of the Court of Review this appeal is brought. The questions argued before the Board were whether, on the grounds alleged, or either of them, the judgment at the trial ought to have been set aside, and whether the procedure taken for setting it aside was correct in form. There are also proceedings taken to set aside the verdict and judgment on the ground that the damages were excessive; but these are standing over pending the decision of this appeal. What the appellants did on the 10th January, 1913, was to present a petition in revocation of judgment, known in Quebec as a *requête civile*, which came on to be heard before Mr. Justice Beaudin on the 27th January, who held, without going into the evidence, that *requête civile* was not the proper way to raise the question. An appeal from this decision was taken to the Court of King's Bench (Appeal side), which Court, by a majority, on the 30th October, 1913, allowed the appeal, ordered the reception of the petition, and remitted the record to the Superior Court for proof and hearing of the issues contained in the petition. This proof and hearing took place on the 21st November, 1914, when the Judge (Monet, J.) heard the evidence and dismissed the petition on the merits. He also disallowed a demurrer by the respondent to the petition, following, in so doing, the judgment of the King's Bench (Appeal side). The appellants appealed to the Court of Review from the decision of Mr. Justice Monet disallowing his *requête civile*, but the respondent did not appeal from the disallowance of his demurrer. The Court of Review affirmed the judgment of Mr. Justice Monet, but a majority of the judges were of opinion that the proceedings were wrong in form, and should have been dismissed on that ground as well as on the merits. The most important question on the appeal to this Board is, as to the effect of serious irregularities in the preliminary proceedings for constituting the jury panel. On this point Mr. Justice Monet found that irregularities or breaches of the provisions of law had occurred, but that the appellants could not avail themselves of them because they had not proved any prejudice to have been suffered by them in consequence.

Very elaborate and minute enactments are contained in the Revised Statutes of Quebec (Sections 3409, 3411, 3414, 3416, 3418, 3421, 3423, 3426, 3427, 3428, 3429, and 3462) for the constitution of a Revising Board to revise annually the jury lists, there being one list of grand and another of petit juries.

The municipalities are directed to give notice to the Sheriff of new names of qualified persons and of the deaths, removals, or exemptions of those on the old lists. The Board, of which the Sheriff is a member, and apparently president, sit in private to make their revision, but public notice is given before the lists are sent on to the Sheriff. There are detailed provisions as to the mode of revision, as to initialling alterations and additions and as to the times of various steps and other matters. The lists so revised

serve for criminal and possibly other purposes, and from the list of grand jurors the list for trial of civil cases is made. The Sheriff, by Section 3429, immediately after the revision of the list, is to notify the prothonotary, who is then to correct his list. The prothonotary's duties are prescribed by Section 430 and following sections of the Quebec Code of Civil Procedure. He is bound to make a list of the persons qualified to serve as jurors in civil cases by taking from the list of persons qualified to serve as grand jurors in criminal cases which is deposited in his office the names of all persons residing within 15 miles of his office in the order in which such names appear, and he is to revise his list immediately after receiving notice from the Sheriff that he has completed the revision of the grand jury list. Then when an order is made for the trial of a civil cause by a jury the names are taken in order from the list to form a panel for that case, and proceedings are taken for reducing the number for trial of the cause, which appear similar to what is known in this country as striking a jury under the old practice, still permissible by special order.

On the hearing of the *requête civile* before Mr. Justice Monet it was proved that in the year 1912, when the cause was tried, these provisions had for several years been neglected by the Sheriff. There had been no revision at all, and old lists had been used. So far as the prothonotary was concerned, it is not clear that he in any way neglected his duties, inasmuch as he used *the list deposited in his office* of grand jurors, although that was, of course, an old one, not duly revised by the Sheriff and Board. From that prothonotary's list the names for this jury were duly taken in order. The Statutes contain no enactment as to what is to be the consequence of non-observance of these provisions. It is contended for the appellants that the consequence is that the trial was *coram non judice*, and must be treated as a nullity.

It is necessary to consider the principles which have been adopted in construing Statutes of this character, and the authorities so far as there are any on the particular question arising here. The question whether provisions in a Statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the Statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th edition, p. 596, and following pages. When the provisions of a Statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. This principle has been applied to provisions for holding

sessions at particular times and places (2 *Hale*, *P C.* 50, *The King* v. *Justices of Leicester*, 7 B. and C. 6, and *Parke*, *J.*, at pp. 39 and 40, in *Gwynne* v. *Burnell*, 2 *Bing N.C.*), to provisions as to rates (*R.* v. *Fordham* 11 *A.* and *E.* 73, *Le Feuve* v. *Miller*, 26 *L.J.* (*M.C.*) 175), to provisions of the Ballot Act (*Woodward* v. *Sussons*, *L. R.* 10 *C. P.* 733, *Phillips* v. *Goff*, 17 *Q. B. D.*, 805), and to Justices acting without having taken the prescribed oath, whose acts are not held invalid (*Margate Pier Co.* v. *Hannam* 3 *B.* and *A.* 266). In the case now before the Board it would cause the greatest public inconvenience if it were held that neglect to observe the provisions of the Statute made the verdicts of all juries taken from the list *ipso facto* null and void, so that no jury trials could be held until a duly revised list had been prepared. As to the objects sought to be attained by these elaborate provisions for the mode of preparing the lists, there seem to be three things aimed at: First, to distribute the burden of jury service equally between all liable to it; secondly, to secure effective lists for the use of the Courts of jurors likely to attend when called, the names of dead men, and absent or exempted men being left out; thirdly, to prevent the selection of particular individuals for any jury, commonly called packing. The duties imposed on the Sheriff appear intended for the first and second of these purposes, and those of the prothonotary for all the three. His duty to take the names in rotation prevents packing, and his taking the names next after those who last served distributes the burden. In this case the prothonotary had a list in fact, although an old one, and the men on it had all been qualified, and probably in most cases remained so. The names were taken in proper rotation, and those ultimately sworn appear all to have been qualified. As to some of the matters, such as the omission to initial correct alterations, it would be impossible to hold that these made the whole list null and void. Having regard to the nature of the Sheriff's duties and their object, it seems quite unnecessary and wrong to hold that the neglect of them makes the list null and void; and although the prothonotary's neglect, if it had been in the matter of the order of taking the names, might have resulted in a packed jury, the neglect if there had been any in other matters, would be of the same kind as the Sheriff's. It does far less harm to allow cases tried by a jury formed as this one was, with the opportunities there would be to object to any unqualified man called into the box to stand good, than to hold the proceedings null and void. So to hold would not, of course, prevent the Courts granting new trials in cases where there was reason to think that a fair trial had not been had. The view taken by Mr. Justice Monet that he ought not to interfere where the appellant had shown no prejudice appears very reasonable, and their Lordships are of opinion that it is also in accordance with the authorities. Taking first the Canadian cases to which counsel referred. The case most relied on was

Grose v. *The Homes Electric Protection Co.*, Quebec Law Rep. (Superior Court), vol. 9, p. 374. In this case the facts are to be gathered from the judgment which is set out in full in the report, and it seems that there had been somewhat similar neglect by the Sheriff in his duties as to jury lists as in the present case, but the prothonotary also had, in direct breach of the code, omitted names standing next in order, and taken others lower down. This amounted to a process of packing the jury, and might possibly have been done with that intention. The minor breaches such as want of initials are recited in the judgment, but the facts as a whole clearly show prejudice, to use Monet, J.'s, phrase, and show the very mischief to have happened which it was one of the objects of the Statute to prevent. That a challenge to the array was allowed in that case is quite consistent with Monet, J.'s, decision. *Rex* v. *Macrae*, Quebec Law Rep., K. B., vol. 16, p. 193, also quoted, was a case of murder, and after a verdict of guilty the conviction was quashed on grounds going to the merits, but it was also held by a majority of the Court that the swearing and inclusion in the jury of a person assigned by mistake, but whose name was not written in the panel of jurors, and who had not the qualifications required by law for being one of the jury, is illegal, and a verdict returned by a jury so composed is null, and should be quashed. This seems to have little to do with the matter, as here no juror is shown to have been disqualified, and if one had been, probably Monet, J., would have held it to be "prejudice." The difference of opinion amongst the Judges in that case arose from the different views taken as to certain sections of the Criminal Code, which have no application to the case now before the Board. *McKay* v. *The Glasgow and London Insurance Company*, 32, Lower Canada Jurist, p. 125, also quoted, merely shows that if a juror is, in fact, interested, and has not been challenged, his interest not being known until after the trial, a new trial will be granted, which obviously has no bearing on the point now under consideration. Of the English cases, *Mulcahy* v. *The Queen*, L. R. 3 Eng. & Ir. Apps. 306, was a writ of error on a criminal conviction taken to the House of Lords. The trial had taken place in one year under a commission opened in the previous year. There were lists of jurors duly made out according to the provisions of the Statutes relating to the matter for each of the two years. The jury had been taken from the list for the first of the two years, and it was argued that it should have been from the list for the year in which the trial took place. The Judges were summoned and questions put to them in the usual way, and Mr. Justice Willes delivered the opinion of the Judges to the effect that the right list had been taken. This is relied on to show that such provisions are not merely directory, otherwise the elaborate judgment actually delivered would not have been silent on such a point. But the question there merely was which list should be taken; each list had been duly made, and no provisions as to the making of

lists were broken. But Mr. Justice Willes does guard himself against inferences being drawn from his judgment as to points which he had not expressly dealt with by saying "Assuming therefore that this sort of objection by way of challenge either to the array or the poll is competent in any case of the kind, it was incompetent in this." Another case referred to in the argument was *Williams* v. *The Great Western Railway Co.*, 3 H. and N. 869, which shows that the omission to challenge, although the facts were not known until after the time for challenge, is not without effect on the rights of the parties, and a comparison of that case with *Lord Ashburnham* v. *Michael*, 16 Q.B. 620, shows that while in England the fact of a juryman being open to challenge, discovered after verdict, may be ground for a new trial, yet it is discretionary with the Court to grant it, and it will not do so when it is of opinion that no prejudice has been done. Their Lordships therefore are of opinion that the decision of Monet, J. on the objection to the verdict founded on the omission duly to revise the lists was right. Counsel for the appellants pressed the Board not to weaken any of the safeguards provided by the Legislature for securing fair and impartial juries, but their Lordships fail to see that the decision of Monet, J., has that effect.

As to the next point, the juror objected to was one Hector Barsalou, who was brother of Erasmus Barsalou, who was husband of an aunt of the plaintiff. It is obvious that this is not relationship or affinity. But Erasmus Barsalou had been the tutor or testamentary guardian of the plaintiff, who was at the time of the trial not much over 21, and whose father had died when the plaintiff was an infant, so that Erasmus Barsalou had brought him up. Hector Barsalou no doubt knew the plaintiff fairly well as his brother's ward, but that was all, and both he and Erasmus gave evidence satisfactory to the Judge as to interest in the cause. The case as to communications with the jury broke down. The witnesses who gave the strongest evidence as to it were claim agents of the appellant company, and it was their duty to inform the appellants' legal advisers at once if during the trial they observed anything which at the time they really thought serious. During the trial appellants' counsel did have some information given him which led him to ask Hector Barsalou if he was allied to the plaintiff. He answered truly that he was not, and the question was not pushed further.

The Judge finds emphatically that the appellants proved no case on these points. The Court of Review adopted the findings of fact of the Judge. Their Lordships would require a very strong case to induce them to differ with the Judge who heard the witnesses, and on a consideration of the evidence they find no such case, but, on the contrary, agree with the Judge.

As to the point whether a *requête civile* was the proper

procedure, their Lordships do not think it open, as neither the decision of the Court of King's Bench nor the disallowance of the demurrer by Monet, J., was appealed from. The decision of the King's Bench was not interlocutory for the purpose of an appeal from it under the rule acted on in this country, as it would have been final if decided the other way.

Even if open a decision on the point is unnecessary, as in their Lordships' view, the *requête civile* failed in proof, and their Lordships would not desire, unless it were necessary, to express any opinion on a question of form and practice in the Quebec Courts, with which the Judges of those Courts are far more familiar than they are. Their Lordships see no reason for interfering, as they were asked to do, with any of the interlocutory orders as to costs, and they will humbly advise His Majesty that the appeal should be dismissed with costs

In the Privy Council.

THE MONTREAL STREET RAILWAY COMPANY AND ANOTHER.

v.

ROCH NORMANDIN.

DELIVERED BY
SIR ARTHUR CHANNELL.

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