

STRANGERS IN THE JURY ROOM.

The right of a jury to deliberate in private has been long established as a principle of English Common Law. In a comparatively recent case, *The King v. Wood, Ex parte Anderson*,¹ the rule is restated in clear and unequivocal terms and differs little, if at all, from that laid down by *Coke upon Littleton* and by Hale. The reiteration of the rule in this case in almost its original form brings into prominence the development that has taken place in the application of the rule in Canada.

Coke upon Littleton,² says with brevity:

By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unlesse it be the bailife, and with him onely if they be agreed.

Archbold in Criminal Pleading, Evidence and Practice,³ cites Hale to the same effect:

Retirement of Jury.—If the jury are unable to agree upon their verdict without retiring from their box, they withdraw to a convenient place appointed for that purpose, an officer being sworn to keep them, and to suffer none to speak to them without leave of the court, nor to speak to them himself, except only to ask them whether they are agreed. 2 Hale, 297.

In *The King v. Wood, Ex parte Anderson (supra)* a coroner's inquisition was quashed on the grounds that the coroner was in the jury's retiring room while they were considering their verdict. Lord Hewart, C.J., at p. 304, says:

It seems to me to be clearly contrary to public policy that a coroner should go into the jury room after the jury have retired to consider their verdict, even though it be for the purpose only of answering an inquiry which the jury seek to make of him, or of giving them further directions which they request.

And Salter, J., p. 306, adds:

I think that the segregation of the jury while considering their verdict is an essential principle of all jury trials.

¹ [1928] 1 K.B. 302.

² Vol. 2, p. 227 B.

³ 27th edition, 1927, at p. 224.

In civil actions an equally stringent rule has been laid down.

In the case of *Goby v. Wetherill*,⁴ the town sergeant, who acted as usher of the Court, went into the retiring room with the jury and remained there for about twenty minutes while they were considering their verdict.

The County Court Judge refused an application for a new trial, saying at p. 674:

I have caused careful inquiries to be made into the matter, and, as a result, I am satisfied beyond shadow of doubt that throughout the jury's deliberations he (the town sergeant) remained a silent figure in the room, and neither by word nor deed interfered in any way. The foreman of the jury has made an affidavit which leaves no room for doubt on the subject. Such an irregularity should not, in my opinion, nullify the carefully considered verdict of a jury in a civil action.

On appeal Bailhache, J., said at p. 675:

I think that this appeal must be allowed. During the deliberations of the jury the town sergeant, in an excess of zeal, remained in the jury room for about twenty minutes. It is said that by his presence in that way the verdict is vitiated and cannot stand. I think that contention is right. The principle is that the jury are entitled and bound to deliberate in private. If a stranger, whether an officer of the Court or not, is present for a substantial time during their deliberations, then the verdict is vitiated. I regret having to come to this conclusion, for I daresay that no harm was done.

In the case of *Ernest Francis Willmont*,⁵ the rule was stated and applied but there is an indication that if the circumstances had been similar to those in *Goby v. Wetherill* (*supra*) the learned Court of Appeal would have come to a different conclusion. This was an appeal to the Court of Criminal Appeal on the ground that there had been a wrongful interference with the jury. The facts were that the Clerk of Assize went to the jury room at the request of the Judge to see if they had agreed or were likely to agree on their verdict. In the words of the Lord Chief Justice:

When he arrived there a question was put to him by one of the jurymen which, with the best possible intentions, he unfortunately answered. A discussion took place in the form of questions by the jurymen and answers and advice by him. After two discussions of this character, the jury came to an agreement and convicted the appellant. In the judgment of this Court the proceedings above described on the part of the Clerk of Assize were wholly irregular. He ought not to have entered into any discussion with the jury or to have put any question to them except, in accordance with the learned judge's request, to have asked whether they had agreed upon their verdict, or

⁴ [1915] 2 K.B. 674.

⁵ 10 Cr. Ap. 173, at p. 174.

were likely to come to an agreement, and he might have asked whether there was any question which they wanted to ask the judge, or whether there was any matter on which they required the assistance of the judge. Outside such matters, no discussion ought to take place with the jury. The trial must take place in public, and the accused is entitled to the assistance of his counsel in all its proceedings, and to hear any directions or advice given to the jury. The whole direction must be by the judge in the full light of publicity.

Having come to the conclusion, therefore, that such a discussion took place, and that it was irregular, we have further to consider whether it was of such a character that we should disregard it, and, notwithstanding the irregularity, affirm the conviction. In our opinion the irregularity was substantial and not one which can be disregarded. We are unable to say that, but for the discussion and the advice to convict the appellant by the Clerk of Assize the jury would have come to an unanimous conclusion, and having formed that opinion, our judgment is that the conviction must be quashed.

Another angle of the same principle is presented in this case where what is said to the jurors is considered not only as violating the right of the jury to deliberate in private but also the right of the accused to the assistance of his counsel in all proceedings and to a trial in public and to hear all directions given to the jury by the trial Judge.

No Canadian civil cases and no cases concerning the Coroner's Court appear to be reported in Canada, although *Boys on Coroners*,⁶ says:

When the coroner is notified that the jury have arrived at a verdict the jury should be brought into the open court. The coroner must not go into their room and take the verdict there before they return to the open court, as it was held in the *Michelstown Inquisition*⁷ that his doing so was misconduct for which the inquisition would be quashed.

But there have been several cases in the Criminal courts in which the principle as laid down in the English cases and the effect of s. 959 of the Criminal Code⁸ are discussed.

959. If the jury retire to consider their verdict they shall be kept under the charge of an officer of the court in some private place, and no person other than the officer of the court who has charge of them shall be permitted to speak or to communicate in any way with any of the jury without leave of the Court.

2. Disobedience to the directions of this section shall not affect the validity of the proceedings.

3. If such disobedience is discovered before the verdict of the jury is returned the court, if it is of opinion that such disobedience might lead to a miscarriage of justice, may discharge the jury and direct a new jury to be sworn or empanelled during the sitting of the court, or postpone the trial on such terms as justice may require.

⁶ 4th edition, 1905, p. 314.

⁷ 22 L.R. Ir. 279.

⁸ Chap. 36, R.S.C. 1927.

In *Rex v. Corrigan*,⁹ (Court of Appeal of Saskatchewan) an appeal by way of stated case in a prosecution for theft, it was brought to the attention of the trial Judge before the jury returned their verdict that the constable in charge of the jury had been present in the room with them for a considerable time while they were considering their verdict. The constable had not interfered with the jury in any way, by conversation or otherwise, but was merely present during a part of their deliberations.

The contention was that the jury were not kept in a "private place" as required by s. 959 of the Criminal Code. *Willmont's* case (*supra*) and *Goby v. Wetherill* (*supra*) were referred to.

The Court of Appeal, commenting on the English cases, where in similar circumstances appeals were allowed, notes that ss. 2 of s. 959 expressly provides that disobedience to the directions of the section shall not affect the validity of the proceedings and that where the disobedience is discovered before the jury return their verdict, and the trial Judge is of the opinion that the accused cannot be prejudiced thereby, he may allow the jury to bring in their verdict as though the directions of the Section had been followed. They held that the English cases did not apply and agreed with the conclusion of the trial Judge that the presence of the constable in the jury-room had not led to a miscarriage of justice.

In *The King v. Barnes*,¹⁰ the defendant was indicted and tried for the crime of rape. Having been found guilty, a motion was made on behalf of the prisoner before sentence to reserve a case, two of the jurors having made affidavits to the effect that while they were deliberating in their room they called the sheriff in and asked him "whether they could report that there had been sexual connection, but with consent, and recommend the prisoner to mercy," to which the sheriff replied, "No, that they would be obliged to report the defendant guilty or not guilty, and that if they found him guilty with a recommendation to mercy, the judge would give him a light sentence."

The sheriff denied these statements and swore that all he said in reply to the question asked him was, "Whatever your verdict is, bring it into court."

Held, per Townshend, Meagher and Drysdale, JJ., that as the case as reserved called upon the Court to first decide the question of fact whether

⁹ 31 Can. C.C. 291.

¹⁰ 42 N.S.R. 55.

anything was said to the jurors by the sheriff to which objection could be taken, the Court for this reason had no jurisdiction to deal with the question.

Townshend, J., at p. 57 refers to s. 959:

Now the only fact not in dispute, is that, the sheriff did speak to the jury, whether by leave of the Court or not is not disclosed, but, even so, we have the express provision that it will not—that is, necessarily—invalidate the verdict. No doubt it was improper and irregular for the sheriff to speak to the jurors at all, but in view of the very common practice of the judge, while waiting for the verdict, to instruct the sheriff to ascertain from them when they will be ready to render the verdict, there was nothing of an objectionable character if no more was said than the sheriff has stated.

Even without taking s. 959 into consideration, the principle contained therein has been followed in the Canadian Courts.

In *Veronneau v. The King*,¹¹ the appellant had been indicted for perjury. The complainant had been summoned to act as a grand juror for the Assizes at which the trial took place. He was with the grand jury when it was charged and when the presentment of a true bill was made, but did not take any part in the deliberation on the case against the appellant.

Held affirming the judgment appealed from,¹² Anglin and Brodeur, JJ., dissenting, that, in the circumstances stated in the reserved case, neither the fact of the presence of the complainant as a member of the grand jury nor the statement made by him constituted a well-founded objection to the constitution of the grand jury which had passed upon the indictment, which therefore could not be quashed under the provisions of S. 899 of the Criminal Code.

The Chief Justice at p. 11 said:

As to the proceedings before the grand jury, it is part of the stated case that Bachand (the complainant), whose name was on the back of the indictment, was examined, but took no other part in the proceedings. In these circumstances, Bachand was not a stranger in the jury room. His presence is explained and accounted for by the fact that he was a witness before the grand jury in this particular case. And, if Bachand took no part in the proceedings, I do not think his mere physical presence somewhere about could affect the result of the grand jurors' deliberations or constitute an interference with the privacy of their proceedings. There is no impropriety in some one or more proper persons being present with the grand jury during their inquiries on bills of indictment. *Reg. v. Hughes*.¹³ I have not overlooked *Goby v. Wetherill*.¹⁴

The case of *The King v. Kelly*,¹⁵ was a motion to quash an indictment before the Court of King's Bench, Quebec. This was

¹¹ 54 S.C.R., p. 7.

¹² O.R. 25 K.B. 275.

¹³ 1 C. & K. 519.

¹⁴ 31 T.L.R. 402.

¹⁵ 9 Can. C.C. 130.

a case where a person who had been regularly summoned to appear and act as a grand juror, but who arrived late, entered the room in which the secret session of the grand jurors was being held and without having been previously sworn, joined the other grand jurors and conversed freely with them. When this was discovered, the grand jurors, without being re-sworn, retired without the unsworn juror and shortly after returned into court and presented several indictments, including the one moved against.

It was contended that the indictment was rendered null and of no effect as the proceedings and deliberations of the grand jurors had been deprived of that secrecy and solemnity which are essential under the law.

Trenholme, J., dismissed the motion, holding that the mere presence of an unauthorized person in the grand jury room while their deliberations are going on does not invalidate the proceedings; that the unsworn juror, O'Neil, could not under the circumstances be said to have participated in the finding of the indictment, nor was it shown that any prejudice had resulted to the accused (p. 131).

Where the communication comes from the Judge the same result follows on grounds outlined in the *Willmont* case (*supra*).

Rex v. Batterman,¹⁶ an application by the defendant for a stated case, heard by Kelly, J., the trial Judge.

While the jury were deliberating, the foreman sent to the Judge by the Registrar of the Court, a note to the effect that the jury wished to see a certain letter. The Judge instructed the Registrar to return and inform the foreman that the letter itself was not put in possession of the Court and that it was not possible for him to give it to the jury.

One of the questions to be stated was: "Was the Judge right in giving instructions or directions to the jury in the manner and by the means aforesaid?"

Kelly, J., at p. 353 said:

Willmont's Case, *supra*, is cited as authority in support of the application. The head-note to that report is: "No communication whatever may be made to a jury deliberating on its verdict, except on the request or by the permission of the Judge." From a perusal of the reasons for that judgment it is apparent that the facts are quite distinguishable from those now under consideration.

Application refused.

In *Greer v. The Queen*,¹⁷ the following error was assigned:

¹⁶ 24 Can. C.C. 351.

¹⁷ (1892) 2 B.C.R. 112.

That the trial Judge did not deliver the whole of his charge to the jury in open Court, but, having been requested by message from the jury after they had retired, proceeded to the jury-room with the plaintiff in charge of the Sheriff, and in the absence of both counsel for the Crown, who elected to be absent, and counsel for the plaintiff, gave further instructions to the jury, the plaintiff not objecting.

Held, . . . while it is inexpedient for a Judge to communicate with the jury otherwise than in open Court, yet his doing so is not necessarily a ground of error.

Crease, J., at p. 120 states as follows:

However inadvisable it may be for a Judge to communicate with a jury after they have retired, and in my opinion it is a custom more honoured in the breach than in the observance, such has been the common practice of the British Judges down to the present time for a long series of years, and is therefore not unlawful.

Drake, J., at p. 129 adds:

The prisoner's counsel cited a dictum of Lord Hale in *Hale's Historia Pacitorum Coronæ*, where that Judge says that "the jury desire to ask any question after having retired to consider their verdict, it should be in open Court." . . . Since the time of Lord Hale no authority was cited or could be found, either in civil or criminal cases, showing that a communication between the Judge and a jury has been held to amount to a mistrial. The custom of answering questions put by the jury to the Judge after the jury have retired has been a common practice in the English Courts. As a matter of expediency, I think the better practice would be that propounded by Lord Hale, but I do not consider it a ground of mistrial or error.

The headnote in the case of *Rex v. Meharg*,¹⁸ reads as follows:

On the trial of the prisoner for murder, after the jurymen had retired to consider their verdict, they sent a message to the presiding Judge that they wished to know whether the foreman could have a private hearing with the Judge or the Crown-Attorney. The request was communicated by the Judge to counsel for the Crown and for the prisoner, and, after discussion, it was agreed and consented to by both counsel that the Judge should visit the jury in their room, unaccompanied by counsel, but taking with him the registrar and the court-stenographer. This arrangement was carried out, and the Judge, in the jury-room, gave further instructions to the jury in answer to a question put by one of the jurymen. The proceedings in the jury-room were recorded by the stenographer. A verdict of "guilty" was then given. Upon a case stated by the Judge for the opinion of the Court:

Held, applying the provisions of sec. 943 of the Criminal Code, that the prisoner had the privilege of being present during the whole of the trial, but he might waive that privilege, and the waiver by his counsel in his presence and acted upon, was his waiver. (*Hodgins, J.A., dubitante*); also there was (sub-sec. 2) substantially a permission by the Judge for the prisoner to be

¹⁸ 51 O.L.R. 229.

out of Court during the time of the proceedings in the jury-room—the Judge did no more than adjourn the court to the jury-room.

Held, also, that no substantial wrong or miscarriage was occasioned by what was done; S. 1019 of the Code.

Meredith, C.J.O., at p. 233 said:

What in fact was done was to make the jury-room the court-room for the time being; the prisoner chose to be absent from it, or was permitted to be absent from it, and his counsel voluntarily absented himself.

It will have been noted that in the Canadian criminal cases, whether the jury is a petit jury or a grand jury, the test applied is,—has there been a miscarriage of justice? And in all probability, having regard to the mass of authority in criminal law, if a breach of the rule were to occur in Canada, under circumstances similar to those existing in *The King v. Wood* and *Goby v. Wetherill* (*supra*), the same test would be applied. The reasons for judgment in the *Willmont* case (*supra*) seem to approve the Canadian interpretation, as the irregularity alone was not considered sufficient ground for quashing the conviction, but in *The King v. Wood* (*supra*) and *Goby v. Wetherill* (*supra*), the strict letter of the law is followed. A stranger has been present during the deliberations of the jury. The verdict is therefore vitiated.

Doubtless the English rule provides a greater safeguard against interference with a jury. It also results in new trials which do not necessarily advance the cause of justice. On the other hand there are indications that under the Canadian rule, a certain slackness has crept in, particularly in the coroner's courts where the proceedings are less formal than in other courts of Record. From the reports of solicitors who frequently attend these courts throughout the Province of Ontario, it would appear that in some districts it is a common practice for coroners to remain with the jury throughout their deliberations.

It is quite likely that on these occasions there is, in fact, no miscarriage of justice, but in the words of Chief Justice Hewart in *The King v. Sussex Justices*¹⁹:

It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Toronto.

V. L. PARSONS.

¹⁹ [1924] 1 K.B. 256 at p. 259.