



accidentally shut out of the profession by Act No. 1216. That is to say, the section relieves those who came here to be admitted under the honest belief that they were qualified, but who found on arrival that their belief was ill founded, owing to the passing of Act No. 1216. In this view, as the applicant arrived here in 1884, and was duly qualified when he arrived, and was in no way under any erroneous belief as to his right to be admitted when he arrived, we think that the section does not apply, and the application must be refused.

F.C.

1895

Re

WHITTLE.

Hood, J.

Solicitors: *Gavan Duffy & King.*

A. F. M.

RE MCCRORY, EX PARTE RIVETT.

Justices—Disqualification—Bias—Time for taking objection to constitution of Bench.

1895

Feb. 12,
March 13.

Hood, J.

Anyone is prohibited by the law from deciding a case, even though he clearly be not biassed or interested, if the circumstances be such that ordinary persons would suspect bias and would regard him as a partial judge.

A Bench consisted of three magistrates. A case was called on in which one of the magistrates was complainant; he left the Bench, entered the witness box, obtained a verdict, and resumed his seat on the Bench. Another magistrate then left the Bench and went down into the court to conduct his own case.

Held, that this transformation of magistrate into complainant and then back again into magistrate was irregular and unseemly in the highest degree.

A party must take an objection to the constitution of the Bench at the hearing, and it is too late to take it by an order to review.

ORDER TO REVIEW.

The facts sufficiently appear in the judgment.

Eagleson for the judgment creditor, M'Crory, to show cause.

Robinson for the claimant, Rivett, to move the order absolute.

The following authorities were cited by counsel:—*The Queen v. Gaisford* (a); *The Queen v. Henley* (b); *Eckersley v. Mersey Docks and Harbour Board* (c); *Mayor of Prahran v. Carter* (d).

Cur. adv. vult.

(a) [1892] 1 Q.B. 381.

(b) [1892] 1 Q.B. 504.

(c) [1894] 2 Q.B. 667.

(d) 15 V.L.R. 228.

1895

Re
McCrory
Ex parte
Rivett.

Hood, J.

HOOD, J. This was an order to review a decision of magistrates. It appears that Mr. John McCrory sued Mr. Ernest Rivett in the Police Court, and obtained judgment. Upon that judgment execution issued, and a certain pony was seized, which was claimed by Mr. A. H. Rivett, a son of the defendant. Thereupon an interpleader summons was taken out, in order to determine to whom the pony belonged, and ultimately the Court decided that it did not belong to the claimant but to the judgment debtor. Thereupon the claimant obtained this order to review, upon the grounds—(1) “that the order was made against evidence;” (2) “that under the circumstances disclosed in the affidavit of Ernest Rivett the said F. W. Rolland was disqualified from adjudicating in the case.”

I propose to deal with the second ground first, as it is the most important. The facts relating to it are that when the Court sat there were three magistrates present—Mr. Rolland, Mr. Hallifax, and Mr. McCrory. The first case called on was one in which Mr. Rolland was complainant. He left the Bench, went into the witness box, proved his case, which was undefended, and obtained a verdict. He then took his seat on the Bench again, and Mr. McCrory went down into the Court to conduct his case against Mr. Rivett. Mr. Rolland, however, was about to leave the Court after his own case had been heard, but was induced to remain to constitute a Bench on Mr. McCrory’s case, though it appears that another justice came to the Court almost as soon as the case began. Upon these facts it is contended that Mr. Rolland was disqualified from sitting upon the case. The rule that applies to such circumstances is clear. To commence with, no man acting in a judicial capacity, from the Lord Chancellor down to the magistrate appointed but yesterday, can deal with a case in which he has a pecuniary interest, or in which he is biassed, unless permitted to do so by Parliament, or by consent of the parties. But the law, in its anxiety to protect the respect and confidence which it is desirable as a matter of public policy should exist in the administration of justice, goes further, and prohibits anyone from deciding a case, even though he clearly be not biassed or interested, if the circumstances be such that ordinary people would suspect bias, and would regard him as a partial judge.

In fact, not only must judicial proceedings be really free from bias and interest, but they must be so conducted as to avoid giving any substantial grounds for suspicion. If from any reason there is a real likelihood that the Bench would have a leaning towards one of the parties that Bench cannot deal with the matter, although it be proved to demonstration that no actual bias existed. Now, in the present case, the transformation of a magistrate into a complainant, and then back again into the magistrate—the sight of one man deciding his colleague's case, and then the colleague doing the like office for him—is unseemly in the highest degree. Should a conflict of evidence arise, as it may at any moment, the magistrates on the Bench might have to decide that their colleague, who has just left them, and who will be alongside them again in a few minutes, is unworthy of belief. On the other hand they may believe him, and decide in his favour, when it is very certain that the defeated litigant will criticise their motives, and the criticism will not be without a certain amount of sting. It was said in argument that a man is entitled to have his litigation decided even though he be a magistrate. This is quite true. But when he accepts such a position he should be prepared to make some small sacrifice, and he might either arrange that his case should not come on in the Court at which he usually presides, or else he might refrain from sitting on the Bench on the day when he has a case in the list. But the question is not whether the appearance of evil can be avoided, but whether the conduct of the magistrates has been such as to call for the interference of this Court. The discussion before me turned entirely upon this, and so far I have dealt with the case according to the mode in which it was presented to me. I do not, however, feel called upon to go any further in this direction. As the matter is of great public importance I have stated what in my opinion is the true rule, and I have also ventured to express the view that the conduct of the magistrates was irregular at least—a view which I believe they themselves now share. But I ought not, I think, to decide whether or not that conduct is a violation of the rule so as to call for the interference of this Court, because under the facts of this case such a decision is totally unnecessary, inasmuch as there is a

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point patent and mentioned in the affidavits which, though not referred to by counsel for the respondent, disposes of the matter. That point is, that this objection was not raised in the Court below, where undoubtedly it ought to have been. When such an objection is taken, if it be a real one, it can be at once yielded to. Even, however, if the judge or magistrate should know the objection to be ill-founded he would serve the interests of justice best by declining to adjudicate if there be any colour for the objection, unless, indeed, it be clearly vexatious, or unless yielding to it would work injustice to others. But if the objection be not taken there is no opportunity of yielding, and no one is so much to blame as the litigant or his lawyer who, while aware of a disqualification in the Bench, says nothing. A litigant who knows (as the applicant did here) that there may be some objection to the constitution of the Bench is bound to mention it at once, in fairness both to the magistrate and to the other side, and even if the objection be a good one the litigant cannot afterwards be allowed to complain if with knowledge he remains silent, and I therefore overrule this ground of the order *nisi*.

The other ground would involve a consideration of the evidence ; but here again, I am sorry to say, I feel compelled to decide the case upon a matter not argued. The question debated was as to the existence of any evidence to support the finding of the magistrates. But an affidavit has been made by one of the members of the Bench, setting out the way in which they dealt with certain documents which were used in evidence by both sides. This affidavit states that those " documents and receipts put in were not received as evidence, as the persons who signed them were not in court to give evidence." I am not quite clear as to what is intended by this, but it cannot be a statement that the documents were not in evidence at all, because both sides admit that they were ; and I think it can only mean that though they were put in, yet the Bench would not act upon them, as the persons who signed them were not called. It is however stated in the affidavits that the justices were informed that one of those persons was in court, and if it was thought necessary for him to be put in the witness box the magistrates ought, in

fairness, to have expressed their wishes. But, in addition, the view put forward by the Bench is erroneous in point of law. If the parties in litigation agree, either expressly or by implication, to admit documents without production of the writers of them, such papers are receivable in evidence, and when once put in they cannot afterwards be treated as nullities.

There has, therefore, been a mis-trial, and I shall direct that the case be remitted and reheard. The order will be absolute without costs, decision below set aside without costs, and the case remitted for rehearing. I have given no costs because the points upon which I have decided the case were not raised by counsel for either party.

Solicitor for judgment creditor: *Brent Robinson.*

Solicitor for claimant: *A. D. J. Daly.*

A. F. M.



WYLIE v. NISBET; KIRK, CLAIMANT.

Interpleader—Contract of letting and hiring—Time payment—Interest in goods saleable by sheriff.

An agreement for the hire of goods contained a provision that on the payment of a certain sum before a certain day the goods should become the property of the hirer. The hirer made default in payment of part of this sum before the date fixed.

Held, that this agreement was not different to other time payment agreements, and that the property did not pass to the hirer until the full purchase money was paid, but that nevertheless the hirer had an interest in the goods which the sheriff might sell under an execution.

ORDER TO REVIEW.

This was an interpleader summons in which Kirk, the letter of the goods, was the claimant, and Wylie was a judgment creditor of Nisbet, the hirer.

The sheriff had issued execution against the goods on behalf of Wylie.

The facts appear fully in the judgment.

Irvine to move the order absolute.

Weigall to show cause.

1895

Re
McCRODY
Ex parte
RIVETT.

Hood, J.

1895

June 17.

A'Beckett, J.