1936
*Nov. 12.
*Nov. 2.
** Nov. 26.

1937
*Feb. 2.

MONTREAL TRAMWAYS COMPANY (DEFENDANT) ..... APPELLANT;

AND

ROSARIO GUÉRARD, ÈS-NOM ET ÈS-QUAL. (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Practice and procedure—Petition in revocation of judgment (requête civile) —Effect of its filing—Suspension of proceedings or hearing before appellate courts—Return of record by appellate court to trial court—Granted at the discretion of the court—Preponderance of inconvenience—Jury trial—Answers to questions—Whether "special, explicit and articulated"—Findings of the jury—Arts. 1106, 1107 C.C.—Arts. 483, 502, 505, 1118, 1168, 1178, 1182 C.C.P.

A petition in revocation of judgment (*requête civile*) has not the effect, *ipso facto,* of suspending the proceedings in the case wherein the petition is presented, and more particularly the hearing before an appellate jurisdiction.—Stay of execution is the only consequence to result from the mere filing of the petition in revocation; and, moreover, such consequence does not follow as a matter of course, but only upon an order to that effect granted by a judge. A *fortiori,* the filing of a petition in revocation of judgment does not operate as a stay of proceedings in appellate jurisdictions as a matter of course.

As to the appellant company's application that, in view of the fact that a petition in revocation has been duly filed in the Superior Court in Montreal, the record ought to be returned to that Court for hearing on the petition, *held* that, such matter being entirely within the discretion of this Court, such application should be refused as, under the circumstances of this case, the respondent having been awarded damages by the judgment appealed from, the balance of inconvenience would be entirely on the respondent's side if the application was granted. *Kowal* v. *New York Central Railroad Co.* ([1934] S.C.R. 214) dist.

On the merits of the case, the judgment appealed from, affirming the judgment of the trial judge with a jury and awarding the respondent damages resulting from an accident due to collision, should be affirmed.—The jury's answer to the question, whether the accident has been the result of the sole fault of the appellant company and if so in what consisted that fault, was "Yes, excessive speed and *negligence of the watchman.*" Although the last underlined part of the answer should be disregarded, being clearly insufficient and irregular as not being "special, explicit and articulated" (art. 483, C.C.P.), the other part of the answer "excessive speed," taken separately—as it must be under the circumstances—is sufficient to meet the requirements of that article of the Code and render the verdict valid; and it is not the function of this Court under the circumstances of this case to review such finding (art. 501 C.C.P.).

*PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, with a jury and awarding the respondent damages in the sum of $11,000 in all, being $8,000 in his capacity of tutor to his minor daughter and $3,000 personally, the damages resulting from an accident due to a collision between a tram-car belonging to the company appellant and an automobile in which the respondent's daughters were passengers.

The material facts of the case and the questions at issue are stated in the judgments now reported.

Arthur Vallée K.C. for the appellant.

J. P. Charbonneau for the respondent.

The judgment of the Court, on the application of the appellant company to suspend hearing of the appeal by this Court and to order the return of the record to the trial court, was delivered by

RINFRET, J.—In this case, upon the verdict of a jury, the respondent recovered against the appellants a sum of $3,000 for himself personally and a further sum of $8,000 for his daughter Pauline, for damages resulting from an accident which happened in Montreal. The presiding judge gave judgment in accordance with the verdict, and his judgment was confirmed by the Court of King's Bench.

The Montreal Tramways Company thereupon appealed to this Court from the verdict and from the judgments confirming it.

The appeal was set down for hearing at the present session of the Court, when the appellants applied for postponement and asked that the record be returned to the prothonotary's office of the Superior Court, in Montreal, on the ground that they had filed in that Court a petition in revocation praying that the judgment be annulled and that the parties be replaced in the same position as they were in before that judgment, in view of the discovery of new evidence, unknown to the appellants or their attorneys at the time of the trial and of such a nature that if it had been brought forward in time, it would probably have changed the result (art. 505 C.C.P.), and also upon other grounds within the provisions of art. 1177 of the Code of Civil Procedure of the province of Quebec.

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On behalf of the appellants, it was urged that the filing of the petition in revocation of judgment, under the Quebec law, had the effect *ipso facto* of suspending all proceedings in the case and that the Court was precluded from hearing the appeal until the petition in revocation had been disposed of.

In the alternative, it was submitted that, in the exercise of its discretion, the Court ought to delay the hearing of the appeal until a final decision had been pronounced on the petition.

It is not necessary, in this case, to determine whether the jurisdiction of the Supreme Court of Canada to hear an appeal regularly entered before the Court may be interfered with by the effect of a proceeding lodged in the provincial courts, and that point will be reserved for our decision in a proper case.

We find however that, quite independently of that important objection which might possibly be found in the way of the appellants' present application and even under the law of the province of Quebec, the petition in revocation of judgment has not the effect *ipso facto* of suspending the proceedings in the case wherein the petition is presented.

The mooted question whether such a petition, before having any effect at all, ought to be received by a judge of the "same court" where the original judgment was pronounced has now been set at rest by the amendment to art. 1178 of the Code of Civil Procedure, introduced by s. 3 of chapter 97 of the statutes of Quebec 22 Geo. V (1931-32). By force of that amendment "the rules laid down by art. 1168" (and that is to say: the rules applicable in the case of oppositions to judgments) "shall govern as to the receiving of the petition in revocation of judgment." The result is that, since the amendment, the petition

> is without effect and cannot be received by the prothonotary, unless it is accompanied by an order of the judge allowing it to be filed (and) no petition in revocation of judgment may be authorized by the judge without a previous notice thereof to the parties.

In the present instance, from the material filed before us, the petition appears to have been duly filed ("dûment produite") and to have been received by the prothonotary. But the filing of the petition, without anything more, does not operate as a stay of proceedings under the Quebec law.

There is no express provision to that effect to be found in the Code of Civil Procedure. If it had been the intention of the legislature that it should be so, and more particularly that the hearing before an appellate jurisdiction should be suspended, it is to be expected that the Code would have said so in express terms.

There is, in the Code of Civil Procedure, article 1182, which says that "the petition in revocation cannot prevent or stay execution, unless an order to suspend is granted by the judge"; and the logical inference to be drawn from that provision is that the stay of execution is the only consequence to result from the mere filing of the petition in revocation; and, moreover, such consequence does not follow as a matter of course, but only upon an order to that effect granted by the judge.

Our conclusion is that *a fortiori* the filing of a petition in revocation of judgment does not operate as a stay of proceedings in the appellate jurisdictions as a matter of course. That view is further supported by: Bioche, Dictionnaire de procédure civile et commerciale, 5th edition, vol. 5, *vbo.* Requête civile, p. 857, nos. 201 & 202; Garsonnet, Traité de procédure civile, 3rd ed., vol. 6, p. 828, no. 494; Glasson & Tessier, Précis de procédure civile, 3rd ed., vol. 3, p. 439; Japiot, Procédure civile et commerciale, 2nd ed., p. 686, no. 1114: "La requête civile ne produit pas d'effet suspensif."

It will be seen, therefore, that the filing in the Superior Court of the petition in revocation of the judgment now subject to appeal had not the effect *ipso facto* of staying proceedings in appeal and the appellants fail on the first ground put forward by them in support of their application.

There remains to decide whether, in view of the fact that the petition in revocation was duly filed in the Superior Court, in Montreal, we should return the record to that court where, no doubt, it will be heard in due course.

Looking at the application in that view and as a matter entirely within our discretion—(in the words of Bioche, *loc. cit.:* "La convenance du sursis est au surplus abandonnée à l'appréciation du juge")—we find that, in the present case, the balance of inconvenience would be entirely on the respondent's side. The respondent holds an award for a total sum of $11,000 and has secured a judgment for that

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amount, with interest and costs. The verdict and the original judgment date back to the month of January, 1935, and they have been confirmed by the appellate court. It is desirable that the appeal in this Court should be disposed of without further delay. If the record should be returned to the Superior Court for the purpose of allowing the appellants to proceed with their petition in revocation, the decision on the petition in that court will not necessarily bring the litigation to an end on that branch of the case; it may be further carried on appeal to several successive jurisdictions and the hearing of the appeal in this Court might possibly be delayed for a not inconsiderable period of time.

Under the circumstances, the wise course is to allow the appeal to proceed. We cannot see that, by following this course, the appellants will suffer prejudice in any way; and it must be understood that we are not expressing any opinion on the merits or the demerits of the petition in revocation.

A word ought to be said about the judgment of this Court in *Kowal* v. *New York Central Railroad* (1). In the special circumstances of that case, the proceedings in the appeal to this Court were suspended for fifteen days to allow the appellant to present a petition in revocation of judgment to the Superior Court; but the application to that effect was made by the plaintiff, whose action had been dismissed by the Superior Court and by the Court of King's Bench (appeal side); and it was thought that, under such conditions, the balance of convenience was in favour of granting the application. The situation, in our view, was practically the reverse of what it is in the present instance.

The application of the appellants to have the hearing of the appeal in this Court suspended and the record returned to the Superior Court will accordingly be dismissed with costs; but without prejudice to the right of the appellants to proceed with their petition in revocation of judgment before the Superior Court as they may be advised; and also with reserve of their right, should occasion arise, to pray before the Superior Court for a stay of execution under art. 1181 of the Code of Civil Procedure.

(1) [1934] S.C.R., 214.

The judgment of the Court, on the merits of the case, was delivered by

RINFRET, J.—Pauline and Lucienne Guérard, the daughters of the respondent, were passengers in an automobile driven by one Bastien, which was struck by a tramway belonging to the appellant. Lucienne Guérard died as a result of the accident. The other daughter, Pauline, was injured in that same accident. The respondent, both personally and as head of the community of property with his wife, sued the Montreal Tramways Company, its motorman, and Bastien, the driver of the automobile, to recover the damages resulting from the death of his daughter Lucienne. He also sued in his quality of tutor to his minor daughter, Pauline, to recover the damages resulting to the latter from her injuries.

The case was tried before a jury, who found that the accident was solely due to the fault of the motorman in charge of the tramway.

The driver of the automobile was exonerated by the jury.

In accordance with the jury's findings and assessment of damages, the action of the respondent against the driver Bastien was dismissed and his action against the appellant was maintained by the Superior Court for a sum of $3,000 allowed the respondent personally in respect of the death of his daughter Lucienne, and for another sum of $8,000 in his quality of tutor to his minor daughter Pauline.

The present respondent, Guérard, did not appeal from the judgment dismissing his action against Bastien.

Upon appeal by the present appellant, Montreal Tramways Company, the verdict of the jury and the judgment of the Superior Court were upheld in the Court of King's Bench (appeal side) by a majority of judges, Mr. Justice Dorion dissenting.

The Montreal Tramways Company then appealed to this Court, upon several grounds which, however, at the hearing, were limited to two: it contended that the verdict was contrary to the evidence and that the amounts awarded were excessive.

The material questions put to the jury and the answers respectively given by it to those questions were as follows:

Troisième question:—Cet accident a-t-il été causé par la seule faute d'Henri Bastien, chauffeur de l'automobile dans lequel avait pris place les

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dites Pauline Guérard et Lucienne Guérard, et si oui, dites en quoi a consisté telle faute?

Non, unanime.

Quatrième question:—Cet accident a-t-il été causé par la seule faute de la défenderesse Montreal Tramways Company et du wattman, Clébert Reumond, et si oui, dites en quoi a consisté telle faute?

Oui, excès de vitesse et négligence de la part du wattman—neuf pour et trois contre.

Cinquième question:—Cet accident a-t-il été causé par la faute commune des dites Pauline Guérard et Lucienne Guérard, d'Henri Bastien, de la défenderesse Montreal Tramways Company et du wattman, Clébert Reumond, et si oui, dites en quoi a consisté la faute de chacun?

Non. Neuf pour, trois contre.

The last part of the answer to the fourth question: "négligence de la part du wattman," may be disregarded, as it was not "special, explicit and articulated," as is required under article 483 of the Code of Civil Procedure whenever "there is an assignment of facts," as there was in the present case.

That part of the answer was clearly insufficient and irregular (*Pinsonnault* v. *Montreal Light, Heat & Power Company* (1); *Davis* v. *Julien* (2); and it is only necessary to read the reports in the cases of *Martineau* v. *Dumphy* (3), and of *Deslongchamps* v. *Montreal Tramways* (4), to see that they have no application here.

How far the insufficiency of that part of the jury's answer might have affected the regularity of the verdict as a whole is a point that was not taken and which need not, therefore, be discussed here.

But the other part of the answer to the fourth question, to wit: "excès de vitesse," taken separately—as it must be under the circumstances—is sufficient to meet the requirements of article 483 of the Code of Civil Procedure; and it is not the function of this Court to review that finding (See decision in *C.N.R.* v. *Muller* (5)). Under the Code, a verdict may not be considered against the weight of evidence unless it is one which a jury, viewing the whole of the evidence, could not reasonably find (art. 501 C.C.P.); and the appellant has not succeeded in showing to us that the answer came within that provision of the Code.

Likewise, on the question of assessment of damages, we cannot accede to the argument that the amounts awarded

(1) (1916) 23 R.L., N.S. 315.
(2) (1915) Q.R. 25 K.B. 35.
(3) (1909) Q.R. 19 K.B. 339.
(4) (1905) Q.R. 14 K.B. 355; (1906) 37 S.C.R. 685.
(5) [1934] 1 D.L.R. 768.

are so grossly excessive that it was evident that the jurors have been influenced by improper motives. Moreover, it was not shown that they had been led into error. In the absence of one or the other of these conditions, a new trial may not be granted under the Quebec law (art. 502 C.C.P.).

A word ought to be said, however, with regard to the answers of the jury to questions nos. 3 and 5. On the evidence, it seems abundantly clear that, before entering on Monkland Avenue (which he intended to cross and where the accident happened), Bastien failed to look, in order to ascertain whether traffic was coming in either direction on that avenue.

It may be a question whether he looked some 25 feet south of the avenue, where he was supposed to stop in obedience to the by-laws of Montreal, in line with a post specially erected to warn the auto drivers in that respect. But there could be no question that he never looked subsequently, as he admits himself:

J'étais intéressé à regarder en avant, pas regarder à chaque bord. J'étais intéressé à regarder en avant de mon char.

* * *

Q. Avez-vous regardé ou si vous n'avez pas regardé?
R. Je ne me souviens pas au juste d'avoir regardé.

* * *

Par la Cour:—
Q. En aucun temps, vous n'avez jamais vu le tramway qui vous a frappé avant qu'il vous frappe?
R. Non.
Q. La première fois que vous avez vu le tramway, c'est dans le trajet, je suppose, à aller au trottoir?
R. Après que j'ai été frappé, que j'ai été débarqué de mon char, c'est la première fois que je l'ai vu.
Q. Vous l'avez vu alors seulement?
R. Oui.

He failed entirely to observe the universally accepted rule of prudence so often referred to by the courts: "Stop, look and listen."

Under the circumstances, it is not easy to understand the answers of the jury to questions 3 and 5 entirely exonerating the driver Bastien of all responsibility whatever.

In the Court of King's Bench, all the judges expressed their surprise. Mr. Justice Dorion said:

Je ferais donc porter toute la responsabilité sur le chauffeur de l'automobile.

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Mr. Justice Bond said he had reached the conclusion that the verdict could be upheld "only after some hesitation." Mr. Justice Saint-Jacques said:

> Le moins que l'on puisse dire, c'est que cette conclusion ne peut pas manquer de causer quelque perplexité étant donnée la preuve sur la façon dont l'accident s'est produit.

And Mr. Justice Barclay (with whom Mr. Justice Saint-Germain concurred):

> Had I acted as trial judge, I might have been inclined to the view that there was common fault on the part of the Tramways Company and the driver of the automobile, but the jury having completely exonerated the latter, and there being sufficient evidence in the record to render such a finding reasonable, this Court cannot substitute a verdict for the verdict of the jury.

Of course, as observed by counsel for the respondent, the obligation arising from the common offence, or quasi-offence, of two or more persons is joint and several (art. 1106 C.C.); and if the answer to question no. 4 must stand against the appellant, the respondent may apply for payment of the whole amount of the awards against the appellant (art. 1107 C.C.), notwithstanding the fact that the driver Bastien ought also to have been held responsible.

But, in my view, that is not quite the point; and the respondent's contention does not meet the situation to my satisfaction. So far as the driver Bastien is concerned, I do not think the answers of the jury can be supported on the evidence; and there is no saying how far a proper consideration of Bastien's conduct by the jury might have influenced the whole verdict. I mean by that: that if the jurors had applied their minds reasonably to the admissions made by Bastien and had acted judicially thereon, they might well have come to the conclusion that the accident was due exclusively and solely to the fault of Bastien.

Of course, it is impossible to speculate as to what might have been the verdict, had the jury given proper and reasonable consideration to Bastien's admissions—a consideration which the answers to questions 3 and 5 suggest that was not given by them. And it seems to me that the consequence—that the jury's answers either to question 3, or at least to question 5, cannot be supported on the evidence—might have led to an order for a new trial.

But I do not think the order can now be made upon the present appeal, having regard to the state of the record before us.

The verdict of the jury in regard to Bastien has been definitely acted upon and acquiesced in. So far as Bastien is concerned, the action was dismissed by the trial judge and no appeal was taken from that dismissal. In this Court, he was kept outside the record. The inscription in appeal was served only upon the respondent. Not only was there no attempt to make Bastien a party to the appeal, but that could no longer be done as soon as the delays for an appeal to the Court of King's Bench had expired. As between the respondent and Bastien, the judgment then became *res judicata* in favour of the latter (*Corporation de la Paroisse de Saint-Gervais* v. *Goulet*) (1).

Under the circumstances, and in the absence of Bastien before us, the answers of the jury in regard to his responsibility can no longer be set aside. As a result, the jury's answer to question no. 4 stands and remains with its full effect.

But if such be the situation upon the record before us, there is no *chose jugée* as between the appellant and the driver Bastien. The appellant may yet have recourse against Bastien under article 1118 of the Civil Code; and, in the course of his address to the jury, the learned trial judge expressed himself several times in that sense. I think, therefore, it should be stated that the rights as between the Montreal Tramways Company and Bastien, whatever they may be, are untouched by the present judgment.

So far as the rights between the appellants and the respondent are concerned, the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the company appellant: *Vallée, Beaudry, Fortier, Letourneau & Macnaughton.*

Solicitors for the respondent: *Lamothe & Charbonneau.*

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(1) [1931] S.C.R. 437 at 441, 442.