

*Semble*, a combined application may be made under Order XIX. r. 27 and Order XXV. r. 4, to strike out a statement of claim on the ground that it is embarrassing and disclosed no reasonable cause of action, and such procedure is not limited to cases which are plain and obvious. Appeal dismissed, MARTIN, J., dissenting.

*Davis*, K.C., for the appeal. *Wilson*, K.C., contra.

Martin, J.]

REX v. HAYES.

[Oct. 2.]

*Criminal law—Grand jury—Constitution of—Cr. Code, s. 656—Jurors' Act and Amendment Act, 1899, s. 2.*

Motion to quash an indictment found by a grand jury at the Victoria Criminal Assizes. It appeared that the sheriff when about to summon, pursuant to section 48 of the Jurors' Act, one of the jurors drafted to serve on the grand jury, ascertained that the juror was demented, and after inquiring from the jurors' medical attendant the sheriff concluded not to summon him.

*Duff*, K.C., *Peters*, K.C., and *G. E. Powell*, K.C., for accused. Thirteen grand jurors have not been returned as required by s. 2 of the Jurors' Act Amendment Act, 1899, and the indictment should be quashed. See *Churchill*, 128.

*Davis*, K.C., and *Harold Robertson*, for the Crown. Under s. 656 of the Code the accused must shew that he has suffered or may suffer prejudice: *Reg. v. Poirier* (1898) 7 Que. Q.B. 483; *Reg. v. Bolyea* (1854) 2 N.S. 220; *Taschereau*, 752.

*Duff*, K.C., in reply: Sec. 656 applies only to the constitution of the grand jury; here the jury has never been constituted at all and there is no jury on which this curative section could operate.

*Per curiam*: This is not really an objection to the constitution of the grand jury within the meaning of s. 656 because there is no such body in existence till the sheriff has summoned that number, i.e., thirteen, which the statute (Jurors' Act, s. 48; Jurors' Act Amendment Act, 1899, s. 2) imperatively directed him to summon and return; the twelve he did summon, and who now appear for a collection of individuals unknown to the law and have no "constitution" in a legal sense that an objection could operate on, and consequently their proceedings are absolutely void ab initio. The fact that in the opinion of the sheriff it was useless to summon the missing juror because he had become demented is no answer, for if it were possible to summon him, as it admittedly was, he should have been summoned; it would be a dangerous precedent to substitute the discretion of the sheriff for the positive requirement of a statute which aims at excluding all discretion. For the purpose of criminal procedure in this province a grand jury is "constituted" after the thirteen have been summoned by the sheriff and a sufficient number of those (i.e. seven under our Act) so summoned have appeared and taken their places in the box ready to be sworn to discharge the duties of their office.