J. B. H. MORIN..... APPELLANT; 1890

AND *Nov. 12.

HER MAJESTY THE QUEEN.....RESPONDENT. *Dec. 9.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Error—Writ of—On what founded—Right of crown to stand aside jurors when panel of jurors has been gone through—Question of law not reserved at trial—Criminal Procedure Act—R. S. C. ch. 174, secs. 164, 256 and 266.

When a panel had been gone through and a full jury had not been obtained the crown on the second calling over the panel was permitted, against the objection of the prisoner, to direct eleven of the jurymen on the panel to stand aside a second time, and the judge presiding at the trial was not asked to reserve and neither reserved nor refused to reserve the objection. After conviction and judgment a writ of error was issued.

Held, Per Taschereau, Gwynne and Patterson JJ., affirming the judgment of the court below, that the question was one of law arising on the trial which could have been reserved under sec. 259 of ch. 174 R. S. C., and the writ of error should, therefore, be quashed. Sec. 266 ch. 174 R. S. C.

Per Ritchie C.J. and Strong and Fournier JJ.—That the question arose before the trial commenced and could not have been reserved, and as the error of law appeared on the face of the record the remedy by writ of error was applicable. (*Brisebois* v. *The Queen*, 15 Can. S. C. R. 421 referred to).

Per Ritchie C.J. and Strong, Fournier and Patterson JJ., that the crown could not without showing cause for challenge direct a juror to stand aside a second time. Sec. 164 ch. 174 R. S. C. (*The Queen* v. *Lacombe*, 13 L. C. Jur. 259 overruled).

Per Gwynne J.—That all the prisoner could complain of was a mere irregularity in procedure which could not constitute a mis-trial.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada quashing a writ of error in a case of murder.

*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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The assignment of errors upon which the writ of error was issued is given at length in the judgment of the chief justice hereinafter given.

F. Langelier Q.C. appeared on behalf of the prisoner.

J. Dunbar Q.C. appeared for the crown.

The sections of the Criminal Procedure Act, R. S. C. ch. 174, and the cases cited and relied on by counsel are all reviewed at length in the judgments hereinafter given.

SIR W. J. RITCHIE C.J.—This is an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec (appeal side) dated the 8th of October, 1890, quashing a writ of error to try the validity of a verdict for murder given against the plaintiff in error, Jean Baptiste Hermenegilde Morin, at the session of the Court of Queen's Bench (crown side) held at Montmagny, in the district of Montmagny, on the 26th day of March, 1890, and subsequent days.

The ground upon which the appeal to this court is based is thus stated in the assignment of errors, being in effect the same statement of it as that contained in the record as returned to the writ of error :

" That at the time of the last criminal assizes at the district of Montmagny commenced on the 26th of March last the said Jean Baptiste Hermenegilde Morin was accused of the murder of one Fabien Roy in virtue of an indictment presented by the grand jury of the said district ;"

" That the said Morin pleaded not guilty to the said indictment, and, after trial had before a jury, was found guilty of the said charge of murder and was condemned by virtue of the sentence of the said court passed on the first of April last to be hanged on the 16th May instant ;"

"That the said verdict, the said sentence, the proceedings at the said trial, the proof made in connection therewith, the swearing and the choosing of jurors, the orders, judgments and action of the said court of Queen's Bench for Montmagny are illegal, null and of no effect, and tainted with legal error, the whole as is hereinafter shown:"

"Because at the time of the swearing of the jurors and the calling of their names according to the panel the crown, by its representative, caused to stand aside the greater part of the jurors called, and thus caused to stand aside, among others, Louis Senéchal, Joseph Pouliot, François Vézina, Augustin Vézina, François Pouliot, Louis Collier, Salomon Brochu, Joseph Labrecque, Evariste Leclerc, Joseph Caron, Adolphe Leclerc and Edmond Duquet, all jurors duly qualified:"

"Because all the said panel of jurors had been gone through and called even to and inclusive of the last name thereon:"

"Because the clerk of the crown recommenced to call the names of the jurors on the said panel who had not been sworn, and called anew the person named Louis Senéchal, who had been caused to stand aside by the crown at the time of the first calling of his name:"

"Because the crown, by its representative, wished again to cause to stand aside the said Louis Senéchal, but the said accused by his advocate objected thereto and contended that the crown could not cause to stand aside and challenge the said Senéchal except for cause:"

'Because, contrary to law, the court dismissed the objection of the said accused, and permitted the crown to cause the said Senéchal to stand aside without giving and showing cause:"

"That the said causing to stand aside of the said Senéchal, and the said decision are illegal and tainted with error:"

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"That the said causing to stand aside of the said Senéchal, objections and decisions were put in writing and made part of the record in said cause :"

"That the same proceedings, objections, decisions and recording thereof were made as to the jurors following: Joseph Pouliot, François Vézina, Augustin Vézina, François Pouliot, Louis Collier, Salomon Brochu, Joseph Labrecque, Evariste Leclerc, Joseph Caron, Adolphe Leclerc and Edmond Duquet."

The assignment of errors was endorsed as follows:

"Original assignment of errors filed this 1st October, 1890. Assignment of errors had and replied to instanter and hearing ordered Saturday next."

"Writ quashed. Tessier J. dissentiente."

The questions which arise in this case turn on the true construction of sections 259, 164 and 266, R.S.C. c. 174, which enact—

Sec. 259. Every court before which any person is convicted on indictment of any treason, felony or misdemeanor, and every judge within the meaning of "The Speedy Trials Act," trying any person under such Act may, in its or his discretion, reserve any question of law which arises on the trial, for the consideration of the justices of the court for Crown cases reserved, and thereupon may respite execution of the judgment on such conviction, or postpone the judgment until such question has been considered and decided.

Sec. 164. In all criminal trials four jurors may be peremptorily challenged on the part of the Crown ; but this shall not be construed to affect the right of the Crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause.

Sec. 266. No writ of error shall be allowed in any criminal case unless it is founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve for the consideration of the court having jurisdiction in such cases.

It is very obvious that while by section 259 of the Procedure Act, R.S.C. c. 174, a judge may reserve any question of law which arises on the trial, there may be, under section 266, questions of law which could

not be reserved, that is, questions not arising on the trial, for which a writ of error may lie. The first question to be determined then is: Was this a question arising on the trial? To determine this we must ascertain when the trial begins. To do this it will be necessary to examine the mode of procedure in criminal cases.

Mr. Archbold in his work on pleading and evidence in criminal cases says as to the arraignment (1):—

Arraignment.—The arraignment of prisoners, against whom true bills for indictable offences have been found by the grand jury, consists of three parts: First, calling the prisoner to the bar by name; secondly, reading the indictment to him; thirdly, asking him whether he be guilty or not of the offence charged. It was formerly the practice to require the prisoner to hold up his hand, the more completely to identify him as the person named in the indictment, but the ceremony, which was never essentially necessary, is now disused; and the ancient form of asking him how he will be tried is also obsolete.

* * * *

Challenge of Jurors (2).—When a sufficient number of prisoners have pleaded and put themselves upon the country, the clerk of the arraigns addresses the prisoners thus: "Prisoners, these good men that you shall now hear called are the jurors who are to pass between our sovereign lady the Queen and you upon your respective trials; (or in a capital case, upon your life and death); if, therefore, you or any of you will challenge them or any of them you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard. The officer then proceeds to call twelve jurors from the panel, calling each juror by name and address. Hereupon, and after a full jury has appeared (R. *v.* Edmonds, 4 B. & Al. 471) the proper time occurs for the defendant to exercise his right of challenge, or exception to the jurors returned to pass upon his trial.

* * * * * *

The usual, and in general the proper course where the panel is exhausted by the challenges of the prisoner and the crown, or of either, before a full jury remains, is to call over the whole panel again in the same order as before, but omitting those peremptorily challenged by the prisoner; and then, as each juror again appears whichever party

(1) Archbold Pl. & Ev. in Crim. Cases, 20th ed. p. 158.
(2) Ibid. p. 169.

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challenges must show cause. If no sufficient cause of challenge be shown the jurors are then sworn. R. v. Geach 9 C. & P. 499.

Then comes the giving the prisoner in charge to the jury, as to which Mr. Archbold says at the next page:

Giving the prisoner in charge of the jury.—In cases of treason and felony the crier (at the assises) makes proclamation in the following form: "If any one can inform my Lords the Queen's Justices, the Queen's Attorney General, or the Queen's Sergeant ere this inquest taken" [this is in my opinion before it is taken] between our Sovereign Lady the Queen and the prisoners at the bar of any treason, murder, felony or misdemeanor committed or done by them or any of them, let him come forth and he shall be heard; for the prisoners stand at the bar upon their deliverance. Cro. Cir. Com. 6 (10th ed.); 2 B. & Ad. 256.

When this proclamation has been read Mr. Chitty in his work on Criminal Law (1). says:

The trial commences in the manner we shall presently consider.

And in the next chapter 14, he treats of the trial evidence and verdict and says:

The jury having been thus assembled in the jury box and sworn the clerk bids the prisoner hold up his hand for purposes of identification this is not now used) and addressing the jury says: "Look upon the prisoner, you that are sworn and hearken to his cause."

He then describes the proceedings on jury trials much as Mr. Archbold does, which commences by giving the prisoner in charge to the jury thus:

The clerk of arraigns then calls the prisoners to the bar and says:—Gentlemen of the jury, the prisoner stands indicted by the name of A. B. for that he on the, &c., (as in the indictment to the end). Upon this indictment he has been arraigned and upon his arraignment he has pleaded that he is not guilty.

Mr. Chitty adds:

"And for his trial hath put himself upon God and the country which country you are. Your charge, therefore, is to inquire whether he be guilty or not guilty and to hearken to the evidence.

Mr. Chitty adds:

(1) Page 553.

When the prisoner is given in charge to the jury the counsel for the prosecution, or if there be more than one the senior counsel, opens the case to the jury stating the legal facts upon which the prosecution relied.

Then, and not till then, does the trial, in my opinion, commence. Ritchie C.J.

Lord Campbell in *Mansell* v. *The Queen* (1) says :

After prisoners have had their challenges, the oath of the juryman is : "You shall well and truly try and a true deliverance make, between our sovereign lady the Queen, and the several prisoners you shall have in charge." When the prisoner is given in charge to the jury, by that jury he must be tried, and in felony or treason the jury cannot separate till they have found their verdict.' But (as often happens at the assizes) before a particular prisoner who has had his challenges is given in charge to the jury, the court rises and the jury separate. Next morning a new jury is called, when the prisoner again has his challenges ; and possibly there may not be one individual upon the second jury that was sworn on the first ; yet all this is regular.

In *Regina* v. *Faderman* (2) the counsel for the prisoner says :—

By statute 11 & 12 Vic. c. 78 sec. 1 any question of law may be reserved for this court which shall have arisen on the trial. The trial commences as soon as the prisoner is called on to plead.

Parke B. says :—

Properly there is no trial until the issue is joined. This I take to mean until the prisoner is given in charge to the jury.

Alderson B. says :—

You say the trial begins with the arraignment ; how then do you explain the question which is put to the prisoner after arraignment : How will you be tried ? At what point in the proceedings did the trial by battle begin ? Trial is a very technical word.

This being so I think we are, in a case such as this, not to enlarge its signification and treat it in a popular or general sense, but to give the term a strict construction.

It is clear that if the question did arise on the trial, we have no jurisdiction to hear it. In the following

(1) 8 E. & B. 79. (2) 1 Den. C. C. 568.

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case where a party pleaded guilty it was held it could not be heard on a case reserved. *The Queen* v. *Clark* (1). This case was considered by Cockburn C. J., Martin and Bramwell BB., and Mellor and Montague Smith JJ. No counsel appeared on either side.

Cockburn C. J.:

In this case we have no jurisdiction. It was not a question arising on the trial; for the man pleaded guilty, and he must be taken to know the law. The power to state a case for the consideration of this court only applies to questions of law which arise on the trial.

I have been referred to the case of *Regina* v. *Brown* (2), where the prisoner was convicted upon his own confession. It is not stated in the case that the prisoner pleaded guilty, nor whether he had been given in charge to the jury and had on his trial confessed to offence. The court held that the point did arise on the trial. It is difficult to see how, if the prisoner pleaded guilty when arraigned, the case could be distinguished from *Regina* v. *Clark* (1), but the court thus distinguished it:

"We think therefore that this court has jurisdiction to entertain the case, and we think it notwithstanding *Regina* v. *Clark* (1). It is to be observed that that case is not directly in point, because there the indictment was good, though the facts stated in the depositions did not support it. The prisoner having pleaded guilty to the indictment the court thought that the point did not arise at the trial. The distinction in the present case is, that the objection was not as to the sufficiency of proof, but arose upon the indictment itself. It was an objection which might have been taken without the proof being gone into. We should not have shrunk from differing from the decision in *Regina* v. *Clark* (1) if that case had been directly in point. It is not, and therefore we do not actually differ from it.

We are of opinion, 1st—That we have jurisdiction to entertain this case, and 2ndly—that upon the facts and clearly upon the general law, the boy was properly convicted upon his own confession of an attempt to commit an unnatural offence.

It is to be remarked that this case was decided with-

(1) L. R. 1 C. C. R. 55. (2) 24 Q. B. D. 357.

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out the court having the assistance of counsel, and that the case of *Regina* v. *Faderman* (1) was not cited or referred to in which Lord Campbell thus speaks :

> We all think that this court has no jurisdiction to entertain this question. We are asked to review a judgment for the crown given on demurrer and to reverse it if we think it wrong. The only power we have is derived from the statute 11-12 Vic. ch. 78. That act gives us no such power, the word " convicted " there used means convicted by a verdict. Trial means trial before a jury. We have no power in case of a judgment on demurrer. It would be dangerous if we had, for as it is clear that no writ of error lies from our judgment we should by hearing this case be depriving the prisoner of a right which he would otherwise be entitled to.

Until a full jury is sworn there can be no trial, because until that is done there is no tribunal competent to try the prisoner. The terms of the jurymen's oath seem to show this. And as is to be inferred as we have even from what Lord Campbell says that all that takes place anterior to the completion and swearing of the jury is preliminary to the trial.

How can the prisoner be tried until there is a court competent to try him? And how can there be a court until there is a judge on the bench and a jury in the box duly sworn? Until there is a court thus constituted there can be no trial, because there is no tribunal competent to try him. But when there is a court duly constituted the prisoner being present and given in charge to the jury his trial in my opinion commences, and not before. The trial mentioned in the statute is clearly a trial of the prisoner by the jury, as we have seen it held in *Regina* v. *Faderman* (1). No prisoner can be tried except by a jury duly selected and sworn to try him but there may be questions preliminary to the obtaining a competent jury to which the right to reserve a case cannot, in my opinion, apply. Thus if after a full jury appears and the array is challenged

(1) 1 Den. C. C. 569.

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this is tried by the court. In Bacon's Abridgement (1) it is said :—

Every question of law raised upon a challenge to the array of the jury is to be tried by the court upon an examination of witnesses ; for unless every such question, although it depend upon a matter of fact, be so tried, there would be a delay of justice.

It is said that in *Regina* v. *Manning* (2), where the prisoner's wife applied for a jury *de medietate linguæ* which was rejected on the ground that she was naturalized, the array was challenged, but in that case the array does not appear to have been challenged for the court held the trial must proceed. Mr. Ballantine moved that his application might be entered on the record, the attorney general said that if that were done he would plead that the female prisoner had married said Edward Manning a natural born subject of the realm. After some consultation it was agreed that Mr. Ballantyne should have the option of raising the question on the record or of having the point reserved for the consideration of the Court of Appeal in criminal cases.

So in a case of a challenge to the polls, Mr. Archbold in his pleading and evidence in criminal cases says (3):

In the case of a principal challenge to the polls, if the partiality be made apparent to the satisfaction of the court, the challenge is at once allowed, and the juror set aside. But in the case of a challenge to the favor, it is left to the discretion of two triers who are sworn and charged to try whether the juror challenged stands indifferent between the parties. The form of oath to a trier, to try whether a juror stands indifferent or not, is as follows :—

"You shall well and truly try whether A.B., one of the jurors, stands indifferently to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God."

It may be observed, that no challenge of triers is admissible. The form of oath to be administered to a witness sworn to give evidence before the triers is as follows :

"The evidence which you shall give to the court and triers upon this

(1) Vol. 9, p. 555.
(2) 1 Den. C.C. 476.
(3) P. 168.

inquest shall be the truth, the whole truth, and nothing but the truth, So help you God."

If the challenge is to the first juror called, the court may select any two indifferent persons as triers; if they find against the challenge, the juror will be sworn, and be joined with the triers in determining the next challenge; but as soon as two jurors have been found indifferent, and have been sworn, every subsequent challenge will be referred to their decision. 2 Hale 275; Co. Litt. 158 a; Bac. Abr., Juries (E) 12. The trial thus directed proceeds by witnesses called to support or defeat the challenge.

After the decision I have quoted nobody would, I should think, pretend to say that either of these trials was the trial contemplated by the statute as to which any case could be reserved, showing very clearly, I think, that the trial contemplated was, as I have said, a trial by a jury after it was completed, and if no case can be reserved upon such trials of challenges does it not follow that a case cannot be reserved when the judge rules that the crown was not obliged to challenge for cause, assuming the law requires the crown to do so? Why should a case be reserved to compel the crown to make a good challenge by assigning cause when if the crown has assigned cause and its sufficiency was referred to triers a question arising on such a trial could not be reserved?

In *The Queen* v. *Lamb* (1) after the prisoner had been given in charge and before any witness was sworn it appeared that the prosecutrix, a child of four years of age did not sufficiently understand the nature of an oath, and it was admitted on the part of the crown that there was no other evidence to sustain the case. On the part of the prisoner it was insisted that having been given in charge to the jury he was entitled to his acquittal. The judge discharged the jury obliging the prisoner to enter into a recognizance with sufficient sureties for his appearance at the next court. A

(1) Jeb. C. C. 270.

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case was submitted to the twelve judges to ascertain whether, in their opinion, the prisoner was entitled to his acquittal or whether the court was justified, under the circumstances, in discharging the jury, and authorised to bind over the prisoner to appear and take his trial at the next court. The judges unanimously gave their opinion that the prisoner ought to have been acquitted and that he should be recommended for a pardon.

And the case of *Regina* v. *Wade* (1) is to the same effect.

Why was this? Because, having been given in charge to the jury, no legal cause having been alleged or question shown for discharging the jury, the prisoner then being on his trial he must be either convicted or acquitted. As no evidence was offered he was on that trial, therefore, entitled to his acquittal, as he would have been if the evidence offered had been insufficient; but it is very different when a full jury to try the prisoner cannot be obtained, though some jurors have been sworn, but not sufficient to make a full jury, and the jury has to be discharged for default of jurors; but where all were sworn and a good cause shown for discharging them, as the illness of a juryman, etc., a new jury may be impanelled, and the prisoner will be entitled to challenge as in the first instance, showing very clearly the difference where the prisoner has been given in charge and no cause shown for the discharge of the jury. In the first case the prisoner was in jeopardy, in the second he never was, and in the third case he ceased to be, when the jury were legally discharged. But is it not equally clear that if the alleged trial was not a legal trial but a mistrial, and therefore a nullity, if reversed he can again be tried because he never was in jeopardy? It

(1) 1 Moo. C. C. 86.

is a fundamental principle of law that a man shall not be twice in jeopardy for the same offence, that is, no prisoners shall be prosecuted twice for the same offence. I think the fair test of when the trial begins is: When was the prisoner put in jeopardy? It is to my mind very clear that no jeopardy can attach until a full jury is impannelled, sworn on a plea of not guilty and the prisoner given in charge to such jury, because there can be no trial until there is a jury competent to try. Mr. Bishop, in his work on Criminal Law, states the law as recognised in the United States very clearly, and which in my opinion is equally applicable to this Dominion. He says (1):—

When jeopardy begins. Then on the completing and swearing of the panel the jeopardy of the accused begins and it begins only when the panel is full. Until full the jeopardy is not perfect. In order words, without a jury set apart and sworn for the particular case the individual defendant has not been conducted to his period of jeopardy. But when, according to the better opinion, the jury being full is sworn, and added to the other branch of the court and all the preliminary things of record are ready for the trial the prisoner has reached the jeopardy from the repetition of which our constitutional rule protects him.

citing in support of this very many American authorities.

If, then, this question arose while the preliminary proceedings were in progress and before the trial commenced it could not, therefore, be reserved. Then the next question that arises is: Was it a proper case for a writ of error? I think it most clearly was. The sections of ch. 174 applicable to this I have read. Assuming that this is not a legal trial and no question could be reserved for the reasons stated, and the prisoner is deprived of his writ of error, how can he possibly avail himself of his right to show the validity of his objection? I am aware that doubts have been expressed by

(1) 7 ed. vol. 1, secs. 1014-1015.

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learned judges in England as to a writ of error being proper in such a case as this, but I understand their doubts have been suggested because in England the question of the right of a party to insist that there should be only a challenge for cause after the panel has been gone through has been considered rather a matter of practice than of law, but in this Dominion it is matter of law, and in this case appears on the face of the record; it is a right secured to the prisoner under the statute I have referred to. The practice in England has been by statute recognised to be the law of this Dominion, and as to any error of law appearing on the face of the record the remedy by writ of error if applicable. In Short and Mellor's Practice of the Crown Office (1) as to error it is said:—

> It is a characteristic feature in English criminal procedure that it admits of no appeal properly so called either upon matters of fact or upon matters of law, though there are a certain number of proceedings which to some extent appear to be, and to some extent are, exceptions to this rule.
>
> The first of these exceptions is a writ of error. It is a remedy applicable to those cases only in which some irregularity apparent upon the record of the proceedings takes place in the procedure.

In *Regina* v. *Frost* (2), Sir J. Campbell A. G. says:

> It may be allowed that, in considering this and all other statutes, the intention of the legislature was to be looked for; when that was discovered, courts were bound by it. Whatever form the legislature had clearly prescribed, must be observed; and it may be allowed that it is not for the judges, if that form has been clearly and distinctly prescribed, to consider whether it was or not advantageous to the prisoner. The doctrine of equivalents and equipollents must be discharged. Whatever the prisoner was entitled to by acts of parliament, that specific thing he had a right to demand; and it would be vain to say that something, even more for his advantage, had been conferred. But in ascertaining the meaning of the legislature, it might be most material to see what was the object, and how that object could best be accomplished.

I think we should be most careful not to deprive a

(1) Page 312.

(2) Moody's C.C. 210.

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prisoner of his writ of error unless we are satisfied beyond all reasonable doubt that the statute has taken it away from him.

This brings us to the last and really the substantial matter of this case. The practice which I have said our Parliament by statute has recognised to be acted upon is, that after giving the crown in all criminal trials four peremptory challenges it declares that this shall not be construed to affect the right of the crown to cause any juror to stand aside until the panel has been gone through or to challenge any number of jurors for cause. If we look at the practice in England, as to the effect of desiring jurors to stand aside, or that in the provinces previous to the passing of this statute, so far as my experience extends and as I can discover, the practice has been entirely consistent, namely, that the panel shall be gone through, or perused as it is termed, once on which calling or perusal it was the privilege of the crown to require jurors to stand aside until the list shall be gone through. Having been gone through and a jury not secured the clerk proceeds to go over the panel a second time when the right of the crown to require jurors to stand aside ceased, and the crown was bound, if its officers sought to perfect its challenge, to do so by showing some good and sufficient cause or to challenge peremptorily if the peremptory challenges were not exhausted. This practice, in my opinion, as I have said, is recognised and consecrated by the statute I have referred to. I cannot discover on the part of Parliament any intention to alter the law and practice and establish a different mode of procedure. It is abundantly clear that in this case the panel had been gone through and was exhausted and a full jury could not be obtained without those who had been asked to stand aside by the crown being

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again called. Then the period had arrived at which the crown was bound to assign cause and instead of being compelled to do so the crown was on the second perusal of the panel again allowed to cause jurors to stand aside without showing cause. In *Regina* v. *Cropper* (1), the course of proceeding is very clearly pointed out, as follows:

> The jury panel contained the names of forty-eight persons. On its being called over, seven were challenged by the prisoner and five by the crown. Only eight others of the forty-eight juryman were in attendance, besides those challenged, and those eight went into the box.
>
> The panel had been entirely called through. The counsel for the prisoner then proposed that the panel should be again called, which was done, and on the first challenge on the part of the crown, the counsel for the prisoner called upon the counsel for the crown to assign cause of challenge. Cause was assigned, which appeared to the learned baron to be insufficient, and that juryman was sworn. The next juryman challenged on the part of the crown was sworn on the voir-dire, and examined for cause, which cause was not allowed by the learned baron; he was then sworn. The challenges of the next two jurymen were given up by the counsel for the crown, and the jury were thus completed and sworn.
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> The jury were then charged with the prisoner on the before-mentioned indictment, and the case having been closed and summed up, the jury retired to consider their verdict.

The case of *Mansell* v. *The Queen* (2) has been much pressed upon us, but, so far from sustaining the action of the judge in this case, it is, in my opinion, quite the contrary. The question there was, not the necessity for the crown to show cause on the second perusal of the panel, but whether the panel had been gone through without calling the jurors who were out on another trial, and who came in after the names of the jurors in court had been called, and the court held that they were properly called because the

(1) 2 Moo. C. C. 41. (2) 8 E. & B. 54.

panel had not been exhausted although once called over. Cockburn, C.J. says in this case, page 104:

It appears that before 4 stat. 33 Ed. 1, the crown, either by prerogative or by usurpation exercised the power of peremptory challenge without restriction as to number; and if that power was exercised so that twelve jurors did not remain, the inquest went off for that cause. To meet this evil the act was passed. On the enactment a practice was grafted by which, on the counsel for the crown intimating his intention to challenge one of the jurors, he was not put to assign cause at once, but the juror was set aside until the panel was gone through to ascertain if enough of persons not objected to might not be found to make a jury, If the panel was large this, in effect, was equivalent to a peremptory challenge. In one of the early state trials, Firzharris's case (1), the Chief Justice uses language as if in practice at that time this privilege was not confined to the crown, but that either side might set aside the juror, and afterwards take their exceptions. But, be that as it may, it must he admitted by everyone that it is now settled by overwhelming authority that where it is proposed to object to a juror, the counsel for the crown have the right to have the man set aside until it is seen if without him there will be jurors enough to try the prisoner, and that it is not until the panel is gone through that cause need be shown. That being so, the question is reduced to this: When is the panel gone through? Is it as soon as the names have been called over? Or is it not until every proper attempt has been made to secure the presence of those on the panel whose duty it is to attend? In the present case the panel had been called over, properly omitting the names of twelve who were known to be justifiably absent, the calling of whose names would have been an idle ceremony, and enough persons did not remain to form a jury. Iremonger's name is again called; and before anything more is done the twelve absent jurymen come in. It is not disputed that they were duly qualified jurymen and on the list; but it is contended that the list having been once gone through, it must be gone through again in the same order as before. But it being conceded that the crown is not put to show cause for its challenge till the panel is gone through, it seems to me very clear that the panel was not gone through till those twelve names of available jurymen were called.

The learned Chief Justice then discusses the case of Iremonger which is not applicable to this case.

The meaning of standing aside being a challenge by

(1) 8 How. St. Tr. 243-335.

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the crown, the consideration of the challenge should not proceed until it could be seen whether a full jury can be got without there being others on the panel. in this Dominion it is not now matter of practice or indulgence or concession, but as I have said a right recognised by statute, a right of which no court, in my opinion, can deprive a prisoner. In this case I think there was a distinct abridgement of the rights of the prisoner. If the crown can order a juror to stand aside on a second perusal of the panel, why may they not do it a third or a fourth time, it fact indefinitely until a jury was selected to suit the prosecuting officer, a case similar to what was pointed out by Lord Campbell in the Mansell case as follows (1) :—

> Our judgment chiefly depends upon the right construction of the ancient statute, 4 stat. 33 Ed. 1, entitled "An ordinance for Inquests," which was re-enacted by 6 G. 4 c. 50 s. 29. An abuse had arisen in the administration of justice by the crown assuming an unlimited right of challenging jurors without assigning cause, whereby inquests remained "untaken." In this way the crown could in an arbitrary manner, on every criminal trial, challenge so many of the jurors returned on the panel by the sheriff that twelve did not remain to make a jury ; and the trial might be indefinitely postponed *pro defectu juratorum*, to the great oppression of the subject, and contravention of the words of Magna Charta (2). *Nulli differemus rectum vel justitiam.* The remedy was to give to the party accused a right to be tried by the jurors summoned upon his arraignment, if after the limited number of challenges to which he was entitled without cause assigned, there remained twelve jurors of those returned upon the panel to whose qualification and unindifferency no specific objection to be proved by legal evidence could be made. To prevent the trial going off for want of jurors by the peremptory challenges of the crown it is enacted that "they that sue for the King," "shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of a cording to the custom of the court." But there was no intention of taking away all power of peremptory challenge from the crown, while that power, to the number of thirty-five, was left to the prisoner. Indeed, unless this power were given under certain restrictions to both sides, it is quite obvious that justice could not be satisfactorily admin-

(1) 8 E. & B. p. 70.

(2) 1 stat. 9 H. 3 c. 29.

istered ; for it must often happen that a juror is returned on the panel who does not stand indifferent, and who is not fit to serve upon the trial, although no legal evidence could be adduced to prove his unfitness. The object of the statute is fully attained if the crown be prevented from exercising its power of peremptory challenge, so as to make the trial go off while there are twelve of those returned upon the panel who cannot be proved to be liable to a valid objection. Accordingly the course has invariably been, from the passing of the statute to the present time, to permit the crown to challenge without cause till the panel had been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the crown and to put the crown to assign cause, so that, if twelve of those upon the panel remain as to whom no just cause of objection can be assigned, the trial may proceed. In our books of authority, the rule is laid down that the King need not show any cause of his challenge till the whole panel be gone through, and it appear that there will not be a full jury without the person so challenged.

Willes J. in Exchequer Court (1), citing 4 Blackstone Com. 353,

The king need not assign his cause of challenge until all the panel is gone through, and unless there cannot be a full jury without the person so challenged, and then, and not sooner, the king's counsel must show the cause or otherwise the juror shall be sworn.

I think, therefore, in this case there was an assumption on the part of the officer of an unlimited right of challenging jurors without assigning cause. The object of the law certainly is to secure the prisoners a fair trial. How can this be accomplished if he is deprived of the privilege the law gives him in the selection of the jury by whom he is to be tried ?

I take the liberty to adopt the language of Lord Campbell C. J. in *Reg.* v. *Bird* (2) where he says :—

I should feel deep regret if a great offender were to escape punishment, but the due administration of criminal justice requires that the forms of judicial procedure should be observed, these forms are devised for the detection of the guilty and for the protection of the innocent.

In the present instance the objection taken is

(1) 8 E. & B. p. 108. (2) 2 Den. C. C. 216.

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not raised on a mere technicality but is that the jury to whom the prisoner shall be given in charge shall be legally selected, chosen and sworn, and that neither the crown nor the prisoner shall have any advantage or privilege other than those conferred by law ; but when privileges are conferred by law they shall be rigidly respected.

Believing then as I do, that the prisoner has not had a legal trial I cannot by my voice send him to the gallows. Had I any doubt in the case I should in *favorem vitæ* give the prisoner the benefit of such a doubt.

STRONG J.—In the case of *Brisebois* v. *The Queen* (1) the meaning of section 259 of the Criminal Procedure Act (2), was under consideration, and I there had occasion to consider what constituted a question of law arising on the trial which could be reserved pursuant to the terms of that section. I was then of opinion that any matter or question of law which arose before the judge presiding at a criminal trial, though it might arise before the empanelling of the jury was complete, and therefore before the prisoner was given in charge, was a question of law susceptible of being reserved under the section in question, and the dissenting judgment which I then delivered was based on this view of the construction of the statute.

This opinion was founded upon the English authorities and also upon what I considered to be the meaning properly to be attributed to the word "trial" as used in this section 259. It appeared to me that this word was not to be restricted in its meaning to that portion of the proceedings which strictly and technically constitute the trial, namely, that part of the proceedings which does not begin until after the jury have been (to use a technical expression) "selected, tried and

(1) 15 Can. S. C. R. 421. (2) R. S. C. ch. 174.

sworn," and which is initiated when the officer of the court (in the language of Sir James Stephen) (1) in cases of treason and felony gives the prisoner in charge to the jury, stating the effect of the indictment or inquisition, and the prisoner's plea of not guilty and charging them to determine whether he is guilty or not. The opinion I formed in *Brisebois'* case was that a much larger and more liberal interpretation of the words " which arises on the trial" should be adopted, and that what seemed to be the English practice should be followed, viz., that the word " trial " was not to be confined to its strict technical signification, but that, as in England, the statute should be interpreted as applying to all proceedings on or incidental to the trial, including the preliminaries of the trial as well as proceedings subsequent to the verdict. I confess, so far as my own individual opinion goes, I still remain of the same mind, and if I was unfettered by authority, I should hold that the question of law involved in the challenges, the allowance of which has been assigned as error in the present case, were questions which might have been reserved under section 259.

I am not, however, free to act on this opinion for the reason that a majority of the court in *Brisebois'* case, according to my reading of the reported judgments then delivered, held otherwise. There the objection was that a juror whose name was on the panel had been personated by a person whose name was not on the panel. This personation was not discovered until after a verdict of guilty had been found and recorded, when it was raised for the first time, whereupon the learned judge who presided at that trial reserved it and stated a case under the statute for the determination of the Court of Appeal. It was held that under these circumstances the question

(1) Crim. Proc. 187.

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of law so reserved was not one arising on the trial, and therefore was not properly a matter which could be reserved under sec. 259. I cannot regard this decision of the court otherwise than as overruling my own opinion expressed in *Brisebois'* case to the effect already stated. The judgment in the case referred to is therefore, I conceive, an authority binding me, irrespective of my own opinion, to construe the word "trial" strictly. It is true that there the objection was taken not as here before the trial commenced, but after the verdict had been recorded, and therefore after the trial had in strictness been concluded, and it was therefore held to be too late to be reserved under the act. But if we are to construe the word "trial" strictly as regards objections taken after its conclusion, we must also do the same as regards questions of law which arise before its commencement. Moreover the real objection in *Brisebois'* case, the real question of law which it was held could not have been there reserved, arose before the commencement of the trial though it was not discovered until afterwards.

As I am thus precluded by authority from following my own judgment as to what I consider to be the proper interpretation of sec. 259, I have no alternative but to abide by the only other construction possible, namely, that which has been stated by the Chief Justice in the judgment he has just delivered and which attributes to the word "trial" its strictly legal and technical meaning. I must therefore hold that the question raised by this writ of error was one which could not have been reserved at the trial. It follows that the writ of error in the present case does not come within the prohibition contained in sec. 266.

It remains to be considered whether the decision of the learned judge at the trial in sustaining the objection of the counsel for the crown to

eleven of the jurors who had on the first calling over of the panel been ordered by the crown to stand aside was erroneous in law. I am of opinion that this ruling, having regard to section 164 of the Criminal Procedure Act, which limits the right of the crown to order jurors to stand aside only until the panel has been once gone through, was substantially an allowance of eleven peremptory challenges, and therefore the crown not having the right to challenge peremptorily that number of jurors, the objections to more than four of those jurors were unwarranted by law and consequently the court erred in allowing them. Upon the authorities and for the reasons already fully stated by the Chief Justice, and which I need not repeat, I am of opinion that the crown upon an indictment for felony is by the 164th sec. of the Procedure Act limited to the challenge of four jurors peremptorily and without cause, a number which was indisputably exceeded in the present case.

There being, therefore, upon the face of the record a judgment, not merely a ruling upon a point of practice within the discretion of the judge, but what is strictly a judgment which is manifestly erroneous as regards seven of the eleven jurors who were ordered to stand aside the second time, I hold that this is a proper subject for a writ of error. Upon this point again I am entirely of accord with the Chief Justice, and adopting the reasons he has given and relying on the authorities he has quoted my judgment must be for the prisoner. I may add that upon this last point I regard a passage in the judgment of Lord Tenterden, Chief Justice, in the *King* v. *Edmonds* (1) as decisive. Lord Tenterden there says :

It must further be observed that the disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a

(1) 4 B. & Al. 473.

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venire de novo. The party complaining thereof applies to the court, not for the exercise of the sound and legal discretion of the judges, but for the benefit of an imperative rule of law, and the improper granting or the improper refusing of a challenge is alike the foundation of a writ of error.

I am of opinion, therefore, that there has been a mistrial and that the appeal must be allowed and a *venire de novo* awarded.

FOURNIER J.—Le jugement soumis à la revision de cette cour a été prononcé par la Cour du Banc de la Reine, à Montréal, dans la cause de la Reine contre Herménigilde Morin, sur un bref d'erreur, pour faire déclarer nul le verdict de meurtre, rendu contre le prisonnier dans le terme de mars de la Cour Criminelle, à Montmagny.

Plusieurs moyens ont été assignés pour l'obtention de ce bref, mais il n'en a été invoqué qu'un seul devant cette cour. Il est énoncé comme suit :

" Que lors de la formation du petit jury, les personnes suivantes, savoir : Louis Senéchal, Joseph Pouliot, François Vézina, Augustin Vézina, François Pouliot, Eugène Hamond, Louis Colin, Salomon Brochu, Joseph Labrecque, Evariste Leclerc, Joseph Caron, Adolphe Leclerc, Edmond Duquet et Alfred Fiset furent récusés sans cause, par le couronne " ordered to stand aside."

" Qu'après que la liste des petits jurés eût été appelée une fois, vu qu'il manquait encore un juré pour former le petit jury, la couronne fit recommencer l'appel des noms, et arrivé aux noms des personnes sus-mentionnées, elle les récusa encore sans cause. L'accusé alors objecta à ce procédé, demandant que la couronne fut tenue de montrer cause pour cette seconde récusation.

" Que l'Hon. Président du tribunal décida que la couronne n'était pas obligée de montrer cause, tel que cela appert par le record devant cette cour."

Lorsque le second appel des jurés a eu lieu, l'avocat de l'accusé a fait objection au droit réclamé par la couronne d'exercer une seconde fois la demande de "stand aside," et il a été entré un jugement, ainsi que le fait voir le dossier, rapporté devant cette cour, déclarant que le juré pouvait être mis de côté une seconde fois sur la demande de la couronne. Ce procédé a été répété pour onze jurés de suite qui ont été ainsi mis de côté une seconde fois par la cour, sur la demande de l'avocat de la couronne, jusqu'à ce qu'on arriva au douzième. La même objection fut faite à chaque juré et rejetée à chaque fois par la cour.

La liste des jurés avait été appelée complètement une première fois (gone through) lorsqu'elle le fut une seconde fois et que la cour décida que la Couronne avait droit à un second *stand aside*. Cette décision est-elle légale? C'est l'importante question que soulève le présent appel.

La Cour du Banc de la Reine, appelée à se prononcer sur cette question, s'est abstenue de la juger sur le principe qu'elle n'avait pas de juridiction et a renvoyé le bref d'erreur en se basant sur la clause 266 du ch. 174 des statuts criminels. Cette clause se lit comme suit:

No writ of error shall be allowed in any criminal case unless it is founded on some questions of law which could not have been reserved, or which the *judge presiding at the trial refused* to reserve for the consideration of the court having jurisdiction in such cases.

Maintenant quel doit être l'effet de cette disposition sur le bref d'erreur; est-elle une prohibition absolue de l'émission de ce bref, à moins qu'il y ait eu une question de droit que le juge présidant au procès aurait refusé de réserver, ou encore, à moins que, comme il est dit dans la première partie de la clause 266 que le bref ne soit fondé sur quelque question qui n'aurait pu être réservée. Cette première partie de la section en question ne semble pas à première vue offrir une significa-

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tion bien facile à saisir. On a dit qu'elle ne pourrait jamais recevoir d'application parce qu'il n'y a pas de question de droit soulevée au procès que le juge présidant ne puisse réserver. Cela est vrai dans un sens restreint, et pourvu que le juge en soit rendu au procès, ou *trial*.

C'est évidemment ce que comporte le texte de notre statut dans les deux seules sections où il soit fait mention des questions réservées. Par la section 266, pour qu'il y ait lieu au bref d'erreur, il faut que le refus du juge de réserver une question de droit ait eu lieu *at the trial*. La section 259 du même acte dit que la cour ou le juge présidant au procès peut réserver des questions de droit et s'exprime ainsi :

> May in its or his discretion, reserve any question of law which arises *on the trial* for the consideration of the justices of the court for Crown cases reserved.

La section 266 me paraît reconnaître deux catégories de cas où le bref d'erreur peut être émis ; les premières, ceux où la question de droit n'a pu être réservée ; la seconde, lorsque le juge présidant au procès a refusé de réserver la question. D'après le texte ce n'est donc que lorsque le juge est au procès *trial* que son refus de réserver une question de droit peut donner lieu au bref d'erreur, autrement il n'en a pas le pouvoir.

Cette loi étant de nature à restreindre les droits du sujet quant au bref d'erreur doit, comme toutes les lois restrictives, être strictement interprétée. Le mot *trial*, dont se sert le statut doit être considéré comme employé dans son sens légal et technique, et signifie cette partie du procès de l'accusé qui commence après l'assermentation du jury, auquel il a été donné en charge, alors que commence l'examen des matières de faits *in issue* en contestation. Cette partie de l'instruction forme le procès *trial* par opposition aux procédures comme *l'arraignment*, l'appel des jurés, les récusa-

tions des jurés et leur procès par des *triers*, qui ne sont que des procédures préliminaires. Ces procédures ayant lieu avant que le "*trial*" ne soit commencé, on ne peut pas dire que les questions de droit qui pourraient s'élever pendant ces procédures préliminaires puissent être considérées comme soulevées au procès-*trial.*

Ce n'est que lorsque le juge en est rendu au *trial* que son refus de réserver une question doit être constaté et qu'il donne alors lieu à la demande d'un bref d'erreur. Cette section 266 consacre une division de la cause criminelle, qui d'ailleurs est reconnue par les auteurs, en deux parties bien distinctes. La première qui consiste en des procédures préliminaires commence à *l'arraignment* et finit à l'assermentation du jury; la deuxième, le "*trial,*" qui commence à l'assermentation du jury et finit à la sentence. C'est pendant cette dernière partie seulement que le refus du juge de réserver une question de droit peut donner lieu à l'émission du bref d'erreur. Comme il n'est nullement question dans la première partie de la section 266, de l'intervention du juge, les questions de droit qui peuvent s'élever alors au sujet des procédés ne sont nullement affectées par la disposition restrictive de cette section. Celles qui peuvent s'élever dans cette partie de la procédure restent soumises aux dispositions du droit anglais quant à l'émission du bref d'erreur, et il peut être émis ici, de la même manière qu'il le serait en Angleterre, sur des questions de droit dans lesquelles il y aurait eu erreur suffisante. Le jugement, qui fait la matière du bref d'erreur, ayant été rendu lorsqu'on en n'était encore qu'à l'appel des jurés, ne pouvait pas être réservé parce qu'il a été rendu avant que le procès *trial* ne fût commencé.

Pour établir la distinction que je fais entre le *trial* et les procédures préliminaires, je me base sur la haute

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autorité de Chitty's Criminal Law. Il décrit ainsi le commencement du procès :

The challenges being then completed and a full jury of unexceptionable jurors, by some of the means we have examined, being ready, the clerk of the arraigns on the circuit proceeds to administer to each of them the following oath : "You shall well and truly try, and true deliverance make between our Sovereign Lady the Queen, and the prisoners at the bar, whom you shall have in charge, and a true verdict give according to the evidence-So help you God." And the clerk of the arraigns directs the crier to make proclamation which is made accordingly in the following form (see form, p. 553.)

Cette proclamation a pour but d'informer tous ceux qui peuvent avoir quelque information à donner sur l'enquête entre Sa Majesté et le prisonnier sur aucune trahison, félonie ou autre crime, d'avoir à se présenter et qu'il seront éntendus, ainsi que tous ceux qui sont obligés par reconnaissance ou obligation de rendre témoignage contre le prisonnier, de se présenter pour donner leur témoignage, sous peine de forfaire leur cautionnement.

Chitty ajoute ce qui suit à propros de cette proclamation :

But it is not necessary that this proclamation, which is only for the benefit of the King, should appear on the record, at least the defendant cannot take advantage of the omission. When this proclamation has been read, *the trial commences* in the manner we shall presently consider.

When the jury have been thus assembled in the jury-box and sworn, the clerk, in case of felony, calls to the prisoner at the bar, and bids him hold up his hand, by saying C.D. and then addresses the jury in these words : "Look upon the prisoner you that are sworn, and hearken to his cause." A. B. stands convicted, indicted by the name of A. B., etc., (reading the indictment). Upon this indictment he has been arraigned, upon this arraignment he pleaded not guilty, and for his trial has put himself upon God and the country, which country you are. So that your charge is to enquire whether he be guilty of the high treason (or felony), whereof he stands indicted, or not guilty."

When the indictment has thus been read and the jury addressed, if it is a cause of any importance, the indictment is usually opened and the evidence arranged and examined and enforced by the counsel for the prosecution, etc., etc.

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On voit que Chitty fixe clairement le moment où commence le procès : C'est après la lecture de la proclamation appelant toutes personnes ayant des informations à donner et tous témoins ou autres ayant des témoignages à rendre contre le prisonnier, à se présenter pour être entendues, sous peine de forfaire leurs cautionnements. *When*, dit-il, *this proclamation has been read, the trial commences in the manner we shall presently consider.* Cette manière est indiquée dans les citations que je viens de lire. En faisant application de cette division de la procédure d'un procès criminel en deux parties, la première consistant dans les procédures préliminaires et la seconde dans le *trial* proprement dit, la sec. 266 devient tout à fait intelligible et l'on comprend que il y a une partie de la procédure où il ne peut y avoir de refus de réserver une question de droit, c'est dans la partie préliminaire. La première partie de la section 266, s'applique évidemment à la question actuelle qui n'a été soulevée au sujet du *stand aside*, que dans la partie préliminaire de la procédure et avant que le procès ne fût commencé. Interprétées de cette manière, les deux parties de cette clause peuvent recevoir leur application. La première n'affecte nullement le droit du prisonnier d'obtenir un bref d'erreur, parceque la question n'a pu être réservée ; la seconde peut aussi recevoir son effet, s'il y a eu refus de réserver au procès *on trial.* Les deux parties ont alors un sens complet et doivent recevoir leur effet.

Dans la cause de *Brisebois* v. *La Reine*, la majorité de cette cour a adopté la distinction des questions réservées au procès *trial* d'avec celles qui n'ont pu l'être. Le juge en chef de cette cour, Sir William Ritchie, C.J. s'est exprimé comme suit à ce sujet (1) :

I am of opinion this was not a question arising at the trial, but it was an objection raised subsequent to the trial, and which could only

(1) 15 Can. S.C.R. p. 425.

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be determined on a writ of error and could not be reserved and disposed of in a summary manner by affidavits. I am therefore of opinion that as this was not a question on the trial which could be reserved, the Court of Queen's Bench in Montreal had no jurisdiction to adjudicate on the case and, consequently, we have none, the prisoner's remedy, if any, being by writ of error.

Cette doctrine ayant été proclamée par la majorité de la cour forme un précédent auquel nous devons nous conformer tant qu'il sera en force. En conséquence je crois que c'est avec raison que le procureur général a donné son *fiat* pour l'émanation du bref d'erreur sur le principe que la question du *stand aside* n'avait pu être réservée.

Pour qu'un bref d'erreur puisse être émané, il y a d'abord une formalité essentielle à remplir, c'est d'obtenir le *fiat* du procureur général qu'il peut accorder ou refuser à sa discrétion. Dans l'exercice de ce pouvoir il n'est en aucune manière sujet au contrôle de la cour.

The court cannot control the exercise of the discretion left to the attorney general on this subject (1). The court will not interfere with the discretion of the Attorney General when he has granted the writ (2.)

La restriction imposée par la section 266 ne devrait-elle pas être plutôt considérée comme adressée au procureur général et non à la cour. N'a-t-elle pas plutôt pour seul objet de servir de direction au procureur général dans la considération de la question de savoir s'il accordera ou refusera son *fiat*. Mais ayant jugé à propos de permettre l'émission du bref sans y avoir imposé aucune condition ou restriction, ne doit-on pas conclure qu'après un mur examen des faits de la cause, le procureur général a trouvé dans les refus répétés du juge d'obliger la couronne à montrer cause pour les récusations répétées, un refus certainement équivalent au refus de réserver la question. Il a sans doute satisfait sa conscience que ce refus d'ordonner de montrer

(1) Archbold, 188; Dunlop *v.* Notman *v.* R. 13 L. C. Jur. 255.

(2) Short & Mellor's Crown Practice p. 317.
R. 11 L. C. Jur. 186, 271;

cause était un refus suffisant de réserver la question, surtout lorsque ce refus a été tant de fois répété.

It cannot issue (the writ of error) now without a *fiat* from the Attorney General, who always determines whether it be sought merely for delay, or upon a probable error (1).

Maintenant que le bref est émis et qu'il est devant la cour sur une contestation régulièrement liée et mettant directement en issue les défauts qu'il y a eu dans l'appel des jurés et dans les récusations, et sans qu'il y ait eu de réponse en droit aux griefs d'erreur, ni aucune objection particulière relativement au défaut de question réservée par le juge, la cour peut-elle éviter de décider la question soulevée, lors de la formation du jury sur la prétention de la couronne à un second *stand aside ?* Elle ne le peut pas, d'après toutes les autorités du droit anglais. Lorsqu'elle a le dossier devant elle, elle doit non-seulement décider les questions d'erreur particulièrement invoquées, mais elle doit aussi prendre connaissance de toute question apparaissant par le dossier qui serait suffisante pour faire mettre de côté le verdict, lors même qu'il n'en aurait pas été pris avantage par les griefs d'erreur. La cour n'est pas déchargée de ce devoir par la section 266, qui n'a pas eu l'effet d'annuler ces dispositions concernant le bref d'erreur.

La cour du Banc de la Reine a plusieurs fois agi d'après ce principe en maintenant des brefs d'erreur pour des moyens non-assignés par le demandeur, et qui n'avaient été ni réservés ni refusés en première instance.

Dans la cause de *Régina* v. *Ling* (2), le bref d'erreur a été maintenu pour une erreur qui n'avait pas été assignée et au sujet de laquelle partant nulle question n'avait été réservée. Il s'agissait :

D'un indictement pour parjure allégué avoir été commis dans une certaine cause où un nommé Adrien Girardin, du township de Kingsey,

(1) 4 Bur. p. 2551.

(2) 5 Q. L.R. p. 359.

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dans le district d'Arthabaska, commerçant, et un nommé Thomas Ling, du même lieu, *farmer*, était défendeur, l'omission des mots *était demandeur* à la suite de la description de Girardin, fut déclarée fatale et la conviction annulée. Cette omission n'avait pas été mentionnée dans les griefs d'erreur ; elle ne fut signalée que par la cour elle-même.

La cour fonda son opinion sur l'autorité suivante :

The court is not limited to the errors assigned, the whole record is before the court, and the prisoner has the right to the benefit of all substantial defects in it and the conviction will be quashed if such defect exists. *Regina* v. *Fox* (1).

Puisque la cour, nonobstant la section 266, est obligée de prendre connaissance de toute erreur apparaissant à la face du dossier, suffisante pour faire mettre de côté le verdict, la question se réduirait donc à décider si l'erreur commise lors de l'appel du jury était de nature à affecter les droits du prisonnier.

La seconde récusation, ou *stand aside*, accordée à la couronne était-elle légale ? Peut-elle à son gré faire repeter l'appel des jurés et les faire mettre de côté non seulement une fois, mais deux et même indéfiniment, de manière enfin, vu le nombre limité que le prisonnier peut récuser, à le forcer d'accepter son procès devant un jury qui n'aurait pas le caractère d'impartialité voulu par la loi.

La loi a donné à la couronne des garanties suffisantes pour assurer la bonne administration de la justice, en lui permettant d'abord de demander le *stand aside* des jurés jusqu'à ce que la liste ait été entièrement appelée, *gone through ;* elle a en outre droit à quatre récusations péremptoires qu'elle peut exercer sans en donner de motif, en outre de celles pour lesquelles elle peut montrer des causes suffisantes. Il serait donc injuste et illégal de lui accorder un privilège comme celui du *stand aside* répété qui aurait l'effet d'anéantir le droit de récusation du prisonnier, et, de laisser pratiquement

(1) 10 Cox 510.

à la couronne le pouvoir de former le jury à sa guise, ou suivant l'expression anglaise *to pack the jury*.

Cette question s'est déjà présentée devant nos cours. La seule cause où l'affirmative du *stand aside* répété ait été maintenue est celle de la *Reine* v. *Lacombe* (1). La cour était composée de quatre juges, un seul, l'hon. juge Drummond a différé d'opinion. En référant au rapport on voit que cette décision est fondée sur le précédent anglais dans l'affaire de *Mansell* (2), qui a été interprété comme ayant décidé que la couronne avait droit à un second *stand aside*. Ce n'est certainement pas la portée de la décision, et elle n'est nullement applicable au cas actuel.

Dans la cause de Mansell le rôle des jurés n'avait pas été épuisé, *gone through*. Onze jurés avaient été assermentés, et il en manquait un douzième. Alors on recommença l'appel de la liste, et à l'appel du nom de Ironmonger l'avocat de la couronne demanda encore une fois le *stand aside*, pour ce juré déjà mis de côté une fois. Dans le même moment douze jurés qui délibéraient sur un autre procès, formant partie du même *panel*, rentrèrent en cour pour donner leur verdict, et se trouvèrent disponibles. La question du droit à un second *stand aside* était actuellement en discussion devant la cour. Le *stand aside* de Ironmonger ne fut maintenu que temporairement, parce qu'il fut alors représenté que la liste n'avait pas été épuisée, *gone through*. En effet les douze jurés qui venaient d'arriver en cour et qui n'avaient pas été appelés le furent alors. Jusque là la liste n'avaient pas été épuisée, mais elle le fut après l'appel des noms de douze jurés qui avaient été absents.

Dans le jugement de Lord Campbell C.J., après avoir exposé tous les faits, il s'exprime ainsi :

But we are of opinion that the panel is not to be considered as gone

(1) 13 L. C. Jur. p. 259. (2) Dears & B. p. 375.

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through so as to require the crown to assign cause of challenge till it is exhausted, *i.e.*, according to the usual practice of the court and what may reasonably be done, the fact is ascertained that there are no more of the jurors on the panel whose attendance may be procured and that, without requiring the crown to assign cause of challenge the trial could not proceed. In the present case the panel had not been exhausted, although once called over, and the twelve jurors who had served on *Chapman's* jury came into court when only nine jurors had been elected and sworn for Mansell's jury, and when the remaining three might be taken from these twelve as conveniently and as much for the advantage of the prisoner as if they had all been in court and had answered to their names when the panel was first called over.

Plus loin, page 397, Lord Campbell ajoute :

Accordingly the course has invariably been from the passing of the statute to the present time, to permit the crown to challenge without cause till the panel has been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the crown, and to put the crown to assign cause, so if twelve of those upon the panel remain as to whom no just cause of objection can be assigned the trial may proceed. In our books of authority the rule is laid down that "The King need not show cause of his challenge till the whole panel be gone through and it appear that there will not be a full jury without the person so challenged."

Cockburn C.J., après avoir fait allusion aux différentes manières d'appeler la liste des jurés, dit :

Here they were called in the order on the panel ; but the twelve absent jurymen were not called, because it was known where they were and that it would be useless to call then. The panel then was not gone through so far as those twelve jurors were concerned, it was not exhausted as to them. Now it being conceded that the Crown was not bound to assign cause of challenge till the panel was gone through it seems to me that it cannot be said that the panel was gone through till those twelve jurymen had been called, and the Crown and the prisoner respectively had said whether they challenge them or not.

Willes J., dit au sujet de la seconde demande de *stand aside* (1) :

The application by the crown that Iremonger should stand by the second trial was a continuance of a previous objection, a demand for further time to show cause rather than a fresh challenge ; and in my opinion the panel had not then been gone through, so as to make it incumbent on the crown to show cause of challenge.

(1) P. 421.

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Chamell B., dit: (1).

The main question is whether the panel was perused when Ironmonger was called the second time; I think it was not, and that the time to put the crown to show cause of challenge had not then arrived.

Chitty, Crim. Law, (2).

But it is agreed that under this statute, the crown is not compelled to show any cause of challenge until the panel is gone through, so that it may appear that there will not be sufficient to try the prisoner, if the peremptory objection is admitted to prevail.

Lors de l'arrivé des douze jurés qui n'avaient pas été appelés le *stand aside* de Ironmonger n'avait pas été décidé, et au lieu de décider cette question, le juge qui présidait permit d'appeler les douze jurés qui venaient d'entrer et le jury pût être complété. C'est donc dans ces circonstances que s'éleva la question de savoir si le *challenge* de Ironmonger n'aurait pas dû être décidée et la couronne obligée de montrer cause. Mais le juge décida que la liste n'avait pas été épuisée, *gone through*, vu l'arrivée de douze nouveaux jurés. Cette décision fut confirmée par les juges de la cour du Banc de la Reine dont l'opinion est citée ci-dessus. Il ne fut nullement décidé que la couronne avait droit à un second *stand aside*. On voit au contraire que l'opinion des juges est contre cette proposition; ils ont admis le principe énoncé par le premier juge que la liste des jurés devait être épuisée, *gone through*, avant de forcer la couronne à montrer cause pour ses récusations. Ce précédent qui a servi de bâse à la décision de la *Reine* v. *Lacombe*, n'a donc nullement décidé que la couronne avait doit à plus d'un *stand aside*, tout au contraire, l'opinion des juges a été qu'une fois la liste épuisée, *gone through*, au deuxième appel des jurés, la couronne doit donner ses causes de récusation. C'est donc à tort que la cour du Banc de la Reine s'est appuyée sur

(1) P. 425. (2) P. 534.

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ce précédent pour maintenir dans la cause de Lacombe que la couronne avait droit à un deuxième *stand aside*. Ce précédent étant encore en force lors de la décision de l'hon. juge dans cette cause, il n'est pas surprenant qu'il s'y soit conformé, car c'était une décision de sa propre cour. Mais ce précédent est isolé ; il n'en existe pas un seul de ce genre en Angleterre. Cockburn C. J. dit à ce sujet :

There is no case in the books by which it appears that a juror who has been once set aside at the instance of the crown, has been again set aside at the instance of the crown without cause of challenge being shown.

Dans la cause de *Regina* v. *Dougall* (1), la moitié ne peut seulement de la liste avait été appelée, et la décision s'appliquer au cas actuel où toute la liste avait été appelée.

Il n'existe pas non plus dans Ontario de cas où il ait été décidé que la liste pouvait être appelée deux fois avant que la Couronne pût être obligée à donner ses causes de récusation. Dans *Regina* v. *Benjamin* (2), on attribue à M. Richards qui représentait la Couronne le langage suivant à ce sujet :

Then in going over the panel a second time the crown must assign a cause certain, which is then inquired of by the court.

Il semble avoir exprimé l'opinion dominante sur cette question, dans la province d'Ontario, car on ne trouve nulle part la contradiction de cette doctrine.

"Bishop on Criminal Procedure" (3), résume bien la doctrine comme suit :

The course of things is, therefore, in England and in those States of the Union in which the English practice prevails, for the court, when the list of jurors is being called over and the prisoner is being required to accept or challenge each juror, to direct such jurors to stand aside as are objected to on behalf of the prosecution. The panel is thus gone through with..... But if a full jury is not thus obtained, then the

(1) 1 18 L. C. Jur. 85. (2) 4 U. C. C. P. 185.
(3) Vol. 1 No. 938, note a.

panel is called over a second time, omitting those whose cases have been finally disposed of, yet including both those who did not answer and those who were set aside at the instance of the prosecution, and on this second call, the Government can challenge only for cause.

Ici sont cités plusieurs précédents anglais, et entr'autres *Régina* v. *Mansell.*

Toutes les autorités font clairement voir que la Couronne doit au deuxième appel des jurés, après avoir exercé le *stand aside* une fois, montrer cause pour ses récusations. C'est ce que le juge a positivement refusé de faire en cette cause onze fois de suite. La liste des jurés avait alors toute été appelée une première fois tel que le constate le record. L'absence de ceux qui n'avaient pas répondu à l'appel fut régulièrement notée et il n'y a aucune preuve qu'aucun de ces jurés fut présent en cour lors du second appel. Il n'y avait donc absolument aucune raison de faire le second appel si ce n'est pour donner à la Couronne le privilège du second *stand aside* auquel elle n'avait aucun droit.

Cette erreur commise dans la constitution du jury peut avoir eu les plus graves conséquences pour le prisonnier. Elle est en violation de la loi qui exige la plus stricte impartialité dans la formation du jury, et est une cause suffisante d'erreur pour faire annuler le procès. S'il en était autrement, je dirais avec Cockburn C.J., dans la cause de Mansell:

> It would be monstrous to common sense to affirm that where it is admitted that there has been an improper selection of the jury, the prisoner shall have no remedy; and if it is not a ground of error there is no remedy, as a bill of exception will not lie in a case of felony.

En conséquence je suis d'avis que le bref d'erreur doit être maintenu.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed on the ground taken by the Court of Queen's Bench, that the question raised by the prisoner on the order given by the learned judge, at the trial, to eleven

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jurors to stand aside a second time at the instance of the crown could have been reserved, and that, consequently, under section 266 of the Procedure Act, as the judge did not refuse to reserve it the writ of error does not lie. The proposition that the question is one that could have been reserved has been so elaborately treated by my brother Patterson that I might content myself with concurring in his remarks. In fact, were it not for the opinions expressed here to-day I would have thought the point free from any doubt. And, I venture to say, if the learned judge at the trial in this case had reserved the question it would never have been thought of, either at the bar or on the bench, to question his right to do so. The eminent counsel himself who argued the case before us for the plaintiff in error did not feel justified in taking the ground that the question was one which could not have been reserved. And Mr. Justice Tessier, in the Court of Queen's Bench, who dissented from the judgment of the court on other points, far from holding that the question could not have been reserved, on the contrary, assumes that it could have been.

To the cases which will be cited by my brother Patterson on this proposition, I add the following: *Levinger* v. *The Queen*, in the Privy Council (1); *Reg.* v. *Manning* (2); *Reg.* v. *Burgess* (3); also, *Reg.* v. *Tew* (4) where the question reserved was whether the witnesses before their examination before the grand jury had been properly sworn, a question which, Lord Campbell said, as presented in the case, was unfounded, frivolous and discreditable, but upon which, however, the court assumed jurisdiction.

Now, here was a case reserved on a proceeding before even a bill had been found by the grand jury.

(1) 11 Cox 613.
(2) 1 Den. C. C. 467.
(3) 16 Q. B. D. 141.
(4) Dears. C. C. 429.

It is an extreme, and perhaps a questionable one. I cite it, however, to show how far the courts in England have gone in the construction of the court of crown cases reserved act. See also *Reg.* v. *Key* (1); and *Reg.* v. *Shuttleworth* (2); in which questions were reserved on the mode of arraignment where a previous conviction is charged.

In New Brunswick the case of *The Queen* v. *Morrison* (3); and in Quebec, amongst others, the cases *R.* v. *Lacombe* (4), *R.* v. *Fraser* (5), and *R.* v. *Chamailard* (6), may also be referred to.

Then, in this court itself, there are two cases in point. In *Abrahams* v. *The Queen* (7) the prisoner had moved to quash the indictment on the ground that it had been submitted to the grand jury without proper authority, it being one falling under the vexatious indictments clause, now sec. 140 of the Procedure Act. It appeared that the indictment purported to have been authorised by the attorney-general, but that this had been done, not by the attorney-general himself but by the counsel who represented him at that term of the court. After conviction the presiding judge reserved the question so raised on the motion to quash. The Court of Queen's Bench, in Montreal, held that the objection was not well founded. But on appeal to this court, that judgment was reversed, and the indictment was quashed.

Now that was clearly an objection not only arising but also taken before a jury was made up, nay, even before the prisoner pleaded to the indictment, as it must necessarily have been under section 143 of the Procedure Act. Yet it was never questioned, either at

(1) 2 Den. C. C. 347.
(2) 2 Den. C. C. 351.
(3) 2 P. & B. 682.
(4) 13 L. C. Jur. 259.
(5) 14 L. C. Jur. 245.
(6) 18 L. C. Jur. 149.
(7) 6 Can. S. C. R. 10 S. C. 1 Dorion, Q. B. 126.

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the bar or on the bench, either in the Court of Queen's Bench, or in this court, but that the case was one which was properly reserved. Are we here to-day to hold that we had no right to quash the conviction in that case as we did ? A question precisely similar in England, I may add, in *R.* v. *Fuidge* (1) was reserved, and the indictment also quashed by the full court ; and there also it was nowhere doubted that the question was one which was properly reserved.

The other case in this court I have alluded to is *Theal* v. *The Queen* (2). One of the points reserved by the judge who had presided at the trial in that case was upon a motion to quash the indictment, which had been moved by the prisoner, upon arraignment, before pleading. The case went through the full Court of New Brunswick and then was appealed here, and not a doubt either in New Brunswick or here was expressed as to the jurisdiction of the court of crown cases reserved upon the point raised by the motion to quash.

It has been suggested that by the giving to the word "trial" in section 259 of the Procedure Act the wide interpretation that it has to the present day unquestionably received in England and in Canada, prisoners in criminal cases by section 266 of this same Act will be deprived in many cases of the beneficial right to a writ of error. That is so, undoubtedly, but in my opinion such is the clear intention of the statute. It was thought expedient not to allow the two remedies to a prisoner, the writ of error and the reservation for the court of crown cases. Neither one nor the other, it must be observed, is grantable as a matter of right. The attorney general, it is true, would not refuse his fiat for a writ of error where a serious ground of error is assigned, though he

(1) L. & C. 390.

(2) 7 Can. S. C. R. 397.

should be careful not to grant it where it is expressly taken away by the statute. But it is equally true that the judge presiding at the trial not only would not refuse to reserve, but even of himself and *ex proprio motu* would reserve, any question of law upon which he might have serious doubts. And a reference to the cases in the court of crown cases reserved, both in England and in Canada, since its establishment fully shows that the judges presiding at trials of criminal cases have, as the full court itself, given the widest interpretation to the statute, and liberally exercised in favor of accused parties the powers it conferred upon them whenever serious doubts arose on any question of law. And then, in the case now before us how could it be said that a question, whether the prisoner has had his trial according to law or by a jury lawfully constituted, is not a question arising at the trial ?

In a late case, 1889, *Reg.* v. *Brown* (1), Lord Coleridge reserved a case not only after the trial, but even after the term of the court had ended, and after he had left the assize town, and this where the prisoner had pleaded guilty, and the full court held that they had jurisdiction. Referring to a previous case, *Reg.* v. *Clark* (2), where it had been held that no case can be reserved when a prisoner pleads guilty, the Chief Justice, for the court, said :—

If that judgment intends that because a man pleads guilty—the judge who tried the case cannot state a case asking for the opinion of this court as to the validity of the conviction, we must respectfully differ from it. In this case the indictment was read to the prisoner, and if, upon it being read, he had taken the objection, it would clearly have been a point arising at the trial ; and the mere fact that he did not take it, but that it arose in the mind of the judge afterwards does not render it any less a point which arose at the trial. Whether it was taken by the prisoner or not, it existed, and the point was there. We think, therefore, that we have jurisdiction to consider this case.

(1) 16 Cox 715. (2) 10 Cox 338.

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Now, we have in that case the latest instance, and I may say perhaps one of the most illustrative, of the liberality with which in England the statute applying to the court of crown cases reserved has been interpreted. And when we are asked here to-day, by the construction sought to be given to curtail the jurisdiction of that court, and to put upon this highly remedial statute a narrower construction than it has received for over forty years, I think we should pause before coming to that conclusion. We should be loath to abridge rights and remedies which have proved so effectual in the administration of the criminal law and so well calculated to ensure to accused parties the protection the law of the land entitles them to on their trial.

A reference has been made to *Brisebois* v. *The Queen* (1), as a decision by this court from which it could be inferred that we had refused to adopt the large construction given to the word "trial" in sec. 259 of the Procedure Act in prior cases. Now, I am sure that neither his lordship nor my brother Gwynne, who with myself composed the majority of the court in that case on the question, whether the question there submitted had legally been reserved or not, intended to question *Abrahams* v. *The Queen* (2) and *Theal* v. *The Queen*, (3) which I have referred to, or in any manner throw the least doubt upon the jurisdiction of this court in those cases.

That case of Brisebois has no application whatever to the present one. There the learned judge presiding at the trial, after the verdict, on a motion in arrest of judgment had illegally, as we thought, tried, upon affidavits, a question of fact, which not only did not appear on the record but which was in direct contradiction of the record. The error assigned there, if any there was or could be legally proved, was error in fact.

(1) 15 Can. S. C. R. 421. (2) 6 Can. S. C. R. 10.
(3) 7 Can. S. C. R. 397.

Now, we held that this was irregular, that no motion in arrest of judgment lies upon a fact not appearing on the record, and that the learned judge had no power after verdict to receive affidavits and try an issue of fact to contradict the record as he had done (1), and that consequently he could not, assuming these facts as proved, reserve a question of law upon them. *Bowsse* v. *Cannington* (2). I need only refer to the remarks of my brother Gwynne who gave the judgment of the court upon this point, at page 454 of the report, to show that this was all that was determined in that case.

I have also great doubts if an order to a juror to stand aside, which merely means that the juror being challenged by the crown the consideration of the challenge shall be postponed till it be ascertained whether or not a full jury can be made without him (3), raises a question of law upon which the writ of error lies. I refer on this point to *Gregory* v. *Reg.* (4), *Mansell* v. *Reg.* in the Court of Exchequer Chamber (5), *Whelan* v. *Reg.* (6), and the cases there cited, also to Chief Justice Harrison's judgment, *in R.* v. *Smith* (7). Section 124 of the Criminal Law Procedure Act, it has been suggested, would have the effect now to make in Canada such a question one of law. But, as it would seem to me, the only new enactment in that section is the allowance of four peremptory challenges to the crown; the subsequent words, " but this shall not be construed to affect the right of the crown to cause any juror to stand aside until the panel has been gone through," import no changes in the law or practice as to the order to " stand aside." I read the clause as

(1) *In re* Sproule, 12 Can. S. C. R. 140; *Reg.* v. *Newton*, 16 C.B. 97; *Reg.* v. *Carlile*, 2 B. & Ad. 362.
(2) Cro. Jac. 244.
(3) *Mansell* v. *Reg.* 8 E. & B. 54.
(4) 8 Q. B. 85.
(5) Dears & B. 409.
(6) 28 U. C. Q. B. 108.
(7) 38 U. C. Q. B. 218

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if it said : The crown shall have four peremptory challenges, but this shall not interfere with the right of the crown to cause any juror to stand aside which right shall continue to exist as it has existed heretofore. I am confirmed in this view by section 170 of the same act which enacts that :

> Nothing in this act shall alter, abridge or affect any power or authority which any court or judge has, when this act takes effect, or any practice or form in regard to trials by jury, jury process, juries or jurors, except in cases where such power or authority is expressly altered, or is inconsistent with the provisions of this act.

The order given by the judge at the trial which the plaintiff in error impugns, it must be remembered, is not an allowance of a peremptory challenge at the instance of the crown to which a demurrer raising a question had been pleaded by the prisoner but merely an order on a challenge for cause by the crown, which postponed the consideration of the challenge till it was ascertained whether a full jury could not be had without the juror so challenged, and to which the prisoner had objected in the only way he could do, by asking that the crown be ordered to show cause forthwith, and I find it difficult to say that this raised a question of law that could be the ground of a writ of error.

However, it is unnecessary for me to determine this point, as upon the ground I first mentioned I am of opinion that the judgment appealed from, which quashed this writ, was right, and that the appeal by the plaintiff in error should be dismissed.

Having come to this determination it seems to me that I should not enter into the consideration of the merit of the ground of error assigned by the plaintiff in error. As we are equally divided in this court the result is that the judgment of the Court of Queen's Bench, which held that the writ of error does not lie, stands. It follows, it

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seems to me, that anything I would say here on the merits would be *obiter* and extra judicial. If the writ of error does not lie, as results from the judgment of this court, I do not see how I would be justified in giving a judgment on the errors assigned, and assume jurisdiction after our judgment determines that we have no jurisdiction. The course pursued in the court below where the learned judges refrained from going into the merits is the proper one, in my opinion (1). However, as a majority of my brother judges have expressed their opinions that the error assigned as to the order to certain jurors to stand aside a second time at the instance of the crown is a good ground of error, I deem it right to make an observation as to the course pursued by the learned counsel who acted for the attorney general, and by the learned judge who presided at the trial in this case. In 1869, in a case of *Reg.* v. *Lacombe* (2) the full Court of Queen's Bench, in Montreal, upon a case reserved, held that on the second calling over of a jury list under circumstances precisely similar to the present one the crown had the right to have a juror stand aside a second time without showing cause. Now, it is obvious that with this ruling of the highest court of the province before him the learned counsel for the crown in this case was perfectly justified to take the course he did at the trial, and that the learned judge who presided could not have been expected, acting there as he was in the capacity of a judge of the Court of Queen's Bench, to assume the responsibility of reversing a jurisprudence settled by that court over twenty years before, and which had remained unchallenged ever since. I can see nothing on this record to create the least doubt but that this prisoner got a fair trial. The right of challenging is given to reject, not

(1) See *Owen* v. *Hurd* 2 T. R. 644. (2) 13 L. C. Jur. 259.

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to select, and as seven of his peremptory challenges were not taken he must be assumed to have been tried by a jury composed of twelve men indifferent, properly qualified, and to none of whom he had any objection.

GWYNNE J.—The objection taken in this case, if it should prevail, must do so upon the ground that there was such a substantial defect in the formation of the jury as constituted a mis-trial, such a defect, therefore, as would have entitled the crown to have avoided the verdict if it had been one of acquittal. This consideration makes it a matter of the gravest importance, in the interest of the accused parties, that whenever a question of mis-trial is raised care should be taken that mere irregularities not working any prejudice to the accused upon his trial shall not be magnified into nullities avoiding a trial. It is not every irregularity upon the trial of a person upon a criminal charge that will constitute a mis-trial. It would be most disastrous as well to the due administration of the law as to the interest of the accused parties themselves if it should do so. The language of several of the learned judges in *Mellor's Case* (1) is very applicable to the present case. Crompton J, referring to the point in that case, says :

> It would be very mischievous if every irregularity of this nature would necessarily vacate a verdict ; if it would necessarily have that effect the same principle would apply in the case of an acquittal even though the irregularity were caused by the prosecution. The extreme mischief should make us cautious in seeing that the strict rules of law are not extended in such a manner that at every assizes and sessions we should be in danger of hearing of verdicts being set aside by accidental or contrived irregularities like those in question.

Crowder J. says :

> Verdicts found at the assizes and quarter sessions after the most

(1) 4 Jur. N. S. 222-3-4.

patient and careful investigation where the trials have been with the utmost impartiality, and the results have been most satisfactory to the ends of justice, might be set aside and the prisoners, if convicted, might have another chance of escape, or if acquitted might have their lives and liberties again imperiled by another trial, for if such a mistake is fatal to the trial it is equally so whether the verdict pass for or against the prisoner, and whatever the nature of the crime may be with which he is charged.

Willes J. says :

If this was a mistake, the prisoner being convicted, it would equally have been a mis-trial in case of acquittal; but to order a *venire de novo* in the latter case would be scandalous and oppressive.

And Byles J. says :

A mere possibility of prejudice cannot vitiate the trial. * * * A mistake of this nature is no mistrial. * * * If a mistake of this nature vitiates a verdict against a prisoner, it equally vitiates a verdict for him. The crown may at any time and at any distance of time take similar objections, and the validity of all acquittals is put in jeopardy.

Now, what is objected to in the present case is simply this : Upon the panel of 40 jurors being once called three did not answer to their names when called and twelve having been peremptorily challenged by the prisoner, and fourteen required to stand aside by the crown when eleven jurors only were obtained and sworn, the clerk then, instead of calling again the three who had not answered to their names, proceeded to go through the panel again in the same order as before, only omitting those who had been peremptorily challenged, when the crown, upon the persons they had required to stand aside being again called in their order as before, again prayed that the period for assigning cause might be further postponed until the panel should be once again thus gone through, and the learned judge decided in favor of the crown, against the contention of the prisoner's counsel that the crown should be compelled to assign cause of challenge upon each of those who had been required to stand aside being called again ; in this manner, accordingly, the

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panel, excluding those who had been peremptorily challenged by the prisoner, was once again gone through, until at length, when it appeared that the three jurors who had been absent when first called were still absent when called a second time in the order in which they were upon the panel, the twelfth juror was obtained by the crown no longer requiring him to stand aside. To this juror so obtained the prisoner, although he still had several challenges or rights of challenge remaining, offered no objection, and it is not alleged that in point of fact he had any objection to him, and thus a complete jury was obtained. Now, if in such a case the crown upon a verdict of acquittal being rendered should demand a *venire de novo*, upon the grounds of there having been such a defect in the formation of the jury as constituted a mis-trial, the language of Willes J. in *Mellor's case* (1) may not inaptly be applied: "To order a *venire de novo* in such a case would be scandalous and oppressive;" and if the crown could not obtain a *venire de novo* in the present case if a verdict of acquittal had been rendered the prisoner cannot upon a verdict of guilty. So likewise I may adopt the language of Crowder J. in the same case as eminently appropriate to the present, where he says:

> Before I can arrive at the conclusion that a verdict found by such a jury so empanelled is a nullity, I must be satisfied that there exists some stringent and inflexible rule of law which goes the length of avoiding every criminal trial when such a mistake, however unattended with the slightest mischief, has occurred, but I can find no such rule of law.

If a procedure such as that which is objected to in the present case constituted a mis-trial, the apprehensions entertained by Byles J., as expressed by him in the same case, may be said to be fulfilled, and henceforth, in this portion at least of the British Empire—

> New trials in criminal cases will come in like a flood. A mere pos-

(1) 4 Jur. N. S. 224.

sibility of prejudice cannot vititiate the trial. If a procedure of the nature in question here vitiates a verdict against a prisoner it equally vitiates a verdict for him. The crown may at any time and at any distance of time take a similar objection, and the validity of all acquittals is put in jeopardy.

It is in the interest of those accused of crime, therefore, that we should hold that the procedure which is objected to in the present case did not constitute a mis-trial.

The language of Bramwell B. in *Mansell's* case (1), and which was not dissented from by any of the learned judges in that case, has also an important bearing upon the objection taken in the present case.

He there says :

According to my judgment the matter relied on to found the objection ought not to have appeared upon the record, and if it is examinable it is not error.

Willes J. was of the same opinion, although he abstained from pronouncing judgment upon it, because, as he said :

Assuming that a court of error ought to pronounce an opinion, and that it is a matter properly upon the record, I am of opinion that the judgment below ought to be affirmed.

Again, Bramwell B. says :

It is now an application to the discretion of the judge whether or not the showing of cause of challenge on the part of the prisoner should be adjourned, and that is so reasonable that, I think, it ought to be admitted. But the delay in showing cause on the part of the crown, which was wholly discretionary at first, has in accordance with the practice become a right, and the judge would do wrong if he did not admit it as matter of right to the crown. In my view, consistently with that, although the panel had been gone through once, the judge might the second time, on reasonable ground, grant the application of the crown to adjourn the showing cause of challenge, or rather continue, at the request of the crown, to postpone the obligation of the crown to show cause of its challenge. Still, I think that the application that a juryman should be ordered to stand by is an application to the discretion of the judge at the trial. Therefore, I am compelled

(1) 4 Jur. N. S. 438

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to say that the story of it ought not to appear on the record, nor can the discretion of the judge be reversed in a court of error.

And again he says :

So long as there are men in court on the panel who were called before and had not answered, the necessity for the crown showing cause has not arisen. The rule must at least be this—that until each man who could answer has answered, and there are still not twelve men in the box, the crown need not show cause.

That the crown was entitled to have called a second time the three men who had not answered when the panel was first called cannot, I think, admit of any doubt; the objection, therefore, is reduced to this, that the judge permitted the panel to be gone through again in the same manner as he had been before, omitting those peremptorily challenged, in order to have the three who had not answered called again in this manner before putting the crown to show its cause of challenge. This mode of proceeding, if at all objectionable, can only be objected to as a mere irregularity in procedure which did not deprive the prisoner of any legal right, or do him any prejudice. It did not result in putting upon the jury an unqualified person or one against whom the prisoner had, or is suggested to have had, any objection whatever, and did not, in my opinion, constitute a mis-trial in whatever form the objection should be raised. It is, however, sufficient for the determination of the present case to say that the point raised involved a question of law, which, upon the English authorities and practice, I entertain no doubt whatever could have been reserved as a point of law arising on the trial for the consideration of the court for crown cases reserved, under sections 259, 260 and 261 of ch. 174 of the Revised Statutes of Canada. With great deference to my brother Strong, the case of *Brisbois* v. *The Queen* (1) has, in my opinion, no applica-

(1) 15 Can. S. C. R. 421.

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tion whatever in the present case. The points in judgment there were, that matter which arose after verdict and was brought to the notice of the judge by affidavits, and in such a manner that he could have rendered no judgment upon it, was not matter raising a question of law arising on the trial; and, moreover, that the objection taken was one which the statute expressly declared could not be taken in any shape. In the *Queen* v. *Burgess* (1), before plea pleaded, and therefore before ever a juror was sworn or called to try the case, the prisoner's counsel moved to quash the indictment, upon the contention that though it professed to charge the prisoner with the offence of compounding a felony it did not disclose any offence. The Recorder of London, in whose court the case was, overruled the objection, whereupon the prisoner pleaded, was tried, and had a verdict of guilty rendered against him, and thereupon the learned recorder reserved for the consideration of the court of crown cases reserved the question:

Whether the indictment was bad on the face of it as not disclosing any offence at law and ought to have been quashed?

The court of crown cases reserved entertained the case, and adjudicated upon it. The question was deliberately argued upon the merits and it never occurred either to counsel or to the court that the question was not one which, within the meaning of the act which gave the court jurisdiction, arose on the trial, and that the court therefore had no jurisdiction to entertain the case. In *Regina* v. *Brown* (2), Lord Coleridge C. J., reserved a case for the consideration of the court for crown cases reserved under the following circumstances: The prisoner had pleaded guilty at assizes to an indictment charging him with having attempted to com-

(1) 16 Q. B. D. 141. (2) 24 Q. B. D. 357.

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mit unnatural offences with domestic fowls and was sentenced to a term of imprisonment. After the judge left the assize town his attention was called to an unreported case which was said to have decided that a duck was not an animal within the meaning of 24 & 25 Vic. ch. 100 s. 51, and he thereupon stated a case requesting the opinion of the court for crown cases reserved whether or not the conviction was good? When pronouncing the judgment of the court, referring to *Reg.* v. *Clark* (1), Lord Coleridge said:

> If it is intended by that judgment that because a man pleads guilty any difficulty with respect to the statement of the case against him is immaterial,—that he is absolutely concluded for ever after from taking any point upon it, and that the judge who tries him cannot state a case for the opinion of this court, we respectfully differ from that view, and inasmuch as the prisoner in the present case was indicted, and the indictment was read to him, and he might then have taken the objection we think the objection was in effect taken. The point was there existing; it might have been taken, and it was a point which in our view did arise on the trial.

The court accordingly entertained the case and adjudicated upon it. Without over-ruling these cases it is impossible, in my opinion, to hold that no question can be reserved for the consideration of the court for crown cases reserved as one arising on the trial within the meaning of the statute in that behalf, unless it be in respect of some matter arising after the jury is selected and sworn. Such a construction would be little short of making null the statute. In the present case no case was reserved, and as the judgment of the court appealed from proceeded upon the ground that, and substantially is an adjudication that, in point of fact, as was also admitted in the argument, the judge who tried the case never was asked or did refuse to reserve a case upon the point for the consideration of the court for crown cases reserved, section 266 of ch. 174

(1) L. R. 1 C. C. R. 54.

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enacts that no writ of error shall be allowed in such a case, and so in effect that the objection cannot be now raised in error.

The appeal therefore should, in my opinion, be dismissed and the judgment of the Court of Queen's Bench, at Montreal, affirmed.

PATTERSON J.—The writ of error has been quashed by the judgment of the court below on the ground that it is founded on a question of law arising at the trial which could have been reserved for the consideration of the justices of the court for crown cases reserved under the 259th section of the Criminal Procedure Act (1), but which the judge presiding at the trial did not reserve, and not having been asked to reserve it, cannot be said to have refused to reserve. The decision proceeds upon the 266th section, which, unlike the 259th, is not taken from the English law, and which declares that in those circumstances no writ of error shall be allowed.

The alleged error is in the selection of the jury. When the panel, which contained the names of forty jurors, had been once perused, twelve men had been challenged by the prisoner, fourteen had been ordered on the part of the crown to stand by, eleven had been sworn on the jury, and three were absent. One juryman was still wanted, and he had to be obtained from among the fourteen men who were standing aside, unless all of the fourteen should happen to be challenged either by the crown for cause, or, to the number of four, peremptorily, as permitted by section 164 of the Criminal Procedure Act, or by the prisoner who was still entitled to eight peremptory challenges. On again going through the panel, one of the men was challenged by the prisoner, and the crown was permit-

(1) R. S. C. c. 174.

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ted, against the objection of the prisoner, to cause eleven of them to stand by a second time. We obtain these facts from the return to the writ of error, where it is further stated that one man of the fourteen was sworn on the jury, completing the twelve jurymen, and one, Augustin Vézina, does not appear to have been called the second time.

I see no reason to doubt that the permission to cause the jurors to stand by the second time was unauthorized. The right of the crown to postpone the assignment of cause for challenging jurors until the panel had been gone through, which has been discussed and explained in several cases the explanations given by judges of eminence not always entirely agreeing, is recognised by section 164 of our Criminal Procedure Act, and is preserved notwithstanding the new right of four peremptory challenges which is created by the statute represented in that section, and is of course beyond question. But when the panel has been gone through and the power to cause a juror to stand aside in place of showing cause for challenging him is asserted a second time, what is done is not easily distinguishable in its effect from a peremptory challenge, and is not warranted by the authority of any English decision or (beyond the number of four) by section 164. The first four of the eleven might, perhaps, be held in this view to have been properly excluded from the jury as being peremptorily challenged, but the other seven should not have been set aside except for cause.

The only English authority cited to the contrary is a dictum of Bramwell B. in the important case of *Mansell* v. *The Queen* (1) where he expresses the opinion that the judge might, after the panel had been perused, "in his discretion for sufficient cause, further postpone the time of assigning cause, either for the crown or the prisoner, but

(1) 8 E. & B. 54; Dears & B. 375.

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not as a matter of right on a mere request without sufficient cause." Mansell's case did not require a decision of the point. The contest there arose on the facts, which are set out in the return to the writ of error (1) that a juror who had been called a second time after the panel had been gone through, with the exception of twelve jurymen who were out of court considering another case, was again required on the part of the crown to stand by, and the twelve men just then returning into court, what was asked and allowed was that the crown should not be put to assign cause for the challenge until after those twelve men had been called. Bramwell B. further explains his opinion, saying :

> I think, therefore, that even if the twelve whose names had not been called over had not come into court when they did, it might have been right to set aside Iremonger for a longer time, as long as there was reasonable ground for thinking that any one might be brought into court who was liable to serve and had not yet been objected to. The true rule is to postpone the time for assigning cause till all reasonable endeavors to make all answer who ought to answer have been exhausted. Then, if twelve jurors have not been obtained the crown must show cause, but not till then.

There is no suggestion that in this case the attendance of the three defaulting jurymen could by any reasonable effort have been obtained, and under the rule laid down by Bramwell B. applied to the facts that we have before us, the crown could not, in my judgment, object again to any one of the fourteen men who were set aside on the first perusal of the panel except by way of challenge for cause, though there was of course the limited peremptory challenge allowed by section 164. The prisoner was deprived of a legal right in respect of the constitution of the tribunal by which he was to be tried, and I agree with the opinions that have been expressed that the matter is proper to

(1) 8 E. & B. 59.

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appear on the record. It would, therefore, be examinable in error unless that proceeding is excluded by the 266th section of the act.

At the same time I have no idea that under the circumstances the prisoner suffered any actual prejudice or that his trial was not fair and impartial, having regard to the fact that he could have challenged peremptorily every one of the seven jurors who were, in my opinion, improperly ordered to stand by.

I think the court below was correct in holding that the case came within the 266th section, and in, therefore, quashing the writ of error.

One essential to the allowance of the writ is that the question of law could not have been reserved under section 259, which authorises the reservation of any question of law which arises on the trial. It is contended that the objection to the right of challenge having been taken before the prisoner was given in charge to the jury the question arose before the trial and not on the trial. This construction which confines the term "trial" to the trial of the issues by the jury, in which sense the word may be, no doubt, and often is properly used, seems too narrow to give full effect to the intention of the section. In my opinion "the trial," within the meaning of the section, embraces all the proceedings before the judge who is called in section 266 the judge presiding at the trial, whether those proceedings are, as in the present case, preliminary to the investigation by the jury; or, as in the instance of a prisoner pleading guilty, result in a conviction without the intervention of a jury; or relate to the evidence, or the directions or ruling of the judge; or to the reception or recording of the verdict; or arise after the conviction, as for example, with regard to the appropriateness of the sentence or to the punishment assigned by law to the offence; and whether any such

questions are actually mooted while the trial is in progress or have not suggested themselves until the trial is over, the prisoner convicted, and sentence passed upon him.

These views are, as I gather from reported cases, those generally acted upon in England under the statute 11 & 12 Vic ch. 78 sec. 1, which is followed by our section 259.

I am not aware of any direct English decision upon the immediate point as to when the trial commences within the meaning of the act, but that is because it was never really in dispute.

My brother Taschereau has cited a number of cases bearing on the point which I do not think it necessary to refer to again.

In *Reg.* v. *Faderman* (1) the point was raised in argument shortly after the passing of the English act (2).

Parke B. said: "Properly there is no trial till issue is joined;" and Cresswell J. asked a question which received an affirmative answer in later cases: "Is a prisoner tried who pleads guilty?" The decision did not touch the question, being that the Court of Crown Cases Reserved had not jurisdiction to review the decision, which was on demurrer, because there had been no conviction. It may be noticed, however, that whatever opinion may have been implied by the observation of Parke B., and whether or not the impression he had at the moment of the signification of the word "trial" would have given the proper force to the expression as used in the statute, his dictum does not reach the present case because the joinder of issue takes place before the jury is called. In the 8th edition of Trials per Pais, which bears the date of 1776, there is this passage at p. 595, which deals with the joining of issue:

(1) Den. C. C. 568.

(2) 8 Feb., 1850. The act was passed in 1848.

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When the defendant hath pleaded to the indictment "not guilty," the clerk on behalf of the king or attorney general, by way of replication says "culprit," *i.e. culprist*, which is an averment of his guilt, and a taking of issue thereupon, as much as *paratus est verificare quod culpabilis est* ; the like as in civil actions *et hoc paratus verificare*, *prist* in French signifying the same with *paratus* in Latin ; then the prisoner being demanded how he will be tried, answers: "By God and the country," which is the same with a rejoinder and joining issue in a civil action concluding *et de hoc ponit se super patriam.* So that upon all arraignments there is a formality of pleading observed, in effect the same as in civil actions.

A year earlier than Faderman's case Rolfe B. had, in *Reg.* v. *Martin* (1), laid down a principle which has prevailed in most, if not in all, subsequent cases. He said :—

I think that the word "trial" in the 2nd section of 11 & 12 Vic. c. 78 ought to have a very liberal construction, and I think it applies to any proceeding in the court below.

The question whether the matter of law for the time in debate arose at the trial has been discussed in several cases, but the objection has usually been that the question was not raised until the trial was over. That was so in *Reg.* v. *Mellor* (2), in 1858, where the complaint related to the constitution of the jury, but the fact that one juryman had been sworn in place of another was not discovered till after the trial. The jurisdiction of the court for Crown Cases Reserved was discussed on other grounds with considerable divergence of opinion among the fourteen judges who composed the court. On the point as to the question having arisen at the trial there was not much difference. No one suggested that the empanelling of the jury was before the trial. Williams J. thought that the point, as it came before the court, must be regarded as a point occurring after verdict and therefore not a question of law which had arisen at the trial within

(1) 2 C. & K. 952.

(2) Dears & B. 468 ; 4 Jur. N. S. 214 ; 7 Cox 454.

the meaning of the first section of the statute. That opinion, which is discredited by later cases and notably by one decided as late as last year which I shall notice presently, does not appear to have been entertained by any other of the judges, while decided opinions to the contrary were expressed. Lord Campbell C. J. thus dealt with the question :—

Although the question was not discussed, the facts upon which it arises had occurred during the trial, and the judge while still acting under the commission, respited the execution of the sentence and reserved the question for the opinion of this court. It therefore seems to me to be a question of law which arose on the trial. The salutary operation of the statute would be greatly impaired if it were confined to questions of law which had been openly discussed during the trial. Since the statute passed, judges have usefully reserved under it questions as to the admissibility of evidence which had not been discussed during the trial ; and if the question might have been discussed before the sentence was pronounced, I think the judge, acting under the commission, has authority to reserve it, and to respite the execution of the sentence.

Coleridge J. said :

We are bound to give this Act of Parliament a liberal construction ; and I think that when the subject matter of dispute or question is connected with, or took place at the trial, whether it is considered at that time or at a later period, it must be said in point of law to have arisen at the trial.

Wightman J., by whom the case had been reserved, and who was speaking rather of the merits of the objection than of the question of jurisdiction, remarked :

It may be that if the mistake had been discovered before the verdict, I might have discharged the juror with respect to whom the objection had arisen, and called another juror, and then have heard the witnesses over again, or I might have given the prisoner the liberty of challenging the juror, with the consent of the counsel for the prosecution. The mistake, however, was not discovered until after the verdict. It appears to me, therefore, that this was a case of mis-trial, and that if the privilege of challenge be of any value at all it might be utterly defeated if this objection is not allowed to prevail.

And Martin B. said :

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I have always understood that this Act of Parliament was passed for the purpose of amending one of the greatest scandals of the law, that whilst, in civil cases, the most trivial objection entitled the parties as of right to a new trial, a prisoner whose life, as in this case, depends on the result, was prevented from getting his case reviewed, as to any error of fact, without he adopted a most circuitous and expensive course. I agree that we ought to give the most liberal construction to this Act of Parliament, for the purpose of giving to a prisoner an opportunity of asserting every right which he legally possesses.

In *Reg.* v. *Martin* (1), decided in 1872, we have a decision upon a case stated on the application of counsel for the prisoner after verdict and sentence.

In *Reg.* v. *Brown* (2), in 1889, before Lord Coleridge C.J., the prisoner pleaded guilty and was sentenced. After the Lord Chief Justice had left the assize town he was informed of a decision which created in his mind a doubt as to the offence coming within the statute under which the prisoner was charged, and he therefore stated the case, which was considered by the court. The case of *Reg.* v. *Clark* (3) was referred to with disapproval as a decision that a case cannot be reserved after a plea of guilty. That had been so held in *Reg.* v. *Clark*, on the ground that the question did not arise at the trial, not, however, from any suggestion that the arraignment and the plea did not take place at the trial, but because the court considered that the prisoner having pleaded guilty without taking any objection to the legal sufficiency of the charge, it could not be said that the question whether the act charged was an offence within a certain statute, on which question the judge asked the opinion of the court, was a question arising on the trial. I shall read the concluding remarks of Cockburn C. J. from the Jurist where the language is given more fully than in the regular report:

(1) L. R. 1 C. C. R. 378, 12 Cox 204.

(2) 24 Q. B. D. 357.

(3) L. R. 1 C. C. R. 54; 12 Jur. N.S. 946.

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But inasmuch as the power to state a case only applies where a question arises on the trial we have no jurisdiction. The prisoner having pleaded guilty, no question arose on the trial. A man who pleads guilty must be taken to know the law.

Thus the decision in *Reg.* v. *Clark*, whether sound or unsound, is foreign to the present discusson.

The question reserved and disposed of in *Reg.* v. *Yeadon* (1) was respecting the verdict.

Among the cases in which the question reserved related to the sentence, it will be sufficient to note *Reg.* v. *Summers* (2), in 1869, in which case the sentence was held to be correct; *Reg.* v. *Willis* (3), in 1872 where the sentence was amended by reducing the term of imprisonment from seven years to five; *Reg.* v. *Denne* (4), in 1877, in which the sentence was left undisturbed; and *Reg.* v. *Horn* (5), in 1883, where the court amended the sentence.

In Ontario the courts have acted on the principle which I have quoted from the language of Lord Cranworth when Baron Rolfe.

In *Reg.* v. *Patteson* (6) the question reserved was respecting the right of the crown to cause jurors to stand aside at the trial of an indictment for libel, and the conviction was annulled on the ground that the right accorded to the crown at the trial was not well founded.

In *Reg.* v. *Smith* (7) there was an objection to the constitution of the jury. The judge reserved the question at the request of the prisoner after the close of the assize. It was held to be properly reserved.

In *Reg.* v. *Kerr* (8) a question was reserved and decided, touching the right to have a special jury.

(1) 1 L.& C. 8; 17 Jur. N. S. 1128.
(2) L. R. 1 C. C. R. 186.
(3) L. R. 1 C.C.R. 363; 12 Cox 192.
(4) 13 Cox 386.
(5) 15 Cox 205.
(6) 36 U. C. Q. B. 129.
(7) 38 U. C. Q. B. 218.
(8) 26 U. C. C. P. 214.

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I am not sufficiently familiar with the jurisprudence of the other provinces to venture to say what its course has been in this matter, but if the jurisprudence of Quebec is correctly stated by Mr. Justice Ramsay in *Reg.* v. *Feore* (8), as I assume it to be, it is to give the fullest possible scope to the provisions of section 259.

No question was reserved in this case, and it must, I think, be held, as was held in the court below, that the mere fact that the judge did not reserve a case, is not tantamount to his refusing to reserve one. The refusal must be in answer to a request. The legislature would doubtless have used language of more direct force, or have employed some such term as "fail," or "omit," or "neglect," if it was intended that a writ of error should always be allowable whenever no case was reserved.

These are the grounds on which I am of opinion that the judgment of the court below should be affirmed. I believe my views are substantially the same as those expressed by my brother Strong on one branch of the case of *Brisbois* v. *The Queen* (1), which was argued shortly before I became a member of the court, and held also in that case by my brother Fournier.

Those views were not concurred in by the other members of the court, who considered that the circumstance that the objection to the constitution of the jury, which was the subject of the case reserved, was not suggested until after the conviction took it out of the statute as a question of law arising on the trial. That opinion does not directly meet the present case, in which the point taken is that the objection arose before the trial and not on the trial. But the decision in Brisbois' case did not rest on the one ground that the question had not arisen on the trial. It proceeded also upon another ground, which was, by itself, quite suf-

(8) 3 Q. L. R. 219.

(1) 15 Can. S. C. R. 421.

ficient to sustain the judgment of the court, namely, that the jurisdiction was excluded by section 246 of the act. The point was thus concisely put by my brother Taschereau:

> This section, in express terms, enacts that judgment shall not be stayed or reversed because any person has served upon the jury who was not returned as a juror by the sheriff. Now, here, the only irregularity complained of is that Moïse Lamoureux has served upon the jury, though not returned as a juror by the sheriff.

It is plain, to my mind, that my opinion in this case is not in conflict with the judgment of the court in Brisbois' case. Other grounds which distinguish that case from the present have now been noticed by my brothers Taschereau and Gwynne.

Reverting to Mellor's case, it may be worth noting that of the fourteen judges seven held that the statute authorised the reservation of the case, and that there had been a mis-trial. The other seven were not unanimous on the question whether upon the facts of that case, which differed materially from those now before us, there had been a mis-trial, but they all agreed that the court had not jurisdiction to entertain the case. I have already referred to the position taken by Williams J. The other six based their opinion on a different line of argument, the strong point of which was that the statute, while it authorised the court to reverse, confirm or amend the judgment. gave no power to order a new trial or a *venire de novo*. The argument is elaborated in the judgments of Pollock C. B., Erle J. and Channel B.; Crompton J. expressed his concurrence, and Crowder and Willis JJ., who had doubts on the subject, inclined to the same view. The answer given to this argument by Coleridge J. seems to have been that the court could declare the trial a nullity and that without any formal award of a new trial the prisoner must necessarily be tried again. Other judges con-

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sidered that the power given by the statute to "make such other order as justice may require" authorised the order for a new trial. Our legislation leaves no room for the question. The act of 1869 (1), provided in section 80, while repealing some provincial enactments which had authorised new trials, and declaring that no writ of error should be allowed in any criminal case unless founded on some question of law which could not have been reserved or which the judge presiding at the trial refused to reserve for the consideration of the court having jurisdiction in such cases, that nothing in that section should be construed to prevent the subsequent trial of the offender for the same offence in any case where the conviction should be declared bad for any cause which made the former trial a nullity, so that there was no lawful trial in the case. This provision took a somewhat more distinct form in section 268 of the Criminal Procedure Act (2), which declared that:

> A new trial shall not be granted in any criminal case unless the conviction is declared bad for a cause which makes the former trial a nullity, so that there was no lawful trial in the case.

This enactment retains the same form in the act of 50-51 Vic. ch. 50, which amends section 268.

It may be safely assumed that if there had been legislation of this character in England in 1858, the opinions of the Chief Baron and the judges who took his view of the *venire de novo* question would have coincided with that of the seven judges who held that the statute covered the case. Indeed that opinion was very soon recognised as the undisputed rule of construction to be applied to the statute, as we find from *Reg.* v. *Yeadon* (3), in which case a *venire de novo* was

(1) 32-33 Vic. ch. 29.
(2) R.S.C. ch. 174; 50-51 Vic. c. 50. 1128.
(3) L. & C. 81; 7 Jur. N.S.

ordered in 1861, by a court composed of five judges, all of whom had taken part in Mellor's case, Pollock C.B. delivering the judgment of the court, and the other judges, including Channel B. and Williams J. concurring.

The language of our section 259 being the same which, as found in the English Act, had received this definite construction, it would be proper to hold, if necessary to resort to that principle, that our parliament had adopted the language in view of the construction it had received.

I am of opinion that we should dismiss the appeal.

Appeal dismissed without costs.

Attorney for prisoner: *F. X. Lemieux.*

Attorney for the crown: *Hon. A. Turcotte.*