OSIAS BRISEBOIS.....APPELLANT; 1888

AND

THE QUEEN.....RESPONDENT. Oct. 11. Dec. 15.

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

Crown case reserved—Ch. 174 *secs.* 246 *and* 259 *R. S.C.—Construction of—Juror—Personation of—Irregularity—Cured by verdict.*

B. having been found guilty of feloniously having administered poison with intent to murder moved to arrest the judgment on the ground that one of the jurors who tried the case had not been returned as such.

The general panel of jurors contained the names of Joseph Lamoureux and Moïse Lamoureux. The special panel for the term of the court, at which the prisoner was tried, contained the name of Joseph Lamoureux. The sheriff served Joseph Lamoureux's summons on Moïse Lamoureux, and returned Joseph Lamoureux as the party summoned. Moïse Lamoureux appeared in court and answered to the name of Joseph and was sworn as a juror without challenge when B. was tried. On a reserved case it was

Held, per Ritchie C. J., and Taschereau and Gwynne JJ., that the point should not have been reserved by the judge at the trial, it not being a question arising at the trial within the meaning of sec. 259 ch. 174 R. S. C.

Held also, per Taschereau and Gwynne JJ. affirming the judgment of the Court of Queen's Bench, that assuming the point could be reserved sec. 246 ch. 174 R. S. C. clearly covered the irregularity complained of. Strong and Fournier JJ. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada on a case reserved by Mr. Justice Henri Taschereau at the Criminal Assizes of the district of Terrebonne, January, 1888.

The case reserved was as follows:

The indictment in this cause found by the Grand Jury alleged that the accused on the 29th of August,

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

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1887, in the Parish of St. Benoit, District of Terrebonne, had feloniously administered to Francois Xavier St. Denis, one ounce of a certain poison called "Paris Green," with the intent then and there to commit murder, on the person of the said Francois Xavier St. Denis.

The trial of the accused took place on the 14th, 16th & 17th of January instant, and terminated in a verdict of guilty rendered by the petty jury sworn for the trial.

After the rendering of the verdict, the advocate for the accused made the following motion in arrest of judgment:

"Motion of the said Osias Brisebois, for arrest of judgment in this cause and that the verdict rendered against him on the 17th day of January instant be set aside and annulled and that the said Osias Brisebois be, if not liberated and discharged, at least afforded a new trial, to be held immediately, or at the approaching criminal assizes for this district, for among other reasons the following:

"Because it appears by the record and the minutes of this court that during the trial in this cause Joseph Lamoureux a resident of the Parish of St. Monique, in the said district, duly qualified and found on the list of petty jurors duly revised for the district of Terrebonne, deposited in the office of the sheriff of this district, and, further, found and mentioned on the panel of petty jurors bound to serve and to act as such during the trial of the said Osias Brisebois, did not answer himself in person to the calling of his name, but that another person, of the name of Moïse Lamoureux, also a resident of the said Parish of St. Monique, in said district, answered falsely and illegally to the calling of the said name of Joseph Lamoureux and did serve and was sworn as a petty juror under the name of Joseph Lamoureux in the trial of the said Osias

Brisebois, instead and in place of the said Joseph Lamoureux."

On this motion the advocate of the prisoner and the deputy of the Attorney General produced respectively affidavits and documents by means of which the following facts are established:

The general list of persons qualified as jurors contains at the same time the names of Joseph Lamoureux and of Moïse Lamoureux, both described as farmers of the Parish of St. Monique, concession of La Côte des Saints.

The special panel of petty jurors bound to serve during the term contained the name of Joseph Lamoureux, farmer, St. Monique.

Although the properties of the said two persons are situated in the said concession of La Côte des Saints, it appears that Moïse Lamoureux only had his residence on the road in front of the said concession, while Joseph Lamoureux had built on the road in front of the neighbouring concession of La Côte St. Jean.

The sheriff went himself to make the service on the petty jurors and going to the domicile of Moïse Lamoureux and without ascertaining his Christian name asked him if he was the only Lamoureux living in this concession. On the reply being in the affirmative by the said Moïse Lamoureux who believed, and who still appears to believe, that Joseph Lamoureux belongs to the concession of La Côte St. Jean, the sheriff gave to the said Moïse Lamoureux personally the summons intended for Joseph Lamoureux. Moïse Lamoureux obeyed this summons, answered during all the criminal term, and in particular at the trial of the accused, to the name of Joseph Lamoureux, was sworn as a juror in the said trial of the accused in the absence of any challenge, and thus formed part of the

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jury which rendered against the accused a verdict of guilty.

It is further in evidence that the accused at the time of the trial, and before, knew Moïse Lamoureux, although he did not know his Christian name.

The evidence and these documents produced do not show that the prisoner had any cause of challenge against Moïse Lamoureux who served under the name of Joseph Lamoureux.

The special panel for the term did not contain the name of Moïse Lamoureux.

On this motion and in view of these facts I did not pronounce sentence against the accused, who was remanded to prison, and I thought it my duty to reserve the question for the consideration of the judges of the Court of Crown Cases Reserved; although an important precedent exists in the matter, reported in the 3 vol. of the Q.L.R., p. 212, *Reg.* v. *Fiore*, and although the 246th sec. of ch. 174 of the Revised Statutes of Canada appears applicable to the case, I have found the question sufficiently special to merit the consideration of the honorable tribunal to which I have referred it.

The Court of Queen's Bench, Mr. Justice Tessier dissenting, refused to interfere with the verdict and the prisoner then appealed to the Supreme Court of Canada.

Leduc (*Belcourt* with him) for appellant.

F. X. Mathieu for respondent.

The points and cases relied on by the counsel are fully reviewed in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—This was a case reserved under the Revised Statutes ch. 174 sec. 259 which enacts that every court before which any person is convicted on indictment for any treason, felony or misdemeanor, and every judge within the meaning of

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"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, &c."

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 be determined on a writ of error and could not be reserved and disposed of in a summary manner on affidavits. I am therefore of opinion that as this was not a question arising 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. Mr. Justice Gwynne has permitted me to peruse what he has written and will read on this point, and as he has discussed the point so fully and I entirely agree with what he has written and with the conclusion at which he has arrived I have nothing further to add. I do not wish it, however, to be understood that there should be a writ of error granted in this case, or to express any opinion as to what should or would be the result, if a writ of error was granted.

It has been also contended that this case comes within and is covered by sec. 246 of ch. 174 of the R. S. C. which enacts *inter alia*: "Judgment, after verdict upon "an indictment for any felony or misdemeanor shall "not be stayed or reversed * * for any misnomer or "mis-description of the officer returning such process "(jury process), or of any of the jurors,—nor because "any person has served upon the jury who was not "returned as a juror by the sheriff or other officer." If I am right in the view I take upon the first point the determination of this question is not necessary for the disposal of this case, therefore without expressing a

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positive opinion I may say I incline very strongly to the view that if this case does not come within the very words of the act it is within the spirit and scope of the enactment and within the intent, policy and object if the legislature or, as Lord Coke expressed it, to suppress the mischief and advance the remedy.

STRONG J.—I am of opinion that we ought to allow this appeal, quash the conviction and order a new trial.

The prisoner was indicted for a statutory felony—administering poison with intent to commit murder—and was convicted. At the conclusion of the trial and before sentence, it was discovered that Moïse Lamoureux, one of the jurymen by whom he had been tried, had not been returned on the panel, but had either by mistake or design, which it does not appear, answered to the name of Joseph Lamoureux, a juryman who had been duly returned on the panel, and thus by personating the latter had been sworn in his place. The learned judge before whom the trial took place reserved the case for the opinion of the Court of Queen's Bench on its appeal side pursuant to section 259 of the Criminal Procedure Act. The case having been argued before the Court of Queen's Bench, that court affirmed the conviction; one of the learned judges however, Mr. Justice Tessier, having differed from his colleagues, the prisoner was enabled to appeal to this court, which he has done,

I am of opinion that Mellor's case (1), which has been relied on as a conclusive authority against this appeal, has no application here. In the first place, the learned judges who there held there had been no mis-trial, did so on the ground that William Thorniley, who by mistake appeared and was sworn in answer to the name of Joseph Henry Thorne,

(1) 1 Dears. & B. 468.

the person actually called, was himself a juror, whose name was contained in the panel duly returned by the sheriff. The prisoner in that case was not able to make the objection that he was tried by a jury, one of whom had no authority to try him. The case there was merely one where one juror was mistaken for another, and it is upon this circumstance that the judgments of those judges who held there had been no mis-trial were principally rested, as will be seen from the clear statement of the argument from that point of view presented in the judgment of Mr. Justice Byles. The same argument is not available here, in answer to the prisoner's objection that he has been illegally tried, for it is manifest that only eleven out of the twelve jurors who had the prisoner in charge had authority to try him.

Next, I cannot agree with the learned chief justice of the Queen's Bench in the opinion that this is an objection covered by the 246 section of the Criminal Procedure Act, (R. S. C. cap. 174). That section is a transcript, so far as the clause is concerned which enacts that a verdict shall not be "stayed or reversed because any person has served upon the jury who was not returned as a juror by the sheriff or other officer," of the English Statute 7 Geo. 4 c. 64 s. 21. This enactment was not referred to in Mellor's case for the very obvious reason that it did not apply since both the juror called and the juror who presented himself and was sworn in his stead had been legally "returned as jurors by the sheriff," and therefore, the case did not come within the terms of the statute. Here, however, the person sworn on the jury was not duly returned and therefore it has been said that the statute applies. There is, however, in the present case something more than the irregularity which the statute was designed to cure, the mere serving on the jury of a person not

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duly returned by the sheriff to serve. Not only was the juror who illegally served here not duly returned, but he personated one who was duly returned, and in that way a wrong has been practised on the prisoner, a wrong which, if done knowingly, was undoubtedly a high contempt of court and an indictable offence, and if done innocently and by mistake may nevertheless have greatly prejudiced the prisoner on his trial. If section 246 covers a case like this, so it would also cover a case where the personation of the juror was the result of a deliberately planned fraud, a conspiracy between the juror actually summoned and a stranger personating him, with the very purpose and design of introducing upon the jury a person whose object it might be corruptly to convict the prisoner. It is impossible to suppose that the statute could apply to validate the trial in such a case, and if it would not it must also be inapplicable in the present case.

The whole tenor of the reasoning of the judges who thought there was no mis-trial in Mellor's case favors this view.

Further Mellor's case can be no authority against the prisoner on the question of mis-trial. Of the fourteen learned judges who composed the court in that case, two, Chief Baron Pollock and Mr. Justice Williams, gave no opinion on this point, but rested their judgments exclusively on the ground that the court had no jurisdiction to entertain the question reserved. The remaining twelve judges were equally divided on this point—six, including Lord Campbell C.J., Cockburn C.J., Coleridge and Wightman JJ., and Watson and Martin BB., holding distinctly that there had been a mis-trial, whilst the remaining six judges were of a contrary opinion. It is evident, therefore, that on this point of the nullity or validity of the trial Mellor's case can be of no decisive authority, and we are

thrown back on the preceding authorities and on the reasons, apart from authority, for and against the view contended for on behalf of the prisoner, reasons which are stated with great force and lucidity in the opposing judgments delivered in Mellor's case. As regards the effect which this case of Mellor ought to have upon our decision on this appeal, I cannot, however, refrain from saying that although their judgments were neutralized by the voices of an equal number of judges on the opposite side, yet the weight of high authority and of great names is decidedly with the six judges who pronounced for the prisoner, and I more especially refer to the two most distinguished judges whose names head the list, who successively filled the office of Lord Chief Justice of England, and whose pre-eminence as great common law judges cannot be questioned,—Lord Campbell and Sir Alexander Cockburn.

The only authority in which the facts resemble those in the present case, where a juryman whose name was on the panel and who had been duly summoned in his proper name was personated by a stranger whose name was not on the panel and who had received no summons to serve, is the civil case of *Hill* v. *Yates* (1), where the Court of Queen's Bench did certainly refuse a rule *nisi* for a new trial on this ground. I consider that case, however, to be virtually disposed of in the judgment of Lord Campbell in Mellor's case where its unsoundness is most conclusively demonstrated. The reasons thus given by Lord Campbell are in the main the same as those which I have already stated as being an answer to the argument raised on behalf of the crown that the prisoner's objection in the present case was met by the 246th section of the Criminal Procedure Act, viz., that if the irregularity were to be con-

(1) 12 East 229.

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sidered as a ground of challenge only, and as not invalidating the trial, the consequence would be, that there would be no remedy, where the wrongful substitution of a stranger for a juror took place with the deliberate and malicious intent of prejudicing the prisoner on his trial. These reasons seem to me unanswerable in a case like the present, where the juror regularly called has been personated by one who was not himself on the panel whatever weight they ought to have in a case like Mellor's where the person substituted was himself a juror, duly summoned and on the panel, and thus legally selected and having authority for the trial of the prisoner subject only to the latter's right of challenge. I am of opinion, therefore, that we ought not to consider ourselves bound by *Hill* v. *Yates*, more especially as that case was not a decision of a Court of Error or Appeal but of a court of first instance only, and moreover a decision pronounced in a civil cause and on a motion for a new trial.

As regards the comparative weight of the reasoning, apart from authority, upon which the respective views of the learned judges in Mellor's case are supported, it seems to me that the reasons of Lord Campbell and the judges who agreed with him far outweigh the arguments put forward by those who held opposite opinions.

In Mellor's case the arguments against the prisoner on the point of mis-trial appear to have been principally of two kinds, first those which depended on the important circumstance, which distinguishes that case from the present, that the person who was there substituted for the juror called was himself a juror, whose name was regularly upon the panel, a consideration which makes all the reasons so based entirely inapplicable here, and secondly arguments deduced

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from considerations of public policy, and the inconvenience of a judicial decision which might open the door to a class of frivolous, technical objections tending in some instances to a failure of justice in the administration of the criminal law. That public inconvenience may possibly be occasioned by holding the objection now raised by the prisoner a ground for invalidating the conviction, may to a certain extent be true but that does not constitute a sufficient reason why a prisoner should be deprived of a fair trial, as he certainly might be if the contrary rule should now be enunciated by authority. The fallacy in the argument thus derived from public policy and convenience is that those who advance it contemplate that this species of fraud on the law, by the personation of jurors in criminal cases will only be perpetrated in the interest of prisoners, whereas it is apparent that it may also be resorted to by those who may seek to injure and prejudice prisoners in their trials, and so long as the last alternative is possible an argument derived from the mere probability that such an abuse of justice will be more frequently practised on behalf of accused persons than against them ought not to prevail. In other words, there is no higher policy known to the common law of England than that which seeks to assure to every person brought under criminal accusation an absolutely fair and impartial trial. The courts have it in their own power to protect themselves, at least in a great degree, against any misapplication of a rule of procedure, involved in a decision of this appeal in favor of the prisoner, by enforcing greater caution and diligence on their own officers, by seeing that proper accommodation is provided for jurymen summoned on the panel so that they may be kept apart from the crowd of mere spectators who throng the courts, and by enforcing exemplary punishment when a case of wilful personation is

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discovered; by these means the anticipated evil which, after all, is probably chimerical, will seldom be likely to cause a failure of justice. But even though the danger were a hundredfold greater it ought not, in my judgment, to weigh for a moment against the sacred right of a prisoner to have a fair trial, a right which it is impossible he can in the future enjoy if the judicial sanction of a court of appeal is now given to proceedings by which the prisoner was not only deprived of his right of challenge but possibly tried and convicted by a juror who may have introduced himself upon the jury for the express purpose of prejudicing the trial against him. Lord Campbell, in his judgment in Mellor's case, answers this argument from public inconvenience thus conclusively:

> There may certainly be a dread that frivolous objections to procedure in criminal cases may be encouraged by our decision; but it is no frivolous objection that the prisoner on a trial for murder was, without any fault of his own, deprived of his right to challenge one of the jurymen who tried him, and I hope the judges may safely rely upon their own efforts, and, if necessary, upon the aid of the legislature, to repress mere technicalities, which seek to screen guilt instead of protecting innocence.

Sir Alexander Cockburn in his judgment is equally pronounced against this argument derived *ab inconvenienti*. We have therefore these great chief justices, both of whom were most experienced criminal lawyers and who had both served in the office of Attorney General before their promotion to the bench, repudiating in the most clear and emphatic manner this argument by which it was sought to infringe on a prisoner's right to a fair trial. I have never read or heard that either of the chief justices was liable to be influenced by sentimental considerations in favor of prisoners; the traditions of the profession are, as I have always heard, rather to the contrary; we may therefore safely assume, that in a case like the present they would have considered the nullity of the trial beyond all doubt or question. In short Mellor's case, so far

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from being an authority against the prisoner on this point as to the validity of the trial, is in truth a strong one in his favor, inasmuch as the opinions of the six judges (including the two chief justices) who there pronounced for the prisoner are, *a fortiori*, applicable here, whilst the opinions of the six judges, who were there against the prisoner applied to an irregularity of a totally different kind from that which occurred on the trial now under consideration. I am, therefore, of opinion that there was such a miscarriage in the trial of the appellant that at common law the whole proceeding was a nullity. Further, I hold that the trial having thus been illegal and void at common law, the 246th sec. of the Criminal Procedure Act does not, for the reasons before stated, cure such irregularity and that it has therefore no application whatever to the case.

Next it is argued for the crown that the 259th sec. of the Criminal Procedure Act providing for the reservation of questions of law arising on the trial of indictments does not apply, and Mellor's case is again invoked as an authority for this proposition also. Here, again, I have to determine against the crown. The great argument against the jurisdiction in Mellor's case was that there was no power conferred on the court to issue a *venire de novo*, so that if the conviction should have been quashed the prisoner must have gone free. The court there, like the court for crown cases reserved under the present statute, was a purely statutory court, and had no authority save such as was conferred upon it by the express words, or by necessary implication from the express words, of an act of Parliament. Had the facts been as here showing indubitably that there had been a mis-trial, and had the statute conferred the powers now given by sec. 268 of the Criminal Procedure Act, and which applied to the Court of Queen's Bench as well as it applies to this

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court, authorizing the granting of a new trial, (a substitution for the common law remedy of a *venire de novo*) where "the conviction is declared bad for a cause "which makes the former trial a nullity so that there "was no lawful trial in the cause;" had, I say, the English statute conferred such a power as this the principal ground of the argument against the jurisdiction in Mellor's case would have entirely failed. As the act of parliament now enables the courts here to do justice by remanding the prisoner for a new trial, I can see no objection to holding that the Court of Queen's Bench had jurisdiction to entertain this objection to the validity of the conviction as "a question arising on the "trial," as I feel assured the English court would also have done in Mellor's case, had the opinion of Lord Campbell and those who agreed with him, that there had been a mis-trial, prevailed and had the statute in terms conferred the power to order a *venire de novo*, or the power which this court and the Court of Queen's Bench now possess of ordering a new trial.

I am of opinion that the trial of the appellant should (in the words of the statute) be declared to have been a "nullity," that the conviction should be quashed and a new trial ordered.

FOURNIER J.—Aux assises du district de Terrebonne, tenues en janvier dernier, Osias Brisbois a subi son procès pour avoir félonieusement administré un certain poison à F. X. Denis dans l'intention de commettre un meutre, et un verdict de coupable a été prononcé contre lui. Après ce verdict, le prisonnier a fait, par le ministère de son avocat, une motion en arrêt de jugement pour faire annuler le verdict, ordonner sa mise en liberté, ou pour un nouveau procès.

L'unique raison donnée à l'appui de cette motion est que le nom de Moïse Lamoureux, qui a fait partie du petit jury qui l'a trouvé coupable, ne se trouve pas

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sur la liste des jurés assignés pour le terme pendant lequel le prisonnier a subi son procès. Le nom de Joseph Lamoureux, son frère, s'y trouve; mais celui-ci n'ayant pas été assigné, a, comme de raison, fait défaut chaque fois que son nom a été appelé comme juré. A chacun de ces appels, Moïse Lamoureux, qui avait reçu, par erreur, l'assignation destinée à Joseph, s'est présenté à la place de celui-ci et a illégalement prêté serment comme juré, siégé comme tel, pris part au verdict—sous le nom de son frère—sans avoir prêté serment sous son nom, ni révélé son identité en aucune manière. Cette étrange irrégularité n'a été découverte qu'après le verdict, mais avant que aucune sentence n'eût encore été prononcée. C'est en se fondant sur ce fait que le prisonnier demande l'arrêt du jugement et l'annulation du verdict.

L'honorable juge H. T. Taschereau, qui présidait au procès de l'accusé, après l'exposé des faits contenus dans la motion et après leur vérification par affidavits, en a fait rapport à la cour du Banc de la Reine, réservant à cette dernière cour la décision de la question ainsi soulevée.

La majorité de la cour du Banc de la Reine a rejeté cette motion pour le motif qu'elle considérait l'irrégularité invoquée comme insuffisante pour faire annuler le verdict. En conséquence de ce renvoi, appel à cette cour.

La question à décider est donc de savoir si le fait de Moïse Lamoureux, dont le nom n'était pas sur la liste des jurés, appelé et répondant au nom de Joseph Lamoureux, dont le nom se trouvait sur cette liste, prêtant serment et siégeant sous le nom de Joseph Lamoureux, sans avoir lui-même prêté serment sous son propre nom, constitue une irrégularité suffisante pour faire déclarer le procès nul (*mis-trial*).

Cette question n'est pas nouvelle. Elle a été soulevée bien des fois en Angleterre. L'honorable juge

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Ramsay dans ses notes sur la cause de *Feore* (1), en a cité plusieurs cas d'où il a conclu :

> I take it, therefore, that before the passing of the statute 21 of Jac. 1, the serving as juror of any person not a juror, or one juror for another, or by a name not his, or by a false addition, or of any disqualified person, would make the trial null, and that is only modified in the provinces by the statute of Jac. 1, and by the section of our Criminal Procedure Act, 32 and 33 Vic., ch. 29, sec. 79.

Cette dernière section est maintenant remplacée par la 246me section du chapitre 174, Statuts revisés du Canada, déclarant que nul jugement après verdict ne sera arrêté, ni infirmé pour diverses raisons et entre autres la suivante :

> Ni à raison de ce qu'une personne aura servi sur le jury, bien qu'elle n'eût pas été mise au nombre des jurés sur le rapport du shérif.

Comme on le voit, le texte qui concerne la question soulevée ici se borne à dire que le jugement ne sera pas arrêté parce qu'une personne dont le nom n'était pas sur la liste des jurés aura servi comme tel. Ce serait bien de faire application de cette disposition, si Moïse Lamoureux, dont le nom n'était pas sur la liste, eût été soit par méprise ou par une erreur quelconque, appelé par son véritable nom à faire partie du jury. Une telle irrégularité aurait été sans doute couverte par la section 246. Mais les choses sont loin de s'être passées de cette manière. Joseph Lamoureux dont le nom se trouvait régulièrement sur la liste étant appelé, c'est Moïse qui se présente à sa place et le personnifie. Il prête serment sous un nom qui n'est pas le sien et s'ouvre ainsi l'entrée du jury par un faux serment. Il répète cette imposture à chaque fois que Joseph Lamoureux est appelé, et il a le soin de si bien cacher son identité qu'elle n'est découverte qu'après le verdict. Est-ce une de ces irrégularités couverte par la clause 246? Evidemment non ; la loi présume que le juré dont le

(1) 3 Q. L. Rep. p. 228.

nom n'est pas sur la liste a dû être appelé par son nom. Elle ne peut certainement pas s'interpréter de manière à couvrir le cas de celui qui a faussement pris le nom d'un autre et jure faussement qu'il est un tel, tandis qu'il est une autre personne. C'est grâce à deux offenses criminelles bien graves : au faux serment et à la personnification, que Moïse Lamoureux a réussi à pénétrer dans le jury. Peut-on dire que la loi entendait traiter comme simple irrégularité le fait dont Moïse Lamoureux s'est rendu coupable ? Par cette supercherie, il a empêché le prisonnier de se prévaloir de son droit de récusation. Il pouvait n'avoir aucun motif de récuser Joseph, mais il pouvait en avoir contre celui qui cachait son nom sous celui de Joseph et s'introduisait d'une manière aussi extraordinaire dans le jury. Quel pouvait être ses motifs d'en agir ainsi ? Nous les ignorons ; mais l'étrangeté et l'illégalité de sa conduite ne font présumer rien de bon en sa faveur. On ne devrait pas en être réduit à des suppositions pour s'assurer si le prisonnier a eu un procès régulier et impartial.

On a invoqué contre la position prise par le prisonnier l'autorité de la décision dans la cause de *Mellor* (1), dans laquelle une question analogue s'est soulevée Cette décision a été citée et discutée dans la cour du Banc de la Reine de Québec, dans la cause de *Regina* v. *Feore* (2), mais la majorité de la cour n'a pas considéré qu'elle devait avoir toute l'importance d'un précédent, parce que sur la question à décider par la cour du Banc de la Reine, les juges anglais s'étaient trouvés divisés également, six d'un côté et six de l'autre. Deux des juges qui furent d'avis de maintenir le verdict, s'abstinrent de décider la question de savoir si l'objection eut été soulevée d'une autre manière, elle eût été fatale ou non. Je ne crois pas, pour les raisons données par

(1) 1 *Dears* v. *Bell* 468. (2) 3 Q. L. R. 219.

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l'honorable juge Ramsay, que l'on doive non plus donner à la décision dans la cause de *Mellor* l'autorité d'un précédent applicable à celle-ci. Les questions en débat, il est vrai, ont été traitées avec beaucoup de science et de développement, mais pour répondre aux arguments employés par les juges de la majorité, il n'y a qu'à se servir des arguments encore plus solides donnés par la minorité.

A l'objection faite, que la cour n'a pas juridiction pour adjuger sur une question réservée, qui n'a été soulevée qu'après le verdict, je répondrai par l'argument de l'honorable juge Ramsay sur la même question dans la cause de *Regina* v. *Feore*. Dans la présente cause, l'objection a été faite et réservée après le verdict, il est vrai, mais avant qu'aucune sentence n'eût été prononcée. L'honorable juge s'exprima ainsi :

With regard to the first of these points it does not arise in this case, for the question was raised before the end of the trial, that is before sentence. But in any case it would be a very narrow mode of interpreting an enactment such as that permitting the reservation of Crown cases, to say that a question did not arise at the trial because it was not insisted upon then. The question took its rise at the trial, although only noticed after. Again, if under the statute the judge had not power to reserve the question, he certainly could not have entered the difficulty on the record, and the accused would have been without remedy, whether he suffered injustice or not, thus effectually avoiding all the inconveniences so much dreaded by Lord Ellenborough. The jurisprudence in this province is to give the fullest possible scope to the enactment permitting the reservation of questions of law, and I think our jurisprudence is more consistent than that in England on the point.

Pour tous ces motifs, je suis d'opinion que l'appel devrait être accordé.

TASCHEREAU J.—The appellant having been found guilty of feloniously having administered poison with intent to murder, moved to arrest the judgment on the ground that one of the jurors who tried the case had not been returned as such. As this irregularity did not appear on the face of the record it could,

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clearly, not constitute a ground for a motion in arrest of judgment. A case having, however, been reserved by the judge presiding at the trial, and determined by the full court of Queen's Bench, we have, I presume to consider it as properly before us on the facts as stated in the court below, assuming, here, of course, that the case could be reserved.

These facts are as follows. The general panel of jurors contained the two names of Joseph Lamoureux and of Moïse Lamoureux. The special panel for the term of the court at which the prisoner was tried contained only the name of Joseph Lamoureux. The sheriff, however, served Joseph Lamoureux's summons on Moïse Lamoureux, but returned Joseph Lamoureux as the party summoned. Moïse Lamoureux appeared in court, as a juror, during the whole term answering to the name of Joseph Lamoureux, and on this Brisebois', trial, went in the box without challenge, having likewise answered to the name of Joseph Lamoureux.

I am of opinion that this appeal should be dismissed on the ground, taken by the Court of Queen's Bench at Montreal, viz.: "that section 246, ch. 174 of the Rev. Stat. clearly covers the irregularity complained of by the appellant here." 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 Moise Lamoureux has served upon the jury, though not returned as a juror by the sheriff.

This is precisely what the statute says will not be a ground for staying or reversing the judgment. The reason that in *Mellor's* case (1), the corresponding Imperial enactment, 7 Geo. IV, c. 64, sec. 21 was not cited

(1) 1 Dears & B. 468.

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is that the enactment had, in that case, no application. There no question arose of a party serving as a juror who had not been returned by the sheriff as such. *Reg.* v. *Feore* (1) has also been relied upon by the appellant, but that case does not bind us, did it apply to the present one. The case of *Dovey* v. *Hobson* (2) is in point, and would conclude this case even without the above clause of our statute.

As to the question whether the point raised was one which could be reserved by the judge at the trial, I am of opinion with the Chief Justice and Mr. Justice Gwynne, that it was not one which could be reserved. I am of opinion that this appeal should be dismissed.

GWYNNE J.—In Mellor's case (3), the Court of Criminal Appeals in crown cases reserved, upon the opinion of eight judges against six, affirmed the conviction. Seven of the eight were of opinion that the point submitted, which was similar to that submitted in the present case, did not come within the jurisdiction of the court for hearing crown cases reserved; and that it could only be raised, if at all, upon a writ of error, as error in fact not error in law. Five of the seven held that if so raised, the irregularity which was complained of, constituted no mis-trial, in which opinion the eighth also concurred, but he gave no opinion as to the jurisdiction of the court further than that he doubted its having any jurisdiction to award a *venire de novo*; and the other two gave no opinion upon the question of mis-trial or no mis-trial, because the point was not properly before them, not coming up on a writ of error. Of the other six who were of opinion that the court had jurisdiction, and that the irregularity complained of did constitute mis-trial, two namely, Cockburn C.J. and Watson B. expressed themselves as having arrived

(1) 3 Q. L. R. 219. (2) 2 Marsh 154.

(3) 1 Dears & B. 468 & 4 Jur. (N.S.) 214.

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at this opinion with great doubt and a third Martin B. rested his judgment upon the principle which he laid down, namely, that in these cases of questions of law reserved under the statute for the opinion of the court of crown cases reserved, the statement of the judge as to the facts upon which the question of law submitted by him depends must be received by the court as absolute verity. If the questions which can be reserved under the statute are limited to questions upon matter appearing on the record, as in arrest of judgment, and questions of law arising during the progress of the trial which the judge presiding at the trial might have judicially determined himself if he had been so minded, the principle that the judge's statement of the facts upon which he wished to submit a question of law to the opinion of the court should be received by the court as absolute verity seems to be perfectly sound; but if the statement of facts made by the judge is, in all cases submitted under the statute to be received as absolute verity, that to my mind affords a conclusive argument against the question which was submitted in Mellor's case and that which is submitted in the present case being within the contemplation of the statute; for, in the absence of any provision in the statute authorizing or enabling a judge to collect material after verdict, upon which to make a statement of facts for the purpose of submitting thereon a question of law, the decision of which, may affect the verdict, I cannot recognize the principle upon which such a statement should be received as absolute verity; or why either the prisoner or the crown should be deprived of their right to dispute the truth of the facts as stated by the judge, or if true of displacing them by other facts proposed to be put in course of judicial enquiry as they would have the right to do in the case of a writ of error in fact; which appears to be the only proceeding by which the

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truth of the facts relied upon as being sufficient to vacate the verdict, or of other facts pleaded or relied upon as displacing the effect of the former, assuming them to be true, can be judicially established. The decision in Mellor's case has never been questioned that I have been able to find except in the case of *The Queen* v. *Feore* (1), in which case, with great deference I say it, the learned judges who set aside the verdict do not seem to me to have correctly appreciated the grounds upon which the judgments of the learned judges who affirmed the conviction in Mellor's case proceeded.

The case is cited as law in the edition of Roscoe's Criminal Evidence by Horace Smith of 1884 (2), and in a note to Chitty's Statutes, 4th edition by Lely (3). The reasoning of those learned judges upon both points is to my mind most conclusive. Pollock C.B. says:

> Apart from the statute which created this tribunal 11-12. Vic. ch. 78, the objection, if any, could not have been taken except on a writ of error, and the error, if error it be, is error in fact and not error in law. In my judgment the statute was clearly not intended to supersede the Court of Error and to confer upon this court all its functions

And again:

> The authority and jurisdiction of the court is, in my opinion, limited to matters of law occurring upon the trial, of which the judge can take judical notice, and in providing for giving effect to the decision of this court and the certificate founded thereon, there are express directions given as to what shall be done in each case. It appears to me that the statute contemplated the final determination of the matter and never contemplated any new trial or any *venire de novo.*

After reading the terms of the statute which I may here observe are substantially identical with ours, the learned Chief Baron proceeded:

> It appears to me that the statute never contemplated any new trial, and I think that will be clear when we come to consider what are the provisions made in the act, for they are very express and direct as to what shall be done upon the certificate going down to

(1) 3 Q. L. R. 219. (2) P. 217.
(3) Vol. 2, p. 253.

the court in which the point arose.

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Referring then to the words of the statute that the court is:—to make such other order as justice may require, he referred to *Regina* v. *Faderman* (1); in which it was held that those words only enable the court to order a party to be let out on bail or to do any other thing of the like kind which justice may seem to demand, and he adds:

If this part of the act which enables us to make "any other order such as justice may require," is to be taken to apply to a case like the present I should be glad to know why, if we can award a *venire de novo*, we cannot grant a new trial in any case where improper evidence has been received, but which in reality was not calculated to have any influence upon the verdict. If we are to award a *venire de novo*, because the prisoner may have lost some benefit, of which there is no suggestion before us, then I would ask, in a case where, in the opinion of this court, improper evidence has been received and where an entry upon the record would be that the evidence having been so received the accused party was improperly convicted, what does justice require in such a case? Why, manifestly that the prisoner, guilty of some atrocious crime, should not thereby escape justice, and yet, I apprehend it will be conceded on all sides (and I do not imagine from the communications which have taken place among us that one single member of this court is of a different opinion) that however much we might all think that justice would require a new trial we should be incompetent to grant it. The act of Parliament provides expressly what shall be done where the conviction is vitiated: We cannot order a new trial in such a case; we cannot order a *venire de novo* to issue, we can only vacate the conviction. And now I come to the second point, that of providing for giving effect to the decision of the court and the certificate founded upon it. I shall read the very words of the act.

The learned Chief Baron read from the statute which, it may be observed, is substantially identical with our own sec. 262 of ch. 174, which is as follows:—

And the said certificate shall be sufficient warrant to such sheriff or gaoler and all other persons for the execution of the judgment as so certified to have been affirmed or amended and execution shall thereupon be carried out on such judgment, or if the judment has been reversed, avoided or arrested the person convicted shall be discharged from further imprisonment, and the court before which

(1) 1 Den. C. C. 565.

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he was convicted shall at its next session vacate the recognizance of bail if any.

The Chief Baron then proceeds—

This difficulty may arise; if we send back a certificate that this conviction is bad, I am not sure that the man would not be entitled to a *habeas corpus* to know why he is detained, and why the sheriff does not instantly discharge him; and it might be a most serious question whether he ought not, from the plain, manifest and clear words of the act, instantly to be discharged * * there is provision for everything which is really contemplated by the act. The sheriff is called on to discharge the prisoner if the conviction is avoided. In the event of the judgment being affirmed and amended then execution is to issue upon the judgment so affirmed and amended, But there is not a syllable in the act that points to any power in the sheriff, or anybody else to detain the prisoner or in any court to try him in the event of a *venire de novo* issuing. On these grounds, in my judgment, this court is not competent to award a *venire de novo*, and, I think, that the remark, in a case I have already cited, that the prisoner ought not to be deprived of his writ of error, applies with equal strength to the prosecution.

And he concludes his most exhaustive judgment thus:

In my judgment the prisoner ought to be left to his writ of error, and as that is my opinion in point of law, giving to the statute my most anxious and deliberate consideration, I abstain from giving any opinion whether a writ of error ought, or ought not, to be granted, or what ought to be the result of a writ of error if it were granted, assuming the facts to be true. These matters are not in my judgment properly now before the court and I think it best to abstain from giving any opinion upon them. In my judgment this court has no authority to interfere, and I am clearly of opinion without the slightest doubt or hesitation that this court has not any power to award a *venire de novo* and, in that way, grant a new trial. I think the awarding of a *venire de novo* belongs exclusively to a court of error. This court by otherwise construing the words which have been referred to "to make such order as justice may require" would not be expounding the act, which alone it has the province to do; but would, in fact, be legislating and taking to itself an authority which the legislature never intended to confer upon it.

The judgment of Erle J. is pronounced with equal force, that the objection taken constituted neither ground of error upon a writ of error, nor had the court under the statute constituting it a court for the con-

sideration of crown cases reserved, jurisdiction to entertain it. He says: 1888

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It is alleged that the prisoner may have intended to challenge Thorniley and have lost the opportunity because Thorne was called, and that this possible loss of challenge is error vitiating the trial. No authority,

He proceeds:

has been adduced to shew that such a mistake has ever been held to be a ground of error.

He then reviews all the civil cases wherein a similar mistake had occurred and thus states the conclusion to be deduced from them.

According to these authorities a misnomer appearing on the record is always ground of error if not amended, but it is no ground of new trial if the person who was sworn was a person that was summoned and no injustice was done. The cases further shew that if a person not summoned was sworn in the name of one who was summoned, it might or might not be ground of new trial according to the discretion of the the court,

or

if a person not on the panel answers to the name of a person on the panel, such personation may or may not be ground of new trial according to the discretion of the court.

As however all these cases were civil cases he adds:

As they relate to verdicts at *Nisi Prius* they differ materially from a verdict under a commission of *Oyer* and *Terminer*; with respect to such a verdict one case only has been found, namely, the case of a juryman (1), where Joseph Currie answered to the name of Robert Currie on the panel and the conviction was affirmed by twelve judges unanimously, the summons having been served on Joseph Currie and the bailiff intending he should serve. This unanimous opinion (he says) of the whole body of judges is a decision against the principle relied on for the prisoner, viz: That the variance between the name of the person called and the name of the person sworn may have misled him in his challenge.

And again:

The possible hardship of having lost a challenge from ignorance is no ground for vitiating a verdict as was said in *Rex* v. *Sutton* (2); where an alien was sworn on the jury without the knowledge of the defendant.

And again:

(1) 12 East 231. (1) 8 B. & C. 418.

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Thus far I have considered the question as if the court was in the present state of the record legally qualified to decide whether a *venire de novo* should be granted, but that writ is not lawful without an entry on the record shewing a valid ground for issuing it. See *Corner* v. *Shew* (1). If in this case it issued without legal ground appearing on the record the new trial would be erroneous, and the verdict thereon no ground for judgment. It is therefore necessary to see what entry could be made.

And upon this point he says:

The entry must be according to the supposed fact and ought to be traverseable so that the truth should be legally ascertained. That entry is essential for a judgment in error, and I cannot assent to the notion that every judicial officer who tries an indictment may receive a rumor and if he believes it, make an entry accordingly, to vitiate a record otherwise correct and so bind other parties and courts by an assumption which may be disputed; thus in point of substance there is no ground of error and in point of form no ground of error appears on this record.

Then as to the statute under which the court of criminal appeal for hearing reserved cases sat, he says:

The provisions of 11-12 Vic., ch. 78 are in terms confined to judgments after conviction, there is no authority given to alter the verdict in any way—none to treat a verdict as a nullity and to grant a new trial. The authority is express to vary the judgment in any way, and even to enter an adjudication that the prisoner ought not to have been convicted, but the verdict is to be left to stand notwithstanding such entry. It is true there is a general power to make such order as justice may require; but this general power follows after specific powers relating to judgments only, and the general words, are to be restricted by the proceeding words and construed to be *ejusdem generis*.

Williams J. was also of opinion that the point reserved did not come within the statute 11-12 Vic., ch. 78. The questions contemplated by the statute as authorized to be reserved were, in his opinion,

questions of law which the judge before whom the case is tried may reserve in his discretion, but he cannot reserve a point which he could not have decided finally. If, he says, the alleged mis-trial could have been cured by a verdict, it would have been helped by the verdict which has been given; I only mention this, he says, to show that the point as it stands before us must be regarded as oc-

(1) 4 M. & W. 167.

curring after verdict. If that be so it seems to me to follow that it is not a question of law which has arisen at the trial, within the meaning of the statute. Now, he continues, in the present case, if the point had been one which could have formed ground for arresting judgment the presiding judge might have decided it, for I do not mean to say that such a point may not be regarded as arising at the trial within the meaning of the statute; but a point like the present could not be raised in arrest of judgment. It could only in the ordinary course of law be made the subject of a writ of error in fact; and I am of opinion that it was not intended by the statute to substitute this court for a court of error, as to errors in fact. I do not see any thing in the statute that enables the presiding judge to collect the materials for such a tribunal. It is said the point was brought to the attention of the judge while he was still acting under the commission in the assize town; but I am at a loss to know what power his commission gave him to act in the matter. I think he might just as well have acted after as during the assizes. There is no doubt that if his object were only to recommend the prisoner to the crown for a pardon, on the ground that he had not been fairly tried, the judge might collect information for the purpose at any time, and from any source on which he though it right to rely. But when the object is to ascertain whether a *venire de novo* ought to be awarded on the ground that there was error in fact, constituting a mistrial I can see no function the presiding judge whether at or after the assize has to perform in the matter or which it was meant by the statute to transfer from him to this court in any event.

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The learned judge was further of opinion that it was unnecessary for him to consider the question whether, if the point was before the court expanded on the record on a writ of error, there ought to be a *venire de novo*, as to this he says—

It would be unbecoming in me, aware, as I am, of the conflicting opinions of my brother judges, to treat this question other than as a very doubtful one. I will only observe that if the facts stated for our consideration had been assigned as error in the ordinary course the question might have assumed a very different aspect if the crown had pleaded in answer to them (as perhaps it might,) that the juryman, William Thorniley, was personally well known to the prisoner, and was seen by him to go to the book to be sworn, and that he never had any intention or wish to challenge that man.

Crompton J. was of opinion that there was no ground which, in point of law, justified the court to interfere with the conviction. He says:

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The present seems to me one of those cases where an irregularity has occurred in the course of the proceedings which does not necessarily vacate the verdict, but where the court in which the record is, in a civil action, or the crown in the exercise of its prerogative may interfere if any unfairness or real prejudice has occurred but where such interference is only matter of discretion. And, again, the argument for the prisoner is that he may have been prejudiced by supposing, from the fact of the name of the other person having been called, that the juryman he had the opportunity of challenging was the person whose name was really called, and so that he may have lost the opportunity of challenging the one whom he would have wished to challenge. I think the case is the same in principle as that of the juryman in the note to *Hill* v. *Yates* (1). If, (he says further) the case is not precisely one of misnomer the alleged prejudice to the prisoner seems to me precisely the same. I am not aware of any authority or case in which the fact that a prisoner has been ignorant of some matter which might have caused him to challenge a person who came to the book to be sworn, has been held to vitiate a verdict in point of law, and I apprehend that it would not do so even if it appeared that the prisoner had been purposely misled, though it would be matter for the consideration of the court in a civil case, in exercising their discretion in granting a new trial, or for the advisers of the crown in the exercise of the prerogative of mercy. It would be, he adds, most mischevous if every irregularity of this nature, however happening, and even if contrived by or assented to by the prisoner or his friends would, necessarily vacate a verdict; if it would neces-sarily have that effect the same principle would apply to the case of an acquittal, even though the irregularity were caused by the prosecution. I am not aware that any case has carried the doctrine so far as would be necessary to support the objection in question and in no criminal cases has any similar objection prevailed that I am aware of.

As to awarding a *venire de novo* he says,

The books are full of authority to show that no *venire de novo* can issue except on matter appearing on the record sufficient to justify such award, and if it be improperly awarded it is error.

And, again,

I will not undertake to say how far, any such objection as the present could properly be put upon the record if a writ of error were brought, and the judgment and proceeding had to be formally entered on the record.

And, again,

In Hales's Pleas of the Crown (2) it appears that if a juryman be returned as sworn, it cannot be assigned for error that he was not

(1) 12 East 230. (2) P. 296.

sworn.

And again:

But here we should be proceeding on the alleged fresh discovery of facts after judgment without anything on the record to justify us.

And again:

In the case of a writ of error and error in fact being assigned, the crown in the case of a conviction, or the prisoner in the case of an acquittal, would have the right of traversing the matter so alleged and so questioning its truth. I feel great difficulty in seeing how we can act without there being some such opportunity afforded to the parties or, at all events, without the matter being on the record.

Crowder J. was of opinion that the case did not come within the statute but, assuming it to do so, that there had been no mis-trial and that, before he could arrive at the conclusion that the verdict was a nullity, for the objection taken he 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, and if there were any such rule of law which would render such a mistake *per se* fatal, he should contemplate with the utmost alarm the awful consequences which might ensue from it to the administration of criminal justice throughout the country. Prisoners if convicted might have another chance of escape or if acquitted might have their lives and liberty again imperilled, for that if such a mistake be fatal it is equally so whether the accused be acquitted or convicted and whatever might be the nature of the crime with which he should be charged. "But," he says, "I can find no such rule of law." Then, referring to the case of a juryman, he says:

It was contended that there was a mis-trial, but held by all the judges that there was not but only a misnomer which did not invalidate the trial.

But he adds:

As regards the main ground on which it was contended before us that there had been a mis-trial the case of a juryman is directly in point. It is said that Mellor's right to challenge was presumably

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prejudiced because he may have desired to challenge the name of William Thorniley but not that of Joseph Henry Thorne and may have known neither of them personally, and so in the case of a jury man the prisoner might have had cause of challenge against Robert Currie and thus the prisoner might have had his right of challenge curtailed if he knew neither of the men personally—the trial, however, was held valid by all the judges.

Willes J. as to the construction of the statute concurred in the judgment of the Lord Chief Baron Pollock, and in the review of the cases relied upon by the prisoner he concurred with the judgment of Erle J. and he adds:

If a foreigner had been on the jury unknown to the prisoner the conviction would have been unobjectionable even though the prisoner were proved to have disliked foreigners, and to be sure to have challenged one if he knew to him to be so; citing *Rex* v. *Sutton* (1). Again, if the juryman had been described on the panel by a wrong Christian name, and had been called merely in court and sworn upon the jury the conviction would have been valid. Yet such a mistake might, equally with that in question, have misled the prisoner and prevented him from challenging.

And again:

If this was a mis-trial, the prisoner having been 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. It is not suggested that the prisoner has not had a fair trial, nor that he has sustained any prejudice. Far from its appearing that he was deprived of his challenge it is even consistent with the facts that he may have known who was about to be sworn and advisedly abstained from objecting to him.

Channell B. was of opinion that there was no mis-trial, and he concurred in the opinion of Erle J. and in the reasons upon which that opinion was formed—and he adds that he was unable to distinguish the case from the case of a juryman upheld and supported as he considered it was by *Hill* v. *Yates* (2). He says:—

The case of a juryman was the case of a capital felony. *Hill* v. *Yates* was a civil action; but it is clear from the report that the court in the last case had in its mind criminal as well as civil cases, and that the objection was considered with reference to both classes of cases. I conclude that in the case of *Hill* v. *Yates*, in the year 1810,

(1) 8 B. & C. 417. (2) 12 East 231.

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the then 12 judges fully recognized and sanctioned the opinion of the 12 judges their predecessors in the case of a juryman come to 27 years before. With great deference to the Lord Chief Justice, I cannot bring myself to doubt that the subject was in these cases fully considered, or that they are to be treated otherwise than cogent authorities upon the question now before us. Assuming that there has been an irregularity or a mis-trial, it seems to me the objection would only be ground of error.

As to the jurisdiction of the court under the statute to entertain the question, he says:—

By the statute referred to, the court is empowered with respect to questions of law reserved to hear and finally determine the same and therefore to reverse, affirm or amend any judgment, or to avoid such judgment and order an entry to be made that the party ought not to have been convicted, or to arrest the judgment, or order judgment to be given at some other session of Oyer and Terminer if no judgment shall have been previously given, or to make such other order as justice may require; it seems to me that the statute contemplates a final decision of the case without any ulterior proceedings except such as may be necessary to give effect to the judgment of this court, and that it did not contemplate or authorize any proceedings in the shape of a *venire de novo* or in the nature of a new trial.

He did not, he said, attach much weight to the objection as to the time at which the discovery of the alleged irregularity was made, and to the consequent objection that the question raised was not reserved at the trial.

Byles J., while expressing no opinion upon the construction of the statute beyond expressing considerable doubt whether it authorized the court to grant a *venire de novo*, entertained a clear opinion that the irregularity complained of did not constitute a mis-trial.

It is, he said, an old and rational rule of law that where the parties to a transaction or the subject of a transaction are actually corporeally present, the calling of either of them by a wrong name is immaterial, *presentia corporis tollit errorem nominis.* In this case there was, as soon as the prisoner omitted the challenge and thereby in effect said "I do not object to the man standing there" a compact between the crown and the prisoner that the individual juryman there standing corporeally present should try the case.

And again:

A mere possibility of prejudice cannot vitiate the trial, the case in

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the note of *Hill* v. *Yates* (1) seems to me to confirm this view and to be a solemn decision by all the judges seventy five years ago, that notwithstanding some earlier cases a mistake of this nature is no mistrial. If another rule is once introduced, new trials in criminal cases will come in like a flood.

In *Reg.* v. *Feore* (2) the learned judge who pronounced the judgment of the majority of the court seems to have been of opinion that the ground upon which the majority of the court in Mellor's case rested their judgment that the question there raised

was not a question of law which arose at the trial

was that the question was not raised until after sentence had been passed; for he says that this point did not arise in *Reg* v. *Feore* (2), for the reason that in that case

the question was raised before the end of the trial, that is before sentence.

and here he treats the trial as not ended by the verdict. But from the extracts above quoted from the judgments delivered by the learned judges in *Mellor's Case* (3) it is apparent that none of them rested his judgment upon any such ground. The grounds upon which they proceeded as most clearly and emphatically expressed by them were: That the jurisdiction of the court was limited by the statute to questions of law arising upon the trial, either out of matter appearing upon the record or in the evidence brought to the judge's notice during the trial, which question of law the judge might himself have judicially determined finally, or might in his discretion reserve for the consideration of the court instead of determining it himself—that the statute does not apply when the judgment of the court upon the question submitted by the judge who tried the case would not finally dispose of the case or where anything remained to be done beyond giving effect to such final decision; that after verdict the judge before whom the case had been tried had no jurisdiction or authority whatever to collect

(1) 12 East. 231.

(2) 3 Q. L. R. 228.

(3) 1 Dears. & Bell 468.

material—that is, to receive information in any manner of any matters alleged to be facts, upon which as established facts to make a statement for the purpose of submitting thereon a question of law—that the statute does not point to any power in any body to try the prisoner again, or empower the court to dispose of any matters not judicially ascertained to be facts, or directly or by implication deprive the crown of the right and opportunity it would have upon a writ of error to aver and prove that the allegations upon which the contention that there had been a mis-trial was rested were not founded on fact, or to displace the effect of such allegations, if true, by submitting to judicial inquiry other facts pleaded—as for example that the prisoner had not been deprived of an opportunity to challenge the juryman of whose presence on the jury he complains, for that in point of fact the prisoner knew the juryman personally, and that he never intended or wished to challenge him, and that upon the juryman being presented to him personally, the prisoner well knowing him, voluntarily accepted him as a juror upon his trial, and declined challenging him—that the statute gives no jurisdiction over a case of mis-trial—none to alter a verdict—none to treat a verdict as a nullity or to grant a new trial—either by means of a *venire de novo* or otherwise—that the authority conferred by the statute is confined to judgments after conviction, which judgments may be affirmed, amended or avoided, but that the affirmance, amendment or avoidance must be a final disposition of the case—that the statute never contemplated substituting the Court of Criminal Appeal for a Court of Error, as to errors in fact—and that the irregularity complained of, if objectionable at all, was so only as error in fact which could only be enquired of on a writ of error.

These were the grounds upon which the judgments

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of the majority of the learned judges in Mellor's case proceeded, and not as suggested in *Reg* v. *Feore* (1) that the question did not arise upon the trial because of the objection not having been taken until after sentence had been passed. Now in the case as submitted by the learned judges to the Court of Queen's Bench on its appeal side, which is the court for crown cases reserved in the Province of Quebec, the learned judge says that after verdict counsel for the prisoner moved in arrest of judgment not upon any matter appearing on the record but stated in an affidavit or affidavits, and that the verdict rendered against the the prisoner should be set aside and annulled, and that the prisoner if not liberated and discharged should be afforded a new trial upon the grounds stated in the affidavits. The learned judge further says that by affidavits and documents produced to the court upon behalf of the prisoner on the above motion and by the deputy of the Attorney General certain facts were established which the learned judge states to be as follows (2):—

Now as to this statement it is to be observed: 1st. that the matter complained of does not constitute ground for arrest of judgment and therefore the learned judge could not upon the ground suggested have entertained the motion in arrest of judgment.

2ndly. As a motion in arrest of judgment can be entertained only upon matter appearing upon the record, affidavits stating new matter not appearing upon the record cannot be received upon such a motion; in so far, therefore, as arrest of judgment was concerned the matter stated in the affidavits was not judicially before the learned judge.

3rdly. The learned judge had no jurisdiction to grant a new trial or to hear and determine the motion so far as it asked for the discharge of the prisoner or

(1) 3 Q. L. R. 228. (2) See p. 423.

for a new trial; the matter stated in the affidavits therefore was not judicially before the learned judge for any of the purposes for which the motion was made or, indeed, for any purpose, and here applies one of the reasons so strongly pressed by the learned judges constituting the majority in *Mellor's Case* (1):— that the learned judge could not reserve a question of law which he could not himself have finally determined, or a question founded upon facts which did not appear judicially before him upon the trial nor had he any jurisdiction after verdict to collect material—or to receive information in any manner of any matter alleged to be facts upon which, as if they had been judicially established, he should submit a question of law to the court.

4thly. That the matters stated by the learned judge to have been established by the affidavits and the documents therein referred to were only cognizable in a court of error as error in fact, and that there is nothing in the statute to deprive the crown of the right to dispute the truth of such matters or to displace them, assuming them to be true, by pleading that the prisoner had lost no challenge or opportunity of challenge, for that he personally knew Moïse Lamoureux and had no intention or wish to challenge him, and that he was given an opportunity of doing so which he knowingly and voluntarily declined to avail himself of; the truth of which, as appears by the learned judge's statement assuming it to be correct, could readily have been established.

In fact the case is almost identical with the case of *The Juryman* (2) for Moïse Lamoureux was the person served with a summons to attend as a juryman during the court. He was duly qualified. He was served with the summons by the sheriff at his dwell-

(1) 1 Dears. & Bell 468. (2) 12 East 231.

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ing house situate in the concession from which the sheriff appears to have been summoning the jurors. We may assume without prejudice, although it is not expressly stated in the case, that the summons with which he was served was addressed to Joseph Lamoreux, a fact which probably Moïse did not know, for he may not have been able to read the summons, &c. The case then is simply this, that Moïse Lamoureux, a qualified juryman was summoned by the sheriff to attend the court as a juryman, and was placed upon the panel in, and answered to, the name of Joseph, thus shewing a plain case of misnomer precisely, as appears to me, within the decision of the case of *The Juryman* (1). He was well known personally to the prisoner, whether the latter knew his christian name or not. It is plain, therefore, from the statement of the learned judge that there was no mis-trial and that the prisoner suffered no prejudice whatever. Indeed, it seems highly probable from the manner in which the motion was made and the form of the motion supported by affidavits that Moïse's christian name was known to the prisoner or that at least he was known not to be Joseph, to which name he answered, and that he was accepted by the prisoner as a juror to sit upon his trial with the reserved intention in the mind of the prisoner or of his friends in case of conviction to have the motion made which was made; but however that may be, it appears to me to be clear upon principle and the authority of Mellor's case that the court of crown cases reserved had no jurisdiction to entertain the question, and that it only could be raised upon a writ of error in fact; and that, upon principle and the authority of *The Case of a Juryman* (1), there was no mis-trial.

I am clearly of opinion also that the case comes precisely within sec. 246 of ch. 174 of the Revised Statutes

(1) 12 East 231.

which enacts that:

> Judgment, after a verdict upon an indictment for any felony or misdemeanor, shall not be stayed or reversed as for any misnomer of any of the jurors, nor because any person has served upon the jury who was not returned by the sheriff or other officer.

In *Mellor's Case* (1) the act 7th Geo. 4, ch. 64, sec. 21 from which the above sec. 246 of ch. 174 R. S. C. originally was taken did not apply because both Thorne and Thorniley were duly returned by the sheriff and entered upon the panel in their own proper names respectively, and the mistake there was that one answered when the other was called, but here Moïse Lamoureux who was summoned to attend was not entered on the panel and he answered to the name of Joseph Lamoureux, who had not been summoned but whose name was upon the panel, and thus Moïse who was not returned by the sheriff served upon the jury —the identical case mentioned in the statute.

For the above reasons, I am of opinion that the appeal should be dismissed,—the conviction affirmed and the case remitted.

Appeal dismissed.

Attorney for appellant: *J. D. Leduc.*

Attorney for respondent: *F. X. Mathieu.*

(1) 1 Dears. & Bell 468.