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*Mar. 2.

*Mar. 26.

ALBERT VICTOR DREW.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Perjury—Judicial proceeding—De facto tribunal—Misleading justice—Jurisdiction—Construction of statute—R. S. Q. arts. 5551, 5561—*Criminal Code, sec.* 145.

The hearing of a charge by a magistrate, assuming to act as a Justice of the Peace having authority to hear it, is a judicial proceeding within the meaning of section 145 of the Criminal Code and a person swearing falsely upon such hearing may be properly convicted of perjury, notwithstanding that of magistrate had no jurisdiction over the subject matter of the complaint.

Judgment appealed from (Q. R. 11 K. B. 477) affirmed, the Chief Justice and Mills J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), on a criminal case reserved affirming the conviction of the appellant for perjury, and the sentence pronounced against him upon such conviction in the Court of King's Bench, Crown side, for the District of Beauharnois.

The offence of perjury of which the appellant was convicted was committed upon the hearing of and information for trespass under article 5551 of the Revised Statutes of Quebec, upon lands situate in the County of Huntingdon, in the District of Beauharnois. The information was laid and the case heard and decided before the Recorder of Valleyfield, who was *ex officio* a Justice of the Peace in and for the whole of the

* PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Mills and Armour JJ.

(1) Q. R. 11 K. B. 477.

District of Beauharnois, but did not reside in the County of Huntingdon where the offence was charged to have been committed and was, therefore, without jurisdiction over the subject matter of the complaint in consequence of the provisions of article 5561 of the Revised Statutes of Quebec limiting the jurisdiction in such matters to one or more Justices of the Peace residing in the county in which the offence has been committed.

The questions raised on this appeal are stated in the judgment, now reported.

Wilson for the appellant.

Duncan McCormick K.C. for the Crown.

THE CHIEF JUSTICE (dissenting).—This is an appeal from the judgment of the Court of King's Bench at Montreal reported in volume 11, at page 477 of the Rapports Judiciaires de Québec. I would allow it and quash the conviction in question for the reasons given by Würtéle and Blanchet JJ., *loc. cit.*, which to my mind are irrefutable.

It could not but be conceded, as it has been unanimously by the judges in the court *â quo*, and by the respondent (private prosecutor) at bar, that the Recorder had no jurisdiction over the case wherein the appellant is alleged to have committed perjury. Secs. 24 and 26 of the Quebec Interpretation Act, declaratory of the common law, enact that :

When anything is ordered to be done by or before a judge, magistrate, functionary or public officer, one is understood whose powers or jurisdiction extend to the place where such thing is to be done ; and

Whenever an oath is ordered to be taken or received, such oath is received by any judge or magistrate authorized to that effect having jurisdiction in the place where the oath is taken.

Then art. 5561 of the Revised Statutes expressly deprives the recorder of any jurisdiction in the case in question.

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The proceedings before him were not judicial proceedings, because he was not a judge or magistrate, *quoad* the case. He was not, it is admitted, a magistrate *de jure*. Neither could he have been at Valleyfield, not being a resident of the County of Huntingdon, a magistrate *de facto*, any more than if he had been sitting at Toronto or at Vancouver. A *de facto* officer's jurisdiction cannot be territorially more extensive than the *de jure* one whose functions he assumes. Where the statute expressly enacts that only the magistrates residing in the County of Huntington have jurisdiction over the case, there cannot have been, outside of that county, whether in the same district or a thousand miles from it, a *de facto* magistrate having any reasonable pretence to jurisdiction. The respondent's contention that a magistrate *de facto* can exercise jurisdiction in any case at a place where the statute expressly decrees that there can be no magistrate *de jure* in that case is untenable. A magistrate *de facto* cannot have more powers than a magistrate *de jure*. The proceedings before the Recorder at Valleyfield were not only voidable, but were void of a nullity of *non esse*. As is said in the civil law, *defectus potestatis, nullitas nullitatum*. No plea of *autrefois acquit* or *autrefois convict* could be based on his decision. No appeal was necessary to set it aside; *Attorney General* v. *Hotham* (1); and a writ of certiorari to have it quashed could have been granted though taken away by the statute (sec. 5579) if he had had jurisdiction. Had he committed any one for contempt for not answering his summons as a witness or for refusing to answer his questions, his warrant would not have been worth the paper it would have been written upon, besides rendering him liable in damages. Nay, under sec. 153 of the Code, he was perhaps guilty of an indictable offence for having illegally received

(1) Turn. & Russ. 209 at p. 219.

the appellant's oath. There was, in law, no oath taken before him, for he had not the power in that case to receive any. And if there was no oath, no judicial oath, how can there have been perjury? The respondent's contention that section 145 of the Act bears the construction that there may be perjury where there is no judicial oath is irrational and untenable. Such an incongruity cannot have been intended by Parliament.

In fact that section, as I read it, plainly says that it is only when the false oath is received by a competent tribunal, or in other words by a person duly authorized to hold the judicial proceeding in which it is taken, that it is indictable for perjury. The words upon which the court below rely to hold the contrary are those of the last part of that sec. 145 which read as follows:

> Or before any *person* acting as a court, justice or tribunal, *having power to hold such judicial proceeding*, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place, or was otherwise invalid.

Now, if the words "having power to hold such judicial proceeding" are read immediately after the word "person," as by the punctuation they must be, they qualify the rest of the section and the oath must have been received, in any case, by one having the power to hold the judicial proceeding. And that they must be so read is rendered free from doubt by referring to the French version, which is the law just as much as the English version, though not brought to the attention of the court below nor of this court.

That reads as follows:

> Ou devant une *personne* agissant comme cour, juge ou tribunal, *autorisée* à faire cette procédure judiciaire, qu'il soit légalement constitué ou non, et que la procédure ait été regulièrement instituée ou non devant cette cour ou personne de manière à l'autoriser à faire la

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procédure, et lors même que la procédure aurait eu lieu dans une localité où elle n'aurait pas dû avoir lieu, ou qu'elle fût invalide sous d'autres rapports.

There is no ambiguity in these words. It is undoubtedly to an oath taken before any person having power to hold the judicial proceeding wherein that oath was taken that the rest of the section exclusively applies, and of two possible constructions in one of the versions, that one which reconciles the two must be followed. So that the words "*having power to hold such judicial proceeding*" in the English version must be read as applied to the word *person* therein, as the corresponding words in the French version unquestionably must be. Here, it is conceded, the Recorder had no more power to hold the judicial proceeding in question than a citizen of the United States or of China would have had, or than he, himself, would have had if he had held his court in New York or Pekin.

It is, therefore, still the law that

> no oath whatsoever taken before persons * * * who are legally authorized to administer some kind of oaths, but not those which happen to be taken before them * * * can ever amount to perjury in the eye of the law, because they are of no manner of force, but are altogether idle. 1 Hawk. P. C. Bk. 1, c. 69, s. 4.

Section 145 of the Code must be restricted to voidable, not to void, proceedings, to judicial, not to extra-judicial oaths as this one was. And an oath administered at a place without his territorial jurisdiction by an officer authorized to administer oaths is absolutely void.

The court *a quo* in its formal judgment seems to rely upon the fact that the appellant's oath in question was taken before a tribunal of his own selection. I fail to see how that can affect the question of the Recorder's jurisdiction, and why the appellant could be convicted of perjury if any other witness in the

case could not have been. For the appellant could not either impliedly or expressly confer upon that magistrate a jurisdiction which the statute exclusively vests in the magistrates of the County of Huntingdon. When it is the jurisdiction of the person that is deficient, a party who invokes the jurisdiction of a court is not thereafter as a general rule allowed to question it, but that is not so when the court has no jurisdiction over the subject matter, or has no lawful power to act by reason of the fact that, as in this case, such power is expressly withheld by the statute, which expressly decrees (sec. 5561 R. S. Q.) that no other magistrates than those residing in the county where the trespass was committed, have jurisdiction over it, thereby in unambiguous terms taking away from this recorder any jurisdiction that he might perhaps otherwise have had over the case.

SEDGEWICK, GIROUARD and DAVIES JJ. concurred in the judgment dismissing the appeal for the reasons given by his Lordship Mr. Justice Armour.

MILLS J (dissenting).—My conclusions in this case are so entirely in accord with those of Mr. Justice Wurtèle in the court below, that I might have contented myself with concurring in his opinions, and in the reasoning by which he has supported them. I accept his views of the law applicable to this case, as he has expressed them; but, as I find that some of my brethren in this court concur in the judgment of the majority of the court below, I feel it my duty to state with some degree of fulness the opinions which I entertain upon the subject.

The principles of the common law in respect to perjury have long been well settled; but some of the decisions in relation to this offence lie very close to the

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border line which separates those cases which have been held to be wilful and corrupt perjury, from another class which may be punished as contempts of court, or as misdemeanors, but which cannot be reached under the law relating to perjury.

Some of the cases in which the parties accused have been convicted of false swearing have been sometimes questioned, because it was doubted whether the principles of the law of perjury were strictly applicable, because, when analysed, some of the elements which go to make up the crime of perjury seemed to be wanting. There were, nevertheless, cases in which the parties had sworn falsely, and for which the presiding judge felt very strongly that the offender, in the interest of society, deserved punishment; and so a construction was given to the law, in order that the offender might be reached, which seemed to go beyond the principles which had been before accepted and acted upon, and its applicability to these cases was sometimes thought open to question. So, when it was proposed here to codify the Criminal Law, a section was inserted to embody the law of these cases, and to remove any doubt, if doubt previously existed, that they lay within the borders of the crime of perjury, and the law was made clear, where before it might have been regarded, by a thoughtful student of its principles, as doubtful, by including them within the definition. It only requires an examination of these cases, and the provisions of section 145 of the Code, to see that the framers of the section aimed at making the definition of perjury cover the whole ground embraced within the decisions of the courts upon the subject.

I think it is only necessary to consider the system of jurisprudence as the common law made it, and as those cases extended it, in order to obtain a clear view,

and to form a right appreciation of the interpretation of section 145 of the Code. We have to consider, in this case, a question of perjury committed before a tribunal that had no right whatever to try the cause then before it; that had no more power to adjudicate upon the question of trespass where it was laid, than a judge of Quebec would have to try a cause in the Province of Ontario; and it would require a very clear declaration in the statute to satisfy me that it was the intention of Parliament to clothe a self-constituted tribunal, that had no existence in law, with the dignity, and surround it with the protection, which attaches to the proceedings of one properly created under the authority of the State, for the purpose of discharging important public duties. We have here a magistrate acting as such in one county, clothed by the law with the necessary power to act in such matters only in another county, and we have a witness before him in this illegal and void proceeding, which he had no right to institute, charged with perjury, and put upon his trial for that offence, and convicted, for testimony given before one who was wholly without judicial authority, sitting as a court which, in law, had no legal existence. All the importance, and all the protection, which it is the policy of the law to bestow on the proceedings of a judicial tribunal, clothed with legal authority, has, by the proceeding in this case, been extended to one that has neither in fact, nor in law, any jurisdiction.

Where a limited tribunal, whether that limitation is due to the fact that the power has been generally withheld, or whether it is due to the fact that it is sitting outside of the territorial limits of its jurisdiction, takes upon itself to exercise judicial functions which do not belong to it, its decision amounts to nothing, its proceedings are void, there can be no appeal from

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its judgment, and the false testimony given before it does not constitute the offence of perjury. (1) Yet, in this case, it has been held that a false oath taken before one who has assumed judicial functions which he did not possess, instead of being regarded as an absolutely void proceeding is, nevertheless, valid so far as to subject the witness to punishment for perjury. Such a recognition is altogether at variance with the settled principles of the criminal law, for it gives to the proceedings of an illegal body the same degree of protection and dignity that it bestows upon a legal tribunal engaged in the discharge of its public duties.

No appellate court could, in a civil action, recognize such a tribunal by entertaining an appeal from its judgment, and no more should any appellate tribunal recognise the proceedings had before a magistrate sitting as a judge outside of his territorial jurisdiction, and having no authority in law to investigate and decide the question in respect to which he has ignorantly usurped judicial authority. (2)

There are some cases of false swearing which the common law regards as perjury; there are some cases of false swearing which cannot be tried and punished as such. The distinction rests upon well settled principles of jurisprudence which, in this regard, embody the underlying principles of the system. What is, and what is not, perjury at common law can be easily traced, and clearly ascertained by its students. But at every step we observe the line of distinction between law and ethics. Law, as Lord Stowell has well observed, has embodied and adopted

(1) *Attorney Gen.* v. *Hotham*, McLean, 113; *Rex* v. *Foster*, Turn. & Russ. 209. Russ & Ry. 459; *Pegram* v. *Styron*, 1 S.C. (L.R.) 595; *Reg.* v. *Ewington*, Car. & Mar. 319.

(2) *United States* v. *Babcock*, 4

the principles of ethics to a limited extent: it travels with them only a certain distance, and stops there. You are not at liberty to go further and say the general speculation would support you in a further progress. It is upon this rule that the law has defined and limited the crime of perjury; and if we were to extend it, so as to go beyond the requirements of the State, we might convert a salutary provision, into a means of vexatious persecution. Care must be taken not to sacrifice restrictions, justified by experience, to what may be regarded as a commendable desire to restrain falsehood, outside of those matters that are being judicially investigated. Neither the courts of law nor the bar desire to break down the distinction recognised, between falsehood sworn to in the course of justice, in a case which is being legally investigated and tried, and falsehood in every other circumstance. The distinction is one made by the law and founded upon reason and experience, and which has given to the common law, to some extent, its symmetrical features, and makes it capable of being expounded on principles of right reason, which were said by its votaries to be the perfection of the law, and I am not prepared to so interpret an Act of Parliament as to mar those features, without any adequate reason.

The criminal law never undertook to embrace within its boundaries the whole field of human conduct and to punish every wrong which one person might do to another as a crime. A large number of offences have been left with each individual, within the limits of the law, to redress for himself. He may decline to deal with a cheat, or to have any intercourse with a man who has wronged him. The law does not undertake to regulate these matters, because each person has adequate means of punishing the wrongdoer without recourse to the law at all. And so there may be many

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moral offences which the law does not punish, because the best interests of society would not be advanced by meddling with them as public offences.

The courts have undertaken, by their decisions, to draw the line in respect of false swearing, and to determine what false oaths should be punished as perjury, and what kind of false swearing should not fall within the limits of that offence.

Perjury (as defined by Hawkins), is a wilful false oath, by one who being lawfully required to depose to the truth in any proceeding in the course of justice swears absolutely, in a matter of some consequence, to the point in question, whether he be believed or not (1).

Mr. Bishop, in his work on Criminal Law defines perjury to be

the wilful giving under oath, in a judicial proceeding, or course of justice, of false testimony material to the issue, or point of inquiry (2).

We have to consider the tribunal before which an oath is taken; the question of materiality of the evidence to the issue; the testimony as being false; the intent of the witness and other matters. The common law required that the oath should be administered in some judicial proceeding, or course of justice, which must be taken in the way directed by the law, and before an officer who is legally authorised to administer it. I do not think that section 145 of our Code has made any alteration in the law of perjury in this particular. It is generally admitted that where a statute sets out a form of oath required that the statute is directory, and will be sufficiently complied with when followed in substance; so that, if what is sworn to is not true, it will not exempt the person taking it from being convicted for perjury. But if the words of the statute are wholly disregarded no perjury can be assigned, though the oath should be false. The first thing to be noted is, that the oath must be one required in the

(1) 1 Hawk. P. C. 429.

(2) 2 Bishop, Criminal Law [8 ed.] § 1015.

course of justice, or in some judicial proceeding, and must be taken substantially as directed by the law, before an officer authorised to administer it. If a party in a cause becomes a witness for himself, under circumstances in which his testimony is not by the law receivable, it has been held that he may, nevertheless, commit perjury, and this seems to be an extension of his responsibility beyond the limits which a strict adherence to the principle upon which perjury rests would warrant; and so, where one is not a legal and competent witness in a case, but is nevertheless admitted as a witness by the court, and testifies wilfully and corruptly to what is false, he commits perjury (1). In the United States courts, where the principles of the common law, in respect to crime, have been followed, it has been held that where one swears falsely as to his residence, in an application for naturalisation, it is not perjury, because the Act of Congress expressly provides that the oath of the applicant shall, in no case, be allowed to prove his residence, and so his own testimony can not, under the authority of the law, be a legal part of the proceeding (2).

The same principle prevails in the English decisions. In the case of the *Reg.* v. *Stone* (3) it was held that where a Master in Chancery had no authority to administer oaths to witnesses before the Court of Admiralty, the conviction for perjury in an affidavit used in the Court of Admiralty, but sworn to before a Master in Chancery, could not be supported.

Pollock C. B. said:

The conviction must be quashed. The affidavit upon which perjury is assigned is sworn before a Master Extraordinary in Chancery, who has no authority by virtue of his commission to administer an oath before the Court of Admiralty, nor does the practice of the

(1) *Chamberlain* v. *The People*, 23 N. Y. 85.
(2) *Silver* v. *The State*, 17 Ohio, 365.
(3) 22 Eng. L. & Eq., 593.

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Court of Admiralty, in an action upon an affidavit so sworn, convey any authority.

And Parke B. said:

The authority of a Master in Chancery has relation entirely to matters before the Court of Chancery. Although the Court of Chancery may have a certain jurisdiction over the Court of Admiralty, yet the latter court, acting as a Court of Admiralty, is independent of the Court of Chancery, and a Master Extraordinary is not a person having authority to administer oaths in the Admiralty Court. If a man knowing the practice of the court uses an affidavit sworn in this manner, knowing it to be false, he is guilty of contempt of court, but it is not perjury.

In the case of *The Queen* v. *Tyson* (1) the question of the materiality of the evidence came before the Court for Crown Cases Reserved. One Sullivan was tried for robbery. Tyson swore that Sullivan had lived in a certain house for the last two years, and that he had never been absent from it more than two nights during that time. The Warden at the House of Correction at Wandsworth was called as a witness in the case, and testified that the prisoner Sullivan was in the prison at Wandsworth during twelve months of the time that Tyson had sworn that he was elsewhere. Kelly C. B. said:

The real question is whether these statements were *material*. We all agree that they were, as they tended to render more probable the truth of the first allegation,

Bramwell B. said:

The witness was asked his reason for remembering, and thereupon he proceeded to state those circumstances which made him competent to swear to the cardinal matter. One of these circumstances is untrue; why is that not perjury?

Lush J. said:

I was embarrassed at first; but now I am quite satisfied that the allegations on which the prisoner was convicted were calculated to make the jury give a readier credit to the substantial part of his evidence, and therefore became material.

(1) 1 C. C. R. 107.

In this case the materiality of what is sworn to does not depend on its intrinsic importance in respect to the facts of the case. but upon the purpose for which it was sworn to. (1)

In the case of the *Queen* v. *Smith*, (2) reported in the same volume as *The Queen* v. *Tyson* (3) the prisoner was convicted for perjury alleged to have been committed on the hearing of an information before two Justices of the Peace, on an application for an order of affiliation. The prisoner was tried before Cockburn C. J. at the Leicester Assizes for perjury, which was alleged to have been committed upon the hearing of an application for an order as stated. The information laid by the mother was duly proved; and it was shown that the putative father appeared before the Justices, and evidence was given on both sides. The court held that the father having appeared, and not having made any objections to the summons, it was not necessary to refer to it, or give any evidence of its existence on the trial for perjury. It was proved that Mee appeared before the Justices, and that upon the hearing of the information, the evidence, which was the subject matter of the indictment, was given by Smith, who was called as a witness by Mee; but the summons was not produced on the trial of Smith, nor was secondary evidence given of its contents, nor was it proved that such summons had been served on Mee. Kelly C. B. delivered the judgment of the court. He said:

In this case, though there was no summons produced, the information was put in and proved, and it was shown that, upon the hearing of the information before the justices, evidence on both sides was given, and that the prisoner gave the evidence which was the subject matter of the indictment for perjury. Was there any necessity to produce the summons? The original object of the summons was to bring Mee into court. He did appear and no objection was then

(1) *Rex* v. *Greep*, Holt, 535. (2) 1 C. C. R. 110.
(3) 1 C. C. R. 107.

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made to the summons. There was no necessity at the trial for perjury to refer to it and, therefore, it was unnecessary to give any evidence of it.

In the same volume the case of the *Queen* v. *Fletcher* (1) is reported. Here Jane Beswick made a deposition upon oath, and the question was whether, in order to give the magistrate jurisdiction in the case, there should be a deposition in writing upon oath. The case had been tried at the Assizes in the county of Derby, before Cleasby B. In the judgment of the Court of Crown Cases Reserved, Boville C. J. said:

> The objection now taken is that the summons was irregularly issued, because there was no sufficient deposition on oath before it was issued. It has been suggested that under the section in question (7 & 8 Vict. c. 101, s. 3), there must be a written statement on oath—in fact an affidavit—by the woman; but I think at any rate an oral statement, taken down in writing in the usual way in which depositions are taken, must be sufficient. Jervis' Act, being later in time, can not apply here, but certainly more than that Act prescribes cannot be required. The second Act referred to (8 Vict. c. 10, s. 1), does not affect the case. That Act only says that proceedings according to the forms in the schedule, or to the like tenor and effect, shall be valid and sufficient; it does not say that these forms must be used. Then, if all that the Act requires be that the magistrates shall make a record of the evidence orally given, the summons itself seems to me very like a writing to the same tenor and effect, with a form of deposition in the schedule of the second Act.

The Chief Justice after referring to the case of the *Queen* v. *Berry*, (2) goes on to say:

> The case was therefore precisely the same as the present; and all the judges composing the court, except my brother Martin, after taking time to consider, held that the conviction ought to be affirmed, on the ground that the defendant by appearing and not objecting, had waived any irregularity in the issue of the summons.

And Blackburn J. said, after discussing certain features of the case:

> If either of these things be omitted, it is an irregularity for which the magistrate or his clerk is blameable, but it does not oust the jurisdiction. I think if these things were left out altogether the proceeding on the summons would none the less be good. But however this

(1) 1 C. C. R. 320. (2) Bell C. C. 46.

may be, the irregularity may be and was waived by the defendant's appearing and not objecting.

In the case of the *Queen* v. *Johnson* (1), the perjury alleged was committed by false oaths taken before one Thomas Deane, who held an inquest as deputy coroner touching the death of one Owen O'Hanlon. By 6 & 7 Vict. c. 83, s. 1, it is made lawful for any coroner of any county, city, riding, liberty or division, and he is thereby directed, by writing under his hand and seal, to nominate and appoint, from time to time, a fit and proper person, such appointment being subject to the approval of the Lord High Chancellor, Lord Keeper, or Lord Commissioners of the Great Seal, to act for him as his deputy in the holding of inquests; and all inquests taken and other acts performed by any such deputy coroner, under or by virtue of any such appointment, shall be deemed, and taken to all intents and purposes whatsoever to be, the acts and deeds of the coroner by whom such appointment was made. Provided also that no such deputy shall act for any such coroner as aforesaid, except it were through the illness of the said coroner, or during his absence from any lawful and reasonable cause. In this case it was contended, on behalf of the prisoner, that the proceeding before the said Thomas Deane was *coram non judice*, because it was incumbent on the prosecution, in order to show jurisdiction in a deputy coroner, to administer an oath, to prove affirmatively that there was lawful and reasonable cause for the absence of the coroner, and that the facts here did not amount to any evidence of such cause. He also contended that the question was one for the jury, and not for the judge. The counsel for the Crown argued that even if the facts proved were insufficient to show that there was lawful or

(1) 2 C. C. R. 15.

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reasonable cause, still, inasmuch as by section 2 of the same Act it is provided that the inquisitions are not to be quashed by reason of their having been taken by deputy, the oath on which perjury was assigned being an oath on which a good inquisition might have been founded, could not be said to be *coram non judice*, but was one legally administered in a judicial proceeding, and, therefore, one on which perjury could be legally assigned. The first question of law reserved for the opinion of the court was, whether it was incumbent upon the prosecution to make out that there was lawful or reasonable cause for the absence of the coroner from the inquest in question. If not the conviction would stand.

The second question reserved was whether it was for the judge or jury to decide the question of reasonable cause. If for the jury the conviction must be quashed, unless the first question was decided in the negative. If for the judge, then the third question reserved was, whether there was evidence upon which the learned judge might properly decide as he did. If so, the conviction would stand. If not it must be quashed, unless the first question was decided in the negative. The court were of opinion that the conviction should be affirmed. They held that it was clearly for the judge to determine the question of the existence of reasonable and lawful cause for the coroner's absence.

In *Caudle* v. *Seymour* (1), a warrant issued by justices was held bad which did not show any information upon oath upon which it had been issued. Coleridge J. said, during the argument:

> A man has no right, because he is a magistrate, to order another to be taken for an offence over which he has jurisdiction without a charge regularly made.

(1) 1 Q. B. 889.

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In the case of *Turner* v. *The Postmaster General* (1), parties were apprehended and brought before a magistrate charged with setting fire to the letters in the pillar box. On their appearance at the Petty Sessions to answer the charges after witnesses had been examined, and cross-examined, they were, at the application of a prosecutor, remanded on bail for a week. At the adjourned sessions the attorney for the prosecution stated that he should proceed against the appellants under the statute 24 & 25 Vict. ch. 97, s. 52, and asked their attorneys whether they would plead guilty to such a charge, or whether further evidence should be offered and supported; they answered that he must go on, and prove his case. He called witnesses, and when the case for the prosecution was closed the appellants' counsel objected that no information on oath had been taken, as the statute required, and the appellants were not found committing the offence, and were not legally in custody, and therefore the justices had no jurisdiction to convict them for the offence then charged. The offence with which the appellants were first charged was a felony; the offence of which they were convicted was punishable on summary conviction. The court held that the want of information and smmmons was cured by the appearance of the appellants before the justices, and that they had waived the objection that they were not legally in custody on the charge under section 52, and, therefore, the justices had jurisdection to convict them. But on both occasions of their appearance before the justices the facts alleged against them were the same, and though they were brought up to discharge their bail, other circumstances show that they appeared voluntarily on this charge; the magistrates were, there-

(1) 5 B. & S. 756.

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fore, justified in convicting them on the charge which had been so made and heard. Cockburn C. J. said:

> All that they could have asked for was, that in point of strict form the evidence should have been taken again on the first charge, and that evidence in support of that charge only should be received. Practically, that was done. They were irregularly brought before the magistrate. In strictness, they were entitled to insist that there should be information and summons, but they waived that, and cross-examined the witnesses and exercised all their rights as defendants on the first charge; after that, they can not object that the justice had no jurisdiction to convict them summarily.

In the cases where there has been a waiver of some *irregularity* in the mode of summoning which was used, (it is perhaps hardly correct to use the expression waiver), a justice can only proceed lawfully where he has jurisdiction, and the jurisdiction may be given by the appearance of the party, before the judge, to answer the charge. The jurisdiction may not depend upon the warrant; this may be improperly issued, but if the accused party appears before the magistrate without objection, he can hardly after a regular inquiry, and after an order for his commitment, take objection to the fact by complaining that he has not been brought regularly before the justices. In the case of the *Queen* v. *Hughes* (1), the charge was made orally that Hughes had sworn falsely and corruptly. The warrant is not the charge, it is a means of procuring the attendance of Hughes to answer it. And the want of an information on summons might be cured by the appearance of Hughes. It is the duty of the magistrate to take all charges, of whatsoever nature, kind or connection they may be, in writing, and this, Lord Mansfield says, is an indispensable duty.

In the case of the *Queen* v. *Hughes* (1), Lopes J. thought the warrant was a mere process for bringing the party complained of before the justices, and had

(1) 4 Q. B. D. 614.

nothing to do with the question of their jurisdiction. Hawkins J. said :

I have assumed as a fact, from the case taken, that Stanley was arrested and brought before the justices upon as illegal a warrant as ever was issued. A warrant signed by a magistrate, not only without any information or oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of its illegality executed it, were liable for an action for false imprisonment. He was brought into the presence of a magistrate to answer a charge which, up to that moment, had never been legally preferred against him. Before those magistrates, and in his presence, the charge was made, over which, if duly made, they had jurisdiction. Upon that charge and in support of it it was that the defendant was sworn, and in giving his evidence swore corruptly and falsely * * * They convicted him of an offence with which he had never legally been charged. In this, I am of opinion they were wrong; and upon this ground I am strongly inclined to think the conviction may be quashed.

It would be contrary to the settled rule, recognised in the interpretation of statutes, to make any alteration in the Common Law further or otherwise than the Act under consideration expressly declares (1), and I do not think that section 145 of the Criminal Code has made so radical a departure in the common law rule, as to make a false oath in a judicial proceeding, before one having no authority, wilful and corrupt perjury. This section begins with a definition of perjury, and it then states the circumstances under which it may be committed.

By section 145, perjury is defined to be

an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding, as a part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit, or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding.

(1) Hardcastle's Construction and Effect of Statutory Law, pp. 138, 139; *Metropolitan Asylum, District* v. *Hill*, 6 App. Cas. 193 at p. 203; *R.* v. *Morris* L.R.1, C.C.R. 90.

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Evidence in this section includes evidence given on the *voir dire*, and evidence given before a Grand Jury. This is the first part of the section. It is necessary that the witness be a witness in a judicial proceeding. There are two departures from the common law rule; the first is that one may be convicted of perjury on immaterial evidence, and the second relates to the *voir dire;* the old rule was that an untrue statement which was not material could not subject the one who gave it to conviction of perjury, and one who is examined on the *voir dire* could not be contradicted, as the question of competence was a collateral question. Subsection 2 of section 145 reads:

> That every person is a witness within the meaning of this section who actually gives his evidence, whether he is competent to be a witness or not, and whether his evidence was admissible or not.

This subsection does not enlarge the boundaries of the common law jurisdiction, but is in strict accordance with the precedents which embrace the principle here laid down.

Subsection 3 is as follows:

> Every proceeding is judicial within the meaning of this section which is held in or under the authority of any Court of Justice, or before a Grand Jury, or before either the Senate or House of Commons in Canada, or any Committee of either the Senate or House of Commons, or before any Legislative Council, Legislative Assembly, or House of Assembly, or any Committee thereof empowered by law to administer an oath, or before any Justice of the Peace, or any Arbitrator or Umpire or any person or body of persons, authorised by law, or by any statute in force for the time being, to make an inquiry, and take evidence therein on oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a Court, Justice, or Tribunal, having power to hold such judicial proceeding, whether duly competent or not, or whether the proceeding is duly instituted or not, before such Courts or person, so as to authorise it or him to hold a proceeding, and although such proceeding was held in a wrong place, or was otherwise invalid.

I omit from consideration the provisions of this subsection relating to perjury committed before any of

the legislative bodies or committees thereof, empowered to take evidence upon oath, and look solely at those provisions relating to perjury committed in respect to evidence taken before the other parties described in this subsection. Now it will be seen that, leaving out legislative bodies with their committees, the section deals only with evidence taken in judicial proceedings, before persons legally competent to hold them, for the purpose for which the proceeding is had. A definition is given of what a judicial proceeding is within the meaning of this section; it is a Justice of the Peace, Arbitrator, Umpire, or any person or body of persons, authorised by law, or by any statute in force for the time being, to make inquiry and to take evidence therein upon oath. In other words, any of the parties mentioned must be authorised by law to exercise jurisdiction over the subject matter of the inquiry, and to take the evidence of witnesses upon oath. The proceeding must be a legal proceeding, having the sanction of the law behind it; but beside these, the proceeding may be before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding. If he has such power, then any irregularity in the constitution of the court, or any irregularity in the proceedings of the court, as in the common law cases to which I have referred, will not exempt one who has been duly sworn and has given false testimony from being convicted of perjury, but there is nothing in any part of this section which would surround with like protection the proceedings of one who is not a Justice of the Peace, or one who is not clothed with judicial authority, and who is not authorised to make an inquiry with the sanctions which attach to the proceedings of a legally constituted court.

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I, therefore, hold that the decision of the court below should be reversed, and that Drew should be discharged, as not legally guilty of the crime of perjury for which he stands convicted.

The judgment of the majority of the court was delivered by

ARMOUR J.—The defendant charged one Benjamin J. Rowe before L. J. Papineau, the recorder of the Town of Salaberry, of Valleyfield, with having entered upon his land without his permission contrary to the provision of article 5551 of the Revised Statutes of Quebec.

This charge was, by article 5561 of the said statutes, made cognizable before one or more justices of the peace, but such justices should only have jurisdiction when they resided in the county in which the offence had been committed.

The offence charged was committed in the County of Huntingdon, and the recorder, although *ex officio* a justice of the peace in and for the district of Beauharnois, in which district the County of Huntingdon was situate, did not reside in the County of Huntingdon, but in the County of Beauharnois.

The defendant was convicted of perjury committed by him upon the hearing of the said charge and the question is whether or not he was rightly convicted, the recorder not having jurisdiction over the offence charged.

And this question is determinable by determining whether or no the hearing of this charge by the recorder was a judicial proceeding within the meaning of that phrase as used in section 145 of the Criminal Code, which provides that every proceeding is judicial within the meaning of that section which is held

before any person acting as a court, justice or tribunal having power to hold such judicial proceeding whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorise it or him to hold the proceeding and although such proceeding was held in a wrong place or was otherwise invalid.

The recorder was a justice, but in hearing the said charge he was not a justice having power to hold such judicial proceeding, but he was acting as a justice having power to hold such judicial proceeding and his hearing the said charge was, therefore, a judicial proceeding within the meaning of that phrase as used in section 145 of the Criminal Code, and the defendant was rightly convicted.

The provision above quoted was taken from section 119 of the draft code prepared by the Royal Commissioners appointed to consider the law relating to indictable offences, and with respect to such section the commissioners said, in their report, that

in framing section 119 we have proceeded on the principle that the guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal *de facto* exercising judicial functions. It seems to us not desirable that a person who has done this should escape from punishment if he can show some defect in the constitution of the tribunal which he sought to mislead or some error in the proceedings themselves.

And the recorder was, in hearing the said charge, a tribunal *de facto* exercising judicial functions.

Appeal dismissed.

Solicitor for the appellant: *D. McAvoy.*

Solicitor for the respondent: *The Attorney-General for Quebec.*