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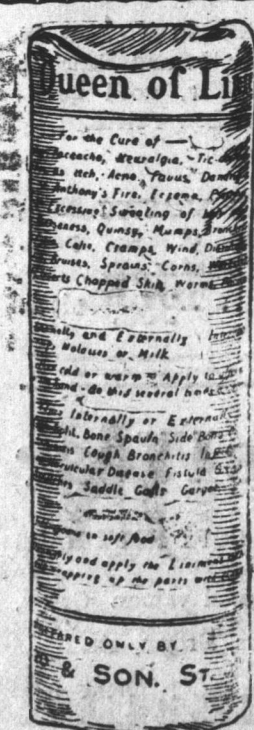
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Supreme Court.

THE KING VS. JAMES WHITEFORD
McNELLY.

Judgment of Mr. Justice Kent.

(Continued from yesterday.)

When the proper time came to draw the Grand Jurors for this Session, the Sheriff waited upon the Registrar for an appointment to draw the Grand Jury, but the Registrar was personally unable to attend, and the Deputy Registrar was absent, being at that time with the Supreme Court on Circuit, and not likely to return before the opening of the Session in St. John's, the Registrar deputized the Chief Clerk in his office, Mr. Kent, as his Deputy, to perform the duties prescribed by the statute to be performed by him. Mr. Kent accordingly attended, and though no comparison of the cards with the revised list was then made, the cards were in the box and the first twenty-three names were drawn in his presence. The names of the twenty-three persons first drawn were subsequently checked by the Sheriff with the revised list, and it was found by him that all these twenty-three names on the cards were also on the revised list; he was therefore satisfied that all these twenty-three names were the names of qualified jurors and appeared on the revised list as received by him from the Revising Magistrate. These twenty-three persons whose names were thus first drawn were, subject to what I shall say later when dealing with objections, 3, 4, and 5, summoned by him to attend and serve as Grand Jurors during the Session. The jurors all attended and served, with the exception of three who were absent from the city, and dealt with several bills of indictment preferred before them by the Crown. Later, Counsel for the Crown brought to the attention of the Court the fact that no comparison of the names on the cards had been made by the Registrar or Deputy Registrar of the Court and that on that occasion the cards were not put in the box or the names of the Grand Jurors drawn in the presence of either of these officials, but in the presence of the chief clerk, Mr. Kent, the Court thereupon held that, under the circumstances, as they appeared at that time, the Grand Jury was validly constituted. In consequence of the above omissions and neglect, the Registrar decided to personally make a comparison between the cards in the box and the revised list; he did so with the Sheriff and the result showed that there were no cards in the box to correspond with names of twenty-five persons upon the revised list, and that there were no cards in the box containing the names of any person not on the revised list, and all the names on all the cards were those of qualified jurors, whose names were on that list. For the purpose of discovering an explanation of the discrepancy between the cards and the revised list, the Registrar examined the various panels of special juries that had been drawn during the year, and he found that twenty of these twenty-five missing names were those of jurors who, during an Easter Session of the Court, had been summoned to serve on special juries and had not afterward been returned to the box. It has also been shown on further enquiry that of the other five, one had left the jurisdiction, is now living in the United States, and that another was dead. Three cards containing the names of three jurors were therefore missing with no apparent reason to explain their disappearance, except that they must have gone astray while some one or more of the previous juries were being drawn. These are the facts and circumstances disclosed by the evidence. They show want of care on the part of the Sheriff in handling the cards in the discharge of his duties whenever it became necessary to draw them from the box, and in carrying out the directions given by the statute as to checking the cards with the revised list and drawing the juries, but is not suggested that he was at any time actuated by and from the terms of the statute in not observing the details prescribed by the statute or in handling the cards or the list of jurors. On the contrary, it is quite clear that apart from the carelessness to which I have alluded, every jury including the Grand Jury serving during the present session were honestly drawn with absolute bona fides on the part of all the officials concerned. The impartiality of the Sheriff is not denied. Under these circumstances was the Grand Jury legally constituted? Was it competent to perform the functions it was called upon to perform? or were the drawing and summoning of the twenty-three men whose names were first drawn abortive, so that the Grand Jury never had any existence as a Grand Jury and all its acts null and void? If the provisions of the statute are honestly and substantially complied with and the jurors of the statute are honest and qualified men, impartially drawn by the proper officer, more technical objections, or objections based on the non-observance of regulations that are incidental rather than fundamental, should be looked upon with disfavor by the Court, provided the accused is not deprived of his substantial right to have the indictment preferred against him found by a grand jury composed of qualified and indifferent men, impartially drawn by lot in compliance with the provisions of the statute. It seems to me that the failure to compare the names on the cards with those on the revised list did not in any way affect the qualification of the Grand Jury or the constitution of the Grand Jury by whom the indictment against the accused was considered and found, for although the scrutiny to which the list and the cards would thereby have been subjected would have disclosed the fact that twenty-five cards were not in the box, still the jury as finally constituted was composed of none but duly qualified jurors impartially selected by lot as prescribed by the statute, whose names were drawn from a box containing the names of substantially all the qualified jurors, in total ignorance of the fact that the twenty-five cards were missing and in the honest belief that the box contained names of all qualified jurors, and did in fact contain the names of none but qualified jurors. I cannot believe that a jury so drawn is so defective as to have no legal existence whatever. The substantial right of the accused was to have the indictment preferred against him found by a Grand Jury composed of upright and qualified men. This the accused, in the present case, had. The jurors were selected by lot with absolute bona fides by the proper officer, and the jurors who served on the Grand Jury were fully qualified and no objection can be maintained against them. In my opinion these objections to the constitution of the Grand Jury are not of a fundamental character, but that whatever omissions or neglect may have been committed by the sheriff or the Sheriff's officers, the accused had all that the law had entitled him to, namely to have the bill of indictment preferred against him considered by a Grand Jury composed of duly qualified jurors and of none but qualified jurors selected by lot honestly and impartially from the general panel of qualified grand jurors. Everything else is incidental or directory rather than fundamental or mandatory. I therefore hold that under the circumstances disclosed by the evidence, the present Grand Jury was legally constituted and competent to perform its functions, and that the indictment found by it against the accused is valid in fact and in law. As to 3, 4, and 5. These two objections are also related in that the statement that of the twenty-three persons whose names were first drawn from the box only eighteen were summoned to serve on the jury is explained by the allegation that the persons whose names are mentioned in the fourth objection, were not summoned. It is not questioned but that the twenty-three persons whose names were first drawn from the box consisted of the eighteen admitted by the defendant in his third objection to have been properly summoned, and the five persons whose names are given in his fourth objection. Summons to attend Court were regularly issued in the names of all these five jurors as they appear on the revised list of jurors, and delivered to bailiffs to be served upon them: in the case of three of them, namely George Baird, Archibald Forbes and J. Penney the bailiffs went to their several places of residence and found that they were absent from the city and could not be here in time to attend Court on the day of the return of the summons, he then returned the summons to the Sheriff: this has been the practice followed for a number of years in the case of absent jurors. It is clear from the evidence that had the summons been left at the residences of these jurors they could not possibly have appeared in Court in response to these summonses on the day of their return. It is equally clear from the terms of the statute that "the first twenty-three persons whose names shall first be drawn from the box—shall serve as grand jurors during this Session," that is during the Session of the Court for the purpose of which their names were drawn by the Sheriff. Now it must be borne in mind that by Order 56 rule 2 it is provided that there shall be three Sessions of the Court in St. John's in each year, to be called respectively, the Winter Session, the Spring Session and the Fall Session, to commence and continue on the dates and for the periods therein after prescribed. The period during which the Winter and Spring Sessions shall respectively continue is prescribed by rules 3 and 4 of Order 56. The Fall Session for the purpose of which the present Grand Jury was drawn, continues under rule 5 during the months October, November and December for the present year. The grand jurors drawn at the commencement of the Session are required by the statute to serve as

long, or objections based on the non-observance of regulations that are incidental rather than fundamental, should be looked upon with disfavor by the Court, provided the accused is not deprived of his substantial right to have the indictment preferred against him found by a grand jury composed of qualified and indifferent men, impartially drawn by lot in compliance with the provisions of the statute. It seems to me that the failure to compare the names on the cards with those on the revised list did not in any way affect the qualification of the Grand Jury or the constitution of the Grand Jury by whom the indictment against the accused was considered and found, for although the scrutiny to which the list and the cards would thereby have been subjected would have disclosed the fact that twenty-five cards were not in the box, still the jury as finally constituted was composed of none but duly qualified jurors impartially selected by lot as prescribed by the statute, whose names were drawn from a box containing the names of substantially all the qualified jurors, in total ignorance of the fact that the twenty-five cards were missing and in the honest belief that the box contained names of all qualified jurors, and did in fact contain the names of none but qualified jurors. I cannot believe that a jury so drawn is so defective as to have no legal existence whatever. The substantial right of the accused was to have the indictment preferred against him found by a Grand Jury composed of upright and qualified men. This the accused, in the present case, had. The jurors were selected by lot with absolute bona fides by the proper officer, and the jurors who served on the Grand Jury were fully qualified and no objection can be maintained against them. In my opinion these objections to the constitution of the Grand Jury are not of a fundamental character, but that whatever omissions or neglect may have been committed by the sheriff or the Sheriff's officers, the accused had all that the law had entitled him to, namely to have the bill of indictment preferred against him considered by a Grand Jury composed of duly qualified jurors and of none but qualified jurors selected by lot honestly and impartially from the general panel of qualified grand jurors. Everything else is incidental or directory rather than fundamental or mandatory. I therefore hold that under the circumstances disclosed by the evidence, the present Grand Jury was legally constituted and competent to perform its functions, and that the indictment found by it against the accused is valid in fact and in law. As to 3, 4, and 5. These two objections are also related in that the statement that of the twenty-three persons whose names were first drawn from the box only eighteen were summoned to serve on the jury is explained by the allegation that the persons whose names are mentioned in the fourth objection, were not summoned. It is not questioned but that the twenty-three persons whose names were first drawn from the box consisted of the eighteen admitted by the defendant in his third objection to have been properly summoned, and the five persons whose names are given in his fourth objection. Summons to attend Court were regularly issued in the names of all these five jurors as they appear on the revised list of jurors, and delivered to bailiffs to be served upon them: in the case of three of them, namely George Baird, Archibald Forbes and J. Penney the bailiffs went to their several places of residence and found that they were absent from the city and could not be here in time to attend Court on the day of the return of the summons, he then returned the summons to the Sheriff: this has been the practice followed for a number of years in the case of absent jurors. It is clear from the evidence that had the summons been left at the residences of these jurors they could not possibly have appeared in Court in response to these summonses on the day of their return. It is equally clear from the terms of the statute that "the first twenty-three persons whose names shall first be drawn from the box—shall serve as grand jurors during this Session," that is during the Session of the Court for the purpose of which their names were drawn by the Sheriff. Now it must be borne in mind that by Order 56 rule 2 it is provided that there shall be three Sessions of the Court in St. John's in each year, to be called respectively, the Winter Session, the Spring Session and the Fall Session, to commence and continue on the dates and for the periods therein after prescribed. The period during which the Winter and Spring Sessions shall respectively continue is prescribed by rules 3 and 4 of Order 56. The Fall Session for the purpose of which the present Grand Jury was drawn, continues under rule 5 during the months October, November and December for the present year. The grand jurors drawn at the commencement of the Session are required by the statute to serve as

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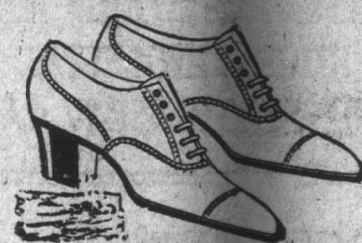
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THE SHOE MEN.

grand jurors during the session and "shall if required serve and attend at any time from the commencement of one Session to the next Sessions. These three persons having been drawn as grand jurors are grand jurors for the present Session of Court and might be required to serve and attend as such at any time during the Session. The accident of their inaccessibility for a particular sitting of the Grand Jury does not discharge them from the panel or enable the Sheriff or the Court to elect a substitute for them. Should they be accessible for other sittings they are liable and entitled to attend and serve. Their absence does not effect the constitution of the jury or prevent the other Grand Jurors, who attend, from performing their proper functions, provided, however, that no bill of indictment can be found against an accused party unless a majority of at least twelve Grand Jurors attend and concur in finding such bill. In my opinion, therefore, the absence of these Grand Jurors, who are regularly on the panel, does not affect the validity of the bill of indictment found against the accused. The other two jurors, to whom objection is taken, namely, Francis Cooper and William Chaney, are in a somewhat different position. It is said they were not summoned

though their names were amongst those of the twenty-three first drawn from the box by the Sheriff. What happened was this: these two names appear on the revised list of grand jurors for the current year, the addresses and occupation being given in each case; the names having been duly drawn from the box by the Sheriff, summons were issued and served at the address given on the revised list, and in answer to those summons the persons living there answered the summons, and upon their names being called in court they drew the attention of the Court to an error in their Christian names. Francis Cooper said his name was Terence G. Cooper, and William Chaney said his name was Wilbur Chaney; the Court was satisfied that there was a mistake in the name but not in the person and in each case directed them to serve on the jury, and they were sworn and served accordingly. It is quite clear that this direction was in accordance with the facts, for further enquiry it turns out that the occupation and address of these two names had been altered by persons unknown. Three such alterations are stated to have been made, but as none of the persons whose names are supposed to have been so altered were drawn or summoned or attended on the present Grand Jury the rele-

question of personation of a juror by some one else arises, the proper person, in both instances appeared and was sworn by his correct name. A distinction must be made between the case of the misnomer of a juror man regularly summoned and that of a person appearing and serving instead of him who has been regularly summoned; in the one case the proper person attends and serves, in the other an entirely different person does so. No objection to the proper person can be supported in the first case; the other does not arise at present. I am of opinion therefore that these two jurors were regularly drawn and summoned and are Grand Jurors for the present Session of the Court, and were properly sworn under their proper names, namely, Terence G. Cooper and Wilbur Chaney, and that the objection to the bill of indictment found against the accused cannot be supported by these men having served at Grand Jurors.

As to the 6th objection: This is based on an allegation that certain names upon the revised list of Grand Jurors had been altered by persons unknown. Three such alterations are stated to have been made, but as none of the persons whose names are supposed to have been so altered were drawn or summoned or attended on the present Grand Jury the rele-

(Continued on page 13.)

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