

# C A S E S

DETERMINED BY THE

## SUPREME COURT OF NEW SOUTH WALES

IN ITS

### Common Law Jurisdiction,

AND BY THE

PRIVY COUNCIL ON APPEAL THEREFROM DURING 1894.

REGINA v. O'KEEFE.

1893.

*Criminal Law Amendment Act, ss. 422, 423—Conviction quashed—Subsequent trial for same offence—Plea of autrefois convict—Record.*

November 24.

1894.

*Held* (THE CHIEF JUSTICE dissenting), that where a person has been convicted of an offence, and that conviction has been quashed by the Full Court on a case reserved under s. 423 of the Criminal Law Amendment Act upon the ground of the wrongful admission of evidence, the Crown cannot put him upon his trial again for the same offence.

March 8, 30.

What is the proper plea to raise such a defence considered, though in this case defence raised by the plea of *autrefois convict*.

The C.J.  
Windeyer J.  
Innes J.  
Stephen J.  
and  
Foster J.

Where a person is convicted of a misdemeanour, and the Court quashes the conviction, *quære* whether the Court could not grant a new trial (*per* Stephen J.).

*R. v. Mowatt* (1) overruled.

CROWN CASE RESERVED.

The following case was stated by Mr. District Court Judge *Fitzhardinge* :—

“The prisoner was tried before me at the Queanbeyan Quarter Sessions on an indictment containing three counts and laid under the Lien on Wool Act, 11 Vic. No. 4, s. 7. One count averred that by a mortgage dated 31st October, 1892, and registered on

(1) 6 N.S.W. L.R. 289.

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the 26th November, 1892, the prisoner mortgaged to Messrs. Andrews and De Lauret 3000 wethers, and alleged that afterwards the prisoner, without the written consent of Andrews and De Lauret, or either of them, sold 2500 of the wethers so mortgaged, and did thereby defeat and destroy the right of property of the said Andrews and De Lauret. It was upon this count that the prisoner was convicted and sentenced.

"To the whole indictment the prisoner pleaded *autrefois convict* as follows:—'And the said Hercules O'Keefe in his own proper person cometh into Court, and having heard the said indictment read, saith, that our said Lady the Queen ought not further to prosecute the said indictment against the said Hercules O'Keefe in respect of the offences in the said indictment mentioned, because he saith that he hath been lawfully convicted of the offences charged in the said indictment, and this he the said Hercules O'Keefe is ready to verify, wherefore he prays judgment, &c., &c.' He further pleaded over to the indictment, 'Not guilty.'

"Upon these pleas the Crown joined issue, and further replied to the plea of *autrefois convict* that by reason of anything in the said plea of the said Hercules O'Keefe pleaded in bar, the Crown Prosecutor ought not to be precluded from prosecuting the said indictment, because there is no record of the said conviction in the manner and form alleged by the said Hercules O'Keefe, the said alleged conviction having been avoided and quashed by the Supreme Court; and prayed that that might be enquired of.

"A jury was empanelled to try the issue raised by the plea of *autrefois convict* and the replication thereto.

"The facts admitted (and proved by the record and certificate of the Prothonotary) were that O'Keefe had been convicted on the 20th July, 1893, on the same charge as was contained in that count of the indictment above set out, and that on the 11th August, 1893, the Supreme Court had, by a majority, ordered that conviction to be quashed. (See 14 N.S.W.L.R. 345.) On these facts I directed the jury to find in favour of the Crown, as it had been admitted that the conviction had been set aside, and that therefore the prisoner had not been before lawfully convicted. The jury returned a verdict on that issue according to my direction. The trial then proceeded on the other issue of not guilty and the prisoner was convicted.

"The question for the Supreme Court is—'Was I right in ruling that the plea of *autrefois convict* was not supported by shewing a former conviction which had been quashed by the Supreme Court?'"

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The case was partly argued on the 24th November, 1893, before the *Chief Justice* and *Windeyer* and *Innes*, JJ., and then adjourned in order that the record might be made up. On the 8th March, 1894, the record having then been made up and being before the Court, the case, being one of great importance, was ordered to be fully re-argued before a Bench of five Judges.

*Moriarty*, for the prisoner. The judgment in this case should be arrested on the following grounds:—First, the practice of the Court is the law of the Court. The action of the Crown in placing O'Keefe on his trial a second time for same offence was contrary to the course and practice of proceedings in criminal Courts in New South Wales. *R. v. Mowatt* (1) may be cited *contra*. In that case the objection was not raised, and the attention of the Court was not called to the matter. The answers of the Judges to the House of Lords in *McNaghten's Case* (2) is decisive. "In cases even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament." Secondly, the case stated on the previous conviction was under ss. 422 and 423 of the Criminal Law Amendment Act, 1883. The statutory power given was to reverse the judgment given, or order an entry to be made on the record that the person convicted ought not to have been convicted. The Court had no power to quash the conviction, and for all purposes the conviction still remains. "Where a person has been convicted for an offence by a Court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence, and it is the conviction, and not the nature of the sentence, which constitutes the bar." *R. v. Miles* (3). *R. v. Mowatt* (1) [decided on

(1) 6 N.S.W.L.R. p. 289.

(2) 8 Scott N.R. 599.

(3) L.R. 24 Q.B.D. 423.

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the head note in *R. v. Drury* (1)] is wrong; the question determined in *R. v. Drury* (1) is correctly stated, p. 199. Thirdly, the second trial was a violation of a fundamental and sacred principle of our law—*nemo bis vexari debet pro eadem causâ*. The second trial brought into jeopardy the liberty of the accused for the same offence a second time. *Blackburn, J.*, in *Wemyss v. Hopkins* (2):—"The defence does not arise on a plea of *autrefois convict*, but on the well established rule at common law that where a person has been convicted and punished for an offence by a Court of competent jurisdiction, *transit in rem judicatam*, that is the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter: otherwise there might be two different punishments for the same offence."

*Rogers, Q.C., Barton, Q.C., and Dawson*, for the Crown. A judgment reversed on a writ of error is no bar to the prisoner being again tried for the same offence: *R. v. Drury* (1); and the reasons given for the decision in that case are entirely applicable to this. There is no difference between a judgment reversed for an error on the record, and a judgment reversed as in this case upon the ground of the wrongful admission of evidence. To prove his plea the prisoner puts in the record, and the record in this case shews that when he was arraigned the second time there was no subsisting judgment or conviction against him, because it is shewn to have been quashed or set aside. His evidence, therefore, disproves his plea. There is no difference between the meaning of the words judgment and conviction. The prisoner is convicted by the judgment of the Court. See *R. v. Charlesworth* (3); *R. v. Conway and Lynch* (4); *Winsor v. The Queen* (5); *Hale*, P.C. 247, 250; *Hawkins*, P.C., 525. These authorities shew that to support a plea of *autrefois convict* there must have been a complete and regular trial from commencement to judgment, standing good at the time of plea pleaded, otherwise the prisoner has never been in jeopardy. From the point in the first trial in this case at which the illegal evidence was admitted, the

(1) 3 C. &amp; K. 193.

(3) 1 B. &amp; S. 460; 31 L.J.M.C. 25.

(2) L.R. 10 Q.B., p. 381.

(4) 7 Ir. L.R. 149.

(5) L.R. 1 Q.B. at 311.

trial was irregular and the judgment was afterwards avoided. The plea of *autrefois convict* must therefore fail.

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*Cur. adv. vult.*

On the 30th March judgment was delivered.

March 30.

THE CHIEF JUSTICE. In this case the prisoner was tried at the Queanbeyan Quarter Sessions held in July, 1893, before Mr. District Court Judge *Gibson*, on an indictment drawn under the Lien on Wool Act, 11 Vic. No. 4. He was found guilty and sentenced to a term of imprisonment. During the trial objections were taken to the admission of certain evidence. Accordingly the learned Judge reserved the question as to the admissibility of this evidence for the consideration of the Judges of this Court, and thereupon stated a case under the provisions of the 423rd section of the Criminal Law Amendment Act, setting forth the question, and the facts and circumstances out of which it arose.

The matter came on for argument in due course, whereupon this Court held that the evidence in question had been erroneously received, and quashed the conviction (1). This determination was then certified under the hand of the Prothonotary, to the proper officer of the Court of Quarter Sessions, and the judgment of the Court of Quarter Sessions having been reversed, the prisoner was duly discharged from imprisonment.

Afterwards it appears that a fresh indictment for the same offence was presented and filed at the Queanbeyan Quarter Sessions held in Queanbeyan in the month of November, 1893, whereupon the prisoner pleaded *autrefois convict*. On the record being produced it appeared that the prisoner had been previously convicted of the same offence, but that such conviction had been quashed, and the prisoner discharged from custody. On this being shewn the learned Judge directed the jury to find in favour of the Crown, relying upon the decision of this Court in *R. v. Mowatt* (2). The question for our consideration now is, whether the learned Judge was right in ruling that the plea of *autrefois convict* was not supported by shewing a former conviction which had been quashed by the Supreme Court. The case,

(1) 14 N.S.W. L.R. 345.

(2) 6 N.S.W. L.R. 289.

1894. which is one of far-reaching importance, demands, and I need not  
 R. say, has received, from me the most earnest attention, all the more  
 v. so as I have the misfortune to differ in opinion from my learned  
 O'KEEFE. colleagues.  
 The C.J.

Before the passing of the Imperial Act, 11 & 12 Vic. c. 78, which was followed in this colony by the passing of 13 Vic. No. 8, a judgment in a criminal case could not be reversed or avoided unless for some error appearing upon the record. If at the trial evidence was improperly received, or improperly rejected, or if the trial was not conducted according to law, this could not be made the ground for relieving the prisoner from the consequences of a conviction. The conviction stood, but when the Judge who presided at the trial reserved a question for the consideration of the Judges, and they were of opinion that the trial, as to the reception or rejection of evidence or otherwise, had not been legally conducted, they recommended a pardon, and their recommendation was always followed. See *R. v. Charlesworth* (1). It therefore followed that the conviction or judgment standing, if a fresh indictment was in such a case presented, the plea of *autrefois convict* could be supported by the record, or the prisoner could plead the pardon which followed as of course upon the recommendation of the Judges.

The passing of the 11th and 12th Vic. c. 78 caused an entire change in the law. Then for the first time a conviction could be quashed, and the judgment reversed for matter not appearing upon the record.

Now what is the effect of the reversal of the judgment in a criminal case? This is clearly laid down in *Archbold's Criminal Evidence* (2), where the law is thus stated:—"Upon the reversal of a judgment against any person convicted of any offence the judgment, execution and all former proceedings become thereby absolutely null and void. If living he (or if dead his heir or personal representative, as the case may be) will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him. But a judgment reversed

(1) 1 B. & S. 460.

(2) 19th Ed. p. 215.

is no bar to a second indictment." And for this *R. v. Drury* (1) is cited.

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So also in *Hawkins' Pleas of the Crown*, Vol. 2 (6th Ed.) 532, the learned writer, speaking of attainder, says—"Where the first attainder is reversed for error after which it can neither be pleaded to a prosecution for the same or any other felony, because by such reversal the attainder is of no more force than if it had never been, and if an acquittal on an erroneous indictment or appeal will not bar a subsequent prosecution, surely, *a fortiori*, an attainder reversed will not do it."

It is argued that the prisoner has been already in peril, and that according to law no man ought to be put in peril twice on the same charge. No doubt this is a fundamental maxim, but it has been frequently misunderstood. In the case of *R. v. Drury* (1), already referred to, there had been a good indictment, issue well joined, a trial completely had, and a lawful verdict found, and judgment pronounced thereupon, but because there was an error in the judgment, inasmuch as it awarded a punishment not justified by law, it was reversed, and the prisoners, who were in prison under the sentence, were discharged under a judgment of the Queen's Bench, which directed that they be restored to all things lost by the erroneous judgment, and depart thence without day on that behalf. Upon a second indictment they pleaded *autrefois acquit*, relying upon the judgment of the Queen's Bench. Upon demurrer it was held that the plea could not be supported; that the former judgment, having been reversed, was the same as no judgment, and that although they were, in some sense, in jeopardy, they were never in law in jeopardy.

So here the judgment has been reversed (for that is the only meaning which "quashing" a conviction conveys to my mind), the trial, in consequence of evidence having been erroneously received, has proved abortive, and "no violence is done to the maxim by holding that when the first trial has become abortive by any reason whatever the proceeding is not legally a bar to a second trial for the same offence." *Per Lush, J.*, in *Winsor v. The Queen* (2). He approves of the judgment of *Crampton, J.*, in *Conway & Lynch v. The Queen* (3), where the latter Judge

(1) 3 C. &amp; K. 193.

(2) L.R. 1 Q.B. 325.

(3) 7 Ir. L.R. 178.

1894. during the course of a singularly able judgment says—"The true and rational doctrine is that when a trial proves abortive in consequence of no legal verdict being given, a *venire de novo* ought to go whether the result has flowed from the error of the Judge, or of the jury, or of both."

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Again in *R. v. Charlesworth* (1), *Cockburn, C.J.*, says:—"When we talk of a man being twice tried, we mean a trial which proceeds to its legitimate and lawful conclusion by verdict, and when we speak of a man being twice put in jeopardy, we mean put in jeopardy by the verdict of a jury, and he is not tried nor put in jeopardy until the verdict is given. If that is not so, then in every case of a defective verdict a man could not be tried a second time, and yet it is well known that though a jury have pronounced upon the case, yet if their verdict be defective it will not avail the party accused in the event of his being put on his trial a second time."

Now here there has been a verdict, but the reversal of the judgment which followed it upon the ground that that verdict was brought about, or might have been brought about, by the admission of illegal evidence, established that the verdict was not a legal verdict; one not legally obtained. Therefore no legal verdict was given at the first trial of this charge, and the judgment having been reversed, there was, according to *Cockburn, C.J.*, no bar to the second trial.

Again the prisoner, having pleaded *autrefois convict*, has to support the plea by evidence. The evidence to be given is the record, and when that is produced, what appears? Why, that the judgment upon which he relies to support his plea has been reversed. The issue joined on this plea must accordingly be found against him.

In the case of *Burgess v. Boetefeur* (2), *Tindall, C.J.*, says:—"It is generally said that a party is acquitted by the jury, but in fact the acquittal is by the judgment of the Court. A plea of *autrefois convict* or *autrefois acquit* can only be supported by proof of a judgment," and this in effect follows what is laid down in 2 *Hale's Pleas of the Crown* 243:—"There must not only be an acquittal by verdict, but a judgment thereupon *quod eat sine*

(1) 1 B. & S. at 507.

(2) 7 M. & Gr. 504.



die, for the bare verdict of his former acquittal is not a bar without a judgment pleaded."

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Although I have gone at some length into this matter, the question to be solved has already been settled. See *R. v. Mowatt* (1). In that case a conviction was quashed upon the ground that the evidence adduced at the trial was not sufficient to support the verdict. See 1 N.S.W. *Weekly Notes* 146. Thereupon the prisoner was put on his trial a second time, and, as here, pleaded *autrefois convict*. The Full Court, consisting of *Martin, C.J., Faucett, J., and Windeyer, J.*, held that the plea of *autrefois convict* was not supported by shewing a former conviction which had been quashed by the Court, and they referred to *R. v. Drury* (2). The Judges in that case, all experienced criminal lawyers thoroughly conversant with the principles which underlie criminal jurisprudence, failed to see any distinction between a conviction quashed and a judgment reversed for error on the record, and a conviction quashed and a judgment reversed for error during trial, though not appearing on the record. In both cases the judgment is gone, and no plea which requires the support of the judgment can be sustained. If the contention of the prisoner is right, *R. v. Mowatt* (1) was wrongly decided and must be overruled, but as I am of opinion that that case was rightly decided, it appears to me to govern this.

The conviction therefore in this case must be supported, and adopting the language of *Coleridge, J.*, in *R. v. Drury* (2) to this case I say that justice and common sense concur with authority in the conclusion at which I, in concert with the Judges who formed the Full Court in the case of *R. v. Mowatt* (1), have arrived. It appears to me that it would be shocking to justice and to common sense that a prisoner twice found guilty of the offence charged should be enabled to escape the punishment meet for his crime because a Judge on his first trial erroneously admitted certain evidence, the admission of which, as events have proved, in no way affected the determination of the question of his innocence or guilt.

WINDEYER, J. The real question for our determination in this case is whether the conviction of a prisoner who has been

(1) 6 N.S.W. L.R. 289.

(2) 3 C. & K. 190.

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previously convicted of the same offence, but which conviction has been quashed by the Court under s. 423 of the Criminal Law Amendment Act of 1883 and who is again convicted upon an indictment charging the same offence, can be sustained. I say the real question for our determination, because it appears to me that the proceedings which took place at the second trial of the prisoner, which are set out in the special case drawn up by the learned Chairman of Quarter Sessions and which are more elaborately set forth in the record of the case which has been drawn up by the Clerk of the Peace, raised that question.

It is true that the plea of *autrefois convict* at first only raised the question whether there was a conviction, and had the question which the Court below was called upon to decide been simply whether a conviction could only be proved by shewing a judgment following upon it, the ruling of the Chairman would have been, as an abstract matter of law, perfectly correct. When the Crown, however, shewed that the previous conviction had been quashed and the judgment following upon it had been avoided, as is admitted, not for any matter of error on the record of the previous trial, but on the ground that evidence had been wrongly admitted, it seems to me that the real question which arose, and which the Chairman should have decided as a matter of law, was, whether he had any power or jurisdiction to try a case, the facts of which were admittedly the same as on the previous trial, but which had been determined by the Supreme Court quashing the conviction, avoiding or reversing the judgment following upon it, and discharging the prisoner from custody. In saying this I do not intend in any way to reflect upon the course pursued by the Chairman of Quarter Sessions, who in ruling as he did simply followed the law as laid down by the Court in *R. v. Mowatt* (1), in which it was held that the plea of *autrefois convict* is not supported by shewing a former conviction which has been quashed by the Court. The plea of *autrefois convict*, it appears to me, in this case raised a false issue, and pleading it was not the mode in which the attempt on the part of the Crown to put the prisoner on his trial a second time should have been met by his legal advisers. The defence appropriate to the

(1) 6 N.S.W.L.R. 289.

circumstances of the case would have been one founded upon the common law principle that when a criminal case has been finally dealt with by a Court of competent jurisdiction, *transit in rem judicatam*, and that all the consequences following upon a plea of *autrefois convict* or *acquit* must follow upon a plea which is in the nature of those pleas though not in those common law terms. The endowment of the Court by the Legislature with power to finally deal with a case by quashing a conviction and discharging a prisoner has, it appears to me, in the event of a prisoner being so put upon his trial a second time for the same offence, necessitated the resort to a form of plea unknown to the common law except as a plea to the jurisdiction, but founded upon the same *maxima* or principle as underlay the old plea of *autrefois acquit*, *Nemo debet bis vexari pro una et eadem causa*. The materials for this plea were before the Court below as soon as the Crown replied as it did to the prisoner's plea of *autrefois convict*, and, upon the facts stated being admitted, raised a matter of law which it appears to me should have been decided by the Judge just as if the prisoner had pleaded the plea applicable to the new state of the law and it had been demurred to by the Crown as disclosing no defence to the indictment. Had the learned Chairman therefore not felt himself constrained by the decision of the Court in *R. v. Mowatt* (1) he would, it appears to me, have been bound as *Erle, J.*, felt himself in *R. v. Stanton* (2), to consider the charge as having already been adjudicated upon and so to have dealt with the case, though the plea pleaded was not apt to its circumstances. The principle upon which such a defence is founded, viz., that there has already been a judicial decision on the same accusation, is the same as that which governed the Court in *Wemyss v. Hopkins* (3) and *R. v. Miles* (4), which shew that though strictly speaking a plea of *autrefois convict* may not be correct, the real question for the Court is whether there has been a judicial decision which finally deals with the matter. Whether the case has resulted in a conviction or an acquittal does not matter if it clearly appears that the law intends the decision given to be a final adjudication on the matter. The record drawn up at

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(1) 6 N.S.W. L.R. 289.

(3) L.R. 10 Q.B. 378.

(2) 5 Cox C.C. 324.

(4) 24 Q.B.D. 423.

1894. the suggestion of this Court when the case was first argued does  
 R. not state, as I think it should have done, that the Court avoided  
 v. the judgment and discharged the prisoner when sitting under the  
 O'KEEFE. provisions of s. 423, upon determining that certain evidence had  
 Windeyer J. been improperly allowed to be given, which would clearly have  
 shewn that the Court was not sitting as one of error and had not  
 avoided the judgment for any matter of which a Court of error  
 could take cognizance. These facts are now, however, admitted,  
 and we are called upon to decide according to the real state of the  
 case, in order that the question may be settled whether the Crown  
 has the right, in every case where it thinks fit, to file a fresh  
 information against a prisoner whose conviction has been quashed,  
 and who has been discharged by the Court under s. 423.

Taking this view of the matter, it is not necessary in my  
 opinion to go into an examination of all the authorities which  
 have been cited in argument before us bearing upon the question  
 whether a conviction must be shewn by a judgment, the effect in  
 old times of the benefit of clergy and the like. The question  
 which we have to decide, I take it, simply is, what is the effect of  
 the Court setting aside a conviction under s. 423 of the Criminal  
 Law Amendment Act of 1883 and discharging the prisoner,  
 though I may say in passing that there can be no question that  
 to support either a conviction or an acquittal a judgment must  
 be shewn. The authority relied upon by the Crown as justifying  
 its action in filing a fresh information against the prisoner, and as  
 justifying the action of the learned Chairman of Quarter Sessions  
 in entertaining the case, is *R. v. Mowatt* (1), decided by this  
 Court in 1885. As one of the Judges who took part in that  
 decision, I am glad to have the opportunity of correcting the  
 mistake which I, as junior Judge, made in too easily concurring  
 with my learned seniors, both experienced criminal lawyers, who  
 seemed to think that the matter was entirely concluded by *R.*  
*v. Drury* (2). The case was unfortunately not argued on behalf  
 of the prisoner, and the attention of the Court was not called to  
 the fact that the real question then, as now, was, not simply  
 whether a plea of *autrefois convict* could be supported when the  
 conviction has been set aside, but whether an adjudication by the

(1) 6 N.S.W. L.R. 289.

(2) 3 C. &amp; K. 193.

Court under s. 423 did not finally dispose of the case. The result, as it now appears to me, is that whilst the decision was sound so far as it was an answer to the precise question raised by the case submitted for our decision, it was wrong if the inference intended to be drawn from it was that a prisoner could be tried again on a fresh information charging the same offence as the first information, when the conviction upon the first information had been quashed under s. 423, and it was certainly defective in not going further than it did and not quashing the second conviction on the ground that by the decision of the Court the case was *res adjudicata*. I had a misgiving when judgment was given offhand that there might be a distinction between a conviction set aside by a Court of error, as in *Drury's Case* (1), and one quashed under the provisions of s. 423. Unfortunately I yielded too readily to the opinion of my learned Chief that this was a distinction which could not affect the case. I now see clearly, as I should have then seen had I thought the matter over more carefully, that this distinction makes every possible difference. In the one case the prisoner has not been in jeopardy, in the other there has been a judicial decision dealing finally with the matter. It is some consolation to think that the mistake into which I think the Court then fell, has worked no such cruel wrong as making an innocent man undergo undeserved punishment, but that the worst that has been done has been to make two really guilty men, twice convicted by juries, suffer the punishment due to their offences, though perhaps rather in accordance with poetic justice than in accordance with law. The possible consequences, however, of a decision so calculated to mislead make it almost a matter of congratulation that the opportunity has arisen for correcting its deficiencies though the prisoner may not feel the same satisfaction as the community in consoling itself with a recurrence to the maxim *Experimentum fiat in corpore vili*.

The decision in the case *R. v. Drury* (1), upon which this Court decided *R. v. Mowatt* (2), is without doubt an authority recognising what appears to me the well established law that the judgment reversed by a Court of error is no judgment, that as upon a record without any judgment no punishment can be

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suffered, the prisoner in contemplation of the law has not been in jeopardy on his first trial and therefore may be tried again. The decision rests upon the ground, that the result of proceedings in a Court of error, which sets aside a judgment, is to leave the case undetermined just as a mistrial leaves it undetermined. The mistake made in applying the case to one like the present is in assuming that when this Court, sitting under the provisions of s. 423, quashes a conviction, it also leaves the case undetermined in a similar way. So far from leaving the case against the prisoner undetermined, it appears to me that the provisions of ss. 423, 424 and 426, which are the same as those of the Imperial Act 11 & 12 Vic. c. 78, contemplate the adjudication of the Court as a final determination of the case brought against the prisoner, and that if he is discharged by order of the Court under s. 424 he is as finally discharged as if discharged by order of a Judge when a verdict of acquittal is returned by a jury, and that he cannot be tried again unless discharged for the reason that there has simply been a mistrial. This view of the final effect of a judgment in a prisoner's favour (unless for a mistrial) under the provisions of the 11 & 12 Vic. c. 78, was held by Chief Baron Pollock in *Mellor's Case* (1). He there says :—" It appears to me that the statute under which we are now sitting contemplated the final determination of the matter, and never contemplated any new trial or any *venire de novo*. The language of the Act, I think, would naturally lead to that conclusion ; it is this, 'And the said Justices and Barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon'—this is what they have power to do—'to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record that, in the judgment of the said Justices and Barons, the party convicted ought not to have been convicted.' Such I understand to be one of the entries my *Lord Chief Justice* of the Court of Queen's Bench proposes to enter upon the present occasion. Or they are 'to arrest the judgment, or order judgment to be given

(1) 2 D. &amp; B.C.C. 468.

thereon at some other session of oyer and terminer and gaol delivery or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require.' My Lord Chief Justice appears to think that this authorises us to order a *venire de novo* to issue. Upon the best consideration I can give to the question it seems to me to confer no such authority. 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 the Court in which the point arose. One could not expect, the statute being so recently passed, to find much authority upon the question, but I observe that Parke, B., now Lord Wensleydale, has expressed an opinion upon what is the meaning of these very words, namely, 'shall make such other orders as justice may require,' in the case which I alluded to just now, *R. v. Faderman and others* (1), in which the prisoner was left to his writ of error upon the demurrer, the Court thinking they had no power to deal with the demurrer. Parke, B., says this: 'The words (to make such other order as justice may require) do not assist you; they only enable this 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.' 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

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

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escape justice; and yet I apprehend it will be conceded on all sides (and I do not imagine from the communications that 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." So *Channel*, B., says, "Whatever the Court does, it is to do finally, and it is therefore empowered to arrest the judgment." *Willes*, J., also says that upon the construction of the statute he concurred in the judgment of the *Lord Chief Baron*. The soundness of these opinions as to the finality of the Court's judgment has never been disputed.

If the judgment of the Court is not a final adjudication upon the matter of the indictment upon which the prisoner was tried, the extraordinary result would follow that the Crown might bring a man to trial a second time even in a case of felony, though the law of England has always been, as declared in *Bertrand's Case* (1), that a new trial could not be granted in cases of felony. Indeed, if a Judge allowed inadmissible evidence to be given on the second trial and the second verdict was set aside, the man might be brought to trial a third time, and so on *ad infinitum*. So monstrous a subversion of the fundamental principle of British criminal law that a man should not be in peril of legal penalties twice upon the same criminal charge could never have been intended by the Legislature when giving the Court power to avoid judgments following upon verdicts obtained upon improper evidence or the erroneous ruling of Judges upon matters of law. Only by the clearest language could so fundamental a principle be set aside, and so far from there being any language in the section pointing to such a conclusion, its language altogether points to the conclusion that the adjudication of the Court was intended to be final as to the offence charged in the indictment. It cannot be denied that this has been the opinion universally obtaining in the profession, and the recognised soundness of the opinion is evidenced by the fact that though an immense number of convictions have been quashed in England and in this colony under the provisions of the Imperial and colonial Acts, there has never been an attempt made, except in the case of *R. v. Mowatt* (2),

(1) 1 L.R. P.C. 520.

(2) 6 N.S.W. L.R. 289.



to try the prisoner a second time, though in some cases it has been felt that the quashing of convictions upon points of law on account of mistakes made at the trial has resulted in a lamentable miscarriage of justice, when a criminal manifestly guilty has escaped the penalty due to his crime. Finality, however, is the policy of English criminal jurisprudence, and that absolute accuracy of procedure which is so fine a feature of British criminal law will, it seems to me, be best maintained and preserved for us as a possession for all time by impressing upon those engaged in its administration that any error will vitiate the proceedings, as there is no process by which it can be corrected. It would be startling to hold that when a Judge, upon a conviction taking place, declined to pass sentence and bound the prisoner over under the provisions of the Act to appear to take his sentence, and the Court after argument held that the conviction must be quashed because the evidence did not prove the offence charged, that because the old common law plea of *autrefois convict* or *acquit* was not open to the prisoner he could plead no plea either in bar or to the jurisdiction of the Court when a second attempt was made to put him upon his trial. If, as their Lordships of the Privy Council held in *R. v. Makin* (1), upholding my judgment in *R. v. McLeod* (2), it is a wrong and a miscarriage of justice that a man should be convicted upon improper evidence, it would be no less a wrong and miscarriage of justice that he should be tried a second time without warrant of law. The law having left the fate of the prisoner to the jury, as far as the facts are concerned, a manifest wrong would be done in placing him a second time on his trial, when if there had been no improper admission of evidence or no misdirection by the Judge the first jury might have acquitted him. As a very distinguished criminal lawyer, Mr. Justice *Hawkins*, observes in *R. v. Miles* (3), at p. 432:—"Reason and good sense point out that, even at the risk of occasional miscarriages of justice, when once a criminal charge has been adjudicated upon by a Court having jurisdiction, that adjudication ought to be final, and, after all, such miscarriages are very

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(1) 14 N.S.W. L.R. at p. 556.

(2) 11 N.S.W. L.R. 218.

(3) 24 Q.B.D. 423.

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rare. No system of judicature can be suggested in which occasional failure to ensure complete justice may not arise. After the most solemn and careful trial of an indictment for murder, resulting in the acquittal of the person charged, it may happen that within a week the most cogent and conclusive proof of his guilt may come to light, or he may actually confess his crime. Yet his first acquittal is final."

As there is, in my opinion, no valid precedent for maintaining this conviction obtained in a trial not warranted by law, I am of opinion that it must be quashed and that the prisoner should be discharged.

INNES, J. With the utmost deference to the opinion expressed by his Honour the *Chief Justice* in this case, I regret that I am unable to concur in the view which he entertains. From the first moment that the question was stated I have been of the opinion that the accused in this case had made out his plea of *autrefois convict*, and although I have listened with unwearied interest to all that has been urged at the bar in opposition to the contention on behalf of the accused, and although I have weighed with all the consideration, to which any judicial opinion of his Honour the *Chief Justice* is entitled, the arguments of his Honour, my opinion has not varied for one moment. To me it has throughout appeared incontrovertible that it would be removing a chief corner-stone from the edifice of our system of criminal jurisprudence if it were to be decided that a man, who had been, upon a criminal charge properly stated, tried before a Court of competent jurisdiction, found guilty by a jury, and sentenced in accordance with the law, could, merely because the conviction had been set aside upon the ground of the wrongful admission of some evidence against him, be again tried for the same offence. So to hold would, in my opinion, be to violate one of the fundamental principles of our criminal jurisprudence. There is no principle of our law more uniformly recognised than that such a thing cannot be.

It is said that where there has been an abortive trial the person accused has not been in jeopardy, and it is said that where any conviction has been set aside, no matter upon what ground, the

trial has been "abortive." In a certain popular and non-legal sense that may be true, but where a trial upon a good indictment before a Court of competent jurisdiction has been *concluded* and sentence duly pronounced,—where there has been no defect in the record,—then that trial, merely because there has been an irregularity—a fatal irregularity such as the admission wrongfully of evidence that ought not to have been admitted,—is in no jurisprudential sense abortive, even though the conviction has been set aside for that irregularity. Where there has been a defective record, or where, through the illness of the Judge or of a juror, the trial has not been concluded,—or where, through the jury not agreeing, they have been lawfully discharged from giving a verdict,—or where there has been want of jurisdiction in the Court assuming to try the case—these are all instances of the trial being abortive in a legal sense, but they bear no analogy to a case like the present.

The case of *R. v. Mowatt* (1) has been cited as an authority to the contrary. That case was decided by a very eminent bench of criminal lawyers, but it rests, so far as it touches the plea of *autrefois convict*, upon the authority of *R. v. Drury* (2). Now, *R. v. Drury* was a case of a defect in the record, in which it appeared by the record that the defendant was not lawfully liable to suffer the judgment pronounced, and therefore the accused had never been in jeopardy within the meaning of the great principle involved. Without going into an elaborate statement of that case, that clearly appears from the judgment of Mr. Justice *Coleridge*. *R. v. Drury* (2) therefore is no authority for the contention on behalf of the Crown in this case, as indeed Mr. *Rogers* frankly admitted when he argued for the Crown. The report of *Mowatt's Case* (1) in the authorised reports does not clearly show upon what ground the quashing of the former conviction in that case had proceeded. From the report of the case when the first conviction of *Mowatt* was set aside, which case is reported in the *Weekly Notes* (3), it appears that the ground upon which the former conviction was upset was the insufficiency of the evidence to support the charge.

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(1) 6 N.S.W. L.R. 289.

(2) 3 C. &amp; K. 193.

(3) 1 W.N. 146.

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*Drury's Case* (1) does not apply to the case of a conviction set aside on such a ground, and is no authority for the decision in the subsequent case of *R. v. Mowatt* (2). I am therefore constrained to think that *Mowatt's Case* (2) was wrongly decided, and should not be followed. No other case can be cited from reports, nor can any passage be quoted from any text book to give any authority to the contention for the Crown. And it would indeed be a curious state of things that, if a man could be so tried a second time, no man ever has been so tried again for the same offence, though time after time convictions have been set aside for such a cause. And, although without due reflection it might appear to be a matter of regret that even in such a case the guilty should occasionally escape, and thereby a defeat of justice obtain, yet it is a matter of infinitely greater importance that fundamental rules of law should not be violated. It has occasionally happened that through some defect in necessary proof, even of some apparently slight and only formal matter, a Judge has been bound to direct the acquittal of some miscreant about whose guilt of very heinous crime there could be no manner of doubt. No one would contend that in such a case, grave as the miscarriage of justice might appear, the accused should again be liable to be tried for the same offence.

Adherence to rules of law is necessary in the highest interests of the public. The liberty of the subject is of far greater importance than the conviction of a man merely because he is accused; and if it were to be held that a conviction should be no bar to a subsequent prosecution for the same offence where the conviction had been set aside by reason of the wrongful admission of evidence, such a decision would open the door widely to a reprehensible and most dangerous laxity in the conduct of criminal trials. Prosecuting counsel would be tempted to offer and Judges to admit inadmissible evidence, because it could be said: "Oh, even if the Full Court does upset this conviction, no harm will be done. A new trial can be had, and the accused, if criminal, will not escape." That is not the way in which criminal law is to be administered. I can conceive of no greater blow to

(1) 3 C. &amp; K. 193.

(2) 6 N.S.W. L.R. 289.

the liberty of the subject and to the proper administration of justice than the possibility of such a state of things. I regret unfeignedly that the Court is not unanimous, but I have never from the outset entertained any doubt in my own mind that this defendant was improperly tried at this second trial, and that the conviction cannot stand.

I have been so incessantly occupied with other public business since the argument that I have not had time to prepare a lengthy written judgment, but my brothers with whom I concur have so exhaustively treated the question that it has not been necessary for me to say more than I have said.

STEPHEN, J. The accused was tried by a Court of Quarter Sessions, convicted, sentenced and imprisoned for a criminal offence. A point as to the reception of evidence was reserved under s. 422 of our Criminal Law Amendment Act. The decision of the Supreme Court was in favour of the accused, the Court directing that the "conviction should be quashed."

The question is whether accused can be tried on a fresh information for the same offence. It can hardly be questioned that it is a fundamental principle of English law that a man cannot be "put in jeopardy" twice for the same offence. This seems the expression most generally used, though we find one Judge using the expression a man cannot be "prosecuted"; another that he cannot be "punished" twice for the same offence. The principle was established in *favorem vite*, when most, if not all, felonies were punishable with death. It equally applies where liberty only is at stake. The way in which an accused seeks to take advantage of his having formerly been in jeopardy is by a plea of *autrefois convict* or *autrefois acquit*. It is the former defence with which I have to deal. I gather from the authorities that when an accused has stood a trial, one that has neither proved abortive or been a mis-trial, but has been completed and resulted in a conviction—by which I mean a verdict of guilty—the accused cannot (speaking generally) be again tried for the offence in respect whereof that conviction took place. Before the Act enabling points to be reserved, if there was an error in the record the accused might after verdict move in arrest of judgment,

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 R. accused could not be said to have been in jeopardy [*i.e.*, in the  
*v.* “legal sense of the word”: *Crompton, J., R. v. Charlesworth* (1)]  
 O’KEEFE. judgment would be arrested, and accused could no doubt be  
 Stephen J. again prosecuted. So, in *Drury’s Case* (2), where an erroneous  
 sentence had been passed, and the judgment reversed on a writ  
 of error, Mr Justice *Coleridge* held that the accused could be tried  
 again.

Again, if the trial had been a mis-trial, such as when the venue  
 has been laid in a wrong county, or there has been a mistake in the  
 jury process, or a defective verdict [see *Winsor v. The Queen* (3)],  
 a *venire de novo* could be granted. In such a case as the  
 wrong reception of evidence and the conviction of an accused, he  
 was without remedy. It did not amount to error in its legal  
 sense; judgment could neither be arrested or reversed on writ of  
 error. Accused could not claim judgment *quod eat sine die: per*  
*Wightman, J., R. v. Charlesworth* (4). The mistake of the  
 Judge did not constitute a mis-trial, or render the trial abortive  
 in the sense in which that word is used in *R. v. Charlesworth*  
 (4) and *Winsor v. The Queen* (3). A *venire de novo* could not  
 be granted. How then were the accused dealt with? The  
 Judges took the course, if there had been anything wrong, of  
 recommending a pardon: *per Crompton, J.* (5). This pardon, of  
 course, could be pleaded in bar of any future prosecution for the  
 same offence. Does not, then, the question seem to be whether  
 the Act, enabling points to be stated for decision, and giving  
 effect to them in a direct manner, have placed accused persons  
 practically in a worse position than they were before? It has  
 enabled points to be reserved which would formerly have been  
 available in arrest of judgment, or by writ of error, and others  
 (*e.g.*, the wrong reception of evidence) as well. It seems to me  
 that this Act was passed for the benefit of accused persons, by  
 providing a simple method of raising points which may entitle  
 them to their discharge, and has not in the least interfered with  
 the admitted principle of law to which I have referred, and has

(1) 31 L.J. M.C. 37.

(2) 3 C. & K. 193.

(3) L.R. 1 Q.B. 319.

(4) 31 L.J. M.C. 25.

(5) 31 L.J. M.C. p. 38. See also  
 note (i) 4 Stephen’s Comm. p. 441.

left untouched the question as to when accused may be said to have been in jeopardy.

It is argued, if I understand rightly, that unless judgment follows conviction and remains, accused cannot be said to have been in jeopardy; that the judgment in this case having been set aside, the result is that there is nothing to which the plea of *autrefois convict* can apply.

As to the first point—viz., that the conviction must be followed by judgment—I am by no means clear that this is so; my impression is to the contrary. I can only read the judgments in *Winsor v. The Queen* (1), and *R. v. Charlesworth* (2), and *R. v. Miles* (3), as implying that on conviction (where no question arises of mis-trial or error on the record) the case is *res adjudicata*, and affords a bar to subsequent prosecution. To avoid unnecessary length, I will epitomise some of the expressions used. In *R. v. Charlesworth* (2), at p. 34, *Cockburn, C.J.*, says:—"‘Twice tried’—trial which proceeds to its lawful and legitimate conclusion by verdict; ‘twice put in jeopardy’—put in jeopardy by the verdict of a jury." *Winsor v. The Queen* (1), p. 311, *per Cockburn, C.J.*:—"The great fundamental maxim of the criminal law means this: a man shall not twice be put in peril after a verdict has been returned by a jury—that verdict being given on a good indictment, and one on which the prisoner could be legally convicted and sentenced." *Per Blackburn, J.*, p. 313:—"When the jury have once found their verdict of conviction or acquittal, the matter has become *res adjudicata*, and there can be no further trial." He then proceeds to emphasize and elaborate this proposition. See also p. 319, where he mentions instances in which a *venire de novo* should issue "where the indictment has not been disposed of." At p. 325, *Lush, J.*, speaks of an abortive trial as one not having gone on to its termination. In *R. v. Miles* (3), a conviction by a Court of summary jurisdiction was held to be a bar to a subsequent prosecution, although accused had been discharged on giving security for good behaviour without any sentence. *Charles, J.*, says (p. 438):—"It cannot be material that a Magistrate has power by statute

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(1) L.R. 1 Q.B. 319.

(2) 31 L.J. M.C. 25.

(3) L.R. 24 Q.B.D. 423.

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to deal with a convicted person, otherwise than by fine or imprisonment, for it is the conviction and not the nature of the sentence which constitutes the bar." Finally I refer to the following passages in *Blackstone's Comm.* (Vol. 4, p. 336):—"The plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment." (See also *Stephen's Comm.*, p. 401.)

I would further ask, if the question is to be decided on the ground that judgment must follow conviction, what about a case where by virtue of s. 422 no judgment is passed and accused is admitted to bail to receive judgment, and the point is reserved and determined in his favour. Can he be deprived of his plea of *autrefois convict* on the ground that no judgment follows the conviction?

Strictly, the judgment has not been dealt with at all. Nor do I see how it could be, as there is no error on the record. The conviction was ordered to be quashed. I hold, for reasons already given, that this has not the effect of nullifying the conviction—in the sense that it must be considered that the accused was never in jeopardy in the sense that *Coleridge, J.*, held that the prisoners had never been in jeopardy by reason of the judgment having been reversed for error on the record. At the risk of some repetition, I cite the following passage from *Broom's Maxims* (p. 313):—"It may be laid down generally that where, 'by reason of some defect in the record, either in the indictment, place of trial, process, or the like, the prisoner was not lawfully liable to suffer judgment for the offence charged on that proceeding,' he cannot, after reversal of the judgment, properly be said to have been in jeopardy within the meaning of the maxim under consideration." I hold that the accused can legally say that he was previously convicted, and lawfully too, if it be necessary to say that.

It cannot be said that he was unlawfully convicted because of an error of the Judge in receiving evidence that was not admissible. In the true sense of the words he was lawfully convicted, if on an indictment to which no objection could be raised, if there was no mis-trial, and no defective verdict.



further maintain, that if he cannot strictly plead that there is a previous conviction standing against him, the fact of its having taken place and having been quashed (or whatever the proper term may be, the word "quashed" not being in the section), instead of disentitling him to bar the second prosecution, is the very matter which shews his right to have been discharged (under s. 424) from imprisonment, and from all liability on the charge in respect of which he suffered it. Possibly the pleading below should have shewn on what grounds the conviction was set aside, that the Judge might have been able to determine whether the accused had been legally in jeopardy or not. At all events it was not shewn that it was upon any grounds which would render him liable to a second trial, and we know that it was because of the improper reception of evidence.

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To disallow the plea in this case, the Court must be prepared to hold that the Crown may obtain a conviction on insufficient evidence, that the Court may declare (as I venture to suggest that it should in this case have done) in terms of the alternative given by the Act that accused "should not have been convicted," and that the Attorney-General may then proceed to try the case again in order to supplement the deficiency, and so on *toties quoties*, and yet that accused cannot avail himself of the plea that he has been previously convicted. It seems to me that this would be utterly opposed to the spirit which dominates our criminal law; to the spirit of s. 423, under which a decision in the accused's favour signifies that a substantial wrong has been done to him. The passage from *R. v. Drury* (1), pointing out how shocking and contrary to justice and common sense it would be that persons guilty of an offence should be exempt from punishment because of a mistake in the judgment pronounced, I meet by the following passage from *R. v. Miles* (2):—"Reason and good sense point out that even at the risk of occasional miscarriages of justice when once a criminal charge has been adjudicated upon by a Court having jurisdiction, that adjudication ought to be final, and, after all, such miscarriages are very rare." The Act which enables these legal points to be determined takes away from accused persons the power of relying

(1) 3 C. &amp; K. 193.

(2) L.R. 24 Q.B.D. 423.

1894. on many technical ones which formerly could have availed them  
R. (see s. 378). In this very matter it is quite possible that, the  
v. offence being a misdemeanour, the Court might have ordered a  
O'KEEFE. new trial by virtue of the authority in s. 423 to "make such  
Stephen J. other order as justice requires." This would be very different  
from another taking place on the *ipse dixit* of the Crown.

The case, however, just cited by Mr. Justice *Windeyer* seems opposed to this suggestion. I would further point out as to the merits, that it cannot be said here, as *Coleridge, J.*, implied against the prisoners in *R. v. Drury* (1), that they had deservedly been found guilty of the offence charged. Here accused complained that he had been found guilty by the introduction of evidence which did not tend to shew his guilt. In considering the effect of a decision in his favour, we ought to do so at the point where he pleaded his former, and not by the light of his subsequent, conviction at a trial which the Court decides should never have taken place.

FOSTER, J. The accused was charged with a misdemeanour under the Liens on Wool Act (11 Vic. No. 4), at Quarter Sessions. His plea was *autrefois convict*, and the Crown having replied *nul tiel record*, the record was produced, when it shewed a good indictment for the same offence, and all the proceedings without apparent flaw or fault, up to conviction and sentence thereupon, but it shewed in addition an endorsement of a certificate by the Prothonotary that the Supreme Court had, on a case reserved, ordered the conviction to be quashed. Upon this the Chairman of Quarter Sessions held, relying on the case of *R. v. Mowatt* (2), that the record did not shew that the accused had been in jeopardy, and so did not support the plea.

It was admitted that the conviction was quashed because of the improper admission of evidence, and also that the prisoner had served a part of his sentence on the former conviction before that conviction was quashed, but it was contended on the authority of *R. v. Drury* (1) that a judgment reversed is no judgment, is, in fact, as if it had never been, and that the prisoner not having served his whole sentence under it, the plea of *autrefois convict* could not avail him.

(1) 3 C. & K. 193.

(2) 6 N.S.W. L.R. 289.

Although the law for the reservation of criminal cases had been in force in England since 11 & 12 Vic. c. 78, some 45 years, and almost as long in this colony, no attempt to proceed afresh for the same cause against a prisoner whose sentence had been set aside under that Act in England, or in this colony, or in any colony in which a like law existed, could be produced to us, except the case of *R. v. Mowatt* (1), which was certainly on all fours with the present case. This case was tried some ten years ago, and on application to the Supreme Court, on a case reserved, it was held to be governed by *R. v. Drury* (2), and the conviction was upheld, but in that case the accused was unrepresented, and it made so little impression upon the public or the legal mind in the colony, that, while frequent observations have been made from the Bench, and by the public, upon the misfortune of persons clearly guilty escaping punishment through mistakes in their trial not affecting the real merits, and though it was decided just ten years ago, no other attempt to bring again to justice a prisoner whose conviction was so set aside has taken place till the present.

No doubt it might seem a defect of jurisprudence that there should be no means of calling to account a person of whose guilt there is indisputable proof, but it is equally apparent that under certain circumstances this depends upon a fundamental principle of British law, as well as of the civil law; for the principle *nemo bis vexari eadem causâ debet* undeniably obtains in both, and a man acquitted by a jury cannot, even on new evidence, be tried again for the same offence; nor, at any rate before the law for the reservation of Crown cases, could a man who has been tried and convicted and sentenced be again tried for the same offence, unless it manifestly appeared, from the record of the trial itself, that there was such error on that record that it in fact amounted to no trial at all, in which case it was held the man had never been in jeopardy, and might be indicted again. In no case has it ever been held under British law, until the case of *R. v. Mowatt* (1), that where an accused person had undergone a valid trial, and been validly sentenced as the completion of that trial, that he could again be proceeded against; and it may well be doubted whether that case, unargued

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(1) 6 N.S.W.L.R. 289.

(2) 3 C. &amp; K. 193.

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for the prisoner as it was, would have been so decided if it had been shewn to the Judges that there had been a valid trial and sentence.

The Court could reasonably say that, though a man was nominally convicted and punished by the sentence of the law, yet as they found that this was not the conviction or punishment of the law at all, but an illegal conviction and punishment, therefore the man had never been in jeopardy in the true sense of the word; but can we say reasonably that when a man has been convicted lawfully, and undergone punishment, part of a sentence which was perfectly legal and therefore actually the sentence of the law, he never was in jeopardy, because the Court has interfered and prevented his serving the remainder of his sentence just as a pardon does? If it be desirable that criminals should under certain circumstances be tried again, after either acquittal or conviction, the power to grant a new trial can be given by law to the Court, and probably it would be left largely to their discretion, but it would be strange indeed, and not consistent with anything hitherto done by the Legislature, if while the Courts have no power to grant a new trial to the Crown in felonies after a valid trial, the Crown can nevertheless on its own mere motion proceed again without any leave, simply because the statute allows the Court to reverse the judgment.

Is *R. v. Mowatt* (1) a decision to be followed? It seems founded apparently on *R. v. Drury* (2). It was apparently unargued by counsel, and prisoner was unrepresented. To see whether *R. v. Drury* (2) supports it we must look to the condition of the criminal law before as well as at the time of that case.

Originally a valid judgment was final. A valid judgment was a proper judgment, founded upon good pleadings and on valid steps in the proceedings; in fact, one apparently good upon the face of the proceedings. From early times to the present day the record could be examined, and if it was found that it did not properly support the judgment, or that the judgment upon it was not a lawful one, the judgment was set aside, but it must be observed this could only be done because it appeared on the face of it not to be what it professed to be—a valid judgment, and

(1) 6 N.S.W.L.R. 289.

(2) 3 C. & K. 196.

therefore it was in fact no judgment at all. The setting it aside was not causing a valid judgment to become invalid, but declaring that it never was a valid judgment, as manifestly appeared upon the examination of the record. Of this class was *R. v. Drury* (1), and of this it might well be said that "the judgment reversed was no judgment at all," because reversing it in this way, the only way a judgment could be reversed in case of felony before the Act for the reservation of Crown cases, was in fact declaring that there never had been a valid judgment at all, and there never having been a valid judgment there was no valid record of the trial, and *autrefois convict* could not be supported.

But it was soon found in our jurisprudence, both in civil and criminal matters, that a judgment might be valid and yet not satisfactory. Though the steps upon the record were valid and regular, there might be irregularities in the details of the trial such as wrongful admission or rejection of evidence, or mis-direction or non-direction of the Judge at the trial, which never made the record or judgment invalid, or enabled the Court to declare the judgment invalid and simply set it aside, but which nevertheless called for *further investigation*. In civil cases this was met by setting aside the judgment *on condition* a new trial should be had, but for these causes a judgment never could be set aside simply and barely, without ordering a new trial. The ground of setting aside in these cases was not that the judgment was invalid, but that it was unsatisfactory, and the Court directed further investigation. This practice of setting aside judgments—not because they were bad, but because they were unsatisfactory and not barely setting aside, but with the additional order that there should be a new trial—was afterwards extended in some cases to criminal misdemeanours, but, as often expressly decided (see *R. v. Bertrand*) (2), never to felonies, except in the one case, afterwards held to be a mistake: *R. v. Scalfie* (3).

Thus it appears in no case, civil or criminal, could a judgment be reversed or pronounced void simply, without ordering a new trial, except for error apparent on the record shewing that there had been no valid trial at all. Had it not been a principle of

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(1) 3 C. &amp; K. 193.

(2) 1 L.R. P.C. 520.

(3) 17 Q.B. 238.

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criminal law that a man should not on a charge of felony be a second time subjected to trial after a valid judgment, even though unsatisfactory, there appears no reason why a new trial should not have been granted in felony. The hardship of having judgment carried out in criminal cases where the Court thought the means whereby it had been obtained were unsatisfactory, led to the practice of the Court, who acknowledged they had no power to set aside the judgment, reporting the case to the Crown as unsatisfactory, the result of which was that without reversing the judgment the Crown granted a pardon. This pardon was pleadable in bar, and was virtually, though not in form, pleaded as a plea of *autrefois convict*, with the addition of a lawful reason why the accused should suffer none of the consequences of conviction. This continued until the Act 11 and 12 Vic. c. 78, when these objections to the satisfactoriness of a judgment were made legal grounds for setting aside a judgment.

It will be observed that the law for the reservation of Crown cases, ss. 422-424 of the Criminal Law Amendment Act, deals with the reversal, arrest or avoidance of the judgment, and says nothing of quashing conviction, yet the reports generally state that what has been done in England and in the colony has usually been to order the conviction to be quashed. If this is a valid order it must be because it is equivalent to reversing, arresting or avoiding the judgment, and we must assume that it is so, otherwise there is nothing to shew that the sentence has been set aside, and the plea of *autrefois convict* is plainly made out by the record; but assuming that an order that the conviction be quashed is equivalent to an order in the words of the statute and reverses the judgment, is such a reversal necessarily the same in effect as a reversal for error on the record? The one is a reversal of a judgment because it manifestly appears from the record itself that it is invalid, and always was invalid, and so the reversal declares. The other is a reversal of a judgment which always was a valid judgment, at least up to the time of reversal, and it would be simply untrue to declare that there never had been any valid judgment at all. Can it be said then that such statements as those of Mr. Justice Coleridge in *R. v. Drury* (1)

that "the judgment reversed is the same as no judgment," and the like, are applicable to a case of the present kind, where the judgment is not by the statute declared to be invalid, and where by common law it was perfectly valid, though not regular in the details whereby it was obtained? I venture to think not.

The reversal may be effective in future, so as to prevent the further carrying out of the sentence, but not effective retrospectively, to make the punishment lawfully suffered, and which it cannot undo, merely null and void, and the conviction no longer pleadable in bar. The former effect is expressly given in s. 424 of the Criminal Law Amendment Act; the latter, I think, ought not to be implied.

Again, we may and must fairly consider whether it is probable that the Legislature intended that, from the power given to the Court to arrest, reverse or avoid a judgment, the consequence should follow by implication, that persons, who would not before have been triable again, might now be re-tried. First, in order to arrive at such a conclusion we must determine that the Act intended, without saying it, to give the act of the Court a retrospective effect, making the sentence and punishment suffered, which up to that time were valid and lawful, to have been always invalid and unlawful, for otherwise the prisoner was lawfully sentenced and suffered punishment lawfully. And next we must consider whether it is likely that the Legislature, if it had so intended what it has not expressly said, would have done it in such a manner.

If the statute has the effect contended for on the part of the Crown, the law as to never granting new trials in criminal cases on the application of the Crown is a mere matter of form.

In *R. v. Bertrand* (1) the Supreme Court was held to have no power to grant a new trial, but if the Court had simply reversed the judgment, the same end would have been obtained, for the Crown could have tried the prisoner again without any leave from the Court. Is it probable the Legislature, if it intended to allow the re-trial of a prisoner tried under a valid record, would have allowed this to be done without the leave of the Court, when the law, even in civil cases, will not allow such a thing?

(1) 1 L.R. P.C. 520.

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Surely this is most improbable, and must not be so assumed except where the words of the Act leave no other meaning possible.

If this be the law the Crown may prosecute a person, and the prosecutor carelessly introducing inadmissible evidence, if the prisoner is convicted and is able to appeal by case reserved, may find the conviction quashed, and then, whether the Court think it a proper case or not, may proceed again; and if another error is committed by the Crown, the same results may be repeated over and over, till at last the Crown may offer only admissible evidence, and the prisoner may be found not guilty.

Can the Legislature have taken away the supervision of the Courts as to new trials in criminal cases, while the law requires it in the pettiest civil case? I think not.

The present law as to reserved cases was admittedly substituted for the old custom of recommending pardons. I think *prima facie* it ought to be held to have a like effect, remitting the consequences of the judgment as to its future execution, but not interfering with its past effect as a bar to further proceedings for the same offence. In this view I think I am upheld by the invariable practice of the Courts in England and the colonies since this law was introduced in England more than 40 years ago, except in the solitary instance above quoted of *R. v. Mowatt* (1).

I have not thought it necessary to express any opinion upon the precise form of the indorsement, for it seems to be in accordance with the practice of this Court. I have assumed that it is equivalent to that judgment in terms of the Act, which would be appropriate to a case where the judgment is set aside because of irregularity in the course of the hearing. Nor have I given any opinion as to what would have been the effect of an order that the judgment should be arrested, which would clearly be inappropriate in this case; but if the endorsement is not substantially authorised by the statute, the conviction and sentence as they appear on the record without the endorsement would be clearly enough to sustain the plea of *autrefois convict*, and in any case the judgment, in my opinion, is wrong, and ought to be reversed.

*Conviction quashed.*

Attorneys for the prisoner : *Davidson & Johnson* (Goulburn).