

jury, and the receiving it on the part of the judge, and the recording it, which is also, though the act of the officer, the act of the Court, were not judicial acts; and I entertain the greatest doubts whether the verdict would not have been invalid, if it had been delivered, received, and recorded on the Sunday. Then, it is said, that the judge might have adjourned till the Monday, and have kept the jury confined on the Sunday, so as to have received the verdict on the Monday. That, no doubt, could have been done with perfect judicial regularity. But this startling difficulty would arise, that since it would be impossible, because absolutely inhuman, to keep the jury without meat or drink during the whole of the Sunday until the Monday, they having been shut up on the Saturday night, the only alternative would have been to have allowed the jury refreshment in the interval. There is no authority for so doing; I believe the authorities rather point the other way. After once the jury have retired to consider their verdict, there is no authority that I am aware of for saying,—or at least no satisfactory authority, for I do not think that what is said in Doctor and Student goes that length, or, if it did, ought to be considered as sufficient to militate against the whole course of practice,—that a jury can have refreshment during the period of their deliberation. The oath that is administered to the bailiff has a strong tendency to support this view; he is sworn to keep them without meat, drink, or fire, (candle light excepted); and then it goes on, ‘nor to speak with them yourself; nor to allow any one else to speak with them without the leave of the Court.’ The exception as to the leave of the Court relates to persons speaking to them, not to allowing them meat, drink, or fire; and I question very much whether, inasmuch as this system of coercion has been handed down to us from our ancestors, the judge could take upon himself to alter the practice without the intervention of the legislature; the sooner that occurs the better for the administration of justice.”—“It was pressed on us also that the evidence of the accomplice, Harris, had been improperly received. That is a matter which we cannot take into account. It was alleged that the accomplice came forward to give evidence

under peculiar circumstances. The plaintiff in error and Harris were both joined in one indictment, and on the first occasion were tried together. On the second, it was proposed, on the part of the prosecution, to sever the trial, with the view to the one prisoner becoming a witness against the other. No doubt that state of things, which the resolution of the judges, as reported to have been made in Lord Holt’s time, was intended to prevent, occurred. It did place the prisoner under this disadvantage; whereas, upon the first trial that most important evidence could not be given against her, it was given against her upon the second, so that the discharge of the jury was productive to her of that disadvantage. I equally feel the force of the objection, that the fellow prisoner was allowed to give evidence, without having been first acquitted, or convicted and sentenced. I think it much to be lamented. In all cases where two persons are joined in the same indictment, and it is desirable to try them separately, in order that the evidence of the one may be received against the other, I think it necessary, for the purpose of insuring the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty as to him; or if the plea of not guilty be withdrawn by him, and a plea of guilty taken, to pass sentence; so that the witness may give his evidence with a mind free of all the corrupt influence, which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce. This objection is not set forth upon the record; in a civil case a question as to the reception of evidence may be raised on a bill of exceptions, but in a criminal case it cannot be raised upon the record so as to constitute a ground of error. We cannot, therefore, take it into consideration. Whether this circumstance should have any influence elsewhere, is a matter upon which it is not for us to pronounce an opinion.”

Blackburn, Lush, and Mellor, JJ., also stated their opinions, concurring with the Chief Justice in giving judgment for the Crown.