The Jury gave a verdict for the plaintiff for £250.

Beard obtained a rule *nisi* for a new trial—1. On the law and evidence. 2. For misdirection, in ruling that there was any evidence to go to the jury, and that the defendants, were bound as councillors to have produced before the commissioners the books of the township, the same not having been proved to have been in in their possession. 3. For the improper rejection of the evidence of Johns. 4. For excessive damages.—He cited *Austen* v. *Willward*, Cro. Eliz. 860; *Thorpe* v. *Barber*, 5 C. B. 675; *Haddrick* v. *Heslop*, 12 Q. B. 284; *Amey* v. *Long*, 9 East 473.

D. G. Miller and *Anderson* shewed cause

McLEAN, J.—On examination of all the evidence, I cannot say that the first objection is well founded. I do not think the verdict contrary to law, for the law will undoubtedly warrant such a verdict on sufficient evidence; and as to the evidence, I must say I think it very strong against the defendants, and shows that they were endeavouring to escape from an enquiry which was calculated to bring out against them very gross and fraudulent acts of misconduct while placed in the position of councillors and guardians of the interests of their township. It is not perhaps surprising that they should try to avoid such an exposure as took place before the commissioners, but if in their efforts to prevent their misconduct from being known they caused to the township, which it was their duty to protect, a loss and expenditure of money to a large amount, they ought not to complain if they are held responsible for the consequences of their acts. Had they been conscious that their conduct as members of the municipal council was upright and honest, a sense of justice to themselves should have induced them to court and encourage enquiry; but the reverse, as appears by the evidence, appears to have been the case. The books and papers of the corporation, which were necessary to the proper investigation of the financial affairs of the township, were not produced, on the pretence that they were in the possession of a clerk who was conveniently absent at the time, but from the evidence there is every reason to believe that they were within the reach and control of the defendants. The clerk of the council, in whose possession the documents were said to be, was also a clerk of Johns one of the defendants, and after his alleged departure, and while another person was acting as clerk, a sum of upwards of £10 was granted to him by the defendants for alleged services in 1856, the defendant Horseman first signing the order on the treasurer in his character as reeve, and then endorsing it as agent for Nealon, the clerk.

The jury, after hearing all the evidence, were satisfied that if there were documents or books in the hands of Nealon they were there by the consent and desire of the defendants, and could be produced by them at any time, if they desired to do so, and I certainly think the evidence leads strongly to that conclusion. If the charge to the jury on that point had been even stronger than it appears to have been, it would still not be subject to be regarded as misdirection.

As to the rejection of one of the defendants, Johns, as a witness for his co-defendants, it appears to me to have been strictly correct. He would have been a competent witness for the plaintiff, and so would either of the defendants; but he could not be called for the defendants while he as well as they were interested in reducing the amount of damages or preventing any from being recovered. In giving evidence for the others he would, in fact, be giving evidence for himself. I think, therefore, he was not a competent witness for them, his name as a party being still on the record and he being equally interested in the result with the other defendants, so far as the damages were concerned

The damages are certainly large, but then it appears that had it not been for the obstructions and delays caused by the defendants, the costs of the commission would not have exceeded £75 or £100, but that in consequence of their conduct the expense actually paid amounted to £328 6s. 1d. If the jury took the £75 as the probable amount of costs, if all information had been readily afforded, then their verdict of £250 would scarcely reimburse the plaintiffs for the extra costs occasioned by the defendants, so that the verdict cannot by any means be considered excessive; but if £100, the larger sum mentioned, were taken as the probable cost of the commission, and the jury took into consideration the interest on the actual sum paid out, the verdict could hardly be said to be excessive. They were at liberty to allow what would replace the money expended in consequence of the defendants' misconduct, and it cannot, I think, be fairly alleged that they have done more.

On all the grounds urged for a new trial I think the defendants must fail, and that their rule must be discharged.

BURNS, J.—This case has already been before the court upon demurrer, and the declaration is fully set out in 16 U. C. Q.B. 556.

1. As to the rejection of the defendant Johns, against whom there was a judgment by default. The venue in this case is in the usual form after a judgment by default and judgment for plaintiff on demurrer—namely, that it is convenient and necessary that there be but one taxation of damages in this suit, therefore let the giving of judgment against the defendants Horseman and Carr be be suspended until the trial of the issues they have put upon the record; and as well to try those issues as to assess the damages on occasion whereof Horseman and Carr had put themselves upon the judgment of the court, as to enquire against Johns what damages the plaintiffs have sustained, let the jury come, &c. We had a similiar question to this a few terms ago in an action of assumpsit, in which it was held that one defendant who had suffered judgment by default could not be examined as a witness on behalf of a co-defendant on issues raised by himself. This case is an action of tort, and the case of *Thorpe* v. *Barber*, (5 C. B, 675) shews that in such cases the defendant, still being a party to the record, and interested in the question of damages, is not a competent witness for his co-defendant upon the trial of issues raised against him. Great pains were taken in that case to review and consider the conflicting decisions which had previously prevailed upon the question. In the same year the question was brought before the Queen's Bench, but there it was whether in a similar case the plaintiff could call as a witness for him in such an action a defendant who had suffered judgment by default, and after reviewing the authorities it it was held the plaintiff might do so. The court upheld the doctrine laid down in *Thorpe* v. *Barber* (*Haddrick* v. *Heslop*, 12 Q. B. 267). The two cases, therefore, establish the principle, and the destinction between the plaintiff and the defendant calling such a witness.

The defendants counsel endeavoured to draw a distinction in the present case, that the damages might and ought to be assessed against the defendant Johns separately from the others, and that would have the effect of rendering him a competent witness for the others, and he relied upon some old cases on the subject of severing the damages to establish this proposition. The argument seems specious, but when examined will not bear the light. The declaration charges these defendants with conspiring, combining, confederating, and agreeing together to obstruct, hinder, and delay the commissioners in the discharge of their duties in making the enquiry, and to cause great expense and damage to the plaintiffs by increasing the costs and expenses of the commission, and to prevent the commissioners from obtaining the evidence. The defendant who has suffered judgment by default has thus admitted all that is charged, and admits his complicity with the others. The point was much discussed in *Hall and another* v. *Goodchild* (5 Burr. 2790), and the doctrine laid down by Lord Mansfield in giving the judgment of the court is, that where a joint trespas is stated, and the jury find two or more defendants of that joint trespass, they cannot sever the damages against each. In *Sahn* v. *Long* (1 Wils. 30), where one of two defendants allowed judgment by default, it was held the jury must assess the same amount of damages against him that they gave against the other.

There was, in my opinion, no misdirection to the jury in respect of the evidence. It was proved sufficiently clear, beyond all doubt that if the defendants had promptly afforded the commissioners the information required, they would have been enabled to have completed their report in some eight or ten days, at an expense of some £75 or £100. The jury were not told that it was the duty of the defendants to take the books, papers and documents out of the custody of the clerk, and produce them to the commissioners, but were told that the defendant Horseman as the head of the corporation, and the other defendants as councillors, had a right to direct the clerk to obey in furnishing that information, and it was their duty to give such directions. There can be no question but that such was their duty. The clerk, it appears, got out of the way, and it was a question for the jury to say whether that pro-