The Legal News.

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DISCHARGE OF JURY BEFORE VERDICT.

A question of some interest was raised in the case of *Jones* v. *Reg.*, reported in the present issue; yet when the authorities come to be looked at, it is susceptible of no difficulty whatever. The question was simply whether the act of the Judge of Sessions, in discharging a jury after they were sworn, and before the trial was concluded, could be reviewed on a writ of error, and whether it was a bar to a second trial. The authorities are so conclusive that the pretention raised on the part of Jones vanishes into thin air. The whole question of the discharge of juries without verdict, and of the validity of so-called second trials, was fully discussed in the celebrated case of Charlotte Winsor, tried for murder. That was certainly a remarkable case, for the Judges of the Court of Queen's Bench in England, in the year 1866, were confronted with a passage from Coke, that "a jury sworn and charged in case of life or member cannot be discharged by the Court or any other, but they ought to give a verdict." The jury in the *Winsor* case had been discharged, after five hours' deliberation, because unable to agree, and because it was on a Saturday night, and the Judges had to hold an assize in another county on the Monday morning. Yet Chief Justice Cockburn had no hesitation in maintaining the validity of the proceeding. "It was said by the prisoner's counsel", he remarked, "that it was competent to judges, and the duty of judges, to carry with them in carts a jury, who could not agree, to the confines of the county where the trial was held, or even beyond the county. I doubt whether there is authority for this assertion. The dicta that are to be found in the Book of Assize have been copied servilely by text-writers, and that has given rise to this opinion. I question very much whether such a practice ever existed; I am sure it has not in modern times. But suppose it to have been so, we, now-a-days, look upon the principles on which juries are to act, I hope, in a different light. We do not desire that the unanimity of a jury should be the result of anything but the unanimity of conviction." If a man may be tried again where the jury disagree after deliberation, there seems to be more reason to say that he may be tried again where, as in the *Jones* case, the jury never arrived at the stage of deliberation, never were in a position to deliberate, and never even had the evidence for the Crown submitted to them. In fact, there is nothing to support such a pretention as that of Jones, except vague statements, as for example, that a prisoner cannot be twice put in jeopardy. But "when we talk of a man being twice put in jeopardy," observed Crampton, J., on one occasion, "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."

THE COURT OF QUEEN'S BENCH.

The Montreal appeal term of this Court has been adjourned to the 2nd of November next, and it is understood that when the sittings are resumed, an attempt will be made to inaugurate in part the system which has been strongly urged by Mr. Justice Ramsay. This, in brief, may be described as a sitting from day to day, for about four days in each week, with intervals for examination of the records, for deliberation, and for judgment. It is said that the judges will be relieved from the Quebec Criminal term. It is to be hoped that this arrangement will result in a material diminution of the list of inscriptions.

NEW PUBLICATIONS.

Lettres sur la Reforme Judiciaire, par S. Pagnuelo, Avocat, Montreal, J. Chapleau & Fils.

We have here a reprint of a valuable series of articles written by Mr. Pagnuelo, of the Montreal bar, upon the administration of justice in this Province, with suggestions as to the reforms which are desirable and necessary. These letters have attracted considerable attention while in course of publication in the daily press, and we have no doubt that many of

our readers are already familiar with the salient features of Mr. Pagnuelo's propositions. We defer for the present a more particular notice of the work, but we take this occasion to commend it to the attention of the bar, and especially of those who have seats in our Legislature.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, June 22, 1880.

Sir A. A. DORION, C.J., MONK, RAMSAY, TESSIER and CROSS, JJ.

THIBAUDEAU et al. (contestants below), Appellants, & BEAUDOIN (creditor collocated below), Respondent.

Bank—Cashier taking hypothec to protect his endorsement of notes held by the Bank—Contestation of collocation.

The cashier of a Bank, who has endorsed notes for a customer of the Bank, may, if in good faith, take a hypothec on the debtor's property to protect himself on the endorsements.

The judgment appealed from was rendered by the Court of Review, Montreal (Sicotte, Torrance, Rainville, JJ.), Dec. 29, 1879, reversing a judgment of the Superior Court, Montreal (Mackay, J.), Sept. 13, 1879.

The question was as to the right of the respondent Beaudoin to be collocated on a mortgage given by the insolvent Trudeau. The assignee of Trudeau had collocated Beaudoin for $870, on a mortgage, but afterwards, learning that this claim was based on notes, and suspecting that Beaudoin was a mere *prête-nom* for La Banque de St. Jean, which had already been collocated on the same notes, the assignee contested the collocation, and Mackay, J., rendered the following judgment maintaining the contestation :—

"The Court, etc.,

"Considering that the obligation attacked as having no consideration is found to have none in respect of which Beaudoin personally ought to be collocated;

"Considering that if Beaudoin had been holder, at the opening of this bankruptcy of Alexis Trudeau, of the notes endorsed by him (Beaudoin) for Alexis Trudeau, he would have had right, which, seeing that he was not holder of them, he cannot be admitted to have had at the bankruptcy, for double ranking cannot be allowed; the Bank of St. Jean was owner and holder of the notes of the bankrupt endorsed by the claimant Beaudoin, and has proved upon them, the claimant himself swearing to their claim; as to the cause of the obligation attacked, it must be held to be only that stated in claimant's letter of 29th September, 1878; this, taken with the other facts now apparent, and the claim by the Bank of St. Jean, shows that claimant has no right as against the contestation by Thibaudeau and others;

"Considering the material allegations of contestation proved;

"Doth maintain the contestation of the collocation of said claimant Beaudoin, and said collocation attacked is annulled with costs against the claimant Beaudoin, and doth order the assignee in this matter to make a new distribution of collocation according to law."

In Review, the above judgment was reversed for the following reasons :—

"Considérant que Beaudoin, en obtenant de Trudeau garantie hypothécaire, à raison de billets endossés pour ce dernier, a agi pour son intérêt personnel;

"Considérant que, lors de la faillite de Trudeau, la dette ainsi garantie par ce dernier en faveur de Beaudoin n'était pas acquittée;

"Considérant que la banque de St. Jean est créancière de Trudeau pour les billets susdits qu'elle a escomptés;

"Considérant que la banque n'est colloquée que pour sa proportion comme créancière chirographaire à raison des billets en question;

"Considérant que Beaudoin a droit d'être colloqué pour sa créance hypothécaire, moins la somme accordée à la banque de St. Jean;

"Considérant qu'il n'est pas prouvé que le créancier colloqué soit le prête-nom de la banque de St. Jean;

"Considérant, en supposant même que telle preuve serait faite, qu'il est prouvé que le failli était endetté envers la dite banque avant la passation de l'obligation sur laquelle est basée la réclamation du dit créancier colloqué, et que sa collocation est bien fondée;

"Considérant que Beaudoin, comme endosseur de ces billets, est débiteur de la banque pour la

balance qui est encore due à cette dernière, et qu'en lui faisant perdre la collocation faite à son profit comme créancier de l'hypothèque en question, il serait dépouillé de droits hypothécaires légalement acquis; cette Cour déclare que la collocation faite en faveur de Beaudoin est conforme aux droits respectifs des parties, et qu'il y a erreur dans le dit jugement du 13 Septembre, 1879, qui l'a déboutée; infirme et annule le dit jugement, et rendant celui qu'eût dû rendre la dite Cour Supérieure, déclare la contestation des dits J. R. Thibaudeau & al., mal fondée et la renvoie, et condamne les contestants à payer les frais tant de la dite Cour Supérieure que de cette Cour de Révision, dis traits," &c. (L'Honorable Juge Torrance ne concourt pas dans ce jugement.)

MONK, J. (*diss.*), was inclined to think that Beaudoin was acting as *prête-nom* for the Bank. He alleged in the mortgage that it was given for money lent, but his own evidence showed that this was not true. Looking at all the circumstances of the case, his honor was of opinion that the judgment of Mr. Justice Mackay should be confirmed, and that the judgment rendered in Review should be reversed.

Sir A. A. DORION, C.J. Beaudoin was agent of La Banque de St. Jean at West Farnham, and afterwards acting-cashier at St. John's. He made advances for the Bank to one Trudeau, and at the date of the mortgage in question tion, Oct. 8, 1877, Trudeau was indebted to the Bank in a considerable sum. Trudeau failed in January, 1878. The Bank produced four notes as part of their claim, and received a dividend on them. When the real estate of Trudeau was sold, Beaudoin was collocated for his mortgage. On the day that the dividend became due, Beaudoin applied to the assignee for his money. The assignee, who had collocated him upon the certificate of the Registrar, asked him for a statement of claim. The next day Beaudoin sent him a copy of the mortgage, with the four notes, on which the Bank had already filed a claim and received a dividend. The assignee thereupon asked leave to contest the collocation. The delay for contesting the dividend sheet had elapsed; but one of the Judges of the Superior Court granted leave to contest the collocation, and this was one of the grounds urged by Beaudoin for having the appeal rejected, it being contended that, after the delay had expired, the Judge had no discretion or right to allow the contestation of his claim. The assignee alleged that no consideration was given for the mortgage in question. Upon that the parties went to evidence, and it appeared that Beaudoin endorsed the notes of Trudeau and took this mortgage to protect himself. The circumstances were such as would naturally excite suspicion, but the majority of the Court do not find actual proof that Beaudoin is the *prête-nom* of the Bank. It is said that the Bank has already ranked for these notes, and that if Beaudoin is allowed to claim on his mortgage there would be double ranking. The Court holds that Beaudoin had a right to take the mortgage for his endorsements, but it will deduct the $288 received by the Bank to the exoneration of Beaudoin, and the collocation will be reduced accordingly.

The judgment is as follows:—

"La Cour, etc.,

"Considérant que l'intimé Beaudoin avait le droit de prendre une garantie hypothécaire pour se protéger contre l'éventualité à laquelle il s'exposait en endossant les billets du défendeur Trudeau;

"Et considérant qu'il n'est pas prouvé que le dit intimé ait agi comme le prête-nom de la Banque St. Jean, en prenant cette garantie hypothécaire;

"Et considérant que le montant des billets endosssés par le dit intimé est de la somme de $962.03, et que la Banque de St. Jean, porteur des dits billets lors de la faillite du dit défendeur Trudeau, a déjà reçu un dividende, sur le montant des dits billets, de $288.60, ce qui ne laisse qu'une balance de $673·43 sur le montant des dits billets pour lesquels la dite garantie hypothécaire a été donné;

"Et considérant que le dit intimé n'aurait dû être colloqué que pour la dite somme de $673.43, balance due sur le montant des dits billets, et non pour la somme de $870;

"Et considérant qu'il y a erreur dans le jugement rendu par les trois judges de la Cour Supérieure siégeant en révision le 29 Décembre, 1879;

"Cette Cour casse et annule le dit jugement, &c., et réduit la collocation de l'intimé à la dite somme de $673.43; et attendu que c'est par la faute de l'intimé que cette contestation a eu

lieu, cette Cour le condamne à payer aux appelants tous les frais encourus en Cour de première instance qu'en Révision, et sur le présent appel." (M. le Juge Monk et M. le Juge Tessier ne concourent pas dans ce jugement.)

Judgment reformed.

Béique & McGoun for Appellants.

Roy & Boutillier for Respondents.

MONTREAL, Sept. 17, 1880.

Sir A. A. DORION, C.J., MONK, RAMSAY and CROSS, JJ.

DOBIE, Appellant, and THE BOARD OF TEMPORALITIES, &c., Respondents.

Appeal to Privy Council—Injunction—C.C.P. 1178.

An appeal lies to the Privy Council from a judgment of the Queen's Bench dissolving an injunction, where the matter in dispute exceeds £500 stg.

The appellant Dobie moved for leave to appeal to H. M. in Her Privy Council from the judgment of June last (p. 244).

Morris, for the respondent, resisted the application, on the ground that the action was by way of injunction, and that no appeal lay. He cited *O'Farrell & Brassard*, 1 Q.L.R. 214; *Belleville & Doucet*, 1 Q.L.R. 250; and *Pacaud & Gagné*, 17 L.C.R. 357.

Macmaster, for the appellant, relied on 1178 C.C.P., and *Buntin & Hibbard*, 1 L.C.L.J. 60.

Sir A. A. DORION, C. J., said the report of *O'Farrell & Brassard*, 4 Q.L.R. 214, was not quite correct. It had not been held that no appeal lay from a prohibition, but that no appeal lay where there was no matter in dispute exceeding the sum or value of £500 stg. The same may be said of the short holding in *Pacaud & Gagné*. Mondelet, J., said that this case did not fall within any of the dispositions of the statute regulating appeals to Her Majesty (p. 375.) The appeal was also refused on the same ground in *Bellefeuille & Doucet*. But we granted the appeal in *Joly & Macdonald* (2 Legal News, 104), because there was in dispute a sum exceeding £500 stg. There is also in this case a matter in dispute greatly exceeding that amount, and therefore leave to appeal should be granted. Leave to appeal is granted, however, without suspending the effect of the judgment dissolving the injunction.

Leave to appeal granted.

Macmaster, Hall & Greenshields, for Appellant Dobie.

J. L. Morris, for Respondents.

LOYSEAU, Appellant, and CHARBONNEAU, Respondent.

Appeal to the Q.B. in forma pauperis.

The Court of Queen's Bench may grant leave to appeal to that Court in forma pauperis.

Motion by defendant Loyseau, for leave to appeal *in forma pauperis*. The defendant was in prison under a judgment of *contrainte par corps* in default of payment of damages. It was objected that the Court had not power to grant leave to appeal *in forma pauperis; Legault & Legault*, 16 L.C.R., p. 163. Art. 31 C.C.P. only applies to the Superior Court.

Sir A. A. DORION, C.J. Leave to appeal *in forma pauperis* was accorded provisionally in Chambers, and confirmed subsequently by this Court in *Prevost & Rodgers* (in June 1878). The Court, in this case, grants leave to appeal *in forma pauperis*, there appearing to be some irregularity in the form of the judgment, but without expressing any opinion as to whether this irregularity will be considered fatal.

Leave to appeal *in forma pauperis* granted.

Longpré & David, for Appellant.

Roy & Boutillier, for Respondent.

ANGERS, Atty. Gen., Appellant, and MURRAY, Respondent.

Appeal to Privy Council.

The Court of Queen's Bench will refuse leave to appeal to the Privy Council from a judgment of the Q. B. rejecting an appeal to the Q. B. for want of jurisdiction.

Sir A. A. DORION, C.J. Two motions were made, one to order back the record which had been sent back to the Court below, in order to move for leave to appeal to Her Majesty; the other for leave to appeal to Her Majesty. The appeal to the Court of Queen's Bench was rejected on motion, because it had been instituted more than forty days after the judgment * (1037

* See 3 Legal News, p. 108.

C.C.P.) The leave to appeal now sought to be obtained is from the judgment dismissing the appeal.

The Court has invariably refused leave to appeal to Her Majesty from judgments dismissing the appeal to this Court for want of jurisdiction in this Court to hear the appeal. Leave to appeal, therefore, could not be granted in this case; but it is only necessary for the Court to dispose of the motion to order back the record. This motion is rejected.

Abbott, Tait, Wotherspoon & Abbott, for Appellant, moving.

W. W. Robertson, for Respondent.

VALOIS, Appellant, and COMMISSAIRES D'ÉCOLE POUR LA MUNICIPALITE DE HOCHELAGA, Respondents.

LUSSIER, Appellant, and CORPORATION OF HOCHELAGA, Respondent.

Appeal to the Privy Council—Future rights.

An appeal will not be granted to the Privy Council from a judgment of the Queen's Bench maintaining an action to recover an amount of assessments illegally exacted, where the matter in dispute does not exceed £500 stg. The fact that the roll under which the assessments were collected might exist for three years does not bring the case under art. 1178 C.C.P., especially where the total amount for the three years would be under £500 stg.

Sir A. A. DORION, C.J. These are two rules by the Corporation, Respondent, for leave to appeal to the Privy Council from judgments of this Court. The Court is of opinion that the Corporation has no right to appeal. The action in each case was to recover back a sum of money exacted illegally from the appellant under an assessment roll.* The validity of the roll was not in question. Future rights were not affected,—at least, not such rights as are contemplated by the article. If the roll were in existence for three years, the total amount at stake would not give the right of appeal.

Leave to appeal refused.

Mousseau & Archambault, for the Corporation moving.

Barnard, Monk & Beauchamp, for Valois and Lussier.

* See 3 Legal News, p. 277.

MORIN, Appellant, and HOMIER, Respondent.

Security in appeal—New surety allowed.

A new surety may be substituted for one whose real estate is proved to be of a value less than the amount of the bond.

Motion to set aside security as insufficient.

Sir A. A. DORION, C.J. The question is whether the security is sufficient. The sureties justified on real estate. It is established by affidavit that the real estate of one of them, Joseph Deloge, is only worth $250, while the bond is for $400. The appellant is given 15 days to procure another surety instead of Deloge.

Piché & Sarrasin, for Appellant.

Archambault & David, for Respondent.

MONTREAL, September 17, 1880.

Sir A. A. DORION, C.J., MONK, RAMSAY, CROSS, JJ.

JONES, plff. in error, v. THE QUEEN, deft. in error.

Criminal law — Writ of error — Felony— Discharge of jury, effect of.

The record showed that on the trial of the indictment the judge discharged the jury after they were sworn, in consequence of the disappearance of a witness for the Crown, and the prisoner was remanded. On writ of error, held, that the judge had a discretion to discharge the jury, which a Court of error could not review; that the discharge of the jury without a verdict was not equivalent to an acquittal; and that the prisoner might be put on trial again.

RAMSAY, J. This case comes before us on a writ of error. The plaintiff in error was indicted before the General Sessions of the Peace for felony. At the trial one Wm. Geo. Turner was called as a witness on the part of the Crown and made default. It appears that previous to this the Crown witnesses had been called over in Court, and he answered to his name. This is not strictly speaking of record, for the fact is only established by the mention of it in the motion subsequently made to discharge the jury, and on which motion the jury was actually discharged. Turner was again formally called on his recognizance, and he still making default, his bond was forfeited and a warrant

for his apprehension was issued. These proceedings being ineffectual, Mr. Mousseau, on the part of the Crown, moved that the jury be discharged. This was on the 7th, and the Court adjourned until the 8th. On the 8th, Turner not having been found in the meantime, the Court granted the motion on the part of the Crown, discharged the jury and remanded the prisoner. The Attorney-General's fiat for a writ of error was obtained by the prisoner, and it is contended that the Judge of Sessions, who made these orders in the Court below, acted illegally in discharging the jury, that the separation of the jury without giving a verdict was equal to an acquittal, and that the prisoner could never be tried again.

If we were satisfied beyond all doubt that the Judge of Sessions had no right to discharge the jury, and that his discharging them because a Crown witness had failed to appear, was a complete bar to any further trial on this indictment, it would, perhaps, be competent for us to give the prisoner the relief he asks by the present proceeding. It, therefore, becomes important to decide whether the law is clear on this point, and how it stands.

I understand the argument urged on behalf of the plaintiff in error to be, that no one can be tried twice for the same offence; that after the jury are sworn they must give a verdict, and that if they are discharged without giving a verdict, this is an acquittal or equal to an acquittal of the prisoner. The learned counsel for the plaintiff in error, however, admitted one class of cases as an exception to this rule. They said if the separation was due to absolute necessity, or as they term it to the hand of God, the prisoner might be tried as if no trial had taken place. They also admitted as a further exception, the case where the jury could not agree. It seems that the case where the jury broke up of their own accord without the authority of the Court, as, for instance, when a juror went away unperceived, was also considered to be one of the cases which would have the effect of allowing the prisoner to be tried anew. And, finally, it was hardly denied that if a Crown witness disappeared owing to the manœuvres of the prisoner, the Court would be justified in discharging the jury and remanding the prisoner. But they say the Court cannot discharge the jury without proof, and without specifically putting it on record that there was evidence of collusion between the prisoner and the witness.

We are at a loss, amidst all these exceptions, to see the force of the rule relied on. We can perfectly understand that the law might lay down an inflexible rule such as the plaintiff in error contends for; but how such a rule can be gathered from a practice with so many exceptions is not so easily understood. We can also understand that writers on the law should lay down as a general rule that the jury once sworn should give a verdict, and the correctness of this doctrine is not destroyed by the existence of exceptions, which in no respect affect the absolute rule, that a man cannot be twice tried for the same felony, or for a misdemeanor, if once acquitted. It appears to us that this is all that can be drawn from what Lord Coke said. It is impossible to suppose that he did not know that in his time jurors were discharged, for Hale says that *nothing is more ordinary* than after the jury have been sworn and heard evidence, for the Court to discharge them for lack of evidence, and that this has been the course for a long time. Coke was therefore laying down in a few words the general rule.

But we have recent authority to guide us, in the case of *Reg.* v. *Charlesworth*, (9 Cox, p. 44,) insisted on by the counsel for the plaintiff in error. It was a misdemeanour, and a witness refused to be sworn to give evidence. The Court fined the witness and committed him for contempt, and the jury were discharged from giving a verdict. The Court set out the facts on the record, and the defendant obtained a rule calling on the Crown to show cause why judgment "should not be entered for the defendant, that he be dismissed or discharged of and from the premises in the information in this prosecution specified and charged upon him, and that he depart without delay in that behalf, and every the award of jury process, and all other proceedings in this prosecution should not be stayed." The case came on for hearing before Chief Justice Cockburn, Wightman, Crompton and Blackburn, JJ. The rule was discharged, not because of any objection to the form of the proceedings, but simply because the grounds set out were not a bar to further proceedings (Cockburn, C.J., at p. 52 to 53).

Crompton, J. (p. 57), said: "I certainly am not able to say that in my judgment there is anything which appears on this record which has that effect, to prevent fresh process issuing. I think that an abortive trial of this kind is not a termination of the proceedings, however it has occurred, whether by the act of the judge, or by the act of the jury going away, as it was put at the argument—the act of the mob disturbing the proceedings."

Further, the same learned Judge says that the rule is that the jury ought not to be discharged unless there is some very strong reason, which, we think, is for the Judge to decide on, in favour of it. See also what was said by Blackburn, J. (pp. 64, 65). In the case of *Winsor* v. *Reg.* the whole question was again reviewed on writ of error, and the discretionary power of the Judge to discharge a jury was maintained, (L.R. 1 Q.B., pp. 390-6). The learned counsel for the plaintiff in error referred the Court to Mr. Bishop's work on Criminal law. It is to be observed, however, that the whole of Mr. Bishop's dissertation turns on the words of the amendments to the Constitution of the United States, art. 5: "nor shall any person be subject for the same offence, to be twice in jeopardy of life and limb." He then goes on to say that jeopardy begins when the full jury is sworn. This, he contends, is the jurisprudence in the United States. In answer to the objections of sickness, &c., Mr. Bishop gets over the difficulty by saying that as this is unforeseen the prisoner never was really in jeopardy at all, although he thought he was. One might as well say that a man who was acquitted was never really in jeopardy, and that therefore he might be tried again. If according to American law "being in jeopardy" means being on trial, the discharge of the jury, no matter from what cause, gives the accused a plea in bar, founded on the express words of the constitution, to every other proceeding.

Wade's case in 1 Moody has been especially referred to. It is said to be the nearest case to the present; but Wade was pardoned. No one ever suggested that the discharge of the jury before verdict was a bar to another trial, else the pardon would have been unnecessary. But we need not go so far a-field for precedents. In the case of *Reg.* v. *Derrick*, 2 Legal News, p. 214, on an indictment for feloniously forging, the jury were permitted to separate twice with the consent of the prisoner, and they gave a verdict, the irregularity not having been observed. On motion in arrest of judgment the Court reserved the question as to whether the trial were regular. We thought it was a mistrial; that the jury, having separated, could give no verdict; that the verdict was a nullity; and we directed that the prisoner should be tried as if no trial had taken place. We do not wish it to be understood for a moment that we do not accept in its fullest sense the doctrine, that when a jury is empanelled to try a prisoner they ought to give a verdict. It seems to us that this is the sequence of the rule that no one shall be twice tried for the same offence; but if from any cause the jury separate without giving a verdict, then the prisoner has not been tried, and the former imperfect trial is not a bar to further proceedings. We think this is equally true in felonies as in misdemeanors. It in no way wars with the rule of law laid down in *Reg.* v. *Daoust* (10 L. C. J., p. 221) that there can be no new trial in a felony. Still less do we wish it to be understood that we think courts should discharge a jury simply for lack of evidence, but we think there are cases in which it becomes the duty of the Court to discharge the jury, and one of these cases would be where it was manifest to the Court that a witness was spirited away, without any fault of the Crown, in the interest of the prisoner, and in order to defeat justice. We are, therefore, of opinion that the writ of error should be quashed, and that the prisoner be remanded.

Sir A. A. Dorion, C.J. It is not necessary to decide whether the discharge of the jury was proper or not. In the *Charlesworth* case the Court held that it is for the judge who presides at the trial to determine whether the occasion justifies the discharge of the prisoner.

Writ of error quashed.

F. X. Archambault, for the prisoner.

Mousseau, Q. C., for the Crown.

MONTREAL, Sept. 17, 1880.

Sir A. A. Dorion, C.J., Monk, J., Ramsay, J., Cross, J.

The Citizens Insurance Co. (defts. below), Ap-

pellants, and THE GRAND TRUNK RAILWAY CO. OF CANADA (plffs. below), Respondents.

Employee—Liability for money of his employer lost through his negligence—Guarantee bond.

An employee left a large sum of money belonging to his employers in open bags in his room, while he went to lunch, without availing himself of the means of safe-keeping provided for him. On his return from lunch the money had disappeared. Held, *that he was guilty of negligence, so as to constitute a breach of a guarantee policy, the condition of which was that he should diligently and faithfully discharge his duty as employee.*

The appeal was from a judgment of the Superior Court, Montreal, Rainville, J., Sept. 30, 1878, maintaining an action brought on a guarantee policy by the Grand Trunk Railway Company. The facts are fully set out in the observations of the learned Judge who delivered the judgment in the Court below, which will be found in 1 Legal News, pp. 485,6.

RAMSAY, J. This is an action by the Grand Trunk Railway Company of Canada on a guarantee policy of insurance. The condition of the policy is that one Faulkner should honestly, diligently and faithfully discharge and transact the duties devolving upon him in his employment by the said company, plaintiffs; "and that he, the said David Faulkner, should faithfully account for and pay over to the said railway company all such money," &c., "he should receive for or from the said company." The breach is that Faulkner had received $22,-489.65 of the money of the company, and that he had not faithfully accounted for or paid over any portion of said sum except $412.65. The facts are that Faulkner drew the money from the Bank of Montreal on the 22nd June, 1877, a little before 12 o'clock; that he carried the money in two bags to his office in Jacques Cartier Square, in a building used by plaintiffs, respondents, and having occasion to go out to his lunch, he placed the two bags under his desk, locked the door of his room, and went out. When he returned in twenty minutes or half an hour after, he found the door unlocked; that the bag with the notes in it had been opened, and all the money, except a $10 bill, which had fallen on the floor, had been carried off. The bag with the silver was untouched.

The insurance company, appellants, contend that Faulkner has faithfully accounted for the whole money, which was stolen in his absence, and that if there was any negligence it was on the part of the railway company, which did not provide him with the proper means of preserving the money entrusted to his care, and, consequently, that the company, appellants, is not liable.

It may at once be said that the company respondent has never alleged, and does not contend that Faulkner is guilty of dishonesty in the matter. His antecedents and his conduct at the time of the transaction repel any suspicion of the sort. But the policy warrants his diligence and fidelity. Did he use all the care a man dealing with so large a sum of money ought to have used? Could he have taken greater precautions under the circumstances? It seems to us he did not exercise common prudence in leaving this large sum of money under the table, in what may almost be called an open room, for it was a badly fastened door on a common stair without any guardian, and leaving the building. Again, we find nothing to show that the Grand Trunk Railway Company, by its arrangements, either ordered or sanctioned such a proceeding. It evidently was not necessary. He could have placed the money in the vault down stairs if he had liked, —he could easily have placed it in the galvanized iron box,—he need not have drawn it from the Bank till after his lunch, and above all he might have sent out for his lunch, or done without it. He was, therefore, guilty of negligence, and we think the judgment should be confirmed.

Judgment confirmed.

Abbott, Tait, Wotherspoon & Abbott, for Appellants.

G. Macrae, for Respondents.

S. Bethune, Q. C., Counsel for Respondents.

RECENT ENGLISH DECISIONS.

Will.—A. left by will all his property to his widow "for the term of her natural life, to be disposed of as she may think proper for her own use and benefit, according to the nature and quality thereof," and, "in the event of her decease, should there be anything remaining of said property, or any part thereof," he gave "said part or parts thereof" to certain persons. *Held*, that the widow had no power to dispose of property by will and that it went to ulterior takers in her husband's will. *Herring v. Barrow*, L. R. 14 Ch. D. 263.