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DIARY FOR FEBRUARY.

1. SUNDAY..... *Septuagesima.*
2. Monday ..... HILARY TERM commences.
3. Tuesday..... Last day for notice Ch. Ex. Hamilton and Sandwich.
4. Wednesday... Grammar School Trustees to meet.
6. Friday ..... Paper Day, Q. B.
7. Saturday..... Paper Day, C. P.
8. SUNDAY..... *Sexagesima.*
9. Monday ..... Paper Day, Q. B. [Last day for notice for Chatham.
10. Tuesday ..... Paper Day, C. P. Chancery Sittings, Exam. and Hg. Toronto.
11. Wednesday .. Paper Day, Q. B. Last day for service for County Court.
12. Thursday..... Paper Day, C. P.
14. Saturday..... HILARY TERM ends.
15. SUNDAY..... *Quinquagesima.*
17 Tuesday..... *Shrove Tuesday.* Chan. Ex. Term Sandwich and Whitby com
18. Wednesday .. *Ash Wednesday.* [Last day for notice for London & Belleville
21. Saturday..... Declare for County Court.
22. SUNDAY..... *1st Sunday in Lent.*
24. Tuesday ..... Chan. Ex. Term Chatham and Cobourg commences.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

FEBRUARY, 1863.

NOTICE.

Subscribers will receive with this number the Index of Subjects and Index to Cases contained in the eighth volume of the LAW JOURNAL, *together with the Title-page for that volume.*

OUR CALENDAR.

Our desire is to make the *Law Journal Calendar* as complete as possible.

With this object in view we have endeavored to embrace dates of interest as well to practitioners in courts of equity as courts of law, besides other dates of interest to municipal councils, school trustees, &c. The chancery hearing and examination terms were fixed by an order of that court, made on 26th December, 1859. In the compilation of the calendar for the present year, we followed the provisions of that order. The calendar was issued early in January. On 10th January the Court of Chancery re-cast the terms for examination of witnesses and hearing of causes for the first six months of the present year.

In order that the calendar may not only be complete but reliable, we have decided upon the issue of a second edition corrected to meet the requirements of the chancery order of 10th January. The calendar, corrected, is sent herewith to subscribers.

The court has not, as yet, made any alterations in the hearing and examination terms for the last six months of the year, but as we presume it intends to do so, we have omitted all reference to the chancery dates for that portion of the year rather than give dates which, though correct at present, will, in all probability, be rendered incorrect by the action of the court several months hence.

In other respects the calendar now issued is the same as that issued during last month.

THE LATE ROBERT EASTON BURNS.

Death is no respecter of persons. He visits all alike. The rich and the poor, the prince and the peasant, the wit and the dullard, the learned and the unlearned, the honest and the dishonest, the good and the bad, all obey his summons. Those in humble positions silently leave us in obedience to the mandate. The blank thus made is scarce observed; the void is soon filled up. But when a man of eminent position yields to the unconquerable conqueror, men begin to reflect upon the uncertainty of life.

Such a man has recently been removed from among us. Robert Eastern Burns is no more. His life was one of patient industry. His death was one of profound peace. He is now relieved from the troubles to which flesh is heir. His being is that of endless eternity.

Mr. Burns was born on 26th December, 1805. His father was a Presbyterian minister. The son received his early training under the father, who for several years was master of the Grammar School in Niagara. Subsequently he became the pupil of the Rev. Mr. Creen, who succeeded the father as master of the Grammar School. He, it is said, was diligent in study, and at an early age exhibited many of the traits of good sense which in after life characterized him as a man.

Law was the profession of which he made choice. He left the Grammar School in 1822, and during Easter Term of that year, at the age of 16, was enrolled as a student of the laws in Upper Canada. He for five years studied in the office of Mr. John Breakenridge, then a well known legal practitioner in Niagara. His studies were completed in 1827. During Easter Term of that year he was called to the bar, and selected St. Catharines for the practice of his profession. As a lawyer he was popular. His popularity, combined with sound judgment, in September, 1837, lead to his appointment to the office of District Judge in the district in which he lived.

He did not long hold this judicial appointment. It did not satisfy his ambition. In the spring of 1838, having resigned the office of Judge of the Niagara District, he removed to Toronto and formed a partnership with Mr. Hagerman, then a leading member of the bar, afterwards a Judge of the Queen's Bench. Mr. Burns applied his

mind to the study and practice of equity. When the Court of Chancery was removed to Kingston, the then seat of government, he also removed to Kingston. He continued to reside there so long as the government remained in that city. When Montreal became the seat of government, Mr. Burns returned to Toronto. He successively formed partnerships with Mr. Oliver Mowat and the present Chancellor of Upper Canada. These partnerships were not of long duration. He soon afterwards accepted the office of Judge of the Home District, which office he held till 1848. His urbanity as judge of that court, and *ex officio* judge of the Division Courts, will long be remembered by the many inhabitants of the present counties York, Ontario and Peel (the old Home District), with whom he in the discharge of his judicial duties came in contact.

This office he resigned in 1848, and formed a partnership with Mr. John Duggan. Mr. Burns, as before applied his mind to practice in Chancery, and was known as an able and reliable practitioner in that court. His connection with Mr. Duggan, however, was of short duration, for in 1850, upon the death of Mr. Justice Hagerman, Mr. Burns became a puisne judge of the Court of Queen's Bench, a position which he held till the day of his death.

He was twice married. On 10th February, 1835, he married Miss Anne Flora Taylor, by whom he had four sons—three of whom survive him. His first wife died in September, 1850, and for six years he remained a widower. In 1856, he married Miss Britannia Nanton. She died in 1858. He never afterwards married.

He had one brother and three sisters. The brother, who lives in St. Catharines. still survives him. One sister married the late Judge Campbell, of Niagara, and was living with Judge Burns at the time of his death. The second sister married Mr. Thomas Taylor of St. Catharines, and is still alive. The third, who also is alive, is unmarried.

Until lately, Judge Burns enjoyed good health. His habits, however, were too sedentary, and, as often happens with persons of sedentary habits, his death was sudden. He presided at the last assizes in Hamilton, and towards the end of the court was heard to complain of being unwell. He finished the business of the assizes, and returned to his house in Yorkville, near Toronto, where he remained till he died. His real complaint was dropsy, but the *proximate cause of death was what is commonly termed* "a breaking up of the system." His energies failed him. His health forsook him. He sank from week to week and day to day, till the near approach of death became a matter of certainty.

His death, which happened on Monday the twelfth day of last month, was on the following day announced through the columns of the Toronto daily press, to a large circle of sorrowing friends. For several days previously rumours were prevalent to the effect that he could not live, but it was hoped, in spite of adverse symptoms, that he might be spared for years to his country and his family. The hope was vain. He humbly bowed to the will of God, and surrendered up his spirit to the Author of his being. His memory will long remain fresh in the minds of the people of Upper Canada. His usefulness as a judge was as great as his popularity as a man. All respected him, and all will continue to respect his memory.

Mr. Justice Burns was a man of strong emotions. More than once have we seen him drop a tear when sitting in judgment on some fallen son or daughter of Adam. On such occasions his heart was full; his lips scarce could find utterance for the thoughts of sympathy that crowded upon him for expression. He felt what he said, and indeed felt much more than he said. We remember well when he last presided as Judge of Assize for the United Counties of York and Peel. A few days before the opening of the court, the news reached Canada of the death of the husband of our beloved Queen. The occasion was one which Mr. Burns seized as affording a subject for some remarks to the grand jury on the uncertainty of life. He spoke in manly terms about the many virtues of the deceased. He pointed out his many good qualities as a Prince, and a father of the first family in the world. He showed how much the nation was indebted to him for the virtuous manner in which he had nurtured his family. He, in heart-melting words, pointed out the bereavement which that family had sustained. When he tried to express his feelings of sympathy for our widowed Queen, his utterance was choked, and only relieved by a flood of tears, which unmistakeably testified alike his loyalty to the Queen and his loyalty to our common humanity. Little did he then think that ere long he would himself be removed from this world, and his own death cause tears to gush down the cheeks of many sorrowing friends.

Judge Burns was too good natured in his dealings with his fellow men. He never could say "no" to an appeal for a favor. His beneficence exceeded his discretion. The consequence was, that in the declining years of life he was harassed with debts contracted on behalf of others. To pay them off he was economizing in every possible *form, and had his life been spared a few years longer* would have been free from debt and able to afford many comforts which of late he denied himself.

More than once have we had occasion to advert to the well defined veins of common sense which are to be found

in his published decisions. No decisions commanded more respect. No judge commanded more confidence. His intellect was a sound one. It was not what the world calls brilliant. It did not shine with the lustre of the polished diamond. It was not a polished, but a rough diamond, though none the less valuable on that account. He had not, owing to the circumstances of this country at the time he was educated, the advantages of a university education. His intellect, strong by nature, did not receive that polish which the higher branches of education imparts. He, however, at all times acquitted himself with singular success. No flights of oratory characterized his addresses to the jury; but steady plain spoken practical sense predominated in all that he said. His intellect certainly was not acute. He was at times a little slow to apprehend, but for this, compensation was afforded in the fact that his decisions were at all times well considered and well delivered. The moment he made himself master of an argumant, his mind saw its way to a logical conclusion. His conclusions were more than once upheld in appeal, even in cases where he had the misfortune to differ from the rest of the Court. He has left behind him, in the published series of our Queen's Bench reports, judgments that will so long as law is administered in Upper Canada be regarded as masterpieces of learning.

He was at all times courteous to the bar. He never forgot the gentleman in the exercise of his high functions as a judge. He seemed to know and to feel that judicial success in a great measure depends upon mutual respect between the bench and the bar. He in consequence at all times received the cheerful support of the bar. Exalted as was his position, he did not hesitate to mingle with the law students, to preside at their debates, to read essays to them, and do all in his power to stimulate them to exertion in the pursuit of their profession. His condescension in this respect was very remarkable. The students appreciated it. Year after year he was elected president of the Osgoode Club. This was the only acknowledgment which the students could offer for his acceptance, and that acknowledgment was heartily made and as heartily received.

He is no more. His memory, however, will ever be cherished with feelings of endearment. His life was an example worthy of imitation—an example of industry to the student, of learning to the barrister, of integrity to the judge, of simplicity and honesty to all men. His family has lost a kind and affectionate father. His court has lost an able and experienced judge. His country has lost a sincerely good and upright man, who adorned every station of life in which he was called upon to act. In a word, he was an honest man—an able man—an upright judge.

TRIAL BY JURY.

It is in the interest of the administration of justice both criminal and civil, that juries should, if possible, agree. But it is not necessary that the agreement should be forced upon them contrary to the free exercise of reason—it is not necessary that mind should be so far subjected to matter that physical endurance should usurp the place of mental exercise. The right of the judge to discharge the jury without consent of parties is at all times a subject of doubt. The right in some cases does exist, but even in those cases the propriety of exercising the right may be open to grave doubts. The law on this subject has recently undergone much discussion in *Reg.* v. *Charlesworth*, decided by the English Court of Queen's Bench at the sittings after Trinity Term last. The case is one of great interest and is a display of great learning. For this reason we have given it entire in other columns. We make no apology for its insertion. It will well repay a perusal, and be found at all times a most useful repository of learning on a recondite branch of law.

NEW CHANCERY ORDERS.

10th JANUARY, 1863.

RE-HEARINGS.

I. From and after the first day of April next, all re-hearings of causes are to be within six months after the decree or decreetal order shall have been passed and entered; and applications in the nature of re-hearings to discharge or vary orders made in Court, not being decreetal orders, are to be within four months of the passing and entering of the same; or within such further time as the Court or any Judge thereof may allow upon special grounds therefor, shown to the satisaction of the Court or Judge.

HEARINGS.

II. Causes are to be heard at the same time that the witnesses are examined upon the close of such examination. No evidence to be used on the hearing of a cause is to be taken before any examiner or officer of the Court, unless by the order first had of the Court or a Judge thereof, upon special grounds adduced for that purpose.

III. When the examination of witnesses before a Judge is to be had in any town or place, other than that in which the pleadings in the cause are filed, it shall be the duty of the party setting down the cause for such examination, to deliver to the Registrar or Deputy Registrar with whom the pleadings are filed, a sufficient time before the day fixed for such examination, a præcipe requiring him to transmit to the Registrar or Deputy Registrar, at the place where such examination of witnesses is to be had, the pleadings in the cause; and at the same time to deposit with him a sufficient sum to cover the expense of transmitting or re-transmitting such pleadings; and thereupon it shall be the duty of such Registrar or Deputy Registrar forthwith to transmit the pleadings accordingly.

The fee payable to the Deputy Registrar for setting down causes under the foregoing order is to be two pounds.

DECREES FOR REDEMPTION OR FORECLOSURE OF MORTGAGES, OR FOR SALE.

IV. When the time for answering in either of the above classes of cases has lapsed, on production to the Registrar of the Court of the affidavit of the service of the bill, and upon præcipe, the plaintiff is to be entitled to such a decree as would, under the present practice, be made by the Court, upon a hearing of a cause *pro confesso*, under an order obtained for that purpose; and on every such bill is to be endorsed the following notice: "Your answer is to be filed at the office of the Registrar, at Osgoode Hall, in the city of Toronto, or (when the bill is filed in an outer county) at the office of the Deputy Registrar at ———. You are to answer or demur within four weeks from the service hereof, or (when the defendant is served out of the jurisdiction) within the time limited by the order authorizing the service. If you fail to answer or demur within the time above limited, you are to be subject to have a decree or order made against you forthwith thereafter; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause. *Note.*—This bill is filed by Messrs. A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above named plaintiff; and when the party who files the bill is agent, and agents of Messrs. E. F. and G. H., of ———, solicitors for the above plaintiff. And upon bills for foreclosure or sale is to be added to such notice the following: 'And take notice, that the plaintiff claims that there is now due by you for principal money and interest the sum of ———, and that you are liable to be charged with this sum, with subsequent interest and costs, in and by the decree to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the decree, your interest in the property may be foreclosed (or sold) unless before the time allowed you, as by this notice for answering, you file in the office above named a memorandum in writing signed by yourself or your solicitor, to the following effect: '*I dispute the amount claimed by the plaintiff in the cause,*' in which case you will be notified of the time fixed for settling the amount due by you at least four days before the time to be so fixed.'"

This order is not to affect any suit now pending.

V. After the first day of February next, all bills of complaint and petitions are to be addressed, "To the Honourable the Judges of the Court of Chancery."

VI. The signature of a Judge shall not be necessary to the authentication of any writ.

SERVICE OUT OF JURISDICTION.

VII. The time within which any defendant served out of the jurisdiction of the Court with an office copy of a bill of complaint shall be required to answer the same, or to demur thereto, to be as follows:

1. If the defendant be served in the United States of America, in any city, town or village within ten miles of Lake Huron, the River St. Clair, Lake St. Clair, the River Detroit, Lake Erie, the River Niagara, Lake Ontario, or the River St. Lawrence, or in any part of Lower Canada not below Quebec, he is to answer or demur within six weeks of such service.

2. If served within any state of the United States, not within the limits above described, other than Florida, Texas or California, he is to answer or demur within eight weeks after such service.

3. If served within any part of Lower Canada below Quebec, or in Nova Scotia, New Brunswick or Prince Edward Island, he is to answer or demur within eight weeks after such service.

4. If served within any part of the United Kingdom, or of the Island of Newfoundland, he is to answer or demur within ten weeks from such service.

5. If served elsewhere than within the limits above designated, he is to answer or demur within six calendar months after such service.

6. The time within which any party served with any petition, notice or other proceeding, other than a bill of complaint, is to answer or appear to the same, is to be the same time as prescribed for answering or demurring to a bill of complaint, according to the locality of service.

7. Any party may apply to the court to prescribe a shorter time than is hereinbefore provided for any other party to answer or demur to any bill of complaint, or to answer or appear to any petition, notice or other proceeding.

8. Any party may apply for leave to serve any other party out of the jurisdiction, under the General Orders of the Court, of June, 1853.

9. Affidavits of service under this Order, and of the identity of the party served, may be sworn as follows: If such service be effected in any place not within the dominions of the Crown, before the mayor or other chief magistrate of any city, town or borough, in or near which such service may be effected, or before any British consul or vice-consul, or the judge of any court of superior jurisdiction. And if such service be effected in any place within the dominions of the Crown, not within the jurisdiction of this Court, such affidavit may be sworn before any the like officer, or any notary public, and in Lower Canada, before any commissioner for taking affidavits appointed under any statute of this province. And such affidavit shall be deemed sufficient proof of such service and identity, without proof of the official character, or of the handwriting of the person administering the oath upon such affidavit.

P. M. VANKOUGHNET, C.
J. C. P. ESTEN, V. C.
J. G. SPRAGGE, V. C.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 10.)

DEPUTY CLERK.

The clerk may have as many assistants as he thinks necessary in doing the work of his office—receiving papers, filling in process, copying papers, receiving monies, or the like—under his direction; but they are not recognized as deputy clerks in the proper signification of the word, though they would be held in law to be the principal's deputy when doing any particular act under his direction. In signing process, administering affidavits, approving instruments, taking confessions, recording judgments, or doing such matters as the legislature evidently trusted to be done by the clerk personally, it is doubtful if assistants would have power to act; but in carrying out the mere

manual work of the office under the clerk's direction, there seems to be no objection to their employment.*

The term deputy applies only to one who has all the authority which the principal has by virtue of his office. A deputy, then, is one who acts by the right, in the name of, and for the benefit of some one else: he is a mere servant of his principal, though he has the power, by operation of law, to do any act which his principal might do (1 Salk. 95); and by making a deputy the whole power of the principal passes to him (2 Salk. 468; and see 1 Salk. 96; *R.* v. *Smith*, Farr. 78).

Ministerial officers can, by common law, make a deputy (4 Bulstr. 78; 3 Mod. 150.) Whether division court clerks come within the general rule is not material to be considered, for the statute has expressly provided for the appointment of deputies, thus rather diminishing than enlarging any common law power; for the express provision would appear by implication to exclude the power of appointment except as provided for. Section 33 enacts that—

"The clerk may (with the approval of the judge) from time to time, when prevented from acting by illness or unavoidable accident, appoint a deputy to act for him, with all the powers and privileges, and subject to like duties, and may remove such deputy at his pleasure, and the clerk and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy."

As it is with the approval of the judge that the appointment must be made, such approval is in the nature of a condition precedent; and an appointment made without the judge's approval would be invalid, at least so far as the clerk and deputy clerk were concerned, though the act of the deputy would be as good as clerk *de facto* quoad third persons: (2 Inst. 381; Cro. Eliz. 534; Kebl. 357; Moore 112; Ld. Raym. 661.)

Any person who has the requisite skill may be a deputy, and of the sufficiency of skill the judge will determine.

The manner and form in which the appointment is to be made is not prescribed by the statute; and there is some doubt whether an appointment by parol would be sufficient. At all events the best and safest mode is to appoint the deputy by an instrument in writing, more particularly as the statute requires the appoval of the judge.

FORM OF APPOINTMENT OF A DEPUTY CLERK.

I, ——, Clerk of the —— Division Court, in the County of ——, being prevented by *illness* (*or as the case may be*) from acting in my said office of Clerk, do hereby, in accordance with the provisions of the Division Court Act, and with the approval of the Judge of the County Court of the said County, appoint —— of the ——, in the County of ——, my deputy to act for me, in the said office, during my pleasure.

Given under my hand this —— day of ——, 186

——,
Clerk of the said Division Court.

Approved by me ——,
Judge of the said Co. Court.

The authority of the deputy clerk is determinable at the will of the clerk under the express power in the statute—to remove such deputy at his pleasure. It is the same at common law: the deputy holds at the pleasure of his principal.

A deputy ought regularly to act in his office in the name of his principal. Still an act by deputy in his own name in general will be good (1 Salk. 96; 3 Bulstr. 78); and he has power to do any act which his principal might do; (1 Salk. 95; 2 Salk. 468; *R.* v. *Smith*, Farr. 73). Thus, in signing process, it would seem proper to sign in the name of the clerk, adding "by ——, deputy clerk;" while in taking confessions, and certifying or approving documents, the deputy would sign in his own name, adding the words, "deputy clerk." It is said that a deputy, being in the place of his principal, may maintain an action for fees, but has no right to the same for his own use: (*Godolphin* v. *Tudor*, 2 Salk. 468). The remuneration of the deputy is a matter of arrangement between him and the clerk, but if no arrangement be made, he will only be entitled to a *quantum meruit* against his principal: (6 Mod. 235).

As to the liabilities in respect to acts by deputies, the general rule of law is, that a principal is liable for the fault or negligence of his servant, though not for his wilful wrong (*Jones* v. *Hare*, 2 Salk. 440; *Habberstey* v. *Ward*, 8 Ex. 330; *McManus* v. *Cricket*, 1 East. 106); but the statute has expressly provided in sec. 33 that the clerk and his sureties shall be jointly and severally responsible for *all the acts and omissions of the deputy*. Being a mere servant, the deputy would not be personally liable for any bare neglect of duty to any party injured thereby, though he would for a misfeasance, for no wrong doer can justify as a servant (*Lane* v. *Cotton*, 12 Mod. 488); but the action would be against the deputy as a misfeasor, not as a servant or deputy, but as a wrong doer (*Ib.*)

It may be added that misconduct by a deputy sufficiently grave to incur forfeiture, if committed by the principal, may work a forfeiture of office by the clerk: (2 Roll Ab. 155.)

* Such assistant clerks are employed in the offices of the superior courts and county courts; but any writs or documents they issue are previously signed by the principal officer, whose agents they are for the particular act.

"CLERK 6TH DIVISION COURT, COUNTY NORFOLK."—Your letter received, but too late for attention in this number. Had it been addressed to Barrie instead of Toronto, it might have appeared in this issue. All communications on the subject of Division Court law should be addressed to Barrie.

UPPER CANADA REPORTS.

IN APPEAL.

[Before The Hon. Sir J. B. ROBINSON, Bart., President; The Hon. ARCHIBALD MCLEAN, Chief Justice of Upper Canada;* The Hon. WILLIAM H. DRAPER, C.B., Chief Justice of the Court of Common Pleas; The Hon. Vice-Chancellor ESTON; The Hon. Mr. Justice BURNS;* The Hon Vice SPRAGGE; The Hon. Mr. Justice HAGARTY; and The Hon. Mr. Justice MORRISON.]

ON APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

BERNARD v. WALKER.

Mortgage—Created by an absolute deed—Joint tenant—Tenant in common.

The principle upon which parol evidence will be received to cut down a deed absolute on its face to a mere security considered and acted on.
Le Turpe v. DeTuyll, 1 Grant 277, commented on and approved of.
T. and B. bring sureties for W. for the due payment of certain moneys to the City of Toronto, obtained from him a mortgage with a power of sale by way of indemnity; afterwards having been obliged to pay certain moneys to the city, and being also liable to pay other sums on his account, they obtained from him an absolute deed for the nominal consideration of £1000; in fact no money was paid, nor did any accounting between the parties take place. Subsequently the holder of a prior mortgage instituted proceedings to foreclose, and on an application to extend the time for payment, T. made affidavit that the application was made as well on behalf of the mortgagor as on behalf of himself and B. and it was also shown that when the deed was signed T. stated that W. would retain his right to redeem, the object of the conveyance being merely to enable T. and B. to raise money to pay off the mortgagee, who was pressing, and other demands. On a bill filed by W. against B. and the representatives of T. (who had died in the meantime), alleging the transaction to have been by way of security only, and praying to be allowed to redeem; a decree was made as prayed, which on appeal to this court was affirmed, notwithstanding the surviving grantee in the deed (B.), swore that the conveyance had been made by W. for the purpose of absolutely releasing his interest in the lands conveyed.—[DRAPER, C.J., dissenting]
Whether the admission of one joint-tenant or tenant-in-common, as to the extent of the interest held by him and his co-tenants are admissible as evidence against his co-tenants, *Quære.*

The bill in the court below was filed by Joseph Walker against Hiram Goodwin Bernard and George P. Dickson, and John C. Griffith, executors and devisees of Charles Thompson, deceased, setting forth, among other things, that a certain deed made by the plaintiff to the defendants Bernard and Thompson, at the Island of St. Joseph, in Nov., 1851 (and bearing date 28th Oct. 1851,) though professing to be an absolute conveyance in fee by the plaintiff to them of lot 54, on the west side of Yonge Street, in the township of Vaughan (210 acres), for the consideration of £1000, was in fact taken as a mere security for whatever balance might be due to them on taking an account between them and the plaintiff; that Thompson died in February, 1858, leaving Griffith & Dickson his executors; that Thompson, in his lifetime, always admitted, and that his said executors now admit, that this deed was in fact a mortgage and that plaintiff had a redeemable interest in the premises, but insist that the plaintiff is still largely indebted to the estate of Thompson upon the transactions between plaintiff and Bernard and Thompson.

That Bernard, on the other hand, insisted that he had acquired an absolute interest in the said estate, under the deed referred to, and denied the plaintiff's right to redeem; and plaintiff prayed that accounts might be taken, and that he might be allowed to redeem, &c.

The defendant Bernard, in his answer, stated what the plaintiff had also set forth in his bill, that the plaintiff had previously given to him and Thompson a mortgage on these same lands, to secure them against any loss or liabilty which they might incur as sureties for the plaintiff to the city of Toronto, for the due performance of certain obligations incurred by the plaintiff, as collector of market fees in the said city. [This mortgage contained a power of sale to be exercised by Bernard and Thompson for the purpose of indemnifying them in the event of Walker failing to save them harmless.]

That they, Bernard and Thompson, had been compelled to pay large sums to the city on account of Walker, and, being still liable for larger sums, they went to the plaintiff at St. Joseph's Island, and agreed with him in November, 1851, that the plaintiff should convey to Bernard and Thompson, absolutely in fee simple, his equity of redemption in the said land, in satisfaction of what they had already paid for the plaintiff as his sureties to the city, and in consideration of their undertaking to pay, as they then did for the plaintiff, all further sums which he might be liable to pay to the city of Toronto in respect of market fees.

That they did afterwards fully pay to the city all further sums for which the plaintiff was so liable, such payments for the plaintiff amounting in the whole to £900 and upwards.

He denied that the deed of October, 1851, was intended to be by way of security merely, and insisted that it was designed as an absolute purchase, as the deed on its face purported to be. "I deny it to be true that either the said Thompson or myself, on the occasion of our being at St. Joseph's Island, as aforesaid, or before or at or about the time of the execution of the said deed, ever stated to the plaintiff that the said deed should be considered or taken as a mere security for the balance that might be due us on taking the accounts between us; and I deny further that it was ever stated, agreed or understood by me, either to or with the said plaintiff, or any person on his behalf, that the said indenture should be a security for any purpose, or that the same should be considered otherwise than an absolute purchase deed: and I say that, to the best of my knowledg information and belief, the said Thompson in like manner took the said deed as an absolute deed; and did not, before or at the time of the execution of the said deed, state to the said plaintiff, or in any manner agree with the plaintiff, that the said deed should be considered as a security merely, but I believe the said Thompson, like myself, regarded and treated the transaction as an absolute purchase of the plaintiff's estate in the said lands, for the consideration before mentioned."

Bernard further stated, in his answer, that he afterwards went into possession of the lands, upon an agreement between him and Thompson, and had expended large sums of money in improvements. [This statement as to improvements was not borne out by the evidence.]

That Walker having given a mortgage on the land to secure the purchase money to the person from whom he had bought the estate, and the holder of that mortgage having pressed for payment and obtained a decree of foreclosure, the said defendant did, on 28th December, 1853, pay to her solicitor £1200 12s. 4d., for principal, interest and costs, and "that thereupon the said solicitor delivered over to him the mortgage deed, and signed an undertaking to transfer the same as he should require;" and that he did not believe it to be true that Thompson ever admitted that the deed so made at St. Joseph's was intended by way of security merely; and that if he ever did make such admission, it was without his, the said defendant's, privity, consent or acquiescence.

The defendants Griffith and Dickson, executors of Thompson, denied all knowledge of what conversation took place with the plaintiff at St. Joseph's, at the time of executing the deed to Bernard and Thompson, or that they had ever stated that that deed, though absolute in its terms, was intended to be a security merely, or that they had ever heard Thompson say so; but they admitted that Thompson had told them that if, when he and Bernard should sell the estate, his proportion of the price obtained for it should exceed the amount of the claim which they had against the plaintiff by as much as would satisfy the debt which the plaintiff owed to Thompson individually, he, Thompson, would be willing to give the excess to the plaintiff as a free and voluntary gift; that knowing such to have been Thompson's intention, they had admitted it to be the fact, and intended, if it could have been legally done by them as executors, to have carried Thompson's intention into effect.

The deed in question was an ordinary deed of bargain and sale, by which the property was conveyed to Bernard and Thompson in fee, for a consideration, as the deed states, of £1000, acknowledged in the deed to have been paid.

The plaintiff having mortgaged the land, in 1845, to the person from whom he bought it, to secure £900, an unpaid portion of the purchase money, Mrs. Washburn, the holder of that mortgage, proceeded to foreclose it in a suit instituted before the deed was executed at St. Joseph's Island, and while that suit was pending, and after the execution of the deed, Walker, Bernard and Thompson, joined in instructing a solicitor, for their common

* McLean, C. J., and Burns, J., were absent when judgment was delivered.

benefit, to endeavour to reduce the claim under the mortgage; and both Bernard and Thompson instructed him also to make an application to extend the time for paying the mortgage debt to Mrs. Washburn, which application was successful. In support of it, two affidavits were made by Thompson, on the 10th and 19th December, 1853, respectively. In the first of these he swore, "that the mortgaged premises in this cause are, to the best of my knowledge and belief, worth more than double the sum found due and payable to the plaintiff, under the master's report in this cause; and I do further say that the said defendant is now resident on the Island of St. Joseph, in Lake Huron; and that I am making exertions on his behalf to raise the money payable to the plaintiff for principal money, interest and costs, under the said report; and I further say that I do verily believe, that if the time be extended by this honourable court, for the redemption of the said premises, for a period of six months, the said defendant will be enabled to redeem the same.'

In the other affidavit, he swore "that I, this deponent, and one Hiram Goodwin Bernard, of &c., being responsible as sureties for the above named defendant in a large sum, and having paid considerable sums of money on account of such suretyship, the said defendant (Walker) some time, and about two years since, conveyed to me, this deponent, and the said Hiram Goodwin Bernard, his equity of redemption of and in the mortgaged premises mentioned in the pleadings in this cause, upon trust or under the agreement and understanding that they should sell the same and pay off and discharge the mortgage security held by the said plaintiff, and the moneys due and to become due and owing to this deponent and the said Hiram Goodwin Bernard under or in relation to the said suretyship, together with all costs, charges, and expenses incurred by them in relation thereto, and then to pay the surplus of such purchase moneys to the said defendant; and I do further say, that during the course of the past summer I have been in continual communication with the said defendant, on the Island of St. Joseph, in Lake Huron, and have had many conversations with him in relation to the said mortgaged premises, and have been fully empowered by him to act in the said matter, and to proceed in the matter of the redemption of the said premises for his interest, and as agent for him, as well as on the behalf of myself and the said Hiram Goodwin Bernard."

The solicitor, who prepared these affidavits, swore that he was instructed by and was acting in the interest of Bernard and Thompson, as well as of the mortgagor, Walker, in using them for the purposes mentioned; that there was an appeal from the master's report, and that he received instructions for the appeal from Bernard and Thompson; that he examined the witnesses in the master's office, and that there was no contention between Thompson, Bernard and Walker; that Thompson first mentioned the matter to him, and was the one who principally came to him. He charged his costs against Thompson, because told by him that he would see them paid, and would pay them when the estate was sold; that he supposed Bernard knew nothing about the payments by Walker (on account of Mrs. Washburn's mortgage), and did not therefore apply to him to make affidavits. He further swore, "I cannot say of my own knowledge that Bernard was privy to the contents of the two affidavits. I never read them to him."

Mr. Crew, son of an auctioneer now deceased, was also examined for the plaintiff in this cause, and swore that he recollected this farm being offered for sale in March, 1857. It was advertised in Thompson's name alone. Bernard objected to his own name being omitted, and, with Thompson's assent, the sale was deferred a few days and new handbills printed with a fresh heading, Bernard's name being inserted with Thompson's, as joint proprietors. He says that he heard Thompson (speaking only of himself, and not mentioning Bernard) state, over and over again, that all he wanted when the property was sold was his money and six per cent. interest, and that the balance should go to Walker.

The printed advertisements of the sale were headed "To close the settlement of an estate"—"Farm for sale." The names "Charles Thompson & H. G. Bernard, Proprietors," are printed at the foot. The handbill being signed by W. B. Crew, as auctioneer.

In the printed conditions of sale, the terms of payment are stated to be 10 per cent. down; a further sum, to make up £2000, in one month from the date; at which time the purchaser "shall receive an assignment of his purchased rights, free from incumbrance;" and the balance of the purchase money to be paid in four equal annual instalments, with interest at the rate of six per cent. per annum, to be secured by mortgage on the property.

Marsh, a farmer, who had lived 37 years near the property, swore that, in 1851, the lot in question was then worth rather over £2000, at one or two years' credit; or £2500 at six years' credit, by annual instalments, with interest; or £3000 at 12 years' credit, payable in the same manner.

When it was put up for sale in 1857, it was offered at an upset price of £20 per acre, and Marsh swore that the land was in his opinion worth that at the time, at six years credit, and that it is now worth that; that there were 200 acres of wood land, worth 40 dollars an acre; and that a farm in the neighbourhood, not more valuable than this, was sold in 1856 or 1857, for £25 an acre; that he (Marsh) thought of buying the farm now in question in 1857, as Thompson was indebted to him; but the debt not being sufficient to cover the price, he did not purchase, though Thompson, he swore, told him he need be under no apprehension about the balance (that is, about being pushed inconveniently for the balance), "for that, after settling certain claims that they had against Walker, the balance was going to Walker, and he wished it to remain invested, so that he (Marsh) would have time enough to pay." He also swore that he had several conversations with Thompson, and "that it was always understood the balance was going to Walker, after paying their claims," which Thompson said were on account of moneys paid by them (that is, by him and Bernard) to the corporation of Toronto for Walker. "I never had any negotiations," he added, with "Mr. Bernard about the farm. I understood Thompson to be speaking both for himself and Bernard, but I cannot say what he meant; however, he always spoke in the plural number."

Other witnesses placed the valuation of the property much lower than this witness; and at the auction no one was found willing to give the upset price of £20 an acre, in consequence of which no sale took place.

Another witness (Watson), also called for the plaintiff, swore that he was intimate with Thompson and a connexion of his, "he frequently told me, in conversation, to the effect that a deed of sale had been made of the property in question, as a means to relieve it of existing liabilities, and to protect Mr. Walker and his family, and that the balance would accrue to Mr. Walker for the benefit of his family, and that he expected there would be a handsome surplus." "Thompson," he adds, "told me what I have stated about the surplus, on different occasions during 1854, 1855 and 1856, when I was doing business along the coast of the lake, as far as Sault Ste. Marie. Walker and Thompson were intimate friends; Walker, I think, reposed great confidence in Thompson."

The defendant Griffith was called by the plaintiff as a witness. He swore that he had heard Thompson say that he was sorry he had put the upset price so high. "I knew nothing," he said, "of Walker having any claim to the property until after Thompson's death. Thompson frequently told me that when the property should be sold, and he and Mr. Bernard should be paid, he intended to give Walker the balance."

It was proved that on the 28th December, 1853, a day or two before the time appointed in the foreclosure suit of Mrs. Washburn against Walker for paying up the amount due, Bernard paid to Mrs. Washburn's solicitor, from his own money as it appeared, £1,200 12s. 6d., being the amount then due with interest.

He desired to have that mortgage assigned *to him*, which was declined, for want of a proper order from Walker directing such assignment. The objection made was, that no authority was given by Walker for assigning to Bernard alone without Thompson. Mr. Bacon, the solicitor who attended with Bernard to see the money paid by him, swore that Thompson told him that when the property should be sold, after he was paid principal and interest, he intended the balance should go to Walker. So far as he was concerned, he said, he had always intended so. He said, at the same time, that he did not consider Mr. Walker was entitled to redeem.

The deed of 28th October, 1851, was executed at St. Joseph's, in the presence of one John C. Spragg, who alone signed it as a subscribing witness, and he gave this account of what passed within his observation:—"The deed was executed in my presence by Walker and wife, Bernard and Thompson. I made the interlineations which made Charles Thompson a party to the deed throughout; they are in my handwriting; they were made at Mr. Walker's house at St. Joseph's. I met Thompson and Bernard on board of the steamboat. As soon as we arrived, Mr. Thompson asked me to go with him and Bernard to Walker's house, to witness a document; I did not know what. I went with them to Walker's house. We met Walker at the wharf; he did not accompany us to the house; Walker staid on the wharf. When we reached the house we passed through two rooms into an inner or third room. Walker joined us in about fifteen or twenty minutes. When he came, Thompson produced a document, and laid it on the table, and said, 'Mr. Walker, I want Mrs. Walker and yourself to sign this document.' Walker went and fetched Mrs. Walker into the room. Mrs. Walker objected to sign the document; she said she had already signed, and she did not think it necessary she should sign any more. Walker then examined the document, and found it was made to Bernard alone, and he objected; and then, and for that reason, the interlineations were made, to remove that objection. Walker required Thompson to be a party. Thompson replied to Mrs. Walker's objection, that the deed would not affect Walker's right of redemption; that he still would have a right to redeem, otherwise the property would have been sold to meet liabilities that had been incurred—that it would have been sacrificed; and he urged this mode of settlement as preferable. I understood it was to raise money to pay off what was due on the place, and other liabilities that were pressing. After this conversation the deed was executed. Bernard was present during part of the conversation. When Walker and his wife entered the room, Bernard stepped into the adjoining room. The door was open between the two rooms, and remained open during the conversation. It was an ordinary board partition between the two rooms; a single row of boards set edge to edge; it was not tongued and grooved; it was not tight. The room we were in was a small one. I have no doubt whatever that a person in the adjoining room would hear all that passed in the room where we were. No accounts were gone into; no statement of figures made; no money passed; nothing more was said that I know of, and upon the statement I have mentioned the deed was executed. I went up in the steamer with Thompson and Bernard. I did not know what they were going for until a few minutes before we arrived; they did not show me the deed till we got into the house; I had no conversation with Thompson and Bernard about the deed. I did not read the deed; Walker read the deed himself. All he said was that he wanted Thompson's name inserted as well as Bernard's. Thompson, when he produced the deed, said it was for the purpose of raising money to meet liabilities. It was not said that Thompson and Bernard were to sell the property, but to raise money on the property. I am not sure that Bernard was in the room when this was said; I concluded that he was in the adjoining room, but do not know; I saw him leave the room where we were, and go into the adjoining room, but do not know whether he remained there. I did not call the attention of Walker and his wife to the fact that this was an absolute deed; I made no remarks myself about it. * * * I think the time occupied was about twenty minutes or half-an-hour. Thompson took the deed when it was executed. I left almost immediately after the business was finished, and went to Sault St. Marie. I do not know whether Bernard was absent all the time of the conversation; I think I missed him just before he was required to execute the document; I think he was not present when the discussion took place. * * * Bernard signed the deed in my presence; he signed it at St. Joseph's, at Walker's house; they all signed it at the same time. I cannot say whether Bernard entered the room after he first left it until he was wanted to sign the deed."

The defendant, Bernard, was examined in this cause, on behalf of the plaintiff. His statements, bearing upon the taking of the deed, and the object and intention of it, were as follows:

"I remember going to St. Joseph's Island; I was there, at Walker's, about an hour; I stayed while the boat stopped to wood and land passengers. I believe Mr. Thompson was with me; he took the deed with him. I don't know who wrote it. I can't recollect when the interlineations were inserted. No accounts were produced, that I recollect. Mr. Spragg went up with us. I heard no talk about accounts. The amount was spoken of that we had paid, and what we had to pay, to the Corporation. I don't recollect any figures be' mentioned. No money was paid. I did not think there was so much due on the Washburn mortgage; I thought not more than half was due that was found due afterwards; I thought only about £350 was due at the time; it was so said. I don't remember giving evidence in the master's office, but I might have done so. I don't recollect any negotiations to reduce the amount. I don't recollect stating in the master's office my reasons for interesting myself. I don't recollect saying that I and Thompson were the absolute owners of the land; nor can I account for not doing so, except that I did not know much about the matter. I don't recollect about my evidence; it is ten years ago; my memory is not very good; I have frequently forgotten matters. I was in possession of the property when I went to St. Joseph's Island. I think I recollect telling Walker that Mrs. Washburn was pressing. When first asked I thought not, but on reflection I think I did; but nothing has occurred to alter my view. I went up to get the deed. I cannot say why I told him that the mortgagee was pressing. The suit had been commenced. I had ascertained that it was true. I did not know when the debt would have to be paid. * * * Thompson, I think, was not looking after the land more than myself. He was, however, backwards and forwards to St. Joseph's Island. He wished me to go to St. Joseph's. I had no communication with Walker about giving the deed before I went. I think Walker knew we were coming. I don't know who told him; likely it was Thompson. I don't know by whom it was arranged that we should go up; I did not arrange it. I believe that Thompson had been speaking to Walker with reference to our going up. Thompson proposed to me to take the deed in my own name some time before we went up. I objected to it at the time, because I wanted my money back, and wanted Thompson to pay his share of what had been paid by me, and was to be paid; and then Thompson agreed to go shares, and take a joint deed. I have been in possession of the land ever since. I have received very little money from it. The property has always been for sale, and it has been let from crop to crop; for the last two or three years it has been leased. I don't recollect what had been paid when we went up to St. Joseph's Island. I think I have paid the Corporation about £900. I have got receipts for all I paid, I think. The property was then supposed to be worth £1,500; but it was offered for sale by auction afterwards, and £1,350 only offered. * * * The property was offered for sale twice by me and Thompson; the last time in March, 1857. We instructed Crew to offer it for sale. Thompson fixed an upset price, and it was offered for that; I think seventy or eighty dollars the acre. Thompson prepared an advertisement."

On his cross-examination he said, "I went to St. Joseph's with Thompson to get an absolute deed of the property, and Thompson and I were thenceforth to be the owners of it. Walker understood the transaction to be so. * * * Thompson was a party to offering the property for sale both times."

Re-examined.—* * * "I did not read the answer over before I swore to it. Nothing particular was said when the deed was executed; the deed was merely signed; nothing was said about the bargain; it was all arranged before we went up, and nothing was said at the time."

In the foreclosure suit of *Washburn* v. *Walker*, Bernard was examined on the part of Walker, and made a deposition, in which, among other things, he stated that he "went several times with Walker to Mr. Morrison's office (the solicitor for Mrs. Washburn) about Mrs. Washburn's mortgage. * * * The reason that I took an interest in effecting a settlement between Morrison and Walker respecting the mortgage was, that I and Mr. Thompson were security to the Corporation of the city for Walker. There is a mortgage registered upon the lands in question, in favor of myself and Thompson, as a security for our liability to the Corporation. The mortgage is conditioned to hold us harmless."

It was proved that soon after the execution of the deed of 28th October, 1851, Bernard went into possession of the farm, and

retained possession afterwards by himself or his tenants; and he himself stated that this was upon an understanding with Thompson that he was to pay a rent to him proportionate to Thompson's interest in the premises, which was to be governed by the proportion that Thompson should be found to have paid of the liabilities which they two had assumed to the City of Toronto on Walker's account.

The cause came on to be heard upon the pleadings and evidence in May, 1861, before his Honor Vice-Chancellor Esten, when a decree was pronounced in favor of the plaintiff, declaring him entitled to redeem, and directing the usual accounts to be taken. From this decree Bernard appealed, assigning as reasons therefor, first, that the conveyance in the pleadings mentioned of the 28th day of October, 1851, was absolute in fact as well as in form, and was not intended to be conditional or by way of security; second, that the evidence produced to the Court of Chancery by the respondent James Walker to prove that the assignment was conditional or by way of security, was inadmissible as contravening the Statute of Frauds, and ought also on other grounds to have been rejected.

In support of the decree, the respondent Walker assigned the following reasons: first, that it sufficiently appeared by admissible evidence that the conveyance in question was not agreed, or intended to be, and was not in fact, though it may have been in form, absolute, but was agreed, and intended to be, and was in fact, though not in form, conditional or by way of security, as the same is by the said decree declared to be; second, that the said decree must at any rate be sustained as far as respects the interests of the other defendants in Chancery, and the equities between the parties cannot be adjusted, or the said decree varied or reversed, in the absence of the said other defendants in Chancery, who are necessarily parties to this appeal.

Strong and *Crombie* for the appellant.

Blake and *J. McNab* for the respondent (Walker).

The authorities principally relied on by counsel appear in the judgment.

ROBINSON, Sir J. B., Bart.—As to the deed of the 28th October, 1851, which the plaintiff affirms was given by him, and was accepted by the grantees, Bernard and Thompson, upon the intention and with the understanding that it was not to operate as an absolute conveyance, but only as security for whatever amount he should be found to owe to them in consequence of their having become security for him to the City of Toronto, two things are quite plain—first, that the deed is on the face of it an absolute conveyance as from a vendor to a purchaser, and contains not the slightest intimation that it was given as a security for any pre-existing debt, or that the land was conveyed upon trust or special understanding or agreement of any kind; and secondly, it seems equally clear that if we admit that a sale was intended, this was not a case in which the evidence affords ground for supposing that it was agreed, as it sometimes is between a vendor and vendee, that the vendor should be allowed the privilege of repurchasing upon returning the price that he had been paid with interest, or on any special condition of that kind.

The consideration expressed was £1000; but it is plain on the evidence that that was a sum named without any reference to the value of the land, either in fact or as agreed upon by the parties. The defendant Bernard, in his own account of what passed at St. Joseph's, makes that clear: "No sum," he says, "was spoken of as the price that was to be paid for the land; no accounts were gone into, and no sum was mentioned." He had advanced, he said, large sums, and expected to have to pay more, on the plaintiff's account; and without anything more definite than that as to the amount that the plaintiff did owe or was likely to owe to him and Thompson, in consequence of their having become sureties for him, it was agreed at St. Joseph's that he should make this absolute deed to them, in satisfaction of the indemnity they were or might be entitled to claim.

It would be difficult to credit this statement, even if there were nothing express in the evidence to contradict it. Among men of business, it could scarcely happen that such a transaction would be conducted so loosely; for the plaintiff could not have known at the time what he was getting for his land, a valuable improved farm, in a highly favorable situation; and for all that appears either in the deed or otherwise in the case, he got nothing, and asked for nothing, in the shape of a discharge from his liability to indemnify, which the defendant says was the real object of the transaction. No doubt the plaintiff might have agreed to give up his equity of redemption, in satisfaction of the debt, to his sureties, and that would have been as much a sale as if it had been made upon a new consideration, paid to him in money; but we can hardly believe that such a transaction would have taken place without any attempt to ascertain the true amount of the debt, and without something being given that would show the plaintiff discharged.

The defendant Bernard states now that he has paid in all about £900 to the City. It does not appear that Thompson made any payments. But Thompson had had various dealings with the plaintiff unconnected with this matter of the suretyship; and it appears to have been agreed between the plaintiff and the other two, that if Thompson should be found indebted in any sum to the plaintiff upon these private dealings, that should be allowed to stand against the advances made by the two on his account; and Thompson and Bernard were to adjust the account between themselves on that understanding.

Whether a large portion of the sums advanced for the plaintiff might not have been covered by an amount of debt due to him by Thompson, is uncertain on the evidence. There are conflicting statements on that point, and no account has yet been taken.

The plaintiff had bought the farm in 1845, for £1,150, paying £250 down, and giving a mortgage on the land for the residue. Whether he got it for less than its value at the time, does not appear. If the place was not then worth more it is proved that it had become of much more value in 1851; but as £900 of the purchase money had not been paid by the plaintiff, and formed an incumbrance on the property, we must suppose that the plaintiff, before he made over his land in satisfaction, would have taken care to see that he got such a sum above that incumbrance, and the interest upon it, as would make up about the value of the land in 1851. According to the evidence given by Mr. Marsh and others, that would hardly have been accomplished by his giving up the land by way of indemnity to his sureties, even if he had really no debt due by Thompson that would have covered any considerable part of what had been paid out for the plaintiff.

It is not pretended that the plaintiff got any other consideration for his interest in the land, if he really did part with it absolutely. His letting it go upon too easy terms, however, would give him no claim to have the transaction looked upon as a security rather than a sale, if for all that appeared it was a sale that was intended; but when we have conflicting accounts of the real intention of the parties, apparent inadequacy of consideration does form a fair ground of argument.

Looking only at so much of the evidence as I have yet remarked upon, the effect of it, I think, would be such as to produce a strong moral conviction that the parties could not have agreed and intended that the land was to be given up to the grantees as a full indemnity for all that they had paid or would have to pay for the plaintiff as his sureties, and that, without any further accounting, or anything more to be done, the land was to be considered as theirs, and the matter of the suretyship thus finally closed.

But, granting that that would seem improbable, we are yet to consider, on the other hand, that no fraud or mistake in obtaining or giving that deed is proved or alleged, and that the deed must therefore have effect according to its language, unless we find ourselves warranted, by evidence admissible in such cases in courts of equity, in directing that the transaction should be regarded in a different light.

It has been urged by the counsel for the defendant Bernard, that there is no such evidence as can be relied upon, or can even be received in equity, for cutting down the absolute estate which the deed by its language has given to the grantees.

This brings up several questions, which have been already so much discussed in this court, in several cases we have had before us, that we may assume them to be settled by decisions which are binding upon us, leaving only that occasion for doubt that it is difficult in most cases to exclude, as to the correct application of the principles to the facts of the particular case.

The cases in this court which I refer to are, *Greenshields* v. *Barnhart*, 3 Grant, 1; *Howland* v. *Stewart*, 2 Grant, 61; *Matthews* v. *Holmes*, 5 Grant, 1; *Arkell* v. *Wilson*, 7 Grant, 270; *Wragg* v. *Beckett*, 7 Grant, 220; *Monro* v. *Watson*, 8 Grant, 60.

Two of these cases—*Greenshields* v. *Barnhart*, and *Matthews* v. *Holmes*—having been carried to England by appeal, the judgments given by the Judicial Committee of the Privy Council are reported in 5 Grant 99, and 5 Grant 1. And besides these cases, the Court of Chancery had occasion, in the case of *LeTarge* v. *DeTuyll*, 1 Grant, 227, to consider the nature of the evidence on which courts of equity can act, in holding a conveyance to be a mortgage which upon the face of it purported to be an absolute conveyance. We have expressed our concurrence in the conclusion come to in that case, though in some later cases, in which it was cited, we thought the principle on which it was determined was desired to be pushed to a length which the decision in the case itself did not warrant.

Upon a review of the cases I have mentioned, and the many English decisions which are cited in them, we must hold, I think, that the plaintiff in this case should not be allowed to redeem, if he had nothing to rely upon but the verbal evidence of witnesses that the defendant Bernard had, either at the time of the deed of the 28th October, 1851, being executed, or afterwards, admitted that that deed was only taken as a security, and was not intended to operate as an absolute conveyance. Still less could any evidence avail, of conversations had with him before the deed was made. That there may be facts shown, either by written or verbal evidence, which, when established to the satisfaction of the court, may lead to the conviction that a deed on the face of it absolute could not have been intended so to operate between the parties, and that this will lay a proper foundation for receiving parol testimony to explain what was the real nature of the transaction, is clear on numerous authorities, and is explained in the cases of *LeTarge* v. *DeTuyll* and *Matthews* v. *Holmes*, and in the well considered judgment given by Mr. Justice Burns in *Howland* v. *Stewart*. Whether, without such evidence, the proof of mere verbal declarations of the defendant Bernard in the case before us could have been admitted to contradict the deed, need not be for a moment considered; for there is no proof whatever of any declarations or admissions of that kind by Bernard—none in his answer, and none independently of it. On the contrary, the defendant distinctly denies what the plaintiff affirms in that respect.

But the plaintiff relies on the following circumstances, of which there is evidence: first, that, according to the defendant's own deposition in this case, and from the other evidence, no certain sum was paid or agreed to be paid as the price of the land, nor anything said or considered between the parties in regard to its value, nor any reckoning of the amount which the grantees in the deed had already paid the city on the plaintiff's account, or of the amount which they would be called upon to pay thereafter, nor any amount brought forward or spoken of as being due by Thompson to the plaintiff on their mutual transactions; though it had been understood that any debt due by Thompson should be allowed to be set against the monies advanced or to be advanced by the grantees in the deed, to the city, on account of the plaintiff.

If the transaction was really such as Bernard represents—simply a sale of the land in consideration of whatever claim Thompson and Bernard might have upon the plaintiff for indemnity—it would certainly seem strange that the parties should have entered into no calculations to ascertain how far the land would or would not be a just satisfaction of the indemnity which the sureties would have had a right to claim. If the plaintiff had certainly no other property than this land, and if there was no likelihood of his ever owning anything else afterwards, and if it was quite clear that the plaintiff's equity of redemption in this lot, in addition to the amount of any debt that Thompson then owed him, could not be worth so much at that time, then it might well be that they would agree to take the land in full satisfaction, and that the plaintiff might be willing to let it go absolutely and without any stipulation for redemption. But even then it would be strange, among men of business, that nothing should be done or said, either then or, for all that appears, at any other time, with a view to ascertain how the parties stood—how much the sureties had paid, and how much they would probably have still to pay; that there should be no sum spoken of as the reasonable value of the land that the plaintiff was making over finally, as the deed imports; no attempt made to ascertain how the plaintiff and Thompson then stood, upon their mutual dealings, which would be necessary to be known before the relative interests of Thompson and Bernard in the land could be adjusted as between themselves, as it was to be, according to Bernard's own account of the matter; and strange too that there should be nothing in writing given on the one side, or asked on the other, for securing the plaintiff against any after claim upon him that Thompson and Bernard might make. It stands admitted that the £1000 mentioned in the deed was an imaginary sum, put in without any regard to the price or value of the land; and the deed contains not a word of explanation that would show any connection between it and the suretyship which Thompson and Bernard had undertaken.

If it was necessary to form an opinion upon the question of fact, whether the plaintiff's interest in the land was or was not at that time worth much more or anything more than the claim which the plaintiff's sureties would have had upon him after they should have paid all that they were liable for, we should be unable to satisfy ourselves upon the point. We know that the plaintiff's mortgage of the land for £900 of the purchase money was yet unpaid, and perhaps some interest on that debt. Whether that incumbrance, added to all the claim which Thompson and Bernard had or might afterwards have upon the plaintiff as his sureties, would equal or exceed what the land was worth in 1851, we cannot tell, without knowing whether Thompson owed him a debt, and of what amount, and without some precise evidence of the value of the land, and the amount which the sureties have paid in all.

I have no doubt that neither the want of a due proportion between the benefit which the plaintiff received from making the conveyance, nor the want of such steps as are ordinarily taken among men of business in conducting similar transactions, could be relied on as sufficient for showing that the deed absolute in its terms must have been intended only as a security, and should be so treated; but this part of the case is nevertheless material as being in accordance with and tending to confirm what may be inferred from other facts which have the same tendency.

Then another fact proved in the case is, that when, on the 4th November, 1857, Thompson and Bernard offered the land for sale by public auction, through Mr. Crew, their auctioneer, they did, by a printed handbill, signed by Crew, their agent, and to which their names are added in print as proprietors, advertise the sale as about to be made, "to close the settlement of an estate." Now, all three were then living; there was no estate of a deceased party that could have been meant. But if, as the plaintiff asserts, the deed was only given as a security, and if it was intended that Thompson and Bernard should indemnify themselves by selling the estate, and should pay over to the plaintiff any surplus above their claim, then there would be a settlement to be made, which might naturally enough account for the sale being spoken of as a sale to be made "to close the settlement of an estate;" for until the estate was sold, the ultimate rights of the parties respectively to its value or proceeds could not be settled. This does seem, therefore, to point to a sale about to be made for some other purpose than simply to turn the land into money, at the will and for the benefit of the vendors as owners. It is proved that Thompson drew up this notice, and that both he and Bernard concurred in the terms of the sale, and were both present at the auction. I refer to this not as a circumstance by any means important, if it stood alone, but material as strengthening the other evidence in the cause—I mean the circumstance that he was recognizing the attempt to sell, and acting, or endeavoring to act through his agent, in selling the estate, under an advertisement such as I have described.

There is next the further fact, that when the foreclosure suit was brought by Mrs. Washburn against the plaintiff, after Thompson and Bernard had taken their conveyance of 28th October, 1851, and while that suit was pending, both Thompson and Bernard are shown to have taken an active part in assisting the plaintiff Walker, as owner of the equity of redemption, not only to reduce the amount claimed to be due on the mortgage, but also to have the time extended for payment, and to have joined in instructing counsel for these purposes; though if the deed he had taken from the plaintiff in 1851 was not taken as a security, but upon an

absolute sale, the plaintiff could have had no interest afterwards in the equity of redemption, and would have had no right to redeem, and would not have been the proper person to be made defendant in the foreclosure suit.

But what the plaintiff relies upon as most material in his favor, and seems indeed to insist upon as decisive, are the two affidavits *of Charles Thompson, sworn to respectively on the 10th and 19th* December, 1853, and filed in the foreclosure suit of *Washburn* v. *Walker*. We have to consider what those affidavits fairly import, and what effect they can have as evidence that can affect Bernard's rights in this suit.

The first of the two affidavits, it will be remembered, contains no statement respecting the deed of October, 1851; but it is fairly to be implied by it that Thompson recognized the plaintiff to be then (in December, 1853) the person entitled to redeem the property, and the person interested in redeeming; and it was made for the express purpose of serving and protecting his interests in that capacity, by procuring for him a longer day than had been set for redeeming by the order made in that cause. It states that the mortgaged premises were worth more than double the sum found due and payable to the plaintiff, Mrs. Washburn. "I am making exertions on his behalf," Mr. Thompson states in that affidavit, "to raise the money." * * * "And I further say *that I do verily believe that if the time be extended* for the redemption of the premises for a period of six months, the said defendant Walker will be enabled to redeem the same." Now, if the deed made more than two years before by Walker to Bernard and Thompson, were really intended to operate as an absolute sale to them of all Walker's interest, which is what it purports to be, then it would be altogether inconsistent with that state of things, that Thompson should, in December, 1853, be representing himself as making exertions on Walker's behalf to raise the money for Mrs. Washburn, in order to enable him to redeem the property. Walker might indeed be liable under a covenant or bond for the mortgage money after he had parted with his equitable interest, but he still would not be the person entitled to redeem the property; and Thompson and Bernard would have been the proper parties to the foreclosure suit, instead of being content to appear as witnesses or friendly agents merely intervening for the protection of Walker's estate in the land.

But the other affidavit, made in the same suit by Thompson a few days afterwards, is more clearly and expressly applicable to the deed of October, 1851; for in it Thompson states on oath, clearly in reference to that deed, that by it Walker conveyed to them (Thompson and Bernard) his equity of redemption of and in the mortgaged premises, "upon trust, or under the agreement or understanding that they should sell the same, and pay off and discharge the mortgage security held by the plaintiff (in that suit Mrs. Washburn), and the moneys due or to become due to him and Bernard under and in relation to their suretyship to the City of Toronto, together with all costs, &c.," and then to pay the surplus of such purchase moneys to the said defendant Walker. And Thompson further states in this affidavit: "During the course of last summer, I have been in continual communication with the said defendant (that is Walker), on the Island of St. Joseph, in Lake Huron, and have had many conversations with relation to the said mortgaged premises, and have been fully authorized by him to act in the said matter, and to proceed in the matter of the redemption of the said premises for his interest, and as agent for him, as well as on the behalf of myself and the said Hiram Goodwin Bernard."

This is a very plain recognition by Thompson that he and Bernard held the land, not as purchasers on an absolute sale, but upon the trust or understanding that they should sell it for the purposes mentioned, and pay over the surplus to Walker. And it is an express admission that Walker, standing in that relation, had a right to redeem by paying the charges referred to, which of course would render a sale by him unnecessary. It is not inconsistent with that, that he should state, as he did in this affidavit, that he was acting in the matter of the redemption of the premises for Walker's interest, and as agent for him, as well as on the behalf of himself and Bernard; for he and Bernard were indirectly interested in staying the foreclosure, either that a sacrifice of the property might be prevented by giving them more time to sell, or that they might have more time to pay off Mrs. Washburn's mortgage themselves, if that should turn out to be necessary.

There can be no doubt that this affidavit of Thompson would be sufficient to establish as against him—if he were living, and a defendant in this suit—that the transaction of October, 1851, was not in fact an absolute conveyance upon a sale, or a final relinquishment of all right in consideration of the debt still due, but was intended to be used as a security by enabling the grantees in the deed to sell the property, and, after retaining the amount of their demand, to pay over the surplus to the grantor; and it is sufficient now to establish the fact in a suit against his devisees in trust representing the estate, who alone have been made defendants in regard to the interest that can be derived under him.

But it is denied that this affidavit of Thompson is evidence that can be made any use of to affect Bernard, the other grantee in the deed. If, on the face of the deed of October, 1851, the grantees could or rather should be regarded as joint tenants, then there are many authorities to establish that the admissions of one would be binding upon the other in regard to the property and rights held by them jointly. I refer to Taylor on Evidence, secs. 674, 680, 681, 683, 686, 691, 712; *Lucas* v. *De la Cour*, 1 M. & Sel. 249; *Cross* v. *Bedingfield*, 12 Simons, 35; *Kemble* v. *Farren*, 3 Car. & P. 623.—Per Tindal, J. In this case, even on the face of the deed, *the grantees would not be joint tenants by our law, but tenants in* common only, because there is nothing expressed in the deed which indicates an intention to make a joint tenancy (Con. Stat. U. C. cap. 82, sec. 10). Then, holding them to be tenants in common, I do not find that the admission of one would on general principles be binding on the other; on the contrary, it has been held that such an admission would not be binding against the co-tenant in common, though both are parties on the same side of the suit. (Taylor on Ev. sec. 681; 4 Cowan, 488, 492, Amm. Ca.) As a general rule, indeed, such an admission of one co-tenant should not be binding on the other; for, admitting in this case the truth to be that the deed was really intended by all parties to be an absolute conveyance, as it imports, it would be hard and unjust that the owner of a several interest held under it should have that interest cut down to a security only, because the owner of the other moiety had chosen for any purpose to deny that the intention was such as the deed expressed.

On the other hand, it would be arriving at a strange result in this suit, if the deed under the same words, applying to both grantees, must be held on any evidence of the intent with which it was made at the time to have conveyed to one grantee an absolute estate and to the other a qualified or conditional estate only. For nothing can be plainer or more certain than that, for whatever purpose the estate was conveyed to one grantee, it was for the same purpose conveyed to the other. And I have not brought myself to the conclusion that we could upon any evidence given in this cause hold this deed to have been a sale as to Bernard, but only a security as regarded Thompson. The common sense view of the point seems to be, that if the court are satisfied of the truth of the statement, that the deed was made as a security only for one purpose and as to one party in the cause, it must for any thing that appears in the case be held to be so for all purposes and as to both parties. That Bernard could have been allowed to disprove the statements made by Thompson, I have little doubt. That however would seem to call for a decision between the opposing testimony, but a decision that of necessity must govern the whole case, since the whole was one transaction, which could not at the same time have been absolute and conditional, or clothed with a trust, but, for all purposes in the cause, must be taken to have been either the one or the other, according to the conviction of the court upon the evidence. On this part of the case I think it material to refer to the case of *Pring* v. *Pring*, 2 Vernon. 99.

Mr. Starkie, in his treatise on evidence, observes "that a community of interest or design will frequently make the declaration of one the declaration of all."

"Thus," he says, "in the case where partners or others possess a community of interest in a particular subject, not only the act and agreement, but the declaration of one in respect of that subject matter, is evidence against the rest. The admission of one of several makers of a joint and several promissory note that it

has not been paid, is evidence against all. Such an admission, however, ought to be clear and unequivocal." He cites as authorities for this principle—11 Ea. 589, and 1 M. & Sel. 249, which I have already referred to; and *Whitcomb* v. *Whiting*, Douglas, 652. Unless indeed this principle were acted upon, the judgment of the court must, or at least might, in many cases be contradictory and inconsistent, and beyond question wrong in one part, if it be right in another.

On the other hand, it is laid down in Mr. Taylor's treatise on evidence, sec. 680, that in order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were jointly interested or one was derivatively interested through the other; and that a mere community of interest will not be sufficient; and he cites a decision of Lord Ellenborough at Nisi Prius, in *Joggers* v. *Binnings*, 1 Stark. Rep. 64, where an action was brought against two defendants, part owners of a vessel, and an admission made by one as to a matter which was not a subject of copartnership, but only of co-partownership, was held inadmissible against the other.

If it had been explained in that case, which it is not, what was the tendency of the rejected admission, we might have seen that there was an obvious propriety in rejecting it, and that the decision could not be applied as an authority in the case before us.

But whatever difficulty there may be in the way of receiving evidence of Thompson's written admission in his affidavit, as binding *per se* upon Bernard, his co-tenant in common, especially in view of what is required by the Statute of Frauds, I feel the case to be clear, on the ground on which the plaintiff's counsel put it, on the argument, namely, that the defendant Bernard has by his conduct in respect to this transaction given sufficient reason to conclude that the transaction which took place at St. Joseph's Island, in October, 1851, could not have been one of absolute sale of this land, and that there is sufficient foundation laid for the reception of parol testimony in order to explain for what purpose the deed in question was then made by the plaintiff Walker.

If it had been proved in the case that Bernard stated publicly, at the auction sale that was attempted to be made, that they held the land in security for their claims upon the plaintiff, and were selling the land for the purpose of satisfying these claims, and paying over any surplus there might be to the plaintiff; that they had computed their claims at a certain sum, and would therefore put up the land at that price, it order that it might not be sacrificed for a sum less than would satisfy the debt; and if the land, at his desire, had been in fact put up at that upset price, I assume that that would not, in the view of a Court of Equity, have been treated as mere verbal declaration of matter contrary to the purport of the deed. It would have been treated as something actually done on his part inconsistent with the state of things to be inferred from the deed, and would have let in any further parol evidence to show what the real nature of the transaction was. It appears to me that what Bernard actually did and participated in was conduct on his part stronger than I have just supposed. He allowed Thompson to take the principal part in obtaining the deed from the plaintiff, at St. Joseph's; left him to make the previous arrangement about it with the plaintiff; went up with Thompson at his request, and, when he arrived there, left it with Thompson to negotiate the matter with the plaintiff, waiting apparently to abide by what Thompson should procure the plaintiff to do. They held already a mortgage from the plaintiff upon the same property, given to them the year before to secure them against the consequences of the liability which they had incurred on his account; and I cannot see why they should have desired to get this other deed for the mere purpose of security, if that were their only object (which indeed is a difficulty in the way of supposing that the latter deed was meant to operate as a security only), except that the mortgage of 1850 required 90 days' notice of any sale to be made by them for the purpose of indemnifying themselves; and they may have desired to act more promptly. But this result is plain, that Thompson, being allowed by Bernard to put himself forward, as he did in the matter, they came away with this absolute deed in consequence of what passed between the three; and two years afterwards, when Mrs. Washburn was endeavouring to foreclose upon her mortgage of much older date, the proceedings take place which Mr. Turner relates in his evidence. Upon all that is before us in relation to what was done in that suit by Thompson and Bernard and the now plaintiff Walker, for obtaining a longer day before foreclosure, Bernard seems again to have allowed Thompson to be the acting party of the two in whatever was necessary for obtaining their common object.

Whether he did or did not know the exact contents of the affidavits made by Thompson, does not precisely appear; but upon the evidence before us, I think no jury would hesitate a moment in concluding that Bernard was concurring in the statements made by Thompson, so far that he knew and acquiesced in them; that having a common interest, they were acting together in the common object of obtaining further time for the protection of Walker, as holding the equitable estate of a mortgagor, entitled to redeem for his own benefit. The defendant Bernard does not pretend that he gave any intimation while he was being examined in the master's office, that he and Thompson were the absolute owners of the estate. "I do not recollect (he says, in his evidence in this cause) stating in the master's office my reasons for interesting myself; I do not recollect saying that I and Thompson were the absolute owners of the land; nor can I account for not doing so, except that I did not know much about the matter; I do not recollect about my evidence; it is ten years ago; my memory is not very good."

I think we cannot be wrong in looking upon Bernard, on a view of all the evidence, as sanctioning the statements made by Thompson, and in using, as much as he used, the affidavits on which they both assisted in obtaining, as if for the benefit and on behalf of Walker, an enlargement of time which could be of no consequence to Walker if he had absolutely and finally parted, as Bernard now affirms he did, with all his interest, legal and equitable, in the premises.

Mr. Turner swore that all three were acting in this matter in pursuit of their common object.

The principle I now refer to was carried somewhat further in the case of *Drewett* v. *Sheard & Price*, 7 Car. & P. 465, where Littledale, J., said to the jury, "The learned Sergeant says that the defendants are only liable for joint acts, that is, acts done (by Sheard) when the defendant Price was present. Still, as on the first occasion, both defendants were present, and stated that they acted in the assertion of a right, you will consider whether Mr. Price did not sanction and concur in the acts done, when he was not present." The act in that case (the re-opening of a ditch which had been filled up) was done by Sheard alone, in the absence of Price.

It is reasonable upon the evidence of Mr. Turner, and upon other testimony in the cause, and considering the privity between these parties, Thompson and Bernard, through the whole transaction, that we should consider Bernard as concurring with Thompson in putting forward the statements contained in Thompson's affidavit, as the means of obtaining the end which it is proved they both had in view. The cases of *Brickell* v. *Halse* (7 Ad. & Ell. 456), *Gardner et al.* v. *Moult* (10 Ad. & El. 464), *Boileau* v. *Rutlin* (2 Exch. 665), and *Johnson* v. *Ward* (6 Esp. Ca. 47), are strong to shew, not that Thompson's affidavit signed only by him can be held to supply written evidence signed by Bernard of the facts contained in it, but that the putting forward that statement by Bernard, or with his sanction, is an act done by him quite inconsistent with what he now contends, that he and Thompson were to be, under the deed, the absolute owners of the estate as purchasers, without any agreement or understanding that Walker should be allowed to redeem. And indeed his active intervention in the foreclosure suit, for the purposes for which he and Thompson did avowedly interfere, would without the affidavits have been evidence to the same effect, less strong perhaps and certainly less particular, but sufficient to afford ground for receiving parol evidence as to the real object in taking the deed of October, 1851.

It was on that view of the case that the plaintiff's counsel relied in his argument, and I think rightly.

Then parol evidence being thus let in, according to the principle constantly acted upon in such cases, we have the strong testimony of Mr. Spragg, the only subscribing witness to the deed of October, 1851, which may, as it appears to me, be confidently

relied upon; for besides that no attempt has been made to impeach his testimony, he seems to be in no manner mixed up with the transaction. Being casually a fellow passenger with Thompson and Bernard, on board the steamboat, he was requested by Thompson to go with them and see the deed executed; and his attention when they got there seems to have been the more given to the matter, from his being requested to make an alteration in the deed, which he did, by inserting the name of Thompson in addition to Bernard, as a grantee. Walker, he swears, read the deed himself, and finding that Thompson's name was not in the deed as a grantee, but only Bernard's, he objected to it on that account, and, in deference to his objection, Thompson's name was added Now, if there had been no such intention or understanding in Walker's mind, as that he was only making this deed as a security, and he was about to execute the deed as a final and absolute transfer of all his right in the land, it could not have signified to him whether Thompson's name was in the deed or not. If both had agreed to give up all claim upon him for indemnity, on his executing the deed which Thompson placed before him, he might, as we may suppose, have been content to make the conveyance either to one or both, as they might have agreed between themselves. If he had been led by what had passed between him and Thompson to believe that the deed was only to be made use of as a means of enforcing payment of the debt due by him to the two, it was natural that he should desire Thompson's name in the deed, for he had confidence in him, and would feel more secure that the understanding on which he was about to convey would be more certainly carried out. Then the witness states that, upon Walker's wife hesitating to sign the deed, Thompson remarked to her "that the deed would not affect Walker's right of redemption; that he still would have a right to redeem, otherwise the property would have been sold to meet liabilities that had been incurred; that it would be sacrificed, and urged this mode of settlement as preferable." "I understood," he says, "it was to raise money to pay off what was due on the place, and other liabilities that were pressing. After this conversation, the deed was executed." Again, this witness swears, "Thompson, when he produced the deed, said it was for the purpose of raising money to meet liabilities. It was not said that Thompson and Bernard were to sell the property, but to raise money on the property."

The witness Spragg speaks here of a transaction that had passed in his presence nearly ten years before; and considering that he had no personal interest in the matter, and no previous knowledge of the circumstances which led to the taking of the deed, his testimony supports as nearly as could be expected in substance the plaintiff's statement in the bill, that the understanding at the time of taking the deed was that it should be and was taken as mere security for the balance that might be due to Thompson and Bernard on taking the accounts between them and him; and that it was agreed that the indenture, though absolute in form, should be and was in fact a mere security for the purposes aforesaid.

It supports also substantially the statements in Thompson's affidavit, made 19th December, 1853, that Walker conveyed to him and Bernard his equity of redemption in the mortgaged premises, upon trust, or under the agreement and understanding that they should sell the same and pay off and discharge the mortgage security held by Mrs. Washburn (upon which she was pressing), and the moneys due to Thompson and Bernard under or in relation to their suretyship for Walker, and to pay the surplus of such purchase money to Walker.

It has been objected that the case made out in evidence varies from that stated in the bill, and does not warrant the kind of relief which the decree gives; for that the tendency of the evidence is to establish a trust, rather than a mortgage, that is, a trust to sell the estate and pay over to Walker any surplus above the debt due by him; or a trust to raise money upon the estate, otherwise than by sale, in order to pay off the debt due.

But take it either way, the substance and effect is that the land was conveyed, not absolutely and unconditionally, but by way of security, as the bill asserts; and whether the intention was to give power to sell the land for raising the money, or to mortgage it for the same purpose, Walker in either case would hold an interest in the property, and the grantees would not be suffered to proceed to a sale or mortgage against Walker's will, if he were able and offered to pay them the money he owed.

The substance of the case is, whether the plaintiff has upon the evidence a right to come for redemption; and it was so regarded in *Cripps* v. *Jee* (4 Bro. C. C. 472), where the circumstances were in principle similar; and I doubt not in many other cases, where what might be spoken of properly as a trust pointed only to realizing a debt out of the property, and paying over any proceeds to the plaintiff. The reasons assigned for appealing do not rest the appeal upon any such distinction, but simply on the ground that there was nothing to shew the deed to be conditional or by way of security, or any thing but an absolute sale.

That is quite true as regards the form of the deed, but not true in a larger sense.

It is true that the defendant Bernard does in his answer most distinctly and positively deny that the deed was taken as a security; but the rule of evidence, which requires more than the testimony of a single witness to overcome his unqualified denial, is in my opinion abundantly complied with here by the corroboration which Spragg's evidence receives from the other testimony relied upon. I refer to 2 Maddock's Chancery, 580 (note b).

In my opinion the appeal should be dismissed with costs.

DRAPER, C. J., said that although he had written out his views on this case he thought it unnecessary, after the very clear exposition of it given by the learned President, that he should delay the Court with my lengthened statement of the facts, or to say more than that, subsequent reflection had failed to change the opinion which he entertained at the conclusion of the very able argument of Mr. Strong, by which he was impressed with the idea that the transaction which took place between these parties, if not an absolute sale was one of trust, the nature of which not having been evidenced by any writing signed by the party is void under the statute, and therefore that the appeal should be allowed, and the bill in the Court below dismissed with costs.

ESTEN, V. C., thought the decree pronounced in the Court below was right, and that the appeal should be dismissed with costs.

The other members of the Court concurred.

Per cur.—Appeal dismissed with costs.

[DRAPER, C. J., dissentiente.]

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*

GOODWIN v. THE OTTAWA AND PRESCOTT RAILWAY COMPANY.

Sheriff's sale of stock—Action by purchaser claiming mandamus to transfer—C. L. P. A., secs. 255, 256, Consol. Stat. C., ch. 70.

In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff in their register as a shareholder in respect of such stock: *Held*, that the provisions of Consol. Stat. C., ch. 70, as well as the C. L. P. A., secs. 255, 256, must be obeyed, and that as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail. [Q. B., M. T., 26 Vic.]

This was an action of mandamus. The declaration set out that defendants were an incorporated company, with a joint transferable stock, and that the Municipality of the City of Ottawa held 1500 shares therein: that the Bank of Montreal recovered judgment against the Municipality, and execution issued, and the sheriff seized in execution the said stock, and afterwards in due form of law sold the same to the plaintiff, and thereupon the sheriff gave to the plaintiff a certificate under his hand and seal of office, declaring that he had sold on said execution the said 1500 shares to the plaintiff, and thereupon the plaintiff produced said certificate to the secretary of defendants, being the proper officer in that behalf, and demanded of him to transfer said shares from the name of the municipality to the plaintiff's name in defendant's books, averring that upon production of said certificate it was the defendant's duty to enter the plaintiff upon their books and registry of shareholders as a shareholder in respect of said stock, according to the statute—with the usual averment of the plaintiff's interest in being so entered, and damage sustained by defendants' non-performance of their duty, neglect and refusal of defendants so to do, that all conditions had been fulfilled, and all things happened, and all times elapsed necessary to entitle

the plaintiff to performance of said duty by defendants; and a mandamus was claimed to compel performance.

Pleas.—1. Not guilty. 2. Traversing the duty alleged. 3. No tender of fee for the transfer. 4. That since 1852 all transfers should express whether the stock transferred was old or preferential stock: that the sheriff's sale and certificate were since the company issued preferential stock, and the certificate given by the sheriff did not express whether the stock transferred was old or preferential stock.

The defendants also demurred to the declaration.

The issues were tried before RICHARDS, J., at the last Guelph assizes. The only witness called was the deputy-sheriff of Carleton. He proved the certificate of sale of the stock, dated 25th of August, 1862: that the sale was on the 12th of July: that some time after he went with the plaintiff's brother to the company's office to get the secretary to transfer the stock to the plaintiff: that he declined in fact to do so: that the witness demanded the books to do it himself; and that no tender was made of fees or demand thereof. He said on cross-examination that he had made two sales on the 2nd of July, and he served a notice on the company as well as a certificate on the 3rd of July; and on the 12th of July another sale through the plaintiff's attorney, Ross. The first sale was by James Goodwin's (plaintiff's brother) directions to the plaintiff, who was not present: they asked for a certificate some time before he gave it: he thought he gave it on the second sale, not the first: the secretary and witness and James Goodwin were alone present.

For defendants it was objected that the stock sold was that of the mayor and commonalty of the city, while the stock in the declaration was alleged as the stock of the Municipality of the City of Ottawa; that the certificate put in was not that required by law under the Consol. Stat. C., ch. 70: that no copy of execution was served on the company: that the duty was cast not on the company, but on the officers: that no deed of assignment from the sheriff reciting the transfer and the kind of stock was shewn: that there was no evidence that Ross or James Goodwin had authority to purchase.

Leave was reserved to defendants to move for a nonsuit on any of these grounds. The demurrer to the declaration raised somewhat the same objections, with some others, and was argued at the same time as the rule.

RICHARDS, Q. C., obtained a rule to enter a nonsuit pursuant to the leave.

Cameron, Q. C., shewed cause, and cited Buller and Leake Prec. 210; *Norris* v. *The Irish Land Company*, 8 E. & B. 512.

Richards, Q. C., contra, cited Tapping on Mandamus, 283, 285, 286; *Regina* v. *Scaley*, 8 Jur. 496; *In re School Trustees of Port Hope, and the Town Council of Port Hope*, 4 C. P. 418; *In re School Trustees of Collingwood and the Municipality of Collingwood*, 17 U. C. R. 133; *The Queen* v. *The Bristol and Exeter R. W. Co*, 4 Q. B. 162, 169; *The Queen* v. *The Commissioners of Excise*, 6 Q. B. 981, note; *The King* v. *The Brecknock and Abergavenny Canal Co.*, 3 A. & E. 217; *The King* v *The Wilts and Berks Canal Co.*, Ib. 483.

The statutes referred to are cited in the judgment.

HAGARTY, J., delivered the judgment of the court.

According to the system that seems, to my great regret, to be becoming general, to the vast increase of cost to suitors, and unnecessary labour to all parties concerned in the administration of justice, there is a demurrer to the declaration and also issues in fact.

The chief objection taken on the demurrer and urged at the trial seems to be that the plaintiff has not conformed to the requirements of the Consolidated Statutes of Canada, ch. 70.

It may be as well to consider this firstly, as if the defendants' view be correct the plaintiff cannot succeed.

It is somewhat perplexing to find two Acts of Parliament bearing directly on the same subject, passed during the same session, and coming into force on the same day, and each making no reference to the other, except the figures of the number of the other Act at the end of the clauses, added by the consolidators of our Statute law.

The Common Law Procedure Act, ch. 22, Consol. Stats. U. C., sec. 255, enacts that "the stock held by any person in any bank, or in any corporation or company in Upper Canada, having a joint transferable stock, may be taken and sold in execution in the same manner as other personal property of a debtor."

Section 256. "Upon the production of a certificate under the hand and seal of office of the sheriff, declaring to whom any stock taken upon an execution has been sold by him, the cashier of the bank, or the proper officer of any other such company or corporation, the stock of which has been sold, shall transfer such stock from the name of the original stockholder to the person named in the certificate as the purchaser under the execution," &c. &c.

This statute seems to have been alone in the plaintiff's view, and he has acted on its directions.

Chapter 70, Consol. Stats. C., sec. 1, declares that all shares, &c., of stockholders in incorporated companies shall be held to be personal property, and shall be liable as such to creditors for debts, and may be attached, seized, and sold under writs of execution from the courts of law in like manner as other personal property.

Section 2 enacts that whenever any share has been sold under a writ of execution, the sheriff by whom the writ has been executed shall within ten days after the sale serve upon the company, &c., an attested copy of such writ of execution, with his certificate endorsed thereon, certifying to whom the sale of such share has been by him made, and the person who has purchased the same; and the person so purchasing shall thereafter be a stockholder of said shares, and have the same rights and be under the same obligations as if he had purchased said shares from the proprietor thereof in such form as by law provided for transfer of stock in such company; and the proper officer of the company shall enter such sale as a transfer in the manner by law provided.

Section 3 directs a sheriff, if required, to seize, and to serve a copy of the writ on the company, with notice of seizure, from which time it avoids all transfers as against the execution, &c.

Section 6 declares that nothing in this Act shall be construed to weaken the effect of any remedy which such plaintiff might without this Act have had against any shares of such stock by *saisie arrêt*, attachment, or otherwise, but on the contrary, the three next preceding sections should apply to such remedy in so far as they can be applied thereto. That would refer to sections 3, 4, and 5.

The rule for the construction of statutes passed regarding the same subject matter is, I presume, as laid down in Dwarris on Statutes, page 569: "It is therefore an established rule of law that all acts *in pari materie* are to be taken together, as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view."

The clauses 255, 256 of the Common Law Procedure Act are copied from the 2 Wm. IV., ch. 6, an Upper Canada Act. The Act also cited, ch. 70, Consol. Stats. C., is a reprint of an Act of 1849, 12 Vic., ch. 23. When the latter was passed by the legislature of Canada the Upper Canada Act had been some years in force. The Act of 1849 begins with declaring that "it is expedient to make better provision for the seizure and sale of shares and dividends of the stockholders of all incorporated companies."

We think we must read these two statutes together, and that we are bound to see that the requirements of each of them be obeyed. The earlier Act simply required the transfer to be made on the sheriff's certificate, declaring to whom he had sold. The later enactment requires that within a certain time from sale he must serve on the company an attested copy of the writ of execution, with his certificate certifying to whom the sale has been made by him, and the person who has purchased.

We are of opinion that as this has not been done the rule for nonsuit must be made absolute. Rule absolute.

COMMON PLEAS.

(Reported by E. C. JONES, Esq., Barrister-at-Law, Reporter to the Court.)

ENGLISH, PLAINTIFF (APPELLANT), v. CLARK, DEFENDANT (RESPONDANT).

Trover—Lien—Division Court.

The plaintiff being the holder of a promissory note made by Francis and endorsed by Thomas Somerville, employed B., his attorney, to collect the same, who sent

it to C., a clerk of a division court, to issue process thereon B., on the trial obtained judgment against the maker, and failed against the endorser. Another suit was afterwards brought in the name of the same plaintiff, by instructions of B. against Thos. S., (the endorser on the former note), upon an alleged promise to join in a new note with Francis S., the consideration being the discharge of the former judgment against F. S. in the division court. The evidence, although it did not prove English (the plaintiff) to have been a party directly to the new arrangement, still shewed that he was present and cognizant of it.

Upon demand made by the plaintiff upon the clerk of the division court for the note, he refused to give it up unless paid $10, and afterwards sent it to B., the attorney.

An action of trover being brought for the same, *held*, that the plaintiff being present and cognizant of the arrangement between Clark and Thos. S., he was to be considered as in possession of the note, and as there can be no lien without possession, B.'s (the attorney's) claim failed, and the plaintiff was entitled to recover.

(C. P., T. T., 26 Vic.)

Trover for a promissory note, made by Thomas Sommerville, for £18 3s. 5d., or thereabouts, dated in or about December, 1861.

Second count in detinue for a similar note. Pleas to first count, not guilty, and that the note is not the plaintiffs. To the second count *non detinet*, and that the note is not the plaintiff's.

At the trial the plaintiff proved and put in a receipt in the following words: "Received from Alexander English two pounds ten shillings on account, costs against the note I hold, made by Thomas Somerville, December 27th, 1861, signed, Charles Clark." On which was endorsed, "original note £13 10s. Interest to December, 1861, £1 12s. 5d. Deposit by plaintiff, 10s." Thomas Sommerville swore that in December, 1861, he gave a note to secure a debt of his brother's to the plaintiff. That there had been a suit in the division court on the old note, and the note now in question was given to pay the debt and costs in that suit. This arrangement was made with the defendant. There was a talk of six dollars which defendant claimed before he would give up the note. That plaintiff had been nonsuited in the action on the note and another suit had been brought. Thomas Medd swore that he was present when plaintiff demanded a note of defendant, who said he could not have it unless he left $5 for Mr. Brogden. Medd then saw the note in defendant's possession. Plaintiff refused this, but went again soon after, when defendant refused to give it up unless plaintiff paid $10. Plaintiff said he had the money to pay the costs, and afterwards he got the receipt put in. And after this again defendant refused to give up the note unless he was paid $10, and said something about having received the note from Mr. Brogden, that he had sent it back to Brogden, but could get it back on payment of his, Brogden's fees. Plaintiff admitted that in the first suit he had employed Brogden to conduct his case.

On the defence Mr. Brogden was examined; he said the action was defended on account of his lien on the note; that he supposed if he did not make a claim this defence would not have been made but he had no interest in the event of the suit. His testimony was objected to, but was admited. He said he was employed by plaintiff in a division court suit against the two Somervilles, and recovered against the maker, who was not good for it, and failed against the endorser, who was good. He gave the defendant the note now put in for collection, and became responsible to him for the costs. He (Brogden) had authority from plaintiff to make the best settlement for him that he could, and plaintiff never interfered in the matter. Defendant made the arrangement with plaintiff by Brogden's direction. His (B.'s) charge is $5 for each case. He (B.) attended one suit and instituted another, which appears to have been brought in the division court against Thomas Somerville for not making a note to plaintiff, jointly with Francis Somerville for £13 10s., the consideration for which was plaintiff's discharging Francis Somerville from a judgment recovered by plaintiff against him in the division court, and which plaintiff had done. On the 12th of December, 1861, Brogden received from defendant the note for which this action was brought, and gave a receipt for it, describing it therein as the note taken by defendant in settlement of a suit of plaintiff against Thomas Somerville, and a suit of the plaintiff against Thomas and Francis Somerville for £10 3s. 5d. Brogden would have given the note to plaintiff on payment of $10, and he sent it afterwards to defendant with instructions to collect it and authorised him to give it plaintiff on payment of $10. The learned judge told the jury that in his opinion Brogden's evidence established the defence, but if they rejected it, and were satisfied that the note was plaintiff's and that defendant refused on demand to deliver it to him, they should find for plaintiff. They did find for plaintiff. Afterwards a rule *nisi* was granted for a new trial, because the verdict was contrary to evidence or the weight of evidence, and that at all events the verdict should have been for defendant on the second count, which rule was made absolute, costs to abide the event.

The cause was argued by *Richards, Q. C.*, for the appellant, and *Hector Cameron* for the respondant.

Draper, C. J.—I have examined the evidence in this case carefully, because the plaintiff's right of property in this note is incontestable, and the defendant's right in any way to withhold it ought to be made very clear before effect is given to the defence. The moral, right of the plaintiff is so strong that if it must be postponed or defeated on any merely legal or technical grounds, they ought to be sustained beyond all doubt. The facts, as well as I can ascertain them on the evidence, appear to be that the plaintiff held a note against Francis and Thomas Somerville, the former being the maker, the latter the endorser. He employed Mr. Brogden, an attorney, to collect it, who sent it to the defendant, the clerk of the division court at Millbrook, that process might issue.

Brogden attended before the judge on behalf of plaintiff, and obtained judgment against the maker, and failed against the endorser, who was the only responsible party.

After this a second suit is brought in the same division court upon the instructions of Brogden against Thomas Somerville, upon a promise alleged to have been made by him to join with his brother Francis in giving a new note to the plaintiff for £13 10s., payable ten months after date, (12th of December, 1859,) with interest. This promise was said to be in consideration of the plaintiff's releasing Francis Somerville from a judgment recovered against him in the division court; I assume, the judgment as maker of the first mentioned promissory note. The evidence is wholly silent as to the agreement thus stated to have been made by Thomas Somerville, who though examined as a witness, has stated nothing about it, nor does Mr. Brogden, in his evidence, refer to his having made it, or being personally cognizant of it. I infer that the plaintiff knew nothing of it nor of the second suit, at least not until the note now in question was given. Mr. Brogden swears "English never interfered in the matter; the arrangement was made by Mr. Clark" (defendant) "with *English*." (meaning Somerville, for there is other proof that it was so), by his Brogden's directions, so that Brogden, not the plaintiff, directed the arrangement which was the foundation of the second suit, and it would seem directed the second suit also, without plaintiff's knowledge or concurrence,

After this second suit was brought, Thomas Somerville went to the defendant and agreed to give the note for which the present action is brought. English came there and was present either during the negotiation or immediately after, and before Thomas Somerville had left the defendant, and signed some receipt in the books. I assume the division court books are meant, and, as I further assume, the receipt relating to the settlement of the former suit which the now plaintiff had brought against the Somervilles. The note was then, on whatever day this was, in the defendants hands. I should, from the statement of the cause of action against Thomas Somerville, have supposed the note bore date on the 12th of December, 1861, but Mr. Brogden gave a receipt as follows: "A. English v. Thomas Somerville, December 12th, 1861. Received from C. Clark, the note which was taken by him from the defendant in settlement of this suit, and suit versus Thomas and Francis Somerville, for £10 3s. 5d." Mr. Brogden does not say what the date of the note sued for is, but at all events, the evidence is sufficient to shew that defendant knew plaintiff in the transaction, and accepted his signature in his (defend...'s) books in relation to some or all the suits, that plaintiff then asked for the note and defendant refused it, and afterwards sent it to Mr. Brogden.

There can be no lien, unless there be possession, and Brogden certainly was not in possession when the defendant made this first refusal, unless the possession of the defendant is to be deemed the possession of Brogden. As a question of law, I do not think it was necessarily so, for I am of opinion that the plaintiff recognised in that character by the defendant and present at the

arrangement ought to be considered as himself making it, intervening to discharge the former suit, and with a right himself to take whatever was taken for its discharge, and that his presence and acts superceded the authority of the defendant as acting for Brogden as well as Brogden's authority as employed as plaintiff's attorney to collect, and that no valid or existing lien had attached in favour of Brogden at the time of the first refusal, and as a matter of fact, I think the jury might well have found that defendant was a wrong-doer in withholding the note from plaintiff at that time; and again when the jury found the defendant receiving the $10 which he had previously demanded as the condition of his giving up this note, they might well consider that he ought not at the same instant to take the money and set up that he had not got the note. They might reasonably treat his taking the $10 as an asertion of his having it, and refuse to listen to his assertion after getting the money, that the note was out of his hands, or lastly, when the third demand was made, as I gather from the evidence there was a third demand, after Brogden had returned this note to him, they might well consider the plaintiff had satisfied every legitimate demand against him.

I think the substantial merits of the case were with the plaintiff that no legal impediment to his recovery was shewn at the trial, and therefore that he should be permitted to retain the verdict he obtained. I pay no attention, under the circumstances of this case, to the asserted uniform practice of clerks of division courts to pay over money only to the party on whose instructions the summons issued. Here the plaintiff became known to defendant, and he was aware that he was not merely a nominal plaintiff, but was beneficially interested in the suit.

It is unnecessary to decide whether Brogden was a competent witness. I incline to think that he was.

In my opinion the appeal should be allowed, and the rule *nisi* for a new trial should be discharged with costs.

Per cur.—Appeal allowed.

CHAMBERS.

(*Reported by* R. A. HARRISON, Esq., *Barrister-at-Law.*)

HOOKER v. GAMBLE ET AL.

Leave to amend after trial—Terms.

Plaintiff sued upon a bond conditioned for the payment of money by instalments, alleging, as a breach, non payment of an instalment which fell due on 1st August, 1858. Defendant pleaded. The cause was twice tried. On the first occasion a verdict was taken for plaintiff in the absence of defendants. Against that verdict plaintiff was relieved on payment of costs. On the second occasion a verdict was also rendered for plaintiff. That verdict was afterwards, on the motion of defendants, set aside, on the ground that plaintiff's claim, in respect of the instalment which fell due on 1st August, 1858, was proved to have been satisfied. Plaintiff afterwards applied for leave to amend his declaration by alleging nonpayment of a subsequent instalment, viz the one which fell due on 1st February, 1859. This was granted, but only on the terms of the payment of the costs of the last trial, the rule setting aside the verdict, and the costs of the application. Payment of the costs of the first trial was not required, inasmuch as on that occasion the verdict passed against defendants solely by reason of their own default. [CHAMBERS, January 6, 1863.]

Plaintiff sued defendants upon a bond conditioned for the payment of money. The declaration alleged that defendants, by their joint and several bond, bearing date on 5th February, 1853, became bound unto the plaintiff in the sum of £5000, to be paid by the defendants to the plaintiff, which said bond was subject to a condition whereby it was declared that the said bond should be void if the said defendant, William Gamble, should, and would, well and truly pay or cause to be paid unto the plaintiff the principal sum of £2474 9s., together with interest in manner following: that is to say, the sum of £100 pounds on the first day of August and February in each year, next after the date thereof, with interest on the balance of the principal sum at each time of payment remaining due until the sum of £400 of the said principal sum of £2474 9s. should be paid, and from that time the sum of £150 on the like days of August and February in each year thereafter together with interest on the balance of the said principal remaining due at each of such days, until the further sum of £2000, other parcel of the said principal sum should be paid, and the sum of £74 9s., being the balance of the said principal sum of money with interest thereon on 1st August, 1863, and in case the said William Gamble should make default in the payment of any one of such instalments at the time so appointed for such payment, that then the whole of the said principal sum then remaining due, and the interest thereon, should become due and payable immediately. Breach, that although the said William Gamble did pay the several instalments that became due and payable from the date of the said bond, up to and inclusive of the instalment of one hundred and fifty pounds, with all interest due on the said bond on the first day of February, 1858, yet on the first day of August, 1858, there became and was due on the said bond, an instalment of one hundred and fifty pounds of principal money and the sum of thirty pounds fourteen shillings and seven pence for interest. Averment, that the said William Gamble did not pay the said last mentioned instalment of principal and interest on the said 1st August, 1858, whereby, and by virtue of the said condition of the said writing, obligatory, the balance of the said principal sum of £2474 9s. and interest on the said balance of principal became and was payable immediately.

Defendants pleaded to this declaration, and upon their pleas issue was joined. The cause was twice tried. On the first occasion a verdict was taken for plaintiff in the absence of defendants. Defendants were relieved from that verdict on payment of costs. On the second occasion a verdict was again rendered for plaintiff for £1315 17s. 9d. A rule was, in the term following, issued, calling upon the plaintiff to show cause why the verdict should not be set aside. It effected the instalment which fell due on 1st August, 1858, only. During Michaelmas Term last that rule was made absolute, the court being of opinion that the instalment which fell due on 1st August, 1858, had, according to the evidence, been paid.

Magrath afterwards obtained a summons calling on defendants to show cause why the declaration should not be amended, by alleging nonpayment of the instalment which fell due on 1st February, 1859.

G. D. Boulton shewed cause.

DRAPER, C. J.—I am disposed to allow plaintiff to amend his declaration by altering the breach, which was nonpayment of one instalment to nonpayment of a later instalment of the money secured by the bond declared upon. The only question is as to terms. There have been two trials. On the last the defendants were not ready, and a verdict for plaintiff was taken in their absence. From this they were relieved on payment of costs. The cause then went down a second time to trial and plaintiff succeeded, but there was leave reserved to defendant to move. On motion made the court set aside the verdict without costs.

On this state of facts it appears to me that the plaintiff is abandoning altogether the ground of action he had gone down to trial upon, not hoping to sustain it against the judgment of the court, and desires to introduce a new breach. He admits he was the cause of the last trial being useless, and so by his error put the defendants to unnecessary expense as to that trial. He should therefore pay the costs of that trial, of the rule setting aside the verdict, and of this application. I give him leave to amend on these terms.

I was pressed to give the costs of the first trial also, as the declaration was then in the same faulty state as on the last trial, but the defendants had to pay costs to get rid of a verdict which passed against them, owing to their own default in not being present when the cause came on. I therefore refuse to make the payment of these costs a condition precedent to leave to plaintiff to amend.

Order accordingly.

HIGGINS v. THE CORPORATION OF THE CITY OF TORONTO.

Amendment after trial—Terms.

Where plaintiff obtained a verdict on evidence which did not sustain his declaration as framed, and that verdict was afterwards set aside, on application of plaintiff for leave to amend his declaration so as to make it conform with the facts which he desired to prove at the trial was granted, but only on the terms of his paying the costs of the trial, the rule to set aside the verdict, and the application for leave to amend.

[CHAMBERS, January 8, 1863.]

This was an action brought by plaintiff against defendants for cutting a drain which led from his premises and so overflowing same with water, mud and filth.

The defendants pleaded not guilty.

The plaintiff took the cause down to trial in Toronto at the autumn assizes, 1860, and obtained a verdict. In the following term the verdict for the plaintiff was set aside for irregularity in the notice of trial, with costs to be paid by the plaintiff. It was then tried again in January, 1861, and the plaintiff obtained a verdict against which defendant moved, on the ground that the evidence did not sustain the declaration as framed. On 4th September, 1861, the rule was argued, and on 23rd September a new trial was granted without costs.

Plaintiff then applied to amend his declaration to make it accord with the facts which he desired to give in evidence.

It was opposed on the ground of long delay since the last trial, and it was also urged that the plaintiff should pay the costs of the last trial if the amendment were allowed.

DRAPER, C. J.—The verdict on the last occasion was only £25, and would not have been disturbed if the court could have found any evidence which would sustain it on the declaration as framed, yet the difficulty was discussed during the argument, and was in fact the main ground of the application for a new trial. No application was then made to amend. I have referred to my note of the judgment then given and find it expresses no doubt that the plaintiff had sustained some injury, for which, on a properly framed declaration, he might probably recover, though I do not yet see how the injury can be traced home to these defendants. I am not sure but that I should be doing plaintiff a kindness by refusing this application, but as he presses for leave to amend, I am not satisfied I ought to refuse it. It can only be granted on payment of the costs of the last trial of the rule setting aside the verdict, and of this application.

In this, I act on the same principle as in *Hooker* v. *Gamble* decided by me a few days since.

Order accordingly.

LAWSON v. MCDERMOTT.

Action for seduction—Arrest—Application for leave to amend.

Where plaintiff having caused defendant to be arrested for the alleged seduction of his step daughter, she at the time of the alleged seduction not being in his service, and afterwards having discovered that he could not at common law maintain the action, applied for leave to amend his declaration by joining his wife, striking out the allegation that the girl seduced was "the daughter of plaintiff," and substituting the statement that she was the daughter of the plaintiff whose name was thus proposed to be introduced, the application was refused.

[CHAMBERS, January 9, 1863.]

This was an application by plaintiff for leave to amend his declaration.

Plaintiff obtained a judge's order to arrest defendant in an action for the seduction of Eliza Shaw, "the step daughter and servant of plaintiff." Defendant was arrested and gave bail, and plaintiff declared in the usual form. Defendant pleaded not guilty, and that the said Eliza Shaw was not the plaintiff's servant.

It appeared from the affidavits of the plaintiff, filed on obtaining the order to arrest the defendant, that the girl was not in the plaintiff's service at the time of her seduction.

Plaintiff's application was for leave to amend his declaration by adding the name of Winfred Lawson, his wife, whom, in an affidavit filed, the plaintiff's attorney describes as "the mother of the step daughter of plaintiff."

DRAPER, C. J.—The plaintiff cannot maintain this action at common law unless the girl was his servant at the time of the seduction.

His wife can maintain an action under the statute though her daughter was not living with her when seduced.

If the mother's name be now introduced into the declaration, it will enable her treating her husband as being made a co-plaintiff for conformity's sake only, to recover for a cause of action belonging to herself, not to her husband, and for which he never could have sued in his own right, and which, in the event of her death, would not survive to him nor to any one else.

Under colour of an amendment, by adding another plaintiff, the object is to substitute for a cause of action claimed as vesting in himself at common law (but which he cannot prove) a cause of action given by statute to his wife, as mother of the girl seduced, and the declaration will require to be amended by striking out the allegation that Eliza Shaw is the step daughter of the now plaintiff, and substituting the statement that she is the daughter of the plaintiff whose name is introduced, and this is in a case where the defendant has been held to bail.

The effect would be to allow a defendant to be arrested for one cause of action and declared against for another, and as stated in the affidavit of the plaintiff's attorney, because owing to the "belief that the defendant was about to leave Canada, a capias was issued to arrest him, and the urgency of the case requiring immediate action, the cause was instituted in the name of the above plaintiff alone."

I do not think that on this statement I ought to allow the amendment, for which I am furnished with no authority, and which could not be made so as to prejudice the bail put in for defendant.

I therefore discharge the summons.

ENGLISH REPORTS.

(From the Jurist)

COURT OF QUEEN'S BENCH.

SITTINGS IN BANC AFTER TRINITY TERM.

REGINA v. CHARLESWORTH.

Criminal law—Practice—Discharge of jury.

The defendant was tried for a misdemeanour. At the trial, a witness, called on behalf of the Crown claimed his privilege not to give evidence, on the ground that he would thereby criminate himself. The judge, who presided at the trial, refused to allow him the privilege; but the witness still refusing to answer, he was committed to prison for contempt of Court, and a conviction of the defendant being, under these circumstances, impossible, the jury, at the request of the counsel for the prosecution, and against the protest of the counsel for the defendant, were discharged without giving any verdict.

Held, that the defendant ought not to be allowed to put a plea upon the record stating the above facts, but that they ought to appear as an entry upon the record.

An entry was made upon the record accordingly, when it was further held, that whether or no the judge had power to discharge the jury, what took place did not amount to the same thing as a verdict of acquittal; and that the defendant was not entitled to judgment *quod eat sine die*, or to the interference of the Court to prevent the issuing of a fresh jury process. *Dubitantibus* Cockburn, C J, and Wightman J, who thought, however, the case sufficiently doubtful to prevent the Court interfering in the way sought for by the defendant.

Quære, whether the judge had power to discharge the jury in this case?

Per Wightman J., that he had not.

This was an information for bribery, at the suit of the Attorney-General, against John Barff Charlesworth, under stat. 17 & 18 Vict. c. 102. The defendant pleaded not guilty.

The defendant was tried at the Spring Assizes for the county of York, before Hill, J, when one José Luis Fernandez, having been called as a witness in support of the prosecution, refused to give evidence, on the ground that he was not bound to criminate himself. The objection was overruled by the learned judge, but the witness still persisting in his refusal, he was committed to prison. Thereupon, on the application of counsel for the prosecution, the jury were discharged.

Sir *F. Kelly*, in Trinity Term, obtained leave to add a plea, stating the above facts; and in the same term, *Atherton*, S. G., obtained a rule, calling upon the defendant to shew cause why the plea should not be taken off the file.

Sir *F. Kelly*, *Bovill*, *Mellish* and *Maule* shewed cause.

Atherton, S. G., *Monk*, *Clearsby*, and *Welsby* were not called upon to support the rule, which the court made absolute, on the ground that the facts stated in the plea would appear upon the record in the ordinary course.

The following was the entry placed upon the record:—"Afterwards, at the day and place within contained, before the Hon. Sir Hugh Hill, Knt., one of the justices of our lady the Queen, before the Queen herself, and the Hon. Sir Henry Singer Keating, Knt., one of the justices of our lady the Queen, of the bench of justices of our lady the Queen, assigned to take the assizes in and for the county of York, come, as well the said Attorney-General of our lady the Queen as the said John Barff Charlesworth, by his attorney aforesaid: and the jurors of the jury, whereof mention is within made, being called, likewise come, who, to say the truth of the matter within contained, were elected, tried, and sworn.

And afterwards, at the assizes aforesaid, in the county aforesaid, the said jury, so sworn aforesaid, are then and there duly charged with the said J. B. Charlesworth, and he, the said J. B. Charlesworth, is then and there duly given in charge to the said jurors, so sworn as aforesaid, and thereupon public proclamation is made there in court for our lady the Queen, that if there be any one who will inform the aforesaid justices of assize, the Queen's Attorney-General, the Queen's Serjeant-at-law, or the jurors of the jury aforesaid concerning the matters within contained, he should come forth and should be heard: whereupon Sir William Atherton, Knt., Solicitor-General, offereth himself, on behalf of our lady the Queen, to do this; whereupon the court here proceedeth to the taking of the inquest aforesaid by the jurors aforesaid, for the purpose aforesaid, and during the taking of the inquest aforesaid, José Luis Fernandez, a witness produced before the said jurors for and on behalf of our said lady the Queen, the said José Luis Fernandez, then being a material and necessary witness on behalf of our said lady the Queen, wholly refuseth to answer a certain question put to him by the counsel for and on behalf of our lady the Queen; whereupon the said Sir Hugh Hill, one of the said justices, having delivered his opinion that the said Fernandez is bound by law to answer the said question, and he, the said Fernandez, still refusing to answer the same, the said Sir Hugh Hill adjudges that the said Fernandez is by reason thereof guilty of a contempt of the court here; and thereupon the counsel for our lady the Queen declines to proceed further with the taking the inquest aforesaid, and calls upon the said justice to discharge the said jurors from giving any verdict thereon: against which the said J. B. Charlesworth, by his counsel in that behalf, objects and protests, and requires the said justice to proceed with the taking of the said inquest, so that the jurors aforesaid may deliver their verdict thereon, which the said justice refuseth to do; and thereupon the said justice then and there, for the reasons aforesaid, and for no other cause whatever, and without the consent and against the will of the said J. B. Charlesworth and of his counsel, orders that the said jurors shall be, and the said jurors, by the justice aforesaid, from giving any verdict of and upon the premises, are discharged Therefore the jury aforesaid are further put in respite before our lady the Queen at Westminster until" &c.

Sir *F. Kelly* then obtained a rule to shew cause instanter why judgment should not be entered for the defendant, that he be dismissed and discharged from the premises, and that he depart without delay; and why the award of jury process and all other proceedings should not be stayed.

Atherton, S. G., *Overend*, *Cleasby*, and *Welsby* shewed cause.—First, there is no precedent for entering judgment for the defendant quod eat sine die at this stage of the proceedings. The proper mode to take an objection of this kind is either by demurrer or by arrest of judgment. If this application were granted, the decision of the court could not be reviewed in a court of error, the issue in fact remaining undisposed of. [*Crompton*, J.—What we are asked to do is to refuse a venire de novo. That refusal will appear on the record; and if we are wrong, surely a court of error would set the matter right. (*M'Mahon* v. *Leonard*, 5 H. L. C. 931) *Blackburn*, J.—The Judgment in *Campbell* v. *Reg.* (11 Q. B. 799) shews that this might be done.] Still the defendant would have a right to be discharged if judgment quod eat sine die were entered, so that the effect would be the same as a verdict of acquittal by the jury. Secondly, the facts of this case do not entitle the defendant to have this application granted. The judge had power in his discretion to discharge the jury, and that is all that need now be contended for. Whether or no his discretion was rightly exercised cannot now be considered. The rule laid down by Lord 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 verdict" (Co. Litt. 227, b) is not true even in felony. The same doctrine is repeated in 3 Inst. 110, where it is applied to treason, felony, and larceny. And in Carth. 464, there is this passage—"Nota, per Holt, C. J., at the sittings in Westminster, 9th November, 1698, in a case of perjury tried before him, between *The King* and *Perkins*, he said it was the opinion of all the judges of England, upon debate between them, (1) that in capital cases a juror cannot be withdrawn, though all parties consent to it; (2) that in criminal cases not capital, a juror may be withdrawn if both parties consent, but not otherwise: (3) that in all civil cases a juror cannot be withdrawn but by consent of parties." But these passages are not law. The question was much discussed in *Reg* v. *Newton*, (13 Q. B. 716) and all the authorities are there collected. In Ferrar's case (Sir T. Raym. 84) one of forgery, it is said to have been "resolved by all the justices, that although the jury be charged and sworn in the case of a plea of the Crown, yet a juror may be drawn or the jury dismissed, contrary to common tradition, which hath been held by many learned in the law." The same law is recognised in Doctor and Student, p. 271. In 2 Hale's P. C. 295, c. 41, it is said, "Nothing is more ordinary than after jury sworn and charged with a prisoner, and evidence given, yet if it appear to the court that some of the evidence is kept back or taken off, or that there may be a fuller discovery, and the offence notorious," then the jury may be discharged. It is not necessary to contend for anything so wide as that. [*Cockburn*, C. J.—That doctrine is certainly not in accordance with modern practice.] No; but it shews how far the rule laid down by Lord Coke, and attributed to Lord Holt, is from being correct.

The whole subject was considered in Kinloch's case, (Fost. 15, 22). There all the authorities are elaborately examined by Foster, J., who comes to the conclusion that the rule laid down by Lord Coke is subject to some exceptions. There are two classes of cases in which it is clearly now settled, that even in felony a jury may be discharged, namely, where a juror has fallen ill, as in *Rex* v. *Scalbert* (1 Vent. 69); *Rex* v. *Stevenson* (2 Leach's C. C., 546); and *Reg.* v. *Edwards* (3 Camp. 207); and where the jury are unable to agree (*Reg* v. *Newton*, 13 Q. B. 733). In *Reg.* v. *Stokes* (6 Car. & P. 151) the jury were discharged on account of the absence of a material witness. It is true that there the prisoner consented, but that could make no difference if the judge has no power to discharge at all. What is contended for is not an absolute power to discharge the jury in all cases, but a discretionary power to do so, if it be necessary to prevent a manifest failure of justice that this should be done. In the present case, if the jury had not been discharged, there would have been a manifest failure of justice, not a mere speculative failure, as in the case of a discharge for the purpose of procuring better evidence. If it were otherwise, a great door to fraud would be opened; as by a friendly witness refusing to give evidence great criminals might escape punishment.

Sir *F. Kelly*, *Bovill*, *Mellish*, and *Maule*, in support of the rule.—The result of all the authorities is, that at the present day, "when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict." The rule is laid down in these words by Blackstone in Com. 360. This rule is recognised in *Conway and Lynch* v. *Reg.* (7 Ir. Com. Law Rep. 171) and never has been doubted in modern times. It is contended that the exception mentioned in Blackstone has no application in this case. What case of "evident necessity" was there? "Evident necessity" means, the happening of some event which renders it physically impossible that the jury should deliver a unanimous verdict. Such an event would be the death or the serious illness of the judge, juryman, or the prisoner. It would also include cases in which the jury had *permanently* disagreed. But here there is no reason whatever why the jury should not in this case have delivered a valid and unanimous verdict if they had not been discharged. With the exception of the cases which occurred about Lord Hale's time, the practice in this respect has been uniform. No single case occurs of a jury having been discharged at any other period, except in cases of necessity, as already explained, except in one case of collusion, and in cases in which it was done with the express consent of the prisoner. The case in the 21 Edw 3, c. 18, cited in Co. Litt. 227 b., is explained by Foster, pp. 32, 33. (See Fitz. Ab., "Corone et Plees del Corone," pl. 449.) *Rex* v. *Jane D*——— (1 Vent. 69) is the case of collusion which has been referred to. In *Rex* v. *Mansell* (1 Anders. 103) the prisoner consented; but Foster J., seems to think that even in this case this ought not to have been done. (*Kinloch's case*, Fost. 31.) In *Hanscom's case* (in 15 Car. 1, cited in 2 Hale's P. C., 295) one of the jury had gone away; the case was, therefore, one of necessity. The cases which follow these in the time of Charles II. ought not to be taken as precedents. It was the worst period of the administration of

justice in this country. No one would now pretend to say that what was done in *Gardiner's case* (Kel. 46), *Jones and Bevor's case* (Id. 52), *Whitbread and Fenwick's case* (7 How. St. Tr. 79), *Bookwood's case* (13 How. St. Tr. 165), *and Cook's case* (Id. 324) in which the juries were discharged for mere want of evidence, are cases by which courts of law ought now to be governed. Since the revolution the practice has reverted to the older and more correct rule. Wherever the question has been raised, and the case has not been one of evident necessity, the discharge has been refused or held to be wrong. (*Rex* v. *Perkins*, Carth. 465; *Rex* v. *Morgan*, Hil., 9 Geo. 2, cited in Fost. 24; *Rex* v. *Jeffs*, 2 Str. 984; *Conway and Lynch* v. *Reg.*, 7 Ir. Com. Law Rep. 161.) On the other hand, all the cases in which the discharge has been made, and not impeached, are cases falling within the rule now contended for. In *Rex* v. *Kinloch* the prisoner had assented. In *Rex* v. *Meadow* (Fost 76) the prisoner was taken in labour. In *Rex* v. *Edwards* (3 Camp. 207) a juryman was taken ill. In *Reg* v. *Newton* (13 Q B. 716) and *Reg* v. *Davison* (2 Fost. & F. 250) the jury had permanently disagreed. With the exception, therefore, of the short period which immediately preceded the revolution the whole course of authorities is uniform, and shews, at the utmost, that except in cases in which it is physically impossible that the jury should deliver a unanimous verdict, cases of collusion and cases of consent, the jury when once charged cannot be discharged by order of the court. Secondly, if the discharge of the jury was wrong, there is error on the record; and though this might be rectified by a subsequent proceeding, still it is the duty of this court to rectify it if there are any legal means of so doing. Surely this court will not say that the discharge of the jury was wrong, and would be available, on arrest of judgment or in error, to reverse the proceedings, and yet send down the prisoner to stand a trial which, in the opinion of the court, must in any case prove abortive. The case of *Conway and Lynch* v. *Reg.* shews that the prisoners are entitled to judgment. *Cur. adv. vult.*

On the following day (June 26) the judgments were delivered.

Cockburn, C. J.—I am of opinion that this rule must be discharged. I adhere to the view expressed by the court in the course of the argument, that if we could see our way clearly to the conclusion that the learned judge, in discharging the jury in this case, had exceeded the limits of his judicial authority, and also could see that the discharge of the jury operated virtually as an acquittal of the defendant, the court ought not to allow its process to be further used, with a view to the prosecution of the second trial, but ought to make this rule absolute to enter final judgment for the defendant, notwithstanding that course might place the Crown in a more disadvantageous position with reference to the bringing error upon such judgment of this court. But I am equally clear, that unless the court can see its way conclusively to that result, it ought not to interfere in the present stage of the proceedings, but ought to leave the defendant, if on the second trial he should have the misfortune to be found guilty, to move in arrest of judgment, or bring his writ of error, as he may be advised.

Two questions present themselves: the one, whether the learned judge had authority to discharge the jury under the circumstances of this case; the second, whether the effect of that discharge of the jury, if done without authority, entitles the defendant at once to the judgment of this court, that he go without delay. Upon neither of those propositions is my mind at the present moment in that state of conviction and certainty, that I feel that the court ought to interpose in the manner prayed. On the contrary, I am bound to say—although I by no means desire that this should be considered to have the character of a definite opinion and judgment—that the present inclination of my mind, as at present advised, is adverse to the defendant upon both those points.

In the first place, with reference to the question of the authority of the judge to discharge the jury, I think it is impossible, after the argument that we have heard, and the authorities which have been brought to our notice, not to feel that the law is, to a certain extent, in an unsatisfactory condition. I apprehend that in no part of our procedure has the practice of the courts more fluctuated than with reference to the question of the discharge of juries on criminal trials. If we go back to my Lord Coke, we shall find him stating, in the most positive and unqualified terms, that a juryman, sworn and charged in the case of life or member, cannot be discharged by the court or any other, but must give a verdict. Now it is plain that that does not embrace several cases in which it is admitted on all hands that a jury may, according to modern practice, be discharged. My Lord Coke takes notice neither of the case of the death of a juryman, nor of the illness of a juryman, rendering it imperatively necessary that the trial should be stopped. It was pointed out, indeed, by Mr. Mellish, in his most lucid and able argument, that my Lord Coke must be considered as not comprehending that case, simply because the jury would, ipso facto, be discharged in such cases by the very force of circumstances, inasmuch as, either by death or by such illness as rendered a juryman's departure from the court a matter of absolute necessity, the jury would be reduced below the lawful number, and would therefore be dissolved. But it must further be observed, that Lord Coke takes no notice of cases in which it is admitted now that a jury might be properly discharged, as in the case of a discharge at the desire of the accused, with the assent of the prosecution, or the case (one now of every day occurrence) of a jury being discharged on account of the impossibility of their agreeing to their verdict. And indeed, if we go back to the period at which Lord Coke wrote—the earlier period of our law—one sees that the very object of the coercion to which juries were subjected in those times was to enforce by duress, if necessary, the unanimity of verdict which the law required. Hence, the practice of taking juries in carts to the confines of the county, keeping them together for the purpose of compelling them to give a verdict, at however much of personal inconvenience and suffering, not discharging them until the commission of the learned judge was at an end, by his ceasing to be within the confines of the county to which he had been sent. If, then, this was the law at the time Lord Coke wrote, certainly the law has undergone many most important changes at later periods. But I think it may perhaps be questioned, notwithstanding the great authority of that great name, whether my Lord Coke was well warranted in laying down the law in the positive terms in which he stated it; for if we look to the passage in Doctor and Student, which was referred to in the course of the argument, and if we look to what was stated at the conclusion of the report of *Mansell's case*, in Anderson, it would certainly lead one strongly to surmise that a different practice existed in the courts anterior to the day at which Lord Coke wrote; and it is observable that he founds his doctrine on the authority of a single case; and I think it is impossible not to believe that Foster, J., was perfectly right when he said that that case did not warrant the conclusion at which Lord Coke had arrived. At all events, it would seem that, at a very short period after Lord Coke wrote, the doctrine thus laid down by him in the 1st and 3rd Inst. was not recognised as the true doctrine by the judges of the time to which I have referred; for we find, from the explicit statement of Lord Hale, who wrote within a comparatively recent period after the publication of Coke's Institutes, that the practice not only at the great criminal court of this country, the Old Bailey, but upon the circuits, was directly contrary to the doctrine laid down by Lord Coke, and that both at the Old Bailey and upon the circuits it was the habit and practice of the judges, in cases where the prosecution appeared about to break down from the failure of proof, to discharge the jury, in order that an opportunity might be afforded of supplying the deficiency. One of two things follows—either the propositions of Lord Coke upon this subject were not considered by the judges who immediately followed him as the true exposition of the law, or else this was considered not a rule of positive law, but simply of practice and procedure, subject to variation by the authority vested in the courts of this country to regulate their own practice; because it is quite clear, and there can be no doubt about it, that that which has been ascribed in the course of this argument, and elsewhere, to a tyrannical and oppressive practice, which arose in the time of the Stuarts, was in fact a practice which existed for many years anterior to the time when its abuse caused it to be brought into question. For there can be no doubt, that, although by Scroggs, C. J., and his fellow justices, in the case of *Whitbread and Fenwick*, to which so much allusion was made in the course of the argument, this practice of discharging juries for the purpose of furthering the administration of justice and preventing its frus-

tration, was converted into an engine of party and political oppression, yet, when afterwards Whitbread and Fenwick were a second time put on their trial, it is a total mistake to say, that even Scroggs and his associates wrested or violated the law; they only held that to be the law which, according to Lord Hale, had been for many years before, by the most virtuous judges, himself among the number, treated as the law, and administered as such. But I can quite understand that, in consequence of the scandalous abuse of this judicial power and discretionary authority as an instrument of tyrannical oppression in such a case as the one to which I have been referring, the judges would consider whether the benefit to be obtained in preventing the occasional defeat of justice, owing to defective evidence, by the postponement of a trial, was not bought at too dear a cost, seeing the abuse to which such a practice was liable to be exposed: and hence came, no doubt, the consideration of the judges among themselves, to which Lord Holt referred, when, in *Perkin's case*, he stated how the judges had agreed that the law should in future be administered. Whether that was upon a consideration of the authorities, and a preference for my Lord Coke's view to that which had been adopted in the period which elapsed between his time and Lord Hale's time, and the time of the revolution, or whether it was a matter of arrangement among themselves as a matter of policy and expediency, it is difficult to say: it may have been either. There is a great deal to be said, I think, on both sides of the question. As Lord Hale points out, it is a grievous and a lamentable thing—a great scandal sometimes as well as a lamentable thing—that, from some defect of evidence which ought to have been forthcoming, and which possibly, by a postponement, might easily be supplied, notorious criminals escape the punishment which ought to await them, it being plain that a single case of escape from punishment, upon manifest although not legally proved guilt, is of the most mischievous consequence; one such escape operating to encourage others to commit crimes infinitely more than the conviction and punishment of many guilty men will operate to deter them from so doing. But, on the other hand, there can be no doubt that it may, in many instances, become the means of imposing great hardship and oppression upon the prisoners, especially of the lower class, as such persons generally are, who may find means on a single occasion to obtain legal assistance, and the presence of witnesses who could speak to their innocence, and on the second occasion might want means to provide those advantages. Therefore, I think, on the balance of good or evil, the law or practice, call it which you please, established after the revolution, and which has existed from that time to the present, is, on the whole, by far the better one, and the one which ought to be adhered to. The question is, however, whether it is a rule of positive law, or whether it is one of practice; and then arises the question, whether it is open to exception, and whether the present case would come within any such exception. What I am at the present moment pointing out is, that the law has fluctuated, and has been differently stated at different periods; for even, as stated by Lord Holt, as the resolution of the collected judges of England, it is quite plain that that statement of the law is no longer conformable to the practice which has prevailed at subsequent periods; for Lord Holt states that these three propositions—that in capital cases a juror cannot be withdrawn, though all parties consent to it; that in criminal cases not capital a juror may be withdrawn, if both parties consent, but not otherwise; that in all civil cases a juror cannot be withdrawn but by the consent of all parties. Now, the first proposition was overruled in the case so much adverted to—*Kinloch's case*—because there the prisoner desired it, and the Crown assented to it. I see no difference between the case of the prisoner desiring it and the Crown assenting, and the case of the Crown desiring it and the prisoner consenting, if the prisoner considers that the postponement of the trial and the discharge of the jury will operate to his benefit. I cannot understand a principle such as that contended for on the part of the defendant, that there should be this authority if the prisoner initiates the application, and the Crown consents to it, and that there should not be the same authority if the Crown initiated it, and the prisoner, for his own purposes and convenience, assented to the proposition; but the proposition, as found in Lord Holt, would embrace the case which actually arose in *Kinloch's case*, because there, there was the consent of both parties. But besides that, he goes on to say, that in criminal cases not capital a juror may be withdrawn if both parties consent, but not otherwise; and so in civil cases. That entirely excludes the case of necessity. It excludes the case, which I may call a case of *quasi* necessity, where the jury is discharged in consequence of their not being able to agree. It is said, however, that that is a case of necessity too. I do not agree in that proposition. If by necessity you mean, as was argued for, physical necessity—that is, that the jury, from inability any longer to discharge their functions of jurymen, must be discharged, because it would be an inhuman practice to keep them together any longer—there are many cases in which we now discharge juries where that state of torture does not arise; and I understand even Sir Fitzroy Kelly to admit, that if a judge becomes satisfied that the difference of opinion among the jury is permanent, and that there is no hope of their ever being brought to unanimity, a judge has then authority to discharge them. I entirely agree in that. It is not necessary that you should wait—and, on the contrary, you ought not to wait—until the jury are exposed to the dangers which arise from exhaustion, or prostrated strength of body and mind, or until you have the chance of conscience and conviction being sacrificed for personal convenience, and to be relieved from suffering. Our ancestors seem to have thought differently. They seem not to have cared by what means unanimity was secured, so long as it was secured; but I think, in our days, that doctrine would not be entertained or acted upon by any one. Therefore, I say the statement of the law, as laid down by Lord Holt, is not in conformity with modern views on the subject.

Then we have a third statement of the law in Blackstone's Commentaries, who lays it down that the jury cannot be discharged, unless in cases of evident necessity, until they have given in their verdict. There, again, I say that is not a true or correct exposition of the law as practised in our day. We do take on ourselves, without the consent of parties, both in criminal and civil cases, where we find a jury have given a case all the attention they can bestow on it, that they have fully considered it, and that they cannot agree, and we are satisfied and confident that that is the true state of the fact—we do take on ourselves to discharge juries; and I trust that no judge will shrink from taking that course, because, as I said before, the jury ought not, if they cannot conscientiously bring themselves to a unanimous view of the subject to be exposed to personal suffering in order to obtain that unanimity, nor ought the parties to be exposed to the danger of a verdict which is not the result of the true conviction of those who are to decide the case, but the result of the suffering of those who cannot endure the inconvenience, and who must give way to those who happen to be stronger in mind or body than themselves. At the same time, while I cannot but point out these fluctuations in the law, still I entirely concur in this—that upon the whole, the doctrine or the rule, whether of law or practice I care not—that a jury shall not be discharged at the instance of the prosecutor, in order to enable the prosecutor to obtain evidence of which at the trial there appears to be a failure, is a sound salutary rule, and one that ought not to be departed from. Whether it be positive law, or whether merely a regulation of practice made by the judges in the time of Lord Holt, is to me a matter of comparative indifference. It has been the uniform practice of the judicial authorities of this country from that time to the present; and I take it, that a *rata praxis* like that becomes substantially a part of the law, and that no judge or body of judges ought to depart from it; and if it is found inexpedient, with a view to the administration of justice, with reference to those results that Lord Hale adverts to, it should be the act of the Legislature by which such a practice should be altered, and not the regulation of a body of judges, still less the act of an individual judge. But at the same time I should be exceedingly reluctant to say that there may not be cases in which there may be, superadded to the mere defect and failure of evidence, some additional circumstance which may call for the exercise of judicial authority to prevent a defeat of justice; and therefore I am exceedingly reluctant to lay it down, that the law is a positive law, such as either Lord Holt or Lord Coke have referred to in the passages to which our attention has been called. In the course of the argument I put the case of a

witness, either kept away from the court, or present in the court, and refusing to give evidence, in consequence of having been tampered with by the prisoner, or those acting on behalf of the prisoner, and justice thus frustrated, and I am not prepared to say that in such a case it would not be the duty of the judge to interpose, and to take upon himself, by virtue of his judicial authority, to prevent the frustration—the scandalous frustration of justice, which would take place if a man were to be acquitted under such circumstances. I put that more than once in the course of the argument, and I did not hear it fairly grappled with. Even Mr. Mellish, with his clear logical mind, and his ability as a disputant, did not appear to me to be competent to grapple with the case. It may be said, it is true, that it is better that in such a case there should be defeat of justice, however humiliating to those who administer it, and the public, who have an interest in its administration, rather than that a great principle and a salutary rule should be infringed upon; and it was said, that although it is true that no man, even in his wildest dreams, would think of imputing corruption to English judges, or the possibility of their being influenced by corrupt motives, they might be rash, or vain, or impatient, and under such circumstances lend themselves to the purpose of oppression in the administration of the criminal law. I own that I am not influenced by any such idle apprehension. I have been now for some years at the bar and on the bench, and have seen a good deal of the administration of justice, and I never yet saw a judge who, either from rashness, or vanity, or impatience, would lend himself to any such purpose, or do anything that was not right and fair, to the best of his knowledge and ability, between the Crown and the party accused. It would not be becoming in me to vindicate, or think of vindicating, myself from any such possible imputation; but, as regards those with whom I have the honour to act, either in this court or any other court, I must say with reference to any such offensive imputations, that I believe the Bar of England would at once repudiate the notion of there being any chance whatever of danger to the accused, from either the rashness, the vanity, or the impatience of judges: impatience there may be sometimes; the question is, whether it is not an honest and well-justified impatience, when elaborate arguments are wasted upon immaterial and undisputed propositions, or when material matters are in question, instead of forensic argument and disputation, when time is occupied in idle or commonplace declamation, or when arguments and observations are repeated again and again, and over again, to the wasteful abuse of the time of the court, which is in fact the time of the suitors and of the country? Now, I say this, that I am not prepared, either as a matter of law, or as a matter of expediency, to give up the judicial authority of a judge presiding at a criminal trial, in a case where justice is frustrated by what may be deemed to be the act of the prisoner, or something in which he concurs and co-operates, to allow justice to be defeated rather than exercise the authority which he may be believed to possess of postponing the trial, by discharging the jury. That would bring us, however, to this question—whether there are cases where, independently of the concurrence of the accused in the means whereby justice is sought to be frustrated, a judge may be justified in postponing the trial in order to prevent that frustration taking place; and we must take it here, that in this case the act whereby justice was defeated, or about to be defeated (because although, of course, we do not assume that the prisoner was guilty upon the charge preferred against him, yet justice was frustrated in this, that the enquiry was prevented by the act of the witness) was not one in which the defendant co-operated; and the question is, whether, under those circumstances, even supposing that a judge has in some cases, the authority to which I have been adverting, this was a case in which it could properly be exercised. The inclination of my opinion is, that under all the circumstances, if my learned brother who presided at this trial had the authority in question, it was a case in which it was not wrong to exercise it. On that there might be differences of opinion: some might think it was a case for its exercise, others not. I do not desire—it is not necessary, in the view I take of the case—to give any definite opinion on the subject. I think it is one of those cases on the confines, in which it is difficult to say what one would have done on the subject. This I know, that a more careful, cautious, or conscientious judge than the one who did act, and exercised his discretion on this occasion, never sat upon the bench; and as I find that all he doubted of was his legal power, but that he entertained no doubts as to this being a fit case for its exercise, if he possessed it, far be it from me to say that he acted wrongly.

But this is not the only difficulty in this case. We come to the second question in the case, and that appears to me to present still greater difficulties in the way of the defendant. Assuming even that the judge had not this power, or that he exercised it improperly, then comes the question, whether what he has done amounts to an acquittal of the prisoner, so as to entitle the prisoner to have judgment entered up for him as though he had been acquitted, because that is the practical result of the judgment which we are now asked to enter up on behalf of the defendant. I must say, on this I can add nothing to the conclusive reasoning of Crampton, J., in the case in 7 Ir. Com. Law Rep., on which so much observation has been made. No case of such a plea as this, except in that case, has ever been known to the law It may be said, and with truth, that that may be because, since the days of Lord Holt, juries have not been discharged, and therefore the occasion of such a plea has never presented itself. But I agree entirely with Crampton, J., that the only pleas which are known to the law of England to stay a man from being tried upon an indictment or an information, are the pleas of *autrefois acquit* and *autrefois convict*, and it is clear that this amounts to neither. It is said that a man is not to be tried twice, and is not a second time to be put in jeopardy, and that that applies equally in a case like the present as it does in a case where the man has been acquitted or convicted before. But in that I cannot concur. Again: I say the reasoning of Crampton, J., is, to my mind, conclusive on the subject. It appears to me that when you talk of a man being twice tried, you mean a trial which proceeds to its legitimate and lawful conclusion by verdict; that when you speak of a man being twice put in jeopardy you mean put in jeopardy by the verdict of a jury, and that he is not tried, that he is not put in jeopardy, until the verdict comes to pass; because, if that were not so, it is clear that in every case of defective verdict a man could not be tried a second time; and yet it is admitted that in the case of a verdict palpably defective, although the jury have pronounced upon the case, yet if the verdict be defective, it will not avail the party accused if he is a second time put on his trial. I cannot say, therefore, that in my humble judgment, as at present advised—though it is not necessary to state more than that such is the present state and inclination of one's opinion—I cannot come to the conclusion that there has been in this case a trial; that the accused has been put in jeopardy; or that he is at all in the position, either in point of fact or in point of law, of a man who has been once acquitted, and who, having been once acquitted, cannot a second time be put upon his trial.

Now this being the view which I take of this matter, after all the attention which I have been able to give to this case—though as I said before, I do not at all wish it to be understood that in that I am speaking as upon a settled and final conviction and conclusion—in this state of things I do not think it is fitting for us to interpose, and that is all we have to deal with on the present occasion. It may be a hardship on the accused, it is true, that he should be put a second time upon his trial, when, perhaps, when this record shall finally be made up, and judgment entered up one way or the other, and that be taken to a court of error, it may be held that he ought not to have been put a second time upon his trial; but that I think we cannot help. Probably, it will be the only case in which such a question could present itself, because, if this be taken to a court of error, we shall have it finally and definitively settled whether or not a prisoner, who, instead of having a verdict given one way or the other upon this trial, is a second time brought to trial, because the jury have been discharged on the first occasion, is entitled to have the benefit of those circumstances to operate by way of acquittal, so as to entitle him to final judgment. Whenever that is settled, as I suppose it will be in this case should it eventually become necessary, this question will no further arise. The great and important question for consideration in this case would then be finally and conclusively settled, and no such case can afterwards arise. The present question is, whether we are bound at the present moment, in this state

of the record, to interfere, and to prevent this case from going to its final conclusion. I think, that, unless we see our way clearly and conclusively, as I said before, to the settled and certain conviction that the defendant is entitled to be treated as though he had had the benefit of an acquittal, we cannot with propriety interfere. It may be—I do not say that it is so, the inclination of my opinion is the other way—but it may be, that by such a course we should deprive the Crown of the opportunity of taking this case to error. Therefore, I am of opinion that we ought not now to interfere; that this case must take its course, like many other cases where a judge may have erred, if in this case he should have erred. There may be cases in which there is no remedy except in the event of a result fatal to the accused, that might give him an equitable ground for the clemency of the Crown, in the shape of a pardon, if serious doubts should be entertained as to the propriety of the proceedings. But in this case even that would not be necessary, because there is the opportunity of taking the opinion of a court of error in case eventually the result of the trial should be against him. All I can say is, that at present I am of opinion we ought not to interfere, and therefore this rule should be discharged.

WIGHTMAN, J.—I should have wished for a longer time, in a case of this importance, to consider the many, and not always concurring authorities that have been cited upon the argument; but as time is of importance, as it is said, I have given them the best consideration that I can.

The two great questions that were argued before us were—first, whether the judge who presided at the trial was warranted in discharging the jury; and, secondly, whether, if he was not, the defendant could again be put upon his trial, and this court grant a *venire de novo*; or whether the defendant was entitled, upon the matters appearing upon the record, to judgment *quod eat sine die*. It appears by the record that the defendant, being charged with a misdemeanour, pleaded not guilty; that a jury was impannelled and sworn to try that issue; and that because a material and necessary witness for the Crown refused to give evidence, the judge, at the request of the prosecutor's counsel, discharged the jury from giving any verdict.

Upon the first point, namely, whether the judge was warranted in discharging the jury under the circumstances stated upon the record, a great many cases were cited in argument, some in which the jury had been discharged on criminal trials, upon grounds nearly similar to that in the present case, and others in which the jury had been discharged on the ground of necessity; as upon the illness of a juryman, or of the prisoner, or other circumstances occurring which rendered the further proceeding with the case impracticable; and it was said, and I believe correctly, that in no instance has the jury been discharged under such circumstances as the present since the Revolution. The cases will be all found collected in the report of the case of *Conway and Lynch* v. *Reg.*, and were all commented on in the course of the argument. In *Rex* v. *Kinloch*, Foster, J., also reviews and comments upon the cases and the law upon this point, and expresses a strong opinion against the propriety of the Court, in its discretion, discharging a jury after evidence given and concluded on the part of the Crown, merely for want of sufficient evidence to convict, but refrains from giving any opinion as to the propriety of such a course where undue practices have been used to keep witnesses out of the way, or where witnesses have been prevented by sudden and unforeseen accidents. The case nearest to the present which has occurred in modern times, of which I am aware, is that of *Rex* v. *Wade*, in which the prosecutrix, in a trial for a rape, when she came to be sworn as a witness, appeared to be wholly ignorant of the nature and obligation of an oath; and the judge before whom the trial occurred discharged the jury, in order that the witness might be instructed as to the matters upon which she was deficient, but reserved the propriety of the discharge of the jury for the consideration of the judges, who all, with the exception of two, who were absent, were of opinion that the discharge of the jury was wrong, and that the prisoner ought to have been acquitted; and a pardon was recommended.

It is obvious that the power of discharging a jury at the instance of the prosecutor, on the ground that the evidence is not strong enough to warrant a conviction, but that upon another trial better and more cogent evidence might be obtained, is more objectionable than in such a case, and may produce the greatest hardship upon the prisoner or defendant, and I cannot think that such a power ought to be exercised upon such a ground; and I think that in this case my Brother Hill, whose only object was to prevent what he most reasonably considered might probably produce, a failure of justice, was wrong in discharging the jury upon the ground suggested in the present case.

But assuming that he was wrong, the second question then arises, how can this error of the judge, if it be one, be taken advantage of by the prisoner or defendant, in case it is proposed to put him upon trial a second time? Or, indeed, can he take advantage of it at all, except as a ground for the interference of the Crown, by a pardon, as recommended in the case of *Rex* v. *Wade?*

It is said for the defendant, that he is entitled to judgment upon the record as it stands, *quod eat sine die*, upon the ground that, as the judge at the trial ought not to have discharged the jury, but to have directed an acquittal, he is entitled to have the same judgment as if he had been acquitted. But no precedent or authority has been cited to warrant such a judgment in such a case. In the case of *Conway and Lynch* v. *Reg.*, the court discharged the prisoner, but it does not appear that they gave such a judgment as that now prayed. Upon a plea of *autrefois acquit*, such a judgment might be given as the jury would have actually pronounced their verdict of not guilty. But it is said, that as it is a rule of criminal law that a man shall not twice be put in jeopardy for the same offence, if he has once been put upon his trial, and the jury sworn, he has been put in jeopardy, and therefore cannot by law be tried again, and so is entitled to judgment *quod eat sine die*. It is necessary to consider in such a case what is meant by putting a man in jeopardy, and at what period of the proceeding is he so placed. If he is placed in jeopardy when the jury are sworn, and evidence given, he is in jeopardy though a juryman were taken ill, or some unforeseen accident occurred, which would be within the ordinary excepted cases in which a jury may properly be discharged; or the jury may give an imperfect verdict, or one which cannot be supported in point of law; in all which cases the prisoner or defendant has been placed in jeopardy, if his being charged before a jury sworn to try him, and evidence given, be a placing him in jeopardy. But in such cases there seems no doubt but that a *venire de novo* may be awarded, and that the defendant is not entitled to judgment. Has he been more in jeopardy when the jury are wholly discharged, as in the present case, than when they give an imperfect verdict, or are discharged by reason of one being taken ill before they have given any verdict? Many instances may be given, fatal it may be to prisoners, which would not entitle them to judgment. Suppose a judge were improperly to admit evidence obtained under circumstances which made it inadmissible, and the prisoner was convicted upon such evidence, could he claim judgment *quod eat sine die*, or must not he rely, as in *Rex* v. *Wade*, upon the interference of the prerogative of the Crown to pardon? Upon the whole, I am disposed to think with Crampton, J., as he expresses it in his elaborate judgment in *Conway and Lynch* v. *Reg*, that "the true and rational doctrine is, that where a trial proves abortive, by reason of no legal verdict having been given, a *venire de novo* may go, whether the result arose from the mistake of the judge or of the jury."

I have not arrived at this conclusion without much doubt, but I have the less difficulty in expressing it, as the objection now urged for the prisoner will be equally open to him upon writ of error if there should be another trial, even if proved guilty; and if the verdict is for him, the question will not arise.

CROMPTON, J.—It seems to me that the only question before us in this case is, whether or not we ought to award jury process; and I am satisfied, from the discussion which we have heard on the part of the Crown (those who appeared on the part of the defendant, I think, were relieved on this part of the case), that the defendant has a right to come before us, and say, "Matters appear on this record on which you ought not to award new process;" whether it is a *venire* or a *distringas* (as, I believe, was argued in my absence) is immaterial: it is, in effect, whether new process ought or ought not to be awarded; and whatever the

result of that may be, it is a judicial act, on our part, to award the process or refuse it—an act, upon which, if we award it improperly, no doubt a writ of error lies for the subject; and whatever the result is, whether a writ of error would lie for the Crown (which, I understand, was also argued when I was away) or not, in my opinion makes no difference, because I think we are bound to give our judgment that this process should not issue, if it is made out to our satisfaction that there is a matter on the record which brings it to issue. The only other question that might arise in the case is this, whether there is that matter appearing on the record which, in effect, terminates the proceeding, either as preventing an awarding process, or as shewing that the party ought to be discharged. Therefore it comes, in my mind, to the question, does or does not the matter appearing on this record prevent fresh process issuing? Now, I certainly am not able to see that, in my judgment, there is anything which appears on this record which has that effect. I think that an abortive trial of this kind is not a termination of the proceeding, however it has occurred—whether by the act of the judge or by the act of the jury; whether by a juryman going away (as it was put in the course of the argument), or whether it be the act of the mob disturbing the proceedings; and I should doubt it, even in the case of the Crown, if such a case could happen, actually interfering. I quite agree with what my Lord and my Brother Wightman have said as to this part of the case. It appears to me that it is an attempt to extend the old plea of *autrefois acquit*, and that there is no case, when the authorities are examined, which will at all bear out the proposition, that an abortive trial does prevent a *venire de novo* in the case of a misdemeanour. There has been a technical point taken, which was stated originally by Lord Holt, and afterwards mentioned by Lord Wensleydale—there is said to be an objection of right to a *venire de novo* going in any case whatever in the case of felony. Whether that be so or not (I own I should have a strong opinion about that, and I think *Rex* v. *Fowler* (4 B. & Al. 273), to some extent, is an authority upon it), certainly that technical objection does not apply to a case of misdemeanour. Then we have to look to see whether it is or is not satisfactorily made out, that a trial which fails in this way has the effect of putting the defendant in the position of being *autrefois acquit*. I think it has not. There has been no trial, which is the first averment to be made in a plea of such a nature, and the party has not been in jeopardy in the legal sense of the word. In one sense, the party is in great jeopardy if there is a verdict against him on a bad indictment, but not in jeopardy, in the legal sense of the word. I think the party has not been tried, nor been put in jeopardy, in the legal sense of the word, and I think that this part of the case was not so fully argued as the other part of the case; there have been no arguments adduced to alter the conclusion in my mind to which I have come, founded very much on the reasons in the judgment of Crampton, J., to which reference has been made by my Lord and my Brother Wightman. I think the reasoning in that case, not only as to that part of his judgment, but as to the whole of his judgment, is perfectly convincing and unanswerable; and, without repeating those reasons, I quite concur in them, and think that an abortive trial of this kind does not amount to anything on which a judgment for the defendant can be prayed in the case of misdemeanor as in the case of a former acquittal or conviction. Mr. Mellish did not seem to me to meet or grapple with that part of the case; but he put it on this, that if there was anything wrong done by the judge, and put on the record, that that could be made ground either of error or of quashing the proceedings. I do not at all agree in that. There are a great many things done by the judge, which I shall have occasion to refer to afterwards, which cannot be made the ground of a proceeding of this nature. It is not because the party may raise any doubt on it upon the record — it is not because there is something done which one may not approve or wish to see done, which necessarily gives the right to consider a trial as one terminating in favour of the defendant.

Now, the old notion that when there was a jury once charged with a prisoner, that jury could be the only jury to try him, has, I think, been long exploded. It was said to be first exploded, I think, in Ferrer's case; at all events, it has not been acted upon, according to the old notion laid down in Lord Coke, ever since Ferrer's case, and the contrary practice has so long prevailed that I think we cannot adhere at all to the old rule. I take the same view on that part of the case as my Lord has done, when he traced the different fluctuations that had occurred in the practice. I think very strongly in favour of Mr. Justice Crampton's notion, that this is matter of practice; it may be called in one respect, a matter of law, because the practice of the court is, to some extent, matter of law; but matter of law or of practice, it seems to me we must take the rule now to be, that the same jury ought to try the case, subject to the power of the court to interfere, if they see it is a proper case for interference; and I think we cannot look upon it now as a rule, that we should have no such power in point of law. I have a strong inclination of opinion that the jury ought not to be discharged, unless there is some very strong reason, which I think is for the judge to decide on. This makes me incline to the notion that it is a matter rather of practice than of law; and when I say of practice, I mean practice in the sense of a rule which the judges ought to adhere and yield to, and that they may be said to act improperly if they depart from it. Now, it seems to me that what was complained of as mischievous in the practice adopted in the earlier times—in the time of Charles II., and probably before that—was an abuse of the former practice of discharging the juries at the time when it was necessary, and that it was the abuse of the practice which was complained of, not that there was ever any doubt what the result would be if this improper practice took place. I look at the proceedings in the case of Fenwick and Whitbread, where this practice of discharging the juries was used in so odious, and dangerous, and unconstitutional a sense, that it cannot be too strongly reprobated, as being taken for the very purpose of the prisoner's being tried again, and the judge knew that if they discharged the jury the party had not the benefit of an acquittal, and that therefore he was liable to be tried again. Again I look at what Lord Holt and all the judges of England said as to this, namely, that they would not discharge the jury, to be founded on this—that if they did discharge the jury, the party would be subject to a new trial. It is now said that discharging the jury is the same as a verdict of acquittal. In effect, I think, the very object and reasoning of the judges agreeing to this rule was, that the abuse of discharging juries for the purpose of getting further evidence was a matter very much to be reprobated, but that it would not have the effect of putting the defendant in the position in which he could say that he ought not to be tried again, and that the result of such a proceeding would be to subject him to a new trial, and that therefore they would not discharge the jury. I think, with the exception of *Conway* v. *Reg.*, in Ireland, there have been no cases where a matter of this kind has been treated as a legal bar to fresh process issuing, or has been treated as a bar to the proceedings, or a termination of the proceeding in favour of the prisoner. All the other cases seem to me to admit of a very different answer. Wade's case, which was so very much relied on, was a case where the judges met, as they used to meet in those times before the court for considering Crown cases was established, to consider whether anything wrong had been done at the trial; whether there had been a wrong direction given; whether they had admitted wrong evidence, or wrongly refused evidence for the prisoner; or any matter of that kind, which was not a ground upon which the defendant could ask to be relieved from the consequences of the verdict, but in which a judge might be doubtful if he had acted rightly; in all those cases they met together and took the course, if they had been wrong, of recommending a pardon. I do not think it has been suggested that it ever could be made matter of plea before the case of *Conway* v. *Reg.* Now, in that case there are three very learned judges delivering their judgment against one. On examining the judgment and the reasons, I must own that I am entirely satisfied with the judgment of Crampton, J. In a case which has occurred since (Newton's case), a very strong opinion was given by the Court that the discharge was not equivalent to an acquittal. In that case the matter came before the Court on an application for a *habeas corpus*. It is difficult, in my mind, to see, if the proceeding was terminated on the ground that the discharge of the jury amounted to an acquittal, how the prisoner was not then entitled to the writ asked for. If the proceedings were terminated against the de-

fendant, I should have thought the Court, on an application for a *habeas corpus*, would have discharged her. I feel a difficulty in seeing how, in that case, the committal still stood. If the committal was for murder, then, if the argument for the defendant is right, the prosecution for that murder was done away with, and it was the very case in which the prisoner ought to have been released. I use that case for the purpose of shewing that the court do not consider themselves as concluded by the case of *Conway* v. *Reg.* Lord Denman there says, "The jury were improperly discharged, according to the argument for the prisoner, and therefore, as it is contended, the prisoner must be set at liberty. I do not think that conclusion follows, either logically or on the legal authorities. Even assuming that the discharge of the jury was improper, I do not see how it is equivalent to an acquittal, or can be a bar to a trial, or how it can be made the subject of a plea. On this, however, I give no opinion, but merely state it by way of protestation, against being supposed to have decided that it may be so pleaded." Then he says afterwards, "I am of opinion that the judge in this case acted rightly; but even if he had acted improperly, I think it does not entitle the prisoner to be set at liberty." Then Patterson, J., says, "There has been no trial resulting in a verdict; what took place was not a trial determining the question of her guilt or innocence. Therefore, even if I saw greater reason to doubt the propriety of what took place at the assizes, I should say she was not entitled to be discharged." What my Brother Coleridge and my Brother Erle said—by Brother Erle particularly—as to the discretion which the judge has, has been mentioned so often in the course of the argument that I will not further refer to it; but it does seem to me that the court there considered it, at all events, an open question; and Lord Denman, I think, expresses the inclination of his opinion that it could be made the subject matter of a plea, and was not equivalent to a determination in favour of the defendant of the indictment.

Now, the last case on the subject, the case of *Reg* v. *Davidson*, (2 Fost. & F. 250, seems to me a still stronger authority. There, as it appeared on the record, there was no ground, within the rule laid down and attempted to be supposed by Sir Fitzroy Kelly and Mr. Mellish, for the jury being discharged; certainly no ground, whether according to their argument or not, according to the case of *Conway* v. *Reg.* In Davidson's case, it was pleaded that the discharge took place "for and by reason of no sufficient and legal cause whatever." It is true that there is a replication put on the record, that "for a long space of time"—which we all know in pleading means no time at all—take it a long time if it be necessary for the purpose of the pleading—that for some long time they had not come to their conclusion, and then, because it was the last case at the session, none of the commissioners chose to wait any time for the verdict—which it was their duty to do. I apprehend—they discharged the jury. That seems to me, according to the case of *Conway* v. *Reg.*, not to be justified; but however that may be, the court do not put it on that ground, but they put it on the ground, that this was a matter that cannot be made the subject of a plea. That was the decision of a court, in one sense inferior to this court, because a writ of error lies from that court to this; yet when we consider that it was in the place where the great criminal trials of the country take place, before a commission composed of three learned judges, with a very solemn argument on the plea—it is a case of as great authority as the one in the Irish Reports. I treat the opinions of those learned judges who presided in the court in Ireland with the greatest respect, but I think, on examining it, the one judge who differs from them gives by far the most conclusive reason for his opinion. Now, in Davidson's case you have a solemn argument before three judges, and I think they decided the very point before us. "We are all of opinion," said the Lord Chief Baron, "that it is unnecessary to hear further argument; the question is, whether the plea is sufficient, and the prisoner's counsel chiefly relies on the case of *Conway* v. *Reg.* Now, though it has no doubt been laid down in the text-books that a jury cannot be discharged except under certain circumstances, it does not appear that prior to that case, the improper discharge of a jury was ever made the subject of a plea I may observe, that in that case the Irish Court of Queen's Bench were not unanimous; and therefore, if the necessity arose, I should consider that we were quite at liberty to review it; but it is observable that the case before them was one of felony, the present being one of misdemeanour only." I will not stop to make any remark on the distinction last adverted to, but it is rather a curious matter that from the very beginning, in almost every case, I think up to the time of the Revolution, the rule has been put as applicable to the case of life and limb, which is the same as felony, and not as extending to the case of misdemeanour, much less to the case of a proceeding in our own court, where the parties on the one side and the other proceed in a very different manner to what they do in general criminal courts. The party here has the benefit of a new trial, and there are a great many things which do not apply to cases of felony; but certainly the rule, as laid down by Lord Holt, and according to my own notion, the practice, as adopted by the judges, or growing up of itself after the time of the Revolution, has extended both to felonies and misdemeanours; and I think the general rule which ought to guide judges is, that it ought not to be done except in cases of evident necessity or propriety in cases of a criminal nature of any kind. In Davidson's case, the Chief Baron goes on to say, "We are of opinion generally, that when a judge has exercised his discretion, that discretion is not to be made the subject of question. It cannot be ground of error, nor can it be traversed before a jury. It seems to me, therefore, that the plea the prisoner has placed upon the record is bad." My Brother Martin puts it entirely on the question of its being a misdemeanour; and my Brother Hill says, that he adopts the position laid down by Crampton, J., in his judgment, where he says, "It is clear the judge has a discretion to exercise." Where is the legal limit of his power to be fixed? The prisoner's counsel could not fix it The judges in Kinloch's case, and Sir M. Foster, says it cannot be fixed. I need scarcely add that I cannot fix it." (7 Ir. Com. Law Rep. 172, 173.) Now, I think those authorities are certainly stronger in favour of its not being a matter of plea than any cases that have gone before, and I do not find it at all made out to my satisfaction; on the contrary, I think the proposition is not a true one, that such matter operates as a plea, whether it is pleaded to a new indictment, or whether it appears, as in this case, on the record. I think that what appears on this record does not operate so as to prevent fresh process being awarded, and does not operate as the termination of the proceeding; and therefore, I think, that in point of law we cannot refuse to award the necessary process for summoning a fresh jury.

Then there is the other part of the case which has been discussed, and which, I think, one ought to give one's opinion upon. I certainly look upon this as a rule to guide judges, which has been acted upon ever since the Revolution, and which I think ought to apply both to misdemeanours and to cases of felony; and I think it is a matter of practice, or rule of law if you like, that the judge ought not to interfere, because the case for the prosecution fails for want of evidence; and certainly it strikes me that this is a case of that description. There may be cases of collusion in which it may be done—I do not say there are; it is a very nice question; and I think Mr. Mellish and Sir F. Kelly both decline to say that it could not be done in a case of collusion. But here we have no case of collusion at all; it is the same case as if a witness does not choose to come into court for some reason or other—not very different to my mind than if he does not answer satisfactorily. It is a failure of evidence on the part of the Crown. Whether that be a matter of discretion or not, I think I am bound to say, as we have heard so much discussion on the matter, I certainly for one, as at present advised, should have directed an acquittal. I think that the importance of the general rule is greater than the importance of justice being baffled in any particular case. It is rather put, I think, by the Crown as if the judge ought to interfere, the witness being fined and behaving ill, because he was baffling justice; but unless that is brought home to the defendant, it does not seem to my mind at present to be a satisfactory distinction. At the same time, I cannot say that the whole matter being before my Brother Hill, and he acting in the exercise of his discretion—certainly, I can say, most conscientiously, having a better opinion of his judgment in such a matter than my own—I cannot say that he acted wrongly upon it. All that I should say is, I would have acted on the general rule, and

on the universal practice, as observed by my Brother Wightman since the Revolution, not to discharge the jury because the case fails for want of evidence. At the same time it is very desirable that justice should not be baffled in this way; and it is one of the defects in our trial by jury, that very often a point arises at the trial which there is no mode of sifting, and one party or the other has the advantage of it. When trials are protracted, as they are abroad, that is supplied; with us there must be an acquittal or a conviction at once; and it would be a very bad practice, I think, that, on the ground of there being a failure of evidence, the jury should be discharged. I think that the practice of discharging the jury too soon because they cannot agree is also an objectionable one. It is said that it is necessary to discharge the jury as soon as you see they are not likely to come to an agreement. I think we ought to take some mean course as to that. Perhaps, it is hardly a matter involved in the present discussion. It always seems to me very dangerous to say, that in a certain time, or in a few hours, the jury would be discharged; but that they ought to be kept, not to coerce them, as put by the Lord Chief Justice, to give a wrong verdict, but such a time as to prevent their saying, "We can wait for such a time; we know we shall be let off, and we will not give a verdict." Therefore, I do not at all reprobate the old practice of confining the jury for a reasonable time. Confining them without meat, drink, and fire, and exposing them to hunger, and thirst, and cold, seems a very barbarous relic, which, I think, might as well be got rid of, but that they should be confined a reasonable time, so that they shall have time to consider, and not merely wait in order to avoid giving an unpleasant verdict. I think, in our discretion, we must take care to avoid one extremity or the other. I shall conclude by saying, that I think that this rule is of very great importance. Certainly it is a rule of practice, if not of law, and I think it ought not to be departed from merely because of the failure of the prosecution in point of evidence. Without saying that my Brother Hill was wrong, I certainly come to this conclusion, which I think I ought to give—I think, according to my Brother Wightman's notion, I should have felt myself bound by the practice to have directed an acquittal. Upon the whole, I am quite satisfied that there is no matter on this record which entitles the prisoner to ask for discharge from the indictment, or to prevent the Crown from having a fresh jury process. Therefore, I think that the rule should be discharged.

Blackburn, J.—I also think that the rule should be discharged. This is an information for a misdemeanour; issue was joined in this court on the plea of not guilty. There is also an award of jury process, and a return of the Nisi Prius record, on which are entries of what took place at the trial at York. From these we find that the jury were sworn, and the case commenced, but that no verdict was given, the judge having discharged the jury under the circumstances stated in the record. On this the question arises, what is this Court to do judicially? The counsel for the defendant contend that it is a rule of law in all criminal cases, as well misdemeanours as felonies, that when once the jury is sworn and the trial begun, the jury must give their verdict one way or the other, unless discharged under circumstances different from those in this case. And they further contend, that if the jury be discharged improperly, the issue can never be tried again, so that judgment could be given against the defendant on their verdict, if found for the Crown. If they are right in this contention, I think this Court should not permit its process to be used for the purpose of causing a trial which could not be available, and the defendant would be entitled, as of right, to a judgment refusing process, and discharging the defendant from this information, the precise form of which judgment we need not consider now. But unless the defendant is right in saying that, as a matter of law, the discharge of the jury operates so as to prevent the issue being tried on a future occasion, the Crown is, I think, entitled, as a matter of right, to an award of process, in order to have the issue tried, which we must not deny.

The judge at the trial has power to discharge the jury whenever it is proper; and he is the sole judge of the propriety—in this sense, at least, that when he decides that the jury are to be discharged, all must obey him, and the jury must be discharged. It may well be that his order, though it must be obeyed, was improperly made: but it seems to me that to entitle the defendant to the judgment his counsel pray for, they must show not only that the discharge of the jury under the circumstances stated on the record was improper, but also that an improper discharge of the jury is, in point of law, equivalent to an acquittal, and entitles the defendant to be discharged, as much as a verdict of not guilty would have done; and in my mind the only question we have to decide is, whether it does amount to a bar in law, and I think we must decide it. It is not sufficient for the defendant, if his counsel can make out that there has been an improper deviation from practice, unless they shew that it is in law a bar.

There are rules of practice (I may take as a familiar example that by which a judge recommends a jury not to act on the non-confirmed evidence of an accomplice) which are so well established that a judge is blameable if he departs from them, and yet a conviction obtained against such a rule of practice would be good in law. In such a case, if the defendant has suffered injury, there is an equitable claim upon the Crown to redress this injury. It is for the proper constitutional advisers of the Crown to say whether such a case is made out. In Wade's case, which was mentioned by my Brother Wightman, we were not deciding on the law, but were consulted as the advisers of the Crown. They thought that it was an improper proceeding on the part of the judge to discharge the jury in order to postpone the trial till a witness could be educated, so as to understand the nature of the oath; and I agree with them; for it seems to me that the evidence given after an education of this sort would be of a very questionable kind. So thinking, they recommended a pardon; but their doing so was not an expression of opinion that the course taken by the judge was beyond his power, or that he had not discretion in a fit case to discharge the jury; and as far as the course adopted by them in recommending a pardon is any evidence of their opinion, they thought it no bar in law. Here we are not acting as the constitutional advisers of the Crown; we are to say whether it is legal to proceed to try this issue after what has happened. It is for the law advisers of the Crown to say whether, if it is legal it is also proper. That is a question for the constitutional advisers of the Crown, of whom I am not now one, to determine on their own responsibility. I have, however, no objection to state my own opinion as to the propriety of the course taken on the trial of this case, though it is somewhat extra-judicial.

I agree, that in general it is very objectionable for a judge to discharge a jury, after a trial has begun, on account of any failure of evidence. The liability to abuse is so great, that I think this should not be done merely on account of the failure of evidence. But I think it cannot be said, that if a judge has power by law to discharge a jury in such cases, he should never exercise that power. In cases of collusion, where it appears that the defendant has instigated a witness to absent himself, or the like, I think a judge ought to use his power. In the present case I agree with the defendant's counsel, that there is nothing stated in the record to lead us to the conclusion, that the defendant instigated the witness to refuse to give evidence. If there were, I should have no doubt that it would have been improper not to discharge the jury. But I think, from the statements on the record, that it is probable that the witness was not instigated by this defendant at all. Still, I think the judge had facts before him from which he might well draw the inference, that the witness refused to answer for the purpose of defeating justice, by procuring the acquittal of this defendant and the other defendants, through the absence of evidence, thinking he could do so with impunity. I think that, under these peculiar circumstances, it was very desirable that not only should the witness who committed this contempt of court be fined and imprisoned, but also that he should be baffled in the object he proposed for himself. It may be that the general rule, that a criminal case once begun should be disposed of, is of such consequence, that it would be better to suffer the wrongdoer to obtain his end than break through the rule; and I will not take on myself to say that a judge who, acting on that notion, should, in such a case as the present, direct an acquittal, would not do well. But, on the whole (though not without doubt), I think that my Brother Hill did better in discharging the jury.

All this, however, is in the nature of *obiter dicta*. The one point on which I rest my judgment is, that at all events, in a case

of misdemeanour, the discharge of a jury sworn to try an issue after the trial has begun, in my opinion, even if improper, is not a legal bar to the trial of the issue by another jury. I have said, "at all events, in a case of misdemeanour," because that is the only question before us, and because the law of England undoubtedly does, in *favorem vitæ*, make a distinction in many cases, and it may be in this, between the modes of procedure in the trial of felonies and misdemeanours.

The whole foundation of the argument of the defendant is rested on two passages of Lord Coke, where he expressly speaks only of felonies where life and limb are in danger, and where a privy verdict may not be given. He is silent as to the effect of an infringement of this rule, and it may well be doubted whether he is doing more than laying down a general rule of practice which he thought ought to guide the Court in felonies, but which was not generally followed.

Before the Revolution, it certainly was the practice to discharge the jury whenever the judge thought the interests of justice required it, in order that there might be a second trial. This was done in all cases of treason and capital felony as well as misdemeanours. The practice is stated by Lord Hale in nearly the same terms as it is stated by Lord Chief Justice North in the case of *Whitbread and Fenwick*. Lord Hale justifies the practice for reasons which are plausible, and which shew that he thought the discharge was no bar to a second trial. He justifies the practice, because, if the jury were discharged, a notorious murderer might be brought to justice, who could not have been so if the discharge was a bar as much as the acquittal. But though his reasons are plausible, the case of *Whitbread and Fenwick* shews that the practice was liable to a great abuse, and I think it clear that the modern practice, by which a criminal trial is not interrupted after it has commenced (unless in very exceptional cases), is very much better. I cannot doubt that a judge would more properly be removed from his office, and impeached, if he were now to discharge a jury under such circumstances as those under which the jury were discharged on the first trial of *Whitbread and Fenwick*. I think an Attorney General who persevered in putting them on their trial again would be deserving of impeachment. But, supposing this to be done, I doubt if the judges before whom the prisoners were arraigned the second time would do otherwise than tell them that there was no legal bar to the indictment, even in a case of treason.

After the Revolution no alteration was made, by the Bill of Rights or any other act, in the law or practice as to criminal trials, but the practice was changed. The reaction against the old abuses was great. In *Rex* v. *Keate* (1 Ld. Raym, 138), in 1696, a special verdict was found in a case of felony. The verdict was such that Holt, C. J., and Foster, J., thought it warranted a judgment for the Crown. Eyre and Rokeby, JJ., thought the verdict uncertain, and that a *venire de novo* ought to issue. It would appear, from the various reports of this case, that there was a doubt whether there could be a *venire de novo* in a case of felony, which, as it seems to me, could only be on the ground, that, in accordance with the doctrine of Lord Coke, in Co. Litt. 227, b., the jury once charged with the prisoner ought to give their verdict, and could not be discharged. In the end no decision was given, as Lord Holt himself took exceptions to the indictment which was quashed. This is the only case I find in which the point arose as a matter to be decided as a question of law. It was soon after this case that, in *Rex* v. *Perkins*, Lord Holt made the statement, that, according to one report, "he had had occasion to consider of this matter;" according to another, "that all the judges of England were of opinion, in debate among themselves," that in capital cases a juror could not be withdrawn: in other words, a jury could not be discharged with consent; and in misdemeanours not without consent. What Lord Holt did in *Rex* v. *Perkins* is what, in every view of the case, is now approved of. The judges could by their resolution alter the practice, but not the law. It has never been decided that in felony there can be a *venire de novo* on an imperfect verdict, though the very able argument of Crampton, J., in *Conway and Lynch* v. *Reg.*, leads me to think it probable that it can. But if Lord Holt thought that there could be no *venire de novo* in case of an imperfect verdict in misdemeanour except by consent, his opinion has been repeatedly overruled; for I take it to be clear that, on an imperfect verdict in misdemeanour, a *venire de novo* is awarded; (see *Rex* v. *Trafford*, 8 Bing. 204); and I agree with the reasoning of Crampton, J., in *Conway and Lynch* v. *Reg.* (7 Ir. Com. Law Rep. 178), which shews that there is no distinction in principle as to its effect as a bar between a discharge of a jury upon an imperfect verdict and any other discharge of a jury. As far as authority goes, the distinction between felony and misdemeanour here becomes important. On the authorities, there is a doubt in cases of felony; in misdemeanour, I think it is clear that a *venire de novo* may be awarded.

On the argument before us it was contended that there was a distinction between a discharge of the jury, because the judge had become convinced that it was impracticable that they could give a verdict, which, it was said, was a case of necessity, and a discharge of the jury where it was manifestly still practicable that they should give their verdict, but where the judge thought that it was desirable for the ends of justice not to take their verdict, though it was practicable. In the latter case it was said to be *ultra vires* and illegal. The distinction is intelligible, but it cannot be supported without overruling Kinloch's case. There the verdict of not guilty might very well have been taken, though the prisoners had not the opportunity of pleading the abatement. It was entirely a voluntary act on the part of the Court which led to a discharge of the jury, and, as is pointed out by Crampton, J., in *Conway and Lynch* v. *Reg.*, the whole reasoning of Foster, J., is founded on the supposition that the judge held his discretionary power, though he ought never to exercise it without very good reason indeed. The case of *Conway and Lynch* v. *Reg.*, is, as I have already observed, a case of felony, and is so far not necessarily a case in point in the present one of misdemeanour. But I must say that the admirable judgment of Crampton, J., convinces me that even in a case of felony he was right and his colleagues were wrong. I will not weaken what he said by reporting or abridging it, but refer to the report, only saying that I subscribe to all his reasoning, except that, as I have already said, I doubt if he is justified in treating it as settled (see p. 178 of the report) that there must be a *venire de novo* in a case of felony on an imperfect verdict. I think this is a point still undetermined by authority (see *Campbell* v. *Reg.*, 11 Q. B. 799), and since the decision in *Conway and Lynch* v. *Reg.* there have been two cases in England in which the question arose. In *Reg.* v. *Newton* (13 Q. B. 716), Lord Denman, C. J., said, "The prisoner was given in charge to a jury at the assizes, and therefore it is contended that she must be set at liberty. I do not think that conclusion follows, either logically or on the legal authorities. Even assuming the discharge of the jury was improper, I do not see how it is equivalent to an acquittal, or can be a bar to a trial, nor how it can be made the subject of a plea." And Patterson, J., says, "There had been no trial resulting in a verdict. What took place was not a trial determining the question of her guilt or innocence. Therefore, even if I had great reason to doubt the correctness of what took place at the assizes, I should say she was not entitled to be discharged." These opinions were given on a return to a *habeas corpus*, where the question before the court was, whether the prisoner could be detained in custody to abide a fresh trial. The question whether there should be a fresh trial was not so distinctly raised as in the present case, but it was before the Court, and the two learned judges just quoted evidently thought that even in the case of a capital felony an improper discharge of the jury was not equivalent to an acquittal. The last case on the subject is *Reg.* v. *Davison* (2 Fost. & F. 250), where the precise question now before us was raised on demurrer at the Central Criminal Court. There, to an indictment for misdemeanor, it was pleaded that the prisoner had been given in charge to a jury, and that they had been improperly discharged by the justices. The replication stated no more than that the justices did it in the exercise of their discretion, because all other business was at an end, and the jury said that they were not likely to agree. This was admitted to be true by the demurrer; and if there was no more than that which is stated in the replication, surely the discharge of the jury was indiscreet and premature. Both Pollock, C. B., and Martin, B., take the distinction between the case before them, which was one of misdemeanour, and that of *Conway and*

Lynch v. *Reg.*, which was one of felony, but rest their judgment on the more general ground, that the improper discharge of the jury could not be the subject of a plea; and my Brother Hill quotes and concurs in the judgment of Crampton, J., in the Irish case.

I think the authorities quite sufficient to authorise us to decide that the discharge of the jury is no legal bar to another trial, and therefore that there ought to be such jury process as is necessary to produce that further trial. Whether that is to be entered on the record as a *venire de novo*, or as a continuation of the former jury process, is a matter not now before us.

Rule discharged.*

GENERAL CORRESPONDENCE.

Police Magistrate—Right to practise as an attorney.

To the Editors of the Law Journal.

Gentlemen,—As a general rule magistrates are not practising attorneys, but the Police Magistrate of the city of Toronto appears to be an exception to the rule. Can you inform me whether or not in law he is entitled to practise as an attorney? Your opinion will oblige

An Enquirer.

Toronto, January 27, 1863.

[Recorders and police magistrates are appointed by the Crown, and hold office during good behavior: (Con. Stat. U. C., cap. 54, sec. 375.) Each is ex officio a justice of the peace for the city or town for which he holds office, as well as for the county in which the city or town is situate: (*Ib.*) The Governor General may, by letters patent under the great seal, appoint the recorder to preside over and hold the division court of that division of the county which includes the city: (*Ib.* sec. 383.) While a recorder is authorized to hold the division court, he is not allowed to practice as a barrister, advocate, attorney or proctor in any court of law or equity: (*Ib.* sec. 385.) We know of no such provision which in express terms disables a police magistrate from practising as a barrister, attorney or solicitor in Upper Canada. It is true that Con. Stat. Can., cap. 100, sec. 2, provides that, "When not otherwise specially provided by law no attorney, solicitor or proctor shall be a justice of the peace in or for any district or county of this province during the time he continues to practise as an attorney, solicitor or proctor;" but we cannot see our way to the conclusion that this *per se* disables a police magistrate to practise as a barrister, attorney or solicitor.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. Evans v. The Bristol & Exeter Railway Com.

Carrier—Delivery—Evidence.

In proving delivery of goods by a carrier, though it is not necessary to give evidence of delivery into the hands of the consignee or his servants, it is necessary to show an actual delivery of the goods into their possession.

* No further proceedings were taken by the Crown in this case, a *nolle prosequi* having been entered by the Attorney General.

EX. Leech v. Gibson.

Practice—Trial—Non-appearance—Nonsuit—Costs of the day.

If when a cause is called on, the Plaintiff is not ready for trial, and the Defendant is so, but does not apply for a nonsuit, he cannot have the costs of the day.

EX. Higginbotham v. The Great Northern Railway Co.

Carrier—Damage to goods—Evidence.

In an action by consignee of goods against carriers for damage caused by want of care in the carriage, proof that the goods were in proper condition when received by them, and were damaged when delivered is sufficient. Although the jury find that the damage was caused partially by bad packing, that does not answer the action, and goes only to the amount of damage.

EX. C. Wright v. Wilkin.

Devise upon condition—Trusts and conditions—Mortmain Act.

A devise of lands to A., upon the express condition that A. should pay certain legacies within twelve months from the decease of testatrix. *Held*, that it was a trust, and not a condition, the breach of which would give the heir a right of entry.

Where lands are devised, subject to certain trusts, some of which are bad by the Statute of Mortmain, the devisee takes the lands free of such trusts.

EX. C. Cahill v. The London & N. W. R. Company.

Railway Company—Passengers Luggage—Merchandise.

Where a railway company contracts with passengers for certain hire, to carry them with their personal luggage only, and a passenger is conveyed, with a box which he has with him as personal luggage, but which is in fact merchandize, the company are not liable for its loss, unless the package is unmistakably merchandize

EX. Jones v. Davies and Wife.

Ejectment—Merger of estate for years in freehold—Tenancy by the Courtesy initiate.

D., the male defendant, being lessee of al. estate for years, his lessor devised the lands in fee to D.'s wife, subject to the payment of an annual rent charge to the plaintiff with a proviso for entry in case of non-payment. D. had issue by his wife.

Before the lease for years had expired, the plaintiff brought an action of ejectment for non-payment of the rent charge.

Held, (affirming the judgment of the Exchequer) that the action was not maintainable; that the devise in fee to the wife did not operate as a merger of the lease for years; that during the lifetime of the wife the husband was only tenant by the courtesy initiate and not consummate, and consequently had not such an estate of freehold in his own right as would merge the term.

C. P. Brown v. Tibbetts.

Set off—Attorney's bill of costs—Demurrer—Practice.

The declaration alleged that the defendant, an attorney, promised to indemnify the plaintiff against all costs which he might incur in a certain action which the defendant was to carry on for the plaintiff as his attorney; that the plaintiff was compelled to pay a certain sum for costs in that action; that all things had happened to entitle the plaintiff to have the defendant's promise fulfilled; that the defendant had not performed his promise or repaid the plaintiff the sum expended by him in payment of such costs. To so much of the count as related to the payment of money by the plaintiff, the defendant pleaded at set-off of his bill of costs. Replication that the defendant did not one month before suit deliver to the plaintiff a signed bill of costs. Rejoinder, that the said charge became due after the passing of 6 and 7 Vic., ch. 73, demurrer to replication. Demurrer to rejoinder.

Held, that the defendant might set-off his bill of costs without having delivered a signed bill one month previous to action, and that as the plea of set-off was confined to the specific sum paid by the plaintiff it was a good plea of set-off, although the count to which it was pleaded might carry special damages.

C. P. LAWRENCE v. WALMSLEY.

Equitable plea—Promissory note—Surety.

To a declaration in a promissory note the defendant pleaded as an equitable plea that he made the note jointly with E., for the accommodation of E, and as his surety; that at the time of making the note, the plaintiff having notice of the premises, agreed in consideration of the defendant's making the said note as surety, to call in and demand payment of the said note from E., within three years; that a memorandum of the agreement was to be endorsed upon the note, which by mistake was not done; that the plaintiff did not demand payment of E. within three years whereby he lost the means of obtaining payment from E., who has since become insolvent.

Held on demurrer that the plea was good, on the ground that the plaintiff had not performed the condition in consideration of which the defendant became surety.

Quære per WILLIAMS, J., whether the averment that the plaintiff thereby lost the means of obtaining payment from E. was material.

B. C. FAWKES v. LAMB.

Principal and agent—Broker—Contract—Evidence—Sale note.

Where a written contract for the sale of goods was silent as to the time for which warehouse-room was allowed by the seller to the buyer, it is competent for either party to show by parol evidence what time is allowed in such a transaction by general custom, but not to shew that the parties themselves had agreed by word of mouth that a certain definite time should be allowed.

Plaintiff, a broker, having goods of T. in his possession for sale, contracted with defendant by a sale note delivered by the plaintiff to the defendant to the following effect: "I have this day bought in my own name on your account of T." certain goods, and signed by plaintiff "A. Fawkes, broker."

Held, that T. and not plaintiff was the person entitled to sue.

CHANCERY.

M. R. DILLWYN v. LLEWELYN.

Will—Construction—Tenant for life—Implied gift of inheritance—Acquiescence.

A testator devised his real estate to his wife for life; remainder to his son Lewis for life; remainders over. During his (the testator's) lifetime, his son Lewis requiring a place for his residence, the testator and his wife agreed that he should take possession of estate X, part of such real estates, build a house, and live there. The arrangement was evidenced by a memorandum, signed by the testator and his son Lewis, as follows:—"X., together with my other freehold estates, are left in my will to my dearly beloved wife; but it is her wish, and I hereby join in presenting the same to our son Lewis, for the purpose of furnishing him with a dwelling house." Lewis took possession of X., and expended during the lifetime of his father, and with his knowledge, a large sum, in the erection of a house and buildings thereon.

Held, that the transaction did not amount to a gift to the son of the inheritance in X., but only of the life interest of his mother therein.

V. C. K. WILLIAMS v. THOMAS.

Settlement—Right to follow trust money—After acquired property—Costs—Letter written "without prejudice."

A husband and wife under their marriage settlement are to have the use and enjoyment of all the personal estate of the wife, together with chattels of the husband during their lives, and of all such personalty as they may become possessed of or entitled to during the coverture. Shortly after the marriage the husband builds houses on land (not his own but adjoing his own) and obtains a lease and builds other houses, stating that they are built with his wife's money and then dies. The wife remains in possession of the property and dies intestate, and the heiress of the husband brings an action of ejectment against the wife's representative, and the tenants to recover possession. An injunction is obtained to restrain the action, the plaintiff, the wifes representative, claiming the houses and lease, and asking by his bill for a conveyance, account, injunction and receiver, the defendant's solicitor offering "without prejudice" to take the money laid out as a charge on the houses.

Held, that the money so laid out is a charge on the houses and leases, and is *corpus* and not income, and that the offer of the defendant's solicitor may be used against the plaintiff on the question of costs, and inasmuch as the decree is on the same terms as the offer, that the plaintiff must pay the costs.

M. R. JAY v. RICHARDSON.

Vendor and purchaser—Restrictive covenant by lessor binding on purchaser—Building public houses—Notice of sale of reversion—Duty of purchaser to enquire—Perpetual injunction—Time.

The owner of building land demises a plot thereof to A. for a term of forty years for the purposes of the erection of an hotel or inn, and the lease contained a covenant by the lessor that he, his heirs or assigns, would not at any time during the term let any house, building, or land for the erection of an hotel or inn, or for the sale of ale, beer, or spirits, within a quarter of a mile of the plot of ground so leased.

Held, that this restrictive covenant amounted to a covenant to do nothing, so as to suffer any house or building to be used as an hotel or public house within the prescribed distance, and that it was binding on the purchasers with notice, as well as the lessees of other plots of the building land within that distance who claimed under the lessor, and a perpetual injunction was granted to restrain a purchaser from allowing or letting his land during the term of forty years, to be used as an hotel or inn.

A reasonable delay in filing the bill, although it might have been material in the case of an application for an *ex parte* injunction, was held not to have effected the right of the plaintiff to the perpetual injunction prayed by the bill.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

DANIEL CLARKE, Esquire, M.D., to be an Associate Coroner for the County of Oxford.—(Gazetted January 17, 1863.)

JAMES S. CROOKSHANK, Esquire, to be an Associate Coroner for the County of Simcoe.—(Gazetted January 17, 1863.)

MARSHALL BROWN, Esquire, M.D. ALFRED AYERST, Esquire, HENRY TAYLOR, Esquire, GEORGE DENNISON, Esquire, PETER BAXTER, Esquire, WM. H. FRANKLIN, Esquire, JAMES HILL, Esquire, EDMUND GODFREY, Esquire, and BRAMWELL WATKINS, Esquire, to be Associate Coroners for the United Counties of Frontenac, Lenpox and Addington.—(Gazetted Jan. 24, 1863.)

THOMAS M. ARMSTRONG, Esquire, M.D., to be an Associate Coroner for the County of Simcoe.—(Gazetted January 24, 1863.)

NOTARIES PUBLIC.

JOHN MACBETH CURRIE, of Niagara, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted January 17, 1863.)

CALVIN BROWN, of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted January 17, 1863.)

REGISTRAR.

JAMES J. PEARSON, of Lloydtown, Esquire, to be Registrar of the North Riding of the County of York.—(Gazetted January 17, 1863.)

INSPECTORS OF ANATOMY.

DAVID THOMPSON, to be Inspector of Anatomy for the Village of Yorkville.—(Gazetted January 24, 1863.)

TO CORRESPONDENTS.

"CLERK 6TH DIVISION COURT, COUNTY NORFOLK"—Under "Division Courts."

"AN ENQUIRER"—Under "General Correspondence."