any substantial injustice has been done to the defendants by the wrongful rejection of the evidence. There is much to be said for the view that, if we may judge from Dr. Thring's written statement as to the cause of death, he could not have shown, or even have expressed an opinion, that the deceased had salpingitis at the time of her taking out the policy. But it is not necessary to decide this point. I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors, for the respondent, *W. H. Peers.*

B. L.

[HIGH COURT OF AUSTRALIA.]

DAVID SYME & CO. . . . . APPELLANTS;
DEFENDANTS,

AND

SWINBURNE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Trial by jury—Misconduct of juryman—New trial—Evidence—Discharge of jury—Withdrawal of discharge—Juries Act 1895 (*Vict.*) (*No.* 1391), *sec.* 4 (2)—*Libel—Excessive damages.*

A conversation between a juryman and one of the parties or his representatives is not of itself a ground for a new trial unless there is reasonable ground for believing that the course of justice has been, or was likely to be, substantially affected.

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During the hearing of a trial before a jury counsel for the plaintiff informed the Court, in the presence of the jury, that he had been told by counsel for the defendants that a conversation had taken place between one of the jurymen and a clerk of the defendants' solicitor. At the instance of the Judge the clerk was sworn, and deposed to a certain conversation having taken place between him and a particular juryman. The defendants' counsel thereupon applied for a discharge of the jury. Before dealing with the application the Judge then told the juryman he might make a statement if he desired, and the juryman, not upon oath, admitted that a conversation had taken place, but denied the substantial portion of it. The Judge then ordered the trial to proceed. He afterwards gave his reasons, stating that he did not believe the evidence of the clerk.

Held, on the evidence (*Isaacs* J. dissenting), that the Judge had not acted upon unsworn evidence, the statement of the juryman being only in the nature of a plea of not guilty.

Held, further (*Isaacs* J. dissenting), that even if the Judge had admitted the unsworn statement as evidence, the defendants, not having at the time objected, had waived the objection, and could not rely upon the admission of that evidence as a ground for a new trial.

An order of a Court may be withdrawn before it is drawn up or acted upon.

Sec. 4 of the *Juries Act* 1895 (Vict.), provides that the party who asks for a jury shall pay the jury fees to the sheriff each day before the Court sits, that if he does not the other party may pay them, and that if the other party does not pay them, the jury is to be discharged, and the trial is to proceed before the Judge. The defendants having withdrawn from the case, did not on a subsequent day pay the jury fees. Counsel for the plaintiff expressed the willingness of the plaintiff to pay the fees if the Judge should think it fairest to do so, but the Judge, being under the erroneous belief that the result of non-payment of the fees would be that the trial would come to an end, expressed no opinion as to the payment of the fees by the plaintiff, and plaintiff's counsel said that the plaintiff would not pay them. Thereupon the Judge announced to the jury that they were discharged and said that the trial was at an end. Counsel for the plaintiff immediately drew the Judge's attention to the provision of sec. 4, and the Judge said that he would prefer the case to be tried with a jury rather than by himself. Counsel for the plaintiff then said the plaintiff would pay the jury fees. The jury had not left the box and the case proceeded to a determination before them.

Held (*Isaacs* J. dissenting), that the jury had not been effectually discharged, and that the trial properly proceeded.

In an action for libel brought by a Minister of the Crown against newspaper proprietors based on statements made in an article in the newspaper which were capable of being interpreted as alleging that the plaintiff dishonestly

wasted public money on his own favourites and was a person of habitual mendacity whose presence in Parliament was a disgrace, the defence was fair comment, and the jury gave a verdict for the plaintiff for £3,250.

Held, that under the circumstances of the case the damages were not excessive.

Decision of the Supreme Court of Victoria: *Swinburne* v. *Syme & Co.*, (1909) V.L.R., 550; 31 A.L.T., 81, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by George Swinburne against David Syme & Co. to recover damages for a libel alleged to have been published by the defendants in *The Age* newspaper on 9th September 1908.

The libel, which was part of an article in *The Age* of that date, was as follows:—

"It transpired that he" (meaning the plaintiff) "had suffered the Department of Water Supply, which he controls, to institute a new system of public tendering for the supply of machinery which was diametrically opposed to the established customs and ethics of honest tendering and which opened the door wide to fraud and favouritism and all manner of abuses. He had called for tenders for a certain pumping plant on a rigid stipulation that the pump had to be supplied under a penalty of £10 a day within six months. Several tenders were put in, but as not one of the tenderers was able to execute the work within the time limited, most of them added thousands of pounds to their contract prices in order to provide against the penalties. One contractor was successful. His price was £4,000 above the lowest tender. That fact surprised many people, but when the public learned that the successful tenderer, behind the backs of his rivals and without their knowledge, had not only been granted a higher price but had actually been gratuitously accorded an extension of time wherein to complete his contract, surprise quickened into indignation. . . .

"It was during the exposure of the same devious piece of business that Mr. Swinburne accomplished his master-piece of equivocation. He was asked by Mr. Lemmon if a provision in the revised tenders that the machinery should be 'made in Australia' had not been struck out. He replied 'the words were not struck out,

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they were not included.' The terms mean so very nearly the same thing that Mr. Swinburne's accumulating reputation for Jesuitical dexterity alone could have induced further inquiries. These proved that the original specifications contained the provision for manufacture in Australia, and that when the tenders were re-advertised the words were struck out in red ink. No doubt in this instance Mr. Swinburne was led to cross the hair line that separates the nearly true from the absolutely false along which he delights in skirmishing by the temptation of witticism. He said a smart thing. The pity is it was also a falsehood, and Mr. Swinburne is a responsible Minister of the Crown. If Parliament has any regard for its fair fame and for the purity of its high office it will show no quarter to a Minister whose abuse of the truth is bringing Parliament rapidly into a lower pass of discredit than even the broken promises, the 'damns' and the clownish vulgarity of Sir Thomas Bent."

By their defence the defendants admitted the publication of the article and set up as a defence that, in so far as the words in the article consisted of allegations of fact, they were true in substance and in fact, and that, in so far as they consisted of comment, they were fair and *bonâ fide* comment upon matters of public interest. Particulars were given of facts upon which the defendants relied as a basis for the comment.

On the application of the defendants the trial was ordered to take place with a jury of twelve men. The action was accordingly tried before *Hodges* J. and a jury of twelve men, and a verdict was given for the plaintiff for £3,250 damages, and judgment was entered for the plaintiff for that sum with costs.

The defendants applied to the Full Court for a new trial on various grounds based on certain incidents which occurred during the course of the trial. Those grounds and incidents are sufficiently stated in the judgments hereunder. The Full Court having refused the application (*Swinburne* v. *David Syme & Co.* (1)), the defendants now appealed to the High Court.

Mitchell K.C. and *Bryant*, for the appellants. There was a mistrial because one of the jurymen had suggested the giving of

(1) (1909) V.L.R., 550; 31 A.L.T., 81.

a bribe to him by the appellants, or, if the fact of that suggestion having been made in the conversation between the juryman and Davis be eliminated, because what remains of the conversation is misconduct which comes within the principle under which a new trial will be granted. Any conversation between a juryman and one of the parties or his representatives is a ground for a new trial. If there is any ground for suspicion of bias or unfairness a new trial should be granted: *Ponting* v. *Huddart Parker & Co.* (1); *Trewartha* v. *Confidence Extended Co. No Liability* (2).

[ISAACS J.—If after examination of the facts the Court thinks that there is a suspicion of unfairness there should be a new trial, but not if the suspicion is wiped away.

GRIFFITH C.J.—The former case went on the ground that no explanation of the circumstances could avoid the necessity for a new trial.]

The mere fact of the conversation having taken place is a sufficient ground for a new trial: *Perdriau* v. *Moore* (3); *Sabey* v. *Stephens* (4); *McRoberts* v. *Carter* (5); *Cooksey* v. *Haynes* (6); *Coster* v. *Merest* (7). The Court will not inquire whether the verdict was or might have been affected by the conversation: *Cohen* v. *Whittington* (8); *Smith* v. *Otago Presbyterian Church Board of Trustees* (9); *Bradbury* v. *Cony* (10); *Reg.* v. *Murphy* (11). Although the appellants might not have been in a position to rely on the conversation—apart from the suggested bribe—inasmuch as one of the parties to it was their agent, they were enabled to do so by reason of the respondent having forced them to bring the matter before the Court. The respondent having forced the appellants into a position in which they appeared before the jury as accusing one of the jurymen of attempted embracery, the jury became disqualified. As to the question whether the juryman did suggest a bribe being given to him the Judge at the trial should have believed the sworn evidence of Davis, and was not entitled to take into consideration the unsworn statement of the juryman; *In re Bell*; *Ex parte Marine Board of Victoria* (12); *Bartlett* v.

(1) 22 V.L.R., 644; 18 A.L.T., 209.
(2) (1906) V.L.R., 285; 28 A.L.T., 8.
(3) 9 N.S.W. L.R., 143.
(4) 7 L.T.N.S., 274.
(5) 9 N.S.W. L.R., 458.
(6) 27 L.J. Ex., 371.
(7) 3 B. & B., 272.
(8) 14 N.Z. L.R., 313.
(9) 15 N.Z. L.R., 680.
(10) 16 Am. Rep., 449.
(11) L.R. 2 P.C., 535.
(12) 18 V.L.R., 432; 14 A.L.T., 58.

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Smith (1). It was a question for the Judge to decide upon proper legal testimony whether the jury was disqualified, and an appeal lies from his decision: *Corfield* v. *Parsons* (2); *Boyle* v. *Wiseman* (3); *Manley* v. *Shaw* (4). The appellants were entitled to make a substantive application to the Full Court for a new trial upon the affidavit of Davis, and that Court was wrong in rejecting that affidavit. The damages were excessive having regard to the facts that had been established up to the time counsel for the appellants withdrew. The minds of the jury were inflamed by the speech of the respondent's counsel and the summing up of the Judge. That is a matter which the Court will look at in deciding whether the damages are excessive: *Watt* v. *Watt* (5); *Chattell* v. *Daily Mail Publishing Co. Ltd* (6); *Praed* v. *Graham* (7); *Bray* v. *Ford* (8).

[ISAACS J. referred to *Johnston* v. *Great Western Railway Co.* (9).]

The jury was in fact discharged by the Judge, and could not be recalled. The respondent took the deliberate course of refusing to pay the jury fees, and the Judge took the only course he could take under sec. 4 (2) of the *Juries Act* 1895. The jury was discharged as soon as the Judge announced that it was discharged. The Judge was then *functus officio*: *See* v. *Lee* (10); *Ex parte Simpson* (11), and could not withdraw the discharge, nor could the respondent alter his election.

[ISAACS J. referred to *R.* v. *Vodden* (12).

GRIFFITH C.J. referred to *R.* v. *Parkin* (13).]

The Judge was not acting under a mistake.

Irvine K.C. (with him *Duffy* K.C. and *Pigott*), for the respondent. The amount of damages was not excessive, having regard to the meaning of the libel and the public position held by the respondent. The whole of the circumstances would justify vindictive damages, for the libel contains a charge of personal corruption.

(1) 11 M. & W., 483.
(2) 1 Cr. & M., 730.
(3) 11 Ex., 360.
(4) Car. & M., 361.
(5) (1905) A.C., 115.
(6) 18 T.L.R., 165.
(7) 24 Q.B.D., 53.
(8) (1896) A.C., 44, at p. 52.
(9) (1904) 2 K.B., 250.
(10) 15 W.N. (N.S.W.), 240.
(11) 8 S.C.R. (N.S.W.), 125.
(12) Dears. C.C., 229.
(13) 1 Mood. C.C., 45.

On a question arising before a Judge as to the competency of the jury he has a judicial discretion to exercise, and from its exercise an appeal lies. But when it has been exercised one of the parties cannot apply for a new trial raising the same ground of incompetency as was raised before the Judge, and yet seeking to treat it as *res integra*. New evidence can only be introduced upon grounds on which new evidence is ordinarily admissible on an appeal. That is to say, it must be shown either that the Judge was wrong on the facts before him or that new evidence has been discovered which could not have been put before the Judge. The Judge did not, in determining the facts as to the alleged conversation between Davis and the juryman, take into consideration the unsworn statement of the juryman, and, if he did, the appellants cannot now object because they did not at the time the statement was made object to its being made not on oath. [He referred to *R.* v. *Loader* (1).] A determination on such evidence is not a nullity, and the appellants have waived any objection to it.

[GRIFFITH C.J. referred to *R.* v. *Sutton* (2).]

There was not in fact a discharge of the jury, nor was there any election by the respondent not to pay the jury fees because the Judge and the respondent's counsel were not *ad idem*.

Mitchell K.C., in reply.

Cur. adv. vult.

March 15.

GRIFFITH C.J. This is an appeal from an order of the Supreme Court of Victoria refusing to grant a new trial in an action for libel tried before *Hodges* J. and a jury of twelve, in which the plaintiff recovered a verdict for £3,250. The application for a new trial was made on various grounds, most of them founded upon incidents of the trial, which are alleged to show that a mistrial occurred. A great number of points were raised, and we have listened to very long arguments upon this, but, if the points are taken *seriatim*, and the relevant matters are distinguished from those which are irrelevant, there is not much difficulty with regard to any of them.

(1) 22 V.L.R., 254; 18 A.L.T. 95. (2) 8 B. & C., 417.

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The plaintiff, at the time of the publication of the libel, was a Minister of the Crown in Victoria in charge of the Department of Water Supply. The defendants are the proprietors of a newspaper which, as I think it must be taken that all parties were aware, had a large circulation and was of long standing in Victoria.

The libel accused the plaintiff practically of malversation of office. It alleged that he had suffered the Department to institute a new system of public tendering "which was diametrically opposed to the established customs and ethics of honest tendering, and which opened the door wide to fraud and favouritism and all manner of abuses." It then related an alleged instance in which this minister had given a contract to a tenderer whose price was £4,000 higher than that of the lowest tenderer. Then to this was added the alleged fact that this tenderer was gratuitously accorded a longer time within which to complete his contract, and it was stated that when this became known to the public "surprise quickened into indignation." It had previously alleged that other tenderers had had to add large sums to the amounts of their tenders in order to provide for penalties that might be incurred by them by reason of their not completing the work within the stipulated time. The article then went on to say that "it was during the exposure of the same devious piece of business that Mr. Swinburne accomplished his masterpiece of equivocation." It then related an incident said to have taken place in Parliament, and added that "Mr. Swinburne's accumulating reputation for Jesuitical dexterity alone could have induced further inquiries." It went on to say that the plaintiff "said a smart thing. The pity is it was also a falsehood, and Mr. Swinburne is a responsible Minister of the Crown. If Parliament has any regard for its fair fame and for the purity of its high office, it will show no quarter to a Minister whose abuse of the truth is bringing Parliament rapidly into a lower pass of discredit than even the broken promises, the 'damns' and the clownish vulgarity of Sir Thomas Bent." That was the libel, and it was one of an aggravated character. It was certainly capable of meaning that the plaintiff dishonestly wasted public money, on his own favour-

ites among tenderers, and was a person of habitual mendacity, whose presence in Parliament was a disgrace to it.

The defence was that the article was fair comment upon matters of public interest, and in support of that defence the defendants delivered particulars, which, besides references to matters relevant to the particular statements in the libel, contained others which were only relevant to the charge that the plaintiff was a person of habitual mendacity. The case duly came on for trial on Monday 16th August 1909. On the following Friday, 20th August, the plaintiff's case was nearly concluded. The plaintiff had been severely cross-examined, and, so far as the case had gone, there had been a total failure on the part of the defendants to establish any foundation for any part of the libel. The case was not only in that position, but in the course of the evidence circumstances of aggravation had appeared, and in particular one to which I shall call attention. It appeared that, two or three days before the publication of the libel complained of, the plaintiff in his public capacity made a speech at Castlemaine which was reported in *The Age*, and the report contained a passage which was so palpably and ridiculously extravagant that it must have been either a *lapsus linguæ* on the part of the speaker or an error on the part of the reporter. As soon as the report appeared the plaintiff corrected the error to the defendants, who published his correction. He said that it was a mistake on the part of the reporter, but the defendants published the correction under the heading "A Political Subterfuge," and characterized his explanation as being disingenuous.

At that stage, then, on the Friday the defendants' case was apparently hopeless, that is to say, it was only a case for the assessment of damages. That being the position, certain incidents occurred which have given rise to the application for a new trial. Counsel for the defendants approached the senior counsel for the plaintiff, Mr. *Duffy*, and gave him certain information to the effect that one of the jurymen had had a conversation with a clerk of the defendants' solicitors, in the course of which the juryman had said it might be as well if some one from *The Age* were to come up and see him. The rest of the conversation as reported to Mr. *Duffy*, and according to all accounts of it given afterwards, was

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of an entirely trivial character. Of course it is very undesirable that a conversation should take place between the solicitor of a party or his clerk and a juryman, but what was said besides what I have mentioned was so trivial that no Court or Judge would pay attention to it as a ground of complaint, nor was it seriously relied upon before us. The only point is the suggestion that the juryman had said it might be as well if someone from *The Age* came and saw him. Thereupon ensued a discussion between the defendants' counsel and Mr. *Duffy*. The latter suggested that under the circumstances it might be as well to go on with eleven jurors. A discussion also took place as to whether the matter should be mentioned to the Court. Mr. *Duffy* thought that it should, but the defendants' counsel positively refused to do anything of the sort, and pointed out the position of their clients. To have gone on with eleven jurymen would have been of no particular advantage to the defendants, whereas to get rid of the jury and make a fresh start might have been of very great advantage to them. The attitude the defendants' counsel took up is stated in their affidavit as follows:—"I" (Mr. *McArthur*) "said to Mr. *Duffy*, if for example we do not make the communication to the Court, and you do not make the application to the Court, we would of course rely upon the fact that we had told you everything as a ground for opposing any application you might think fit to make afterwards for a new trial." These conversations were in no way confidential.

The Court resumed its sittings on the following Monday, and just before the Court sat a written memorandum signed by the defendants' counsel was handed to Mr. *Duffy*, which was as follows:—"Referring to the facts which have already been communicated to you by us, we think that you are entitled to the discharge of the jury if you so desire, and we will support your application to that effect; or if you prefer, we will, with your concurrence, make the application ourselves. Unless you indicate which course you wish taken, we see nothing for it but to let the trial proceed before the present jury." I pause for a moment to consider what was the attitude of the defendants at that time. The matter is now put forward as misconduct on the part of a juryman. That under some circumstances may be a ground for

a new trial, but the granting of a new trial on that ground is discretionary: *Morris* v. *Vivian* (1): and a new trial is granted only because there is reason to believe that the course of justice has been substantially affected. Stopping here for a moment, I will suppose that nothing more had happened and the case had gone on to a conclusion and a verdict had been given for the plaintiff. It is quite clear that the defendants could not have taken any objection on this ground, because they themselves had expressed a desire not to take advantage of it. They thought the matter was not of such a nature that the case should not go to its ordinary conclusion. So that, if the conversation really occurred and if it amounted to such misconduct as would constitute ground for a new trial—as to which I do not express an opinion and am not to be taken as assenting to the proposition that it would —still the defendants could not have taken advantage of it *per se* as misconduct of the jury. They must therefore now rely upon something subsequent, some additional facts which, added to that which was innocent, would make a mistrial. If all that happened subsequently was innocent, to add together two things which are innocent would not make guilt. Now what is this subsequent conduct on the part of someone which, added to what had previously happened, is said to have constituted a mistrial? Just before going into Court on Monday morning Mr. *Duffy* said to counsel for the defendants, "Do you propose to get up and mention the matter?" and the defendants' counsel said "No." Then, when the Court opened, Mr. *Duffy*, conceiving it to be his duty, rose and said that he had received information that there had been a conversation between a juryman and a clerk of the defendants' solicitors, and that there had been a conversation between himself (Mr. *Duffy*) and counsel for the defendants in reference to the matter. Amongst other things Mr. *Duffy* said:— "It is suggested by my learned friends that they would mention the matter to the Court if we would be willing to say to the Court that we thought the trial should not go on and if we would not suggest that the trial should go on with a less number of jurymen. Acting on behalf of my client, I could be no party to that. I cannot stand in the position of going on with this case

(1) 10 M. & W., 137.

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without your Honor knowing about it. If this matter does come to such a stage that your Honor thinks that one of the jurymen has done wrong, I shall certainly ask that this trial go on with a less number of jurymen. I shall publicly ask that the defendants consent to that course. It has cost an enormous expense to get this far, and then to have the whole thing re-opened and all this gone through again would be too much." For myself I see no objection whatever to anything in Mr. *Duffy's* conduct so far. What followed after that is this:—Mr. *Duffy* was willing that one juryman should retire and that the case should go on in order to save the expense of starting afresh. The other side wanted to get rid of the jury altogether and make a fresh start. Thereupon the learned Judge said he felt unable to act without more information—he wanted to know the facts. Mr. *McArthur* said he thought it might be advisable that either the Judge or the defendants should ask the clerk to go into the box and make a statement. The learned Judge agreed. Thereupon the clerk went into the box, was sworn, and made a statement. He gave his evidence, as the Judge thought, in a very hesitating manner, even when relating that part of the conversation which I have described as being trivial, and when he came to the portion which is alleged to contain a suggestion on the part of the juryman that he was willing to take a bribe, the clerk's memory failed. He had to be pressed, and leading questions were put to him. At last he concluded by saying "I think he said 'Some one from *The Age* ought to see me.'" That evidence having been given, the learned Judge asked what application counsel made, and thereupon Mr. *McArthur* applied that the jury should be discharged. Mr. *Duffy* again said that he had no objection to going on with eleven jurymen, but that he did object to the whole of the jury being discharged, and he gave what I think was a very sound reason for asking that the defendants should consent to the course he suggested. The defendants, however, were not bound to consent, and did not do so. The learned Judge had then to make up his mind as to what he should do. Before doing so he left the Bench and consulted his colleagues. When he returned he said to the juryman:—"I want you to understand that you are under no obligation to say one single word, but, if

you desire it, I will hear anything you have to say in answer to what has been said by the witness. I do not propose to put you on your oath, but, if you desire it, I will hear anything you have to say." Thereupon the juryman made a statement. As to the alleged request for a bribe, he said that nothing of the kind had taken place, and that the clerk must have made a mistake. The learned Judge then declined to discharge the jury, and said that he would go on with the trial. Counsel for the defendants said that they thought that plaintiff's counsel had taken a tactical advantage of their candour, had put them in a difficult position, and had put the defendants at a disadvantage. Mr. *McArthur* then continued:—"The result is that my learned friend, Mr. *Starke*, and I considered that we are so hampered ourselves, and we think our clients are so hampered by what has been done that we do not feel we can take the responsibility of continuing in the conduct of this case." Then they went away. Whether they were justified in doing so is a matter of opinion, I suppose. I should be very sorry to say that I thought they were.

Advantage is now sought to be taken of this episode on various grounds. First it is said that Mr. *Duffy* was guilty of conduct of such a nature as to amount to a mistrial. I never heard that misconduct on the part of counsel in relation to things which were said in open Court could amount to a mistrial. But suppose that it could. What was the misconduct? During the argument counsel for the defendants frequently disclaimed any intention to impute dishonorable conduct to Mr. *Duffy*, but as often as they made the disclaimer they went on to make the charge that there was misconduct on his part which amounted to a mistrial. I cannot see that there was any misconduct on his part. I have described what he did. Whether he was bound to disclose to the Court what he heard or not he was certainly justified in doing what he did, and there was no misconduct on his part. So that episode cannot be added to what the parties themselves had previously thought insufficient to disturb the verdict and so to constitute a mistrial.

The second point the defendants make is that the learned Judge ought to have discharged the jury for three reasons, first, because the matter was mentioned in Court, that is, because Mr.

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Duffy informed the Court of what he had heard,—with that I have already dealt—secondly, because the Judge was bound to believe the evidence of the clerk, and, thirdly, because the Judge had no right to take the denial of the juryman into account. I have some difficulty in apprehending the second and third points. The actual difficulty is this:—The real issue between the parties had been raised by Mr. *McArthur's* application that the jury should be discharged, and Mr. *Duffy's* refusal to consent to that being done. The Judge was entitled to know what issue he had to try, whether of fact or of law, and whether there was sufficient reason for discharging the jury. He accordingly asked whether there was an issue of fact. I cannot conceive of a Judge dealing with the matter in any other way than by inquiring whether the facts are admitted. Apart from that, was it not an obvious principle of fair play that the juryman who had had a charge publicly brought against him should have an opportunity of as publicly denying it? For both reasons I think the Judge was perfectly justified in asking the juryman if he had made the statement to the clerk or not. The Judge refused to discharge the jury. Was he bound to discharge them? Of course he was not if he did not believe the witness Davis. Even if the Judge only disbelieved the evidence of Davis because it was contradicted by the juryman, no objection was taken that the juryman had not been sworn, and the defendants cannot now rely on that objection when they stood by and took no objection at the time the matter might have been corrected. The Judge did not at the time give any reasons for refusing to discharge the jury, stating that he thought it advisable not to do so then. He afterwards stated that he did not believe the evidence of Davis that any such conversation had taken place, that is to say, so far as the relevant portion of it was concerned.

The defendants, then, for the reasons I have given, cannot take advantage of anything that occurred up to that time, and they certainly cannot take advantage of the withdrawal of their own counsel. The case then went on, and a verdict was given for the plaintiff.

Then another episode occurred, which is also relied on as a ground for setting aside the verdict, or for saying that there

should be a new trial—whether before the same Judge or not is immaterial. Under the law of Victoria, when a party demands a jury—in this case it was the defendants—that party is bound to pay the jury fees every morning before the Court sits. If he does not, the other party may pay them, if he pleases, and, if he does not, then the trial goes on before the Judge without a jury. On the day after the defendants' counsel had withdrawn, and their solicitors, having had an opportunity of considering what they should do and of saying whether they wished to instruct other counsel, had said that they did not, the defendants did not pay the jury fees. That was duly reported to the Court, and the Judge mentioned that there was a difficulty in the way of going on. The jury then retired to their room. The position was that the plaintiff could have paid the jury fees, when the trial would have gone on with the jury, or he could have abstained from doing so, in which case the trial would have gone on before the Judge alone. The plaintiff's counsel, acting very naturally under these circumstances, sought to know, if he might with propriety do so, whether the Judge would give an intimation of his desire either that the jury should be discharged or that they should be continued. The Judge was under the impression, however, that what followed the non-payment of the jury fees was that the trial came absolutely to an end, not that he would have to go on with the trial by himself.

Being under that impression, he would give no intimation. He said "Call in the jury and I will discharge them." When they returned to the box he said to them "I am under the obligation to discharge you from further attendance. Go to the sheriff's office, gentlemen, and you will be paid your fees. You can leave. The trial is now at an end. This was set down for trial before a jury. I must treat this trial as at an end. Adjourn the Court *sine die*." But the trial was not at an end, and the jury was discharged only as an incident of the trial being at an end. When the Judge's attention was called to the fact that the trial was not at an end, he asked the jury to retire to their room, so that as a matter of fact the jury was not discharged. The Judge treated them as being still there. Then Mr. *Duffy* called attention to sec. 4 of the *Juries Act* 1890, and having received from

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the Judge an intimation that he preferred the case to be tried by a jury, said that the plaintiff would pay the jury fees. The case thereupon went on to an end. It seems to me that under these circumstances the jury were never discharged. The rule that a Judge may correct an order made by him under a misapprehension before it is acted upon is very clear, and is one that is generally recognized in Courts of law, and in a case such as this it seems to me that only a Judge conscious of his own infallibility could say that so human an error could not be corrected. This view is supported by *R.* v. *Vodden* (1), and *R.* v. *Parkin* (2).

Another ground set up is actual misconduct on the part of the juryman. Upon that two questions arise. First, was there any misconduct; and, secondly, if there was, could the defendants take advantage of it? I have already pointed out that in such a case the granting of a new trial is discretionary, and that the defendants were not in a position to complain of the misconduct. Even if they were, other difficulties are in their way. They had to establish the fact that there had been misconduct, and they are met by the fact that the same matter had been investigated in the same case on an issue between the same parties, and that the Judge did not believe the evidence they put forward. A review of a decision upon the credibility of a witness is of course possible, but no fresh evidence was offered except an affidavit repeating what the witness had already said. Therefore the alleged misconduct is not proved, and that objection fails.

The remaining objection is that the damages awarded are excessive. It is well known that there is no fixed measure of damages in an action for libel. Having regard to the position of the plaintiff, to the nature of the charges made against him, and to the widespread influence of the defendants' paper—which must be taken to be well known—I should think the damages could not be described as intemperate. But it is said that the jury's minds were inflamed by a passage in Mr. *Duffy's* speech. That seems to me a remarkable ground for asking for a new trial, and I have never before heard of such a ground being taken. It must be remembered that the Judge was present to correct any error that might arise from counsel's statements.

(1) Dears. C.C., 229. (2) 1 Mood. C.C., 45.

The passages objected to are, in substance, that the defendants crept out of Court so as to be able to say that there was no trial. Mr. *Duffy* called it a "theatrical display," and said that the jury must not be led away by their "tricks and machinations." That was comment on the behaviour of the defendants and their counsel, and I certainly am not prepared to say that it was unfair. It certainly could not be said to have prejudiced the defendants.

Then it was said that the damages are excessive on a ground that would rather go to misdirection. The objection is put in this way, "that the charge of the learned Judge to the jury was unfair to the appellants in that he directed the jury to consider a matter arising out of a personal altercation between the junior counsel for the appellants and himself as evidence of malice or improper conduct on the part of the appellants." The first answer is that there is no foundation in the report of the proceedings for the allegation that the Judge did anything of the kind. In the course of the trial a witness for the plaintiff was being cross-examined, and the cross-examination was apparently tending to show that the plaintiff was dishonest. The Judge asked the cross-examining counsel, "Do you or do you not dispute that the transaction with regard to Koondrook or Swan Hill, whatever may have been the tendency of the tendering, and so forth, was in all honor and honesty, and that the persons connected with it were free from any moral blame?" In the course of a case of this sort it is important to know what is the case intended to be set up by the defendants, because, if the defendants do not impute dishonesty to the plaintiff, the line of evidence is likely to be very different. The Judge was entitled to ask on the fifth day of the trial whether the charge of dishonesty were persisted in. The answer counsel gave was, "Your Honor will hear our case when we submit it to the jury." The Judge in his summing up pointed out that under the circumstances it appeared that the defendants, so far from being sorry for what they had said, intended to persist up to the last possible moment in making the worst charges against the plaintiff. That certainly was a circumstance to which the Judge was right in calling the jury's attention. For all these reasons I think there was no mis-

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trial, that the damages were not excessive, and that no ground whatever has been shown for impeaching the judgment.

BARTON J. read the following judgment:—The judgment of the Chief Justice, in my opinion, covers the whole ground, and I do not feel justified in adding more than a few words.

The Judge did not believe Davis's account of the transaction between him and the juryman. His Honor's notes lead me to the conclusion that he so distrusted that account that on hearing it he was prepared in face of it to proceed with the trial, though after consideration—apparently to make assurance doubly sure—he allowed the juryman to make a statement, not upon oath, amounting to a denial of the charge brought against him by Davis. There was nothing unjust to the parties in his allowing that statement to be made, or in his preferring it to a statement which he already distrusted. Moreover, the defendants' counsel made no objection to that course, and, in my opinion, waived any objection to it. Assuming that the Full Court will sometimes act in supervision and control of the decision of the Judge at the trial against an application for the discharge of the jury, based on such a ground as was taken in this case, still the Court will not interfere unless it be shown not only that the Judge came to an erroneous conclusion, but that he has been misled by false evidence, or that he has exercised his discretion on a wrong principle, or that injustice has resulted. In the absence of factors such as these his exercise of his discretion will not be interfered with. And here I find no such factors. Again, to ask for a new trial on an affidavit repeating the evidence which the Judge who tried the case has already refused to believe, is, in my opinion, a hopeless task.

Then there is the ground that the Judge had after the withdrawal of the defendants from the case discharged the jury upon the plaintiff appearing to be unwilling to assume the payment of their fees. This was a direction given obviously under the misapprehension that this action on the part of the plaintiff put an end to the case. The misapprehension was removed and the direction recalled on the spot, all the jury being still in the box. It is, to my mind, out of all reason to suggest that the Judge

could not adopt the course he did under the circumstances, or that it was not competent to him to rectify the proceedings at once.

As to the damages, although the sum is large, no Court could upon the facts in proof say that the jury in awarding them acted as reasonable men could not have acted, and the facts so amply account for their view, that I cannot think that the comments of the plaintiff's counsel upon the course taken by counsel for the defendants operated to mislead the jury or to unduly enhance the damages. No reasonable jury attaches any weight to oratorical flourishes of that kind, nor is there reason to suppose that this jury did so.

I am of opinion that the appeal should be dismissed.

O'CONNOR J. read the following judgment:—The Supreme Court were in my opinion clearly right in refusing to grant a new trial in this case. The grounds of appeal naturally arrange themselves in two divisions—those relating to damages, and those relating to the incident of the juryman and the managing clerk. It is claimed that a new trial should be granted because the damages awarded were excessive. Before a defendant can succeed in disturbing a verdict on that ground he must show that, having regard to all the circumstances of the case, the damages are so large in amount, having regard to the cause of action and the facts proved, that no twelve men could reasonably have given them (*per* Lord *Esher* in *Praed* v. *Graham* (1)). The defendants, in my opinion, failed to establish that position. It may be that the libel does not charge the plaintiff with having personally made corrupt pecuniary gains, but the jury would be certainly justified in reading it as accusing him of serious malversation of office and of habitual prevarication and paltering with the truth in the public defence of his conduct. In addition to which there is the plain assertion that if Parliament had any regard for its fair fame and the purity of public office it would show him no quarter. There was evidence that the newspaper persisted in these accusations notwithstanding the plaintiff's public denials of the misconduct alleged and his published explanations with

(1) 24 Q.B.D., 44, at p. 55.

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reference to facts upon which the inferences against him were based. Afterwards, when the action was initiated, the appellants defended their publication as fair comment and supported the defence by particulars of many facts. At the trial they entirely failed to elicit in cross-examination any fact or circumstance which could justify the publication, still they persisted in their defence to its fullest extent up to the time of their final disappearance from the Court. Under these circumstances it is impossible to say that the jury acted unreasonably in finding for the plaintiff and awarding £3,250 damages. It was contended that the damages were inflamed by improper comments of the Judge in summing up and of the plaintiff's counsel in addressing the jury on the defendants' conduct of their defence and the withdrawal of their counsel and subsequently of themselves from the trial. The Judge was entitled to ask the defendants' counsel the basis upon which the defence was being conducted and the jury were entitled to take counsel's reply into consideration, giving to it what weight they thought fit, having regard to all surrounding circumstances of the Judge's question and the counsel's answer. The withdrawal from the case of the defendants' counsel, in pursuance no doubt of their view of their clients' interest, was a matter which, in one sense, concerned only the defendants and their legal advisers, but, on the other hand, it was an incident in the case which was a legitimate subject of comment, and there was, in my opinion, nothing said by either the Judge or the plaintiff's counsel which could possibly furnish any ground for legal objection.

I turn now to the other class of grounds relied on. The sole object of the Court's interference with the verdict of a jury on account of the misconduct of a juryman is to secure the pure administration of justice. Whether the facts relied on to establish misconduct are sufficient to justify the Court in interfering is for the Court in its discretion, after a consideration of all the circumstances, to determine. Sometimes, as in the case of *Cooksey* v. *Haynes* (1), where the jury had surreptitiously procured victuals and beer during their retirement and had afterwards issued from the jury room with a very large verdict for the plaintiff, the

(1) 27 L.J., Ex., 371.

Court will grant a new trial on the ground of misconduct of the jury although neither of the parties were to blame. But in most cases the connection of either of the parties with the misconduct complained of is an important circumstance for consideration. Whatever view may be taken of the incident under consideration, it is clear that the plaintiff was entirely free from blame. The defendants, therefore, are called upon to establish at least reasonable ground for suspicion that the due course of justice has been interfered with before they can call upon the Court in the exercise of its discretion to set aside a verdict which the plaintiff has obtained without default on his part, and to put him to the expense and risk of a new trial. The juryman incident came before the Full Court in two aspects, as an original application to that Court, and as an appeal against the decision of the Judge at the trial. In view of the course of events at the trial, there is no substantial difference between these two aspects. The defendants were, I think, entitled to place before the Court as in support of an original application the affidavits which the majority of the Court rejected. But there was nothing in those affidavits which the learned Judge at the trial had not already considered on substantially the same issue. His determination could not be left out of consideration by the Full Court. From whichever aspect, therefore, the matter is regarded the question remains the same—ought the Supreme Court to have interfered with the discretion which the learned Judge exercised with reference to the incident at the trial? In the decision of such matters as they arise the presiding Judge must necessarily have a wide discretion, a discretion with the exercise of which the Full Court is always loth to interfere. It is well established that the Full Court will not do so unless satisfied that the determination questioned was clearly erroneous, and that some injustice to the party complaining has ensued or is likely to ensue therefrom: *Duke of Beaufort* v. *Crawshay* (1).

Applying these principles to the incident, as it was dealt with at the trial, several cases were cited during argument to show what had been held in other cases to be misconduct in jurymen. The decision in each case depended necessarily upon its special

(1) L.R.1 C.P., 699.

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circumstances. In helping this Court to a decision they are of value only in so far as any rule can be gathered from them. No doubt any conversation between a juryman and a party or anyone acting for a party during a trial is to be deprecated, as affording opportunities of corrupt interference with the due course of justice, or at least as likely to give rise to suspicions of such interference. Such incidents always demand careful inquiry when they are brought to a Judge's notice. But the test which he should apply, in so far as it can be gathered from the cases, appears to be this—Is there reasonable ground for belief that the fair administration of justice has been or is likely to be interfered with? That was the question which Mr. Justice *Hodges* was bound to investigate and answer for himself as soon as facts were brought under his notice. The only evidence before him was that of Davis, the managing clerk, and the only allegation in his evidence which could be seriously relied on as a ground for discharging the jury was that the juryman had said "Some one from *The Age* ought to see me." In the written statement of reasons the learned Judge states that he did not believe the witness as to that allegation. It is clear from what took place in Court that that was the attitude of his mind before he invited the juryman, if he should so desire, to make a statement with respect to the accusation contained in Davis's evidence. The learned Judge was entitled, if he thought fit, to disbelieve Davis and to refuse to act upon his testimony, and whatever his view of that testimony may have been, he was entitled to ascertain before proceeding further whether the juryman admitted or denied the charge involved in what Davis had sworn. But, apart from that, the clearest principles of justice would suggest that the juryman should, if he so wished, have the opportunity of publicly making a statement in answer to the accusation which had been publicly made against him. In view of these considerations I am of opinion that there was nothing illegal or irregular in the procedure adopted by the learned Judge, and that in declining to discharge the jury he so exercised his discretion that the Supreme Court would not have been justified in setting aside his decision.

It is difficult to discover anything tangible in the ground of

appeal which has been founded on Mr. *Duffy's* conduct with respect to the juryman incident. The defendants' counsel, no doubt, believed in the truth of Davis's statement as he made it to them, and felt themselves bound to communicate the information to the plaintiff's counsel. The information having been given to the latter unasked for and under no conditions of secrecy, he on his part was entitled in the interests of his client to have it communicated to the Court for the purpose of further inquiry. Apparently he was willing that the defendants' counsel should make the statement to the Court. It was only when it became clear that the latter was willing to do so only on conditions to which Mr. *Duffy* refused, and was justified in refusing, his assent that he made the matter public in Court. In doing so he did nothing illegal, nothing that he was not entitled to do in his client's interests. Mr. *Duffy's* disclosure of the matter, having regard to what followed, may or may not have put the defendants in an unfavourable light before the jury. But he did nothing which the law did not entitle him to do, and his action furnishes no ground for the disturbing of the verdict.

Finally it is urged that a new trial must be granted because the jury, having been discharged under sec. 4, sub-sec. 2, of the *Juries Act* 1895, could take no further part in the case. It is clear to my mind that the Judge never did make any order for the discharge of the jury. True, he told the jury they were discharged and gave them the directions usual on discharge, but having done so under a misapprehension as to the effect of the Statute on which he intended to base his order, he recalled his words immediately and before the jury had left the jury box—in other words, before his directions had been in any respect acted on. The power of a Judge to recall a decision given in error before it has been acted on or made a record has been recognized in the practice of all Courts. Even a jury may correct a mistake in their verdict after they have left the jury box so long as they have not finally separated, and they may be sent back to correct it: *R.* v. *Vodden* (1). Under these circumstances it is impossible to treat the Judge's words, recalled immediately they were uttered, as a judicial order. It is, however, contended that the

(1) Dears. C.C., 229; 23 L.J.M.C., 7.

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learned Judge was bound to order the discharge of the jury because the plaintiff's counsel had irrevocably elected under sec. 4 not to pay the jurors' fees. I can find nothing in the section that prevented the plaintiff's counsel changing his mind as often as he pleased on that matter until an order was made by the Judge. After the latter had recalled his direction that the jury should leave the box and before he had given any other direction or made any order, Mr. *Duffy*, on the plaintiff's behalf, elected to pay the jurors' fees. There was nothing then to prevent the trial going on to a conclusion as it did. For these reasons I am of opinion that the defendants must fail on all the grounds put forward, that the Supreme Court were right in refusing to disturb the verdict, and that this appeal should be dismissed.

ISAACS J. read the following judgment:—The appellants rely on several grounds to which I shall refer in the order best suited to indicate my opinion.

They say the damages are excessive. For mere general vindication of character, £3,250 might be difficult to support on the facts as a just compensation notwithstanding the gross nature of the imputations and the extensive circulation they received. But the jury were invited to consider, and presumably did consider, circumstances of aggravation, and two of those—both highly important ones, and, if found by the jury to be sustained, sufficient to justify the amount awarded—are complained of by the appellants.

One was urged at the trial by learned counsel for the respondent, who under the designation of "tricks and machinations" of the appellants grouped a whole succession of events, and ascribed them to the appellants as one concerted scheme to maliciously injure the respondent.

These events, making up the one malicious plan, were said to be, first, an elaborate, almost vindictive cross-examination, as to the truth of matters known to be false, then a sudden disappearance of counsel under a false pretext, really as the first overt step in an intended harassing of the respondent, next an equally hypocritical disappearance of the clients themselves, the better to effectuate their future action. The charge is of such a nature

affecting practitioners of the Court, that I feel bound to state that, if I were the proper tribunal to determine the issue, I would say that the supposed conspiracy between counsel and clients was purely imaginary, and that the course taken by Mr. *McArthur* and Mr. *Starke* was quite independent and *bonâ fide*. The appellants contend that no other view was open to the jury, and therefore they have probably been unjustly visited with punishment by reason of the inflammatory and unfounded suggestion. Their contention is, however, as a matter of legal complaint, validly answered in this way. The whole transaction from cross-examination to disappearance took place in open Court and in the presence of the jury, and though Mr. *Duffy* chose to place so sinister a construction upon the conduct of the appellants' counsel, it cannot be said he was not at liberty to form that conclusion, and ask the jury to concur with him, they being also at liberty to accept or reject the view so presented of the scenes enacted in their presence.

The second important circumstance of aggravation alleged is that the learned Judge referred to an incident of personal altercation between himself and Mr. *Starke* as affording evidence of appellants' malice or persistence in defaming the respondent. Again, it would appear to me, if it were my function to try that issue, that the action of counsel was in fact independent of the views of his clients, but nevertheless I think the course taken by the learned Judge was perfectly accurate. It was not only proper, before giving effect to Mr. *Starke's* objection to evidence, to ask the question which the learned Judge put to counsel, but it was essential. His Honor, as it seems to me, took an unusual, and even unnecessary, amount of trouble to make the position unmistakeable, and, although counsel probably acted in what he thought the best interests of his clients, the attitude he persistently assumed undoubtedly left the conduct of the case open to the observations of the learned Judge in his charge to the jury. There was in fact a continuous refusal to disclaim the worst possible aspect of the transaction then being investigated, and the jury were not improperly directed to place their own value on the refusal.

A third objection was advanced, that the learned Judge

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prejudiced the appellants by saying that their counsel had put them in a hole. I have been unable to see why this observation should injuriously affect the clients, or why it was beyond the right of the learned Judge to make.

These are the only objections made by the appellants except those based upon the irregular conduct of the trial, to which I shall now address myself. Before doing so, however, I think it just to observe that in my opinion both parties should be held strictly to their respective legal positions. While, on the one hand, the imputations made against the respondent were of a grossly defamatory character, ascribing personal and official mendacity of a most virulent type—imputations which on the evidence so far as it has appeared were quite unjustifiable—still, on the other hand, there are circumstances which have undoubtedly disturbed the regular course of the trial and the calm consideration of the issues, including the proper amount of damages. Amongst these is one incident appertaining to counsel's address, which is not brought before us as a ground of objection, but portion of which was casually referred to in the course of the argument, and which, to my mind, by exciting general animosity against the appellants, quite apart from any particular grievance of the respondent, and by transparently suggesting a wealthy pocket of £50,000 to £100,000 a year in connection with a demand for vindictive damages, was eminently calculated to swell and improperly swell the amount of those damages. I shall not here quote the words of Mr. *Duffy* in his address, but shall refer to them as from folio 1355 for some considerable distance onwards. All I say as to this is that it strengthens my view that to both sides there should be applied a strict construction of the law. If the trial was perfectly regular, the respondent should keep his verdict, although the question is thereby closed for ever; if it was not strictly regular, the matter should be retried, and he and the appellants left to a regular and orderly determination of the issues between them, and the more especially do I think so, having regard to the public nature of the matters involved.

The regularity of the trial is impeached in the first place because it is said that one of the jurymen, Mr. Ransom, misconducted himself. Now, whatever discretion exists as to this, it

must be exercised judicially and upon evidence judicially received. The learned primary Judge rejected the version given by Davis, so far as it related to a visit from *The Age*, but apparently not otherwise. All the rest is taken, and properly taken, by the Full Court as being admitted by Ransom; see the judgment of *Madden* C.J., fols. 1909 and 1910. The following circumstances consequently remain uncontroverted. On Friday evening, about eight o'clock, Ransom accosted Davis in the street and asked how long the case would last, and on learning it would last about a week longer, suggested that it was causing him inconvenience and expense, adding that if he had known that it was going to last so long he would not have come up. He said he had 15 or 16 employés to look after. Ransom's own account breaks off suddenly and does not affirmatively explain how the interview ended. Davis's account is that, after recognizing the danger he was running into, he said, "I think I had better leave you now. There is danger in speaking to you." And twice Davis states that Ranson said "*I will see you again*," and he, Davis, replied "*Not while this case is going on.*" Davis continues that Ransom replied "*The Age* or some one from *The Age* ought to see me." I may say that the words "I think" occur in this connection in both statements of Davis, and the position of the quotation marks affecting the meaning of these words may be due to the way the shorthand writer transcribed his notes. I therefore attach no importance to the altered position of the words "I think" in the second statement, relatively to the quotation marks.

Now, what does Ransom deny? Avowedly he denied nothing but *The Age* portion of Davis's account. His silence as to the statement twice sworn to that Davis pointed out the danger of their conversing, that he, Ransom, declared he would see Davis again, and that Davis refused, is significant in the extreme. All this, as the Full Court points out, is admitted. If this part is true, if Ransom, after stopping Davis and intimating that he was losing time and money—a pregnant statement in itself I should imagine—also said "I will see you again"—a statement quite in line with his observation as to loss—I can see no real difference between that and the request that someone from *The Age* should see him. In either case the purpose is identical and unmistake-

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able. I agree with the contention presented by the appellants' counsel that, apart altogether from any direct reference to *The Age*, the uncontradicted and inferentially admitted evidence presents a clear case of misconduct. And once the misconduct is exposed, I must say the probability of an unbiassed consideration of the case is greatly reduced. Resentment is henceforth added to disappointment. I would add that in the circumstances the distinction between the appellants and their responsible advisers would probably be in the juryman's mind for all practical purposes too fine for perception.

As to *The Age* reference, to which alone both *Hodges* J. and the Full Court attach importance, the learned primary Judge believes Ransom and disbelieves Davis.

It is contended by the respondent that Ransom's statement had no effect in assisting the learned Judge to arrive at his conclusions whether he could believe Davis or not. It is, at all events, an indisputable fact that, before announcing any decision, he invited and received a statement from Ransom, not on oath. It was, of course, quite fair and proper to receive Ransom's version, but was it fair to appellants or justified by law to receive it and act upon it unsworn to ? The question he had to decide was one entirely between the parties, namely, whether the appellants were entitled to have the jury dismissed or the respondent was entitled to have them retained, the determining consideration being whether an indispensable unit of that body was disqualified by misconduct, or by misconduct coupled with necessary exposure? That is the strictly legal question. It is also an indisputable fact that, after Davis had given his evidence, no indication by cross-examination or otherwise was given that it was unbelievable, or that no case for interference had been made out to the satisfaction of the Judge. If the learned counsel for the respondent had disbelieved Davis's story, or if he had thought it a trick to terminate the trial, it would have been easy to say so. On the contrary, however, he concurred with Mr. *McArthur* that it would be very undesirable to proceed with that juryman. And as it was purely a matter between the appellants and the respondent, and as both sides at that juncture agreed it was undesirable to proceed with the juryman, I should have expected

an intimation from the learned Judge either that he would accept that concurrence as a basis, or that he did not believe, or was not satisfied with Davis, at least, on the matter of *The Age* reference. There was then no conflict with the juryman, and no more reason for judicial reticence than in any other case of testimony.

The only contest between opposing counsel at that stage was as to the dismissal of the whole jury, one side contending that the legal consequence of Ransom's misconduct coupled with exposure must be the discharge of the jury, and the other not denying that in point of law, though not admitting it, but pressing for a consent to less. Both were within their rights, and I can see no blame attachable to either counsel for their respective attitudes all through in regard to this incident.

But the learned Judge said, "I am not quite clear that the evidence will justify me in requiring the jury to leave."

That looks much more like a doubt as to the law, than a misgiving as to fact. It means, in my opinion: "Assuming all the statements of Davis are true, does it constitute a legal ground for discharging the whole jury." His Honor is "disposed to go on," which appears to me, as it naturally would to anyone who heard him, an inclination of legal opinion, but he intimates he will consult his colleagues, and he does so. It cannot be that he desires to consult them as to whether Davis is to be believed; and, indeed, before going, he adds: "If both the parties ask for the jury's discharge I shall do it." If Davis were utterly discredited at that time as to *The Age* reference, seeing the little importance both the learned primary Judge and his colleagues, when in the Full Court, placed on the rest of Davis's evidence, it is hardly possible that his Honor would have made his parting statement, or on returning would have troubled about Ransom making a statement at all. His Honor may well at the moment have thought (though I do not think it ought to have followed) that as Davis was the clerk of the appellants' solicitor, the appellants alone could not have asked for the jury's discharge, and this probability is strengthened by his Honor's parting words already quoted: "If both the parties ask for the jury's discharge I shall do it." This intimation shows clearly that the learned Judge recognized the issue as one that concerned the two

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parties, otherwise I think he would have said so, and would not have stated his willingness, without hearing Ransom at all, to discharge the jury at the request of both parties, and necessarily upon the basis of Davis's testimony.

On returning from the consultation, his Honor, without addressing either party—and having apparently after consultation with his learned colleagues, fully decided upon a definite course of action—tells Mr. Ransom that he is under no obligation to say a single word, but that the learned Judge is willing to hear anything he has to say *in answer to what has been said* by the witness, and that the Judge does not propose to put him on his oath.

The learned Chief Justice of Victoria says (1) :—" It seems to us that the proper view is this—that the juryman was a person who was charged. He was therefore put, as far as he could be put, in the attitude of a person charged, who was *not allowed* to be sworn. He was warned that he need not say anything unless he desired to do so. He was asked what he had to say, and he said in effect—'I am not guilty.' He admits all the rest, but says that he said nothing about anybody from *The Age* being sent to see him, And that was the whole matter. In that case the Judge says:—'Here is a man who denies this charge. What is the evidence against him?' Before any man upon any sort of charge is called on to say anything in his defence, it is necessary under our law that those who laid the charge against him should first establish it."

The view thus presented by three of his Honor's colleagues is manifestly that which was adopted by the learned primary Judge. Reading the facts for myself I arrive at the same conclusion.

The analogous practice of an accused person making an unsworn statement is familiar in Victorian law. Sec. 52 of the *Evidence Act* 1890 speaks of his "answer or defence," and allows him to make a statement of facts (without oath) in lieu of or in addition to any evidence on his behalf. No one has any right to compel such a person to be sworn, and no Judge would permit it if asked by another to have him sworn. Accepting the view of the Full Court—there being nothing whatever inconsistent with

(1) (1909) V.L.R., 550, at pp. 567-8.

that in anything that fell from the learned primary Judge—it appears that Ransom was treated as far as he could be as an accused person would have been; that the learned Judge, while willing to hear his "answer" to the charges made by Davis, felt that the requirement stated by *Madden* C.J. was essential, namely, that "before any man upon any sort of charge is called on to say anything in his defence, it is necessary under our law that those who laid the charge against him should first establish it," and feeling that, the fact that Ransom was invited to answer it, shows to me that *primâ facie* it had been established and an answer called for. This necessarily implies that it was intended to take Ransom's statement into consideration in determining his guilt or innocence. It certainly is inconsistent with the view that, in the mind of the learned Judge then, there was nothing calling for an answer. The next day (folio 132) his Honor referred to "the *conflict* which exists between the statement of the juryman and the statement by the clerk of the defendants' solicitors," and said, "I abstain and have preserved silence upon that for reasons which will be obvious," &c., and again (at folio 1327) to "the *difference* between what was stated by the juryman and the witness." It seems obvious that the learned Judge in his own mind had regarded the statements as in conflict, and had *formed* an opinion in regard to that conflict and refrained from *expressing* it. If that is so the juryman's denial must have influenced his mind. Again (at folio 1536), in his charge to the jury the learned Judge says:—"*If the one juryman whose conduct was attacked has told the truth,* there is nothing very serious, nothing in what he said, though it was improper and much to be regretted that it was said, but it was not very serious. He is not yet incapable by anything he said—*if he told the truth*—of giving an impartial mind," &c.

The learned Judge then makes it plain that the fact is in his mind dependent on whether the juryman has "told the truth," in other words "If we can trust his statement." Again, in the learned Judge's statement of reasons his Honor says he refrained from "stating what was my view of the *allegations* made by the clerk and the juryman." Observe the word "allegations" applied to both. It is not discovering the issue, or ascertaining the mere formal plea of an accused person, but "allegations" of the two

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persons who testify to what occurred. It is true the learned Judge says at folio 1736, "From what took place in the witness box I did not believe that the juryman had said 'Some one from *The Age* might see me' or anything to that effect." But his Honor, in the next sentence, goes on to say, "I did not believe him and I did believe the unsworn statement of the juryman Ransom." It is perfectly consistent with this that the learned Judge, after hearing both statements, balanced on the one side Davis's words and on the other side his demeanour, *plus* the statement and demeanour of Ransom. And such appears to have been really the case because the learned Judge immediately after says, "It was *therefore*," that is, after hearing and believing Ransom, "my duty to determine whether," and so on. He confirms this by saying further, "The *conflict* has not been with the defendants, not with the solicitors for the defendants, nor with the counsel for the defendants, but only with a clerk." What conflict, unless it was the conflict of testimony on which the learned Judge decided? I therefore cannot avoid coming to the conclusion that the learned Judge did, in deciding this issue, take into account Ransom's unsworn statement as a statement of facts. But it would not help the respondent if Ransom's statement were taken as a mere plea of not guilty. Obviously the learned Judge, when he came back fortified with the views of his colleagues, would have discharged Ransom and the whole jury if he had admitted Davis's statement about *The Age*. But as he never would have put Ransom on oath, and as we could not suppose he would act judicially against the respondent's objection, merely on an unsworn admission of a juryman, it follows that the learned Judge was prepared to act on Davis's evidence if corroborated by Ransom, and to refuse to act upon it if denied by Ransom. And so *quâcunque viâ* it comes to the same point.

What then is the legal effect of this?

Ransom was not in jeopardy under any charge, and treating him by analogy to an accused man under trial for an offence did not alter the fact that on this issue he was a witness and nothing more, although the alleged misconduct was his own. The rule is clear that—with certain very limited exceptions of which the present instance is not one—*in judicio non creditur nisi juratis,*

a principle embodied in our law and enforced in a number of precedents of which the *Earl of Lincoln's Case* (1) is one of the foremost examples. A juryman may answer a charge of misconduct upon oath: *Standewick* v. *Hopkins* (2). In my opinion there was a serious irregularity in receiving Ransom's unsworn evidence upon a point which beyond dispute affected the constitution of the tribunal to determine the case, and therefore was a point of radical import.

But it was not a nullity—it was, though grave, an irregularity merely and might be waived: *Sells* v. *Hoare* (3). Whether it was waived or not has been to me a matter of some difficulty. On the whole, and for the reasons I shall state, I have come to the conclusion that it was not waived. If the view indicated by the Full Court of the course pursued by the learned primary Judge be correct, as I feel no doubt it is, it is perfectly obvious that counsel would have urged, and could see, as everyone could see, that he would have urged a futile objection by asking that Ransom should be sworn. The learned Judge, after his consultation, came back resolved, and by his action indicated he was resolved, to give Ransom an opportunity of making his statement —no objection of counsel would have stayed that. His Honor also resolved, and made it evident that he had resolved, that Ransom should not be compelled to make his statement on oath, and the learned Judge in using the word "propose" plainly left it at best to the discretion of Ransom himself to make his statement upon, or free from, the obligation of an oath. Counsel were not addressed on the matter, it was not apparently intended to consult them or their wishes in the matter; the Court, after consultation with the other Judges, took the whole of that investigation into its own hands, with a mind fully made up, and as the course of events showed without any intention of departing from it, whatever objection might be made.

Now, waiver is an intentional relinquishment of some right: (see *Earl of Darnley* v. *London, Chatham, and Dover Railway* (4). Intention is of course as plainly and strongly evidenced by conduct as by words. A party who might have had a right ack-

(1) Cro. Car., 64.
(2) 2 D. & L., 502.
(3) 3 B. & B., 232.
(4) L.R. 2 H.L., 43, at p. 56.

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nowledged if he had chosen to ask for it at the proper time, is not at liberty to complain if by his words or his silence he forgoes it then, and is refused it when he comes at an improper time to demand it. But if the circumstances are such as to indicate to him that demand is useless, and it is shown that it would have been useless, then in my opinion the onus which lies upon his opponent of proving the waiver has not been satisfied. The necessary element of consent is absent. There is one case of great authority and considerable bearing on this point of the case. In *Beaudry* v. *Mayor, &c. of Montreal* (1), the appellant in a land compensation case desired to have witnesses sworn and examined. The Court declared they had no power to administer an oath to such witnesses, and that the jury would not hear them, as they were satisfied. The appellant raised no objection, and a verdict was returned fixing the value of the land. The Privy Council held that the witnesses might have been and ought to have been sworn and examined. Then came the question of waiver. Their Lordships say (2): "Has this objection been waived? . . . It seems to us, that when the Justices decided that they had no power to administer an oath, and, therefore (as we consider), declined to swear the witnesses and receive their testimony, the claimant could do nothing more than he did; it was not his business to protest in Court, but respectfully to submit to a legal decision. In order to prove that he acquiesced, and waived his right to complain of an illegal decision, it ought to be shown that he said or did something to give the Court a jurisdiction which the Act in question did not give them. Mere respectful acquiescence, or submission to the ruling of the Justices, will not, we think, amount to a waiver."

In principle those observations appear to me to govern this case. In my view, it would be idle to assume that the announcement of *Hodges* J. after his consultation with his colleagues was liable to alteration on request of appellants' counsel.

For these reasons I conclude there was no waiver.

In this connection I am of opinion that the Full Court was justified in not entertaining the question of the disqualification of Ransom, or of the whole jury, as an original application. If

(1) 11 Moo. P.C.C., 399.

(2) 11 Moo. P.C.C., 399, at p. 426.

Hodges J. was right, his decision should stand; if he was wrong, it should be set right on appeal. If he erred in law, as I think he did, of course the matter is open to correction; if it was a mere matter of credibility of a witness without error in law, equally of course his opinion cannot consistently with well known principles be reversed.

That leaves only one further matter to be dealt with; whether the jury was discharged, and, if discharged, was validly recalled.

This presents itself to me as a very plain and simple question. As I have already said the nature of the case and the events of the trial taken as a whole are not such as would induce me to strain any rule of law one way or the other. It is simply a dry question of "Who is strictly right, or who strictly wrong?" This part of the appeal rests on undisputed facts, and raises a clear question of law, and of law only, not a trifling matter, not a trivial technicality, but of highly important law, governing the administration of justice. It depends on the meaning and effect of sub-sec. (2) of sec. 4 of the *Juries Act* 1895. The legislature has provided in sub-sec. (1) that in civil cases, where there is a jury required by the Court but not on the application of the party, neither party is liable to pay the fees. Then sub-sec. (2) relates to civil cases where one of the parties require a jury, and it enacts for the second and every subsequent day the jury fees shall be paid to the sheriff by the party requiring the jury at or before the opening of the Court on each day. It also categorically provides that if those fees are not "so" paid, the Court or Judge "shall"—not "may" but "shall"—the clearest and most imperative form of command—do two things, first, "discharge the jury" and second, "proceed to finish the hearing of the trial and determine the same without a jury, notwithstanding the same commenced with a jury."

There is one circumstance, and one only, which, according to the will of Parliament, can prevent the discharge of the jury in such a case, and that is thus expressed: "unless the said sums be paid by any other party." Of course that circumstance must come *before* the discharge, and not after. The Court has no option, no discretion in the matter; it is not a question of application by either party; both sides might consent to the jury

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continuing without payment, but that would be useless if the events stipulated by the legislature arose; it is a duty of the Court commanded by Parliament and must be obeyed, apart from request, and despite objection.

Now I know of no rule for the construction of a Statute couched in plain and unequivocal terms, as this is, except to follow its directions. Laws are made to be implicitly obeyed, and a Court or a Judge has no greater option to disobey or disregard the law, or to strain it, than the humblest citizen. A command so distinct and so imperative as that contained in the section under review seems to me to present little possibility of misunderstanding.

In *Kinloch's Case* (1) an argument was raised that the literal construction of an Act should be departed from, so as to avoid inconveniences and yet answer all purposes of the Act. Lord Chief Justice *Willes* said for the Court, "That in so plain a case as this is, arguments *ab inconvenienti* are of no weight; the law must take its course; inconveniences in plain cases are proper only for the consideration of the legislature." The principle is most apposite to the present case.

When the Court opens and is ready to proceed with the business of the day, the party requiring the jury is bound there and then to pay the jury fees if they have not been already paid. If this is not done the Court is neither to proceed with the jury nor to delay the trial, but to discharge the jury and then proceed without it—unless the other party is ready and willing to pay the jury fees, of course within what in the circumstances is a reasonable time. The other party must be at all events ready to pay, he must there and then elect what he will do, and if he elects not to pay—not to interpose the only obstacle which the legislature recognizes to stay the hand of the Court—that election, if unrevoked before the Court acts, is irrevocable. Once the facts exist which call for the action of the Court, and the Court acts upon them, once the Court validly performs the duty demanded by the legislature, the first step of the legislative will is complete, the jury are outside the case, the gate is closed, and, unless there is some statutory power to re-open it, and re-admit

(1) Fost., 16, at p. 21.

the jury, there is henceforth no jury, but the Judge must forthwith "proceed," without further order, but simply by reason of the self-executing provisions of the Statute, to hear and determine the case. It is not competent for the Judge to undo what has been done merely because he thinks it reasonable to do so. Having obeyed the law he is *functus officio*.

What in fact occurred?

At the opening of the Court on Wednesday 25th August 1909, at 10.30 a.m., his Honor adverted to an obstacle in the way of going on. Mr. *Duffy* assented, and mentioned the Statute. The jury retired to their room while the discussion proceeded. The Act was placed before the Judge. Mr. *Duffy* thought that his client might possibly, in the event of a new trial being applied for by the appellants, be prejudiced if the respondent paid the jury fees, and he asked the Judge to advise him in the matter—otherwise he would simply let the law take its course—that is, not pay the fees, and let the jury be discharged, with the legal consequences of that discharge. The learned Judge most properly refused to advise. It would have been a most unjudicial thing to do, to advise one side to take one course or the other, so that the Court should assume the responsibility of action which would otherwise rest on the party, and more particularly would this have been the case in view of the absence of the other side. The learned Judge promptly declined to do this. But when this refusal was met with, Mr. *Duffy* said his client decided to do what he thought right, namely, in effect, to pin the defendants down to the course they had taken, and to the consequence, namely, that the jury must go.

His Honor then said "Call in the jury and I will discharge them." The jury returned to the box. Then said the learned Judge, addressing the jury, "I do not know, gentlemen, that it is necessary to explain anything to you, but there has been a question about the jury fees, and they are not paid, and there is no intention of paying them, I am under the obligation to discharge you from further attendance. Go to the sheriff's office, gentlemen, and you will be paid your fees. You can leave." So far his Honor is addressing the jury.

I agree with the appellants' contention that the jury were

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thereby irrevocably discharged, and I feel specially indebted to Mr. *Bryant* for the clear and convincing way in which he presented this branch of the argument. "Discharge" does not connote leaving the box. Presence in the jury box does not of itself constitute a jury: absence does not necessarily work a discharge.

To discharge a jury is to relieve them of the duty with which they are charged. In a criminal case, they are charged with the prisoner, and they may be discharged of the prisoner (see for instance *Hale's, Pleas of the Crown*, vol. II., p. 294; *Kinloch's Case* (1); *Winsor* v. *The Queen* (2)).

In a civil case they are charged with the issues of fact, and they may be discharged from giving their verdict as to some issues and not as to others: *Powell* v. *Sonnet* (3); *Marsh* v. *Isaacs* (4). Leaving the jury box is not essential in such a case. It is quite different from the cases where the jury has by inadvertence been improperly discharged and where the improper direction could be validly recalled but for the fact that the jury had left the box and mingled and conversed with others, whereby the future impartial consideration of the case might be imperilled. The reasons given by the Full Court are more applicable to such a case than to one of the present class.

The Judge distinctly told the jury here that he was obliged to discharge them, and directed them to go to the sheriff's office and receive their fees, and a peremptory statement was added—"You can leave." This involved the fact that they were no longer a jury. Of course, that was a complete discharge in fact, and if they had there and then left, as they were at liberty to do, no one could pretend they had not been duly discharged. That ended the observations of the learned Judge to the jury. It was a valid discharge, and not only was it valid, but up to that point no other course would have been valid.

There was no mistake as to the facts. Learned counsel, of course, knew the law, and was under no misapprehension if even misapprehension on his part not induced by the other side had importance. His action was deliberate and with a set purpose.

(1) Fost., 16, at p. 21.
(2) L.R. 1 Q.B., 390.
(3) 1 Bl. (N.S.), 545.
(4) 45 L.J.C.P., 505.

The learned Judge was aware of the necessary circumstances imposing upon him the absolute statutory duty to discharge the jury, and up to, and including that discharge, all was regular and in compliance with the law. From that moment the Judge had no further concern with the jury, nor they with him. They had passed from all connection with the case. Then, that duty completed, his Honor observed—necessarily not to the jury because there was none, but manifestly to the respondent and his advisers—" This trial is now at an end. This was set down for trial before a jury. I must treat this trial as at an end," and then addressing the crier, " Adjourn the Court *sine die*." These latter observations emphasize the fact that the jury had already been discharged. They show, indeed, that the *Judge mistook the second mandate* of the legislature, namely, that *after* discharging the jury, the trial should not be at an end, but should proceed before himself as the constitutional tribunal without a jury. That error was of course open to correction, then and there, and is now. The erroneous statement was no part of his order of discharge—was no part of any order, and was not precedent to the order of discharge, and in effect was a mere erroneous view as to what the law was as the consequences of discharging the jury. Being invalid it was not insusceptible of recall, or rather correction, from the point of error, and if his Honor had proceeded at once to hear the case alone it would have been quite regular, and no one could have said that his error as to consequences rendered the prior discharge of the jury a nullity, or in any way improper. But then Mr. *Duffy* said, " Would your Honor look at the Statute before your Honor discharges the jury." The jury are then asked to retire, as if they had not been discharged.

I consider all that immaterial. If the jury had been already discharged whatever was done afterwards came too late, and could not restore them. *Madden* C.J. recognizes (fol. 1920) that the jury were discharged, but holds that the discharge was not irretrievable. It is there I respectfully venture to differ from the Full Court. The way in which the order of discharge was in the opinion of the Full Court lawfully retrieved and the jury recalled was as follows. A discussion ensued, during which Mr. *Duffy* still expressed his intention to let the law take its course,

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again adverted to the difficulty in which he considered his client was in with regard to the retention of the jury, and after some time his Honor said, "Personally of course I would rather the jury disposed of it—much rather." Mr. *Duffy* immediately replied—"Very well, Sir, we will pay the jury fees." His Honor again consulted his colleagues, and in the result the jury were recalled. Mr. *Duffy* said, "I understand that, notwithstanding anything that has been said, your Honor in fact has not discharged them." His Honor said, "Oh! no, they had not left the box."

Except leaving the box, admittedly everything that could have been done to discharge them had been done. The learned Judge states their continued presence in the box as the only reason their discharge was not complete. If that was necessary to their discharge, they were not discharged. If it was not, they were discharged. In my opinion, as I have already stated, it was not necessary—they were discharged.

The case then stood in this position. The jury, which as a whole the appellants considered—though as I think erroneously—a jury necessarily prejudiced against them, had gone, by the express refusal of the respondent to retain them, and among them had gone one juryman whose conduct is admitted on all hands to have been improper, and who was regarded by both sides as an undesirable juror, and the respondent suffered nothing, because the cause was there ready for determination by the Judge, the proper tribunal selected by the law. Was it lawful to recall the jury merely because the learned Judge expressed a personal preference that they and not he should have the duty of determining the issues?

There is no English case very much in point as to this. It is however well established law, that while in equity the historical and appellate practice of rehearing still exists (*In re St. Nazaire Co.* (1) and *London County Council* v. *Dundas* (2)), no such practice applies to common law orders (see particularly *per Thesiger* L.J. (3) and *Chitty's Archbold's Practice*, 14th ed., p. 1398). A common law order once validly made without mistake is final, except by consent or on appeal. I know of no instance,

(1) 12 Ch. D., 88.

(2) (1904) P., 1, at p. 29.

(3) 12 Ch. D., 88, at p. 101.

where a Judge after pronouncing such an order has rescinded it, allowing the party to make a new case, reversing the state of facts on which the order was made.

In such a case as the present the order has immediate effect, it goes into operation *instanter*, there is no drawing up, or artificial perfecting by passing or entering required or possible. The direction appears on the Judge's notes—the shorthand notes being such for the purpose of the trial—it cannot then appear elsewhere, and the only question therefore is as to the legal effect of what the learned Judge said.

Two cases were referred to during the argument as lending support to the action of the learned Judge: *Parkin's Case* (1) and *Vodden's Case* (2). But these cases have no application. In neither of them was the jury discharged actually or inferentially: in neither of them was the thing which was corrected validly done in the first instance. In each of them by error a juryman gave an answer not in fact agreed to by the jurors, and before they were discharged the error was discovered and set right. In the latter case, the Judge certainly went so far as to discharge the prisoner out of the dock, but as that was on a mistaken impression of what the real verdict was, the discharge of the prisoner was illegal and could be instantly corrected, as it was. Here on the contrary the discharge of the jury, as I have said, in fact occurred, was valid, was mandatory, and was free from any misapprehension of the necessary antecedent facts.

But though there is no English case directly in point—there are cases of high authority in America which are sufficiently close to throw light on the subject. A leading case of *Walters* v. *Junkins* (3) came before the Supreme Appellate Court of Pennsylvania. There the jury were not formally dismissed, but after verdict recorded, they, or most of them, remained in the box, and certainly in Court, and for a few minutes another case proceeded. It was held they were dismissed. The Court relied on the principles deduced from English authorities. In *Reitenbaugh* v. *Ludwick* (4) the same tribunal, differently constituted, said, "A verdict once recorded, and the jury dismissed, *if but for an*

(1) 1 Mood. C.C., 45.
(2) Dear. C.C., 229.
(3) 16 Sergeant and Rawle (Pa.), 414.
(4) 31 Pa., 131, at p. 141.

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instant, they cannot be recalled: *Walters* v. *Junkins* (1). It is beyond the reach of any discretion, and to exercise it, would be an error reviewable here."

To prevent misapprehension from the mention in that case of separation of the jury during the adjournment of the Court, it appears that in America where, as there, a "sealed verdict" is arrived at, the jury may separate and meet the Court next day without affecting their constitution as a jury (see *Profatt on Jury Trials*, s. 450, and *Kenny* v. *Habich* (2)).

In 1862 the Supreme Judicial Court of Massachusetts had to consider in *Commonwealth* v. *Townsend* (3), the effect of a jury's discharge. The Court had given order to an officer to discharge a jury at a certain time, if they had not then agreed. The officer ascertained they had not agreed and told them they were discharged. They then asked for five minutes more, which he refused. The foreman was still writing, and in 10 or 15 minutes they knocked and said they had agreed, and inquired if he would take the verdict. He said he had nothing to do with the verdict, and the jury next morning at the opening of the Court presented a sealed verdict. There had been an agreement, that if the jury agreed they might seal up their verdict separate and return it into Court next morning. The Superior Court refused to set aside the verdict. But the Supreme Appellate Court reversed that decision, and set the verdict aside on the ground that when the officer told the jury that they were discharged, they not having then agreed, they were in law discharged. The Court regretted the necessity, and pointed out how a premature discharge could be avoided, but nevertheless held that there was no discretion to restore the jury. A converse case occurred before the same Court in 1896 before *Field* C.J., *Holmes* J. (now of the Supreme Court of the United States), and other Justices in the case of *Hansen* v. *Ludlow Manufacturing Co.* (4). Similar orders were given to an officer, who, however, disobeyed, and did not discharge the jury. There the Court adopted the inaction of the officer, and the verdict was received. But, said the Court, "If he had discharged them and they had afterwards agreed on

(1) 16 Sergeant and Rawle (Pa.), 414.
(2) 137 Mass., 421, at p. 423.
(3) 5 Allen (Mass.), 216.
(4) 167 Mass., 112, at p. 113.

a verdict, the case would have come within *Commonwealth* v. *Townsend*" (1).

Both on principle and on precedents which, though not controlling me, are confirmatory of the view I take, the present case being stronger because the discharge was commanded by Statute, I think the jury were irrevocably discharged. The time that elapsed between discharge and recall was short indeed; but whether a minute, an hour, or a day, it cannot alter the power or the duty of the Court, though it might affect its discretion if it possessed any. The point is important as a matter of law and as a general precedent, and in view of what transpired has a very substantial bearing on the practical result.

For these reasons I am of opinion the appeal should be allowed.

HIGGINS J. read the following judgment. I concur in the opinion that this appeal should be dismissed. I do not think we should be justified in declaring that the learned Judge at the trial exercised his discretion wrongly or was wrong in proceeding with the trial after hearing the evidence of Davis. He found—and no sufficient reason has been shown for treating his finding as wrong—that there was no reasonable ground to believe that the jury would not discharge their duties with impartiality. If there has been a fiasco on the trial—if the defendants could have proved to the satisfaction of the jury the facts which the defendants alleged—the fiasco cannot be attributed to the Judge or to the plaintiff's counsel. The defendants deliberately took the risk, staked their case on their supposed right to a discharge of the jury; and they must now take the consequences.

It is unnecessary for me to re-state the facts which have been already stated at length in the judgment of the Chief Justice. But I wish to refer briefly to two technical points which have given me more trouble than anything else in the case.

In the first place, it is said that the Judge ought not to have allowed Ransom, the juryman in question, to make a statement without oath. Davis had given evidence on oath; and the only material statement—the only serious statement—the only statement which suggested a desire for a bribe—the statement "Some

(1) 5 Allen (Mass.), 216.

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one from *The Age* ought to see me"—was literally dragged from the witness by leading questions. First Davis gave his story, and said there was nothing else: and when asked what was said about *The Age*, and about some one from *The Age* seeing him, he could recollect nothing. Finally, being much pressed by counsel, Davis added something; and when asked by the Judge to be more precise, he said, "I think he (Ransom) said 'Some one from *The Age* ought to see me.'" The Judge has stated—and we are bound to accept his Honor's statement—that he did not believe this part of Davis's evidence. With a very proper reticence, in view of possible criminal proceedings, the Judge did not express directly his disbelief; but he said "I am not quite clear that the evidence will justify me in requiring the jury to leave," and was disposed to go on with the trial. The rest of the conversation, as detailed by Davis, was harmless. I can see that one already suspicious might possibly find a sinister aspect in the words of one friend to another —"All right. I will see you again." But the Judge who saw and heard the witness did not accept this aspect; he was entitled to take the innocent view; and I cannot say that he must be wrong. After consulting his colleagues, the Judge told Ransom that he might make an unsworn statement if he chose. I regard his Honor as merely ascertaining whether and how far the statements of Davis were admitted —"guilty or not guilty." If admitted, there would be more reason for finding that there was a reasonable ground for suspecting the impartiality of the juror, and for treating the jury as unfit. But the vital statement as to *The Age* sending some one to him was not admitted; and the Judge held to his first opinion. So far the position is simple enough; but his Honor says, "I did not believe him (Davis), and I did believe in the unsworn statement of the juryman Ransom." These words, taken by themselves, might be regarded as showing that the Judge treated Ransom's statement as evidence; but, probably, when all the circumstances are considered, the meaning is merely that on Davis's evidence the Judge did not believe the statement of Davis as to *The Age*, and believed that Ransom's plea of "not guilty" was a true plea. But even if this is not the correct view, I am of opinion that the defendants are precluded from asking for a new trial on the mere ground that Ransom was

not sworn, inasmuch as the defendants' counsel did not at the time insist that any statement of Ransom's should be taken on oath. He could, at the least, have asked that his objection be noted. The litigant is bound by the conduct of his counsel at the trial; and inasmuch as the matter of the oath could have been cured at the time, the defendants, cannot now complain of a procedure which they allowed without remonstrance: *Doe d. Gord* v. *Needs* (1); *Henn* v. *Neck* (2); *Short* v. *Kalloway* (3).

The next technical point is that the jury was in fact discharged on 25th August, and that any subsequent proceedings before the jury are void. The jury had been obtained on the request of the defendants, and the defendants paid the jury fees until they abandoned the case, and then they ceased to pay the fees. Under the *Juries Act* 1895, sec. 4 (2), if before the opening of the Court on each day of the trial the fees are not paid to the sheriff by the party requiring the jury, it is the duty of the Court, unless the fees be paid by another party, to discharge the jury, and to proceed to finish the trial and to determine the same without a jury. Plaintiff's counsel put the matter before the Judge, and expressed himself as willing to pay the fees if his Honor thought it fairest to do so. Counsel knew that under the Act if the jury were discharged the Judge had to give the verdict; but the Judge did not know that this duty would fall on him, and, in ignorance of this embarrassing consequence of the discharge of the jury, he declined to express an opinion as to paying the fees. Thereupon the Judge used express words of discharge—"Go to the sheriff's office, gentlemen . . . you can leave. This trial is now at an end. . . . Adjourn the Court *sine die*." Counsel at once, before the jury left the box, drew the Judge's attention to the Act to show that the action was not at an end; and the jurymen were allowed to retire while the position was being discussed. As soon as the Judge realized the true position, and that he would be obliged personally to give a verdict, he expressed the opinion which he had previously refused—said he would rather that the jury disposed of the case than that he should have to do so. Counsel for the plaintiff at once undertook to pay the fees, the

(1) 2 M. & W., 129.
(2) 3 Dowl. P.R., 163.
(3) 11 A. & E., 28.

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jury was recalled, and the case proceeded. The learned Judge refused to express his wish (for payment of the fees) while he thought the alternative to be an end of the trial; but as soon as he found that the alternative was that he must give a verdict himself, he expressed the wish. The Judge changed his mind; and counsel changed his attitude as to paying the fees in consequence. Nothing had been done that could not be undone. There is no definite time fixed by the Act within which the fees should be paid by the plaintiff; and as the fees were to be paid, there was no longer any obligation to discharge the jury. If under such circumstances it is to be laid down as the duty of the Court to treat the trial as ended by the words of discharge, and all subsequent proceedings as futile, then there is justice in the charge that legal procedure is repugnant to common sense. In my experience, a Judge is always permitted to correct his mistakes as he goes; and if he find that he has said something that he thinks fit to recall, before his order has been carried into effect, or even embodied in any formal document, he is at liberty, like other mortals, to change his mind and to recall his words. I do not say that it is "never too late to mend"; but it certainly is not too late to withdraw an order discharging a jury before the jury has left the box. I find very strong authority in support of this view in *R.* v. *Parkin* (1), and *R.* v. *Vodden* (2); and the force of these authorities is increased by the fact that they were criminal cases, and were decided against the accused. In the latter case not only had the words of discharge of the prisoner been uttered, but the prisoner had actually left the dock.

I need not say much as to the extraordinary position here—a party seeking to have a new trial on the ground of a conversation which his own solicitor's clerk has improperly had with a juryman. The plaintiff might complain; but, under most circumstances, the party in fault cannot complain. This case is probably an exception; but it is easy to conceive how, in other cases, a dishonest party might, on finding a jury adverse, devise opportunities for conversations with jurymen.

Appeal dismissed with costs.

(1) 1 Mood. C.C., 45.

(2) Dears. C.C., 229.

Solicitors, for the appellants, *Gillott & Moir.*
Solicitors, for the respondent, *Smith & Emmerton.*

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B. L.

DAVID SYME & Co. *v.* SWINBURNE.

[HIGH COURT OF AUSTRALIA.]

AGNES BROWN AND DUNCAN BROWN . APPELLANTS; DEFENDANTS,

AND

HOLLOWAY . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1909.

Married Women's Property Act 1890 (*Q.*) (54 *Vict. No.* 9), *sec.* 3 (2)—*Liability of husband for wife's torts—Ex contractu or ex delicto.*

BRISBANE, *Nov.* 29, 30 *Dec.* 1.

SYDNEY, *December* 18.

Griffith C.J., O'Connor and Isaacs JJ.

Agnes Brown, a married woman with separate estate, leased a furnished house from the plaintiff. She used it, as the plaintiff had done, as a private hospital. There was a covenant to keep the premises and furniture in a good state of repair and condition. During the lease Agnes Brown, in fumigating one of the rooms, set fire to the house, with the result that it and some of the furniture were consumed. The jury, in an action for breach of the covenant and negligence, in which the husband Duncan Brown was joined as a defendant, found that the fire was caused by the negligence through ignorance of Agnes Brown.

Held—(1) That the action could have been brought against the defendant Agnes Brown either on the express condition to keep in repair, or on the implied condition arising from the contract of demise not to commit waste, or on the duty not to commit waste:

(2) That the wife's negligence was not a tort pure and simple, that the action arose essentially out of contract:

(3) That since the *Married Women's Property Act* 1882, 45 Vict. c. 75 [(Queensland) 54 Vict. No. 9], a husband is not liable for his wife's torts.