Judgment of the Lords of the Judicial Committee on the Appeal of the Attorney-General of New South Wales, Appellant, v. *Henry Louis Bertrand, Respondent, from New South Wales; delivered on the* 10*th July*, 1867.

Present:

Sir John T. Coleridge.
Sir William Erle.
Sir Edward Vaughan Williams.
Lord Chief Baron.
Sir Richard Torin Kindersley.

THIS is an Appeal on behalf of Her Majesty against an Order of the Supreme Court of New South Wales, making absolute a rule *nisi* for a new trial, which had been obtained on behalf of the Respondent, against whom a verdict of guilty had passed on an information charging him with wilful murder. By the law of the Colony an information by the Attorney-General stands in the place of an indictment found by a Grand Jury. The Appellant had been tried at the same sittings, and the jury not agreeing, had been discharged; upon the second trial a new jury, taken from the same panel, had found him guilty—sentence of death had been pronounced, and the rule above mentioned had been subsequently obtained. The record after mentioning that fact, stated, "That it had "been made to appear to the said Court, that at "the trial of the said Henry Louis Bertrand, cer- "tain of the witnesses for our Lady the Queen, "after being duly sworn at the said last-mentioned "trial, were allowed by the said Chief Justice, at "the request of the said Henry Louis Bertrand, "and of his Counsel, to be examined by reference "to notes of the evidence given or supposed to "have been given by those witnesses at the afore- "said first trial; and that such notes, the same "having been taken at that trial by the said Chief "Justice, were then at such request, and by con-

" sent of the Counsel prosecuting for Her Majesty, " read in open Court to such witnesses respectively, " each of them thereupon being asked, and declar- " ing on his oath, whether the matter so read to " him was true; and that thereupon as well the " Counsel for the said Henry Louis Bertrand as the " Counsel for Her Majesty, then and there exa- " mined, or were permitted to examine, each such " witnesses orally in the ordinary manner." The record then concluded thus:—" And because it ap- " pears to the said Court now here sitting in Banc " as aforesaid, that the said last-mentioned trial, and " the proceedings thereat in respect of the matters " so suggested and appearing were and are irregular, " and contrary to law; therefore on motion this day " made to the Court on behalf of the said Henry " Louis Bertrand, it is ordered by the said Court that " for the cause aforesaid, the verdict so given against " him as aforesaid be set aside, and the judgment " thereon vacated, and that the sheriff do cause a " jury anew to come for the trial of the issue so " joined upon the information aforesaid between " Her Majesty's Attorney-General and the said " Henry Louis Bertrand; and the prisoner is re- " manded to the custody of such sheriff in order to " take his trial accordingly on that information."

Upon this statement it was contended first on behalf of the Respondent that their Lordships ought not to entertain the Appeal; but they do not accede to this. Upon principle and reference to the decisions of this Committee, it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a Charter or Statute, the authority has not been parted with, it is the inherent prerogative right, and on all proper occasions the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure so far as may be the due administration of justice in the individual case, but also to preserve the due course of procedure generally. The interest of the Crown, duly considered, is at least as great in these respects in criminal as in civil cases; but the exercise of this prerogative is to be regulated by a consideration of circumstances and consequences; and interference by Her Majesty in Council in criminal cases is likely in so many

instances to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an Appeal by its officers on behalf of itself or by individuals. The instances of such Appeals being entertained are therefore very rare.

The opinions stated by this Committee in the case of *Abraham Ames and others*, 3 Moore, 409; *The Queen* v. *Joykissen Mookerjee*, 1 Moore, N. S. 272; and the *Falkland Islands Company* v. *The Queen*, ibid. 299, establish these positions.

The result is that any application to be allowed to appeal in a criminal case comes to this Committee labouring under a great preliminary difficulty, a difficulty not always overcome by the mere suggestion of hardship in the circumstances of the case; yet the difficulty is not invincible. It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose; but it may safely be said, that when the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted, or diverted into a new course, which might create a precedent for the future; and also where there is no other mean of preventing these consequences, then it will be proper for this Committee to entertain an Appeal, if referred to it for its decision.

The present case appears to fall within this category, on the allegations of both parties; on the one hand, it is clear that the Court below has directed a new trial in a case of felony; it is alleged that no such trial can be had according to the uniform practice in our Criminal Law; if this allegation be correct, it is obvious that an innovation has been made without authority, one of great importance, and establishing a precedent which may be expected to be frequently acted on. On the other hand, it is alleged that a serious departure has been made from the ordinary course of conducting a criminal trial before a jury; and if this be true, it is obviously of the last importance to prevent this for the future; and it has not been seriously contended on either side that any mode of redressing these alleged miscarriages exists but that which has been resorted to. Their Lordships therefore will not decline to entertain the present appeal; and they proceed accordingly to consider the

first ground on which it is rested—the grant of a new trial in a case of felony.

It is alleged, and, so far as their Lordships are aware, truly, that according to the universal impression among lawyers, no such power exists as that which the Court below has exercised in this instance; and further, that but a single case is reported in which an application for a new trial in felony has been made, and but one—the same case, of course—in which it has succeeded. That case occurred in 1851, and although, as is well known, the public attention has been very much drawn to the subject during the interval which has since occurred, and it cannot be doubted that verdicts have since been pronounced which might have seemed questionable, no attempt has been made in this country to press the authority of that case in support of a similar application. On a matter of so much importance, it is right to consider that case attentively, and it is fortunate as to the freedom with which their Lordships may deal with it, that two of them who have taken part in the hearing of this appeal, also took part in the decision then arrived at. The *Queen* v. *Scaife, Smith, and Rooke*, 17 Q. B. 238, was a case of an indictment for felony, found at the Hull Borough Sessions, and removed by *certiorari*. The trial was at the York Assizes before the late Mr. Justice Cresswell, and in the course of it a deposition of a living witness not produced, was tendered on the part of the prosecution; there were grounds which applied only to Smith, on which it was admissible as against him; the counsel for that prisoner objected to its reception, but the learned Judge overruled the objection, and rightly,—he admitted it, as is said, "subject to the objection;" the meaning of which probably was, that he might, upon consideration, have referred his ruling to the Court of Criminal Appeal. But in summing up he left the evidence generally to the jury, omitting to tell them that the deposition could affect Smith only. Singularly enough, the jury convicted Scaife and Rooke, and acquitted Smith. In the following Term a rule *nisi* was obtained for a new trial, on the grounds of improper reception of evidence and misdirection. The case was argued at some length, and neither in the course of the argument, nor in

the judgments which followed, was a syllable uttered on the point now in question; the attention both of the Counsel and the Judges seems to have been exclusively confined to the questions of evidence and misdirection; but after the judgments pronounced making the rule absolute this occurred: the counsel for the rule suggested that there was a difficulty in ascertaining what rule should be drawn up, "*no precedent having been found for a new trial in felony.*" Upon which Lord Campbell is reported to have said, "That might have been an argument against our hearing the motion." Still, however, the rule was made absolute, and a new trial, in fact, took place.

It appears, then, from this examination of the case, that a most important innovation in the practice of our Criminal Law was here made without a word of argument at the Bar upon it, or the attention of the Court having been for a moment addressed to it, until after the opinions of all the Judges had been expressed on the point really debated. And, as has been already stated, the decision has taken no root in our law, and borne no fruit in our practice. Are their Lordships to be bound by it in the advice they are now to tender to Her Majesty? It is somewhat embarrassing even apparently to disregard any judgment of the Court of Queen's Bench; but in truth, when examined this can scarcely be said to be a judgment *upon the point* now to be decided; substantially the Court decided, and decided rightly, the only question directly for consideration, namely, that of the reception of evidence and misdirection, and for that alone the decision is properly an authority. That they adhered to it in spite of the consequence involved, after it was pointed out to them, is true; and their Lordships now venture to say, to be regretted; for at all events it would seem, that if such an innovation were to be made, it should not have been made without argument or indirectly.

Their Lordships, therefore, will feel at liberty to consider the present case apart from this authority. The course of the general argument for the Respondent was of this sort:—It seemed not to be very seriously denied that, except for the precedent of the *Queen* v. *Scaife*, the Court below, in making absolute the rule for a new trial, had introduced a

new practice; but it was said that this was in analogy with the whole proceeding of our Courts of Justice in regard to new trials; that as to these, as in many other instances, a wholesome improvement in our law had been made and established; that this improvement had been made in the exercise of a wise discretion, and perhaps inherent powers, for the advancement of justice; that new trials had commenced in civil matters, and advanced in them gradually, and, upon consideration, from one class of cases to another; that thence they had passed to criminal proceedings first where the substance was civil, though the form was criminal, and thence to misdemeanours, such as perjury, bribery, and the like, where both form and substance were criminal. Hitherto, it was admitted that they had, except in the instance of the *Queen* v. *Scaife*, stopped short of felonies, but that the principle in all was the same; and that, where there was the same reason, the same course ought to be permitted. There may be much of truth in this historical account; and if their Lordships were to pursue it into details, it might not be difficult to show how irregular the course has been, and what anomalies, and even imperfections perhaps, still remain. But they need not do this; it is enough to say they cannot accept the conclusion: what long usage has gradually established, however first introduced, becomes law; and no Court, nor any more this Committee, has jurisdiction to alter it; but, on the same principle, neither the one nor the other can, in the first instance, make that to be law which neither the Legislature nor usage has made to be so, however reasonable, or expedient, or just, or in analogy with the existing law it may seem to be. In saying this, their Lordships desire to be understood as expressing no opinion that the introduction of new trials in felony would or would not be expedient, or conduce to a more just or more careful administration of the law.

The conclusion to which their Lordships have thus come on the power to grant the new trial makes it unnecessary for them to express any judicial opinion on the remaining point, whether, assuming the power to exist, it was exercised by the Court below on such insufficient grounds that, if the question were open, the rule could not be sustained. Nor do they intend to do so; but, as they

will have humbly to advise Her Majesty that the Respondent ought not to have the benefit of a new trial, and the verdict of guilty and sentence thereupon will consequently remain in force against him, it may be not improper to add a very few remarks on the course taken at the trial. They are bound to adopt, and willingly adopt, the account which the record gives, and it appears that what was done was done at the request of the Respondent and his counsel, and with the consent of the counsel for Her Majesty; the witnesses were before the jury, were asked, all in turn, whether what was read was true, and were submitted, at the pleasure of the counsel on either side, to fresh oral examination and cross-examination; and their Lordships have no doubt that the whole proceeding was conducted by the able and learned Judge who presided with due care for the interests of justice on both sides. In nothing that their Lordships shall say do they intend to make the slightest reflection on him, nor are they in a condition to say that any injustice to the Prisoner resulted from it. Yet it is one of the inconveniences of such a course, that no one in their Lordships' position, and called to review the proceeding, could be sure of the contrary. It is a mistake, moreover, to consider the question only with reference to the Prisoner. The object of a trial is the administration of justice in a course, as free from doubt or chance of miscarriage as merely human administration of it can be,—not the interests of either party. This remark very much lessens the importance of a Prisoner's consent, even when he is advised by Counsel, and substantially, not of course literally, affirms the wisdom of the common understanding in the profession, that a Prisoner can consent to nothing. For thus it will be seen that a most important consideration is forgotten,—that of the Jury charged with deciding on the effect of the evidence. It is essential that no unnecessary difficulty should be thrown in the way of their understanding and rightly appreciating it. The evidence in this case, taken in the usual way on the former trial, had occupied nearly three days. Those of their Lordships who have been used, on motions for new trials, to hear the Judge's notes of the evidence read, probably know well by experience how difficult it is to sustain

the attention, or collect the value of particular parts, when that evidence is long; and one cannot but feel how much more this difficulty must press upon twelve men of the ordinary rank, intelligence, and experience of common Jurymen. But this is far from all. The most careful note must often fail to convey the evidence fully in some of its most important elements,—those for which the open oral examination of the witness in presence of Prisoner, Judge, and Jury is so justly prized. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the Prisoner, when that has been important, upon the statement of anything of particular moment; nor could the Judge properly take on him to supply any of these defects; who indeed will not necessarily be the same on both trials; it is, in short, or it may be, the dead body of the evidence, without its spirit; which is supplied when given openly and orally, by the ear and the eye of those who receive it.

Their Lordships neither affirm nor deny that any of these inconveniences in fact happened on the trial of the Respondent. It is one of the evils incident to the cause that it makes such affirmation and denial equally impossible. They do not pronounce that anything amounting in law to a mistrial can be fairly charged on the course pursued. Neither, of course, do they intend to press their remarks in cases where a necessity exists (which is not alleged here), nor to the literal and entire exclusion of the reading any part of the evidence with the guards used on this occasion. The part may be so unequivocally formal, or so short, as to make their remarks inapplicable. But their Lordships do not hesitate to express their anxious wish to discourage generally the mode of laying the evidence before the Jury which was adopted on this trial. They have no doubt that upon an application on behalf of the Respondent, which they recommend to be made, to the proper authorities, such weight will be given to these remarks, as they may be found to deserve.

Their Lordships will advise Her Majesty that this Appeal should be sustained without costs, and that the order for a new trial should be reversed.