following question :—When the first new trial in a case of misdemeanor was had in England, was there any law that authorized the Court of Queen's Bench to grant it? I believe I am safe in saying that there was none. There being, then, no law, there must have been some principle, and, in my humble opinion, it must have consisted in this unlimited power inherent in the Court of Queen's Bench, to do what it considered necessary in the interests of justice. If these premises are well founded, I proceed to ask, as the Court granted a new trial in a case of misdemeanor for the first time, from the conviction that it had the right and the power to do so, why should it not grant a new trial in cases of felony? Why remedy a small evil, while it left the subject convicted of felony, no recourse? For there is no writ of error where it is a mere question of evidence. I say, then, that if the Court of Queen's Bench has the right to order a new trial in a case of misdemeanor of small importance, it has the right to order it in the more serious case of a felony. It is said that the Courts would constantly be assailed with applications, if new trials were allowed for felonies. But surely that is no reason for refusing to give an innocent man an opportunity of establishing his innocence. Then again, in civil cases, new trials are constantly granted; nor is the trouble imposed on the judges any consideration for refusing them.

But, it is urged, the Courts in England have always refused to grant a new trial in cases of felony. I must say, that in my opinion, this is no reason for continuing to refuse it. Many things have been for centuries refused, and then the old practice has been departed from. Is it not true, for instance, that in all Courts, counsel were prohibited from putting a question in cross-examination that did not proceed from the examination-in-chief? I remember the time myself. So at one time it was asserted that a jury could never be discharged after retiring to deliberate upon their verdict, nor could meat or drink be provided them, till they were agreed.

It is said that a man who has been convicted must go to the Executive and ask for a pardon. Now, I do not relish the idea that an innocent man must go upon his knees before the Governor-General, or the Attorney-General, and ask for a pardon. Besides, is there not something incongruous in a man saying, "I am innocent, but I want a pardon." There is another case to be mentioned. It might happen in times of high political excitement, such as I hope will never prevail in this country, that the Government might be desirous of getting rid of a formidable opponent, and if a conviction had been obtained against him, would not be inclined to grant a pardon. In Upper Canada a law exists allowing the Court to grant a new trial in cases of felony. Why have we not that law here? I answer, because the Judges have the power to grant a new trial without any special statute. I believe they did not require a statute in Upper Canada; but the people asked for a statute, thinking, perhaps, that the Judges might hesitate about granting a new trial.

MEREDITH, J.—The first point to be considered in this case, is as to whether the main question snbmitted to us, is one which, under the statute, could be reserved for our opinion.

Upon this subject there has been much difference of opinion upon the Bench in England, and as all the arguments on the one side and on the other, with respect to what questions may be reserved, will be found in the well known case of the Queen *v.* Miller,* I shall limit myself to a brief statement of the reasons which induce me to think that the question reserved *is* one which we have power to consider. The words of the law are very general. "The Court before which the case has been tried may, *in its discretion*, reserve *any question of law* which has arisen *on the trial* for the consideration of the said Court of Queen's Bench on the appeal side thereof." There can be no doubt that the question: Can there be a new trial in a case of felony, is "a question of law;" and I think that question may be said to have arisen "on the trial," because, to repeat the words made use of by Baron Rolfe (now Lord Cranworth) in the case of the Queen *v.* Martin,† "the word 'trial' ought to be taken in a liberal sense, and

*Dearsley & Bell, p. 468.
† 3 Cox C.C. p. 451.