The case of *Pomeroy*, appellant, and *Wilson*, respondent (26 U. C. R. 45), decides that the quarter sessions had no power to reserve for the consideration of this court, under Con. Stat. U. C. ch. 112, a case which has been appealed to that court under the statute allowing appeals to the quarter sessions.

The first section of that act enacts that, when any person has been convicted of treason, felony or misdemeanor, before any court of quarter sessions, the justices may reserve any question of law which arose at the trial for the consideration of the justices of either of her Majesty's superior courts of common law. The act respecting new trials in criminal cases is the next in the Con Stat., ch. 113, and the first section is, whenever any person has been convicted of any treason, felony or misdemeanor, before a court of quarter sessions, such person may apply for a new trial The language in the two statutes seems identical, and if the court of quarter sessions, when a case has been appealed cannot reserve any question of law for the consideration of the judges of either of the superior courts, I do not think the court could grant a new trial in such a case, under the authority of ch. 113.

Then has the court of quarter sessions power, of its own original jurisdiction, to grant a new trial on the merits in a matter of appeal. In the case of *The Queen* v. *Bertrand* (L R. 1 P. C. 526), in argument it is stated, "Granting new trials is a practice of comparatively modern date. The history of its introduction is to be found in *The King* v. *Mawbey*, 6 T. R. 619, which was a case of misdemeanor only. In a note to the case of *The King* v *The Inhabitants of the County of Oxford*, 13 East, 410, 415, it is stated that there is no instance of a new trial being granted in a capital case. All the authorities upon the point are collected there." In the cases referred to, it is stated in argument, and apparently assented to, that granting new trials formed no fact of the common law jurisdiction of the court, nor was it given by statute, but arose out of the imperious necessity of doing justice. There was no remedy formerly in civil cases but the attaint of the jury, which, in its nature, was no satisfaction to the party wronged; but even this did not extend to criminal cases. The first instance recorded in the books of a new trial granted, was in 1648 (referred to in 1 Burr. 394), and then it was observed it had been done before. If a defendant were unquestionably guilty, and the jury acquitted him, though there is a palpable failure of justice, yet the court cannot grant a new trial. On the other hand, if the defendant be convicted of felony or treason, though against the weight of evidence, there is no instance of a motion for a new trial in such a case; but the judge passes sentence and respites execution till application can be made to the mercy of the crown.

The case of *The Queen* v. *Scaife*, 17 Q. B. 238, an indictment for robbery removed by *certiorari* into the court of Queen's Bench, and tried at the Hull assizes, before Mr. Justice Cresswell, is the only recorded case where a new trial was granted in England in Felony. That case is expressly overruled by the Privy Council in *The Queen* v. *Bertrand*, above referred to.

In a note to *The King* v. *The Inhabitants of the County of Oxford*, 13 East, 416, it is stated, the authorities are unanimous that an inferior jurisdiction cannot grant a new trial upon the merits, but only for an irregularity, and this even in civil suits. Many of the authorities are there referred to. The same case in *East.*, implied, shews what has never yet been successfully contended for, as far as I am able to see, that the court of Queen's Bench will not issue a *certiorari* to remove an indictment for a misdemeanor and proceedings thereon at the assizes, after conviction and before judgment, sought for the purpose of applying for a new trial on the judge's report of the evidence, upon the ground of the verdict being against evidence and the judge's direction. In that case the motion was refused. If the judge of assize could have granted a new trial, there would have been no necessity for that application, and so astute a judge as Lord Ellenborough would have referred to that fact in his judgment; and the reporter Mr East, who adds many valuable notes and authorities to the case, a learned criminal lawyer, would have referred to such a power if it had existed.

The Court of Oyer and Terminer and General Gaol Delivery are not courts of inferior jurisdiction as to granting new trials, more than the courts of general quarter sessions. If those courts could not grant a new trial on the merits, I fail to see how the quarter sessions could. The fact that neither of the learned gentlemen who argued this case have been able to refer us to a single authority shewing that the quarter sessions could, independent of our statute on the subject, grant a new trial on the merits, satisfies me that the law must be, as I have always understood it to be, against such a power.

If such a power existed in ordinary cases, it may well be doubted if it would exist in exercising a statutory jurisdiction by appeal, when no such power is conferred by the statute.

We therefore come to the conclusion that the court of quarter sessions had no power to grant a new trial, or to order the conviction to be quashed with costs; and that the order granting a new trial and quashing the conviction must be quashed.

We make no order as to the court below issuing any process to enforce the conviction, as that is not sought for by the application now made to us; and if we were asked to do so, before issuing a mandamus we should require express authority to shew us that the quarter sessions would be bound to give effect to a verdict pronounced against the express direction of the court.

We think the learned chairman of the quarter sessions would have been warranted by the established practice at the assizes, in refusing to allow the party to call further witnesses, or his counsel to address the jury, after the undoubted established facts had clearly shewn, in the opinion of the court, that he had made out no case. It is unseemly to allow a counsel to address a jury, and to urge them to find a verdict against the ruling of the court, when the court itself will be obliged to tell the jury to find the other way. In such a contest the juries are in truth made the judges instead of the court, and the judge enters the arena as a contestant with the advocate for a favourable decision. Such displays are not calculated generally to assist in the ad-