Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Our Sovereign Lady the Queen v. *Murphy, from New South Wales; delivered* 17*th July*, 1869.

Present:

SIR WILLIAM ERLE.
LORD CHIEF BARON.
SIR ROBERT PHILLIMORE.
SIR JOSEPH NAPIER.

UPON this Appeal, it appears by the proceedings returned to this Court that the prisoner Murphy was tried for murder at a Session of Oyer and Terminer and Gaol Delivery for the month of September, before Mr. Justice Fawcett, and was convicted and sentenced; and all the proceedings, as far as appeared, were regular in due form of law.

Afterwards, an application on behalf of the prisoner upon an affidavit was made to the Supreme Court sitting in Banco, in term, for a rule to show cause why a *venire de novo* should not issue for the trial of the said prisoner, and, upon further affidavits, the said rule was made absolute; and therein it was also ordered that a suggestion should be made on the record to the effect that after the Jury had been empannelled, and before verdict, the jurors were allowed, during certain adjournments of the Court for the night, by the officers of the Sheriff having charge of them, to have access to and free perusal of certain newspapers containing reports of the evidence from day to day; and that the last-mentioned trial, by reason of the matters so suggested, was not according to law, but was irregular and void. This suggestion was followed by an entry, purporting to be an order, that, for the

cause aforesaid, the Judgment on the said verdict be vacated, and that the Sheriff cause a Jury anew to come.

It farther appears by the same proceedings above referred to that the only affidavit giving judicial knowledge to the Supreme Court of the alleged irregularity in keeping the jurors was that of the Attorney for the prisoner, who deposed, "That he was informed by one of the jurors who acted on the said trial, and he verily believed, that after they had been empannelled to try the said case, and during their confinement at the hotel (where they were kept during adjournments), and before verdict, the jurors were allowed the free use of the newspapers of the day which contained reports of the aforesaid trial as far as it had gone, in one of which newspapers the heading given was the 'South Creek Murder Case.'" These are the proceedings in the Courts below to which we think it necessary to advert as relevant to this Appeal.

Upon the argument in this Court the question has been whether the above mentioned Order for vacating the Judgment upon the verdict and for a *venire de novo* in order for another trial was valid, and their Lordships have come to the conclusion that the answer should be in the negative both on the ground which their Lordships relied upon in the case of R. *v.* Bertrand, and also on the further grounds stated below :—

1st. Their Lordships consider that the present case is in substance an attempt, by the exercise of a discretion, to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial.

In Bertrand's case the irregularity was that the evidence of the witnesses was read to the jury from the notes of the evidence on a former trial. Here the irregularity was in so keeping the jury during the course of the trial, as that the jurymen may have had access to some newspapers during that time: but the law is clear that the discretional power vested in certain Courts and cases to grant new trials does not extend to cases of felony. The law on this subject was declared by their Lordships in that case, and we consider that the law so declared governs the present case.

rules fail to produce any effect, and the conviction stands unimpeached thereby.

We do not examine the authorities cited for the Respondent, because none of them appear to us to sanction the notion that a verdict even in a civil case, could be set aside upon an imagination of some wrong without any proof of reality. The suggestions upon which verdicts have been so set aside in civil cases have alleged traversable facts, material and relevant, to show that the verdict had actually resulted from improper influence, and we refer to the special verdict reported in 11 H. 4, f. 17, as affording an example of such facts as would, if stated in a suggestion on the record, have had the effect of setting aside the verdict.

The case in the Year Book, 11 H. 4, 17, we translate as follows (the original is transcribed below in the note*) :—

"The Plaintiff in an assize had delivered an escrowment [writing to be used in case of need ?] to a juryman on the panell, for evidence of his matter; and after the same juror, with others, had been sworn, and put into a house to agree on their verdict, he showed the writing to his companions, and the officer who kept the enquest showed this matter to the Court, through which the Justices took the writing from the jurors, and took their verdict; and by the examining ("per l'apposaile") of the jurors the time of the delivery of the writing

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* "Le Plaintiff en assise livera un escrowmᵗ a un Juror empanell' pur evidence de son matter : Et puis mesme le Juror ove auters fuit jurus et mis en un meason d'accord de leur verdit, il monstr̃ m̃ l'escrowmᵗ a les comp̃. et le ministr̃. q̃ gard l'enq̃st monstra cest matter al Court per que les Justices pristr̃ le scrowm̃ᵗ des Jurors et pris-teront lour verdit, et per l'apposaile des Jurors le temps de livere del escrowment fuit enquis, et fuit trove ut supra et pur ceo q̃ le verdit passa pur le Plaintiffe, ove il pria son judgement. Gasc. et Hulls disoient, que le Jury apres ceo q̃ ils fuerent jur̃, ne devient veier, ne porter ovesqʒ eux nul autre evidence, sinon ceo que a eux fuit livere per le Court, et per le party mis en Court sur l'evidence monstre, et entant que ils fier̃ le contrary, ceo fuit suspicious per que il ne duist judgement aver. Et puis le Plaintiffe dit, que l'escrowement prova mesme l'evidence, que il mesme dona a eux al barre, per que il ne fuit cy male, come s'il nust parle en evidence et non allocatur, &c."

was inquired into, and it was found (*i.e.*, by the jurors) to be as above stated; and as the verdict was for the Plaintiff, now he prayed Judgment. Gascoigne and Hull said, that the Jury, after that they were sworn, ought not to see or carry with them any evidence, except that which was delivered to them by the Court, and by the party put in Court as the evidence shown; and inasmuch as they did the contrary, the Plaintiff ought not to have Judgment."

This case, with the words of Gascoigne and Hull, has been frequently referred to in abridgments and treatises by Brooke, Rolle, Hale, Viner, and others; but the general words of those Judges, as well as of Judges in general, are to be limited in some degree by reference to the facts of the case in respect of which they were spoken, and the issue of this case is not altered by transcription. We take one reference to this case, as an example, from Bro. ab "Gen. Issue," p. 85, thus:—

"After stating that an enquest must not take evidence privily, he adds:—"Et par Gascoigne et Hull s'ils preignent escrowe extra curiam et passent pur le Plaintiff, si ceo appiert sur examination par le Court, ceo est cause d'arrester le jugment."—(11 H. 4, 17.)

So that the result of the examination, viz., that the verdict was not "according to the evidence," but upon evidence taken out of Court, from one party without the assent of the other, appeared by the finding of the jury, and was upon the record, as Brooke understands the case, or the Judgment could not have been arrested.

The special verdict here reported may be contrasted with the suggestion in the present case.

In the case 11 H. 4, 17, the Court which had jurisdiction both to try the suit and to arrest the Judgment ascertained the fact of the misconduct of the Plaintiff by examining the jurors, while acting as jurors, and by their verdict. Judicial knowledge from this source is in contrast with the affidavit above described. Also the interest of a Plaintiff as a party may be contrasted with the supposed interest of the Queen (referred to in the Judgment of the Chief Justice in the Court below) in an indictment in which, although it runs in her

name, she has no interest beyond that of truth and right. Neither is the Sheriff her agent, as also there suggested: he emanates from the people, and is neither appointed by, nor can be dismissed by, nor is he paid by the Queen; furthermore, the mere omission of his Bailiffs to clear a room in an inn where jurors are confined, of the newspapers coming there by the course of the inn, is in contrast with the culpable craft of the Plaintiff who prepared a statement of his case, and sought out a juryman into whom he probably infused a prejudice in his favour, and so influenced the verdict.

In conclusion, their Lordships desire to add that they are sensible of the importance of guarding the channels for information through which the minds of the jury are led to their verdict, and concur with the Learned Judges of the Court below in their zeal for the prevention of any such misconduct in future; but they think that the Court was wrong in granting a new trial, as a remedy for this misconduct, and that the mischief would be greater if uncertainty was introduced respecting the course to be pursued in administering the law relating to charges of felony.

If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority, with whom rests the discretion either of executing the law or commuting the sentence. As there was, in the opinion of the Court below, irregularity in the trial of the Respondent sufficient to vacate the Judgment, their Lordships have no doubt that, upon proper application on behalf of the Respondent, which they recommend to be made, such weight will be given to these remarks as they may appear to deserve. But, as between the Appellant and Respondent, their Lordships will advise Her Majesty that the Appeal should be sustained without costs, and that the order for a new trial should be reversed.

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