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Sep. 1, 2, 3 & 4.

Sep. 13.

In re ROBERT EVAN SPROULE.

Habeas Corpus—Granted by Judge in Chambers—Appeal under sec. 51 Supreme and Exchequer Act—Writ improvidently issued—Jurisdiction of Court to quash—Control of Court over its own process—Criminal case under sec. 51—Supreme Court of British Columbia—Constitution of—Commission to Judge presiding over—Trial of prisoner in—Order to change venue—Provision for increased expenses—Practice.

Section 51 of the Supreme and Exchequer Court Act (1) does not interfere with the inherent right which the Supreme Court of Canada, in common with every superior court, has incident to its jurisdiction to enquire into and judge of the regularity or abuse of its process, and to quash a writ of *habeas corpus* and subsequent proceedings thereon when, in the opinion of the court, such writ has been improvidently issued by a judge of said court. The said section does not constitute the individual judges of the Supreme Court of Canada separate and independent courts, nor confer on the judges a jurisdiction outside of and independent of the court, and obedience to a writ issued under said section cannot be enforced by the judge but by the court, which alone can issue an attachment for contempt in not obeying its process. (Fournier and Henry JJ. dissenting.)

Per Strong J.—The words of section 51 expressly giving an appeal when the writ of *habeas corpus* has been refused or the prisoner remanded, must be attributed to the excessive caution of the legislature to provide all due protection to the subject in the matter of personal liberty, and not to an intention to deprive the court of the right to entertain appeals from and revise, rescind and vary orders made under this section.

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* PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Taschereau JJ.

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(1) Section 51 of the Supreme and Exchequer Courts Act provides that "any judge of the Supreme Court shall have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada, * * * and if the judge shall refuse the writ or remand the prisoner an appeal shall lie to the court."

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The right to issue a writ of *habeas corpus* being limited by section 51 to "an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case at common law. (Fournier and Henry JJ. dissenting.)

Per Fournier and Henry JJ. dissenting.—The restriction imposed by section 51 to "an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada" is merely intended to exclude any enquiry into the cause of commitment for the infraction of some provincial law; and the words "in any criminal case" were inserted to exclude the *habeas corpus* in civil matters; it is sufficient to give jurisdiction if the commitment be in virtue of an Act of the Parliament of Canada.

Query—Is section 51 of the Supreme and Exchequer Court *ultra vires?*

Semble, that when a judge in a province has the right to issue a writ of *habeas corpus* returnable in term as well as in vacation, a judge of the Supreme Court might make the writ he authorizes returnable in said court in term as well as immediately. (Fournier and Henry JJ. dissenting.)

An application to the court to quash a writ of *habeas corpus* as improvidently issued may be entertained in the absence of the prisoner. (Henry J. dissenting.)

After a conviction for a felony by a court having general jurisdiction over the offence charged, a writ of *habeas corpus* is an inappropriate remedy.

If the record of a superior court, produced on an application for a writ of *habeas corpus*, contains the recital of facts requisite to confer jurisdiction it is conclusive and cannot be contradicted by extrinsic evidence. (Henry J. dissenting.)

A return by the sheriff to the writ setting out such conviction and sentence and the affirmation thereof by the court of error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff. (Henry J. dissenting.)

The Supreme Court of British Columbia is clothed with all the powers and jurisdiction, civil and criminal, necessary or essential to the full and perfect administration of justice civil or criminal, in the province; powers as full and ample as those known to the common law and possessed by the superior courts of England.

The various statutes of British Columbia providing for the holding of Courts of Oyer and Terminer and General Gaol Delivery render unnecessary a commission to the presiding judge.

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Per Strong J.—The power of issuing a commission, if necessary, belonged to the Lieutenant Governor of the province. (Henry J. *contra.*)

An order made pursuant to Dominion Statute 32 and 33 Vic. ch. 29 sec. 11, directing a change of venue, would be sufficient although containing no reference to any provision for expenses, when the indictment has been pleaded to and the trial proceeded with without objection, and even in a court of error there could be no valid objection to a conviction founded on such order.

Even if the writ of *habeas corpus* in this case had been rightly issued, the prisoner on the materials before the Judge was not entitled to his discharge, but should have been remanded.

MOTION to quash a writ of *habeas corpus* issued by Henry J. in chambers as being improvidently issued.

The material facts presented to the court on the motion are as follows:

In June, 1885, a murder was committed in the District of Kootenay, B.C., and Robert Evan Sproule was charged with the commission of the crime and committed for trial. On the application of the Attorney General of the province, an order was made by the Chief Justice of the Supreme Court of the province to change the venue from Kootenay to the District of Victoria, which order was in the following words:

BRITISH COLUMBIA. }
To wit: }

Whereas it appears to the satisfaction of me, Matthew Baillie Begbie, Chief Justice of the Supreme Court of British Columbia, a judge who might hold or sit in the court at which Robert E. Sproule, a prisoner, now confined in New Westminster gaol, under a warrant of commitment given under the hand and seal of Arthur W. Howell, one of Her Majesty's justices of the peace in and for the Province of British Columbia, is liable to be indicted for that he, the said Robert E. Sproule, did on the first day of June, A. D. 1885, feloniously, wilfully and of his malice aforethought, kill and murder one Thomas Hammill; that it is expedient that the

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trial of the said Robert E. Sproule should be held in the city of Victoria (being a place other than that in which the said offence is supposed to have been committed);

I do order that the trial of the said Robert E Sproule shall be proceeded with at the Court of Oyer and Terminer and General Gaol Delivery, to be holden at the city of Victoria, and I do order the keeper of the New Westminster gaol to deliver the said Robert E Sproule to the keeper of the gaol at Victoria city, and I do order and command you the keeper of the said gaol at Victoria city, to receive the said Robert E. Sproule into your custody in the said gaol, and there safely keep him until he shall be thence delivered by due course of the law.

Dated at Victoria, this 13th October, 1885.

(Signed) MATT. B. BEGBIE *C.J.*

The prisoner was then indicted and tried at Victoria, found guilty, and sentenced to death. A writ of error was subsequently granted and a return made to the Supreme Court of British Columbia. In making up the record on the writ of error it appeared that the order to change the venue contained no provision for payment by the Crown of increased expenses to the prisoner in holding the trial at Victoria, and the Chief Justice thereupon signed the following order:

CANADA,
Province of British Columbia.

REGINA V. ROBERT E. SPROULE.

At the City of Victoria, Tuesday the thirteenth day of October, A.D 1885.

Upon motion of Mr. P. Æ. Irving, of counsel for the Crown, in the presence and hearing of Robert E. Sproule, a person charged with and committed to stand his trial for having on the 1st day of June, A.D. 1885, at Kootenay Lake, in the bailiwick of the sheriff of

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Kootenay, in the Province of British Columbia, feloniously, wilfully, and of his malice aforethought, killed and murdered one Thomas Hammill;

And upon hearing Mr. Theodore Davie, of counsel for the said Robert E. Sproule, and it appearing to my satisfaction that it is expedient to the ends of justice that the trial of the said Robert E. Sproule, for the alleged crime, should be held at the city of Victoria;

And Mr. Irving now undertaking on behalf of the Crown to abide by such order as the judge who may preside at the trial may think just to meet the equity of the eleventh section of 32-33 Vic. cap. 29, intituled: "An Act respecting procedure in criminal cases, and other matters relating to criminal law," such being the conditions which I think proper to prescribe;

I, Sir Matthew Baillie Begbie, Knight, Chief Justice of British Columbia, and being a judge who might hold or sit in the court at which the said Robert E. Sproule is liable to be indicted for the cause aforesaid, do hereby order that the trial of the said Robert E. Sproule shall be proceeded with at the city of Victoria, in the said province, at the Court of Oyer and Terminer and General Gaol Delivery, to be holden at the said city, on Monday the 23rd day of November, 1885, next.

And I order that the said Robert E. Sproule be removed hence to the gaol at the City of Victoria, and that the keeper of the said gaol do receive the said Robert E. Sproule into his custody in the said gaol, and him safely keep until he shall thence be delivered by due course of law.

(Signed) MATT. B. BEGBIE C.J.

This order was placed in the record as the order for change of venue. The counsel for the prisoner alleged diminution of the record on the ground that this order was not the true order made for change of venue, and was not in existence at the time of the trial; and, also,

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that an application which he had made at the close of the trial for the polling of the jury should appear on the record. Both these points were overruled by the court.

The substantial matters of error assigned upon the record, and argued before the full court, were :

1. That the indictment did not show the alleged offence to have been committed within the jurisdiction of the court, or within the realm at all, the only venue which appeared being "British Columbia, to wit," which, since the province was divided into judicial districts, was no venue.

2. That there was no valid order to change the venue, and the Court of Oyer and Terminer at Victoria had no authority to try the prisoner ; and

3. That the court was held under a commission from the Lieutenant Governor of the province, and was not a properly constituted court, as the Governor General only could issue the commission.

These grounds of error were all overruled by the unanimous decision of the court, and the prisoner was remanded to gaol.

The counsel for the prisoner then applied to Mr. Justice Henry, of the Supreme Court of Canada, for a writ of *habeas corpus*, and the learned judge granted the following *rule nisi :*

IN THE SUPREME COURT OF CANADA.

Monday the 3rd day of May, A.D. 1886.

Upon hearing Mr. D'Alton McCarthy Q.C. as of counsel for Robert Evan Sproule, and upon reading the affidavits of Theodore Davie filed respectively on the 3rd May, 1886,

I do order that the sheriff for Vancouver Island, James Eliphlet McMillan, Esquire, do show cause before me, at my chambers, at the Supreme Court house, in the city of Ottawa, on Saturday, the twenty-second day of

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May instant, why a writ of *habeas corpus ad subjiciendum* should not issue to the said sheriff requiring him to bring before the court the body of the said Robert Evan Sproule—together with the day and cause of his detention, and why in the event of this order or rule being made absolute, or the writ being allowed the said Robert Evan Sproule should not be discharged without the writ of *habeas corpus* actually issuing and without the prisoner being personally brought before the court.

(Signed) W. A. HENRY.
A Judge of the Supreme Court of Canada.

On the return of the rule *nisi* McCarthy Q.C. and Theodore Davie appeared for the prisoner, and Burbidge Q.C. and J. J. Gormully for the Crown, and the same grounds were taken and argued as had previously been urged before the Supreme Court of British Columbia on the writ of error, the counsel for the Crown contending, in addition to the points involved in the case itself, that as there was no appeal from the decision on the writ of error, the court being unanimous, the prisoner should not be allowed to take this proceeding, which was virtually an appeal, and so evade the statute.

His Lordship having heard the argument ordered the issue of the writ of *habeas corpus* delivering the following judgment:

HENRY J.—This is an order to show cause why a writ of *habeas corpus ad subjiciendum* should not issue to the sheriff of Vancouver Island, British Columbia, to bring up the body of the above named Robert Evan Sproule, together with the day and cause of his detention in the custody of the said sheriff, and why, in the event of the allowance of the said writ, the said Robert Evan Sproule should not be discharged from the said custody without the actual issue of the said writ or the

attendance of the said Robert Evan Sproule before me.

The order was duly served upon the sheriff of Vancouver Island and upon the Attorney General of British Columbia; and on the argument before me, on the twenty-fifth and twenty-sixth days of May last past, cause was shown on behalf of the Crown against the discharge of the prisoner.

The argument on both sides was able and exhaustive, and my labor and inquiry much less than would otherwise have been necessary.

Having since been occupied, however, in the hearing of arguments in term or session of the court, and in delivering judgment in other cases in court, I have not been able to prepare my judgment at an earlier date.

The case is a novel one, particularly in the Dominion, and required, and has had, my best consideration.

The judges of the Supreme Court of Canada derive their authority in regard to writs of *habeas corpus ad subjiciendum* from the 51st section of the Supreme and Exchequer Court Act of the Dominion, passed in 1875, which is as follows:

> Any judge of the Supreme Court shall have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada * * *

The Supreme Court of British Columbia has complete cognizance of all pleas whatsoever, "and has "jurisdiction in all cases, civil as well as criminal, aris- "ing within the said colony of British Columbia." That court has, and its judges have, full jurisdiction in respect of the writ of *habeas corpus ad subjiciendum* and the judges of this court have, therefore, under the 51st section I have cited, the same jurisdiction.

Having then such jurisdiction the next inquiry is as to its applicability to the circumstances of this case.

It is not appellate but original, deriving its power

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and authority from the section before-mentioned.

In such a case we cannot, in any way, review the decision of a court of competent jurisdiction, but must confine our consideration to the question of jurisdiction over the subject-matter in question, exercised by a court, and resulting in the conviction and sentence of a person charged with a criminal offence. If the court before whom the prisoner in this case was tried and convicted had the necessary jurisdiction I cannot interfere. This position was taken on the argument and well sustained by binding authorities.

The authorities go, however, as effectually to sustain the proposition that when ascertaining the cause of the commitment of a prisoner it is shown that the court had no jurisdiction to try and convict him he is entitled by law to his discharge. The law has provided the mode and manner for trying parties accused of crimes and the courts before whom they are to be tried; and no one can be legally sentenced unless tried and convicted by competent authority and according to law. If any necessary link in the chain to constitute jurisdiction be wanting no one can be legally punished. If the judge who presides at a criminal trial be without proper authority in regard to such a trial the conviction is a nullity, and so in all other cases where, from any cause, there was not jurisdiction, and when such want of jurisdiction is made to appear, it must necessarily result in the discharge of the convicted party.

Numerous authorities might be cited to sustain that proposition.

I cannot in this connection do better than quote from the judgment of Chief Justice Cockburn in *Martin* v. *Mackonochie* (1).

It seems to me, I must say, a strange argument in a court of justice to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by

(1) 3 Q. B. D. at page 775.

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dealing summarily with a defendant, the proceedings should be upheld. In a court of law such an argument *a convenienti* is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done but whether justice has been done according to law. All proceedings in pœnam are, it need scarcely be observed, *strictissimi juris;* nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended, on the whole, to insure the safe administration of justice and the protection of innocence, and must be observed.

A party accused has the right to insist on them as a matter of right, of which he cannot be deprived against his will; and the judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect it is for the legislature to amend it. The judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself * * *. The law constitutes a given act an offence. As such it attaches to it a given punshisment. But it prescribes a plenary course of procedure by which, if at all, the offence is to be brought home to a party charged with having committed it. If a court having jurisdiction over the offence takes upon itself to substitute a different and more summary method of proceeding, surely this is to make the court, as it were, supersede the law.

The prisoner was indicted at Victoria and tried there under an indictment which is as follows:

BRITISH COLUMBIA. }
To wit: }

The jurors for our Lady the Queen upon their oath present that Robert E. Sproule, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-five, feloniously, wilfully and of his malice aforethought, did kill and murder one Thomas Hammill, against the peace of our Lady the Queen, her Crown and dignity.

The homicide of Hammill took place at or near to Kootenay, in British Columbia, distant from Victoria about seven hundred miles. The province was, by several Acts of its legislature, the last of which was in 1885,

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divided into judicial districts or circuits; and courts of assize and *nisi prius*, and of oyer and terminer and general gaol delivery, were provided to be held at each of the undermentioned places, at the times mentioned in the Act, that is to say, at the city of Victoria, at the city of Nanaimo, at the city of New Westminster, and at other places, including the bailiwick of Kootenay.

Before the trial it is shown by affidavit that an order for a change of venue to Victoria was made, and signed by the learned Chief Justice of British Columbia. That order was subsequently considered, and no doubt properly, defective, as it made no provision, as required by the statute, for such conditions as to the payment of any additional expenses thereby caused to the accused as the court or judge may think proper to prescribe. The prisoner, previous to the making of that order, was in custody for a crime alleged to have been committed by him within the bailiwick of the sheriff of Kootenay, but was taken by some process, the nature of which does not appear, before the learned Chief Justice; and, by his order before referred to, committed for trial to the custody of the sheriff of Vancouver, where he was during the trial and now is. It has been satisfactorily shown by affidavit that the only order for a change of venue in existence at the time of the trial of the prisoner was the one beforementioned. If that order is defective, then the trial of the prisoner was without authority.

By law, the trial should have been had in the bailiwick where the homicide took place, unless the venue for the trial was changed as by law prescribed and required. The right of the court or a judge to order a change of venue in a criminal case is upon the condition following: "But such order shall be made upon such "conditions as to the payment of any additional expense "thereby caused to the accused as the court or judge

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"may think proper to prescribe."

When it may be the case that a prisoner charged with an offence is without means to provide for his defence at a place distant from the ordinary place of trial, to change the venue without at the same time making provision for the additional expense would practically prevent him from making any defence, and the order for doing so would be manifestly unjust.

The legislature has therefore properly and humanely provided that the court or a judge, meaning no doubt the court or judge making the order, shall consider all the circumstances in relation to the change of venue, and make the order conditional upon the payment of any additional expense thereby caused. The statute requires the court or a judge to decide in his discretion "as to the payment of any additional expense." The trial in this case took place six or seven hundred miles from Kootenay, and the prisoner before being tried had the right to the opinion and decision of the judge as to the amount to be previously paid to him. I say previously paid, because, for good and palpable reasons, the statute has clearly made the decision of the judge and the payment of the additional expense as settled by him conditions precedent to the operation of the order. Those conditions not having been prescribed a peremptory order was made which I think was wholly unwarranted and void.

I have considered this matter from the position shown in the affidavits read on behalf of the prisoner, made by Theodore Davie, Esquire, counsel of the prisoner, who, in one of them says: "That the order in the above "matter as drawn up and in existence at the time of "the trial of the said Robert Evan Sproule, referred to "in the affidavit of James E. McMillan filed herein on "the 22nd of May instant, was in the words and "figures of the document hereunto annexed and marked

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"A, and not otherwise." Annexed to that affidavit is the copy of the order purporting to have been made on the 13th October, 1885, by the learned Chief Justice of British Columbia; and it contains no reference whatever to the matter of the additional expenses of the prisoner. In another affidavit, which is referred to in the order herein, the same deponent stated that on the 13th day of October, 1885, the said Robert Evan Sproule was brought in custody before His Lordship the Hon. Sir Matthew Baillie Begby, Chief Justice of the Supreme Court of British Columbia, at the Supreme Court house at the city of Victoria aforesaid, whereupon an application was made on behalf of the Crown, the result of which was that an order was made by the said Chief Justice, and drawn up and signed by him, directing the trial to proceed at the city of Victoria, instead of at Kootenay, without imposing any terms or conditions. Accompanying the last-mentioned affidavit a verified copy of the record of the trial was produced, and in that affidavit the said Theodore Davie further says: The order for "change of venue set out in the second and third pages "of the said exhibited copy record, was not in existence "at the time of the trial and sentence, but was drawn up "and signed and issued subsequently. Before proceed-"ing to assign errors upon the record, I alleged a diminu-"tion of the record and applied for a *certiorari* upon my "own affidavit, showing that the order for change of "venue set out in the record was not the true one, or in "existence at the time of the trial and judgment *
" * * The court after hearing argument "overruled the same."

Here then the error alleged was brought by affidavit to the notice of the court, but the allegations of error were overruled. Should they have been if the facts are truly stated in the affidavits referred to? The court was asked to correct the record for the reasons alleged,

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but declined to do so without showing in its judgment why. I have, however, been furnished with the reasons of the learned judges in a report of the argument, and, strange to say, the allegation that the order for the change of venue as appearing in the record was made up after the trial and sentence of the prisoner is not referred to. The fact is neither admitted nor denied. The order purports to have been made and signed by the learned Chief Justice. If so made he was in a position to affirm or deny the allegation. It purports to have been made on the 13th of October, 1885, the same date with the order shown by the affidavit of Mr. Davie to have been made and signed on that day. If two orders were made on that day the fact could easily and should have been shown. When delivering judgment in the matter the learned Chief Justice said: "We are all of opinion that the order of the 13th October, "1885, for the removal of the trial to Victoria was a "good and proper order under sec. 11 of the Canadian "Procedure Act, 1869, ch. 29, and that the condition as "to costs was an expedient and sufficient condition." The learned Chief Justice then dealt with a contention of Mr. Davie, that the statute only applied to a case of change of venue after an indictment found, but made no reference to the allegation under oath of Mr. Davie, that although it appeared as if made on the 13th October, 1885, it was not in fact made or in existence till after the trial and sentence. I can hardly think any respectable counsel, or any other sane person, would have the temerity to make such a statement to the court, if unfounded, when he knew one of the learned judges must know that it was so, but the allegation having been made, and not in any way contradicted, the truth of it must be assumed. The reference of the Chief Justice is to the order appearing in the record, but he does not say that it was made before the trial, and

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therefore does not contradict the statement otherwise of Mr. Davie in regard to it. Whether the record must be received as conclusive is, however, another matter, and one I will hereafter deal with. If, then, the order as shown in the record was not made before the trial, some one is answerable for antedating it or the record assigned a wrong date to it. There can be no reasonable doubt that two orders were in fact made, the one last referred to, as I think, being intended to supply what was considered a fatal defect in the previous one. It would be absurd to say that an order, made after the trial held in a wrong place, could relate back and give jurisdiction where none existed when the trial took place. It would be like the case of an execution for murder without a conviction.

I have already given it as my opinion that the order alleged to have been first made was defective, and, as I find that the other was not made till after the trial and sentence, I think the trial of the prisoner was improperly and illegally removed to Victoria; but should I be wrong in my conclusion that the order set forth in the record was not made till after the trial, I will consider the question of its validity if made, as it purports to have been, on the 13th October, 1885. After setting out that it appeared to the satisfaction of the learned Chief Justice, who made it, that it was expedient to the ends of justice that the trial of the said Robert Evan Sproule for the alleged crime should be held at the city of Victoria, His Lordship ordered as follows:

And Mr. Irving now undertaking on behalf of the crown to abide by such order as the judge who may preside at the trial may think just to meet the equity of the eleventh section of the 32 & 33 Vic. chap. 29, intituled "An Act respecting procedure in criminal cases and other matters relating to Criminal Law": Such being the conditions which I think proper to prescribe, I, Sir Matthew Baillie Begbie, Knight, Chief Justice of British Columbia, and being a judge who might hold or sit in the court at which the said Robert Evan

Sproule is liable to be indicted for the cause aforesaid, do hereby order that the trial of the said Robert E. Sproule shall be proceeded with at the city of Victoria, in the said province, at the Court of Oyer and Terminer and General Gaol Delivery, to be holden at the said city on Monday the 23rd day of November, 1885."

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Is that then a valid order within the terms of the statute that requires the court or the judge that makes the order to prescribe, and by which to settle, the conditions as to the payment of the additional expense? The statute gave no power of delegation to the court or a judge. The allowance of additional expenses might be to enable a prisoner to secure the attendance of witnesses for his defence, and a poor man would require provision to be made for their attendance by the judge who makes an order of the kind. To postpone the consideration until the trial would, in some cases, be a virtual denial of that which the statute has provided for. The wrong would be done, and if the prisoner should have been convicted what benefit, as to the trial, would be an order from the presiding judge for additional expenses? The clear intention of the provision, was to put the prisoner in no worse pecuniary position as to his trial, in the case of a change of venue. The court or judge applied to for an order for that purpose should, on proper and necessary inquiry, decide as to the amount, if the inquiry satisfied him additional expense would be incurred, and insert it in the order; and having done so, the payment should be considered a condition precedent to the operation of the order.

In no other way could the interests of a prisoner be sufficiently protected, for if once removed he would have no security that the additional expenses would be furnished to him in sufficient time before his trial, and he should not be left to depend on the undertaking of any irresponsible person. In this case the learned judge seems to have made no inquiry whatever before

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making the order. He decided nothing as to the matter, but made the order upon Mr. Irving's undertaking, on the part of the Crown, to abide by an order to be subsequently made by the judge who might preside at the trial.

A judge's order of such a character is, I consider, void, and must be so considered in all cases where the terms upon which the statute allows it to be made are not fulfilled, and where the judge does not himself first do what the statute enjoins as necessary to give him jurisdiction over the subject-matter. A party accused of the committal of a crime is required, by the law, to be tried in the bailiwick where it is alleged to have been committed. The grand jury there are to find an indictment against him before he can be put on his trial, and twelve good and lawful men of that bailiwick form a necessary part of the tribunal. If the order for the change of venue is defective, as I in this case hold it is, the grand jury of no other place could find a bill of indictment against him, and no other petit jury could legally be empanelled to try him.

Chief Justice Cockburn, in his remarks in the case before-mentioned, and which I repeat, says:

> And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law, and to the end of justice, is as much part of the law as the substantive law itself.

It was when deciding upon a rule, calling on Lord Penzance, the official principal of the Arches Court of Canterbury, and J. Martin, to shew cause why a writ of prohibition should not issue to prohibit the said court from publishing, proceeding with, or enforcing a decree of suspension *ab officio et beneficio* made against the Rev. Alexander H. MacKonochie, clerk, in a suit *Martin* v. *MacKonochie*, such decree being one which was made without jurisdiction. It was contended, and admitted,

that the Arches Court had jurisdiction over cases of the kind in question, but only at the request of the Diocesan Court, and that no such request was shown. The writ of prohibition was granted because of the want of jurisdiction in the Court of Arches.

In this case, I think, for the reasons I have given, there was no jurisdiction to try the prisoner at Victoria.

I will now consider whether or not it is permissible, in a case like the present, to contradict the record.

It is well understood that in a great variety of cases the record of a court of competent jurisdiction is not only conclusive evidence of the facts stated therein but in many cases the only proof; still, where the jurisdiction is impeached it appears to me that the mere statements in a record, by which jurisdiction is shown, should not prevail where evidence by affidavit shows conclusively that the statements are erroneous. The question of jurisdiction in a proceeding like this being raised, I think, for the true and proper determination of that question, evidence should be admitted to show that there was really no jurisdiction. To state perhaps an extreme case; should a man be hanged or punished when it could be shown by extrinsic evidence that the tribunal had no authority to try or convict him? In *Crepps* v. *Durden et alio*, (1) we find it stated:

> But a question has occasionally arisen, whether in cases where the justices have proceeded without jurisdiction, and have, nevertheless, stated upon the face of the conviction matter showing a jurisdiction, it be competent to the defendant to prove the want of jurisdiction by affidavit.
>
> It certainly appears desirable that the court should have the power to entertain the question of jurisdiction. Some cases might easily be suggested where not only great private but great public inconvenience might arise from leaving an invalid order or conviction unreversed, and great injustice might be caused by allowing justices, out of or in sessions, by making their order or conviction good upon the face of it, to give themselves a jurisdiction over matters not entrusted to them by law.

(1) See 1 Smith's Leading Cases, p. 740.

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At page 241 of the same book we find it said:

Supposing that the court below cannot be compelled by *mandamus* to show the defect of jurisdiction upon the record, the next question is, will the court above allow evidence of such defect of jurisdiction to be laid before it by way of affidavit on the record being brought before it by a writ of certiorari?

In *R.* v. *St. James, Westminster* (1) it was remarked by Mr. Justice Taunton (a judge whose *obiter dicta* are always worthy of the greatest attention) that this had been constantly done. In *R.* v. *The Inhabitants of Great Marlow* (2) an appointment of overseers, good on the face of it, was allowed to be questioned by affidavit on the ground of a defect of jurisdiction and was finally quashed.

The court in that case had taken time to consider as to the practice with regard to receiving the affidavit, and Mr. Justice Laurence mentioned several cases in which that course had been pursued. In the case of *R.* v. *Justices of Cheshire* (3) the question was a good deal discussed; and it seems to have been admitted that affidavits might be looked at for the purpose of showing a defect of jurisdiction. It cannot be disputed "said Mr. Justice Coleridge in the latter case" that there are many cases in which affidavits may be looked at in order to ascertain whether there was jurisdiction or not; for suppose an order made which was good on the face of it, but which was not made by a magistrate, it is clear that this fact may be shown to the court.

And it seems to be settled by the later cases that a defect of jurisdiction may be shown by affidavit, though the proceeding is so drawn up as to appear valid on the face of it.

See the judgments in *Regina* v. *Bolton* (4); *The Westbury Union Case* (5); *in re Penny* (6) and other cases.

At page 743 Mr. Smith says:

It should seem that the Queen's Bench Division will on *certiorari* entertain affidavits where the conviction is good on the face of it, —not only to show that preliminary matters required to give the justice jurisdiction to enter upon an enquiry into the merits of the case were wanting, see *R.* v. *Bolton* (7); *R.* v. *Badger* (8); *R.* v. *Wood* (9); *R.* v. *Justices of Totness* (10); the judgments in *R.* v. *St. Olave's District Board* (11); and *in re Smith* (12)—or that circum-

(1) 2 A. & E. 241.
(2) 2 East 244.
(3) 1 P. & D. 23; 8 A. & E. 400.
(4) 1 Q. B. 66.
(5) 4 E. & B. 314.
(6) 7 E. & B. 660.
(7) 1 Q. B. 66.
(8) 6 E. & B. 17.
(9) 5 E. & B. 49.
(10) 2 L. M. & P. 230.
(11) 8 E. & B. 529.
(12) 3 H. & N. 227.

stances appeared in the course of the inquiry which ousted his jurisdiction, *R.* v. *Nunneley* (1); *R.* v. *Cridland* (2); *R.* v. *Backhouse* (3); *R.* v. *Stimpson* (4), but also that there was no evidence to prove some fact, the existence of which was essential to establish the offence charged.

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It seems also to be well settled by judgments in the United States that where it is shown that jurisdiction over the subject-matter did not exist the statements of facts in a record of the highest court might be inquired into by affidavit on the ground that if there was not jurisdiction there was no legal record. I will refer to a few out of a great many authorities that might be cited.

In *Davis* v. *Packard* (5) in the Court of Errors, the Chancellor speaking of domestic judgments, says:

> If the jurisdiction of the court is general or unlimited both as to parties and subject-matter it will be presumed to have had jurisdiction of the cause unless it appears affirmatively from the record, or by the showing of the party denying the jurisdiction of the court, that some special circumstances existed to oust the court of its jurisdiction in that particular case.

In *Bloom* v. *Burdick* (6) Bronson J. says:

> The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void in whatever court it was rendered.

And in *People* v. *Cassels* (7) the same judge says:

> That no court or officer can acquire jurisdiction by the mere assertion of it or by falsely alleging the existence of facts upon which jurisdiction depends.

In *Harrington* v. *The People* (8) Paige J. expresses the opinion that the jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. He repeats the same view in *Noyes* v.

(1) E. B. & E. 853.
(2) 7 E. & B. 352.
(3) 30 L. J. M. C. 118.
(4) 4 B. & S. 30.
(5) 6 Wend. 327-332.
(6) 1 Hill 130.
(7) 5 Hill 164.
(8) 6 Barb. 607.

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Butler (1) and in *Hard* v. *Shipman* (2) where he says of inferior as well as superior courts, that:

> The record is never conclusive as to the recital of a jurisdictional fact and that the defendant is always at liberty to show a want of jurisdiction although the record avers the contrary—and that if the court had no jurisdiction it had no power to make a record.

The English cases which I have cited are those before justices; but on principle I can see no difference between a judgment of an inferior and one of a superior court, when the question of jurisdiction is raised, nor can I see why, if the record of the former can be shown to be erroneous or false as touching the matter of jurisdiction the other cannot be; for without jurisdiction the acts of one must be void as well as those of the other, and therefore the rule in the one case should be the same as in the other; and in the cases I have consulted in the courts in the United States the rule is applied to their highest courts.

I could suggest many cases in which serious wrong and injury might result if the jurisdiction of a court could not be attacked by evidence outside of the record, and in contradiction of it, showing the total want of jurisdiction. Suppose that there was no question that a commission of oyer and terminer and general goal delivery was necessary, and a judge undertook to try an accused person for high crime, and the record showed that he had a legal commission authorizing him in the premises but the fact was that no such commission was ever issued or held by him, and that the accused was convicted, and sentenced possibly (as in this case) to forfeit his life, would it not be a gross prostitution of the principles of common justice to shut out evidence tendered to show that the judge acted without a commission, and therefore without any jurisdiction. On the same principle, evidence to show that for any other reason he had not jurisdiction should not be

(1) 6 Barb. 613. (2) 6 Barb. 621, 623.

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rejected. It is proper to explain in this connection, that a copy of the record was submitted, and referred to in the affidavit on behalf of the prisoner, when the order *nisi* was applied for, and another copy was returned by the sheriff of Vancouver, and put in by the Crown when showing cause against the order. It was, therefore, by both parties, made a part of the case submitted for my decision, and although the proceedings were not removed by *certiorari* the consideration of it as to the question of jurisdiction was legitimately submitted.

Other objections to the jurisdiction were raised and debated, to which I need not give the same amount of consideration that I would feel it necessary to do in case my decision depended on the correct solution of them.

I will, however, deal with one of them, and refer to the others. The learned judge before whom the prisoner was tried acted by authority of a commission of oyer and terminer and general gaol delivery, issued by the Lieutenant Governor of British Columbia and the commission is set out in the returns. The latter named high functionary was then acting under a commission from the Governor General, under the Imperial Confederation Act of 1867. That commission "authorizes, "empowers, requires and commands the Lieutenant "Governor in due manner to do and execute all things "that shall belong to his said command, and the trust "reposed in him, according to the several powers and "directions granted, or appointed him, by virtue of the "present commission, and of the British North "America Act, 1867, and according to such instructions "as were therewith given to him, or which might, "from time to time, be given him in respect of "the said province of British Columbia, under the "sign manual of the Governor General of Canada, or by

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"order of the Privy Council of Canada, and according "to such laws as were, or should be, in force within the "province of British Columbia." The Governor General's commission authorizes him "to constitute and appoint "judges, and, in case requisite, commissioners of "oyer and terminer, justices of the peace, and other "necessary officers and ministers in our said colony." It is apparent that since the union of British Columbia with Canada, in 1876, its legislative power was largely restricted, and the powers and duties of the Lieutenant Governor proportionately restricted. In fact, the Lieutenant Governor, after the union, was no longer the Imperial officer a Lieutenant Governer had previously been. Under his commission from the Queen previous to the union, the Lieutenant Governor directly represented her, and only through that representation had he any power to issue commissions; but we are not necessarily to inquire what the power of the Lieutenant Governor was before the union, but simply to ascertain what power, if any, to issue commissions of the kind in question here has been given to a Lieutenant Governor by a commission from the Governer General under the Imperial Conferation Act, within its terms. The party so commissioned has no reserved power; but the office and its powers and duties are limited to the subjects over which a Lieutenant Governor so commissioned and appointed would have jurisdiction. Any question as to a reserved power is not, I think, to be considered in the face of the provision of sec. 12 of the B.N.A. Act, 1867, which provides "that all the powers, "authorities and functions vested in the Governor or "Lieutenant Governor of the several provinces shall be "vested in and exercisable by the Governor General, "subject, nevertheless, to be abolished or altered by the "Parliament of Canada." I cannot imagine how, then, the Lieutenant Governor of a province can be claimed to

have any power whatever except what is given by the Act in question and his commission from the Governor General thereunder. Sec. 129 provides that, except as otherwise provided by that Act, all laws in force in the several provinces mentioned, and subsequently made applicable to British Columbia, all laws in force at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing at the union, shall continue in each of the said provinces respectively as if the union had not been made, subject, nevertheless, to be repealed, abolished or altered by the parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under that Act.

By sub-section 8 of section 91, the parliament of Canada has the authority and duty of making laws for "the fixing of and providing for the salaries and allow-"ances of civil and other officers of the government of "Canada;" and by sub-section 27: "the criminal law, "except the constitution of courts of criminal jurisdic-"tion, but including procedure in criminal matters," is within the exclusive jurisdiction of that parliament. In another section the salaries of the judges were expressly provided to be paid by the government of Canada.

Sub-section 14 of section 92 gives to the legislature of each province the right to make laws for "the "administration of justice in the province, including "the constitution, maintenance and organization of "provincial courts, both of civil and criminal jurisdic-"tion, and including procedure in civil matters in "those courts."

In regard, then, to jurisprudence in civil matters the legislatures of the provinces have the entire legislative

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authority, except that in relation to the fixing and providing for the salaries and allowance of the judges.

The authority and duty of legislation in regard to the administration of justice in criminal cases, including procedure in criminal matters, is given to the parliament of Canada, except (as provided in sub-sec. 27 of sec. 91 before recited) "the constitution of courts "of criminal jurisdiction."

By a comparison of sub-sec. 27 of sec. 91, and sub-sec. 14 of sec. 92, it will be observed that the latter, in addition to the word "constitution," has the words "maintenance and organization." I do not, however, consider that the difference between the two sub-sections has any material bearing on the case under consideration; but, if it has, I think that in view of the terms of the concluding clause of sec. 91 we should confine the operation of sub-sec. 14 of sec. 92 so as to make it harmonize with sub-sec. 27 of sec. 91.

Reading it in that way the parliament of Canada has the right to legislate in all matters of a criminal nature including procedure, and including the appointment and paying of judges, except the constitution of the courts.

It was clearly not intended that the word "maintenance" should include the payment of the judges' salaries, as they, as I have shown, are otherwise provided for. It may, however, have been intended to include the other expenses of the courts, and in otherwise maintaining them when constituted or organized. The words "constitution" and "organization" in this connection I consider synonymous as applicable to courts. To constitute a court means to form, make or establish it, and, necessarily, to prescribe the powers, jurisdiction and duties of those who are to operate it. It, however, does not, necessarily, in all cases include the power of appointment of the judges to preside in them, if the

local legislatures had been given plenary power to provide for their appointment, but with the limited and prescribed powers of legislation awarded to the provinces by the Imperial Act such power does not exist. There is no award of deputed executive powers by the Act in relation to the exercise of any prerogative right of the sovereign by the Lieutenant Governors of the provinces, and their commissions do not contain any. How then can they have any? The commissions to Lieutenant Governors before confederation included such powers, and it was only from them they derived the authority.

We must construe an Act by taking it altogether

By it (sec. 9) the executive government and authority over Canada is declared to continue and be vested in the Queen. Section 10 provides that "the provisions "of this Act referring to the governor extend and apply "to the Governor General, for the time being, of Canada, "or other the chief executive officer or administrator, "for the time being, carrying on the government of "Canada on behalf and in the name of the Queen, by "whatever title he is designated."

In England the sovereign was and is the source of all judicial appointments to the higher courts of law. It is a prerogative right that, while existing, cannot be usurped, and until removed or cancelled by an Act of parliament, assented to by the sovereign, cannot be controlled or interfered with.

When British Columbia became a part of Canada its courts were already established and constituted, and by the terms of the Confederation Act, sec. 129 before cited, were so continued—and so also was the position of the judges. They then held and derived authority from commissions appointing them as judges of the Supreme Court or Court of Queen's Bench during good behavior, but none as permanent judges of the court of oyer and terminer and general gaol delivery, for which com-

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missions *pro re nata* had been issued by the Lieutenant Governors from time to time. As in England, the judges appointed to this duty were styled and called commissioners, and the Acts in British Columbia, providing for the appointment of such commissioners, limited their selection by the Lieutenant Governors.

The judges of the Supreme Court or Court of Queen's Bench had no authority, without such commission, to hold a court of oyer and terminer and general gaol delivery. In connection with this part of the subject I have considered the effect of the provision contained in sec. 14 of cap. 12 of the Acts of British Columbia, 1879, which is as follows: "Courts of assize and *nisi* "*prius*, or of oyer and terminer and general gaol "delivery, may be held with or without commissions, at "such times and places as the Lieutenant Governor may "direct, and provided, when no commissions are issued "the said courts, or either of them, shall be presided over "by the chief justice or one of the other judges of the "said Supreme Court" It is doubtful if that Act, except sec. 17, ever came into operation, requiring as it does the Lieutenant Governor's proclamation for that purpose, and I understand that no such proclamation was issued. In *Regina* v. *McLean & Hare*, British Columbia, in 1880, reported by one of the judges, the learned Chief Justice alluding to the Supreme Court of that province, says:

> Those powers and authorities were and are no other than those possessed by the Queen's Bench in England. It would have been exceedingly important if one English case had been cited in which a judge of the Queen's Bench had sat and tried without commission, and without removal by *certiorari* or otherwise, a criminal committed by a justice of the peace to take his trial at the next Court of Oyer and Terminer. But no such case was produced from the records of several centuries, and it is believed none is producible.

The learned Chief Justice further said:

> It is true one case was produced from the Ontario courts (*Whelan*

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v. *The Queen*) (1) in which an attempt was made to impeach such a trial unsuccessfully. The trial was actually impeached, although an extant enactment by a competent legislature had expressly declared that a court of oyer and terminer might be presided over by a judge of the Supreme Court without commission. It is impossible to read the arguments and judgments upon this point without perceiving what the result would have been in the absence of such a statute. And there is no statute in force here. It is true the Ontario provision has been copied into a local Act here, but being matter of criminal procedure it is *extra vires* of the local legislature; and moreover it only purports to come into force from a day not yet named. All these Acts of Parliament are in effect statutory declarations that by the law of England and the provinces these commissions are necessary to confer jurisdiction, and that nothing less than an Act of parliament can render them unnecessary. The whole argument upon this point, based upon *Whelan* v. *The Queen*, which was referred to at great length by counsel for the Crown, is almost decisive in favor of the prisoners.

The learned Chief Justice concluded his judgment as follows:—

The gaoler alleges two causes for detention. One the sentence of Mr. Justice Crease, the other a warrant of commitment by Mr. Senator Cornwall J. P. The rule *nisi* was obtained on the sole ground of the invalidity of the sentence and the various informalities at the late alleged trial. With these objections we agree, and we consider that the prisoners have never been tried at all. But as to the second cause of detention, the warrant of commitment, it has not been at all impeached, and we cannot at this stage allow it to be now impeached. I think, therefore, the proper order is to remand the prisoners to be held in custody according to the exigence and tenor of the last mentioned warrant.

The case of the prisoners had been brought before the court by a rule *nisi* for a writ of *habeas corpus ad subjiciendum* for their discharge on account of the invalidity of the conviction, and they were discharged therefrom but remanded under the warrant for their commitment.

The "Ontario" statute referred to was passed before confederation by the legislature of the combined provinces, Upper and Lower Canada, and was therefore

(1) 28 U. C. Q. B. 27.

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intra vires, but that of British Columbia was after its union with Canada, and therefore was, as the learned Chief Justice, I think properly, says, *extra vires*. Such being the case there is no parliamentary dispensation of commissions in criminal cases, and as, in my opinion, the Lieutenant Governor had no power to issue them, the learned judge who tried and sentenced the prisoner had, for these reasons, no jurisdiction.

There was another point of objection raised to the jurisdiction. The venue in the margin of the indictment is "British Columbia to wit." No county, shire, division, district or place is mentioned; and there is no venue stated in the body of it. The whole province was formerly one shrievalty, but for many years past it has been divided into several court districts, and shrievalties—one of which is Kootenay. There is no sheriff of "British Columbia," and the indictment did not indicate in what bailiwick it should be preferred to a grand jury, or from what bailiwick the petit jury should be summoned. The provisions of sections 32 and 33 of the Criminal Procedure Act, 1869, are, however, very comprehensive, and, in my opinion, were intended to provide for such a case if, indeed, it be not covered by the provisions of section 21, in regard to which there might be some doubt.

Section 32 enacts that:

Every objection to any indictment for any defect apparent on the face thereof, must be taken by demurrer or motion to quash the indictment before the defendant has pleaded, and not afterwards, &c., and power to amend is given to the court.

Whether the power could be exercised to relate back, so as to warrant the finding of the grand jury, is a question that would admit of a discussion which I consider unnecessary here. Section 33 provides that:

If any person being arraigned upon an indictment for any indictable offence pleads thereto a plea of "not guilty," he shall by such plea, without further form, be deemed to have put himself upon the

country for trial, and the court may, in the usual manner, order a jury for the trial of such person accordingly.

The provisions of the three sections would certainly seem to cover every possible objection, and I am inclined to the opinion that the objection being apparent on the face of the indictment the party might, under section 32, have demurred; and if the venue was wrongly stated, the question as to the power of amendment could then have been raised. That course was not taken, and it is not now necessary to consider the matter. And as the result does not depend upon any decision I might arrive at, I think it unnecessary to refer further to that objection.

Another as to the polling of the jury was submitted; but it would be of no practical service were I to consider it, as my doing so will not affect the decision. I may say, however, that I consider such an objection is altogether for a court of error to decide. It does not, in my opinion, affect the jurisdiction, and therefore is not in my province to consider.

For the reasons I have given as to the first point referred to, I think there was no jurisdiction to try the prisoner at Victoria; and that the learned judge who presided had no jurisdiction to try the prisoner in the absence of any legislative authority, or a commission from the Governor General, and, therefore, that the trial was a nullity, and as if the prisoner had never been tried. The prisoner is shown by the return and certificate of the sheriff to be detained solely on the calendar of the Assize Court containing the sentence of death, and the formal sentence, and a remand dated the 27th of February last, the prisoner having been brought before the court sitting in error, and the sentence having been unrevoked. No warrant of commitment or other cause of detention was produced or shown in this case. And, as in my opinion the trial was a nullity,

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and the sentence therefore illegal, no other course is, I think, open to me but to order the discharge of the prisoner, and to adopt the necessary proceedings therefor. It is the bounden duty of a judge to declare the law as he finds it, and believes it to be, regardless of consequences and all other considerations.

Pursuant to the order of the learned judge a writ of *habeas corpus* was issued out and served upon the sheriff. Such writ was in the form following:—

CANADA, }
To wit: }

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the Sheriff of Vancouver Island, in the Province of British Columbia.

GREETING:

We command you that you have the body of Robert Evan Sproule detained in our prison, under your custody (as it is said) under safe and sure conduct, together with the day and cause of his being taken, by whatsoever name he may be called in the same, before the Honorable Mr. Justice Henry, one of the judges of our Supreme Court of Canada, at his chambers at the city of Ottawa immediately after the receipt of this writ, to do and receive those things which our said judge shall then and there consider of him in this behalf; and have you then there this writ.

Witness, the Honorable Sir William Johnstone Ritchie, Knight, Chief Justice of our said Supreme Court of Canada, this twenty-fifth day of June, one thousand eight hundred and eighty-six.

(Signed) ROBERT CASSELS,
Registrar of the Supreme Court of Canada.

Per statutem tricesimo primo Caroli secundi regis; and under the Supreme and Exchequer Court Act of the

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Parliament of Canada, thirty-eight Victoria, chapter eleven; and the Act of the Parliament of Canada, thirty-nine Victoria, chapter twenty-six.

(Signed) W. A. HENRY,
A Judge of the Supreme Court of Canada.

To this writ the sheriff made the following return:

"The within named Robert Evan Sproule was convicted and sentenced to death at the last Victoria assizes for the crime of wilful murder, and the conviction and sentence was afterwards unanimously affirmed on writ of error by the Supreme Court of British Columbia in full bench.

"I hold the prisoner accordingly, and humbly submit that such affirmed conviction and sentence is paramount to the within writ.

"I have not received or been tendered any expenses of the conveyance of the prisoner.

"For the above reasons I respectfully decline to produce the prisoner.

"The answer of James Eliphalet McMillan, the sheriff for Vancouver Island, to the within writ.

"Victoria B.C., 19th July, 1886."

The prisoner's counsel then applied to His Lordship for an order for the prisoner's discharge, which order, after argument, was granted. His Lordship delivered the following judgment on this application:

HENRY J.—This matter came before me under an order made by me in May last on a petition of Sproule, setting forth that he had been illegally convicted of murder at British Columbia, and was under sentence of execution. The order was returnable on the twenty-fifth day of May last, and was directed to the sheriff of Vancouver Island, in whose custody, under the conviction and sentence, the prisoner then was. It called upon him to show cause why a writ of *habeas corpus*

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should not issue to bring up the body of the prisoner, and why, in the event of the order being made absolute, he should not be discharged without the writ being absolutely issued, and without the prisoner being personally brought before me. The order was duly served on the sheriff of Vancouver Island, and on the attorney-general of British Columbia. The sheriff returned the whole of the proceedings in the prosecution, including a copy of the conviction and sentence. The proceedings having been returned before me, and the Crown having been represented by Messrs. Burbidge and Gormully, and the prisoner by Messrs. McCarthy and Davie, at the hearing objections were raised on the part of the prisoner to the jurisdiction of the tribunal by which he was tried and convicted. The objections were argued, and answered on behalf of the Crown, and upon two of them I decided and gave judgment in favor of the prisoner, holding that the tribunal had not jurisdiction, and that the prisoner was entitled to his discharge. The argument was confined to the objections so raised on the part of the prisoner.

After my decision, I heard counsel on the part of the Crown and the prisoner, as to the proper course to be pursued for giving effect to my judgment, the counsel for the prisoner claiming that as the order to show cause was in the alternative, and as counsel appeared, were heard, and showed cause, and took no exception to the terms of the order on the argument, the prisoner was entitled to an order absolute for his discharge. This course was objected to by the counsel for the Crown, and after deliberation I decided to grant an order for a writ of *habeas corpus* to bring the prisoner before me, so that he could be by me discharged. I gave no opinion or decision as to the right of a judge, under the circumstances, to make an order absolute for

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the discharge of the prisoner, but rather yielded to the desire of the counsel for the Crown to have the prisoner brought before me.

An order for the issue of the writ was therefore made by me on the 25th of June last past, and the writ, directed to the sheriff of Vancouver Island, was duly issued on the same day.

The writ was served on the sheriff in the early part of July last past, but not returned until the 19th of that month. In fact, it is not returned at all, for although sent back to the registrar of this court, and purporting to be a return of the sheriff, the endorsement thereon bears no signature. Neither does it appear to be in the handwriting of the sheriff. I have compared the writing with his signature to some of the authenticated documents on file in this case, and I have found little difficulty in concluding the indorsement in ques- not to be of his proper handwriting, and there is no affidavit verifying it to be his return, or that it was made by his authority. The endorsement is dated the 19th of July, 1886. Whoever wrote that endorsement seems to be of opinion that a sheriff—a Queen's officer —can refuse to execute the Queen's writ, and usurp judicial authority to decide as to the validity of the writ. Such an assumption by a sheriff is a contempt of legal authority and cannot be permitted. I am, therefore, strongly inclined to the opinion that the endorsement is not that of the subordinate officer, to whom the writ was directed, and if proceeded against for contempt he would, in all probability, be found to deny that he authorized it. It was his duty, under any circumstances, to execute the writ and make a proper return of and to it. At present I will only add, that hereafter it may be found that subordinate officers, such as sheriffs, cannot treat the writ of *habeas corpus* duly issued with contempt. The writ required the sheriff to produce the body of

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the prisoner and he has failed to obey it and must bear the consequences.

On the second instant, pursuant to notice to the attorney general, an order absolute was again moved for by Mr McIntyre, counsel for the prisoner, and Mr. Burbidge Q. C. and Mr. Sinclair were heard for the Crown in opposition. It was contended by the latter gentlemen that inasmuch as a writ of *habeas corpus* was issued the order could not be made, and that further proceedings can be taken only by means to enforce its execution, and that as that course, that is by the issue of the *habeas corpus*, had been adopted, no other was available.

I have carefully reviewed the authorities furnished by the counsel on each side and shall briefly give my views.

It is said in Addison on Torts (1) that:

The validity of the commitment may be tried on moving for a rule to show cause why a *habeas corpus* should not issue and why, in the event of the rule being made absolute, the prisoner should not be discharged without the writ actually issuing or the prisoner being personally brought before the court.

And the case of *Eggington* (2) is cited.

The counsel who showed cause in that case said: "It "may be questioned whether the rule in this form can "be made *in invitos*—there has been no consent." To which Lord Campbell C.J. replied: "I have repeatedly "granted it in vacation in this form without consent, "in order to avoid the necessity of bringing up the "party." Other authorities sustain the same course.

The constitution of the Supreme Court in British Columbia is founded on a proclamation of the Lieutenant-Governor, under a statute, and his commission. The proclamation provides:

That the Supreme Court of civil justice of British Columbia shall have complete cognizance of all pleas whatsoever, and shall have

(1) At page 625. (2) 2 E. & B. 734.

jurisdiction in all cases, civil as well as criminal, arising within the colony of British Columbia.

The unlimited jurisdiction thus given to the court includes the issuing of writs of *habeas corpus ad subjiciendum* and the discharge of prisoners illegally imprisoned, and in the performance of that part of their official duty the judges of the court have authority to pursue the practice of the courts and judges in England; and if the judges in the latter country have established the practice of ordering the discharge of a prisoner without requiring him to be brought personally before them, the judges of British Columbia are, in my opinion, at liberty to pursue the same course; and the same power is given to a judge of this court.

I have considered the objection, that having ordered the issue of the *habeas corpus* I have no power to adopt the other means now sought for the discharge of the prisoner; but no case has been cited or argument advanced in favor of that proposition; and I can see no reason why, if one alternative course has failed through the negligence or improper conduct of the sheriff, the other should not be adopted.

I have, therefore, decided to make an order for the discharge of the prisoner.

The Attorney General of British Columbia then applied to the Supreme Court of Canada to have the writ of *habeas corpus*, and all proceedings thereunder, quashed as having been issued improvidently.

A special session of the court was called to hear the application.

Robinson Q.C. and the Attorney General of British Columbia (*Gormully* with them) supported the motion, and *McCarthy Q.C.* and *Theodore Davie* (*A. F. McIntyre* with them) appeared for the prisoner.

A preliminary objection was taken by the counsel for the prisoner that the application should not be heard in

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his absence.

Robinson Q.C. on this point.—I always understood the rule to be that the presence of the prisoner was only necessary when the court was about to deal with the conviction or with the record. In cases before the Privy Council the prisoner is never present. See *The Queen* v *Murphy* (1) and *The Queen* v. *Coote* (2).

McCarthy Q.C.—The court is bound to protect the prisoner, and will not hear an adverse motion behind his back. If the court has power to hear the application it must have power to bring the prisoner here. The prisoner has a right to be present in every matter affecting his discharge. See *Re Boucher* (3); *Ex parte Martins* (4); *Eggington's case* (5).

The court having overruled the objection, the counsel for the prisoner asked for an adjournment until the next morning that they might consult as to whether or not they should appear under the circumstances. The argument was, however, allowed to proceed, counsel for the prisoner to be considered as only watching the case for the present.

Robinson Q.C. and the Attorney General of British Columbia for the Crown.—The first question to be argued is: What authority is there for this writ to issue? Section 51 of the Supreme and Exchequer Court Act confers the jurisdiction in *habeas corpus* on the judges of this court, and we contend that that section constitutes a court of criminal jurisdiction, and is, therefore, *ultra vires* of the Dominion. See *The Queen* v. *St. Denis* (6), where this question is incidentally considered by Chief Justice Cameron.

Then, what is the "concurrent" jurisdiction that is conferred by this section? When the act was passed

(1) 2 P. C. 535.
(2) 4 P. C. 599.
(3) Cassel's Dig. 181.
(4) 9 Dowl. 194.
(5) 2 E. & B. 717.
(6) 8 Ont. P. R. 17.

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there was, practically, no communication between the capital of the Dominion and the province of British Columbia. Then, was it intended to do more than to give this jurisdiction to the judges of the Exchequer Court, and that only when they were in the province in which the writ was required? "Concurrent" means concurrent in territory. It cannot mean concurrent in jurisdiction because that is different in the different provinces.

Again, we say that there was no jurisdiction to issue the writ in this case, because it can only issue to inquire into the cause of commitment in a criminal case under an act of the Parliament of Canada. In this case the prisoner was convicted of the crime of murder, an offence under the common law, and not an offence under an act of the Parliament of Canada.

If then as we contend, this writ should not have been issued, is there any authority in this court to quash it?

The writ has been issued under the seal of the court and tested in the name of the Chief Justice, and was, therefore, the process of the court, and there is an inherent right in this court, in common with all courts, to exercise control over its own process. See Abbott's National Dig. (1); *Robinson* v. *Burbidge* (2) citing the remarks of Parke B. in *Witham* v. *Lynch* (3).

This explains why no appeal is given when the writ is granted. When the writ is refused the appeal must be expressly given, but when it is granted the power of the court over its own process renders an appeal unnecessary.

The following authorities were cited on this point, *Dawkins* v. *Prince Edward of Saxe Weimar* (4); *Sea-*

(1) Vol. 2 p. 152, and cases there cited.

(2) 1 L. M. & P. 99.

(3) 1 Ex. 399.

(4) 1 Q. B. D. 499.

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ton v. *Grant* (1); *Edmunds* v. *The Atty. Gen.* (2); and 5 Fisher's Dig. (3), where most of the cases are collected.

It is clear that the learned judge had no power to order the prisoner's discharge. If the return to the writ was insufficient, he should have left the prisoner to his remedy by attachment against the sheriff, in which case the matter would have come before the full court.

McCarthy Q.C. and *Theodore Davie* for the prisoner.

This is, in effect, an appeal from the decision of Mr. Justice Henry granting the writ, and the court has no jurisdiction to hear it.

It is argued that section 51 is unconstitutional, but we think it cannot be denied that the Parliament of Canada can create courts for the administration of criminal law. See *The Picton Case* (4).

The jurisdiction in *habeas corpus* matters is this—the power is given to the judge, and he is thereby constituted a court altogether distinct from the Supreme Court of Canada, just as he was under the Election Act. *Valin* v. *Langlois* (5). The effect of this may be that the judge should not have used the writ of the court, but the order of discharge is valid.

The argument that this power is only to be exercised by the judges of the Exchequer Court would support the proposition just advanced, because, if a judge is out of Ottawa, he cannot issue the writ under the seal of the court. But we do not concur in this view. The writ of *habeas corpus* should be open to everybody in Canada, but if it can only be issued when the Exchequer Court is sitting, it will, practically, be open only to the people of Ottawa.

The contention that the jurisdiction can be exercised only in case of an offence created by an act of the Par-

(1) L. R. 2 Ch. 459.
(2) 47 L. J. Ch. 345.
(3) Last ed. p. 1739.
(4) 4 Can. S. C. R. 648.
(5) 3 Can. S. C. R. 1.

liament of Canada is untenable. It is a commitment under an act of the Parliament of Canada that forms the basis of the inquiry, and the case is within it. All the proceedings here were under the "Indictable Offences Act."

Even if we are wrong in this, section 129 of the British North America Act makes all common law offences offences under the laws of Canada.

The judges of this court would have jurisdiction in *habeas corpus* matters without express authority. See *ex parte Bollman* (1).

But no matter how erroneous the action of the learned judge in granting this writ may have been, this court has no power to interfere. No authority can be produced to show that an order to discharge a prisoner on *habeas corpus* can be reversed. On the contrary *The Queen* v. *Weil* (2); *The Mayor, &c.* v. *Brown* (3), and *The Attorney General* v. *Sillem* (4), are all authorities to show that this proceeding is unwarranted. See also, *Carus Wilson's Case* (5); *The Canadian Prisoner's Case* (6), and *In re Padstow Total Loss Association* (7).

Robinson Q. C. in reply cited Bishop on Criminal Procedure (8); *Ex parte Tom Tong* (9); *Re Stretton* (10).

Sir W. J. RITCHIE C. J.—The first question to be determined in this case is as to the right of this court to inquire into the propriety of the issue of the writ of *habeas corpus* and its power to quash the writ if improvidently issued.

This writ having been issued out of this court, under the seal of the court, and tested in the name of the Chief Justice (and I know of no other way in which the writ

(1) 4 Cranch 75.
(2) 9 Q. B. D. 701.
(3) 2 App. Cas. 168.
(4) 10 H. L. Cas. 704.
(5) 7 Q. B. 984.
(6) 9 A. & E. 731.
(7) 20 Ch. D. 137.
(8) Sec. 117.
(9) 108 U. S. R. 556.
(10) 14 M. & W. 801.

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of *habeas corpus* could be issued on the fiat of a judge of this court), was a proceeding in this court, and every superior court, which this court unquestionably is, has incident to its jurisdiction an inherent right to inquire into and judge of the regularity or abuse of its process.

In *Witham* v. *Lynch* (1) Parke B. remarks:

> Whenever a jurisdiction is conferred by statute on a judge of the superior courts it is subject to appeal to the court unless there is something in the context leading to a contrary conclusion.

And in *Robinson* v. *Burbidge* (2) Maule J. cited the above remarks of Parke B. with approval.

That this is a matter pertaining to the court, and one with which it can deal, and not a jurisdiction conferred on a judge of the court outside of and independent of the court, and that the judge has no independent jurisdiction unconnected therewith, is, I think, very obvious from the fact that he can only act as a judge of this court through the instrumentality of the writ of this court, obedience to which could not be enforced by authority of the judge but by the court, which alone could issue an attachment for contempt of the court in not obeying its process, the contempt being contempt of the process of the court, not of the fiat of the judge authorizing its issue, and therefore the impossibility of enforcing obedience to the process of the court without the assistance of the court seems to me to prove, conclusively, that the matter is within the jurisdiction of the court.

The learned judge, by indorsement on this writ, declares that the writ was issued, "*per statutem tricesimo primo Caroli Secundi Regis*," and under the Supreme and Exchequer Court Act of the Parliament of Canada 38 Vic. ch. 11, and the act of the Parliament of Canada, 39 Vic. ch. 26. Now this was certainly wrong, because it is clear beyond question that the

(1) 1 Ex. 399. (2) 1 L. M. & P. 99.

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31st of Car. 2 has nothing to do with a case like the present and does not authorize the issue of a *habeas corpus* in such a case as this. The statute of 31 Car. 2 was to provide that persons committed for criminal, or supposed criminal, matters in such cases where by law they were bailable should be left to bail speedily. Abbott C. J., in 6 D. & R. 209, says the object of the *habeas corpus* Act, 31 Car. 2 cap. 2, was to provide against delays in bringing to trial such subjects of the king as were committed to custody for criminal or supposed criminal matters, and therefore if this writ could be issued out at all it must be issued at common law.

Now the sixth question proposed to the judges by the House of Lords, see Bacon's Ab. *habeas corpus*, vol. 4, p. 493, and Wilmot's Opinions and Judgments p. 777, and the answers thereto, show conclusively that a judge in vacation has no power to enforce obedience to writs of *habeas corpus* issued at common law, and I think it may be taken to be equally clear that there is no such power in cases within 31 Car. 2. The writ of *habeas corpus* is not the writ of a judge on whose fiat it issues. It is a high prerogative writ which issues out of the Queen's superior courts, and, in my opinion, is necessarily subject to the control of those courts, not necessarily by way of appeal, but by virtue of the power possessed by the court over the process of the court. The course of proceeding to be observed in obtaining an attachment, shows that it is matter with which the court alone can deal; it is thus laid down. The course of proceeding to obtain an attachment which issues to punish disobedience to the Queen's writ is by motion to the court for a rule for an attachment; on being granted a writ of attachment issues. On the sheriff returning *cepi corpus*, a motion is of course for a *habeas corpus* to produce the defendant in court; it is then moved that the defendant be sworn

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to answer interrogatories; if he does not give bail he is returned to prison; interrogatories which contain the charge against the prisoner are filed, and the defendant is examined on them before a master, and it said in the English books of practice the examination is referred to the Queen's coroner and attorney, on whose report the court sentences the defendant to fine or imprisonment or discharges him.

It has been urged, however, that by section 51 of the Supreme Court Act, the individual judges of this court were thereby created so many separate and independent courts and could, and it was said should, issue writs of *habeas corpus*, not out of the court, but in their individual names, and for disobedience to which the judge issuing the writ had power to issue an attachment in his own name. There is not, in my opinion, the slightest pretence for this contention. There is nothing whatever in the statute to indicate that the legislature contemplated the erection of six additional courts, and the power conferred is entirely inconsistent with any such contention. In such a case the judge of this court would not have equal and concurrent jurisdiction with the judges of British Columbia, but a larger and more extensive jurisdiction, and would be capable of doing, under this equal and concurrent jurisdiction, what no judge in British Columbia could do, namely, issue or direct the issue of a writ uncontrollable by any court, and would have the right to issue an attachment which no single judge could do in British Columbia. The power conferred on the judges of this court in cases where they are entitled to order the issue of a writ of *habeas corpus* is the same, in my opinion, that the judges in British Columbia have, that is to say, as the judges there direct the issue of the writ out of the Supreme Court, tested in the name of the Chief Justice of that court, under the seal of the court and subject to the con-

trol of the court if improvidently issued, and for disobedience to which the remedy would be in the court by reason of the disobedience being a contempt of court out of which the writ issues, so the judge of this court granting his fiat for the issue of a writ out of this court, as was done in this case, such writ is necessarily subject to the like control of this court if improvidently issued.

It was stated on the argument of this case that no case could be found where the writ of *habeas corpus*, issued in vacation, having been improvidently issued, was for that reason quashed, but it will be found in the matter of *John Crawford* (1) that a *habeas corpus* having issued directed to the keeper of Her Majesty's jail at Castle Ruchen, in the Isle of Man, and his deputy, commanding him to have the body of John Crawford before this court, at Westminster, to undergo and receive, &c. Peacock at this term obtained a rule calling upon the prosecutor to show cause why the writ should not be quashed on the ground that the same had issued improvidently. Patteson J. observed, just what is applicable to this case, "then the question here being in effect whether the writ, if it had never issued, ought to go, we must make the rule absolute for setting aside the writ." So in this case, if we think the writ ought never to have been issued, then we should quash it. And I may remark, inasmuch as a judge in British Columbia has no doubt the right to issue a writ returnable in term as well as in vacation, as at present advised, I cannot see any reason whatever why the judges of this court, having concurrent and equal jurisdiction with the judges of British Columbia, might not make the writs they authorize to be issued, returnable in this court in term as well as immediately, but it is not necessary for the purposes of this case to determine that point.

Assuming then that we have the power to entertain

(1) 13 Q. B. 612.

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this application an objection has been taken that we should not do so in the absence of the prisoner. I do not view this as an appeal, in the ordinary sense, from the decision of the judge on the return to the writ of *habeas corpus*, but simply as an application to set aside the writ on the ground that it never should have issued by reason of the want of power or jurisdiction in the learned judge to interfere by *habeas corpus* at all in a case such as this, with the judgment and sentence of a superior court of competent criminal jurisdiction.

We are not called upon to say whether the facts submitted to the learned judge justified the issue of the writ and subsequent proceedings thereon. If they did not then the learned judge should have refused the application for the writ. We are, therefore, now dealing with the question as on the application for the writ as suggested by Patteson J., and are called upon to determine, in effect, if the writ had never issued whether it ought to go, and in this view the question of the right of the prisoner to be present could not arise, for on such application, or until the writ was actually issued and returned, the prisoner could not be present, and he does not appear to have been present in the case of Crawford, nor, so far as I am aware, is he ever present before the Privy Council on appeals.

It has also been contended that the 51st section is *ultra vires*. On this point I express no opinion, as in the view I take of the case it is unnecessary for the determination of this case to do so.

It is also contended that, assuming the judges of this court have power to issue writs of *habeas corpus*, the right to do so is limited to an inquiry into the cause of commitment in any criminal case under any act of the Parliament of Canada, and that this being a case of murder it is a case at common law and not a criminal case under any act of the Parliament of Canada. Why

this limitation was imposed, and why the same language was not used as in the 101st section of the British North America Act, which gives power to establish this court of appeal and other courts for the better administration of the laws of Canada, is not very apparent, but the legislature having limited the jurisdiction we are bound to give effect to that limitation, and, as at present advised, I think the objection must prevail and therefore my learned brother had no authority to issue this writ. If so, then most certainly the writ of this court was improvidently issued.

But supposing I should not be right in this view, I am then brought face to face with the real, serious substantial question, and it is a most serious substantial question, namely: Was my learned brother, on the materials before him, justified in issuing the writ and making the order discharging this prisoner, or, on the other hand, did the materials before him clearly show that the writ ought never to have been issued and the order for discharge should not have been made, and therefore that the writ was improvidently issued and, as a consequence, should, with the proceedings thereon, be quashed? The two grounds on which the learned judge granted the writ and subsequently made an order discharging the prisoner were: First, that the order changing the place of trial was void and therefore there was no jurisdiction to try the prisoner at Victoria; and secondly, that the court of oyer and terminer could only sit under and by virtue of a commission which the Lieutenant Governor of British Columbia had no power to issue. Such a commission never having been issued by the Governor General there was no authority for holding the court. The learned judge says:

For the reasons I have given as to the first point (that is the order to change the place of trial) referred to, I think there was no jurisdiction to try the prisoner at Victoria; and that the learned judge

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who presided had no jurisdiction to try the prisoner in the absence of any legislative authority or a commission from the Governor General, and, therefore, that the trial was a nullity and as if the prisoner had never been tried. The prisoner is shown by the return and certificate of the sheriff to be detained solely on the calendar of the assize court containing the sentence of death and the formal sentence and a remand dated the 27th of February last, the prisoner having been brought before the court sitting in error, and the sentence having been unrevoked.

No warrant of commitment or other cause of detention was produced or shown in this case. And, as in my opinion the trial was a nullity and the sentence therefore illegal, no other course is, I think, open to me but to order the discharge of the prisoner and to adopt the necessary proceedings therefor.

In considering this case it must be borne in mind that the writ of *habeas corpus* does not issue as a matter of course upon application in the first instance, but must be founded upon an affidavit upon which the court is to exercise a discretion in issuing it or not, that is, a legal discretion justified by the facts presented.

The first inquiry must be as to the jurisdiction of the Supreme Court of British Columbia and the Court of oyer and terminer and general gaol delivery. The Supreme Court of British Columbia is established under a proclamation having the force of law in Her Majesty's colony of British Columbia, whereby it is declared that "the said court shall be a court of record by the "name or style of the Supreme Court of civil justice in "British Columbia." The proclamation designates the seal the court shall use, and declares that:

The said Supreme Court of civil justice of British Columbia shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the said colony of British Columbia.

Here then we have a superior criminal court established, of the highest character, clothed with all the powers and jurisdiction civil and criminal, necessary or essential to the full and perfect administration of justice, civil or criminal, within the colony, without

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limitation or stint, powers as full and ample as those known to the common law, and possessed by the superior courts of England, and to which court, as necessary and essential part of the jurisdiction, belongs the right to supervise inferior courts, and entertain writs of error from the courts of oyer and terminer and general goal delivery when duly allowed by Her Majesty's attorney general. As to the courts of assize, *nisi prius*, oyer and terminer and general goal delivery, I am of opinion that these courts are superior courts of record, and, as clearly established by the case of *ex parte Fernandez* (1), courts of very high degree, dignity and importance. By 42 Vic cap. 12, 1879 (B. C.), it is enacted that courts of assize and *nisi prius*, oyer and terminer and general goal delivery, may be held with or without commissions, at such time and place as the Lieutenant Governor may direct, and when no commissions are issued the said courts, or either of them, shall be presided over by the chief justice or one of the judges of the said Supreme Court. This Act was to come into force on any day named in a proclamation named by the Lieutenant Governor to that effect published in the *Royal Gazette*. The act was brought into force by authority of a proclamation in the *British Columbia Gazette* on the 24th July, 1880, and was therefore in force long before the trial in this case. By 46 Vic. cap. 15 (B. C.), the jury district from which jurors are to be selected and summoned for the trial of civil and criminal cases at the towns and places where courts of assize, *nisi prius*, oyer and terminer and general jail delivery may be held, the following sections of the province and electoral districts and polling divisions established at the time of the passing of this act shall be districts, *inter alia*. Victoria district, the limits of which are set out in the Act, and grand and petit jurors

(1) 10 C. B. N. S. 3.

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required for or by the order of any court or judge thereof shall be summoned only from the district as established by this act wherein the said court is to be held. On the 9th March, 1885, an act of British Columbia was passed, which was in force at the time of this trial, to fix the times for holding courts of assize and *nisi prius* and oyer and terminer and general gaol delivery, *inter alia*, at the city of Victoria, on the first Monday in the month of April, and the fourth Monday in the month of November in each year, with a proviso that it should be lawful for the Lieutenant Governor in council to appoint times for holding additional and other courts of assize and *nisi prius*, oyer and terminer and general gaol delivery at any of the places aforesaid, and at other places when and so often as he should deem it expedient to do so; so that it is abundantly clear that a court of oyer and terminer and general gaol delivery could be held without a commission at the time fixed by law for holding the same, and that the fixing of the time by the Lieutenant Governor in council was for the holding only of additional and other courts of assize and *nisi prius*, oyer and terminer and general gaol delivery at any of the places named in the Act, and at other places when and so often as he should deem it expedient so to do. And this court at which the trial took place was held at the time and place fixed by the statute. There being then no necessity for a commission in this case, the issuing of a commission by the Lieutenant Governor, if unnecessary, could not in any way interfere with the right to hold the court at the time and place named in the statute. It might possibly have helped the jurisdiction of the court, it could not possibly have interfered with it. All this, however, as to which I humbly conceive there can be no doubt, renders it wholly unnecessary to discuss or determine whether the power to issue a commission such as that issued by the Lieu-

tenant Governor belongs to the Lieutenant Governor of the province or to the Governor General of the Dominion exclusively. I will not discuss this question as it is wholly unnecessary to the determination of this case, but I wish it to be distinctly understood that my not discussing and determining it is not to be construed as throwing any, even the slightest, doubt on the validity of a commission so issued. I simply express no opinion on the question as not being necessary to the determination of this case.

Here then we have a supreme court and courts of oyer and terminer and general gaol delivery having general, full, and ample power and jurisdiction of the largest character for the administration of the criminal jurisprudence of and in the Province of British Columbia. It is only necessary now to refer to one other statute, namely, the Dominion Act 32 and 33 Vic. cap. 29, by which it is provided:

Sec. II.—Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with felony or misdemeanor should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court at which such person is, or is liable to be, indicted may at any term or sitting thereof, and any judge who might hold or sit in such court may at any other time order, either before or after the presentation of a bill of indictment, that the trial shall be proceeded with in some other district, county or place within the same province, to be named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused as the court or judge may think proper to prescribe.

The record of the proceedings in the courts of oyer and terminer and general gaol delivery and of the Supreme Court of British Columbia in error was brought before the learned judge both on the part of the prisoner and on the part of the Crown and the sheriff. The learned judge says:

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It is proper to explain that a copy of the record was submitted and referred to in the affidavit on behalf of the prisoner when the order *nisi* was applied for, and another copy was returned by the sheriff of Vancouver and put in by the Crown when showing cause against the order. It was, therefore, by both parties made a part of the case submitted for my decision.

And the cause of the prisoner's detention under the sentence and judgment of those courts was also shown to the learned judge by the affidavit of the sheriff, and also by his return to the writ of *habeas corpus*, and the learned judge, it is true, thinks there was no return, because the document returned with the writ by the sheriff, though purporting to be the sheriff's return, was not signed by him, and, the learned judge thinks, was not in his handwriting, he having compared the writing with the sheriff's writing in another document before him which he thinks it does not resemble. The return does not appear on the proceedings to have been in any way challenged or impugned, or any contention made that it was not transmitted by the sheriff, or by his authority, as and for a regular and proper return, and, in my opinion, it was a good and sufficient return; but whether so or not is wholly immaterial, inasmuch as the learned judge had before him the record of the trial, conviction and sentence of a criminal court of competent jurisdiction, with the record of the Superior Court in error affirming and sustaining such conviction and sentence, and the affidavit of the sheriff which showed that the prisoner was held in custody under and by virtue of such conviction and sentence. With these materials before him should this writ have issued? I think not; when it appeared by the records of courts of competent criminal jurisdiction, courts having jurisdiction over the person and over the offence with which he was charged, that he had been tried, convicted and sentenced, and was held under such sentence, the learned judge should have refused

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to grant the writ. But the learned judge has held that the court which tried the prisoner was no court at all. I have shown, I think conclusively, that it was a properly constituted court.

He also held that he could go outside the record to show that the case was not triable in Victoria. I venture to propound without fear of successful contradiction, that by the law of England and of this Dominion, where the principles of the common law prevail, that if the records of a superior court contains the recital of facts requisite to confer jurisdiction, which the records in this case did, it is conclusive and cannot be contradicted by extrinsic evidence; and if the superior courts have jurisdiction over the subject-matter and the person, as the court of oyer and terminer and general gaol delivery and the Supreme Court of British Columbia had in this case, the records of their judgments and sentences are final and conclusive, unerring verity, and the law will not, in such a case, allow the record to be contradicted.

It is said there were two orders for changing the venue; that the first order made no reference to any provision for expenses, and which it was alleged by reason thereof was void; on the other hand, it is said the order originally made, orally, in the presence of the prisoner and his counsel, made such provision, and that this is the order which appears on the face of the record; with this discussion I think the court has nothing to do, as I think we can only look at the record and are bound by what it contains, and this record sets out that on application of the Crown made in the presence and hearing of Sproule charged with and committed to stand his trial for having, on the 1st of June, 1885, at Kootenay Lake, in the bailiwick of the sheriff of Kootenay, in the Province of British Columbia, feloniously, wilfully and of his malice aforethought, killed

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and murdered one Thomas Hammill, the Chief Justice on hearing the counsel for Sproule, and it appearing to his satisfaction that it was expedient to the ends of justice that the trial of the said Sproule for the alleged crime should be held in the city of Victoria, and Mr. Irving undertaking on behalf of the Crown to abide by such order as the judge who may preside at the trial might think just to meet the eleventh section of 32 and 33 Vic. ch. 29, such being the condition which he thought proper to prescribe, ordered in these words:

I, Sir Matthew Baillie Begbie, Knight, Chief Justice of British Columbia, and being a judge who might hold or sit in the court at which the said Robert E. Sproule is liable to be indicted for the cause aforesaid, do hereby order that the trial of the said Robert E. Sproule shall be proceeded with at the city of Victoria, in the said province, at the court of oyer and terminer and general gaol delivery, to be holden at the said city on Monday, the 23rd day of November, 1885, and I order that the said Robert E. Sproule be removed hence to the gaol at the city of Victoria and that the keeper of the said gaol do receive the said Robert E. Sproule into his custody in the said gaol and him safely keep until he shall thence be delivered by due course of law.

(Signed) MATT. B. BEGBIE C.J.

The record then goes on to show the record of the trial, conviction and sentence, the writ of error and the errors assigned, the hearing of the parties, deliberation and the judgment of the court which was "that "there is no error either on the record or proceedings or "in the giving of the judgment on which the writ of "error was brought, therefore it is considered and "adjudged by the said court here that the judgment "aforesaid be in all things affirmed and stand in full "force and effect."

I may say, however, that the judge having power before indictment to change the place of trial he did so, and the order said to have been signed in the first instance was a good and sufficient order for that purpose, as was the order which appears on the record. The

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indictment was found in the place assigned for the trial; no objection was made to the change before or after the finding of the indictment, no application was made to set aside, add to or alter the order or to quash the indictment. The indictment was pleaded to and the trial proceeded without any objection being made to the court or place or manner of the trial; no application to postpone the trial, nor any complaint made at the trial that any wrong was being done the prisoner. The court then had full jurisdiction over the prisoner and the subject-matter tried. After the trial the prisoner obtained a writ of error and assigned the alleged errors which included the very matters now alleged as grounds entitling him to a discharge under this writ of *habeas corpus*. He was heard and the court adjudged that there was no error and affirmed the judgment and sentence of the court of assize and general gaol delivery.

In this case my learned brother has cited numerous authorities to show that he had the right to go behind the record, but he frankly admits that the cases he has relied on all have reference to the records and proceedings of inferior courts. He has not been able to find a case of the record of a superior court contradicted, or its validity impugned, by extrinsic evidence. And I venture humbly, and with all respect, to suggest that the difficulty in this case has arisen from a misapprehension of what can, and what cannot, be done under a writ of *habeas corpus*, but more especially from not duly appreciating the distinction between the validity and force of records of courts of inferior, and of courts of superior, jurisdiction, but treating records of superior and inferior courts as being of the same force and effect. That this was done in this case is very obvious, for the learned judge says:

> The English cases which I have cited are those before justices; but on principle I can see no difference between a judgment of an

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inferior and one of a superior court, when the question of jurisdiction is raised; nor can I see why, if the record of the former can be shown to be erroneous or false as touching the matter of jurisdiction, the other cannot be; for without jurisdiction the acts of the one must be void as well as those of the other, and therefore the rule in the one case should be the same as in the other.

From this doctrine I am constrained to dissent. I certainly did not expect to hear it contended that the record of a superior court was not to be treated as absolute verity so long as it stood unreversed. The following from Coke on Littleton, 260, I have always been taught was good law at the time it was written, and ever has been since:

> Legally records are restrained to the rolls of such only as are courts of record and not the rolls of inferior, nor of any other courts, which proceed *secundum legem et consuetudinem angliam*. And the rolls being the records and memorials of the judges of the courts of record import in them such uncontrollable credit and verity as they admit no averment, plea or proof to the contrary; and if such record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself. And the reason hereof is apparent, for otherwise (as our old authors say and that truly) there should never be any end of controversies, which should be inconvenient. Of courts of record, you may read in my reports, but yet during the term wherein the judicial act is done the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that term as the judges shall direct, but when that term is past then the record is the roll and admitteth no alteration, averment or proof to the contrary.

The cases which establish that in a case like the present the writ of *habeas corpus* is inapplicable are numerous. I will refer to a few only of them.

In the *Queen* v. *Lees* (1) Lord Campbell C.J. says:

> A writ of *habeas corpus*, to the expediency of granting which we have also directed our attention, is not grantable in general where the party is in execution on a criminal charge after judgment, on an indictment according to the course of the common law; and even supposing it could run to St. Helena, it could only be useful as ancillary to, or accompanying, a writ of error, as it is only by writ of error that such judgment, according to the course of the common

(1) 27 L. J. N. S. 407.

law, can properly be reversed; until the judgment be reversed the prisoner ought not to be discharged. For these reasons we think that we ought not to interfere.

It is alleged, on the part of the prisoner, that the proceedings were upon a repealed statute, and that there were errors in the judgment, and hardships and irregularities in the proceedings. If such allegations are well founded, and obstacles are found to prevent any remedy by appeal to the Privy Council, or by writ of error to this court, we apprehend that the advisers of the Crown will take the matter into their consideration, and form their judgment with respect to any alleged error, wrong or hardship, which may be brought before them; and if any such should be established to their satisfaction, will advise the Crown to give the relief to which they may think the applicant entitled, by pardon, or mitigation of punishment. We have no authority to interfere.

Application refused.

In *ex parte Fernandez* (1) Erle C.J. says:

Now, the presumption is that all has been rightly done, and that the imprisonment has taken place in due course of law. The commitment being the act of a lawful court acting within its competency, there can be no invasion of the liberty of the subject in the sense in which the phrase is used. To issue a *habeas corpus* for the purpose of reviewing the decision of the judge, would be to my mind a gross abuse of the process. The writ would, I think, be most perniciously applied, if sought for on that ground; witness the numerous applications, for writs of *habeas corpus* to bring into question the validity of judgments and other proceedings, which have invariably failed. That principle ought to be adhered to, unless there is reasonable ground for thinking that the commitment was void for want of setting forth in the warrant the facts which would show the offence and the jurisdiction of the judge to deal with it. I am clearly of opinion that no foundation is laid for this motion.

Willes J.:

The result is that, historically, the courts of assize, as being courts of general jurisdiction in all criminal cases, and having power to try all issues of fact of whatever importance arising in the several counties on their circuits, to which, therefore, every man is indebted in a greater or less degree for the protection of his property, his liberty and his life, do stand in the place of the ancient iters of the judges itinerant, and are a superior court, so to speak, by succession; whilst, practically, regard being had to the powers which they exercise, they are, as to criminal matters, courts of the most

(1) 10 C. B. N. S. 37.

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extensive jurisdiction, and, as to civil causes, periodical sittings of the judges of the superior courts, or, in their necessary absence, of others thought worthy to be associated with them for trying in the country those issues of fact which can be more conveniently disposed of there than in London or Middlesex.

In *ex parte Partington* (1) Lord Denman C. J. says:

There still remains the question whether the commissioner has rightly decided that the prisoner's case was not within the act; but this was a question which he had jurisdiction to enquire into and decide; he has done so, and we are not authorized to review his decision. We by no means intimate a doubt of the propriety of that decision; we simply express no opinion upon it. It may be that there may be no court competent to review it; or it may be that by the chief judge or the Lord Chancellor the merits of the decision may be reviewed. It is clear only that we have not that power. The prisoner, therefore, must be remanded.

In *Regina* v. *Newton* (2) Lord Denman C.J. says:

The prisoner was convicted at the Central Criminal Court of unlawful wounding at the Beulah Spa, which place was stated in the indictment to be in the Parish of Lambeth, within the jurisdiction of the central criminal court. The Beulah Spa is really out of the jurisdiction of the Central Criminal Court. Affidavit being made, showing this last fact, in support of a motion for a writ of *habeas corpus* to bring up the body of the prisoner, the court, on the motion being made, refused the writ, the affidavit being in contradiction of a record.

Jarvis C.J. says:

It is sought to impeach this record. This is not the remedy to be taken. There is a record which you cannot impeach. The proper application is to the Attorney General for a writ *coram nobis*. The Attorney General has a discretion on that matter, and is not the mere slave of the public. I looked, when Attorney General, with anxiety to this part of my duty. I refused a writ of error in the case of the Mannings. The application here has been made and refused. The record stands, and the prisoner is convicted of an offence committed within this jurisdiction.

Cresswell J.:

I am of the same opinion. A record is of so high a nature that, if error in fact be assigned which contradicts it, it is ill assigned.

Crowder J.:

As long as the record stands it is quite impossible to grant a *habeas corpus* on a motion of this kind.

(1) 6 Q. B. 656; (2) 3 W. R. 419.

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Brenan's Case (1) Lord Denman C.J.:

We think, however, that, the court having competent jurisdiction to try and punish the offence, and the sentence being unreversed, we cannot assume that it is invalid or not warranted by law, or require the authority of the court to pass the sentence to be set out, by the gaoler upon the return. We are bound to assume, *prima facie*, that the unreversed sentence of a court of competent jurisdiction is correct; otherwise we should, in effect, be constituting ourselves a court of appeal without power to reverse the judgment.

No words could have more clearly intimated that the fact of a sentence having been passed by such court founds the right to detain, and that the validity or regularity of the sentence is not to be called in question. Even if that sentence is erroneous, this court cannot set it aside or inquire into its propriety or deny the effect which the law assigns to any sentence.

In the matter of *Clarke*, a case of a magistrate's order (2), Lord Denman C.J. says:

The adjudication of any competent authority deciding on facts which are necessary to give it jurisdiction is sufficient. It would be different if the affidavits tended to show that the magistrate's order was obtained by fraud, or that he was not really exercising the functions which he professed to exercise.

Patteson J.:

The only real question now is, whether affidavits are admissible to show that the statements in the order are not true. There is no case in which a party has been allowed in this way directly to contradict facts set forth in an order. All that the courts have permitted has been to allege a collateral extrinsic fact, confessing and avoiding, as it were, the disputed order. Here the object proposed is to contradict it; and there is no instance of such an attempt having been yielded to. *Brittain* v. *Kinnaird* (3) shows that a fact directly stated on a conviction is not to be controverted. Every order must show facts sufficient to give a jurisdiction; but the facts, if so shown, are not to be contested.

Wightman J.:

I think, for the reasons which have been given, that the prisoner must be remanded. No case is cited in which parties have been allowed to controvert a fact directly decided by a court of competent

(1) 10 Q. B. 502. (2) 2 Q. B. 632.
(3) 1 B. & B. 432.

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jurisdiction.

Prisoner remanded.

Dime's Case (1) shows the distinction between proceedings before a superior court and those of an inferior court.

In *Carus Wilson's case* (2) Lord Denman C.J says:

We may decide the question before us by considering the principle of the exception that runs through the whole law of *habeas corpus*, whether under common law or statute, namely, that our form of writ does not apply where a party is in execution under the judgment of a competent court. When it appears that the party has been before a court of competent jurisdiction, which court has committed him for contempt or any other cause, I think it is no longer open to this court to enter at all into the subject-matter.

* * * * * *

Suppose a party were convicted of murder, and ordered to be executed in three weeks, could we, while he was awaiting the execution of his sentence, receive a statement that he was improperly convicted, that evidence was improperly admitted, or that the offence was not murder? The security which the public has against the impunity of offenders is, that the court which tries must be considered competent to convict. We would not interfere in this way without incurring the danger of setting at large persons committed for the worst offences.

In the case of the *Sheriff of Middlesex* (3) Lord Denman C.J. says:

On the motion for a *habeas corpus* there must be an affidavit from the party applying, but the return, if it discloses a sufficient answer, puts an end to the case, and I think the production of a good warrant is a sufficient answer.

On a writ of *habeas corpus* per Littledale J.:

If the warrant returned be good on the face of it we can inquire no further.

I have not deemed it necessary to refer to the American cases cited, which though entitled to every respect are not binding on this court, and should not be followed if at variance with the English authorities by which we are bound when they are consistent, but I find, in a case in Massachusetts decided by an eminent

(1) 14 Q. B. 554. (2) 7 Q. B. 1008.

(3) 11 A. & E. 201.

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jurist, formerly chief justice of Massachusetts and now a distinguished judge of the Supreme Court of the United States, a principle propounded as I believe the law to be in these words.

Per Gray J. in *Fleming* v. *Clarke* (1).

The general rule is well established that a person imprisoned under the sentence of a court having general jurisdiction of the case is not to be discharged by *habeas corpus*, but should be left to his remedy by appeal, exceptions or writ of error,

For which he cites a number of authorities.

These authorities are, to my mind, conclusive that if the prisoner has any just cause of complaint against the proceedings in this case his remedy, if any exists, cannot be obtained through the instrumentality of a writ of *habeas corpus*, for I have no hesitation in saying that a judgment of conviction and sentence of the court of oyer and terminer and general gaol delivery of British Columbia on an indictment for murder, confirmed on error by the Supreme Court of British Columbia, and standing unreversed by the Privy Council, is conclusive as to the prisoner being a convicted felon. Such a decision as this on which we are called to pass raises a conflict of authority, between the established superior courts of the country and individual judges, of a most extraordinary character; places the officer in whose custody the prisoner is, in this most anomalous and trying position, compelling him to elect to hold the prisoner under the judgment and sentence of a court of unquestionably competent criminal jurisdiction, confirmed by the unanimous decision of the full bench of the Supreme Court of the province having unrestricted jurisdiction in criminal cases, or to discharge him under the order of a single judge at chambers, it may be even of a single judge of the very court that unanimously affirmed his judgment and sentence, or a single

(1) 11 Allen 195.

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judge of this court, in direct opposition to, and defiance of, such a conviction and sentence.

A good deal has been said as to the sheriff not obeying the writ and not bringing up the prisoner.

In Comyn's Dig. *hab. cor. b.* it is said:

> If a man is in prison for any cause, except upon a conviction for any crime, or in execution, he may have an *habeas corpus cum causâ detentionis.*

But where the commitment is for treason or felony plainly expressed in the warrant the officer is not obliged by stat. 31 Car. 2 cap. 2, to make a return as directed by that statute and, *per* LeBlanc J. (1):

> It is sufficient for the officer having him in his custody to return to a writ of *habeas corpus* that a court having competent jurisdiction had inflicted such a sentence as they had authority to do and that he holds him in his custody under that sentence.

Chief Justice Robinson deals with that phase of the case in *Regina* v. *Crabbe*, (2) where he says, delivering the judgment of the court:

> We cannot properly grant the *habeas corpus* to bring up a prisoner who is under sentence upon a conviction for larceny at the Quarter Sessions; and if we should grant the writ the sheriff or gaoler would do right to return that the prisoner is in his custody in execution of a sentence upon conviction before the Quarter Sessions, and not bring up the prisoner. If there has been anything wrong in the proceeding below, still there can be no *certiorari* after judgment; the only course is by writ of error.

From these views of the law I am not prepared to dissent. So soon then as it appeared by the record of a superior court of general criminal jurisdiction that the prisoner had been tried, convicted of a felony and sentenced by such a court, the jurisdiction of the judge, that is to say, the right of the judge to issue the writ, or discharge the prisoner, ceased.

If in the administration of the criminal jurisprudence of the Dominion the judgments of the superior courts of the provinces, and of this the Supreme Court of the

(1) 1 East 317. (2) 11 U. C. Q. B. 448.

Dominion, can be paralysed by a single judge of either of those courts in chambers, the practical effect of what is now contended for, and if, as contended, there is no redress in this or any other court of the Dominion of Canada, is it too much to say that to allow single judges by virtue of the writ of *habeas corpus* so to review, control, and, in effect, nullify the judgments of these high courts of criminal jurisdiction is subversive of all law and order? For if this writ and order could stand, it is clear that every sentence pronounced, not only by the Supreme Court of British Columbia but by all the supreme courts of criminal jurisdiction in the other provinces, would be subject to be, practically, reviewed summarily and their judgments and sentences declared invalid and of no effect, by a judge in chambers not only of this court but by a judge in chambers of the courts of the province in which the proceedings were had and the judgments and sentences pronounced.

As the judges of this court, in matters of *habeas corpus* for the purpose of inquiry into the cause of commitments in criminal cases under any Act of the Parliament of Canada, have only concurrent jurisdiction with the judges of British Columbia, if a judge of this court has jurisdiction in this matter, a single judge in British Columbia can, on *habeas corpus*, not only review the proceedings of the court of oyer and terminer and general gaol delivery and of the Supreme Court of British Columbia, and discharge a prisoner convicted and sentenced by those courts, but, if on error there had been a difference of opinion in the Supreme Court of British Columbia and an appeal had been taken to this court, and this court had affirmed the judgment and sentence of the courts in British Columbia, on the grounds acted on by my learned brother, the dissentient judge in British Columbia could, on *habeas corpus*, have treated the whole proceedings as a nullity, and, notwithstanding

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the unreserved judgments of all these courts, prevented these judgments from having any effect, although they stood on the records of the court unreversed, by simply ordering the prisoner to be discharged out of custody. Nor indeed, if the judgment of this court was carried to the Privy Council and there affirmed, can I see any reason why, on the principles acted on in this case, a single judge in British Columbia or of this court should not go behind the record, and by extrinsic evidence, pronounce the proceedings without jurisdiction. It seems to me only necessary to state the logical result and effect of the exercise of such a jurisdiction, either by the individual judges of British Columbia or of this court, to produce the conviction that the principles of the common law under which this writ issued could never be found to sanction such a proceeding. At any rate, I have an abiding confidence that the laws of this Dominion have not entrusted to any single judge, however high his legal status, a jurisdiction fraught with such dreadful consequences. Much as I appreciate the value of the writ of *habeas corpus*, and no man can do so more than I do, if by its instrumentality such an exercise of jurisdiction can be accomplished, I should feel that instead of its being a blessing, as I verily think it is, it would be the exact opposite. And I can only add in conclusion that if the proceeding of issuing this writ and the order discharging the prisoner from the judgment and sentence of the court of oyer and terminer in British Columbia, affirmed on a writ of error by the Supreme Court of British Columbia, and which writ, if a judge of this court could issue it, might have been issued by a judge of the court of British Columbia (thereby, in effect, reversing the judgment of both those courts and that, too, on the very same point now in controversy) is so final and conclusive that such writ and order cannot be

dealt with by this or any other court in the Dominion of Canada, would it be too much to say that the administration of justice in this Dominion of Canada is in a truly deplorable condition?

The record and materials before the learned judge having not only shown a proper legal trial, conviction, and sentence by a court of general criminal jurisdiction, but disclosed a valid ground of detention, the application for a writ, therefore, should have been refused. As the writ should not have issued, then, as in *Crawford's case*, it was improvidently issued and should be quashed, and it follows as a necessary consequence that if my learned brother ought not to have issued the writ clearly the order for the prisoner's discharge should not have been made.

STRONG J.—The presence in court of the prisoner for the purposes of this motion was, I consider, for the reasons which have been stated, unnecessary. And the other preliminary objection that the court has no jurisdiction to control its own process by quashing a writ of *habeas corpus* issued under section 51 of the Supreme and Exchequer Act of 1875, is, in my opinion for reasons which I will state hereafter, wholly untenable. That the writ was improvidently issued, the matter upon which it was granted having been in law insufficient, is also a conclusion which I have arrived at for reasons and upon authorities which I will now proceed to state.

In the first place there was no jurisdiction to issue the writ under section 51, the prisoner not having been committed in a "criminal case" under any Act of the Parliament of Canada. The offence of murder is not a statutory but a common law crime, in as much as the first section of the statute 32 and 33 Vic. ch. 20, does not apply to the offence but to its punishment.

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In the case of *Potvin* who had been been committed on a charge of murder under a coroner's warrant, and for whose discharge an application for a writ of *habeas corpus*, was made to me, I had to consider this identical question, and I then formed and acted upon the same opinion as that just enunciated.

If any proposition is conclusively established by authorities having the support of the soundest reasons, it is that, after a conviction for felony by a court having general jurisdiction of the offence charged, a *habeas corpus* is an inappropriate remedy, the proper course to be adopted is such a case, being that to which the prisoner in the present case first had recourse, viz.: a writ of error. The anomalous character of such an interference with the due course of justice, in intercepting the execution of the judgment of a court of competent jurisdiction, and by which a single judge in chambers might reduce to a dead letter the considered judgment of the highest court of error, would to my mind be itself sufficient even without authority to induce a strong presumption that such a state of the law could not possibly exist.

The authorities are however abundant, and decisive against such a contention. The strong language used by Williams, J. in *Regina* v. *Newton* (1) seems well warranted, and without attempting any minute examination of the authorities, it is sufficient to say that the case of *Regina* v. *Newton* is entirely in accordance with other well considered cases particularly with those of *Regina* v. *Suddis* (2); *ex parte Lees* (3); *Bethell's Case* (4); *Re Carlile* (5); *Re Crabbe* (6); and *ex parte Watkins* (7), (a case in the Supreme Court of the United States). When there has been a conviction

(1) 16 C. B. 103.
(2) 1 East 306.
(3) E. B. & E. 828.
(4) 1 Salk. 347.
(5) 2 B. & Ad. 362.
(6) 11 U. C. Q. B. 447.
(7) 3 Peters 93.

for a criminal offence by a superior court of record having general jurisdiction over that offence the objection that the court ought not in that particular case to have exercised its jurisdiction or that there was some fatal defect in its proceedings is one conclusively for a court of error, in other words the judgment of the court is *res judicata* as to questions of jurisdiction as well as to all other objections. If a court having no jurisdiction over the offence charged should so far exceed its authority as to entertain a criminal prosecution, there the proceeding, being one beyond its general jurisdiction, is wholly void and the prisoner so illegally dealt with may be entitled to be discharged on a writ of *habeas corpus*. This distinction, may, I think, be well illustrated by a case which I put during the argument, of a recorder's court or a court of quarter sessions having no jurisdiction either at common law or by statute to try a prisoner for murder, trying and sentencing one on such a charge, for such a proceeding would be beyond the general jurisdiction of the court. Applying this here, there can be no doubt or question that the court of oyer and terminer in British Columbia had jurisdiction to try prisoners for murder, and that being so it is, in my judgment, decisive of the question upon which we are called upon to pronounce.

As to the objection that the court was not properly constituted for want of a commission from the Governor General of the Dominion that was a proper question for the court of error and is concluded by the judgment in error, or if the Supreme Court of British Columbia did not possess the jurisdiction in error which it assumed to exercise (as to which however I have no doubt) then this point was equally concluded by the sentence of the court of oyer and terminer itself, as is shown very clearly by the cases already cited of *re Carlile* and *Regina* v. *Newton* and *re Crabbe*, in all of which cases

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the objections were to the jurisdiction of the convicting court.

Whilst I hold that the record is conclusive here and that that is sufficient to show that the writ was improvidently issued, I am also prepared to agree with the Chief Justice in holding, as he has, that the objections to the conviction of the prisoner were, even viewed as matters of error, all untenable. Without intending to enter upon any consideration in detail of these objections, I may say, that as regards the objection that there was no proper commission of oyer and terminer, it appears to me entirely covered by the statute of 1885, which, as well as that of 1879, was in force when the prisoner was tried and applied to his case. These acts were, under sub-section 14 of section 92 of the British North America Act authorizing the constitution, maintenance and organization of provincial courts of criminal jurisdiction, clearly within the competence of the provincial legislature, and if no regular commission was issued there was jurisdiction to hold the courts of oyer and terminer and general delivery without commission. I am, however, of opinion that under the provisions of sections 64 and 65 of the British North America Act and the provisions of the order in council for the admission of British Columbia into the confederation, the power of issuing such commissions was conserved to the Lieutenant Governor who before the union clearly possessed that power.

As regards the objection to the order changing the venue I also agree that there could be no valid objection to the conviction, which the prisoner could avail himself of upon a writ of *habeas corpus*, so long as the record was regular and sufficient upon its face. We are bound to consider the record as importing absolute verity, and the order must, therefore, be assumed to

have been actually made on the day it bears date. Moreover, the decision of the Court of Error would, as already shewn, be conclusive as to this objection.

Next it is said that the Supreme Court of British Columbia had no jurisdiction to entertain a writ of error. The terms on which that court was originally established giving it a general jurisdiction in criminal cases are said to be insufficient to confer jurisdiction in error. The court was originally established not by legislative enactment, but by the authority of the Crown given to the Lieutenant Governor by his commission, and by a proclamation of the Lieutenant Governor following the terms of the commission. A court to exercise jurisdiction according to the course of the common law, (but common law courts only) can, as is well known, be legally established in this way. The only question therefore which can be raised is as to the extent of the jurisdiction implied in the words used. And this, I think, must be answered by holding that the powers of the court in criminal cases were to be the same as those of the Court of Queen's Bench at Westminster as it existed at the date of the proclamation. That court, being the great criminal court of original jurisdiction known to the common law, is the type which all criminal courts of general jurisdiction established in this way, must, in the absence of some words expressly restricting jurisdiction, be assumed to follow, and on this principle I have no doubt as to the jurisdiction in error in criminal cases of the Supreme Court of British Columbia. It would, however, make no difference if this were not so, for granting that the Supreme Court of British Columbia had no jurisdiction to issue the writ of error and that the judgment in error was wholly void, still we have before us the record of the Court of

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Oyer and Terminer which shows a good conviction and a conclusive sentence, and, in the cases already quoted of *Regina* v. *Newton*, *Regina* v. *Carlile* and *Regina* v. *Lees*, there was no writ of error, but conclusive effect in these cases was attributed to the judgments of courts of first instance.

So far I have refrained from writing fully either for the purposes of discussing arguments or examining authorities, all of which has been done by the chief justice.

There are however two or three points which were raised in the argument by the learned counsel for the Crown on which I desire, speaking only for myself, to say a few additional words. In the first place it was contended that the 51st section of the Supreme and Exchequer Court Act, 1875, was not within the powers of the Parliament of the Dominion. Acting upon the well established and salutary rule that a question of constitutional validity is one which courts never deal with, if the case is susceptible of a decision in favor of the party raising the objection on other grounds, it has been considered advisable not to enter upon any discussion of this point, and I only mention it expressly to reserve the right to consider it fully if it should be raised hereafter.

Next, with reference to the jurisdiction of the court to entertain the present motion, I desire to say that I have formed an opinion on that point even stronger than that already expressed by the Chief Justice. This court has, in my view, in exercise either of an inherent jurisdiction to control its own process and writs, or referentially under the words of the 51st section conferring on the judges of the court a jurisdiction not in terms unlimited but only concurrent and therefore co-extensive, with that of the judges of the Supreme Court of British Columbia who

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are subject to the control of their own court, power to set aside this writ as having been issued improvidently. Some of my learned brothers, I believe, hold that the words of the 51st section expressly conferring a right of appeal in case the writ should be refused have the effect, upon the principle of the argument "*e contrario*," of excluding an appeal to or a right of review by the court in all other cases under the clause in question. Differing, I admit, very widely from them, I am of opinion that there is nothing in the words just referred to which ought to have the effect of so excluding the ordinary jurisdiction of this court to review the decision of one of its judges who, sitting in chambers, exercises the power of the court. If the concluding words of the section giving the appeal in case of the refusal of the writ had been omitted and the section had concluded with the words "any Act of the Parliament of Canada" (the provision relating to extradition was repealed in 1876,) there could, I apprehend, be no possible doubt that, on the general principle that when jurisdiction is conferred on a judge in chambers a right to revise his decision is impliedly conferred on the court, there would be in every case, as well in those in which the writ might be granted as in those in which it might be refused, a right in the court to revise the decision and rescind the order of a judge made under this section. The cases of *Robinson* v. *Burbidge* (1), and *Witham* v. *Lynch* (2), are sufficient authorities to establish this proposition, though no doubt other cases to the same effect could easily be produced, but the proposition in this general form is so universally admitted and acted on in practice that a search for additional authorities may have been thought superfluous. The question is then reduced to this: Do the latter words of the section, giving the right of appeal in

(1) 1 L. M. & P. 99.

(2) 1 Ex. 391.

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the one particular case of the writ having been refused, take it away in all others, upon the principle of the often quoted maxim, *expressio unius est exclusio alterius*, or are we to consider this provision as introduced either by way of extreme caution in regard of the right of personal liberty, or from a misapprehension of the general law, which without such words would have conferred an appeal or right of review? No reason can be suggested why the right of appeal should be withheld when the writ is granted, and I am of opinion, therefore, that we must attribute these words expressly giving an appeal to the excessive caution of the legislature to provide all due protection to the subject in the matter of personal liberty, and not to an intention to disarm the court of the almost essential right of controlling writs and process issued under its seal and running in its name. The provision under consideration is therefore to be construed not upon the principle of the maxim referred to, but upon the application of another equally recognized, viz., *expressio eorum quae taciti insunt nihil operatur*, and a right to entertain appeals from, and revise, rescind and vary orders made, under this section must be recognized as existing in the court to the fullest extent or, in the present case at least, to as full an extent as the Supreme Court of British Columbia possesses jurisdiction to revise and rescind the orders of its judges made at chambers in matters connected with the granting of the writ of *habeas corpus* and proceedings incidental to it.

Next, it is to be observed that the notice of motion asks not merely that the writ of *habeas corpus* be set aside, but also that the order for the prisoner's discharge consequent upon the return may be rescinded. That the return was a perfectly good one in form, in my opinion, cannot be doubted. It follows the precedent of a return to such writs given in Archbolds Crown

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Practice (1); and I cannot think that there is any ground for the objection that the return should in addition to the form used be signed by the sheriff in his own hand. The sheriff is a ministerial officer and such officers may in law always act by deputy, and we know that in practice the returns to all writs directed to the sheriff are usually signed by the deputy or under sheriff in the name of the sheriff. That the return is good in substance appears not only as a necessary consequence of what has been already said that the sentence of a court of competent jurisdiction is not to be interfered with by a writ of *habeas corpus*, but also by the high authority of a case directly in point. In the *Queen* v. *Crabbe* (1), already referred to, where such a writ was moved for to bring up a prisoner under sentence of a court of quarter sessions on a conviction for larceny, upon the ground that the court which tried him was not properly constituted, Robinson C.J. says:—

> We cannot properly grant the *habeas corpus* to bring up a prisoner who is under sentence upon a conviction for larceny at the quarter sessions, and if we should grant the writ the sheriff or gaoler would do right to return that the prisoner is in his custody in execution of a sentence upon conviction before the quarter sessions and not bring up the prisoner.

This is a decision of peculiar weight as being the judgment of a great crown lawyer and of a Chief Justice little disposed to excuse any laxity in obedience to the process of his court. Having thus upon the files of this court a return good in form and in substance, a return which is nothing less than a record of the court, what, I ask, is there in the statute to prevent this court acting on such a return to its own writ? The utmost effect which can be given to the words already referred to, is that they apply in case the writ is granted to exclude an appeal from that decision, but here the writ having been granted and obeyed so far that a

(1) At p. 346. (2) 11 U. C. Q. B. 447.

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good return has been made to it, how can these words, which do not refer to the proceedings ulterior to the granting of the writ, that is, to the return and subsequent proceedings, take away that obvious jurisdiction which this court must, in common with the most humble tribunal of the land, possess over its own records and its own officers? I can see no reason against exercising jurisdiction on this head and even therefore if I was convinced that we had no power to inquire into the circumstances connected with the granting of the writ, I should still be prepared to hold that there was on the files of the court a good return to the writ of the court upon which we are bound to act by relieving the sheriff, an officer at once of this court and of the Supreme Court of British Columbia, from the embarrassing position in which he is placed between the conflicting orders of the two jurisdictions, by rescinding the order for the prisoner's discharge from custody made on the return.

It is laid down in Bacon's Ab. Tit. *Habeas Corpus*, that a writ to bring up a criminal prisoner should be directed to the gaoler and not to the sheriff, as in the case of a civil prisoner, but here it appears from the proceedings before us that the prisoner, although originally in the custody of the gaoler, was remanded by the court of oyer and terminer and also by the Supreme Court in error to the custody of the sheriff in whose custody he must therefore be now considered to be.

Lastly I must observe that had I thought the learned judge right in all other respects I should still have thought he erred in discharging the prisoner instead of remanding him as he had by statute express authority to do. There were, in my opinion, materials before the judge amply sufficient to warrant a remand.

For the foregoing reasons I am of opinion that this motion must be granted to the fullest extent asked for.

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FOURNIER J.—Cette cause est soumise à la cour sur une motion de la part de la Couronne demandant l'annulation d'un bref d'*habeas corpus* émis sur l'ordre de l'honorable juge Henry, ordonnant au shérif de l'Ile de Vancouver de produire devant l'honorable juge, à Ottawa, la personne de Robert E. Sproule. L'annulation des procédés subséquents au dit bref, y compris l'ordre de mise en liberté du dit Sproule sont aussi demandés par la même motion. Les raisons données à l'appui de cette demande sont : 1° Que l'honorable juge n'avait pas le pouvoir d'ordonner l'émission du dit bref d'*habeas corpus*. 2° Que son jugement ordonnant la mise en liberté du dit Sproule est erroné parce que le dit Sproule avait légalement subi, devant une cour compétente son procès pour meurtre, et en avait été trouvé coupable et convaincu, et que la conviction avait ensuite été confirmée sur un bref d'erreur.

Le meurtre pour lequel le prisonnier a subi son procès en décembre 1885, à Victoria, dans la Colombie Britannique, avait été commis le 1er juin, à Kootenay dans la même province. Un verdict de culpabilité fut rendu (avec recommandation à la clémence royale), mais une sentence de mort n'en fût pas moins prononcée contre le prisonnier, le 5 janvier 1886.

Le condamné ayant obtenu un bref d'erreur, la cour Suprême de la Colombie, composée de cinq juges, étant au complet, rejeta, après audition, le bref d'erreur et confirma la sentence prononcée.

Le trois mai suivant une demande d'*habeas corpus* fut présentée à l'honorable juge Henry, lequel, après audition et délibéré, ordonna l'émission du bref d'*habeas corpus* dont l'annulation est demandée. Sur ce bref le shérif de l'Ile de Vancouver ayant fait rapport qu'il détenait Sproule en vertu d'une sentence de mort, prononcée contre lui aux dernières assises de Victoria, pour

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meurtre, sentence qui avait ensuite été confirmée par la décision unanime de la cour Suprême de la Colombie Britannique, sur un bref d'erreur, il soumettait respectueusement qu'en conséquence il n'était pas tenu de se conformer aux injonctions de ce bref. Après la production de ce rapport, une demande de mise en liberté du condamné fut présentée à l'honorable juge qui après audition, accorda cette demande.

Les questions débattues devant l'honorable juge Henry furent les mêmes que celles qui avaient été discutées devant les cinq juges de la cour Suprême de la Colombie, savoir: 1° qu'un changement de *venue* avait été illégalement ordonné; 2° que la commission du lieutenant-gouverneur de la Colombie-Britannique, en date du 23 novembre 1885, établissant une cour d'Oyer et Terminer et de délivrance générale, en la cité de Victoria, et les assises tenues en vertu de cette commission émise sous le grand sceau de la province de la Colombie, étaient illégales.

L'honorable juge par un jugement dans lequel il a fait un examen approfondi des importantes questions qui lui étaient soumises, a ordonné d'abord l'émission du bref d'*habeas corpus* et plus tard, la mise en liberté du condamné.

Les mêmes questions ont été de nouveau débattues devant cette cour sur la motion demandant l'annulation des ordres rendus par l'honorable juge Henry tant pour l'émission du bref d'*habeas corpus* que pour la mise en liberté du prisonnier.

Ces questions ont été traitées par les habiles conseils entendus tant de la part de la Couronne que de celle du condamné, avec tous les développements dont elles étaient susceptibles. Mais avant de les aborder, les savants conseils du condamné ont tout d'abord soulevé contre la juridiction de cette cour, une objection qui, si elle est maintenue, nous interdit le droit d'entrer dans

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'examen des questions décidées par l'honorable juge Henry. Cette question doit en conséquence être décidée avant que l'on puisse procéder ultérieurement.

La cour Suprême, disent les savants conseils du prisonnier, n'a qu'une juridiction limitée en matière d'*habeas corpus*. Elle ne peut ni ordonner l'émission du bref en première instance, ni siéger en appel pour reviser l'ordre rendu par un seul juge, s'il n'a pas refusé le bref demandé.

Bien que la section 15 de l'Acte de la Cour Suprême déclare d'une manière générale que la cour Suprême exercera une juridiction d'appel en matière civile et criminelle, dans tout le Canada, cette juridiction est définie et limitée par les sections qui suivent cette déclaration. L'appel est limité tant au civil qu'au criminel.

En matière d'*habeas corpus ad subjiciendum* dans les affaires criminelles la juridiction est conférée par la section 51 de l'Acte de la Cour Suprême à tout juge de cette cour, mais elle n'est pas étendue à la cour même qui n'a à cet égard aucun pouvoir, comme le font voir clairement les termes de cette section :

"Any Judge of the Supreme Court shall have concurrent jurisdiction with the Courts or Judges of the several Provinces, to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada * * * "

D'après ces termes c'est au juge individuellement de la Cour Suprême que des pouvoirs concurrents avec ceux des cours et des juges des provinces sont donnés au sujet de l'*habeas corpus* et non pas à la cour Suprême ; il n'y a pas entre cette dernière et les cours et les juges des provinces, concurrence à cet égard.

Le pouvoir que pouvait exercer l'honorable juge Henry quant à l'émission du bref d'*habeas corpus* est exactement le même que celui possédé par la cour Suprême de la Colombie et par les juges de cette cour

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individuellement. Or le pouvoir d'ordonner l'émission du bref *habeas corpus* appartient incontestablement à la cour Suprême de la Colombie et à chacun de ses juges individuellement. Cette clause lui donnait clairement le pouvoir qu'il a exercé de s'enquerir des causes du *commitment* du condamné.

On a paru trouver singulier que la section 51 n'ait pas donné à la Cour Suprême, en matière d'*habeas corpus*, comme c'est le cas dans les autres tribunaux supérieurs, les mêmes pouvoirs que la loi donne à ces cours et aux juges individuellement. La raison en est sans doute que la juridiction donnée à chaque juge était considérée suffisante pour l'expédition de ces sortes d'affaires.

Une autre raison bien forte pour faire voir que tous les pouvoirs ont été conférés à un seul juge, c'est qu'il est en réalité établi comme une cour de première instance en matière d'*habeas corpus*. Le parlement du Canada possède incontestablement par la section 101 de l'Acte de confédération le pouvoir de créer des tribunaux additionnels. C'est ce pouvoir qu'il a exercé en concentrant tous les pouvoirs sur un seul juge. Ce pouvoir de créer des tribunaux additionnels a déjà été exercé plusieurs fois, entre autres dans la création d'une cour d'élection et d'une cour maritime, où dans chacun de ces tribunaux un seul juge forme la cour.

Ce qui rend encore plus évident l'intention du législateur qui, par la section 15, créait une cour d'appel en matière civile et criminelle, c'est qu'il accorde le droit d'appeler de la décision d'un seul juge à toute la cour, lorsque le juge a refusé la demande d'*habeas corpus*, ou renvoyé l'accusé en prison.

D'ailleurs, quelles qu'aient été les raisons du législateur pour en agir ainsi, il est évident que son intention n'était pas de donner à la Cour Suprême une juridiction de première instance. Toute la juridiction qu'il lui a

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conférée se borne à un appel dans le seul cas où un juge a refusé le bref d'*habeas corpus*. Il n'y a que dans ce cas que la Cour Suprême puisse exercer une juridiction d'appel en matière d'*habeas corpus*. Si ce n'eût pas été l'intention de limiter ainsi l'appel sur l'*habeas corpus* en matière criminelle, le législateur, comme il l'a fait pour l'*habeas corpus* en matière civile, section 23, ne l'aurait-il pas accordé d'une manière générale à chaque partie intéressée. L'intention de limiter les appels en matière criminelle apparaît encore par la section 49, où cet appel est refusé lorsque la cour qui a confirmé la conviction, a été unanime. Ceci doit suffire pour faire voir que l'appel accordé en matière criminelle est limité et qu'il ne peut être exercé que dans le cas où il est spécialement accordé. Il l'est évidemment dénié dans le cas qui nous occupe, par les termes de la section 51—qui ne l'accorde que lorsquele bref a été refusé—dans ce cas, le bref a été accordé par l'honorable juge. Cette cour est donc sans juridiction.

Pour combattre le texte formel de l'acte de la cour Suprême refusant l'appel, on s'est attaché à des subtilités techniques pour en conclure que la cour a tout de même un droit de surveillance et de contrôle sur les brefs d'*habeas corpus* émis par un juge. Tout bref émanant de la cour Suprême, dit-on, doit, en vertu de la sec. 66, être attesté au nom du juge en chef, et de cette attestation, au nom de la cour on en conclut que celle-ci peut s'enquérir de la manière dont le bref a été émis,—et l'annuler si elle trouve qu'il l'a été irrégulièrement. Il est vrai que le bref signé par l'honorable juge Henry est intitulé comme émis de la cour Suprême et porte l'attestation du juge en chef. Il faut remarquer que la sec. 66 ne s'applique qu'aux brefs de la cour Suprême, c'est-à-dire à ceux qu'elle a le pouvoir d'émettre en vertu du statut. Cette formalité de l'attestation doit sans doute être observée pour ces brefs. Mais en est-il de même

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pour un bref qu'elle n'a pas droit de faire émettre ? Je ne le crois pas. Le bref d'*habeas corpus* aurait pu être valablement émis sur l'ordre du juge seul, sans l'attestation de la cour, et il eut été suffisant, car la principale et presque la seule formalité requise par le stat. 31, ch 2, (1) est la signature du juge, et le bref dont il s'agit porte celle de l'honorable juge Henry. L'officier sur lequel aurait été signifié ce bref, sans la signature d'un juge n'eût pas été obligé de s'y conformer, bien que ce bref fût attesté par le juge en chef et portât le sceau de la cour La formalité indispensable était la signature du juge ordonnant l'émission du bref et non l'attestation. Il serait donc valable sans l'attestation. Mais le fait d'y avoir ajouté cette pure formalité peut-il donner à la cour une juridiction que le statut lui refuse en termes formels. C'est évident que non, car ce serait un moyen indirect de violer la loi en s'attribuant au moyen d'une simple formalité sans valeur, une juridiction importante que la législature a refusée. Si cette formalité, ce dont je doute fort, doit être remplie dans un bref que le juge seul a droit d'émettre, il faut en conclure que le législateur a voulu autoriser le juge, qui seul a le pouvoir de faire émettre le bref, à se servir de l'attestation du juge en chef et du sceau de la cour.

Dans tous les cas le fait d'avoir rempli cette formalité ne peut pas plus vicier le bref, qu'il ne peut donner juridiction à la cour. Il est de principe d'ailleurs que le bref d'*habeas corpus ad subjiciendum* ne peut être déclaré nul pour simple défaut de forme.

On nous a dit aussi pour nous persuader que la cour Suprême doit avoir le droit de contrôler ou de reviser la décision de l'honorable juge Henry, que la cour du Banc de la Reine a un droit de surveillance sur les cours inférieures de record et qu'elle peut au moyen

(1) Vol. 1 Chitty's Crim. Law, p. 125.

soit du bref de prohibition ou d'erreur, ou de *certiorari* reviser leurs jugements ou les contraindre à se renfermer dans les limites de leurs juridictions respectives. Elle a aussi le même pouvoir sur les tribunaux inférieurs qui ne sont pas des cours de record, au moyen d'un bref appelé *writ of false judgment* On peut encore au moyen du bref d'*habeas corpus* émané de l'une ou l'autre des cours de juridiction supérieure mettre en question la validité des jugements des tribunaux inférieurs. Enfin les pouvoirs de surveillance de la cour du Banc de la Reine sur les tribunaux inférieurs sont très étendus et d'un caractère général.

On nous dit en outre que cette cour peut exercer, en certains cas, le pouvoir d'annuler des brefs qui auraient été illégalement ou irrégulièrement émis, et qu'elle tire son autorité pour en agir ainsi d'un pouvoir inhérent à sa constitution.

Tout cela est sans doute vrai de la cour du Banc de la Reine ; mais ne l'est pas de la cour Suprême. Si elle a ces pouvoirs où est le texte de loi qui les lui confère. Il n'y en a certainement pas. Ce n'est pas en supposant une analogie qui n'existe pas entre ces deux cours, que l'on peut en tirer la conclusion, que les pouvoirs de l'une peuvent être exercés par l'autre.

De ce que la cour du Banc de la Reine peut avoir un certain contrôle sur les brefs qui en sont émanés, doit-on en conclure que ce pouvoir existe aussi dans notre cour ? Peut-on dire encore que ce pouvoir résulte de l'ensemble des dispositions de l'acte de la cour Suprême et de la volonté présumée du législateur, de ne pas laisser à un seul juge, sans aucun contrôle de la part de la cour, le pouvoir de décider finalement les questions importantes qui peuvent être soulevées sur *habeas corpus*.

Ce raisonnement ne repose sur aucune base sérieuse. Ce n'est pas par des analogies et des présomptions que

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l'on peut s'attribuer une juridiction—il est de principe qu'elle n'est conférée que par des termes précis et une volonté formellement exprimée par le législateur. Ici le législateur a dit, de la manière la plus précise, tout le contraire de ce que l'on veut lui faire dire. Dans tous les cas ce qui peut être vrai du pouvoir reconnu à la Cour du Banc de la Reine d'annuler (quash) son propre writ, ne s'applique pas au bref d'*habeas corpus* émis par un juge de cette cour dans l'exercice de sa juridiction en cette matière. Sa juridiction à cet égard est concurrente avec celle des cours provinciales et de leurs juges. Il la possède toute entière lorsqu'il l'exerce seul, et elle est aussi étendue et complète dans sa personne que lorsqu'elle est exercée par une de ces cours ou un de leurs juges. Ses décisions ne sont nullement sujettes au contrôle et à la révision de la cour dont il fait partie pas plus que celles des juges des cours provinciales. Bien que la prétention contraire ait été avancée par les savants conseils de la couronne, ils n'ont pu l'établir par aucune décision judiciaire ni par aucun texte de loi. La décision citée *Queen* vs. *Crawford*, (1) sur laquelle ils ont fortement insisté comme établissant leur proposition, prouve précisément tout le contraire de leur avancé. Car dans cette affaire, l'ordre du juge avait fait le bref rapportable devant la cour, de sorte qu'elle exerçait ses pouvoirs en première instance et non comme tribunal de révision. La décision d'un juge ordonnant l'émission du bref et la mise en liberté d'un prisonnier est considérée comme finale, du moins le contraire n'a pu être établi.

Le pouvoir donné au juge de la Cour Suprême au sujet de l'*habeas corpus* est en ces termes :

" For the purpose of an inquiry into the cause of commitment, in any criminal case under any act of Parliament of Canada."

(1) 13 Q. B. 613.

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Ces termes ont, dit-on, l'effet de restreindre le pouvoir du juge à la catégorie des cas désignés par ces expressions. En conséquence un *habeas corpus* demandé en vertu de la loi commune ne pourrait pas être accordé, parce que, pour le Canada (Dominion), il n'existe pas de loi commune. Toutefois cette interprétation me paraît fort douteuse, parce que la première partie de la clause assimile le pouvoir des juges de la Cour Suprême à ceux des cours provinciales et de leurs juges. Malgré cela, je ne crois pas que pour la décision de cette cause il soit nécessaire de trancher cette question, car cette cause est évidemment régie par les statuts du Canada. Mais une demande *d'habeas corpus* qui serait fondée sur un *commitment* pour infraction à quelque loi provinciale serait sans donte refusée parce qu'elle ne tomberait pas dans la catégorie désignée. C'est à cela seulement, dans mon opinion, que se borne la restriction imposée par le statut

Les savants conseils de la Couronne ont prétendu que la condamné n'ayant pas été trouvé coupable sur un indictement pour violation d'un statut du Canada, l'honorable juge Henry n'avait en conséquence aucune juridiction ; mais la section 51 ne lui donne-t-elle pas clairement le pouvoir de s'enquérir des causes du *commitment* en vertu des statuts du Canada ?

Les mots " dans une cause criminelle " que l'on trouve dans cette phrase n'y sont sans doute insérés que pour exclure l'*habeas corpus* en matière civile. Le mot *case*, n'est pas mis là pour signifier *offense* ou crime ; cette phrase ne veut pas dire que l'offense ou le crime doit être défini par une loi du Canada, comme on le prétend, pour qu'il y ait juridiction ; elle dit au contraire qu'il suffit que le *commitment* soit en vertu d'un acte du parlement du Canada pour qu'il y ait lieu d'exercer la juridiction ; pourvu que ce soit dans une cause criminelle.

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Cela me paraît d'autant plus certain que le juge n'a que le pouvoir de s'enquérir de la légalité du *commitment* et qu'il n'a pas le droit de faire le procès du pétitionnaire dans un *habeas corpus*, pour le crime ou l'offense qui a amené son incarcération. Evidemment cette cause a été conduite d'après les statuts du Canada.

L'indictement porté contre le condamné est dans les termes du statut 32-33 Vict, ch. 29, ainsi qu'il suit :

British Columbia. }
To wit : }

The Jurors for Our Lady the Queen upon their oath present that Robert E. Sproule on the first day of June in the year of Our Lord one thousand eight hundred and eighty-five feloniously wilfully and of his malice aforethought did kill and murder one Thomas Hammill against the peace of Our Lady the Queen, her Crown and dignity.

Les seules différences entre cette forme et celle donnée par le statut, sont 1° qu'on y a ajouté les mots "contre la paix de Notre Souveraine Dame la Reine, sa couronne et sa dignité," qui ne se trouvent pas dans celle du statut ; la deuxième, qui est plus grave, est qu'on a omis d'indiquer le comté, ou le district où l'offense a été commise. Quoiqu'il soit encore d'usage, de conclure les indictements d'après la loi commune par les mots " contre la paix de Notre Souveraine Dame la Reine, sa couronne et sa dignité," et de conclure les indictements pour offenses contre les statuts par la formule " contre la forme du statut en tel cas fait et pourvu et contre la paix de Notre Souveraine Dame la Reine, sa couronne et sa dignité," cela n'est cependant pas reconnu nécessaire depuis la passation du statut 14 et 15 Vict. ch. 100 sec. 24. L'addition des mots " contre la paix," etc., n'indique pas une intention de procéder conformément à la loi commune puisque la forme de l'indictement est celle donnée par le statut en vertu de la section 27 du ch. 29, 32-33 Vict.

Le changement de *venue*, qui est un des principaux moyens sur lesquels s'est appuyé l'honorable juge pour

accorder l'*habeas corpus*, a eu lieu en vertu du même statut, sec 11, comme le fait voir le record de la cour Suprême de la Colombie. Ce n'est qu'en vertu de cette section que la cour siégeant à Victoria a pu acquérir juridiction pour faire le procès du condamné, qui sans cela eût dû le subir dans le District de Kootenay où l'offense a été commise. C'est uniquement en vertu de ce statut que la cour a pu acquérir la juridiction nécessaire pour faire le procès du condamné.

Le châtiment infligé par les sec. 1 et 2, de la 32-33 Vic. ch. 20, est celui qui a été prononcé contre le condamné. Comment peut-on dire après cela que cette cause n'est pas "*criminal case under an Act of Parliament of Canada*" quand tout le procès a eu lieu en vertu du c. 29, de 32-33 Vic?

L'honorable juge avait certainement le droit de s'enquérir si le condamné était détenu en vertu d'un ordre légal d'une cour compétente. Il n'a en cela assumé aucune juridiction, mais n'a fait qu'exercer celle que lui confère le statut. Je n'examinerai pas le mérite des questions qu'il a décidées par ses deux ordres, car je suis persuadé que je n'ai aucun droit de siéger en révision ou en appel de ces ordres. Il est vrai que par ses jugements, l'honorable juge se trouve avoir pratiquemment renversé la sentence prononcée contre le condamné, ainsi que le jugement de la cour d'erreur confirmant unanimement cette sentence. Cette conséquence, quoi que grave, n'est pas comme on l'a représentée, une anomalie qui renverserait l'ordre judiciaire, si cette cour ne mettait pas à néant les ordres de l'honorable juge. Ce serait suivant moi une bien plus grande anomalie et un danger beaucoup plus grand, si dans une cause où un malheureux lutte pour sauver sa vie on voyait une cour exercer une juridiction qui ne lui appartient pas.

Le jugement de l'honorable juge Henry doit subsister

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tant qu'il n'aura pas été mis de côté par une cour compétente, et celle-ci suivant moi ne l'est pas, comme je crois l'avoir démontré. Si cette cour n'a pas le pouvoir d'intervenir, il y en a une autre qui a une juridiction incontestable dans cette affaire, c'est le Conseil privé de Sa Majesté. C'est là qu'on eut dû s'adresser de suite au lieu de venir devant une cour dont les avocats de la couronne eux-même ont contesté la juridiction. Chose extraordinaire, tout en nous demandant d'annuler les ordres en question, les savants conseils de la couronne ont en même temps essayé de démontrer que la clause 51 était inconstitutionnelle ; mais cette prétention n'a pas été mieux établie que celle du droit de la cour de siéger en appel des ordres en question.

Je ne crois pas devoir entrer dans l'examen de la question de constitutionalité de la section 51 ; car la Cour Suprême a plusieurs fois déjà exprimé l'opinion qu'elle ne déciderait pas des questions de ce genre, si le litige pouvait être jugé sans cela. Comme je suis d'opinion que la cour n'a aucun droit de reviser les jugements de l'honorable juge Henry, je m'abstiendrai pour cette raison de considérer la question de constitutionalité.

J'ai déjà fait remarquer que les savants conseils de la couronne n'ont pu établir la proposition que la mise en liberté ordonnée par un juge sur *habeas corpus* est sujette à un appel à la cour dont ce juge forme partie. Il s'en suit que les ordres en question doivent subsister tant qu'ils n'auront pas été mis de côté par une cour compétente. Il en est de même en matière civile, et le principe doit, je crois, être observé pour les ordres sur *habeas corpus* comme il l'est dans les causes civiles. Je citerai à l'appui de cette proposition une cause civile dans laquelle ce principe a été soutenu par l'opinion de juges éminents.

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Ex parte Bryant, in re Padstow, Total Loss and Collision. Ass. Co. (1).

If a court in assumed exercise of a jurisdiction belonging to it makes an order which, under the particular circumstances of the case, is beyond that jurisdiction, the order must, until it be discharged, be treated as a subsisting order, and can only be discharged upon an appeal.

Le juge Brett fait à ce sujet les observations suivantes qui sont parfaitement applicables à cette cause. (2)

"That order was the order of a superior court which superior court has jurisdiction, under a certain given state of fact, to make a winding up order, and if there has been a mistake made in the particular case, and not the assumption of a jurisdiction which the court has not, I should be inclined to say that this order could never have been treated, as long as it existed, either by the court that made it or by any other court, as a nullity, and that the only way of getting rid of it was by appeal. The case, therefore, is one of appeal, rather than of jurisdiction. It is an erroneous judgment if erroneous at all."

D'après cette autorité, si l'honorable juge Henry a fait une erreur en ordonnant la mise en liberté du condamné, en exerçant une juridiction qui lui appartenait clairement—celle de s'enquérir des causes du *commitment*—pourvu qu'il n'ait pas assumé une juridiction qui ne lui appartenait pas, son ordre ne peut être traité comme une nullité absolue, ni par lui-même ni par aucune autre cour L'appel privé est le seul moyen de faire annuler cet ordre. Jessell, M. R, a exprimé la même opinion dans cette cause (3).

Assuming for the present that the association was an unlawful one, and that the court had no jurisdiction to make the order, is the proper mode of getting rid of that order to appeal against it? I think it is. I think an order by a Court of competent jurisdiction, which has authority to decide as to its own competency when that order is made, must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that there is error in the order, the Court having in fact no jurisdiction to make it.

Ces autorités me confirment dans l'opinion que les

(1) 51. L. J. Eq. N. S. p. 344. (2) P. 350.

(3) P. 348.

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ordres de l'honorable juge Henry doivent subsister jusqu'à ce qu'ils aient été annulés sur un appel à une cour compétente Celle qui a ce pouvoir est l'honorable Conseil privé de Sa Majesté et non la cour Suprême qui n'a aucune juridiction dans le cas actuel. La motion devrait être rejetée.

HENRY J.—This matter came before the court in special session convened by our learned Chief Justice on an application made by the attorney general of British Columbia to consider a motion to be made on the part of the Crown to quash a writ of *habeas corpus ad subjiciendum*, directed to the sheriff of Vancouver Island, British Columbia, to bring before me the body of the prisoner with the cause of his detention, and, also, to set aside an order by me for his discharge subsequently made.

I think it very doubtful if the learned Chief Justice had any jurisdiction to convene the court, as the power to call a special session of this court is, I think, only for the purpose of exercising jurisdiction as prescribed by the Act. When the matter came before me under the alternative order *nisi* made by me, I arrived at the conclusion that on two grounds there was an absence of jurisdiction in the tribunal by which the prisoner was tried, and that he was therefore entitled to be discharged. I adopted one of two alternative means that I considered available for that purpose and caused a writ of *habeas corpus* to be issued to bring the prisoner before me. This not having been obeyed for several weeks or, in my opinion, properly returned, I made the order for the discharge of the prisoner which is now sought to be set aside.

A copy of the record was annexed to the affidavits read on behalf of the prisoner when the original order was applied for, and an authenticated copy of it was

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returned by the sheriff in whose custody the prisoner then was, and still is. By the record so produced it was shown that the trial of the prisoner was conducted by one of the learned judges of the Court of Queen's Bench of British Columbia, authorized, as it appeared by the record, only by a commission of oyer and terminer and general gaol delivery issued by the Lieutenant Governor of British Columbia, and it appeared also by affidavits, uncontradicted, that the order for the change of venue set out in the record was made after the trial and conviction of the prisoner. In my judgment on the hearing for the reasons given in it, I stated that, in my opinion, there was no jurisdiction to try the prisoner at Victoria, and that the Lieutenant Governor had not the right to issue such a commission.

It is contended that under the circumstances as shown by the record I had no jurisdiction to make the original order or the subsequent one, or to allow the issue of the writ. If I was wrong as to all, another important question necessarily arises: Has this court the power to deal at all with the subject matter? It is not contended that the court has any appellate jurisdiction, but it is contended that inasmuch as the writ was technically that of the court, the court therefore can quash it as improvident on the ground of my want of jurisdiction. On the argument of the first order before me my jurisdiction to deal with the subject-matter was referred to on behalf of the crown, but was not in fact objected to, and no question as to it was taken or argued, but the whole argument took place on the objections raised to the jurisdiction of the court before which the prisoner was tried and convicted. The case then before me was argued for two days and determined upon points which did not involve a question as to my jurisdiction, and is it not now too late to question it? It is, however, now contended on the part of the crown that the court has

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the right to quash the writ as having been improvidently issued because of the want of jurisdiction on my part.

It should not be forgotten that the matter was before me under the first order, and that had I then made an order for the discharge, as by the practice of the Queen's Bench, in England, I might have done, no one has so far said that this court has any jurisdiction to question the validity of it, but it is claimed that as the writ of *habeas corpus* intervened the court has the right not only to deal with that but also the final order for the discharge of the prisoner. I am quite ready to admit that if the last mentioned order was founded on the writ, and that the writ was necessary to sustain the order, the latter must fail if its source fails, but here the order was quite independent of the writ, and if valid, cannot be affected by any jurisdiction this court might undertake to assert as to the writ. To affect the final order for discharge, the mere assumption of power to deal with the writ does not, in my opinion, confer authority to deal with the order. I have searched in vain to find a case or authority that will sustain the proposition that where a judge has a general authority to issue a writ of *habeas corpus*, and having considered and dealt with the question of the commitment and detention of a prisoner, the court has quashed the writ as improvident. *Crawford's Case* (1) has been referred to but in that case the *habeas corpus* required the prisoner to be brought before the court and cause to be shown before it. In that case the prisoner was committed by the Court of Chancery, in the Isle of Mann, for contempt, and the court held the committal valid, and being so the cause shown was therefore sufficient. Erle J. said:

Taking this, then, as an ordinary case of an application for a *habeas corpus*, we are to see whether there has been a lawful order of a competent tribunal.

(1) 13 Q. B. 613.

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I may say that when considering the matter of cause shown against my first order, I felt it to be my duty to see whether there has been "a lawful order of a competent tribunal." In *Crawford's Case* the court had in itself original jurisdiction and also by the writ. This court has no original jurisdiction and the writ, if it had commanded the prisoner to be brought before it, would have been void.

The right to legislate in respect of this court is given to the Parliament of Canada by section 101 of the British North America Act, 1867 :—

The Parliament of Canada may, notwithstanding anything in the Act, from time to time provide for the constitution, maintenance and organization of a general court of appeal for Canada and for the establishment of any additional court for the better administration of the laws of Canada.

The Supreme and Exchequer Court Act of Canada, 1875, section 15, provides that :

The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and without the Dominion of Canada.

Sec. 23 provides :

An appeal shall lie to the Supreme Court in any case of proceedings for or upon a writ of *habeas corpus* not arising out of a criminal charge. * * *

Sec. 51 :

Any judge of the Supreme Court shall have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment in any criminal case under any act of the Parliament of Canada. * * * And if the judge shall refuse the writ or remand the prisoner, an appeal shall lie to the court.

By the latter section the appeal is only given to the prisoner, and by the 23rd section an appeal in a matter arising out of a criminal charge is excepted. Considering together those two sections the conclusion is irresistible that there is no appeal on the part of the crown in a criminal case, and still an opposite opinion has been expressed. It will be seen that the jurisdic-

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tion given by section 51 to the individual judges of this court is concurrent, not only with the jurisdiction of the individual judges of the several provinces, but concurrent with the jurisdiction of the courts. If the judge has the jurisdiction of the courts in the several provinces, why should he not have power to issue an attachment for contempt. I conclude therefore that the jurisdiction of a judge of this court is wholly unconnected with his position as a member of the appeal court of the Dominion. It is a jurisdiction given to the judge to be exercised as in a matter wholly unconnected with the functions of the appeal court. To the judge who acts in a *habeas corpus* case is given a jurisdiction which gives him the power of a court in any of the provinces, and unless an appeal is specially provided for to this court I fail to see how it can interfere with the judicial acts of the judge, any more than it could with the decision of one of the courts in the provinces. Our statutes provide that the cases of contested elections shall be tried by a judge of one of the superior courts in the provinces. The writ under the seal of the court is issued. There is no appeal to the court of which the judge is a member, but to this court. Suppose in a case decided by the judge, the court of which he was a member was moved to quash the writ and reverse the judgment given by him, could it be successfully contended that the court would have power to do so? The judge is authorized to use the process of the court in the exercise of a special jurisdiction. The writ was tested in the usual way and has the seal of the court affixed to it, but it is in connection with a matter beyond the jurisdiction of the court. The court as such has no jurisdiction and none is given by statute. How, then, can the mere use of the writ give any jurisdiction to the court to reverse what the judge may decree? It is a writ giving a jurisdiction to

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a judge that the court as such could not exercise. The court has not the power to order the issue of the writ or prevent its issue. The law gives the judge the whole jurisdiction and enables him and him only to deal with it. In *Valin* v. *Langlois* (1) the Privy Council held that:

The Parliament of the Dominion of Canada has power to impose new duties upon existing provincial courts, and give them power as to matters coming within the classes of subjects over which the Dominion Parliament has jurisdiction.

In addition to the appellate jurisdiction of the court, the statute provides that any one of the judges may use Her Majesty's writ of *habeas corpus* when in his judgment—not that of the court—a proper occasion is presented. It is true, the writ in this case is issued as the writ of the court and bearing its seal, but it was so issued on my part and specially allowed by and signed by me. The statute gave me the right to do that which the court could not do or prevent, and whence then comes the right of the court to say that I exceeded my jurisdiction? It may have been wrong for me to issue the writ, but in doing so I respectfully submit that the court has not the right to say so or to reverse my judgment. It has been excitedly said that it would be monstrous that one judge, by means of a *habeas corpus*, should control the final decision of a capital case by a court. The consequences, we were told, would be most serious. My answer to that is that if the power exists in regard to the jurisdiction to make use of the writ of *habeas corpus*, to inquire into the existence of jurisdiction, to try and convict a prisoner, it has existed for centuries in England and for a great many years in the United States of America, and we have yet to hear a reason to induce the conclusion that the power is a dangerous one. We have to assume that, when Parliament intrusted the exercise of the power of

(1) 5 App. Cas. 115.

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dealing with cases of *habeas corpus* to the judges of the highest court in the Dominion, it was not ignorant of the power of the courts and judges in England and in this country, and fully expected that the judges of this court would deal as properly with such cases as, at all events, the judges of subordinate courts. If, however, I, or any of my learned colleagues, should happen to err in any case we cannot found the jurisdiction of this court upon the regrets or fears of some of its members. In a case of doubtful jurisdiction, in the humanity of the law, it might be by some, and I trust the larger number, considered better that the jurisdiction should be assumed than that a life of a human being should be sacrificed when there was no doubt in the mind of the judge that he had been illegally convicted. Better than, I think, for this court to assume a jurisdiction to prevent that being done. I don't, however, intend to convey the impression that I felt any doubt of my jurisdiction over the subject matter or of the conclusions at which I arrived. It was established satisfactorily before me, and admitted by the counsel for the Crown, that the order for the change of venue set out in the record was not made until after the trial and conviction of the prisoner, and that the learned judge, who presided at the trial, had so presided solely by the authority of a commission from the Lieutenant Governor. Since the argument before me a proclamation to bring into operation a statute of British Columbia dispensing with the necessity for commissions of oyer and terminer and general gaol delivery by which the statute was in force, at and before the trial of the prisoner, has been brought to our notice. Had it been notified to me I would then have had to consider the question of the right of the legislature of British Columbia to pass such an act since the incorporation of that Province as a part of Canada, affecting as it did, a prerogative right of the crown. If

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it had not then the case was not altered. The question of jurisdiction to pass that statute would admit of an important and exhaustive argument. That argument must have been had before me and should I have, improperly even, decided that the act was *ultra vires*, and that a majority of this court should think that my decision was wrong, would that be sufficient to authorize the court to assume jurisdiction and to decide that because of an error of judgment on my part I had improperly exercised jurisdiction? In a case of *habeas corpus* before the court in British Columbia, referred to in my first judgment, the Chief Justice of that court decided that the act was *ultra vires*. I must contend that if it was at all a question legitimately before me for decision the writ cannot be dealt with at all, much less quashed by this court. On the face of the return the defect of jurisdiction appeared and how can the question of my jurisdiction be affected when exercised in May last by something now for the first time shown. The court should now say to the crown "according to the showing before the judge he had "jurisdiction when he decided the case and his decision "cannot be affected by new matters shown before this "court." I differ then with the conclusion of one or more of my learned colleagues, when assuming the right of this court to decide as to my jurisdiction to issue the writ, upon evidence for the first time given at the present argument. The question as to my jurisdiction, as far as that question affects our decision, must, I submit, be determined on the facts and evidence before me, and not upon any new facts shown. Were it a case of appeal with permission to adduce further evidence the case would be very different. The affidavit upon which the motion before us was made show the fact of the introduction of the further evidence in question.

It has been asserted that a judge of this court has no

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more power in a *habeas corpus* case than a judge of a provincial court, and that as the last named court has jurisdiction to deal with its own writ, this court has the same power. To that I answer, first, that under the provisions of the statute a judge of this court has the full power of a provincial court, and the two cases are not in that respect parallel; and, secondly, that a provincial court has original jurisdiction over the subject-matter which this court has not. We are told again that the statute is *ultra vires* of the Dominion Parliament—if it be so, it must be so pronounced by a court of competent jurisdiction, and the mere fact of its being so cannot give power to any court otherwise without jurisdiction to so declare it—and how can a mere court of appeal, constituted as this court is, go out of and beyond the jurisdiction prescribed by the statutes creating it.

Again it is said that the power given to a judge of this court being limited to "an inquiry into the cause "of commitment in any criminal case under any act of "the Parliament of Canada," I had no jurisdiction. This provision may read two ways, that is, it may have been meant to apply to the commitment only in a criminal case—the commitment being "under any act of the Parliament of Canada," or it may also be construed to apply only to cases where the offence was created by an act of the Parliament of Canada. The latter construction has been asserted to be the correct one, but I cannot so read the provision. The true grammatical, and, as I think, the sensible and proper construction is, that it applies solely to the commitment under an act—the inquiry is to be in reference to the commitment, and the true construction, I think, may by a slight change in the position of the words be given thus, "for the purpose of an inquiry, in any criminal case, into the cause of commitment under any act of the Parliament

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of Canada," or the provision may be construed by reading the words " in any criminal case " as if found at the end of the provision. The inquiry is certainly to be as to the commitment, and I think the words " in any criminal case " were inserted to limit it to criminal cases as distinguished from civil. I am the more ready to adopt that construction, not being able to find or imagine any reason for attributing to Parliament the intention to limit the jurisdiction of a judge of this court, as the construction contended for would do, when the jurisdiction of the judges of the provincial courts is not so limited. No such reason has been advanced and I do not think any can be found, more especially when we reflect that the power otherwise given to a judge of this court transcends that of the judges of the provincial courts. That the commitment of the prisoner was under the acts of the Parliament of Canada will scarcely be denied, and it has not been. The arrest and commitment of persons charged with crime are provided for by statute, as well as the venue and all proceedings on indictments. The form of the indictment is given, and sec. 27 of cap. 27, 32 and 33 Vic. provides for the sufficiency of indictments, when according to the form given in the schedule to the act. Admitting, however, that my construction when dealing with the case was wrong, how can my judgment be reversed by any court not having original or other jurisdiction, or the writ issued by me quashed by any such court? The fearful consequences that we have been told likely to arise from the exercise of the jurisdiction by judges, such as has been done by me in this case, if not prevented, has been alleged as a reason why this court should interpose, and not only should interpose but give it authority to do so, if none previously existed. I cannot subscribe to any such doctrine. If the administration of the law is defective it is for the legislature, who imposed the duties on

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judges of this court and gave them jurisdiction, to interpose. I am of the opinion that it is the duty of the court to declare the law such as it is. If it be defective we may sincerely regret it, but because we do so we cannot alter it whatever the results may be. I know of no jurisdiction that can be assumed under any circumstances from what has been called a necessity arising in the minds of those using it for what they may deem the proper decision of any case civil or criminal. This court is the creature of legislative enactments giving it a limited jurisdiction, and specially providing for the cases over which jurisdiction is given to it, and it cannot go beyond it. We must assume that the parliament when giving power in *habeas corpus* cases to the judges of this court, was of the opinion that they might possibly exercise the jurisdiction properly, and therefore, not only did not provide for an appeal on the part of the Crown, but expressly provided against any. For this court to assume jurisdiction in any way is, in my opinion, going in the face of the statute. Besides, parliament in its wisdom, by an amendment to the act, withdrew from the court the original and appellate jurisdiction conferred upon it and the judges in *habeas corpus* cases in matters arising out of any claim for extradition, but in doing so did not change or limit the powers of the judges in other matters. In reference then to the claim to exercise jurisdiction by this court from necessity, I may remind those who make that claim that the decision of the judge is not final, but may be controlled by Her Majesty the Queen by judgment of Her Privy Council.

As touching the right of this court to interfere in this case by a summary proceeding to set aside my orders I will refer to the case in *re the Padstow Total Loss and Collision Association (Limited) ex parte*

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Bryant (1). The court in that case decided on an appeal to discharge an order for winding up the association made by *Malins* V. C., 1880, that:

If a court acting in assumed jurisdiction belonging to it makes an order which, under the particular circumstances of the case, is beyond that jurisdiction, the order must, until it be discharged, be treated as a subsisting order and can only be discharged upon an appeal.

In that case Jessel M.R. said:

Assuming for the present that the association was an unlawful one and that the court has no jurisdiction to make the order, is the proper mode of getting rid of that order to appeal against it? I think it is. I think an order by a court of competent jurisdiction, which has authority to decide as to its own competency when that order was made must be taken to be a decision by the court that it had jurisdiction to make the order and consequently you may appeal from it on the ground that there is error in the order, the court having in fact no jurisdiction to make it.

Brett L.J. said:

That order was the order of a superior court, which superior court has jurisdiction, under a given state of facts, to make a winding up order; and if there has been a mistake made in the particular case and not in the assumption of a jurisdiction which the court had not, I should be inclined to say that the order could never have been treated, as long as it existed either by the court that made it or by any other court, as a nullity, and that the only way of getting rid of it was by appeal. The case, therefore is one of appeal rather than jurisdiction. It is an erroneous judgment, if erroneous at all.

In the case now under consideration, I, as one of the judges of the highest court in the Dominion, was clothed with the jurisdiction in cases of *habeas corpus*, possessed not only by the judges individually, but of the courts in several provinces. I had therefore a general power to deal with all cases in which application was made to me to inquire into the commitment of prisoners and my first inquiry would be as to my jurisdiction. If I found I had none I would refuse the writ or an order to show cause why the prisoner should not be discharged. If, on the contrary, I decided in favor

(1) 51 L. J. Eq. N. S. 344.

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of my jurisdiction the prisoner would obtain by the proper legal means the benefit of that decision. If I improperly refused to issue the writ or to discharge the prisoner the statute provided for an appeal by the prisoner to this court. Was not, therefore, the position I occupied precisely similar to that of the court in the case just referred to, in which it was expressly decided that the order could not be treated as a nullity either by the court that made it or any other court, and that the only way to get rid of it was by appeal? I can discover no distinction between that case and this one, nor do I think that any can be found by any one else who has a sound legal mind and judgment. If such a doctrine be sound as respects a court of unquestioned jurisdiction over the subject-matter, it cannot be unsound as respects a court which has it not. I don't wish it to be thought by any one that I have any objection to a controlling power in this court in cases like the present, but I have felt under the obligation of ascertaining and deciding upon the contention that it has. I have endeavored, and I trust successfully, to consider the matter before us in the same way I would have considered it my duty to do had the circumstances arisen before any other judge of this court, and in that spirit have arrived at the conclusion that this cour thas not, and was not intended by Parliament to have, any such right or power as that contended for, and cannot aid those who are ready to assume a jurisdiction that does not exist, unless, indeed, revealed by some mysterious nebulous agency invisible to the eyes of ordinary mortals.

For my reasons as to other points taken and debated during the argument I must refer to my two previous judgments in this case.

The argument before the court in this case took place in the absence of the prisoner. He was served with a

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notice to show cause why the writ should not be quashed and my order for his discharge set aside. He had the decision of a judge of this court that he was entitled to his discharge and an order to give effect to it. The crown seeks, while he is confined in gaol at Victoria, to quash the writ of *habeas corpus* and set aside the order, which if valid, which I claim it to have been till legally set aside, entitled him to his discharge. He is required by the notice to show cause when it is physically impossible for him to do in his own proper person. If a prisoner so confined is in poverty and unable to employ counsel the question of his life or death must be considered and determined *ex parte*. If the same motion was made without notice to the prisoner I should think no court would hear it, and is it not substantially the same thing and the giving of the notice a mere form if the prisoner cannot do what the notice is intended to prepare him for doing? I think every principle of justice that requires that every one shall be heard when his rights civil or criminal are to be effected should govern in such cases. His counsel objected to appear until the court decided upon the objection raised as to the absence of the prisoner. It was subsequently arranged that the argument should proceed subject to the objection to be dealt with by the court. In answer to the objection the want of jurisdiction of the court to issue a writ of *habeas corpus* is suggested and the want of that jurisdiction is another reason why the court should not take upon itself the right to entertain the motion made. I think that under no circumstances should such a motion be entertained in the absence of the prisoner, unless by his own consent. For the reasons I have now given and those to be found in my previous judgments, before referred to, I am of opinion the motion should be refused.

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TASCHEREAU J.—On the constitutionality of section 51 of the Supreme Court Act, which confers on the judges of this court the power to issue writs of *habeas corpus*, I have always entertained grave doubts. I will refrain, however, from determining this question in the present case, as, in the view I take of it, the writ now under our consideration cannot be held to have issued under that section of the Act. This said section enacts that any judge of this court has concurrent jurisdiction to issue the writ of *habeas corpus*, for the purpose of an enquiry into the cause of commitment, in any criminal case under any act of the Parliament of Canada. Now, murder is not a crime nor a criminal case, under or in virtue of any act of the Parliament of Canada. It is clear that parliament did not intend to confer on the judges of this court power to issue the writ of *habeas corpus* in all criminal cases whatsoever, otherwise they would not have added the words "under any act of the Parliament of Canada." These words constitute a restriction, a limitation of the right to issue the writ, which we cannot overlook without grasping at a jurisdiction not intended to be conferred by the statute. It has been argued that because the proceedings in all criminal cases are taken under the Procedure Act of 1869, this makes any criminal case, according to the terms of this section 51, a criminal case under an Act of the Parliament of Canada, but this contention, it seems to me, is against the very words of the section The procedure in all criminal cases must be under the Procedure Act of 1869, so that the words "under any act of the Parliament of Canada," would be a surplusage and would have no meaning, if they were so interpreted. This interpretation would strike out these words, and this cannot be done. It would be legislation under the guise of interpretation. Then, how can murder be said to be a criminal case under the Procedure Act of 1869?

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We say a crime or a criminal case, for instance, under the Forgery Act, or under the Malicious Injuries to Property Act, or the Larceny Act, or a crime or a criminal case under the common law, but how can it be said that murder is a crime, or that the trial for murder is a criminal case under the Procedure Act of 1869? Neither can it be contended, as has been attempted, that if a prisoner is committed by a magistrate, under 32 and 33 Vic. ch. 30 (D.), this constitutes a case which under this section 51 gives us the right to issue a writ of *habeas corpus*. This would be reading the section as saying "into the cause of commitment under any act of the Parliament of Canada," omitting the words "in any criminal case," or it would be contending that murder is a criminal case under the act respecting Justices of the Peace as regards indictable offences.

We must consequently hold that the writ in this case did not issue under this section 51 of the Supreme Court Act. There was then under that Act no power, no jurisdiction whatever, to issue it. The judges of this court, and this court itself, have no other powers than those expressly conferred upon them by the statute. Their powers are exclusively statutory, and that this court is constituted a court of common law and equity must, in conjunction with the British North America Act, be held to apply only to the appellate jurisdiction of the court, not to any original jurisdiction which parliament did not, and could not, confer upon it. It has been contended that this section 51 should be interpreted as constituting each of the judges a separate court, established with original jurisdiction in virtue of section 101 of the British North America Act for the better administration of the laws of Canada, or in other words that six courts have been so established. This contention seems to me untenable. By its very first section only two courts are established by the act,

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"The Supreme Court and the Exchequer Court," not eight as this proposition would assert.

It being clear then that the writ of this court has been issued without authority, it must necessarily follow that we have jurisdiction to quash it. It would be an extraordinary state of things if this court had not the power of supervision over its own writs. It is not a case of appeal. Where, as here, a judge having a limited jurisdiction exercises a jurisdiction which does not belong to him, his decision, or his acts, amount to nothing and do not create any necessity for an appeal. *Attorney General* v. *Hotham* (1). A proceeding so taken is a complete nullity, a nullity of *non esse*. As we say in civil law, *defectus potestatis nullitas nullitatum*, and a writ so issued without jurisdiction should not be obeyed.

On the merits of the case I have very little to add to what has been said by his Lordship the Chief Justice, with whom I entirely concur on all points. First, as to the presence of the prisoner. In the view I take of the case it is evident that we would have no jurisdiction to order the prisoner to be brought here. To do so would be in direct contravention of the principle I hold to rule the case. As to the injustice and hardship that the absence of a prisoner, as it has been argued, might entail in such cases, we must take it for granted that each court, in each particular case, will always see that a prisoner suffers no injustice. Then it must be borne in mind that on criminal appeals to the Privy Council the prisoner is never present. On criminal appeals before the Court of Crown cases reserved, likewise, the prisoner is never present. And the court hears the case whether the prisoner is defended by counsel or not. *Reg.* v. *Child* (2); *Reg.* v. *Daynes* (3); *Reg.* v.

(1) 3 Turn. & Russ. 219. (2) 12 Cox 64.
(3) 12 Cox 514.

Reeve (1); *Reg.* v. *Rendall* (2); *Reg.* v. *Farrell* (3); *Reg.* v. *Greathead* (4); *Reg.* v. *Brown* (5).

In this court also the presence of the prisoner has never been required in criminal appeals. *Laliberte* v. *The Queen* (6); *Reg.* v. *Cunningham* (7).

On the question of the change of venue the record shows a perfectly valid and legal order. That this record could be contradicted by affidavits is to me an untenable proposition. The records of a court are of such high and supereminent authority that, as I read in 4 Stephen's Comm. 260, their truth is not to be called into question. For it is a settled maxim that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary. I refer also to Hawkin's Pleas of the Crown (8) and *Rex.* v. *Carlile* (9), and to Chief Justice Wilson's remarks and cases cited in *re McKinnon* (10).

Then if the plea of not guilty puts the order in question for a change of venue in issue, as a matter of fact, the verdict of the jury is conclusive, and the order must be taken as having been duly proved. If not guilty did not put it in issue, the question, in the absence of a plea to the jurisdiction, is at an end. For the jurisdiction in question here, it must not be lost sight of, is a jurisdiction *ratione personae* only, not *ratione materiae*. The court at Victoria had, in law, jurisdiction, not only to try the crimes committed within its district, but also all those the trial of which, under sec. 11 of the Procedure Act, had been transferred to it from any other part of British Columbia. To say that a prisoner cannot confer jurisdiction on a Court is true, when the court is incompetent *ratione materiae*, but is not true

(1) 12 Cox 179.
(2) 12 Cox 598.
(3) 12 Cox 605.
(4) 14 Cox 108.
(5) 15 Cox 199.
(6) 1 Can. S. C. R. 117.
(7) Cassel's Digest 107.
(8) Book 2 ch. 2 sec. 14.
(9) 2 B. & Ad. 362.
(10) 2 U. C. L. J., N. S., 327.

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when the incompetency is *ratione personae*. The prisoner, for instance, can himself ask the change of venue, and then surely he submits to another jurisdiction than his own. In fact, in the present case, all the objections taken here by the prisoner as to the jurisdiction would be open to him, if he is right in his contentions, even if the order changing the venue to Victoria had been made at his own request and upon his own application.

There are, besides, many other cases which the court of Victoria has jurisdiction to try though the offence has been committed outside its territorial jurisdiction. I allude to those crimes which can by statute be tried at any place where the prisoner is apprehended or in custody, as forgery, bigamy, perjury and various others. *Rex* v. *James* (1); *Reg.* v. *Smythies* (2) *Reg.* v. *Whiley* (3).

This section 11 of our Procedure Act is a new enactment, so that no English cases absolutely in point can be found. But its terms are so clear that there can be no difficulty in working it. Paragraph two thereof enacts in so many words that upon the order for the change of venue being made all proceedings in the case shall be had in the district where the venue has been transferred as "if the case had arisen or the offence been committed therein." These words alone settle the question raised by the prisoner.

I observe that, by the Act 37 Vic. ch. 42 sec. 5, it is enacted that the Supreme Court of British Columbia, and any court thereafter to be constituted by the legislature of the said province and having the powers now exercised by the said court, shall have power to hear, try and determine, all treasons, felonies and indictable offences whatsoever mentioned in any of the said acts

(1) 7 C. & P. 553. (2) 1 Den. C. C. 498.
(3) 1 C. & K. 150.

(the Criminal Acts of 1869) which may be committed in any part of the said province.

However, as this clause has not been mentioned before us I refrain from inquiring here how far it affects or applies to this case.

Coming to another point, I hold that it was a sufficient answer to the rule to show cause, and, *a fortiori*, a sufficient return to this writ that the prisoner was in custody under the sentence of the court of oyer and terminer. *Bethel's* case (1); *Gosset* v. *Howard* (2); *re Suddis* (3); Eight Report Criminal Law Commissioners (4). A contrary doctrine would entitle every convict in any of our penitentiaries to be brought to Ottawa on an affidavit that the court which tried him had no jurisdiction (5). The court of oyer and terminer of Victoria was the court competent, in this case, not only to try the prisoner but also to determine its own jurisdiction and power to try him. It determined it by assuming it. If it erred the only remedy the prisoner had, after moving in arrest of judgment if he chose to do so, there being no court of Crown cases reserved, was a writ of error. *Rex* v. *Seton* (6); *Rex* v. *Justices of Yorkshire* (7). Rightly or wrongly, there is no appeal in criminal cases. The conviction before a court of superior jurisdiction and its decision on its own jurisdiction is, unless reversed on a writ of error, or by the court of Crown cases reserved if any exist, *res judicata*, and as such *pro veritate accepitur*, as said by Lord Tenterden in *Rex.* v. *Carlile* (8). The judge presiding at the trial may refuse to reserve a case. The Attorney General may refuse his fiat for a writ of error. But hard as this may seem to be, the law is that in such a case the prisoner

(1) 1 Salk. 348.
(2) 10 Q. B. 411.
(3) 1 East 306.
(4) P. 195.
(5) See E. B. & E. 828.
(6) 7 T. R. 373.
(7) 7 T. R. 467.
(8) 2 B. & Ad. 362.

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has no way of avoiding either the rulings of the court or the verdict of the jury, or the sentence of the court, but by applying to the Crown. And I venture to say that if parliament ever attempts to change the law on this matter and seeks to give a defendant in a criminal case the right to have a conviction against him reviewed, it is not to a judge in chambers that this power will be given.

What would be the consequences if the proposition enunciated in this case on the part of the prisoner were sustained? Purely and simply, it seems to me, that any judge, whether of this court or of the Supreme Court of British Columbia, would have the right to liberate a prisoner on the ground of want of jurisdiction in the court that tried him even after his conviction has been affirmed either in the court of error, or in this court, or in the Privy Council. Or that when, as in *Reg.* v. *Goldsmith* (1) for instance, the prisoner has contended that the indictment disclosed no crime, and consequently gave no jurisdiction to the court, a judge in chambers who would adopt that view might discharge the prisoner even after, not only the judge at the trial but even the court of crown cases reserved, has held the contrary. Or that when, as in *Reg.* v. *Carr* (2), the very question reserved was as to the jurisdiction of the court to try the prisoners, a judge on *habeas corpus* might have liberated the prisoner, if the judge presiding at the trial had not reserved a case, or even after the conviction was affirmed on a case reserved. But I need not go out of the case now under consideration to illustrate how untenable is the position taken here on the part of the prisoner. A writ of error was by him taken, and after argument the conviction was affirmed by the full court of British Columbia, the judges being unanimous. If the judges

(1) 12 Cox 479. (2) 15 Cox 129.

had not been unanimous the prisoner would have had an appeal to this court. But that not being so the judgment of the full court of British Columbia was final. Yet the prisoner would contend that though this court, on this very question of jurisdiction, cannot review the decision of the court of British Columbia, yet a judge, either of this court or of British Columbia, sitting in chambers has the power to reverse that judgment on the very question of jurisdiction and to liberate the prisoner. I say "either of this court or of the British Columbia court" for the powers of the judges of this court under section 51 of this Act, or under the common law, if any exist, under one or the other, are concurrent with the powers of any of the judges of British Columbia. That means, as I read it, that if a judge of this court had the power to issue this writ any judge in British Columbia had the same power.

To these cases already cited may be added one from the Province of Quebec, *ex parte Plante* (1). In that case the prisoner had been sentenced to the penitentiary for life, although fourteen years was the maximum fixed by the statute; he applied for a writ of *habeas corpus* to Chief Justice Bowen, but the learned judge refused to discharge him on the ground that he could not, on a writ of *habeas corpus*, act as a court of error and revise the sentence of the criminal court. I would also add *Reg.* v. *Smith* (2), where Burns J. says: "That after sentence pronounced, no remedy but the writ of error is left to the prisoner;" and also *Reg.* v. *Powell* (3), where it was held that the proper proceeding to reverse a judgment of the Court of Quarter Sessions is by writ of error, not by *habeas corpus;* also to the American case of *Grignon* v. *Astor* (4).

On the question of whether an order to discharge the

(1) 6 L. C. R. 106.
(2) 10 U. C. Q. B. 99.
(3) 21 U. C. Q. B. 215.
(4) 2 How. 319.

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prisoner can issue without a writ being issued, or without the prisoner being brought up, I have only to say that if such a practice has ever existed it is, it seems to me, a loose and illegal one, and one which we should not sanction. Under sections 53, 61 and 62 of 32 and 33 Vic. ch. 30, a prisoner may be admitted to bail without a writ of *habeas corpus*, but that cannot be extended to a discharge *sine die*.

I have only one more remark to make It is as to the well established rule that if a *corpus delicti* appears by the depositions against a prisoner the judge should not set him at liberty, however defective or irregular the commitment might be. In the present case I may take it for granted, after the verdict of the jury, that the depositions against the prisoner charged him with one of the most heinous crimes known to the law. Yet were he to have the benefit of this order given by the learned judge in chambers he would be set at large. This was a necessary consequence of the granting of this writ, as a *certiorari* to return the deposition could not, under our statute, have been issued by the learned judge, according to the decision of this court in the Trepanier case. But this, it is evident, demonstrates what serious consequences would follow the exercise of the power, if it existed, by a single judge sitting in chambers to assume the the functions of a court of error and review the decisions of the superior courts of the country even on a question of jurisdiction. The court of oyer and terminer's judgment in the case on the question of its own jurisdiction, had it been distinctly raised before it, would have been final and conclusive until reversed by the court of error. The fact that the prisoner did not raise any such objection before the court itself at any time during or after the trial can surely not give him the right to raise it afterward before a judge in chambers.

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Different other grounds of error have been assigned by the prisoner before the British Columbia court. But we do not sit here in appeal from the decision of that court, and the objections there taken by the prisoner to the proceedings of the court of oyer and terminer were not grounds for a *habeas corpus* and are not now before us. I may, however, notice the objection that no venue whatsoever, as contended by the prisoner, is laid in the indictment. Now, in fact, a venue is laid in the margin thereof, according to section 15 of the Procedure Act. If not a proper one, section 23 of the Procedure Act covers that defect. *Reg.* v. *O'Connor* (1) and that class of cases cannot now be followed. But moreover this is a defect apparent on the face of the indictment, and one which clearly could have been amended *Reg.* v. *Ashburton* (2). So that by section 32 of the same act, the prisoner cannot now avail himself of that defect. The analogous English clause says, "Every formal defect." But ours says "Every defect." The section is as follows:

Section 32. Every objection to any indictment for any defect apparent on the face thereof must be taken by demurrer or motion to quash the indictment, before the defendant has pleaded and not afterwards; and every court before which any such objection is taken may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

See 3 Burns Justices of the Peace 33 (30th ed).

On the question of the proper constitution of the court of oyer and terminer, and of the court of error, I entirely agree with the Chief Justice, and for the reasons by him given, that here also the prisoner's contentions are entirely unfounded.

I am of opinion that this application should be

(1) 5 Q. B. 16. (2) 5 Q. B. 48.

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allowed and that the writ of *habeas corpus* and the order to discharge the prisoner should be quashed and set aside.

I am not sorry (I may say in fine) to have been able to reach this conclusion, perfectly satisfied, as I am, that the prisoner in this case has had a fair and legal trial. I duly appreciate the highly beneficial character of the writ of *habeas corpus* as one of the most effective safeguards of the liberty of the subject, but I cannot forget that society has also its rights, and that the courts of the country are bound to see that the writ is not taken advantage of for the protection of felons and convicts.

Motion allowed. Writ of habeas corpus quashed and the order and proceedings consequent thereon also set aside.

Solicitor for the Crown: *Attorney General of British Columbia.*

Solicitor for the prisoner: *Theodore Davie.*