IN THE MATTER OF ANNIE McNUTT.

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ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Nov. 28.
*Dec. 10.

Habeas Corpus—"Supreme Court Act," s. 39(c)—Criminal charge—Prosecution under Provincial Act—Application for writ—Judge's order.

By sec. 39(c), of the "Supreme Court Act" an appeal is given from the judgment in any case of proceedings for or upon a writ of *habeas corpus* * * * not arising out of a criminal charge.

Held, per Fitzpatrick C.J. and Davies and Anglin JJ., that a trial and conviction for keeping liquor for sale contrary to the provisions of the "Nova Scotia Temperance Act" are proceedings on a criminal charge and no appeal lies to the Supreme Court of Canada from the refusal of a writ of *habeas corpus* to discharge the accused from imprisonment on such conviction. Duff J. contra. Brodeur J. *hesitante.*

By the "Liberty of the Subject Act" of Nova Scotia on an application to the court or a judge for a writ of *habeas corpus* an order may be made calling on the keeper of the gaol or prison to return to the court or judge whether or not the person named is detained therein with the day and cause of his detention. On the return of an order so made, an application for the discharge of the prisoner was refused, and an appeal from this refusal was dismissed by the full court.

Held, per Idington and Brodeur JJ. that such order is not a proceeding for or upon a writ of *habeas corpus* from which an appeal lies under said sec. 39(c).

Per Duff J.—That the judgment of the full court was given in a case of proceedings for a writ of *habeas corpus* within the meaning of sec. 39(c), and that the proceedings did not arise out of a "criminal charge" within the meaning of that provision; but that, on the merits, the appeal ought to be dismissed.

APPEAL from the decision of the Supreme Court of Nova Scotia(1) affirming the judgment of a judge who refused to discharge the appellant from imprison-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 46 N.S. Rep. 209.

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ment on a conviction for keeping liquor for sale in violation of the "Nova Scotia Temperance Act."

The appellant having been convicted and sentenced to three months' imprisonment in gaol applied to a judge for a writ of *habeas corpus* on the ground that the magistrate at the trial had inquired into a previous conviction before the offence he was trying had been established. It appeared that on the trial a witness had been asked as to previous convictions and had stated that there were several, and it was alleged that the accused had been interrogated on the same matter. The judge, instead of granting the writ, made an order under the "Liberty of the Subject Act," calling upon the the gaol keeper to return the date and cause of the detention. On return of this order he refused to discharge the prisoner and his refusal was affirmed by the full court. The prisoner then appealed to the Supreme Court of Canada.

Ralston in opposing the appeal claimed that this was not a proceeding for or upon a writ of *habeas corpus* and that the court was without jurisdiction, citing *In re Harris*(1) and *Ex parte Byrne*(2).

Power K.C. and *Vernon* for the appellant. The proceedings were for, if not upon, a writ of *habeas corpus*. See *Rex* v. *Cook*(3).

(The objection was taken from the Bench that the proceedings arose out of a criminal charge which would deprive the court of jurisdiction.)

On the merits counsel cited *Rex* v. *Coote*(4); *Rex* v. *Reid*(5); *Rex* v. *Vanzyl*(6).

(1) 26 N.S. Rep. 508.
(2) 22 N.B. Rep. 427.
(3) 18 Ont. L.R. 415.
(4) 22 Ont. L.R. 269.
(5) 17 Ont. L.R. 578.
(6) 15 Can. Cr. Cas. 212.

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THE CHIEF JUSTICE.—I am of opinion that we cannot entertain this appeal.

It was on the appellant to shew that we have jurisdiction, and he referred us to section 39(*c*) of the "Supreme Court Act," which provides for an appeal

from the judgment in any case of proceedings for or upon a writ of *habeas corpus* * * * *not arising out of a criminal charge.*

In other words, the statute gives an appeal when the petitioner for the writ is detained in custody on a process issued in a civil matter.

Assuming, but without admitting, that the order made in this case, under the "Liberty of the Subject Act," R.S.N.S. (1900) ch. 181, is for the purpose of determining our jurisdiction, the equivalent of a writ of *habeas corpus*, in what aspect can it be said that the commitment under which the petitioner is detained is a civil process or that the order in question arises out of a civil matter ? In my opinion it is clearly in the nature of an order in a criminal proceeding.

The proceedings originated in a complaint by the Inspector, a public official, to the effect that the petitioner

unlawfully did keep intoxicating liquor in his possession for sale contrary to the provisions of the "Nova Scotia Temperance Act," 1910.

That complaint was tried by the stipendiary magistrate under the "Summary Convictions Act" (Canada) and he condemned the petitioner to be imprisoned for three months in the county gaol, without the option of a fine. This petition was made to obtain her discharge from that custody. In what aspect then can the subject of these proceedings be described as a wrong for which there is a remedy by civil process or how can this be said to be a proceeding which

has for its object the recovery of money or other property, or the enforcement of a right for the advantage of the person suing. Halsbury, vol. 9, No. 499.

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The act of keeping liquor in the circumstances of this case is not, in itself, an injury to a private person, nor is it an act forbidden by the statute

in such a way that the person guilty may be liable to a pecuniary penalty which is recoverable as a debt by civil process.

The illegal act with which the petitioner is charged is a violation of the provisions of a statute passed to regulate the sale of liquor in the interests of the inhabitants of the Province of Nova Scotia and the punishment for that illegal act is imprisonment for a definite period. The petitioner is "furnished with no key," it is not in her power in any way to shorten that term; the imprisonment is, therefore, not imposed as a coercive or remedial measure for the benefit of the complainant; it is solely punitive to vindicate the authority of the law. The procedure at the trial was that prescribed by the summary procedure sections of the Criminal Code and the conviction is in the form given by that code. We have, therefore, in this case all the necessary elements of an offence against what has been not inaptly described as a provincial criminal law. But it is impossible to find in the proceedings below any of the distinguishing features of a civil process and to this latter class of case the jurisdiction of this court is, with respect to appeals upon writs of *habeas corpus,* expressly limited by the statute under which it is constituted.

The "Canada Temperance Act" was by decision of the Privy Council upheld on the ground that it might be referred to the general powers of the Dominion Parliament in respect of "the peace, order and good government of Canada." That legislation does not rest upon the execution of Dominion powers with regard to criminal law, although having as stated by

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their Lordships *direct relation thereto.* It is to be observed that the general principle and object of the local Act in question here is in a large measure the same as that of the Dominion Act, the prohibition of the sale of intoxicating liquors within municipal divisions. Similar legislation was upheld by the Privy Council in the *Prohibitory Liquor Laws Case*(1) under the authority of the province to make laws for the suppression of the liquor traffic; "British North America Act," section 92(16).

If this subject comes within the powers of the province then the right to impose punishment by imprisonment to enforce its provisions undoubtedly exists. Sec. 92(15). Such legislation if enacted by the Imperial Government would be denominated criminal and fall within the category of criminal law; and I fail to understand how the element of criminality disappears merely because the Act is competent to the provincial legislature. At all events it cannot be said to be in any aspect legislation creating or regulating a civil remedy or process.

This appeal is dismissed but without costs.

DAVIES J.—The appellant had been convicted of having

unlawfully kept intoxicating liquors for sale contrary to the provisions of the "Nova Scotia Temperance Act," 1910.

The conviction was for a second offence, and the punishment imposed was imprisonment for a term of three months.

Applications were first made to the Chief Justice of Nova Scotia and afterwards to the Supreme Court

(1) 24 Can. S.C.R. 170.

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of that province for the prisoner's discharge from imprisonment on the ground that by admitting some general evidence of the appellant's conviction of a previous offence before he had adjudicated upon the second offence for which appellant was being tried, the magistrate had acted illegally and deprived himself of jurisdiction, and that the conviction was therefore bad.

Both applications were dismissed and from the dismissal of the application to the Supreme Court of Nova Scotia an appeal was taken to this court.

Preliminary objections were taken at the hearing in this court to our jurisdiction to hear this appeal, on the ground that it did not come within sub-section (*c*) of section 39 of the "Supreme Court Act," under which alone we can claim jurisdiction.

Section 39 enacts:—

> Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court,—
>
> (*c*) from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge.

These objections were, first, that the order for the prisoner's discharge applied for was one under the "Liberty of the Subject Act," and was not a "proceeding *for or upon a writ* of *habeas corpus*" within the meaning of the sub-section (*c*) and, secondly, that the proceeding impeached did "arise out of a criminal charge," within the meaning of those words in the sub-section, and was, therefore, exempted from our jurisdiction.

I have reached the conclusion that this latter objection is fatal to the maintenance of the appeal.

The question involved is whether the offence for which the appellant was convicted and imprisoned is

covered by the exception forming the closing words of sub-section (*c*) above quoted, "not arising out of a criminal charge." The contention that they are not so excepted is based upon the fact that section 91, sub-section 27, of our "Constitutional Act" assigns the exclusive power to legislate upon criminal law, to the Dominion Parliament, and that the Act under which the appellant was convicted was a provincial one.

These words, no doubt, must be construed, as stated by Lord Halsbury in the reference respecting the validity of the "Lord's Day Act," as embracing criminal law "in its widest extent," but that does not preclude the provincial legislatures, when legislating upon matters strictly within any of those assigned to them by the 92nd section of that Act, from enacting such necessary sanctions for their legislation as are essential to make that legislation effective, in fact sub-section 15 of section 92 expressly confers such necessary powers upon them.

In the case before us no attack was or could successfully be made upon the constitutionality of the "Nova Scotia Temperance Act, 1910." The right of the legislature to pass it was indubitable, and in the legitimate exercise of that right its powers were plenary. The penalties and punishments it prescribed for offences against its provisions, though in a sense criminal legislation, were not unconstitutional because they were necessary to effective legislation on the main subject-matter which the legislature was dealing with and were expressly authorized by sub-section 15 of section 92 of the "British North America Act."

The Act was one dealing with public law and

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order from a provincial standpoint, and not with private wrongs or civil rights.

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this—that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity. 4 Bl. Com. p. 5.

As defined in Russell on Crimes, vol. 1, p. 1, crimes are:—

Those acts or omissions involving breach of a duty to which by the law of England a sanction is attached by way of punishment or pecuniary penalty in the public interest.

See also, 1 Austin's Jurisprudence, Lecture 17, p. 405.

In *Russell* v. *The Queen*(1), the Judicial Committee of the Privy Council, in determining the validity of the "Canada Temperance Act, 1898," refer, at page 840, to an argument advanced by counsel for the appellant in that case as follows:—

It was argued by Mr. Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to sub-sec. 15 of sec. 92, viz., "The imposition of any punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." *No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects;* but as far as they have yet gone, their Lordships fail to see that this has been done.

In *Hodge* v. *The Queen*(2), at p. 129, the Judicial Committee adopt with approval the following statement of the law made by their Lordships in *Russell* v. *The Queen*(1), having reference to such legislation as was embodied in the "Canada Temperance Act."

(1) 7 App. Cas. 829. (2) 9 App. Cas. 117.

> Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights.

These words apply with equal aptitude to the provincial "Temperance Act" in question. The nature and object of it and the "Canada Temperance Act" are alike and they each, in their respective spheres, fall within legislation for the promotion of "public order, safety and morals."

I conclude, therefore, that the offence for which the appellant was convicted and imprisoned came within the classification of public wrongs or crimes. The only question remaining is whether Parliament intended, when exempting from our jurisdiction in sub-section (*c*) of section 39 proceedings "not arising out of a criminal charge," to embrace in the exemption cases arising under provincial legislation.

I see no reason for reading any limitation into the general words of the exemption and to confine them either to criminal charges at common law or under Dominion legislation.

It seems to me that the same reasons for withdrawing jurisdiction from this court in proceedings arising out of a criminal charge under Dominion temperance legislation must apply to proceedings under provincial temperance legislation.

Parliament in the one case and the legislature in the other, when so legislating, do so in their respective spheres with plenary powers. The legislation in each case deals with public law and order, safety and morals; the offences created are those of public wrongs or crimes and not civil injuries or private wrongs. The only distinction between the legislation is that one is general, relating to the Dominion at large, and

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passed under the general power given respecting peace, order and good government, and the other provincial,

relating to matters of a local or private nature in the province.

I am unable to find any sufficient reason for excluding from our jurisdiction respecting appeals under the section of the "Supreme Court Act" I have quoted, proceedings for or upon a writ of *habeas corpus* to test the validity of convictions for offences under the "Canada Temperance Act" on the ground that they arise out of a criminal charge, and at the same time including as within that jurisdiction similar proceedings if taken under provincial temperance legislation.

I think they equally come within the exemption and decline to read a limitation into the section which would give us jurisdiction in the one case and exclude it in the other. I do not think we have jurisdiction in either case.

I would, therefore, quash this appeal for want of jurisdiction.

IDINGTON J.—Such jurisdiction as this court has in regard to *habeas corpus* appeals falls entirely within and is defined by the "Supreme Court Act," section 39, sub-section (*c*), which reads as follows:—

Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court,—

(*c*) from the judgment in any case of proceedings for or upon a writ of *habeas corpus*, *certiorari* or prohibition not arising out of a criminal charge.

We have not before us the motion paper or other material of that kind, if any, presented to the learned judge who made what may be called an order *nisi*

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when the application was made to him, to shew exactly what was asked. Appellant's affidavit shews she had instructed her solicitor to move for a writ of *habeas corpus*. What he got was an order under an Act known as the "Liberty of the Subject Act," of which the first part of section 3, sub-section 2, provides:—

> Where it would be attended with unnecessary delay, expense or inconvenience to bring in the body of a person illegally restrained of his liberty before the court or judge, the court or judge, upon sufficient cause shewn by or on behalf of any person confined in any jail or prison, may, in the discretion of such court or judge, instead of granting a fiat for the writ of *habeas corpus cum causa* requiring the keeper of such jail, etc.,

and defines the proceeding adopted.

Could anything be more explicit than this to shew that it was not within the language of the section 39 of the "Supreme Court Act" that the proceedings were taken?

The "Habeas Corpus Act" has not been supplanted by this new Act. The former is still in force in Nova Scotia.

This new proceeding for whatever purpose furnished and however much in many of its features and operative results alike to those of what the "Habeas Corpus Act" provides, is certainly not in the language of section 39, "a case of proceedings for or upon a writ of *habeas corpus*."

It is no part of our right or duty to presume to fit the jurisdiction given us to something which we in our wisdom may deem suitable to produce the same results.

We might as well presume it our right or duty to hear appeals from a county court in a province should its legislature enlarge the county court jurisdiction

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therein so as to cover some cases heretofore originating in a court of superior jurisdiction.

The local legislatures might by some such provisions thus subtract from our jurisdiction a large part of the field of litigation which now falls within it; yet we could not thereafter reach out and claim that so incidentally taken away as part of our jurisdiction because in substance it was within the field originally given us.

The "Supreme Court Act" has defined by technical terms the limits of our jurisdiction and we have no right to depart therefrom or go beyond the limits so defined however technical the boundaries may be.

Whatever be said in this case the mode of procedure adopted renders our jurisdiction, to say the least, exceedingly doubtful. The rule properly observed by this court has uniformly been to refuse jurisdiction where it appeared doubtful or by virtue of changes had become doubtful.

I think we have no jurisdiction in this case.

It so happened that not being all agreed in this view after argument on the objection taken by Mr. Ralston, the case was heard upon its merits.

Coming to the conclusion I have, I do not think I have a right to pass any opinion upon the several interesting points discussed in the argument on the merits.

No good purpose can be served by doing so. Even if we were all agreed thereon such result could not establish a precedent or determine any rule of law when we were without jurisdiction.

The appeal should be dismissed without costs.

DUFF J.—Mr. Ralston takes a preliminary objection to the jurisdiction of the court, which is as fol-

lows: He says that section 39(*c*) confers jurisdiction only where the judgment appealed from is

> the judgment in any case of proceedings for or upon a writ of *habeas corpus*,

and that the proceeding, in which the judgment now appealed from was given, was a special statutory proceeding and was not a proceeding either "for nor upon a writ of *habeas corpus*," I do not think this objection can be sustained. The original application was an application for a writ of *habeas corpus*. The proceeding was begun therefore as a proceeding for a writ of *habeas corpus*. It is perfectly true that no writ was issued but that an order was made under the statute requiring the gaoler to return the cause of commitment but dispensing with the production of the body of the prisoner and the judgment refusing the application for the discharge of the prisoner followed upon the return made pursuant to this order. I think that for the purposes of this section the nature of the original application which as I have said was an application for a writ of *habeas corpus* may not unfairly be said to determine the character of the proceedings in which this judgment was given. I think one is not doing violence to the language of the statute in holding that this is a judgment in a "case of proceedings for a writ of *habeas corpus*."

Another point has been raised which was not taken by the counsel for the respondent and which it is necessary to discuss. It is said that the offence with which the appellant was charged was a crime and the proceeding in which she was convicted a criminal proceeding and, consequently, that the judgment appealed from falls within the exception created by section 36(*a*) which is in these words:—

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There shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty.

The phrase "criminal charge" means of course a charge forming the foundation of a judicial proceeding which is criminal proceeding and the point for consideration is whether or not (using the word "criminal" in the sense in which it is used in this context) that word is properly descriptive of the proceeding in which the appellant was convicted.

The first question one naturally asks oneself is whether in the contemplation of the law of Canada such a proceeding is properly designated as a "criminal proceeding."

The law of England from which our criminal law is derived furnishes no infallible test by which for all purposes one can determine whether a given proceeding is civil or criminal.

In the earlier history of the law the point, if it arose, could present little difficulty. A criminal proceeding was a proceeding at the suit of the Crown having for its object the punishment of an offence against the law of the land and speaking generally in the case of a commoner it involved a trial by jury pursuant to indictment, presentment or information. In modern times a vast number of statutes affecting the conduct of people in a great variety of ways have frequently given rise to questions whether the summary proceedings taken with a view to punishing offenders or delinquents are or are not to be regarded as criminal proceedings for the purpose of applying some rule of law or some statutory provision. "It must always be," said Lord Bowen in *Osborne* v.

Milman(1), at page 475 dealing with one of these questions,

> a question on the construction of the particular statute whether an act is prohibited in the sense that it is rendered criminal, or whether the statute merely affixes certain consequences more or less unpleasant to the doing of the act,

and decisions upon one statute must always be applied with caution as authorities for the construction of another. But these decisions do furnish us with illustrations of the criteria which have been applied by eminent judges in England in determining whether for some particular purpose a given proceeding under one of these modern statutes was to be regarded as a criminal proceeding or not; and where the proceeding is instituted for the punishment of an offence against an Act of the Parliament of the United Kingdom and instituted by the Crown *ad vindicatam publicam* then it has, I think, invariably been held that you have a criminal proceeding unless there is something in the Act to shew that it is not to bear that character. It is characteristic of such proceedings that they are proceedings at the suit of the Crown in the public interest and that the sanctions sought to be enforced cannot be remitted at the discretion of any private person; or, in other words, where the sanction is remissible at all it is remissible at the discretion of the Crown.

When we come to apply these criteria in this country to summary proceedings taken under the authority of a provincial statute for enforcing penalties imposed by such statutes we are confronted with a difficulty. All such criteria contemplate an offence punishable and a proceeding taken under the sanction of

(1) 18 Q.B.D. 471.

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a law-making authority having unfettered jurisdiction to make laws in respect of crimes and criminal proceedings. The language of Lord Bowen quoted above is of course used with reference to the enactments of a Legislature possessing such powers. When Littledale J. in *Mann* v. *Owen*(1), at page 602, says in language often cited that a crime is "an offence for which the law awards punishment" he is not contemplating a rule of conduct which has force as law solely by the enactment of a legislative body that is destitute of all authority over the subject of the criminal law. And it may be added that when Austin asserts the characteristic of the criminal law to be that "its sanctions are enforced at the discretion of the Sovereign," he is not thinking of an authority which, while for some purposes it acts in the name of the Sovereign, has nothing whatever to do with the exercise of the Sovereign's prerogative of pardon in reference to crimes strictly so called.

By section 91, sub-section 27 of the "British North America Act, 1867," exclusive legislative authority upon the subject of the criminal law including the subject of criminal procedure is committed to the Dominion. The prerogative of Parliament in respect of criminal offences is under his instructions exercised in Canada by the Governor-General acting on the advice of His Majesty's Canadian Ministers acting under their responsibility to the Parliament of Canada. It is for the Parliament of Canada alone to say what acts the criminal law shall notice and punish as crimes and in what manner all criminal proceedings in Canada shall be conducted.

(1) 9 B. & C. 595.

In *Attorney-General of Ontario* v. *Hamilton Street Railway Co.*(1), at pages 528-9, the supreme judicial authority for Canada expounded the effect of section 91, sub-section 27 of the "British North America Act;" "The criminal law in its widest sense is," said Lord Halsbury, delivering the judgment of the Privy Council, "reserved for the exclusive authority of the Dominion Parliament." His Lordship added that

> the reservation * * * is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords.

By sub-section 15 of section 92 the provinces are authorized to attach the sanctions of fine and imprisonment to acts or omissions in violation of their enactments; but it seems to be clear that consistently with the views thus expressed by Lord Halsbury acts or omissions struck at by such penal enactments cannot with strict propriety be described as crimes nor can the proceedings taken with a view to enforce the sanctions attached to them be properly described as criminal proceedings. Under a constitutional system such as ours that which the supreme legislative authority declares to be so, is so in contemplation of law; and in face of this declaration in the "British North America Act," construed as it has been construed in the passages quoted, it cannot be said that in the contemplation of the law of Canada an act which is an offence against a provincial statute is for that reason alone a crime; and no definition of the terms "crime" and "criminal proceeding" which fails to take this circumstance into account, can be considered adequate with reference to the law of this country. To put it in another way, the "British North America

(1) [1903] A.C. 524.

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Act," which is the supreme law of this country, says to the provincial legislatures: "Though you may pass statutes creating prohibitions and imposing duties in the public interest and attach to them penal sanctions enforceable and remissible at the instance of the Crown alone, yet you are incompetent to pass any enactment which in itself can have the effect of making a given act or omission a crime in the eye of the law." The limitation upon the powers of the local legislatures respecting public offences may be said to be tacitly recognized in every valid enactment passed by a provincial legislature creating such an offence; and every such enactment may be read as containing an implicit declaration that the offence created by it shall not be deemed to be a crime. In the eye of the law, therefore, the proceeding in question here is not a criminal proceeding. It is true, nevertheless, that the phrases "crime" and "criminal proceeding" may be used by a legislative body in a manner which is not strictly accurate, and it is necessary to consider whether there is anything in the "Supreme Court Act" (or in other enactments of the Parliament of Canada which as being *in pari materiâ* may properly be resorted to for aid in the construction of that Act) justifying the inference that in the instance in question Parliament has used the phrase "criminal charge" in a sense broad enough to include within its scope a charge made under a provincial statute.

It may first be noted that the "Supreme Court Act" is a statute dealing with jurisdiction and procedure and primarily addressed to lawyers—a statute in which one may consequently expect to find that the language of the law will not be employed without due attention to its strict meaning; and the onus, there-

fore, seems to be upon those who argue that the phrase in question is used in a sense different from that which the law of this country in strictness attaches to it. The appellate jurisdiction of this court in criminal matters is referred to in three sections, 35, 36 and 39 (*c*), which are as follows:—

35. The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada.

36. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, in cases in which the court of original jurisdiction is a superior court: Provided that,—

(*a*) there shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of *habeas corpus*, arising out of any claim for extradition made under any treaty; and, (*b*) *there shall be no appeal in a criminal case except as provided in the Criminal Code.*

39. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court, * * * (*c*) from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge.

Sub-section (*b*) of section 36 shews clearly enough that the subject of the appellate jurisdiction of the court in criminal matters is regarded by Parliament as falling within the general subject of criminal procedure which is dealt with in the Criminal Code; and that being the point of view from which the legislature has envisaged the subject, the "Supreme Court Act" may properly, in so far as it deals with criminal matters, be read as an Act *in pari materiâ* with the Criminal Code. Turning now to the Criminal Code we find there that the authors of the Code have used the words "crime" and "criminal" throughout in the strict sense; in the sense, that is to say, in which they are used in the "British North America Act;" and without apparently a suspicion of their possible application to

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offences against provincial penal enactments. There is a striking illustration of this in the group of sections, 10, 11 and 12, bearing the sub-title "Application of the Criminal Law of England." As to Ontario I quote section 10:—

> 10. The criminal law of England as it existed on the seventeenth of September, one thousand seven hundred and ninety-two, in so far as it has not been repealed by any Act of the Parliament of the United Kingdom having force of law in the Province of Ontario, or by any Act of the Parliament of the late Province of Upper Canada, or of the Province of Canada, still having force of law, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such Act, shall be the criminal law of the Province of Ontario.

Here indeed is a declaration by the Parliament of Canada—the Legislature entrusted with exclusive authority over the subject of the criminal law—professing to define what in the Province of Ontario is comprised within the body of law known as the "criminal law"; and provincial penal enactments are obviously excluded.

I mention another statute relating to criminal procedure and to that extent *in pari materiâ* with the provisions we are considering, chapter 145, of the Revised Statutes of Canada, 1906, known as the "Canada Evidence Act." In section 2 of that statute the phrase "criminal proceedings" appears and is obviously used in the strict sense. So far as my observation extends I am not aware of any instance in any enactment of the Parliament of Canada in which the word "crime" or "criminal" is used in the broad sense it is suggested we should attach to it in the enactment under consideration.

Coming to the "Supreme Court Act," itself, there is nothing in the language of the Act affording a reason for ascribing to the word "criminal" as used in

section 36 any broader scope than that which the word bears in other enactments passed by the Parliament of Canada dealing with the same subject matter, viz., criminal procedure.

Two reasons I understand are given in justification of the broader construction. First, it is said that the effect of the strict construction would be this: From judgments of the court of last resort in proceedings under provincial penal statutes there would in the case of some of the provinces be an unrestricted right of appeal, while from the judgments of such courts in criminal matters strictly so called which are usually matters of far greater moment, the appeal is by the provisions of the Criminal Code very narrowly restricted. It cannot be supposed, it is argued, that Parliament could have contemplated such a result.

This argument, with great respect, seems to prove too much; for a judgment of the Supreme Court of Nova Scotia in a civil action condemning a litigant to pay the sum of $100 is appealable to this court, even although the court be unanimous; while the unanimous judgment of the same court affirming a conviction for murder is not subject to such appeal. Manifestly the test which Parliament has applied in determining in what cases an appeal shall lie to this court is not the relative gravity of judgments as affecting the interests of the parties. The truth is that in the matter of the appealability of judgments a set of considerations has always been regarded as applicable to criminal proceedings which admittedly has no application or very limited application to proceedings of a different character. The "Supreme Court Act" (accordingly) treats the subject of appeals to the Supreme Court in criminal matters as belonging to and governed by the same considerations as the general

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subject of appeals in such matters (or, in other words, as an integral part of the subject of criminal procedure) and therefore as proper to be dealt with in the Criminal Code; a manner of treatment of course in no wise fitting in respect of appeals from judgments in provincial penal proceedings. It may be noticed in passing that one circumstance which unquestionably has weighed with legislators in dealing with the subject of appeals in criminal matters in an exceptional way is the fact that the prerogative of pardon in itself affords some security against manifest injustice. This prerogative as exercisable by the Governor-General in Council under the advice of Canadian Ministers and under the control of the Dominion Parliament has, of course, nothing to do with judgments given in proceedings taken under the authority of a provincial statute.

Then I understand it is suggested that section 62 of the Act which confers jurisdiction in *habeas corpus* upon the judges of this court in respect of commitments in "criminal cases under any Act of the Parliament of Canada" in some way supports the inference that the phrase "criminal case" as used in section 36 is not used in the strict sense. The suggestion as I understand it is that because the scope of the phrase is restricted by express words in section 62 it must be given the broadest meaning of which it is capable in the other sections. But the truth is that for some reason Parliament when conferring original jurisdiction upon the judges of this court in *habeas corpus* in criminal matters, determined to restrict that jurisdiction to criminal matters of a particular class or to commitments of a particular class, and to give effect to that purpose used appropriate qualifying words. Giving the phrase "criminal case" the narrowest conceivable

interpretation the qualifying words were absolutely essential to give effect to the legislative intention; and one has some difficulty in understanding why the use of such necessary qualifying words can be supposed to have any relevancy touching the construction of this phrase when standing alone. If Parliament had used in section 62 the phrase "criminal case" simply without qualification that language construed in the strictest manner would have given a larger jurisdiction than Parliament intended to give. The restriction, therefore, has really no bearing whatever upon the construction to be given to the same phrase when found in other parts of the Act.

For these reasons we have, in my judgment, jurisdiction to entertain the appeal before us. On the merits I think the appeal must be dismissed. The statutory provision relied upon was not intended, in my opinion, to exclude any evidence which, if the statute had not passed, would have been lawfully admissible on the issue of the guilt or innocence of the accused in respect of the offence charged. I am unable myself to understand upon what ground it can be disputed that it was open to the prosecution to shew as bearing upon the character of the accused's possession of the liquor found on her premises that she had previously kept liquor on the same premises for the purpose of sale. Nor can I understand upon what principle it can be held that a judgment determining that fact against her in a proceeding to which the Crown and she were parties — I am unable to understand, I say, upon what principle it can be contended that such a judgment would not be admissible evidence for the purpose of proving that fact. But assuming that a previous conviction would not be legal evidence of

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previous possession for the purpose of sale, how far does that carry us? The magistrate permitted the question to be asked in a general way whether or not there had been previous convictions against her in respect of the same premises. He also admitted evidence to the effect that it was the common report that the accused kept liquor for sale on those premises. If the magistrate erred in the first mentioned instance, does not the first mentioned error stand in the same category as the second? Is it anything more than an instance of the improper admission of evidence? The magistrate was not engaged upon any substantive enquiry into the charge that there had been an earlier conviction. He was engaged in taking evidence relevant as he thought upon the trial of the charge before him. I think nothing occurred which amounted to an inquiry into the charge of a former conviction within the meaning of the statute. I express no opinion upon the question whether there being non-compliance with the statutory provision the effect of such non-compliance would or would not be to deprive the magistrate of jurisdiction.

I think the appeal should be dismissed.

ANGLIN J.—In my opinion we have not jurisdiction to entertain this appeal because, assuming that the order of Mr. Justice Graham for a return by the keeper of the common gaol, made under the Revised Statutes of Nova Scotia, 1900, chapter 181, section 3(2), should be deemed the equivalent of a "writ of *habeas corpus*" for the purpose of clause (*c*) of section 39 of the "Supreme Court Act," the judgment appealed from was rendered "in a case of proceedings * * * arising out of a criminal charge" within the meaning of that phrase as used in that clause.

The appellant was convicted of having unlawfully kept intoxicating liquor for sale contrary to the provisions of the "Nova Scotia Temperance Act" of 1910 after a previous conviction for a like offence. Under that Act, and an amendment of 1911, this is made an offence punishable by imprisonment with or without hard labour, without the option of a fine. That the statutory offence thus created constituted a crime, as that term is ordinarily understood in English law, admits of little doubt.

The proper definition of the word "crime" is an offence for which the law awards punishment. *Mann* v. *Owen*(1), at page 602, *per* Littledale J.

See also *The Queen* v. *Tyler and International Commercial Co.*(2), at pages 594-5, *per* Bowen L.J.; and *Easton's Case*(3). The proceedings against the appellant arose out of what would commonly be deemed "a criminal charge," and she is "a criminal prisoner." *Osborne* v. *Millman*(4); *Reg.* v. *Sparham* (5); *Reg.* v. *Roddy*(6); *Reg.* v. *Sullivan*(7).

It has been recognized in several decisions of the Judicial Committee that provincial legislatures in passing statutes of which the principal matter is within one of the classes of subjects assigned to them by the "British North America Act" may include, under the authority of sub-section 15 of section 92 of that Act, provisions of a criminal character without offending against sub-section 27 of section 91, which assigns to the exclusive jurisdiction of the Dominion Parliament the field of "criminal law." *Hodge* v. *The*

(1) 9 B. & C. 595.
(2) [1891] 2 Q.B. 588.
(3) 12 A. & E. 645.
(4) 18 Q.B.D. 471.
(5) 8 O.R. 570.
(6) 41 U.C.Q.B. 291.
(7) Ir. R. 8 C.L. 404.

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Queen(1), at page 133. As put by Ramsay J. in *Pope* v. *Griffith*(2) :—

> In one sense of the word, the act of which appellant is accused (keeping liquors for sale without a license) is a crime; but it is equally plain that it is not a crime in the sense of sub-sec. 27 of sec. 91 of the "British North America Act."

In *Russell* v. *The Queen*(3), at page 840, Sir Montague Smith, in delivering the judgment of the Judicial Committee, appears to endorse Mr. Benjamin's designation of provisions such as that now under consideration as "provincial criminal law." As put by the present Chief Justice of Canada, in *Ouimet* v. *Bazin*(4), at page 505:—

> It must be accepted as settled that "criminal law" in the widest and fullest sense, is reserved for the exclusive legislative authority of the Dominion Parliament, subject to an exception of the legislation which is necessary for the purpose of enforcing, whether by fine, penalty or imprisonment, any of the laws validly made under the "enumerative heads" of sec. 92 of the "British North America Act," 1867.

The facts that the "criminal law" is assigned by the "British North America Act" to the Federal Parliament and that the offence of which the appellant was convicted is the creation of a provincial legislature do not, therefore, involve the conclusion that that offence is not a crime or that the proceedings against the appellant did not arise "out of a criminal charge."

Except a suggestion that section 39(*c*) and section 62 of the "Supreme Court Act" are mutually complementary, and embrace the whole field of *habeas corpus* jurisdiction—an idea which, as I shall presently point out, is based on a misapprehension—I have neither heard nor do I know of anything which would indicate that the words "criminal charge" are used in

(1) 9 App. Cas. 117.
(2) 2 Cart. 291.
(3) 7 App. Cas. 829.
(4) 46 Can. S.C.R. 502.

section 39(*c*) of the "Supreme Court Act" in any restricted sense or with any other than their ordinary legal meaning. That is in itself a sufficient reason for giving that meaning to them. *Vestry of St. John, Hampstead* v. *Cotton*(1), at page 6; *The King* v. *Judge Whitehorne*(2), at page 830. Moreover, I find several indications in the statute itself that these words are intended to have their widest signification. By section 62 every judge of this court is given original jurisdiction to issue

> a writ of *habeas corpus ad subjicidum* for the purpose of inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

The form of this provision indicates two things:—

1. That when Parliament meant to limit the application of the word "criminal," it said so; and

2. That section 62 and section 39(*c*) are not mutually complementary.

When the Supreme Court was established in 1875 the original *habeas corpus* jurisdiction, now provided for by section 62, was conferred. (See section 51 of the Act of 1875.) At that time a great deal of indisputably criminal law, which has since been codified, was not the subject of any Act of the Parliament of Canada. At the present time there remains a body of criminal law of some importance which is not covered by the Criminal Code, or by any other federal statute. (See Criminal Code, sections 10 *et seq.*) It is therefore obvious that in certain criminal cases this court has neither original nor appellate jurisdiction in *habeas corpus* proceedings, and there is no ground for the contention that section 39(*c*) should be given a construction which would extend our appellate jurisdic-

(1) 12 App. Cas. 1. (2) [1904] 1 K.B. 827.

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tion to all cases not within section 62. That is simply impossible. Parliament has in the former provision deliberately omitted the qualifying words "under any Act of the Parliament of Canada," which are found in the latter. Why then should we restrict the meaning of "criminal charge" in section 39(*c*) to a charge of an offence such that only the Dominion Parliament could create or deal with it? The purpose of Parliament would appear to have been to confine our jurisdiction in *habeas corpus* matters of a criminal character to those cases in which jurisdiction is expressly conferred by section 62, which now embraces many cases of crime to which section 51 of the original Act did not apply—to place upon our appellate jurisdiction in *habeas corpus* matters a restriction similar to that imposed on the jurisdiction of the English Court of Appeal by section 47 of the "Judicature Act." *Ex parte Woodhall*(1); *Ex parte Schofield*(2); *Seaman* v. *Burley*(3); *Rex* v. *D'Eyncourt*(4). The word "criminal" is, I think, used in section 39(*c*) in contradistinction to the word "civil" and connotes a proceeding which is not civil in its character. The proceeding against the appellant was of this class. I am therefore, of the opinion that she cannot invoke the jurisdiction conferred by that section.

I base my judgment on this ground rather than on the ground that the order of Graham J. should not be deemed the equivalent of a writ of *habeas corpus* for the purpose of clause (*c*) of section 39, because the strict construction of that clause, which I understand that some of my learned brothers favour, might result in our being deprived of jurisdiction to hear appeals in

(1) 20 Q.B.D. 832.
(2) [1891] 2 Q.B. 428.
(3) [1896] 2 Q.B. 344.
(4) 85 L.T. 501.

cases of *certiorari* and prohibition from provinces in which writs of *certiorari* and prohibition have been abolished, or are not now in use, having been superseded by the modern "order of the court or a judge." (See Ont. Consolidated Rules, Nos. 1100 and 1101.) Without much further consideration I am not prepared to accept the view that our jurisdiction has been thus curtailed.

It was strongly urged on behalf of the respondent that, since the intent with which the liquor found on the appellant's premises was kept by her is the gist of the offence of which she has been convicted, in order to establish that intent evidence of her having been formerly convicted of a similar offence was admissible and that the casual and incidental introduction of such evidence on behalf of the prosecutor in a general form and without particulars, while the defendant was on trial for a subsequent offence, charged as such, and before she had been convicted of such subsequent offence, was not contrary to the purpose of the legislature in prescribing with notable particularity the procedure to be followed in such cases, and did not vitiate the whole proceeding before the magistrate, rendering the conviction void and the imprisonment under it illegal. I believe one of my learned brothers takes this view. While I wish to refrain from expressing a judicial opinion on the merits of an appeal which I think we have not jurisdiction to entertain, I desire not to be understood to accede to these propositions of the learned counsel for the respondent.

BRODEUR J.—After a great deal of hesitation I have come to the conclusion that the judgment *a quo* has

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not been rendered in a case of proceedings for or upon a writ of *habeas corpus,* and I concur in the views expressed by Mr. Justice Idington.

Some of my colleagues are quashing this appeal on the ground that the proceedings for the discharge of the appellant arose out of a criminal charge though based on a provincial statute.

I do not think it would be advisable to decide this most important point. It was not mentioned in the factums of the parties and it was not discussed at bar, and I would not like to commit myself to such a proposition unless it would be fully argued.

The effect of such a decision might curtail the legislative powers of the provinces, because if all the provincial penal laws are criminal it might mean that the procedure in respect thereto under the provisions of sub-section 27 of section 92 of the "British North America Act" should be made by the Federal Parliament.

At the same time it may be argued that the Federal Parliament in giving us an appellate jurisdiction on writs of *habeas corpus* excluded the criminal cases because it had given original jurisdiction to judges of this court to issue the writ of *habeas corpus* in criminal matters, and in speaking in section 39 of criminal charges it simply referred to the criminal laws that were under its control and not to what has been called criminal provincial laws.

Appeal dismissed without costs.