IN RE FRED STORGOFF

1944

*Oct.13, 16
1945
**Feb. 6, 7, 8, 9
**Apr. 24.

Constitutional law—Criminal law—Habeas corpus—Conviction of applicant under Criminal Code—Application for habeas corpus granted by a judge of British Columbia—Appeal by Attorney General to Appeal Court—Jurisdiction to hear appeal—Appeal Court reversing judgment and ordering re-arrest—Provisions of section 6 of Appeal Court Act of B.C. granting right to appeal—Inoperative if applicant convicted for a criminal offence under Criminal Code—Exclusive jurisdiction of Federal Government to authorize such appeal—B.N.A. Act, sections 91 (27) and 92 (13).

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand JJ. and Thorson J. *ad hoc*.

**PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau, Rand, Kellock and Estey JJ.

(1) [1935] S.C.R. 568.

(2) [1933] S.C.R. 44.

The provisions of section 6 of the *Court of Appeal Act* of British Columbia (R.S.B.C. 1936, c. 57), granting a right to appeal to the Court of Appeal in a *habeas corpus* matter are inoperative, if the applicant for that writ is detained in custody by virtue of a conviction for a criminal offence under the Criminal Code.—The Chief Justice dissenting.

The Dominion Parliament has exclusive jurisdiction to authorize such an appeal under section 91 (27) of the *British North America Act, 1867* ("Criminal law * * *, including the Procedure in Criminal Matters"); and a Provincial Legislature has no such power under section 92 (13) of that Act ("Property and Civil Rights in the Province").—The Chief Justice dissenting.

MOTION before Mr. Justice Hudson in Chambers for the issue of a writ of *habeas corpus ad subjiciendum* referred by him to the full court.

The applicant Storgoff was convicted by police magistrate Wood, in the city of Vancouver, on a charge of "while nude being found in a public place", contrary to section 205A of the Criminal Code. He was sentenced to be imprisoned at hard labour in the British Columbia Penitentiary for a period of three years.

On the 30th of June, 1944, Coady J., in the Supreme Court of British Columbia (1), granted a motion for the discharge and release from custody of Storgoff, made on the return to a writ of *habeas corpus* which had previously issued. Storgoff was immediately freed from the penitentiary and set at liberty.

On the 18th of July, 1944, the Court of Appeal for British Columbia (2), on appeal by the Attorney General of that province, reversed the judgment of Coady J. and ordered the re-arrest of Storgoff, whereupon he was taken into custody under the judgment of the Court of Appeal and returned to the New Westminster Penitentiary.

Application was then made to Mr. Justice Hudson for a writ of *habeas corpus* under sections 57 et seq. of the *Supreme Court Act,* and the reference to the full court was directed.

(1) (1944) 60 B.C. Rep. 464; [1944] 2 W.W.R., 509; 82 Can. Cr. Cas. 111.

(2) (1944) 60 B.C. Rep. 464, at 468; [1944] 3 W.W.R. 1; 82 Can. Cr. Cas. 153; [1944] 4 D.L.R. 445.

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On the first hearing, after argument by counsel for the applicant and for the Attorney General for British Columbia, the application was adjourned to the next session of the Court, and the applicant was ordered to notify the Attorney General of Canada and the Attorneys General of the provinces.

C. W. Hodgson for the applicant.

F. P. Varcoe K.C. and *W. R. Jackett* for the Attorney General of Canada.

J. W. de B. Farris K.C. for the Attorney General for British Columbia, (*E. Pepler K.C.* with him at the first hearing).

THE CHIEF JUSTICE (dissenting).—This is a Reference to the Full Court directed by Mr. Justice Hudson on the 1st day of October, 1944. On the 12th and 15th of October, 1944, the petition was partially heard by the Full Court. At that time, one Fred Babakaiff joined with Storgoff in the petition for *habeas corpus,* but the application was then denied as far as he was concerned, when the following judgment was delivered:—

"THE CHIEF JUSTICE.—(Orally, for the Court) We will dispose of the first part of this application, because we do not think it should stand in the way.

We look upon the motion on behalf of the two applicants as being divided and, so far as Babakaiff is concerned, the application for a writ of *habeas corpus* is denied. In our view, section 41 of the *Penitentiary Act* must be read in conjunction with section 705 of the Criminal Code and so read we have no doubt that the magistrate had power to sentence the accused to three years imprisonment in the penitentiary in accordance with the provisions of section 205 (*a*) of the Code.

As to Storgoff, the application will be adjourned to the next session of the Court. The applicant is to notify the Attorney General of Canada and the Attorneys General of the provinces. All parties will be at liberty to fyle factums. It is understood that that part of the petition will be heard *de novo;* otherwise the case will stand

adjourned until the next term, to be first on the list. It is to be stated that the adjournment is by consent of all parties."

The petitioner notified the Attorney General of Canada and the Attorneys General of the provinces, who were given leave to fyle factums, and the petition was heard *de novo* with respect to the part thereof which dealt with the re-arrest of Storgoff by order of the Court of Appeal for British Columbia after he had been discharged from custody under *habeas corpus* proceedings in the Supreme Court of British Columbia.

Fred Storgoff was convicted by H. S. Wood, Esquire, K.C., a Police Magistrate, in and for the city of Vancouver, on the 8th day of May, 1944, for that he:—

> At the said City of Vancouver, on the 7th day of May, A.D., 1944, while nude, was found in a public place, to wit, Stanley Park, in company with other persons.

He was sentenced to be imprisoned at hard labour in the British Columbia Penitentiary for a period of three years.

The sentence was under section 205 (*a*) of the Criminal Code, which in its relevant aspects reads as follows:—

> every one is guilty of an offence and liable on summary conviction to three years' imprisonment who, while nude, * * *
>
> (*b*) is found in any public place whether alone or in company with one or more other persons.

On the 30th of June, 1944, Coady J., in the Supreme Court of British Columbia, granted a motion for the discharge and release from custody of the said Storgoff made on the return to a writ of *habeas corpus* which had previously issued. Storgoff was immediately freed from the penitentiary and set at liberty.

On the 18th of July, 1944, the Court of Appeal for British Columbia, on appeal by the Attorney General of that province, reversed the judgment of Coady J. and ordered the re-arrest of Storgoff, whereupon he was taken into custody under the judgment of the Court of Appeal and returned to the New Westminster Penitentiary.

Application was then made to Mr. Justice Hudson for a writ of *habeas corpus* under sections 57 et seq. of the *Supreme Court Act,* and the reference herein before mentioned was directed.

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The grounds urged for Storgoff's release were:—

(*a*) The commitment to British Columbia Penitentiary was bad and in excess of the Magistrate's jurisdiction. (But as aforesaid, this Court ruled against the application of Storgoff and Babakaiff on that ground.)

(*b*) The Court of Appeal for British Columbia lacked jurisdiction to hear the Attorney General's appeal and order Storgoff's re-arrest. The application of Storgoff is now renewed but on this ground alone.

The issues arising on the Reference may be stated as follows:—

(1) Did the Court of Appeal for British Columbia have jurisdiction to hear the appeal of the Attorney General of British Columbia?

(2) Is the assumption that *habeas corpus* is always a civil remedy, even where release is sought from imprisonment based on a criminal charge, correct?

(3) Does the *Court of Appeal Act* of British Columbia give appeals in *habeas corpus* matters generally or only in civil matters of *habeas corpus?*

(4) Can the *Court of Appeal Act* give an appeal in criminal matters of *habeas corpus* which arise under the Criminal Code?

The whole contention of the petitioner, Fred Storgoff, is that the Court of Appeal of British Columbia lacked jurisdiction to hear the appeal of the Attorney General for the province, and to order his re-arrest once he had been freed and set at liberty by order of Coady J., a judge of the Supreme Court of British Columbia, on *habeas corpus* proceedings.

Counsel for the petitioner stated that his contention could not be more clearly epitomized than in the words of McDonald C.J.B.C., in *Ex Parte Lum Lin On* (1):—

> The *Court of Appeal Act* purports to give an appeal in *habeas corpus* matters generally, but I think it is clear that the province cannot give an appeal in criminal matters that arise under the Code. All justifications that have been offered for holding that appeal lies in *habeas corpus* proceedings have been based on the assumption that *habeas corpus* is a civil remedy, even where release is sought from imprisonment based on a criminal charge.

(1) [1943] 59 B.C. Rep. 106, at 108.

The argument of the learned counsel for the petitioner was really based on the decision of the House of Lords in *Amand* v. *Secretary of State for Home Affairs and Another* (1). He contended that to hold *habeas corpus* is always a civil remedy is to differ from the House of Lords in that case; and he added that where English law has been settled by the House of Lords, and said English law prevails in Canada, then the decision of the House of Lords must be followed in Canada to the same extent as a decision of the Privy Council. For this principle counsel relied on the case of *Robins* v. *National Trust Co. Ltd.* (2).

The province of British Columbia, before it joined the Dominion of Canada in 1871, had adopted the laws of England as of the year 1858, and it was, therefore, urged before us that those laws prevailed in that province and the House of Lords decision in the *Amand* case (1) was binding upon this Court.

In the *Amand* case (1), Viscount Simon, L.C., at p. 383 stated:—

> The House, therefore, has to decide the question whether the judgment of the Divisional Court, refusing a writ of *habeas corpus*, was a judgment in a "criminal cause or matter".

And at p. 385 the noble Lord added:—

> This distinction between cases of *habeas corpus* in a criminal matter and cases when the matter is not criminal goes back very far. * * *
>
> The distinction is noteworthy. * * *
>
> It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test.

However, in that case the point which the House of Lords had to decide was neither of the nature, nor of the character, of the present proceedings. The issue was not whether *habeas corpus* proceedings were in relation to a criminal matter, but whether the antecedent cause or matter was criminal. As stated by Lord Wright at p. 387:—

> The cause or matter in question (under s. 31 (1) (*a*) of the *Judicature Act*) was the application to the court to exercise its powers under the *Allied Forces Act, 1940* * * * It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law.

(1) [1942] 2 All E.R. 381; [1943] A.C. 147.

(2) [1927] 1 W.W.R. 692; [1927] A.C. 515.

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The immediate point involved in the appeal was whether or not the cause or matter of the application to the Court was in a criminal cause or matter, because, according as it was, or was not, there laid an appeal to the Court of Appeal in England, or no appeal laid. To quote Lord Porter at p. 389 in that case:—

> The question whether a right of appeal does or does not exist is now governed by the *Supreme Court of Judicature (Consolidation) Act, 1925*, s. 31 (1) (*a*). The wording is:—
>
> "No appeal shall lie except as provided by the *Criminal Appeal Act, 1907*, or this Act, from any judgment of the High Court in any criminal cause or matter".

That being the question in issue before the House of Lords, Lord Wright said, at p. 387:—

> The words "cause or matter" are, in my opinion, apt to include any form of proceeding. The word "matter" does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced in order to exclude any limited definition of the word "cause". In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers

(meaning s. 31 (1) (*a*) of the *Judicature Act*).

The cause or matter in question was the application to the court to exercise its powers under the *Allied Forces Act, 1940*, and the Allied Forces (Application of 23 Geo. V., c. 6) (No. 1) Order, 1940, and to deliver the appellant to the Netherlands military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter. The former class of cases was dealt with in the *Habeas Corpus Act, 1679;* the reforms of procedure in the latter class had to wait until the 1816 Act.

And Lord Porter, at p. 389, added:—

> Was then the application for the writ of *habeas corpus* in the present case made in a criminal cause or matter? Certain principles have been consistently followed in coming to a conclusion upon this question and are now, I think, too firmly established to be open to challenge. One such principle is that *mandamus* may be asked for either in a criminal or in a civil proceeding, and in any given case it must be determined whether or not the proceeding is criminal. This does not mean that the matter in order to be criminal must be criminal throughout: it is enough if the proceeding in respect of which *mandamus* is asked is criminal, e.g., the recovery of a poor rate is not of itself a criminal matter, but its enforcement by magistrates by warrant of distress is; and, if a case be stated by them as to their right so to enforce it and that case is determined by the High Court, no appeal lies (see *Seaman* v. *Burley* (1)). So, if the proceeding before

(1) [1896] 2 Q.B. 344.

the magistrate was a criminal proceeding, the decision of the High Court upon a writ of prohibition is a decision in a criminal matter whether the magistrate had jurisdiction or not. He purported to be exercising criminal not civil jurisdiction, and the decision of the High Court was given in that matter (see per Viscount Cave in *Re Clifford and O'Sullivan* (1)).

As long ago as 1888 it was unsuccessfully argued in *Ex parte Woodhall* (2), that the decision to be in a criminal cause or matter must deal with what was a crime by English law, and in the same case it was contended in vain that an application for *habeas corpus* was a separate proceeding from that which the magistrate dealt with in the case brought before him. That case has been consistently approved by the courts of this country and I think at least once by your Lordships' House: see *Provincial Cinematograph Theatres, Ltd.* v. *Newcastle-upon-Tyne* (3). The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought before the magistrate in jeopardy of a criminal charge: see *Ex Parte Pulbrook* (4) and *Rex* v. *Brixton Prison (Governor), Ex. Parte Savarkar* (5).

In the *Woodhall* case (6) referred to by Lord Porter, it had been decided that no appeal laid from the refusal of a *habeas corpus* by the High Court to a fugitive accused of an extradition crime committed to prison with a view to his surrender to a foreign state. And Lord Esher, M.R., there said at page 72:—

> The words ("no appeal shall lie from any judgment of the said High Court in any criminal cause or matter" in section 47 of the *Judicature Act, 1873*) apply to any decision by way of judicial determination of any question with regard to proceedings, the subject matter of which is criminal at whatever stage it arises.

And Lindley, L.J. stated at p. 72:—

> The object is to have the alleged criminal released from a prosecution for a criminal offence. If it is not a criminal case I do not know what it is. In cases of *habeas corpus* for the custody of infants and the like, there is jurisdiction, but in cases like this it is perfectly plain that there is none.

The Woodhall case (2) came up for discussion before the courts of the province of British Columbia. In 1925 it was followed and an appeal on a writ of *habeas corpus* for the release of an alleged criminal from a prosecution for a criminal offence was rejected. But in 1938 that decision was overruled.

(1) [1921] 2 A.C. 570, at 579.
(2) (1888) 20 Q.B.B. 832.
(3) (1921) 90 L.J. K.B. 1064.
(4) [1892] 1 Q.B. 86.
(5) [1910] 2 K.B. 1056.
(6) (1888) 57 L.J. M.C. 71.

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It was in 1920 that the *Court of Appeal Act* was amended in British Columbia giving the right to appeal in *habeas corpus* proceedings in matters over which the legislature of that province had jurisdiction. The first reported case is *In re Wong Shee* (1). McDonald C.J.A., at p. 148, said:—

> The recent amendment of the Act, giving an appeal in a case like the present, is an amendment to the civil laws of this province. It has nothing to do with the criminal law or criminal procedure, and hence the preliminary objection must be overruled.

Then in 1925 came the decision in *Rex* v. *McAdam* (2), where it was held that an appeal from a refusal of a writ of *habeas corpus,* arising out of a criminal matter, is a criminal appeal, and falls within the heading Criminal Law assigned to the Dominion by s. 91 of the B.N.A. Act; and that, therefore, there was no right of appeal in such a case as none is granted by the Criminal Code. The *Woodhall* case (3) was applied. Martin, J.A., dissented in a very lengthy and learned judgment.

But in 1938 the Court of Appeal for British Columbia reversed its decision in *Rex* v. *McAdam* (2) in the case of *Ex parte Yuen Yick Jun* (4). O'Halloran J.A. concurred in by the other two judges constituting the Court, crystallized the *ratio decidendi* as follows p. 549:—

> The remedy of *habeas corpus* is not to supplant the procedure in or the trial of the issue in civil or criminal matters.

On the same page he quoted the language of Martin J. of the Quebec Court of King's Bench in *Rex* v. *Labrie* (5):—

> The great object of the writ is the liberation of those who may be imprisoned without sufficient cause and is the remedy which the law gives for the enforcement of the civil right of personal liberty.
>
> It is not a proceeding in the original criminal action or proceeding. It is in the nature of a new suit brought by the respondents to enforce a civil right which he claims as against those who are holding him in custody.

Thus Martin J.A.'s dissenting opinion in *Rex* v. *McAdam* (2) was finally approved by the Court of Appeal for British Columbia in the *Yuen Yick Jun* case (4).

(1) (1922) 31 B.C. Rep. 145.
(2) (1925) 44 Can. Cr. Cas. 155; [1925] 4 D. L.R. 33; 35 B.C. Rep. 168.
(3) (1888) 20 Q.B.D. 832; 57 L.J. M.C. 71.
(4) (1938) 54 B.C. Rep. 541.
(5) (1920) 61 D.L.R. 299, at 309.

In *Ex parte Lum Lin On* (1), the question again came before the Court of Appeal for British Columbia, but the majority of the Court came to the conclusion that the attack upon the jurisdiction of the convicting magistrate failed and the appeal was dismissed. In his reasons for judgment, McDonald C.J.B.C., referring to the two contrary decisions in that Court in the *McAdam* (2) and *Jun* (3) cases, said at pp. 108 and 109:—

> Although this Court has so held, overruling its own contrary decision, I think the matter must be considered *de novo,* in view of the House of Lords' recent decision in *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* (4), which I cannot read otherwise than as laying down that *habeas corpus* is always a criminal remedy when used to question imprisonment on a criminal charge.

But the other judges refrained from referring to the validity of the *Court of Appeal Act* in criminal matters, and O'Halloran J.A. stated that he persisted in the opinion that he had already expressed in the *Jun* case (3) "that the Court of Appeal had jurisdiction to hear this appeal".

Finally, in 1944, this matter again came before the Court of Appeal for British Columbia in *State of New York* v. *Wilby* (*alias Hume*) (5), the Court consisting of Sloan, O'Halloran and Sidney Smith JJ.A. The decision of the Court was delivered by Sloan J.A. The *Amand* case (4) was referred to. As a preliminary objection, counsel for the State of New York objected to the jurisdiction of the Court of Appeal to entertain the appeal, and Sloan J.A., delivering the judgment of the Court, said at p. 374 (5):—

> At the outset it must be restated, as our brother O'Halloran made clear in his judgment therein, that our jurisdiction to entertain the appeal in *Ex Parte Lum Lin On* (1), was never questioned by counsel in that case. Had it been otherwise, I would have concurred in the judgment of my brother O'Halloran at that time.
>
> It is our present view that our brother O'Halloran correctly stated the position when he said in the *Lum Lin On* case (1) (at p. 110):
>
> "* * * the *Amand* case (4) does not detract from or furnish any real ground for doubting the correctness of the reasoning which prompted the decision of this Court * * * in *Ex parte Yuen Yick Jun* (3) * * *".

(1) (1943) 59 B.C. Rep. 106.
(2) (1925) 35 B.C. Rep. 168.
(3) (1938) 54 B.C. Rep. 541.
(4) [1943] A.C. 147.
(5) (1944) 60 B.C. Rep. 370.

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In consequence we are of opinion that our jurisdiction to entertain this appeal cannot now be questioned. See also *The King* v. *Junior Judge of the County Court of Nanaimo and McLean* (1).

The preliminary objection is therefore overruled.

It may now be convenient to quote section (6) of the *Court of Appeal Act,* R.S.B.C. 1936, chap. 57, referred to in the case at bar:—

> The Court of Appeal shall be a Superior Court of Record, and, to the full extent of the power of the Legislature of the Province to confer jurisdiction, there shall be transferred to and vested in such Court all jurisdiction and powers, civil and criminal, of the Supreme Court and the Judges thereof, sitting as a Full Court, etc. * * * And without restricting the generality of the foregoing an appeal shall lie to the Court of Appeal;
>
> * * *
>
> (7) *Habeas Corpus:*
>
> And in any matter arising under sub-clauses (1) to (7), inclusive, in which the appellant is in custody, the Court of Appeal, if sitting, shall give the appeal precedence over every other appeal, and, if not sitting, shall promptly sit for the purpose of hearing such appeal; and in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person.

A short quotation from Halsbury, 2nd Edit., vol. 9, p. 701, par. 1200, may be in order:—

> 1200. The writ of *habeas corpus ad subjiciendum,* which is commonly known as the writ of *habeas corpus,* is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the King has a right to inquire into the causes for which any of his subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released.

And in *Crowley's* case (2), referred to in the footnote of the above quotation, Eldon, L.C., said, at p. 48:—

> The doctrine originates in the maxim of law, that the writ of *habeas corpus* is a very high prerogative writ, by which the King has a right to inquire the causes for which any of his subjects are deprived of their liberty: a liberty most especially regarded and protected by the common law of this country.

At p. 708, par. 1209, of the same volume of Halsbury, the author adds:—

(1) (1941) 57 B.C. Rep. 52, at 58, 59.

(2) (1918) 2 Swan. 1.

As the *Habeas Corpus Act, 1679,* applied only to cases where persons were detained in custody for some criminal or supposed criminal matter, the benefit of its provisions in facilitating the issue of the writ did not extend to cases of illegal deprivation of liberty otherwise than on a criminal charge, as, for example, where children were unlawfully detained from their parents or guardians by persons who were not entitled to their custody, where a person was wrongfully kept under restraint as a lunatic, or where a person was illegally kept in confinement by another. In all such cases the issue of the writ during vacation depended solely upon the common law, and remained unregulated by statute until the year 1816, when the *Habeas Corpus Act, 1816* * * *

And at p. 713, par. 1214:—

The remedy by *habeas corpus* is equally available in criminal and civil cases, provided that there is a deprivation of personal liberty without legal justification * * *

In modern practice the purposes to which the writ is most frequently applied are (1) the testing of the regularity of commitments, and particularly in cases of the commitments for extradition and of fugitive offenders; and (2) the investigation of the right to the custody of infants.

And at p. 704 see footnote (*f*) *Rex* v. *Cowle* (1), per Lord Mansfield C.J., at p. 855, and then Halsbury continues as follows:—

The common law regards the King as the source or fountain of justice, and certain ancient remedial processes of an extraordinary nature which are known as prerogative writs have from the earliest times issued from the Court of King's Bench in which the Sovereign was always present in contemplation of law. The prerogative writs were issued only upon cause shown, as distinguished from the original or judicial writs which commence suits between party and party and which issue as of course * * *

In *Lorenz* v. *Lorenz et al.* (2), an appeal in a *habeas corpus* matter was brought before the Court of King's Bench (Appeal Side) and dismissed. This case is reported in the Canadian Abridgment, vol. 21, p. 510, as follows:—

The law respecting *habeas corpus* was not introduced into Quebec by the *Quebec Act* of 1774, but was adopted by a provincial ordinance, 1784, c. 1, which in all substantial provisions reproduced *The Habeas Corpus Act, 1679.* This legislation was confirmed by *The Constitutional Act, 1791* (Imp.), c. 31. *Habeas corpus* in civil matters was first introduced into Quebec by 1812, c. 8, which extended the remedy to any person "confined or restrained of his or her liberty, otherwise than for some criminal or supposed criminal matter". These provisions have been continued ever since, and are now to be found in art. 1114 of the Quebec Code of Civil Procedure. These later statutes merely introduced a form of the remedy which had long since been recognized by the law of England and English authorities are therefore applicable in Quebec to the writ of *habeas corpus* in civil as well as in criminal matters.

(1) (1759) 2 Burr. 834.

(2) (1905) Q.R. 28 S.C. 330.

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I think this ends the review which should be made of the several decisions to which this Court was referred by counsel for the petitioner.

With due respect, I do not think the *Amand* case (1) can be considered as an authority in the matter now before the Court. It is by no means the same kind of a case. As already pointed out, by reference to the judgment of Lord Porter, the question there was whether a right of appeal existed under the *Supreme Court of Judicature (Consolidation) Act, 1935*, s. 31 (1) (*a*). I fully agree with the remarks of O'Halloran J.A. in *Ex parte Lum Lin On* (2), at p. 110:—

> The point for decision in the *Amand* case (1) in the Court of Appeal and later in the House of Lords, as well as *In re Woodhall* (3), on which it is largely founded, was confined to the interpretation of an English statute which has no counterpart in this Province.

Moreover, the question now before our Court may not be discussed from the viewpoint of the English constitutional law. In this country we have to apply the B.N.A. Act and the Criminal Code, two statutes which, of course, do not apply in England and do not call for interpretation and application in the English courts. In addition to that, the Supreme Court of Canada is now the court of last resort in criminal matters; and although, of course, former decisions of the Privy Council, or decisions of the House of Lords, in criminal causes or matters, are entitled to the greatest weight, it can no longer be said, as was affirmed by Viscount Dunedin, delivering the judgment of their Lordships in *Robins* v. *National Trust Co. Ltd.* (4) at p. 519, that the House of Lords, being

> the supreme tribunal to settle English law, * * * the Colonial Court, which is bound by English law, is bound to follow it.

For all these reasons, my view is that Storgoff's case stands to be decided according to Canadian law and by the application of the relevant sections of the B.N.A. Act, the Criminal Code, and the statutory and common law of British Columbia.

When discussing the relative and distinctive meaning of the words "criminal and civil", we must take into consideration the text of sections 91 and 92 of our Constitutional Act, and more particularly, subsection 27 of

(1) [1942] 2 All E.R. 381.
(2) [1943] 59 B.C. Rep 106.
(3) (1888) 57 L.J. M.C. 71.
(4) [1927] A.C. 515.

section 91 and subsections 13 and 14 of section 92; also the text of the relevant sections of the Criminal Code and of the statutes of British Columbia.

Under section 91, head 27, of the B.N.A. Act,

The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters,

is assigned to the "exclusive Legislative Authority of the Parliament of Canada", whilst, under heads 13 and 14 of section 92,

Property and Civil Rights in the Province, and The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts

are assigned to the "exclusive jurisdiction of the Legislature in each Province".

It may be added that by force of head 15 of section 92,

The Imposition of 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

are also "exclusively assigned to the Legislature in each Province".

Incidentally, it should not be forgotten that in several judgments of this Court, and of the Judicial Committee of the Privy Council, reference was made to what was there called "provincial criminal law", thus indicating that the distinction made in the *Amand* case (1), and other similar cases in England, between criminal or civil causes, or matters, cannot be made in this country in the interpretation, or discussion, of the law under which it is governed.

In the course of the very exhaustive and able argument made on behalf of the petitioner by the learned Deputy Attorney General of Canada and counsel for Storgoff, as well as by counsel for the Attorney General for British Columbia, it was conceded as being beyond question that in matters of *habeas corpus* as applied to a case, for example, of the custody of infants, or lunatics, or such other cases, the writ must be considered as being a civil matter. I suppose it should also be considered that, when issued in relation to a matter properly coming within the description of a "provincial criminal matter", the writ of

(1) [1942] 2 All E.R. 381

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habeas corpus must necessarily be held to be a writ coming under the jurisdiction and the proper legislative authority of the legislature in each province.

The only field of *habeas corpus*, therefore, that could possibly be argued to belong to the jurisdiction of the Parliament of Canada must be the writ of *habeas corpus* issued for the release of a person detained as a consequence of a conviction under the Criminal Code. But, even then, it was argued on behalf of the Attorney General for British Columbia that, in that respect, it is an independent proceeding, unconnected with the criminal cause for which the commitment was ordered, and that the real subject matter of the proceeding, even in such a case, is the civil right of the individual or subject to his liberty.

In connection with that argument the Court was referred to Jenks "A Short History of English Law", where, at pp. 341, 342 and 343, the learned author, after outlining the writ of *habeas corpus* and pointing out that, although at first the writ was resorted to under the common law, there came subsequently the *Habeas Corpus Act of 1679* giving every prisoner an absolute right to have the validity of his imprisonment speedily raised and discussed by a superior Court in his presence, whether in Term time or vacation. If the authority under which he is imprisoned is lawful, as in the ordinary case of a prisoner committed for trial, with bail lawfully refused, the applicant will, of course, simply be remanded to prison.

And the author adds:—

This statute, re-inforced as it was by the civil remedies applied in the well-known "General Warrant" cases at the end of the eighteenth century, may be said to have definitely established in England that "Rule of Law" which is the chief guarantee of English liberty. For both statute and decisions are based upon the principle, that even an official acting under the authority of the Crown must show definite legal authority for any act which interferes with the personal freedom or domestic privacy of the ordinary citizen.

And in Halsbury's "Laws of England", 2nd edit., vol. 9, at p. 706, par. 1205, "Crown Practice", we read:—

1205. The right to the writ is a right which exists at common law independently of any statute, though the right has been confirmed and regulated by statute. At common law the jurisdiction to award the writ was exercised by the Courts of King's Bench, Chancery, and Common Pleas, and, in a case of privilege, by the Court of Exchequer. This jurisdiction is now exercised by the King's Bench Division and the judges of the High Court of Justice.

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Then paragraph 1208 is in these words:—

1208. The operation of the *Habeas Corpus Act, 1679*, has at various periods been temporarily suspended by the legislature on the ground of urgent political necessity * * * Such an enactment, while it remains in force, in no sense abrogates or suspends the general right to the writ at common law.

A note at the foot of p. 707 adds:—

The writ in modern times is almost invariably issued by virtue of the common law jurisdiction, and not under the statute.

And par. 1226, at p. 719 of the same volume:—

1226. During the law sittings application for the writ of *habeas corpus*, whether at common law, as is the usual practice * * *

It is in order to read the above quotations with what Martin J.A., of the Quebec Court of King's Bench (Appeal Side), said in *Rex* v. *Labrie* (1);—

The first requirements to the validity of a judgment is that it should be rendered by a tribunal clothed with authority to render it, and if the Superior Court wrongfully usurped jurisdiction, surely there must be an appeal to this Court. I shall not repeat what was said by this Court in the cases of *McShane* v *Brisson* (2); *Dostaler* v. *Lalonde et al.* (3); *La Cité de Montréal* v. *Henault* (4).

But it is urged that these principles do not apply in the present case because we are dealing with *habeas corpus* in criminal matters. The expression "criminal matters" is not a happy one, though made use of in the Act.

The writ of *habeas corpus* is one of the prerogative writs. It is a civil writ issued out of a court of civil jurisdiction, and in the present case it relates to criminal matters only in so far as it goes to the cause of detention, which in this case is a conviction by a court of criminal jurisdiction, but the judgment or order of release is a judgment of the Superior Court. The great object of the writ is the liberation of those who may be imprisoned without sufficient cause and is the remedy which the law gives for the enforcement of the civil right of personal liberty.

It is not a proceeding in the original criminal action or proceeding. It is in the nature of a new suit brought by the respondents to enforce a civil right which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty and not by the Crown to punish him for his crime. The judicial proceedings under the writ is not to enquire into the criminal act of which he has been accused, tried and convicted, but into the right of liberty notwithstanding the criminal act and conviction. A judgment may be questioned anywhere for want of jurisdiction.

It is curious to note that a similar stand was taken by the United States Supreme Court in the case of *Ex Parte Tom Tong* (5), where the head note reads as follows:—

The proceedings under a petition for *habeas corpus* are in their nature civil proceedings, even when instituted to arrest a criminal

(1) (1920) 61 D.L.R. 299, at 309.
(2) (1890) M.L.R. 6 Q.B. 1.
(3) (1919) Q.R. 29 K.B. 195.
(4) (1919) 26 R.L. N.S. 270.
(5) (1883) 108 U.S. 556.

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prosecution and secure personal freedom: and the appellate revisory jurisdiction of this court is governed by the statutes regulating civil proceedings.

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And at p. 539 of the same report, Mr. Chief Justice Waite, delivering the opinion of the court, says, among other things:—

> A question which meets us at the outset is whether we have jurisdiction, and that depends on whether the proceeding is to be treated as civil or criminal.

And later on the same page he adds:—

> The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offence; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. This petitioner claims that the Constitution and a treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution. It was said by Chief Justice Marshall, speaking for the court, as long ago as *Ex parte Bollman & Swartwout* (1):—
>
> "The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts."

Some interesting remarks in that connection were made by the former Chief Justice of this Court, Sir Lyman P. Duff, *In the Matter of Annie McNutt* (2), beginning at p. 270. At the foot of p. 271, Duff J., as he then was, states:—

> Another point has been raised which was not taken by the counsel for the respondent and which it is necesssary 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:—

(1) (1807) 4 Cranch 75, at 101. (2) (1912) 47 Can S.C.R. 259.

"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 show 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

(1) (1887) 18 Q.B.D. 471.

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difficulty. All such criteria contemplate an offence punishable and a proceeding taken under the sanction of 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), 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, subsection 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.

In *Attorney General of Ontario* v. *Hamilton Street Railway Co.* (2), at pages 528-9, the supreme judicial authority for Canada expounded the effect of section 91, subsection 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 subsection 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.

(1) (1829) 9 B. & C. 595, at 602. (2) [1903] A.C. 524.

I stop at this point of the already long quotation from the judgment of that great jurist, but the whole judgment is to be read as illustrating the very point made in another part of the present judgment to the effect that in discussing the true meaning of "criminal", under head 27 of section 91, the courts in Canada cannot be governed, without qualification, by judgments rendered in England where the jurisdiction in these matters is not divided, as it is here, under the *British North America Act* and where they have not, as here, a Criminal Code, which, of course, must be applied according to its text and not according to decisions rendered in different circumstances and under a law which may not always be the same.

Again in 1914 in *Quong-Wing* v. *The King* (1), Sir Lyman Duff says:—

> The enactment is not necessarily brought within the category of "criminal law", as that phrase is used in section 91 of the *British North America Act, 1867,* by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. The decisions in *Hodge* v. *The Queen* (2), and in the *Attorney General for Ontario* v. *The Attorney General for the Dominion* (3), as well as in the *Attorney General of Manitoba* v. *The Manitoba Licence-Holders' Association* (4), already mentioned, established that the provinces may, under section 92 (16) of the *British North America Act, 1867* suppress a provincial evil by prohibiting *simpliciter* the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable *milieu* for it, under the sanction of penalties authorized by section 92 (15).

See also *His Majesty the King* v. *Jeu Jang How* (5).

In view of what has already been said, I would hold that section (6) of chap. 57 of R.S.B.C. 1936, of the *Court of Appeal Act* of British Columbia, has application to an appeal from an order in a *habeas corpus* proceeding, releasing a prisoner from custody on a warrant of commitment on a conviction for a criminal offence on the ground that the Magistrate had no jurisdiction to issue the warrant; and that as such the section was within the competence of the legislature as being in relation to a matter within the class of subject Property and Civil Rights in the Province and was not legislation in relation to criminal law and procedure.

(1) (1914) 49 Can. S.C.R. 440, at 462.
(2) (1883) 9 App. Cas 117.
(3) [1896] A.C. 348.
(4) [1902] A.C. 73.
(5) (1919) 59 Can. S.C.R. 175.

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Habeas corpus is the safeguard of personal liberty—the most important of civil rights. (See Blackstone's Commentaries, book one, ch. 1, cited by Martin J.A. in *Rex* v. *McAdam* (1). In that judgment the late Chief Justice Martin at pages 184 to 190 quoted from a wide range of authorities and judgments that the writ of *habeas corpus* is the great constitutional remedy protecting the rights of personal liberty.

Lord Halsbury in *Cox* v. *Hakes* (2), said:—

> For a period extending as far back as our legal history the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject.

Lord Birkenhead in *Secretary of State* v. *O'Brien* (3), said:—

> We are dealing with a writ antecedent to statute, and throwing its roots deep into the genius of our common law * * * It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward 1. It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

See also *Re George Edwin Gray* (4), where Sir Charles Fitzpatrick, C.J.C., says at p. 155:—

> Indeed, in any case of an application for this writ which, as is said in Maitland's Constitutional History of England, "is unquestionably the first security of civil liberty" * * *

Historically and constitutionally the writ is so firmly embedded in and recognized as the Charter of British Liberty and as the greatest of all Civil Rights, that its incidental and consequential relation to Criminal Law cannot uproot it from its real purpose nor tear it away from that which for centuries has been its pith and substance.

I would hold that the English decisions to which we have been referred were strictly limited to the application of section 31 (1) (*a*) of *The Judicature Act of England*:—

> No appeal shall lie from the judgment of the High Court in a Criminal Cause or Matter.

(1) 1925) 35 B.C. Rep. 168, at 177.
(2) (1890) 15 App. Cas. 506, at 514.
(3) [1923] A.C. 603, at 609.
(4) (1918) 57 Can. S.C.R. 150.

(*Quinn* v. *Leathem* (1)). They are inapplicable to the construction of section 91, head 27, and section 92, heads 13 and 15, of the *British North America Act*.

The question in the present case is not the scope of the criminal law, but whether the legislation is enacted in relation to the criminal law. (*Rex* v. *Daly* (2), re civil remedy.)

The illegal detention of the subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus*, and that is in relation to civil liberty and not to criminal law. The true test of the respective jurisdictions of the Parliament of Canada and of the provincial legislatures under sections 91 and 92 of the *British North America Act*, as invariably put in the decided cases both in this Court and in the Judicial Committee of the Privy Council, depends upon the distinction between legislation "affecting" civil rights and legislation "in relation to" civil rights. (*Gold Seal Limited* v. *Dominion Express Co.* (3); *Attorney General for Ontario* v. *Reciprocal Insurers* (4); *Lymburn* v. *Mayland* (5); *Attorney General for British Columbia* v. *Kingcome Navigation Co.* (6); *Shannon* v. *Lower Mainland Dairy Products Board* (7); *Reference re Debt Adjustment Act* (8)).

An instance of the application of the principle appears in *Union Colliery* v. *Bryden* (9), where the *Coal-mines Regulation Act* of the province was amended to prohibit Chinamen working underground in coal mines. The Privy Council came to the conclusion that the

> leading feature of the enactment consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia.

(1) [1901] A.C. 495, at 506.
(2) (1923) 55 O.L.R. 156, at 163, 164; and cited as *Attorney General for Ontario* v. *Daly*, [1924] A.C. 1011.
(3) (1921) 62 Can. S.C.R. 424.
(4) [1924] A.C. 328, at 345.
(5) [1932] A.C. 318, at 324, 325.
(6) [1934] A.C. 45.
(7) [1938] A.C. 708, at 719.
(8) [1943] A.C. 356, cited as *Attorney General for Alberta* v. *Attorney General for Canada*.
(9) [1899] A.C. 580, at 587.

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The Judicial Committee held that in pith and substance the legislation related to aliens or naturalized subjects and consequently trenched on the exclusive authority of the Dominion.

But, in contrast to that, the section of the Act now under discussion is legislation in relation to the right of personal freedom and was not directed against criminal law as such. To collaterally inquire into the lack of jurisdiction in the Magistrate might incidentally affect the criminal law, but the real purpose of the Act was not in relation thereto. The pith and substance of the legislation was civil liberty and not criminal law. It is not aimed at criminal law, but is of general application to any case where the applicant's right of freedom is involved. In no sense is the lawful administration of the criminal law affected or interfered with by *habeas corpus*. An attempted exercise of a non-existing power by a Magistrate is not within the criminal law but is an interference with the civil right of liberty.

I feel it unnecessary to refer to all the judgments, either in this Court or in the Judicial Committee of the Privy Council, where the necessity to distinguish between legislation affecting civil rights and legislation in relation to civil rights was emphasized.

In any event, even if it should be conceded, for the purpose of argument, that the powers of the Court under *habeas corpus,* either by statute or at common law, could be dealt with by the Federal Parliament as a matter ancillary to criminal law and not as a substantive part thereof, it should be noted that there is no federal legislation repugnant to section 6 of the British Columbia *Court of Appeal Act* and, consequently, the section would not be *ultra vires* even in its application to appeals from *habeas corpus* where the detention was under a warrant for a criminal offence.

In the *Amand* case (1) in the House of Lords, the issue was not whether the *habeas corpus* proceedings were "in relation to" a criminal matter, but whether the antecedent cause or matter was criminal. Here, it being established that the British Columbia statute was enacted to enforce

(1) [1942] All E.R. 381.

the legal right to personal freedom, which, as such, is a civil right within the meaning of head 13 of section 92, it is immaterial that it incidentally affects criminal law.

In the *Amand* case (1) the *habeas corpus* was an intervening link, while in the case at Bar the proceedings in *habeas corpus* were after the criminal proceedings were completed and were extraneous. The writ was directed not to an inquiry as to the criminal proceedings, but as to the legality of the petitioner's subsequent detention. In the words of Mellish J., in *The King* v. *Morris* (2):—

> I do not think that legislation to secure the liberty of the subject from illegal imprisonment can properly be called legislation making, altering or affecting criminal law or criminal procedure.

And as was said by Chief Justice Meredith in *Rex* v. *Spence* (3):—

> It would not have been a step in a criminal proceeding in the matter of this criminal charge, but would be one quite without and only collateral to it.

To quote from the judgment of the Quebec court of appeal in *Moquin* v. *Fong* (4) where Cannon J. quotes from the judgment of Martin J. in *Rex* v. *Labrie* (5).

> It is not a proceeding in the original criminal action or proceeding. It is in the nature of a new suit brought by the respondents to enforce a civil right which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty and not by the Crown to punish him for his crime. The judicial proceedings under the writ is not to enquire into the criminal act of which he has been accused, tried and convicted, but into the right of liberty notwithstanding the criminal act and conviction.

We have already seen that the Supreme Court of the United States came to the same conclusion and we may add the following decisions: Re *Kurtz* v. *Moffitt* (6):—

> A writ of *Habeas Corpus,* sued out by one arrested for crime, is a civil suit or proceeding, brought by him to assert the civil right of personal liberty, against those who are holding him in custody as a criminal.

And *Re Farnsworth* v. *Territory of Montana* (7):—

> A writ of prohibition is a civil remedy, given in a civil action, as much so as a writ of *Habeas Corpus,* which this Court has held to be a civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution.

(1) [1942] All E.R. 381.
(2) (1920) 53 N.S.R. 525.
(3) (1919) 45 O.L.R. 391.
(4) (1928) Q.R. 44 K.B. 476, at 494.
(5) (1920) 61 D.L.R. 299, at 310; Q.R. 31 K.B. 47, at 60.
(6) (1885) 115 U.S. 487.
(7) (1889) 129 U.S. 104, at 113.

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It follows that section 6 of the British Columbia *Court of Appeal Act* in its application to *habeas corpus* is *intra vires*, and that the Court of Appeal acted within its jurisdiction in setting aside the order of Coady J.

At Bar, Mr. Farris, acting for the Attorney General of British Columbia, stated that he did not intend to support that part of the *Court of Appeal Act, section* (6) (d) (vii), whereby

> in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may seem fit concerning the re-arrest of the accused person.

He said that it was surplusage or *ultra vires*. But, as I see this case, it is not necessary to pass upon the validity of that part of the Act.

I have already quoted from Jenks, "A Short History of English Law", the following passage at p. 343:—

> If the authority under which he is imprisoned is lawful, as in the ordinary case of a prisoner committed for trial, with bail lawfully refused, the applicant will, of course, simply be remanded to prison.

This result is, of course, what Mr. Farris meant by describing the provision for the "re-arrest of the accused person" as surplusage.

In the premises, the Court of Appeal must be taken to have given the judgment which Coady J. should have given. If the latter had quashed the writ of *habeas corpus*, or had refused to issue it, in the words of Mr. Jenks "the prisoner would have been remanded to prison". The effect of the judgment of the Court of Appeal in the present case must be exactly what the effect of the judgment of Coady J. would have been, if he had given the judgment he should have rendered, and logically the result must be the same. It is, therefore, immaterial whether the *Court of Appeal Act* empowered the British Columbia Court of Appeal to make an order concerning the re-arrest of the petitioner, and also whether such an order was made here.

By his petition for *habeas corpus*, the petitioner prayed that his detention be enquired into for the purpose of determining whether it was illegal and, if so, for an order that he should be given his liberty. The judgment being that his detention was legal, it follows, as a matter of course, that the petitioner did not succeed in establishing his right

to liberty, that he should remain imprisoned, and that if he has been temporarily set free, as a result of the erroneous judgment of the trial judge, he should merely be "remanded to prison".

I, therefore, conclude that the attack on the validity of the British Columbia statute fails and that, accordingly, the judgment of the British Columbia Court of Appeal was competently rendered; that the petition in this Court for a writ of *habeas corpus* should be refused, and that the petitioner should be remanded to prison.

In the circumstances, I would not think that either the Attorney General for Canada or the Attorney General for British Columbia would likely ask for costs, but in any event I do not think this is a case for costs against the petitioner.

Although my conclusion is that the writ of *habeas corpus,* sued out by the present petitioner in the British Columbia courts, must be looked upon as a civil suit or proceeding, nevertheless, the prayer in this court is for the issue of a writ "for the purpose of an inquiry into the cause of commitment in a criminal cause". Therefore, the petition comes within the wording of section 57 of the *Supreme Court Act* and this court has jurisdiction to hear and entertain the same, and is competent to dispose of it.

Of course, the question might arise whether, if I am right in my opinion that *habeas corpus ad subjiciendum* is always a civil writ, section 57 was competently inserted by the Dominion Parliament in the *Supreme Court Act.* Section 101 of the *British North America Act* provides for the

> Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Under section 57 of our Act Parliament purports to give to the Supreme Court of Canada original jurisdiction to issue the writ as a court of first instance. It does seem that this can hardly be authorized by section 101 of the *British North America Act,* for the power is neither given to the court as a court of appeal, nor can it be said that it is given to an additional court for the better administration of the laws of Canada, since the latter words "laws of Canada", under a well established and settled jurisprudence, are

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accepted to mean only laws adopted by the Dominion Parliament and to exclude legislation properly coming within the jurisdiction of the legislature in each province.

It would follow that section 101 does not assign to the Parliament of Canada the authority to confer jurisdiction upon the Supreme Court of Canada to act as an original court of first instance in matters coming under the description of "Property and Civil Rights in the Province" (head 13 of section 92), or the

> Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts (Head 14 of section 91).

However, the point was neither argued nor raised before us, counsel evidently wishing to confine their argument to the main question whether the *Court of Appeal Act* of British Columbia was valid in conferring upon that court an appellate jurisdiction in *habeas corpus* matters, even when the purpose of the writ was an inquiry into the cause of commitment in a criminal case under an Act of the Parliament of Canada. For that reason, and also in view of the fact that the majority of this Court does not share my opinion in respect to the nature of the writ of *habeas corpus,* I do not deem it necessary to go into the discussion of this very important question.

Moreover, if the judgment had to pass upon that question, I think it would only be fair that the Attorney General of Canada should be given an opportunity of arguing the point before the Court—an opportunity which was not given to the Deputy Attorney General of Canada when he appeared before us. Under such circumstances this question, to my mind, should be left for decision in a future case where the point will arise and it will be found essential to decide it for the purpose of reaching a result in the judgment to be rendered.

KERWIN J.—An application was made to Mr. Justice Hudson in Chambers for a writ of *habeas corpus ad subjiciendum,* directed to the Warden of the British Columbia Penitentiary at New Westminster, to have before a judge of this Court the bodies of Fred Storgoff and Fred Babakaiff, prisoners detained in the Warden's custody,

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so that there might be caused to be done thereupon what of right and according to law the court or judge should see fit to be done. This application was made under section 57 of the *Supreme Court Act* by which every judge of this Court has, with an immaterial exception, concurrent jurisdiction with the courts or judges of the several provinces to issue the writ for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada. Under Rule 72 the application was referred to the Court.

Upon the argument, the Court divided the motion. Babakaiff had been convicted and sentenced to imprisonment in British Columbia Penitentiary for an offence under the Criminal Code, and there he remained. His application was denied. Storgoff's application was adjourned and directions were given that the applicant should notify the Attorney General of Canada and the Attorneys General of the provinces. This was done but only counsel for the applicant, for the Attorney General of Canada and for the Attorney General of British Columbia appeared.

While the writ has not been issued and a return made thereto, it appears that Storgoff was convicted on May 8th, 1944, by Mr. H. S. Wood, a Police Magistrate in and for the city of Vancouver, of having been found, while nude, on May 7th, 1944, in a public place in company with others, contrary to section 205A of the Criminal Code. He was sentenced to imprisonment at hard labour in the British Columbia Penitentiary at New Westminster for three years. By warrant, dated May 8th, 1944, the magistrate commanded the constables or peace officers to take and safely convey Storgoff to the said penitentiary and there deliver him to the keeper, and commanded the keeper to receive Storgoff into his custody in the penitentiary and there to imprison and keep him at hard labour for the said term. Storgoff applied to Mr. Justice Coady, in the Supreme Court of British Columbia, for a writ of *habeas corpus*, and on June 30th, 1944, his discharge from custody was ordered and he was accordingly released on July 3rd.

The Attorney General of the province appealed from the order of Coady J. to the Court of Appeal under the provi-

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sions of section 6 of the *Court of Appeal Act*, c. 57, R.S.B.C. 1936, the relevant parts of which are as follows:—

6. * * * an appeal shall lie to the Court of Appeal:—

* * *

(*d*) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court Judge, in any of the following matters, or in any proceeding in connection with them, or any of them:—

* * *

(vii) *Habeas Corpus:*

* * *; and in cases of *habeas corpus* in which Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person:

* * *

The appeal was allowed, the writ of *habeas corpus* was quashed, and the Court of Appeal ordered that Storgoff be forthwith arrested and recommitted to the custody of the Warden of the British Columbia Penitentiary at New Westminster from which he was released by virtue of the said judgment.

On July 29th, Storgoff was rearrested by the provincial police and was taken and lodged in the British Columbia Penitentiary, where, it is not contested, he is being detained to complete the sentence of the magistrate. It is to test the legality of that detention that the present application is made.

We have had the advantage of a complete argument in which the question involved has been thoroughly canvassed. That question is whether under the *British North America Act, 1867*, the British Columbia legislature had the power to authorize an appeal by the Crown from an order made on a *habeas corpus* application discharging a prisoner from imprisonment resulting from his conviction of an offence against a section of the Criminal Code. Undoubtedly the Dominion Parliament had power to create as an offence under the Code the act of which Storgoff was convicted and to determine the punishment therefor but it was argued by Mr. Farris that *habeas corpus* is the safeguard of personal liberty, the most important of civil rights, and that there is no distinction between such an abstract right and the procedure to enforce it. He contended that the Provincial Legislature had the power to authorize the appeal under head 13 of section 92, "Property and Civil Rights in the Province" and head 14,

The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts;

and that Parliament had no such power under head 27 of section 91,

The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Before dealing with that proposition I might point out that for the determination of the question involved, it is not to the purpose to consider what are criminal causes or proceedings for or upon a writ of *habeas corpus* arising out of a criminal charge under section 36 of the *Supreme Court Act*. It is obvious that Parliament had power to restrict the jurisdiction of this Court as it saw fit and it has been held, in construing this section, that offences under provincial statutes were criminal matters although justifiable under head 15 of section 92,

The Imposition of 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.

The King v. *Nat Bell Liquors* (1), where Lord Sumner, speaking for the Judicial Committee, approved the opinion expressed by three of six judges of this Court in *Re McNutt* (2), and by three out of five in *Mitchell* v. *Tracey* (3), the decision in the last of which was in fact followed by this Court when one of the appeals in the *Nat Bell Liquors* case (4) was before it. Decisions under section 36 of the *Supreme Court Act* are therefore not in point.

Nor are decisions as to the power of the Supreme Court of the United States to award the writ of *habeas corpus* applicable. Two were particularly referred to in the argument, *Ex parte Bollman and Swartwout* (5), and *Ex parte Tom Tong* (6). As to these, two observations may be made. First, the Constitution of the United States is so different from ours that very little, if any, assistance may be gained from decisions construing the relevant Articles. Second, as to the power actually given the Court by Congress within the ambit of the Constitution, care must be

(1) [1922] 2 A.C. 128.
(2) (1912) 47 Can. S.C.R. 259.
(3) (1919) 58 Can. S.C.R. 640.
(4) (1921) 62 Can. S.C.R. 118.
(5) (1807) 4 Cranch 75.
(6) (1883) 108 U.S. 556.

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exercised in reading these decisions since Congress from time to time enlarged or restricted the Court's jurisdiction. In the latter of the two cases cited, Chief Justice Waite, referring to Tong, who was held under criminal proceedings states:—

> the prosecution against him is a criminal prosecution but the writ of *habeas corpus,* which he has obtained, is not a proceeding in that prosecution.

For that proposition, which he elaborates, he cites the judgment of Chief Justice Marshall in the earlier case. There the latter remarks:—

> It has been demonstrated at the bar, that the question brought forward on a *habeas corpus,* is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.

The demonstration at the bar referred to by Chief Justice Marshall included a statement of the early jurisdiction of various courts in England. In view of the later researches of many eminent scholars, this statement must be taken with considerable qualification as will appear when we come to consider the case in the House of Lords of *Amand* v. *Home Secretary* (1).

Disregarding these decisions, therefore, and confining our consideration to the relevant provisions of the *British North America Act,* we may first notice section 129:—

> Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick 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 therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) 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 this Act.

It follows from this that the powers of the Provincial Courts of Appeal to hear appeals from orders granting writs of *habeas corpus* where the applicant has been imprisoned as a result of his conviction of an offence under the Criminal Code may vary in the four provinces. When the occa-

(1) [1943] A.C. 147.

sion arises it may be necessary to investigate why it was that *habeas corpus* Acts had been enacted by the law enacting bodies of some of these provinces before 1867; but in this case we are concerned with the province of British Columbia.

By proclamation, and then by statute or ordinance enacted March 6th, 1867, the civil and criminal laws of England as the same existed on November 19th, 1858, had been declared to be in force in British Columbia. The statutory provision is now found in section 2 of the *English Law Act,* R.S.B.C. 1936, chapter 88:—

> The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the geographical limits thereof.

Section 11 of the Criminal Code provides:—

> The criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far as it has not been repealed by any ordinance or Act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or of the colony of British Columbia passed since such union, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the province of British Columbia.

In England, rights had been conferred by Magna Charta, the Petition of Right, and the Bill of Rights, under which was established the Rule of Law. That part of the first named whereby no freeman was to be arrested, imprisoned, put out of his freehold, outlawed, exiled, destroyed, or put upon in any way except by the lawful judgment of his peers or the law of the land, may be taken either as the source of the writ of *habeas corpus* or as an admission by the Sovereign of its existence. Its exact origin is not wholly clear but that it was used in early days for purposes far removed from those with which we are familiar has been established beyond pre-adventure. There was a common law writ and it was not until the *Habeas Corpus Act* of 1679 that various abuses that had sprung up in connection with its issue were removed. This Act, however, guaranteed the citizen only against arbitrary arrest on a criminal charge and while

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in some of the colonies as, for instance, in Lower Canada in 1812, similar improvements were effected in connection with imprisonment otherwise than for some criminal or supposed criminal matters, it was not until 1816 that the same improvements were effected in England.

The right to *habeas corpus* at common law and under these statutes existed in British Columbia at the date of its joining the Union, July 20th, 1871. There is not and never has been a *habeas corpus* ordinance or statute of the province or of the colonies of Vancouver Island or British Columbia. As of November 19th, 1858, there was no right of appeal in criminal or civil matters in England (and therefore in British Columbia) where a person in custody had secured his release through the instrumentality of the writ, *Cox v. Hakes* (1); *Secretary of State for Home Affairs* v. *O'Brien* (2). Such a right of appeal was never attempted to be given in British Columbia until 1920 when the forerunner of what is now section 6 (*d*) (vii) of the *Court of Appeal Act* and the authority to the Court of Appeal to rearrest was enacted.

What is the nature of the writ? Various views have been expressed by many eminent judges in Canada but nowhere have opinions fluctuated to such an extent as in the Court of Appeal for British Columbia. *In Re Wong Shee* (3), that Court allowed an appeal from an order discharging Wong Shee upon *habeas corpus* proceedings from the custody of the Controller of Chinese Immigration at Vancouver. The objection that there was no appeal from an order of *habeas corpus* releasing the person detained was overruled and it was held, following *The King* v. *Jeu Jong How* (4), that proceedings under the Federal *Immigration Act* were not of a criminal nature and that the amendment to the British Columbia *Court of Appeal Act* in 1920 was valid so as to permit of such an appeal. In *Rex* v. *McAdam* (5), the majority of the Court determined that no appeal was competent under the amendment, from the refusal of a writ of *habeas corpus* at the instance of a person arrested on a charge of rape. Martin J.A., in an exhaustive and learned judgment dissented. In *Ex*

(1) (1890) 15 App. Cas. 506.
(2) [1923] A.C. 603.
(3) (1922) 31 B.C. Rep. 145.
(4) (1919) 59 Can. S.C.R. 175.
(5) (1925) 44 Can. Cr. Cas. 155; [1925] D.L.R. 33.

parte Yuen Yick Jun (1), the Court was asked to review its judgment in the *McAdam* case (2), and it appears that at that time the Attorney General of Canada associated himself in that request. The Court declined to follow the earlier decision and the view of Martin J.A. (by then Chief Justice of British Columbia) prevailed and were enlarged upon in the judgment of Mr. Justice O'Halloran. In *Ex parte Lum Lin On* (3), an appeal from a refusal to release the applicant on *habeas corpus* proceedings was dismissed but Chief Justice Macdonald considered the matter *de novo* in view of the House of Lords' decision in *Amand's* case (4), which he stated he could not read otherwise than as laying down that *habeas corpus* is always a criminal remedy when used to question imprisonment on a criminal charge. Mr. Justice O'Halloran, who stated that the point had not been argued, considered that the *Amand* case (4) did not apply and that no reason had been shown to change the conclusion reached in the *Yuen Yick Jun* case (1).

Finally, in *State of New York* v. *Wilby* (*alias Hume*) (5), Sloan J.A., delivering the judgment of the Court, stated its current view that O'Halloran J. had correctly set out the position when he said in the *Lum Lin On* case, (3), at page 110:—

> The *Amand* case (4) does not detract from or furnish any real ground for doubting the correctness of the reasoning which prompted the decision of this Court * * * in *Ex parte Yuen Yick Jun* (1).

The basis of these decisions is that the right to *habeas corpus* is always a civil right and therefore within head 13 of section 92 and all the reasons advanced from time to time for that conclusion appear in the judgments of Martin J.A. and O'Halloran J.

With respect I find myself in disagreement with the later views of the British Columbia Court of Appeal and with those other judges who have expressed similar views. The writ of *habeas corpus* is indeed a writ to enforce a right to personal liberty but that right may have been infringed by process in criminal or civil proceedings and

(1) (1938) 54 B.C. Rep. 541.
(2) (1925) 44 Can. Cr. Cas. 155; [1925] D.L.R. 33.
(3) 1943) 59 B.C. Rep. 106.
(4) [1943] A.C. 147.
(5) (1944) 60 B.C. Rep. 370.

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that distinction serves to indicate the dividing line between the power of Parliament and the British Columbia Legislature to legislate with reference to the writ. The matter does not fall within Property and Civil Rights. As Viscount Haldane stated in *John Deere Plow Company* v. *Wharton* (1):—

> The expression "civil rights in the province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of s. 92 and also to much of the field of s. 91. But the expression cannot be so interpreted and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words.

The matter is dealt with elsewhere and the real question is whether it is within head 27 of section 91 or head 14 of section 92. So far as it deals with appeals from orders granting the writ, where the applicant is detained under a conviction under the Criminal Code, it falls under the former.

The practice upon applications for *habeas corpus* differs in civil and criminal cases and, as pointed out by Anglin J. in *Rex* v. *Whitesides* (2) and by Osler J.A., speaking on behalf of the Court of Appeal of Ontario in the same case, the warrant of commitment in a criminal matter is sufficient to justify the prisoner's detention and the Court will not, on *habeas corpus,* inquire into any irregularity in his original caption. A number of the cases in England setting forth this distinction are referred to. Finally, in *Amand's* case (3), it is pointed out by Viscount Simon, with the concurrence of Lord Atkin and Lord Thankerton, at page 156:—

> The distinction between cases of *habeas corpus* in a criminal matter and cases where the matter is not criminal goes back very far;

and

> it is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test.

The actual decision in that case was that an appeal from an order of the Divisional Court, refusing to grant the writ, to the Court of Appeal, was an appeal from a judgment of the High Court in a criminal cause or matter within the meaning of section 31 of the *Supreme Court of Judicature* (*Consolidation*) *Act, 1925.* I quite agree that this decision and

(1) [1915] A.C. 330, at 340.
(2) (1904) 8 O.L.R. 622.
(3) [1943] A.C. 147.

the speeches of their Lordships must be applied with care to a question arising under the B.N.A. Act but the words quoted from Viscount Simon's speech are, I think, appropriate and significant as well as the statement of Lord Wright, at page 160, that "the writ is essentially a procedural writ", and the statement of Lord Porter that

> it was contended in vain (in *Ex parte Woodhall* (1)) that an application for *habeas corpus* was a separate proceeding from that which the magistrate dealt with in the case brought before him.

These passages indicate that, for the purpose of construing a statute giving a general right of appeal, their Lordships found it necessary to investigate the nature of the writ of *habeas corpus ad subjiciendum,* and decided that it was a step in the proceedings under which the applicant was imprisoned.

The application to Coady J. was a step in the criminal proceedings which resulted in Storgoff's imprisonment and it was, therefore, a matter of criminal law or procedure as to which the British Columbia Legislature had no power to legislate. Being a designated subject matter in section 91 of the B.N.A. Act, it is exclusive to the Dominion, and the right of a person imprisoned to test the legality of his incarceration when it is alleged to have followed a conviction of a crime, being one of the great constitutional rights of the subject, cannot be said to be merely ancillary and, therefore, subject to the power of the British Columbia Legislature in the absence of parliamentary action. "In such a case" to quote Viscount Maugham in *Attorney General of Alberta* v. *Attorney General of Canada* (2),

> it is immaterial whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament.

So far as it purports to authorize in such a case as the present, an appeal by the Crown from an order granting the writ, section 6 of the *Court of Appeal Act* is *ultra vires.* There being no authority in the Court of Appeal to set aside the order of Coady J. and direct the rearrest of the applicant, the application should be granted, and under section 58 of the *Supreme Court Act,* an order made for the release of Storgoff.

(1) (1888) 20 Q.B.D. 832.
(2) [1943] A.C. 356, at 370.

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HUDSON J.—The important question to be decided in this appeal is whether or not the Court of Appeal of British Columbia had jurisdiction to allow an appeal from an order releasing the appellant upon the return of a writ of *habeas corpus*, and directing his rearrest.

Storgoff was held in custody because of an offence or alleged offence under the Criminal Code of Canada. On the return of the writ he was set at liberty and remained at liberty until rearrested under the order of the Court of Appeal.

An appeal from an order discharging a prisoner on the return of a writ of *habeas corpus* is not authorized by Dominion legislation, nor is there any such right at common law. See *Cox* v. *Hakes* (1), and *Secretary of State for Home Affairs* v. *O'Brien* (2).

For this reason, the jurisdiction of the Court of Appeal, if any, must be found in valid legislation of the province of British Columbia. The provision relied upon by the Court of Appeal is section 6 of the *Court of Appeal Act*, c. 57 of the Revised Statutes of British Columbia 1936, which reads in part as follows:

6. * * * an appeal shall lie to the Court of Appeal:—

* * *

(*d*) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court Judge, in any of the following matters, or in any proceeding in connection with them, or any of them—

* * *

(vii) *Habeas corpus*:

* * *; and in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the rearrest of the accused person.

We are not concerned here with the validity or application of this statute in cases where the original detention did not arise in the course of the enforcement of the Criminal Code or other cognate laws of the Dominion.

The real point in dispute is whether or not the order setting aside the discharge and directing the rearrest of Storgoff falls within the "criminal law" or "procedure in criminal matters", as used in subsection 27 of section 91 of the *British North America Act*.

(1) (1890) 15 App. Cas. 506. (2) [1923] A.C. 603.

If so, then it was a matter in respect of which Parliament had exclusive legislative jurisdiction and no legislation of a province could confer jurisdiction on the Court of Appeal.

Storgoff was imprisoned through the operation of criminal laws of Canada; whether or not such imprisonment was lawful would depend in part on the regularity of the procedure followed.

It would seem to be logical that the legislature which has exclusive power to enact criminal law and prescribe procedure in criminal matters should also have the sole right to prescribe the means and methods by which the validity of such procedure should be tested.

Parliament has accepted this view and ever since Confederation exercised the right to make provision for appeals in criminal matters and prescribed the conditions under which such appeals were permitted and the courts to which they might be taken. (Sec. 1013 (4) Criminal Code). It is noteworthy that in 1887 the British Columbia legislature passed an Act providing that anyone aggrieved by any conviction made under a statute of Canada might appeal to any judge of the Supreme Court of British Columbia. On the recommendation of Sir John Thompson, then Minister of Justice, this statute was disallowed by the Governor General in Council: see *Canada Gazette* of 21st April, 1888, and referred to in Hodgins' Dominion and Provincial Legislation 1867-1895.

In addition to the provision for appeals, Parliament has enacted certain laws in respect of *habeas corpus* in the case of indictable offences (Sec. 1120 Criminal Code) but, so far, none in respect of those similar to the present, under summary conviction, except by authorizing the court to make certain rules not here material. (Sec. 576 Criminal Code.)

A writ of *habeas corpus* differs in many respects from an appeal but, in cases like the present, it is just another means of bringing in question the validity of proceedings in criminal matters. It would appear strange indeed if Parliament could provide for and control appeals but not interference with criminal administration by way of *habeas corpus*.

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The argument in support of the jurisdiction is that personal liberty is primarily a civil right and as such falls within the field of provincial legislative jurisdiction under section 92 (13) of the *British North America Act*, and further, that the remedy of *habeas corpus* is directed to the preservation or vindication of a right to liberty.

Section 92 (13) gives the provincial legislature exclusive power to make laws in respect of "13. Property and civil rights in the province". This must be read always as excluding from its application criminal law and procedure in criminal matters, in respect of which the Dominion powers are paramount. Criminal laws almost always interfere with personal liberty.

Moreover, this argument does not meet the present case. The Court here is concerned with the appeal, not with the writ. Storgoff enjoyed liberty when the appeal was launched. He lost his liberty as a consequence of the proceedings taken under provincial legislation. However one may choose to look at it, the appeal in question was a proceeding to enforce criminal law and not to secure liberty. This distinction is made very clear by the opinions of the learned law Lords in *Cox* v. *Hakes* (1). Lord Halsbury said at p. 514:

> For a period extending as far back as our legal history, the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might make a fresh application to every judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed.

Lord Herschell at pp. 527 and 528 uses the same language:

> A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question. There was no power in any court to review or control the proceedings of the tribunal which discharged him.

The opinion of Lord Herschell was concurred in by Lords Watson and Macnaghten. Some of the members of the Court expressly withheld any opinion as to a right of appeal where the prisoner had not been discharged.

(1) (1890) 15 App. Cas. 506..

On the interpretation of the words "criminal law" and "procedure in criminal matters" in relation to appeals from writs of *habeas corpus*, there has been a great diversity of opinion in the different provincial courts and particularly those of the province of British Columbia. I will not attempt to analyze these cases; none of them is binding on this Court and it seems to me that we must settle the case by the application of general principles.

In the English *Judicature Act* there is a provision that

> no appeal shall lie except as provided in the *Criminal Appeal Act, 1907*, or any Act, from any judgment of the High Court in any criminal cause or matter,

and this provision has been the subject of much discussion in the Courts in England. It is definitely settled now by a decision of the House of Lords in *Amand* v. *Home Secretary* (1), that this provision excludes an appeal from a decision in a case of *habeas corpus* where the original cause of arrest was in the nature of a criminal cause or matter. Some passages from their Lordships' opinions should be quoted. Viscount Simon L.C. at p. 155 states:—

> The law to be applied in connexion with appeals from decisions of the High Court, or of a single judge, on application for a writ of *habeas corpus ad subjiciendum* is well established. The speech of the Earl of Birkenhead in *Secretary of State for Home Affairs* v. *O'Brien* (2) described the nature and characteristics of the writ and laid it down—following the previous decision of this House in *Cox* v. *Hakes* (3) that "if the writ is once directed to issue, and discharge is ordered by a competent court, no appeal lies to any superior court".

Then follows a quotation from the speech of Lord Halsbury L.C. in *Cox* v. *Hakes* (2).

Viscount Simon also remarks that:

> It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test.

Lord Wright says at p. 160:

> It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter. The former class of cases was dealt with in the *Habeas Corpus Act, 1679;* the reforms of procedure in the latter class had to wait until the Act of 1816.

An opinion to the same effect was stated by Lord Porter.

(1) [1943] A.C. 147.
(2) [1923] A.C. 603, at 609.
(3) (1890) 15 App. Cas. 506.

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This decision may not now be binding on this Court but in interpretation of the words "criminal law" and "procedure in criminal matters" these opinions can hardly be questioned.

It is argued that the words used in the *Judicature Act* may not mean quite the same thing as when similar words are used in the *British North America Act*, but it seems to me that for the reasons already mentioned the words as used in section 91 (27) of the former Act should be given even a broader application than when used in the English *Judicature Act*. Uniformity of procedure in criminal matters throughout Canada is a cardinal principle of the Canadian constitution. A power in each separate province to provide a different means of testing the validity of such proceedings would be fatal to the maintenance of such principle.

For these reasons, I am of the opinion that an order should be made releasing Storgoff from custody.

TASCHEREAU J.—This is an application under section 57 of the *Supreme Court Act* for a writ of *habeas corpus ad subjiciendum*.

The applicant and one Fred Babakaiff were on the 8th of May, 1944, convicted in Vancouver on a charge of being found nude in a public place, contrary to section 205 (*a*) of the Criminal Code, and were sentenced to be imprisoned for a term of three years.

As a result of *habeas corpus* proceedings, the applicant Storgoff was, on the 30th of June last, discharged from custody by order of Mr. Justice Coady of the Supreme Court of British Columbia, and was immediately released. The Court of Appeal reversed this decision, and ordered Storgoff to serve his sentence of three years in the penitentiary.

Both Storgoff and Babakaiff applied to the Honourable Mr. Justice Hudson of this Court, for a writ of *habeas corpus*, but their applications were referred to the Full Court. On the first hearing, Babakaiff's application was refused, but as to Storgoff, this Court ordered that the Attorneys General of Canada and of all the provinces should be notified, in view of the points raised in the course of the argument.

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The applicant submits that the Court of Appeal for British Columbia had no jurisdiction to hear the appeal of the Attorney General of that province, because the *habeas corpus* in the case at bar was a proceeding in a criminal matter, and the right of appeal could not be given by a provincial statute, but only by the Parliament of Canada. The second point raised is that the Court of Appeal lacked the necessary jurisdiction to order Storgoff's re-arrest once he had been freed and set at liberty by order of Mr. Justice Coady.

The appeal of the Attorney General to the Court of Appeal of British Columbia was brought in virtue of section 6 of the *Court of Appeal Act,* chapter 57 of the Revised Statutes of British Columbia, 1936, which reads in part as follows:—

6. * * * an appeal shall lie to the Court of Appeal:—

* * *

(*d*) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court Judge, in any of the following matters, or in any proceeding in connection with them or any of them:—

* * *

(vii) *Habeas Corpus*:

* * *; and in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person:

These provisions enacted by a provincial authority granting an appeal in matters of *habeas corpus* undoubtedly apply to the case at bar if we are dealing with a civil matter, but are obviously inoperative if an application for an *habeas corpus,* as the result of a criminal process, must be considered as a proceeding in a criminal matter. In the latter case, only the Parliament of Canada would be invested with the necessary powers to grant such an appeal, and no legislation to that effect has ever been enacted. The question, therefore, resolves itself as to whether the *habeas corpus* granted by Mr. Justice Coady was in a civil or in a criminal matter.

The Attorney General for British Columbia has submitted that it was within the competence of the Legislature to give an appeal in such a matter as being in relation to property and civil rights (B.N.A. section 92,

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par. 13). He has forceably contended that *habeas corpus,* which is the safeguard of personal liberty, is essentially a civil writ even if issued as the result of criminal proceedings, the object of the writ being to enforce civil rights, having no relation whatever to the prosecution or the proceedings for the punishment of crimes. It is a new suit brought to enforce a civil right as against those who are holding illegally a person in custody.

Habeas corpus is one of the oldest writs known in the British law. Even at dates further back than the Magna Carta of Jean Sans Terre it was *jus non scriptum,* and it was only in 1679 that it appeared in the statutes of England.

This Imperial Act, (31 Charles II, chap. 2) is entitled *An Act for the better securing the liberty of the subject and for prevention of imprisonments beyond the seas,* and in 1896, by virtue of *Short Titles Act,* it was called the *Habeas Corpus Act.* This legislation clearly did not abolish the rights of the subject which existed under common law; it did not create *Habeas Corpus* which from time immemorial existed in England, but, it was merely a beneficial enactment to remedy some defects of the common law writ, which had become, as Hurd says:— "the subject of great abuses" (Habeas Corpus p. 81).

There can be no doubt that the common law writ, as amplified by the legislation of 1679, was a remedy available only to the subjects imprisoned as a result of a criminal process. The recital of the Act makes it clear that it is only in "criminal or supposed criminal matters" that the writ may be issued. We find also that it is issued

> for the prevention and more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters,

and that

> it shall be served upon the said officer or left at the jail or prison.

We further see that it contains dispositions such as these

> if any person or persons shall be or stand committed or detained as aforesaid for any crime, * * * some court that hath jurisdiction in criminal matters, etc. etc.

The use of these precise terms lead to the inescapable conclusion that this writ of *habeas corpus,* as completed by the Act of 1679, may be resorted to only when a person is kept in custody as a consequence of "a criminal or supposed criminal matter".

When the *Quebec Act* was passed by the Imperial Parliament in 1774, this "*Habeas Corpus* in criminal matters" was not introduced in that part of the country which at that time formed the whole colony, but it was only in 1784, by a proclamation of Haldimand, then Governor General, that it became the law of the land. This proclamation, known as 24 Geo. III, chap. 1, practically reproduces the Imperial Statute 31 Charles II and provides that:—

> Be it declared and enacted by His Excellency the Captain General and Governor-in-Chief of this Province, by and with the advice and consent of the Legislative Council thereof, and by the authority of the same, it is hereby declared and enacted, that from and after the day of the publication of this Ordinance, all persons who shall be or stand committed or detained in any prison within this Province, for any criminal or supposed criminal offence, shall of right be entitled to demand, have and obtain from the Court of King's Bench in this Province, or from the Chief Justice thereof, or from the Commissioners for executing the office of Chief Justice respectively or from any judge or judges of the said Court of King's Bench, the writ of *Habeas Corpus,* together with all the benefit resulting therefrom, at all such times, and in as full, ample, perfect and beneficial a manner, and to all intents, uses, ends and purposes, as His Majesty's subjects within the realm of England, who may be or stand committed or detained in any prison within that realm, are there entitled to that writ, and the benefit arising therefrom by the common and statute laws thereof.

The distinction between the writ of *Habeas Corpus* in criminal and civil matters is further emphasized by the fact that in 1812, in the province of Quebec, an Act was introduced, entitled: *An Act to secure the liberty of the subject by extending the Powers of His Majesty's Courts of Law as to Writs of Habeas Corpus ad subjiciendum.* It applied exclusively to persons restrained of their liberty, "otherwise than for some criminal or supposed criminal matter". It is known as 52 Geo. III, 1812, chap. 8, and as to the means of enforcing obedience to such writs, it says:—

> It is hereby enacted by the authority of the same, that when any person shall be confined or restrained of his or her liberty, otherwise than for some criminal or supposed criminal matter, it shall and may be lawful for the Chief Justice of the Province, and for the Chief Justice of the Court of King's Bench for the district of Montreal, and for any one of His Majesty's justices of the Court of King's Bench for the district of Quebec or of the Court of King's Bench for the district of Montreal, or of the Court of King's Bench for the district of Three-Rivers, and for the judge of the Provincial Court of Gaspe, within the limits of their respective jurisdiction, and they are hereby

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required, upon complaint made to them by or on the behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation, in cases where by law an affirmation is allowed, that there is probable and reasonable ground for such complaint, to award, in vacation time, a writ of *Habeas Corpus ad subjiciendum*, under the seal of such Court whereof he shall then be one of the judges, or the judge, to be directed to the person or persons in whose custody or power the party so confined or restrained, shall be returnable, immediate, before the judge so awarding the same, or before any other judge of the Court, under the seal of which the said writ issued.

We now find these two different proceedings "Habeas Corpus in criminal matters" and "Habeas Corpus in civil matters" contained in the same pre-confederation statute —Cons. statute L. C. 1860, chap. 95—where the clear distinction is made between the "criminal and civil matter". Later after Confederation, the legislature of the province of Quebec enacted certain sections in its code of Civil Procedure dealing with *Habeas Corpus* in civil matters only, and leaving purposely to the proper authorities the care of enacting whatever laws they deemed fit, when the matter was "criminal or supposed criminal". The relevant section (1114 C.C.P.) in part reads as follows:—

> Any person who is confined or restrained of his liberty, otherwise than under any order in civil matters granted by a court or judge having jurisdiction, or than for some criminal or supposed criminal matter * * * may apply * * * etc.

Like *Habeas Corpus* in criminal matters, *Habeas Corpus* in civil matters was also merely *jus non scriptum* in England until 1816, when the first statute was enacted dealing with this subject of the law. It improved the common law remedy but could be resorted to, only in non criminal matters as the custody of infants or of a wife, the test of the legality of the detention of a lunatic, etc., etc.

Such was the state of the law in England after 1816, and it is the law as it existed at that time, that was imported in various parts of Canada. British Columbia did not enter Confederation before 1870, and until then, it was known as "Her Majesty's Colony of British Columbia and its dependencies". It was in 1858, that James Douglas, Governor of the Colony, issued a proclamation importing the civil and criminal laws of England as they existed at the date of the proclamation. In 1867, this proclamation was repealed, but this did not affect any

rights acquired or liabilities incurred or existing before such repeal, and was re-enacted in a different form by Governor Frederick Seymour.

The clear result of these enactments was that from 1858, the criminal and civil laws of England were by statute introduced in the Colony of British Columbia, including "*Habeas Corpus* in criminal matters", and "*Habeas Corpus* in civil matters".

When British Columbia joined Confederation in 1870, the same laws continued to be in force in the province, and the only legislation affecting *Habeas Corpus* enacted since, that I can find, is the one passed by the Legislature giving a right of appeal. In view of the distribution of powers by the B.N.A. the problem arose as to whether *Habeas Corpus* was a civil or criminal writ, and a great number of judgments have been rendered on the matter, in all parts of Canada.

It has been argued that *Habeas Corpus*, being a matter of civil right and property, is still within the jurisdiction of the Provincial Legislature although it may affect incidentally criminal law and procedure. On behalf of this contention, the respondent has cited many judgments making the necessary distinction between legislation affecting civil rights, and legislation in relation to civil rights. (*Gold Seal Limited* v. *Dominion Express Co.* (1); *Attorney General for Ontario* v. *Reciprocal Insurers* (2); *Attorney General for British Columbia* v. *Kingcome Navigation Company Ltd.* (3); *Shannon* v. *Lower Mainland Dairy Products Board* (4). *Reference re Debt Adjustment Act, 1937* (5). Of course, I do not quarrel with these very high authorities, but they would apply only if I thought that *Habeas Corpus* was a civil right, but I do not believe it is necessary to deal with this point in view of the conclusion which I have reached.

It has been held in many cases that *Habeas Corpus* is always a civil writ entirely independent of the proceedings at the trial, as a result of which a person is convicted. (*Le Roi* v. *Labrie* (6); *Léonard* v. *McCarthy*

(1) (1921) 62 Can. S.C.R. 424.
(2) [1924] A.C. 328, at 345.
(3) [1934] A.C. 45.
(4) [1938] A.C. 708, at 719.
(5) [1943] 1 W.W.R. 378, at 388.
(6) (1920) Q.R. 31 K.B. 47.

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(1); *Regimbald* v. *Chong Chow* (2); *The King* v. *Morris* (3); *Ex parte Fong* (4)). In these cases it was held that *Habeas Corpus* was not a step in a criminal proceeding, but that it was an essentially new civil process.

In the United States, similar judgments were rendered, and the Supreme Court of the United States in the case of *Ex parte Tom Tong* (5), decided that the prosecution against the applicant was a criminal prosecution, but that the writ of *habeas corpus* which he had applied for was not a proceeding in that prosecution. Other American courts have reached the same conclusion. (*Kurtz* v. *Moffitt* (6); *Farnsworth* v. *Territory of Montana* (7)).

A different view was taken by other Canadian courts, and all these wide divergences of opinion give an indication of the difficulty which we have to meet. These judgments have held that *habeas corpus* proceedings may be either criminal or civil, depending on whether or not the detention of the person is based upon a crime. (*Vide King* v. *Barré* (8); *Veregin* v. *Smith* (9); *Miller* v. *Malepart* (10); *Perlman* v. *Piché* (11).

In *Rex* v. *McAdam* (12), the Court of Appeal of British Columbia, Mr. Justice Martin dissenting, decided that a writ of *habeas corpus* issued as a result of a criminal process, is a criminal proceeding. But the same court, in 1938, (*Ex parte Yuen Yick Jun* (13) reversed its own decision and decided that an *habeas corpus* was a proceeding for the enforcement of the civil right of personal liberty, and that the enquiry which it evokes is not into the criminal act, but into the right of the person in custody to his liberty notwithstanding the criminal act and conviction.

And finally, the late Chief Justice McDonald of the same court, in *Ex parte Lum Lin On* (14), expressing his personal views only, as the other members of the court did not pass on the point, considered the matter *de novo* in view of the House of Lords' decision in *Amand*

(1) (1926 Q.R. 42 K.B. 569, at 571.
(2) (1925) Q.R. 38 K.B. 440.
(3) (1920) 53 N.S. Rep. 525.
(4) [1929] 1 D.L.R. 223.
(5) (1883) 108 U.S. 556.
(6) (1885) 115 U.S. 487.
(7) (1889) 129 U.S. 104.
(8) (1905) 11 Can. Cr. Cas. 1.
(9) [1934] 1 W.W.R. 351.
(10) (1918) 32 Can. Cr. Cas. 208.
(11) (1918) Q.R. 54 S.C. 170.
(12) (1925) 35 B.C. Rep. 168.
(13) (1938) 54 B.C. Rep. 541.
(14) (1943) 59 B.C. Rep. 107.

v. *Home Secretary* (1), and said that *Habeas Corpus* is always a criminal remedy when used to question imprisonment on a criminal charge.

In reaching this last conclusion, the Chief Justice of British Columbia followed the recent decision of the House of Lords in *Amand* v. *Home Secretary* (1). The question raised in that case was whether the appeal from the Divisional Court to the Court of Appeal was an appeal from

a judgment of the High Court "in any criminal cause or matter" within the meaning of sec. 31 of the *Supreme Court of Judicature Act 1925.*

The House of Lords had to decide if the judgment of the Divisional Court refusing a writ of *habeas corpus* was a judgment in a "criminal cause or matter". The House held that it was, and that the Court of Appeal had no jurisdiction.

It was argued before this Court that when giving its decision, the House of Lords was dealing with a different statute and that the issue was not whether *habeas corpus* proceedings were in relation to a criminal matter, but whether the antecedent cause or matter was criminal.

In giving their decision, their Lordships dealt, in my opinion, with the very issue with which we are confronted. The English jurisprudence dealing with the nature of *habeas corpus* was reviewed by their Lordships who accepted the decision in *Ex parte Woodhall* (2) *and Ex parte Savarkar* (3). Viscount Simon expresses his views as follows in the *Amand* case (1), at page 156:—

This distinction between cases of *habeas corpus* in a criminal matter, and cases when the matter is not criminal, goes back very far. The *Habeas Corpus Act, 1679* (which improved the common-law remedy in various ways), applied only to cases where persons were detained in custody for some criminal matter. Similar statutory improvements in non-criminal cases were not made till the *Habeas Corpus Act, 1816.* The distinction is noteworthy, though in fact (as Blackstone, writing in 1768, points out (vol. III, p. 157)) in non criminal cases, the practice of judges, when granting writs of *habeas corpus* at common law, was to comply with the spirit of the Act of 1679. As regards the right to appeal, it has been consistently held that there is no right of appeal from the refusal of the writ in extradition proceedings * * * It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be "criminal" although he is not charged with a breach of our

(1) [1943] A.C. 147. (2) (1888) 20 Q.B.D. 832.
(3) [1910] 2 K.B. 1056.

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own criminal law, and (in the case of the *Fugitive Offenders Act*), although the offence would not necessarily be a crime at all if committed here.

Although some aspects of the *Amand* case (1) may not altogether be similar to those submitted in the case at bar, their Lordships clearly laid down the principle that there was a difference between a writ of *habeas corpus* in criminal matters, and a writ of *habeas corpus* in civil matters. As Viscount Simon says at page 156:—

> It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.

Lord Wright expresses similar views at page 160:—

> The word "matter" does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word "cause". In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the *Allied Forces Act* and the order, and to deliver the appellant to the Dutch Military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter.

Lord Porter says at page 164:—

> As long ago as 1888 it was unsuccessfully argued in *Ex parte Woodhall* (2) that the decision, to be in a criminal cause or matter, must deal with what was a crime by English law and in the same case it was contended in vain that an application for *habeas corpus* was a separate proceeding from that which the magistrate dealt with in the case brought before him. That case has been consistently approved by the courts of this country, and, I think, at least once by your Lordships' House: see *Provincial Cinematograph Theatres, Ltd.* v. *Newcastle-on-Tyne Profiteering Committee* (3). The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought up before the magistrate in jeopardy of a criminal charge.

In view of this recent decision, and of the unequivocal language used by their Lordships, I believe it is settled law that *Habeas Corpus* is a procedural writ, and that it is not a new suit different from the one which has been

(1) [1943] A.C. 147. (2) (1888) 20 Q.B.D. 832.
(3) (1921) 90 L. J. (K.B.) 1064.

dealt with at the trial. It is not as contended, always a civil writ, the purpose of which is to enforce a civil right. In certain cases it is of a criminal nature, being a step in a criminal proceeding, and in other cases, when it is a step in a "civil cause or matter", it will have a civil character.

The judge, whose duty it is in a matter of *habeas corpus,* to examine if the magistrate who convicted had jurisdiction, or if the commitment is legal, does not of course sit as a court of appeal. But he must necessarily examine in one case, the legality of a detention in a criminal matter, the jurisdiction of the magistrate which is conferred upon him by the Criminal Code, and who is sitting in a criminal court; and in the other case, his investigation is in relation to a detention in a civil matter. The detention itself and the remedy available to have this detention enquired into, are so bound together, that it is, in my opinion, impossible to reach the conclusion, that they are of a different nature, that one could be criminal and the other civil. The proceedings that result in the conviction of a person may, of course, have some special peculiarities which are absent in the examination that is made of the legality of the detention, but these procedural variances do not mean that both have not the essential qualities which are necessary to give them the same fundamental character.

I believe that this decision in the *Amand* case (1) is in harmony and forms a consistent and orderly whole, with the various existing legislations in England, which have been imported in this country, and which have always distinguished between *habeas corpus* in criminal and civil matters. It would to my mind seem extraordinary, that the writ be always of a civil nature, as contended by the Attorney General of British Columbia, and yet, that the legislation dealing with it had made the distinctions which I have noted before.

In the present case, the applicant was convicted of a criminal offence under the Criminal Code of Canada, which is the necessary condition to give jurisdiction to this Court. On *habeas corpus* procedings, he was discharged from custody by Mr. Justice Coady, and ordered to serve his sen-

(1) [1943] A.C. 147.

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tence of three years by the Court of Appeal of British Columbia. That court was dealing with a criminal matter, and as no right of appeal has been given by the Parliament of Canada, I come to the conclusion that this order must be set aside, and that the applicant should be released.

RAND J.—This appeal raises an important question of constitutional law. The applicant, Storgoff, was convicted in the Police Magistrate's Court of Vancouver, British Columbia, under Part XV of the Criminal Code, for being found nude in a public place in company with other persons, and was sentenced to three years in the penitentiary. A week or so later, on an application for a writ of *habeas corpus,* he was discharged by order of Coady J. on the ground that the magistrate had no jurisdiction to commit to the penitentiary for such an offence. The Attorney General appealed to the Court of Appeal which, holding the magistrate to have had jurisdiction, reversed the order of discharge and directed the rearrest and recommitment of the accused to serve out his sentence. An application for discharge on *habeas* is now made to this Court.

The appeal to the Court of Appeal was taken under section 6 (*d*) (vii) of the *Court of Appeal Act,* which is as follows:

> 6. An appeal shall lie to the Court of Appeal:—
>
> * * *
>
> (*d*) From every decision of the Supreme Court or a Judge thereof * * * in any of the following matters, or in any proceedings in connection with them, or any of them:—
>
> * * *
>
> (vii) *Habeas Corpus.*

And the question in controversy is whether that provision can be successfully invoked to support the order made in the appeal.

In this court the Attorney General for Canada intervened and took part in the argument. Both in British Columbia and in other provinces there has been a decided conflict of opinion as to whether provincial legislation in *habeas,* in relation to criminal matters, is competent. Mr. Farris, representing the Attorney General of British

Columbia, though he argued for the continued efficacy of the original commitment, conceded that he could not support the order for rearrest under the provincial legislation, an invalidity which might be sufficient to the appeal; but he pressed upon us the desirability of having the court pass upon the broader question of legislative jurisdiction, and in that Mr. Varcoe joined. This I think we should do, and having reached the conclusion that the order of the Court of Appeal was invalid *in toto*, I do not find it necessary to deal with the narrower ground. I should add that the able examination of the question by all counsel has made the task of reaching that conclusion much easier than otherwise it would have been.

As the matter presents itself, namely, a conviction for an offence in a proceeding under the criminal law of Canada and an application the purpose of which was to terminate the punishment imposed by reason of an illegality in that proceeding, the first impression that it lies within the field of criminal procedure accentuates the desirability that we have clearly in mind at the outset the conception of *habeas* in which this seemingly obvious conclusion is claimed to be unsound.

The case for the province is put thus: *habeas* creates a special right to be freed from illegal detention whether the detention is under process in law, civil or criminal, or by private act. It is an original and detached proceeding, set in motion by a prerogative writ, that stands apart from other proceedings the consequences of which it may affect. Not being linked to the cause of detention, it constitutes an independent enquiry in protection of a civil right as such, and by section 92 (13) of the *British North America Act*, the legislative power in relation to it has been committed to the exclusive jurisdiction of the province.

Undoubtedly the right to the writ, one of the most fundamental possessed by the citizen, is a civil right and extends to all illegal detention. Its beginnings are shrouded in the dim past, but that it was recognized and enforced at common law is unquestioned. It arose at a time when the individual was too often the victim of tyranny in public and private prisons and when the King

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as the supreme lord might well be concerned about the fate of lieges. In 1679, to meet evasions and abuses that had grown up, the statute was passed with which the name of the writ is ordinarily associated but the procedure which it prescribed did not supersede that at common law with which it co-exists to-day. Its provisions dealt only with detention for certain crimes or alleged crimes; and it was not until 1816 that in England statutory provision supplemented the common law in relation to custody other than for crimes, debt or under process in a civil suit.

Section 92 (13) endows the province with exclusive power to make laws "in relation to * * * (13) property and civil rights in the province." "Civil rights" carries obviously the most general signification from which the several areas of specific and paramount legislation, by section 91 given to the Dominion, must be removed. It is necessary also to be precise in the concepts we attribute to it. We speak of a right in the individual to personal liberty, of a right to the issue of the writ of *habeas* and a right to be discharged from illegal detention. The basis for asserting freedom from restraint, whether conceived to be the creation of law or to be the result of an original absence of any warrant under law to interfere with liberty, is postulated as a primary right in the juridical system by which we are governed. In that sense, the positive law, in its relation to individual liberty, creates the justification for encroachments upon it. What is important here is the remedial civil right to protection against any other than those legal encroachments and the procedure by which it is enforced; and, within limits, that is what is furnished by the law of *habeas*. It is not, however, the abstract right to be free that is in question but the right to be free from the particular process.

The precise point for decision is, then, whether in the constitutional distribution of legislative power the law of *habeas* in cases of detention for crime is in relation to 91 (27) "the criminal law * * * including the procedure in criminal matters," or to 92 (13) "civil rights." It is no objection for the purposes of the former section merely that what is dealt with is a civil right. Criminal proceed-

ings abound with civil rights. Trial by jury is such a right but no one would suggest that in criminal matters it is not part of procedure or that it could be abolished by the province. The question of ancillary powers does not arise because parliament has not legislated for appeals on *habeas* nor for such features of it as would be inconsistent with appeals: and if the provincial legislation is not within the field of section 91 (27), there would not seem to be much doubt of the pith and substance of it or of the aspect in which it was enacted.

The nature of *habeas* and its relation to the proceedings in or by which the detention has been brought about are, therefore, the essential consideration of the enquiry. The question, is the detention legal? when asked of detention under the act of a court, goes to the sufficiency in law of the process. The decision in *habeas* is, therefore, a judicial determination of a question of law arising in or in relation to a criminal or a civil proceeding. In each instance it is a query of law put directly to steps in judicature. It is a question within the criminal or civil law and the court is asked to revise a judgment in that law. Certainly, then, the enquiry under the writ does, in a criminal case, relate to criminal law and procedure. Is the step itself within that procedure?

That the writ becomes in effect a step in, or takes on the character of, the cause or matter out of which the question to be determined arises, was, I think, established in *Ex parte Alice Woodhall* (1). In that case there was a commitment to prison under the *Extradition Act*. An application for a writ was refused. The applicant sought to appeal under section 47 of the *Judicature Act* which, giving a right to appeal generally, excepted an appeal "from any judgment of the High Court in any criminal cause or matter" and the question was whether the refusal was such a judgment. The Court of Appeal held that it was. Lord Esher uses this language:

> I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises. Applying that proposition here, was the decision of the Queen's Bench Division, refusing the

(1) (1888) 20 Q.B.D. 832.

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application for a writ of *habeas corpus*, a decision by way of judicial determination of a question raised in or with regard to the proceedings before Sir James Ingham? I am clearly of opinion that it was, and I think it is impossible to say that what took place before him was not a proceeding the subject-matter of which was criminal.

Whether this treats the application for the writ as, in itself, the criminal proceeding by reason of its subject-matter being criminal, or as being "in" the proceeding below, i.e., in extradition, I shall consider later. Bowen L.J. adds:

> The questions, upon which the application for a writ of *habeas corpus* depends, are whether or not there was evidence before the magistrate of a crime, which would be a crime according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter; and it follows that the judgment given upon the application for a writ of *habeas corpus* is a judgment in a criminal matter.

In that case, as here, it was argued that the application was collateral and civil, but the fact that the judgment dealt with the refusal as in the criminal matter below, is referred to in *Amand* v. *Home Secretary* (1) by Lord Porter in his speech:

> As long ago as 1888 it was unsuccessfully argued in *Ex parte Woodhall* (2) that the decision, to be in a criminal cause or matter, must deal with what was a crime by English law and in the same case it was contended in vain that an application for habeas corpus was a separate proceeding from that which the magistrate dealt with in the case brought before him.

And Lord Wright expresses the same view:

> The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for habeas corpus may or may not be in a criminal cause or matter.

The sole controversy in that case was whether or not the cause or matter below was in fact criminal: it was assumed that the order refusing the writ was in it: and the language of the opinions makes it clear that the "criminal cause or matter" was the proceeding in which it was sought to hold the applicant subject to the Dutch military law. Lord Simon L.C.:

> It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be "criminal" although he is not charged with a breach of

(1) [1943] A.C. 147. (2) (1888) 20 Q.B.D. 832.

our own criminal law, and * * * although the offence would not necessarily be a crime at all if committed here. It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test.

Then Lord Wright:

The words "cause or matter" are, in my opinion, apt to include any form of proceeding. The word "matter" does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word "cause". In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the *Allied Forces Act* and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter.

And Lord Porter's language has already been quoted.

On the other hand, in *Clifford and O'Sullivan* (1), Lord Sumner, who dissented on the point whether the cause or matter was criminal, seems to take the view suggested by the language of Lord Esher in *Ex parte Alice Woodhall* (2):

My Lords, the question on the preliminary objection is whether the appeal, taken to the Court of Appeal in Ireland, was in a cause or matter which was criminal, or was in one which was not criminal, the "matter" being in either case the decision of Powell, J., to refuse the writ of prohibition.

* * *

An application for a writ of prohibition is in itself no more and no less criminal than it is the contrary. This quality of the matter of an application for that writ must be decided according to the subject-matter dealt with on the application.

* * *

I think the real test is the character of the proceedings themselves which are the subject-matter of the particular application, whatever it be, that constitutes the cause or matter referred to.

In *Rex* v. *Nat Bell Liquors Ltd.* (3), he had used this language:

Certiorari and prohibition are matters of procedure and all the procedural incidents of this charge (i.e., the charge in the original court) are the same whether or not, etc.,

which seems to imply that *habeas* should be taken as a procedural incident of the original proceeding.

But whether we take the concept to be that the application for the writ is a step in that proceeding, the character of which, whether criminal or civil, must be determined as in the *Amand* case (4), or that the appli-

(1) [1921] 2 A.C. 570.
(2) (1888) 20 Q.B.D. 832.
(3) [1922] 2 A.C. 128, at 168.
(4) [1943] A.C. 147.

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cation is itself the cause or matter, the character of which in turn is to be taken from the proceeding below, which becomes the subject-matter of the application, is of no materiality for our purposes. In either case there is criminal procedure concerned with the same subject-matter.

It is of interest that on this subject we have an observation of a great legal historian, Maitland, who, in his Constitutional History of England, at page 538, uses this strikingly apposite language:

> A modern code-maker would very possibly not put the provisions of the *Habeas Corpus Act* into that part of the code which dealt with constitutional law—he would keep it for the part which dealt with criminal procedure—still we can see that the history of the writ is very truly part of the history of our constitution.

And in Bacon's Abr. vol. 4, p. 114:

> It is also in regard to the subject deemed his writ of right, that is, such an one as he is entitled to ex debito justitiae, and is in the nature of a writ of error to examine the legality of the commitment.

The same language is used by Hale C.J. in *Bushel's* Case (1):

> For a *certiorari* and an *habeas corpus,* whereby the body and proceedings are removed hither, are in the nature of a writ of error.

And in *Ex parte Bollman* and *Swartwout* (2), *Marshall* C.J.:

> The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus,* and this writ must always be for the purpose of revising that decision, and, therefore, appellate in its nature.

Habeas in this conception is an additional procedure akin to appeal or error by which restraints upon personal liberty must, under the law, be justified; and it takes its character from the proceeding into which it is introduced or which becomes its subject-matter.

Undoubtedly the interpretation of a provision for appeal in the *Judicature Act,* as in *Ex parte Woodhall* (3), is a different matter from that before us, but we are in fact dealing with a question of the scope of similar language in relation to the same procedure. "Criminal cause or matter" under the *Judicature Act* is given by the courts of England the broadest scope, just as "criminal law * * * including procedure in criminal matters" is

(1) (1674) 86 E.R. 777.
(2) (1807) 4 Cranch 75, at 101.
(3) (1888) 20 Q.B.D. 832.

interpreted as "criminal law in its widest sense": *Attorney General for Ontario* v. *Hamilton Street Railway Co.* (1). In the unitary legislation of Britain it is a question of the distribution of legislative subject-matter for the purposes of judicial action; under the federal scheme of the Dominion, it is one of distribution for the purposes of legislative action. Under section 47 the judgment of refusal must be "in a criminal cause or matter": under section 91 (27) the law of *habeas* must be "in relation to * * * procedure in criminal matters."

> The exclusive power, then, to legislate
> in relation to * * * the criminal law * * * including the procedure in criminal matters,

subject to section 92 (15), must, I think, extend to a procedural step "in a criminal cause or matter" of the nature of *habeas*. It follows that legislation in relation to the law of *habeas* in respect of criminal matters over which the Dominion has jurisdiction, must be deemed to be within the language of section 91 (27) and excluded from section 92 (15).

The soundness of this construction is supported by a consideration of the results which would follow from the contrary view. In the proceeding with which we are dealing, admittedly the order of rearrest is incompetent to the provincial legislature because it is a step in criminal procedure; but without that ancillary power, a declaratory jurisdiction would appear to be futile: *Cox* v. *Hakes* (2). Then, if each province could set up its own procedural machinery, I see no reason why it could not go further and enlarge the scope of enquiry. It might, for instance, permit the return to be traversed as does the Act of 1816, or an examination into matters dehors the commitment or judgment. The present limitations of the procedure do not follow necessarily from the general subject. There is nothing in the principle of a direct, immediate and summary challenge to detention to confine the examination by the court to the appearance of legality which the record on its face may present. But in any enlargement of that sort, the character of "criminal procedure" in the steps becomes self-evident: and at once it collides with grounds of appeal or error. *A*

(1) [1903] A.C. 524. (2) (1890) 15 App. Cas. 506.

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fortiori would the interference with that law and procedure be apparent in the abolition or suspension of the writ by the province. These considerations demonstrate the incompatibility between jurisdiction over criminal law and procedure, on the one hand, and an independent civil jurisdiction over *habeas* even within its present limitations, on the other.

The *Court of Appeal Act* should not, therefore, be interpreted as applying to *habeas* in criminal matters within section 91 (27). The application should be allowed and the prisoner discharged.

KELLOCK J.—If the principle of the decision of the House of Lords in *Amand* v. *Home Secretary* (1) is applicable, as in my opinion it is, the question arising in the case at bar is concluded and the motion must succeed. The contention of the Attorney General for British Columbia is that the decision in *Amand's* case (1) is confined merely to the construction of an English statute and has no application to a question arising under the *British North America Act*. It is quite true that the decision referred to does arise under the *Supreme Court of Judicature (Consolidation) Act 1925,* but the question is, does it involve any principle pertinent to the decision of the case at bar. Before considering *Amand's* case (1), I desire to refer to some earlier authorities.

In *Clifford and O'Sullivan* (2) Lord Sumner in the course of his dissenting judgment said at page 586:

> An application for a writ of prohibition is in itself no more and no less criminal than it is the contrary. This quality of the matter of an application for that writ must be decided according to the subject matter dealt with on the application. The same is true of *certiorari* (*Regina* v. *Fletcher* (3), and *habeas corpus* (*Ex parte Woodhall* (4),.

The fact that Lord Sumner's judgment is a dissenting judgment is not here of importance. It is true that the question before the House was whether or not an appeal lay from the Court of Appeal in Ireland under legislation similar to that in question in *Amand's* case (1), but Lord Sumner in the passage cited is considering the basic nature of prohibition and of *habeas corpus.*

(1) [1943] A.C. 147.
(2) [1921] 2 A.C. 570.
(3) (1876) 2 Q.B.D. 43.
(4) (1888) 20 Q.B.D. 832.

In *Regina* v. *Fletcher* (1), the question involved was whether an appeal lay under legislation, the predecessor of that in question in *Amand's* case (2), from a decision of the Queen's Bench Division discharging a rule nisi for a *certiorari* to bring up a conviction in a criminal case for the purpose of quashing it for lack of jurisdiction. In the course of his judgment, Mellish L.J. said at page 45:

> This was a conviction for an offence under the criminal law, and although not commenced in the Queen's Bench Division, the proceeding in that Court, in order to obtain a *certiorari,* was a matter which was clearly criminal before the justices. If there is an appeal at all, it must be for both sides. Suppose the rule had been made absolute for a *certiorari* and a rule had also been made absolute to quash the conviction, surely the latter would have been a judgment in a criminal proceeding, and I can see no difference between an appeal from a rule to quash and an appeal from discharging a rule for a *certiorari.*

Brett L.J., as he then was, at page 46 said:

> There had been a conviction in a criminal matter by justices and a motion in the Queen's Bench Division for a *certiorari* for the purpose of determining whether that conviction is good or ought to be quashed; and the Queen's Bench has determined by discharging the rule for a *certiorari* that the conviction ought to stand; in other words, the Court has affirmed the conviction. If that is not a proceeding in a criminal matter, I am at a loss to see what is. It is in effect a judgment or decision on the question whether a man shall be fined or imprisoned or not.

Amphlett L.J., page 47, said:

> It is argued that this is really a civil proceeding for protecting the civil rights of a person who has a *bona fide* claim to the right of shooting. But that is not so; in substance as well as form, it is a criminal proceeding. If the man makes out *prima facie* that he is setting up a *bona fide* claim of right, the justices ought to hold their hands, and if they proceed to hear and convict notwithstanding, the Queen's Bench Division will grant a *certiorari,* even if *certiorari* is taken away in the particular case, because it is for the purpose of preventing the justices from proceeding without jurisdiction; and when it comes before the Court, the purpose is not to determine the civil right, but to determine whether or not the Magistrates had jurisdiction, or whether, as it were, the plea to the jurisdiction was a valid plea. It is, therefore, a proceeding in a criminal matter to determine whether the conviction can be sustained; and consequently there is no appeal.

In my opinion, all the members of the Court approach the matter first from the standpoint of the situation with regard to the nature of *certiorari* as it was understood before the *Judicature Acts* were passed, and they determine that its nature depends upon the character of the

(1) (1876) 2 Q.B.D. 43. (2) [1943] A.C. 147.

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earlier proceedings to which the proceeding by way of *certiorari* is directed. The same argument made in the case at bar with respect to the nature of *habeas corpus,* was made in *Fletcher's* case (1) with respect to *certiorari,* and rejected. This is clear from the above extract from the judgment of Amphlett L.J.

In *Ex parte Alice Woodhall* (2), the Court of Appeal had to consider the competence of an appeal from a decision of the Queen's Bench Division, refusing to grant an order nisi for the issue of a writ of *habeas corpus,* where the appellant had been brought before a Magistrate charged under the provisions of the *Extradition Act* as a fugitive criminal accused of having committed forgery in New York. It was argued on her behalf that an application for a writ of *habeas corpus* was not a criminal cause or matter within the meaning of section 47 of the *Judicature Acts,* but that such an application was a *collateral matter* not necessarily having reference to any criminal proceeding. In his judgment, Lord Esher M. R. referred to *Regina* v. *Fletcher* (1), as the case which furnished the most help in construing that section. He referred to portions of the judgments of Mellish L.J. and himself in that case, and then said that in order to make his meaning in the earlier case clear, section 47 applied to a decision by way of judicial determination of any question

raised in or with regard to proceedings, the subject matter of which is criminal, at whatever stage of the proceedings the question arises.

Applying that test, he held that the decision of the Queen's Bench Division refusing the application for the writ of *habeas corpus* was a decision by way of judicial determination of a question raised in or with regard to the proceedings before the magistrate, and consequently, there was no appeal.

It may be said that this judgment of Lord Esher is limited to mere construction of the language of the statute before him and that he employed language in paraphrasing that statute which is similar to the language employed in section 36 of the *Supreme Court Act*—

(except in criminal cases * * * for or upon a writ of *habeas corpus.* * * * arising out of a criminal charge),

(1) (1876) 2 Q.B.D. 43. (2) (1888) 20 Q.B.D. 832.

which is not to be found in section 91 (27) of the *British North America Act* and that therefore, his judgment can have no application to the last mentioned Act. It is to be observed, however, as already pointed out, that Lord Esher founds himself upon *Regina* v. *Fletcher* (1) and that in using the language which he did, he is expressing the effect of the decision in that case based as, in my opinion, it was based, upon a consideration of the nature of *certiorari* before the *Judicature Acts* were passed.

Lindley L.J., at page 836, said:

> Can we say that the application in the present case is not an application in a criminal cause or matter? I think that in substance it certainly is. Its whole object is to enable the person in custody to escape being sent for trial in America upon a charge of forgery.

Bowen L.J., at 838, said:

> The magistrate is charged with the duty of considering upon the evidence before him, whether that evidence is sufficient, according to English law, to justify the committal for trial of the accused person. How can the matter be other than criminal from first to last? It is a matter to be dealt with from first to last by persons conversant with criminal law and competent to decide what is sufficient evidence to justify a committal. The questions upon which the application for a writ of *habeas corpus* depend are wether or not there was evidence before the magistrate of a crime which would be a crime, according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter; and it follows that the judgment given upon the application for a writ of *habeas corpus* is a judgment in a criminal matter.

In my opinion, the substratum of the judgments in this case, as in *Regina* v. *Fletcher* (1) with respect to *certiorari*, is that the proceeding by way of *habeas corpus* with relation to a criminal charge is in substance criminal and was so regarded, long prior to the *Judicature Act* of 1873. That Act, and the same may be said of later *Judicature Acts*, was intended to change procedure in criminal cases: *Regina* v. *Fletcher* (1), referred to by Lord Wright in *Amand's* case (2) at p. 161.

Certiorari, prohibition and *habeas corpus*, are matters of procedure; Lord Sumner in *The King* v. *Nat Bell Liquors Limited* (3); Lord Wright in *Amand's* case (2)

(1) (1876) 2 Q.B.D. 43, at 44. (2) [1943] A.C. 147.
(3) [1922] 2 A.C. 128, at 168.

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at p. 160; Lord Dunedin in *The King* v. *Halliday* (1). So far as concerns the question which arises in the case at bar, proceedings by way of *certiorari,* prohibition and *habeas corpus* are comparable.

It is from this standpoint, therefore, that *Amand's* case (2) is to be approached. Were *habeas corpus ad subjiciendum* always and under all circumstances a civil proceeding, I do not think that the *Amand* case (2) nor the earlier decisions of which it approves could have been decided as they have been. In my opinion, all these authorities are based on the view that *habeas corpus,* being procedural, partakes of the nature of the earlier proceeding, as a result of which it has been invoked, and that this view of its nature is not dependant upon anything enacted in England by the *Judicature Acts* but was well recognized long before their enactment.

The fact that in Canada the field of legislation is divided between Parliament and the provincial legislatures by virtue of the provisions of the *British North America Act,* does not render the principle of the above decisions inapplicable in the present case. The result of the division of legislative power may reduce the area in which proceedings by way of *habeas corpus* are to be considered as falling within Dominion jurisdiction, but it has no other effect. I agree, therefore, with the conclusion that section 6 of the *Court of Appeal Act,* if it can be said to authorize, in such a case as the present, an appeal by the Crown from an order granting the writ, is *ultra vires.* The application to Coady J. was in a criminal proceeding and it was, therefore, a matter for legislative purposes, within section 91 (27) of the B.N.A. Act, from which the provincial legislature is excluded.

With respect to the decisions in the Supreme Court of the United States to which we were referred, it is sufficient to say that as they are at variance with the decision of the House of Lords in *Amand's* case (2), they cannot be regarded as authorities.

It follows that Storgoff must be discharged.

(4) [1917] A.C. 260, at 295. (2) [1943] A.C. 147.

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ESTEY J.—This appeal raises an important question with respect to the position of the prerogative writ of *habeas corpus ad subjiciendum,* or, as often referred to, the writ of *habeas corpus* in Canadian jurisprudence.

The accused, Fred Storgoff, was found guilty by a magistrate in the city of Vancouver on the 8th of May, 1944, for an offence contrary to section 205A of the Criminal Code and sentenced to imprisonment for three years in the penitentiary. On June 30th, 1944, the Honourable Mr. Justice Coady, a judge of the Supreme Court of British Columbia, upon an application for a writ of *habeas corpus* released the accused Fred Storgoff from custody.

The Crown appealed to the Court of Appeal for British Columbia, and on the 18th of July, 1944, that Court reversed the order of the Honourable Mr. Justice Coady and ordered a re-arrest of Storgoff.

The appeal to the Court of Appeal was taken under the *Court of Appeal Act* for British Columbia, being chap. 57, R.S. B.C. 1936, which reads in part as follows:

> 6. * * * an appeal shall lie to the Court of Appeal:—
>
> * * *
>
> (*d*) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court Judge, in any of the following matters, or in any proceeding in connection with them, or any of them:—
>
> * * *
>
> (vii) *Habeas Corpus*:
>
> * * *; and in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person:

This is an application under sec. 57 of the *Supreme Court Act,* chap. 35, R.S.C. 1927, that a writ of *habeas corpus* be issued releasing the accused from custody under the order directed by the Court of Appeal. The application came before the Honourable Mr. Justice Hudson, who, because of the importance of the question, referred it to the full Court.

The respective contentions are that as the accused was convicted for an offence contrary to the Criminal Code, (legislation within the exclusive jurisdiction of the Dominion Parliament, B.N.A. Act, sec. 91 (27)), the province cannot legislative with respect thereto, and therefore the foregoing sec. 6 (*d*) (vii) is *ultra vires* of the

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province of British Columbia and the order of the Court of Appeal made thereunder a nullity: On the other hand, that the writ of *habeas corpus* is not issued in respect of criminal law or criminal procedure, but is a prerogative writ for the protection of personal liberty. Personal liberty is itself a civil right and comes under the B.N.A. Act, sec. 92 (13) and is therefore subject to provincial jurisdiction: That the above sec. 6 (*d*) (vii) was passed under these provisions and is valid provincial legislation.

In the result the issue is restricted to the competency of the British Columbia legislature to pass sec. 6 (*d*) (vii) above quoted. In this case the answer is dependent upon the position of the writ of *habeas corpus* in our jurisprudence.

We in Canada adopted the writ of *habeas corpus* from the common law of England. In British Columbia, the province with which we are immediately concerned, it is provided (*English Law Act,* R.S.B.C. 1936, chap. 88, sec. 2; Criminal Code of Canada, R.S.C. 1927, chap. 36, sec. 2) that the civil and criminal laws of England, as of the 19th day of November, 1858, shall be in force throughout British Columbia, except as they may be modified as provided in the foregoing *English Law Act* and the Criminal Code.

In modern times the position of the writ of *habeas corpus* in the common law has been discussed in *Ex parte Woodhall* (1); *Cox* v. *Hakes* (2); *Secretary of State for Home Affairs* v. *O'Brien* (3); *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* (4). These authorities establish the character and nature of the writ and its position, not only in the common law, but under the various statutes passed from time to time, and in particular the *Habeas Corpus Act,* 1679 and the *Habeas Corpus Act,* 1816. The following quotations describe the writ:

> It is a remedial mandatory writ by which the King's supreme court of justice, and the judges of that court, at the instance of a subject aggrieved commands the production of that subject, and inquires after the cause of his imprisonment. Lord Eldon, *Crowley's* Case (5).

(1) (1888) 20 Q.B.D. 832.
(2) (1890) 15 App. Cas. 506.
(3) [1923] A.C. 603.
(4) [1943] A.C. 147.
(5) (1818) 2 Swan. 1, at 61.

It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. Earl of Birkenhead, *Secretary of State for Home Affairs* v. *O'Brien* (1), at 609.

It was not a proceeding in a suit, but was a summary application by the person detained. No other party to the proceeding was necessarily before, or represented before the judge except the person detaining, and that person only because he had the custody of the applicant and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. Lord Halsbury L.C., *Cox* v. *Hakes*, (2).

The remedy by *habeas corpus* is equally available in criminal and civil cases, provided that there is a deprivation of personal liberty without legal justification. 9 Halsbury, page 713, par. 1214.

The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction, in *habeas corpus*. 9 Halsbury, page 702, par. 1201.

The authorities establish that the writ of *habeas corpus* is available to any subject detained or imprisoned, not to hear and determine the case upon the evidence, but to immediately and in a summary way test the validity of his detention or imprisonment. It matters not whether the basis for the detention or imprisonment be criminal or civil law: That the applicant may go from judge to judge renewing his application, and once he finds a judge who grants his application, at common law that concludes the matter as no appeal is provided. Appeals in matters of *habeas corpus* have been and are statutory.

The most recent description of the writ in the common law is that of Lord Wright in *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* (1):

The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter.

The writ of *habeas corpus* is therefore a matter of procedural or adjective law rather than that of substantive law as this division has been developed in the common law of England. Salmond Jurisprudence, 8th ed., pages 496 and 498; Dicey's Conflict of Laws, 4th ed., page 798.

The problem here presented arises because of the division of legislative powers between the Dominion Parliament and the Provincial Legislatures, and specifically in

(1) [1923] A.C. 603.

(2) (1890) 15 App. Cas. 506, at 515.

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this case because the Dominion Parliament only can legislate with respect to criminal law, and the Provincial Legislature with respect to civil rights.

An examination of the provisions of the B.N.A. Act indicates that the division into substantive and procedural or adjective law as developed in the common law is continued in that Act. In this regard sec. 92 (13) deals with the substantive law of property and civil rights, whereas sec. 92 (14) deals with procedural rights in civil matters. These sections read as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—
>
> 13. Property and Civil Rights in the Province.
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Moreover, the same distinction appears in sec. 91 (27) where the language is "criminal law * * * including procedure in criminal matters." There the substantive right and procedural right are recognized, and it is specifically provided that they are both included in the phrase "criminal law" as it is used in that section.

Lord Wright's description of the writ of *habeas corpus* as a procedural writ appears to fit logically into the scheme of the B.N.A. Act. It is part of the "machinery of justice" contemplated by the provisions of that Act. This does not mean that the test expressly adopted in the *Amand* case (1) under the Imperial Statute is necessarily applicable to the determination of questions that may arise under our law, either dominion or provincial, but only that the writ is a matter of procedure.

The conclusion that the writ of *habeas corpus* is a procedural writ in our jurisprudence does not dispose of the question presented in this case. It is here contended, as above set out, that personal liberty is a civil right under sec. 92 (13), and because the province has a right to legislate with respect to the procedure in civil matters under sec. 92 (14), the province has jurisdiction to legislate with respect to the writ of *habeas corpus*.

(1) [1943] A.C. 147.

The question is, what are proceedings in relation to civil rights, and what are proceedings in relation to the provisions under sec. 91, or more particularly in this case under sec. 91 (27) "criminal law * * * "

In this Court counsel for the province of British Columbia submitted that section 6 (*d*) (vii) was valid in its application to this case because it applied

> to an appeal from an order in a *Habeas Corpus* proceeding, releasing a prisoner from custody on a warrant of commitment on a conviction for a criminal offence on the ground that the magistrate had no jurisdiction to issue the warrant; and that as such the section was within the competence of the legislature as being in relation to a matter within the class of subject Property and Civil Rights in the Province and was not legislation in relation to Criminal Law and Procedure.

The basis for this contention "that the magistrate had no jurisdiction to issue the warrant," was that he, as magistrate, had jurisdiction to issue a warrant committing the accused to the common jail, but not, as he did, to the penitentiary.

The judge who heard the application so decided the case, and the accused was released; his decision was reversed in the Court of Appeal. In arriving at their decision, the learned judges considered provisions of the Criminal Code, the *Penitentiary Act,* as well as reported decisions upon the criminal law.

It is conceded that it was a criminal proceeding before the magistrate when the accused was found guilty under 205A of the Criminal Code. The language of Lord Esher is appropriate:

> If the proceeding before the magistrate was a proceeding the subject-matter of which was criminal, then the application in the Queen's Bench Division for the issue of a writ of *habeas corpus,* which if issued would enable the applicant to escape from the consequences of the proceeding before the magistrate, was a proceeding the subject-matter of which was criminal. *Ex parte Woodhall* (1).

It is also important to note the words of Lord Wright in the *Amand* case (2) at p. 160:

> The cause or matter in question was the application to the court to exercise its powers under the *Allied Forces Act* and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals

(1) (1888) 20 Q.B.D. 832, at 836.

(2) [1943] A.C. 147.

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with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter.

Amand v. *Home Secretary and Minister of Royal Netherlands Government* (1).

The foregoing indicate that in England it is the law invoked in the original proceedings under which the applicant is placed in custody which determines the character of the proceedings throughout.

Under our law the authorities indicate that it is the provisions of the statute or law under which the accused is charged which determines the character of the proceedings. Even where the offence charged is under a provincial statute the proceedings may be criminal in character, within sec. 1024 of the Criminal Code and sec. 36 of the *Supreme Court Act,* but this conclusion is arrived at by an examination of the statute or law out of which the proceedings arise or upon which they are based. *The King and Nat Bell Liquors Ltd.* (2); *Nadan and The King* (3); *Chung Chuck and The King* (4).

The King and Nat Bell Liquors Ltd. (2) illustrates this point and indicates some of the complications that develop under the B.N.A. Act. There, upon an application for a writ of *certiorari,* proceedings under the *Liquor Act, 1916,* of the province of Alberta, were held to be criminal within the meaning of sec. 36 of the *Supreme Court Act.* Then in passing, with respect to the writs of *certiorari* and prohibition, also prerogative writs, the Privy Council, at page 168, stated:

> *Certiorari* and prohibition are matters of procedure and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion Legislature under section 91 (27).

There is also the case of *Chung Chuck* v. *The King* (4), which was an appeal from the Courts of British Columbia to the Privy Council. Chung Chuck was convicted for an offence contrary to the British Columbia *Produce Marketing Act* (Statute of B.C. 1926-27, chap. 54) and amendments thereto. After conviction he applied by way of *habeas corpus* and *certiorari* for discharge on the basis that

(1) [1943] A.C. 147.
(2) [1922] 2 A.C. 128; 2 Cam. 272.
(3) [1926] A.C. 482; 2 Cam. 400.
(4) [1930] A.C. 244.

the *Produce Marketing Act* was *ultra vires* province of British Columbia. It was held in the Privy Council that upon a construction of the *Produce Marketing Act* this was a criminal matter within sec. 1025, now sec. 1024, of the Criminal Code. Upon this point the Privy Council followed its decision in *Nadan* v. *The King* (1).

These cases indicate the basis of the decision upon related questions brought before the Courts by way of prerogative writs and indicate to some extent the limits of the legislative power of the dominion and of the provinces. The Privy Council here points out that under the division of legislative powers by the B.N.A. Act, a matter within the competence of the Provincial Legislature may be criminal law within the meaning of the Dominion legislation with respect to appeals to the Supreme Court of Canada and the Privy Council.

This illustrates again what was said in *Hodge and The Queen* (2):

> * * * that subjects which, in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

It also provides an example of that relationship which exists between the substantive and procedural law as indicated by Chief Justice Cockburn:

> 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. *Martin* v. *Mackonochie* (3).

It appears from all of the relevant provisions of the B.N.A. Act, particularly sec. 91, 92 and 101, that it was intended that the Dominion, within its field, and the provinces, within their fields, should have authority to determine the procedure that shall obtain with respect to the enforcement and the determination of rights under any laws which might be enacted by the respective legislative bodies. Sir Lyman Duff C.J., *In re "An Act to Amend the Supreme Court Act"* (4) in referring to sec. 101 of the B.N.A. Act stated:

> I now come to section 101. That section has two branches, one which deals with a general court of appeal for Canada, while the other relates to the establishment of additional courts for the better admin-

(1) [1926] A.C. 482.
(2) (1883) 9 App. Cas. 127, at 130; 1 Cam. 333, at 344.
(3) (1878) 3 Q.B.D. 730, at 775.
(4) [1940] S.C.R. 49, at 61.

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istration of the laws of Canada. The phrase "laws of Canada" here embraces any law "in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion". (*Consolidated Distilleries* v. *The King* (1)).

It may be added that it has been held to give authority to Parliament in relation to the jurisdiction of provincial courts; and to impose on such courts judicial duties in respect of matters within the exclusive competence of Parliament; insolvency (*Cushing and Dupuy* (2); in election petitions (*Valin and Langlois* (3)).

Then also, *Cushing and Dupuy* (2) establishes that with respect to legislation competently passed by the Dominion Parliament under one of the clauses of sec. 91, it is the procedure as determined by the Dominion Parliament which obtains and is paramount to any procedure that might be applied with respect thereto as passed by a Provincial Legislature. In that case the Parliament of Canada had passed "an Act respecting Insolvency", (38 Vict. chap. 16) and set forth provisions for an appeal which "shall be final". The final court of appeal in the province of Quebec under that provision was the Court of Queen's Bench. At the same time, there existed a procedure for appeals to the courts in that province, to this Court and to the Privy Council with respect to civil rights. It was there decided that the Dominion Parliament had the jurisdiction to enact provisions for appeal under the *Insolvency Act* which should obtain, notwithstanding the provisions for appeal in matters respecting civil rights.

It is important in regard to all of these questions to observe the basic distinction between civil rights and public wrongs:

> 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. Comm. p. 5. *In re McNutt* (4).

And again, Blackstone states:

> To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impos-

(1) [1933] A.C. 508, at 522.
(2) (1880) 5 App. Cas. 409; 1 Cam. 253.
(3) (1879) 5 App. Cas. 115, at 119, 120.
(4) (1912) 47 Can. S.C.R. 259.

sible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. 3 Blackstone 134.

No one would minimize either the right or the dignity of personal liberty. It is a fundamental right of English jurisprudence, but it is subject to that larger or paramount public right or authority which assures to the individual his personal liberty and freedom. The people through Parliament fix these limitations, more particularly through the enactment of prohibitory, penal and criminal laws. It is through these parliamentary enactments in the language of Blackstone we clearly define

the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful.

It is equally a fundamental right throughout our law that both in the administration of criminal and civil law every opportunity is given for the taking of all proper objections and a due presentation of every contention that either party may care to raise. The writ of *habeas corpus* provides one procedure for submitting contentions with respect to the legality of the detention or imprisonment imposed by legislative enactments in relation to public wrongs. It is upon such an application, the competency of the legislation and the compliance with all the requirements imposed by that legislation before the detention or imprisonment can be legally imposed, which are inquired into.

Upon an application for a writ of *habeas corpus* questions of law only are decided. It is not a hearing or a trial at which the evidence is heard and decision made thereon. It is the legality of the applicant's detention that is in issue. The question raised may be as to jurisdiction of the justice of the peace, magistrate or presiding judge; the constitutionality or the interpretation of the law upon which the proceedings are based; the sufficiency of the information or complaint, conviction or order of commitment. It may also be a question as to the adequacy of the service of process, notice or step required. This is not a complete enumeration, but they do indicate the type of questions that are determined upon these applications.

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The determination of these questions is made not upon the law with respect to personal liberty, but upon the provisions of the law or the constitutionality of a law upon which the proceedings are based, or out of which they arise. If the applicant is successful, his liberty is restored, but if unsuccessful, his liberty has been legally interfered with and he remains in custody. The result does not determine the nature of the proceedings. The fact that an accused is found not guilty and discharged when tried upon indictment, or discharged upon an application to quash an indictment under sec. 898 of the Criminal Code, does not make the proceedings civil. They are criminal proceedings regardless of the outcome. The nature and character of the proceeding in an application for the writ of *habeas corpus* is not determined by the result, but rather by the law upon which the proceedings are based, or out of which they arise. If it is a section of the Criminal Code or a law that is competent criminal law, then the procedure by way of *habeas corpus* is a criminal proceeding. It is criminal procedure, and as such is subject to the legislation of the Dominion Parliament, except only insofar as the provinces may legislate with respect thereto, and even then the Dominion legislation with respect to appeals may apply. *Attorney General of Manitoba and Manitoba License Holders' Association* (1); *Canadian Pacific Wine Co. Ltd.* v. *Tuley* (2); *The King and Nat Bell Liquors Ltd.* (3); *Chung Chuck and The King* (4).

The Storgoff case is a splendid illustration of the foregoing. Mr. Justice Coady, upon an application for a writ of *habeas corpus,* released the accused from custody and from the consequences of the criminal proceedings before the magistrate.

Then an appeal was taken on behalf of Storgoff under the above quoted section 6 (*d*) (vii) in these *habeas corpus* proceedings.

The appeal so taken on behalf of the Crown was for the express purpose of reversing the order of Mr. Justice Coady, and for the re-arrest and putting Storgoff back

(1) [1902] A.C. 73; 1 Cam. 574.
(2) [1921] 2 A.C. 417; 2 Cam. 238.
(3) [1922] 2 A.C. 128; 2 Cam. 272.
(4) [1930] A.C. 244.

into custody, not under any law with respect to civil rights, but under, and by virtue of, the provisions of the criminal law. Yet, it was the same proceeding throughout. It was the same law that was invoked and adjudicated upon throughout the proceedings. That law was criminal in character within the exclusive jurisdiction of the Dominion Parliament, and in my opinion, the proceeding by way of the writ of *habeas corpus,* arising out of the prosecution based thereon, was a criminal proceeding.

In this case the appellate court, in my view, was acting without authority, but it would be otherwise and the same reasoning would apply, in respect to the same proceeding arising out of, or based on, competent provincial legislation.

The able presentation and exhaustive review of the authorities by all of counsel have been of greatest assistance in consideration of this important question. A study of the decisions throughout Canada indicates a difference of judicial opinion. I have carefully considered the reasons advanced, and have arrived at my conclusion with the greatest deference to the learned judges who hold a contrary view.

In my opinion the application made on behalf of Storgoff before the Honourable Mr. Justice Coady was a matter of criminal procedure, and so far as the foregoing section 6 (*d*) (vii) purports to legislate with respect to criminal law and procedure, it is beyond the competence of the Provincial Legislature. Therefore, there was no appeal from the order directed by Mr. Justice Coady, and consequently this application should be granted.