of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought and still continue to think that we cannot inquire into them." The writ was denied. A like disposition was made by the Circuit Court of Illinois of a petition for habeas corpus by a person accused of larceny and forgery, who had been arrested in Peru: Ex p. Ker, 18 Fed. Rep. 167. In Dow's case, 18 Penn. St. R. 27, the Supreme Court of Pennsylvania applied the same rule to the case of a citizen of that state arrested in Michigan without legal authority and carried into Pennsylvania.

See too Rex v. Marks, 3 East 1157, and Ex p. Krans, 1 B. & C. 248, cases of original caption without sufficient authority, in which discharge was refused. However illegal and unwarranted the original caption, if the prisoner is now rightly and properly detained, and the warrant returned to the writ of habeas corpus shews such lawful detention, the whole current of authority indicates that the Courts will not grant the discharge.

In Regina v. McHolme, 8 P. R. 452, the detention as well as the caption was illegal and unwarranted.

In all the cases cited the prisoners were in custody awaiting trial. But if a person not yet found guilty and by law presumed to be innocent should be held for trial by a competent Court, if in lawful custody within its jurisdiction, notwithstanding any illegality of his caption, the convict held in execution can certainly have no higher right to a discharge.

Being unable to agree with the decision in Regina v. Jones, and deeming the matter of sufficient importance to be considered in a higher Court, the proper course for me to take seems to be to exercise the power conferred by sec. 81 (2) of the Judicature Act. I accordingly refer this question to the Divisional Court.

As this course is somewhat unusual, I have put in writing my reasons for adopting it.

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OSLER, J.A. JULY 28TH, 1904.

C.A.—CHAMBERS.

## TABB v. GRAND TRUNK R. W. CO.

*Appeal—Supreme Court of Canada—Extension of Time for Allowance of Security—Leave to Appeal Necessary but not Granted—Powers of Judge of Appeal.*

Motion by defendants to extend the time for the allowance of the security proposed to be given upon an appeal