

MONTREAL, March 9th, 1866.

*Ex parte* JAMES MILTON BROWN.

*Extradition—Warrant of Commitment.*

*Held*, that a warrant of commitment, under the Extradition Treaty, which omits to state that the accused was brought before the magistrate, or that the witnesses against him were examined in his presence, is bad upon the face of it, and must be set aside.

In this case a writ of *habeas corpus* had been ordered to issue on the preceding day, returnable *immediate*. The case again came up on the return of the writ.

The grounds of the application are sufficiently apparent from the remarks of the judges, of which the following is a full report.

DUVAL, C. J., said, this case had been so fully argued for several days past that no further light could possibly be thrown upon it. The judges entertained no doubt whatever that the man should be discharged. It was therefore ordered, that it appearing upon the return to the writ, that the warrant of commitment in virtue of which Brown was now detained, was bad, he be discharged from custody, his detention being illegal. The case was certainly one of very great importance. In the first place it was of importance to the liberty of the subject. It was not an ordinary case of depriving a man of his liberty and leaving him in the country, but it was a case of sending him out of the country. It might be said that this man was not a British subject. Still, he was within British territory, and so long as he was in British territory, he owed allegiance to Her Majesty, and owing allegiance he was entitled to protection. If extradited, not only would he be deprived of his liberty, but he would be sent out of the Queen's dominions, and this no court had power to do unless in accordance with the law. It should be well understood that this court was prepared most fully and faithfully to execute the stipulations of the Treaty, and that the Judges would not encourage or suffer any quibbling with its terms. If the Judges saw that a party fairly came within the provisions of the Treaty, it would be in vain for him to attempt to escape by exceptions *à la forme*. The Court would not listen to such exceptions, but would see that justice was

done. It was intimated over and over again, that if there was a mere informality in this case, another warrant might be substituted by the magistrate. Nothing of the kind has been done. We must suppose, therefore, that the magistrate had a reason for not doing so. We have to determine as to the warrant before us, and we have no hesitation in saying that it is illegal. Not one of the requirements of the amended Act 24 Vic. cap. 6, has been complied with. The Statute says, first, that the party shall be charged upon oath, and the magistrate thereupon shall have him arrested and brought before him. I believe the majority of the Judges are agreed that if the man is already before the magistrate, it is not necessary to issue a new warrant, because the object of the warrant is the arrest. But if the man is before the magistrate, what is to be done? The magistrate may examine upon oath any persons touching the truth of the charge, and upon such evidence as according to the laws of this Province would justify the apprehension and committal for trial of the person so accused, if the crime had been committed here, it shall be lawful for such magistrate to issue his warrant for the commitment of the person, till surrendered or discharged. Here was a very important proviso, which must be fulfilled. Great Britain had not yielded to the demands of foreign powers. She said: it is not sufficient that this is a crime in your country; it must be a crime in this country. We see the object the Legislature had in view. It must appear upon the warrant of commitment that the accused had been brought before the magistrate, and that the magistrate examined witnesses in his presence in the terms of the said act. We see at once the importance of complying with this; for no one would pretend that a British subject, or even a stranger, could be sent out of the Queen's dominions without having heard what was alleged against him, or having an opportunity of giving any explanation. This was no idle form; it was essential that it should appear on the face of the warrant; and this Court, in the exercise of its controlling and superintending powers, must see whether it had been complied with.

Another question might arise—whether this