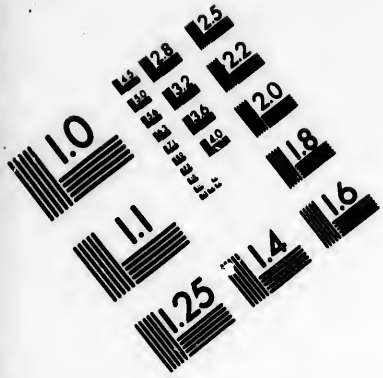

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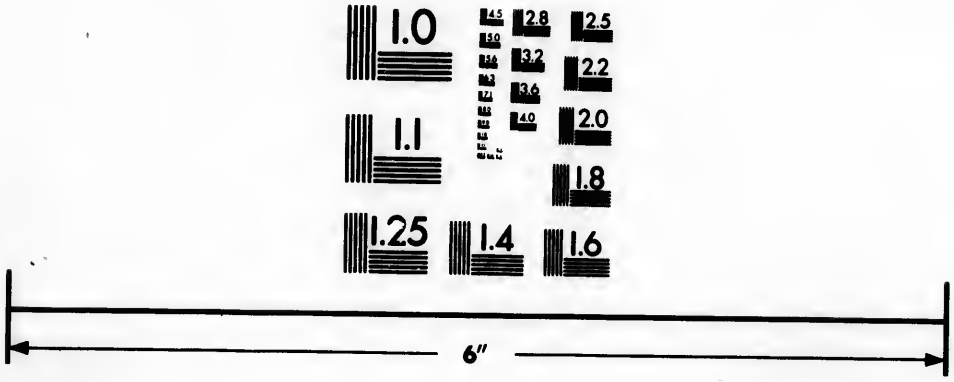

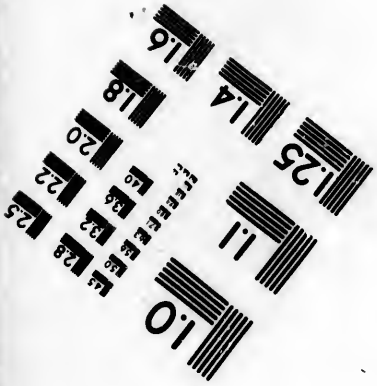

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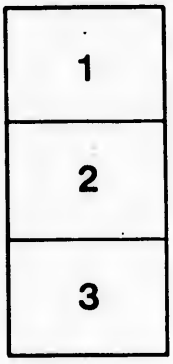

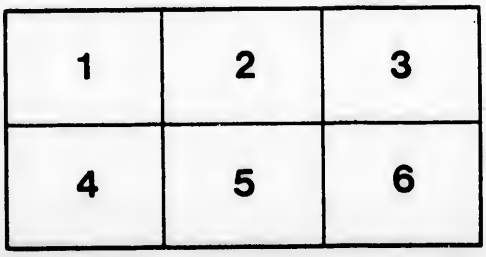

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REPORT

OF THE

CASE OF JOHN TEED,

ON AN APPLICATION FOR A WRIT OF

HABEAS CORPUS,

DECIDED BY THE

COURT OF KING'S BENCH,

AT QUEBEC.

ALSO ;

THE OPINIONS OF

JUSTICES PANET AND BEDARD,

DELIVERED IN VACATION, UPON THE SAME CASE.

QUEBEC :

PRINTED BY THOS. CARY & CO. BUADE STREET.

1839.

HABEAS CORPUS.

IN THE COURT OF KING'S BENCH.

11th February, 1839.

Ex parte—JOHN TEED.

STUART Chief Justice—This is a case in which the Court is about to give its determination, on a motion for a Writ of *Habeas Corpus*, to bring up the body of John Teed who, it appears, is now confined in the Common Gaol of this district, on a charge of Suspicion of High Treason. The case is of importance, from the nature of the grounds which have been urged in support of this application, but, certainly, has presented no difficulty to the Court in coming to the decision of it, which has been delayed, in part, from a desire to give it the most deliberate consideration, and, in part, from the constant occupations in which the Court has been engaged.

To this application is opposed an ordinance of the Governor of the Province, passed with the advice and consent of the Special Council, by which it is enacted that persons in custody, "by any warrant for high treason, " suspicion of high treason, misprision of high treason, " or treasonable practices, may be detained in safe cus- " tody, without bail or mainprize, during the continuance " of that ordinance, and that no Judge or Justice of the " Peace shall, during such continuance bail or try any " person or persons so committed, without an order from " the Governor, &c."

On the part of the applicant, it has been contended, on several grounds, that this ordinance has raised no bar to the success of his application. These grounds may be reduced to three.—1st. The ordinance referred to, it is said, is invalid and inoperative.—2d. The first clause of the ordinance, it is also said, is obligatory only on Justices of the Peace, and on Judges acting singly, and in vacation, and not on this Court.—3d. The writ of *Habeas Corpus*, it is alleged, must issue as of course and *de jure*, whether the applicant be, or be not entitled to be bailed or discharged after the return of the writ.

In support of the first of these grounds, three reasons have been assigned—1st. The ordinance, it is said, was passed by a Legislature, incompetent for want of power, and could not therefore have the effect of suspending the Statute 31 Charles II, c. 2, commonly called the *Habeas Corpus* act.—2d. The ordinance was passed, on the 8th of November, after a Proclamation had been issued, for convening the Special Council, on the 9th of the same month.—3d. The Special Council, by which the ordinance was passed, was not appointed by Her Majesty.

The validity of the ordinance necessarily depends on the extent of power, conferred on the existing Legislature, by the Imperial Act 1st Victoria, c. 9, and the exercise of that power, in conformity with the provisions of the Statute. It has been assumed, in argument, that this power does not extend to the repeal, or suspension of any act of Parliament whatever, in force in this Province, and it is urged, that as the Statute 31. Charles II, c. 2, makes part of the criminal law of this Province, and is, therefore, in force, it could not be suspended by the existing legislature. According to the view I am about to take of this subject, it is altogether immaterial, whether the Statute now mentioned be, or be not, part of the criminal law of this Province, in as much as it was within the competence of the present legislature, to repeal or suspend it, even though it be a part of the criminal law of this Province. As this is a point, on which I must be presumed to have a decided opinion, which it would be unfit to conceal upon this occasion, I must, in frankness, admit, that I consider the Statute 31 Charles 2, to be, from the nature of its provisions, part of the criminal law of England, and that as such it has become part of the criminal law, which now prevails here, under the Statute 14 Geo. 3, ch. 83. At the same time, I abstain from any discussion of this point, as being, in my opinion, entirely unnecessary to the decision of the question before the Court.

To determine the question, as to the competence of the power of the Provincial Legislature, the 3d Section of the Statute 1. Vict. c. 2. is first to be considered.—By this Section it is enacted, " that it shall be lawful for the " Governor, with the consent of the majority of the said " Counsellors, &c., to make such laws or ordinances for " the peace, welfare and good government of the said " Province of Lower Canada, as the Legislature of " Lower Canada as now constituted, is empowered " to make, and that all laws and ordinances so " made, subject to the provision hereinafter contained " for the disallowance thereof by Her Majesty, shall " have the like force and effect, as laws passed before " the passing of this act, by the Legislative Council and " Assembly of the said Provinse of Lower Canada, and " assented to by Her Majesty, or in her Majesty's name, " by the Governor of the said Province."

The effect of this enactment having been, to confer on the newly constituted legislature, subject to certain restrictions to be presently mentioned, the same legislative power which was vested in the suspended legislature, it becomes necessary to ascertain the extent of the legislative authority, held by the latter, and transferred to the former legislature.

By the Act 31 Geo. III. c. 31. establishing the suspended legislature, it was enacted " that in each of the " said provinces (of Upper and Lower Canada,) respec- " tively, His Majesty should have power, with the ad- " vice of the Legislative Council and Assembly of such " provinces, respectively, to make laws for the peace, " welfare, and good government thereof,—such laws not " being repugnant to that act." The terms of this enactment plainly convey a general legislative authority, which rendered the suspended legislature competent to repeal, suspend, or alter any part of the civil and criminal laws of Lower Canada, as well, that constituting the common law, as that to be found in the statutes of England transplanted into this province, and making part of the general body of the law. That this power was thus conveyed, is expressly recognized in the 33d Section of the same Statute, by which it was enacted, " that all " laws, statutes and ordinances, which should be in " force on the day to be fixed, in the manner therein " after directed, for the commencement of that act, should " remain and continue to be of the same force, authority, " and effect, in each of the said provinces, respectively, " as if that act had not been made, &c., *except in so far* " *as the same are expressly repealed or varied, by that* " *act, or in so far as the same should or might, thereof-* " *ter, by virtue and under the authority of that act, be* " *repealed or varied, by His Majesty, his heirs or suc-* " *cessors, by and with the advice and consent of the* " *Legislative Councils and Assemblies of the said provinces* " *respectively.*"

Under the legislative power thus conferred, various alterations (*a*) were, from time to time, made in the criminal law of this province, by the suspended legislature, by repealing and modifying Statutes of the Parliament of England and of Great Britain, which, having been originally made for England, and having therefore, *proprio vigore* no authority in Canada, had become the law of this province, by a general introduction of the criminal law of England.

This legislative power was held, however, subject to the general restriction, under which dependent colonial legislatures exercise their authority, namely, that of not being capable of repealing, altering, or suspending any act of Parliament made expressly, for the colonies, or for Canada in particular. This restriction, which is inherent in the constitution of all colonial legislatures, and is indispensable, for the maintenance of the supremacy of the parent or metropolitan state, was enforced, with respect to the old American colonies, in which it

(*a*) Vide Provincial Statutes 41 Geo. 3. ch. 9., 4 Geo. 4. c. 1., 4 Geo. 4. c. 4., 4 Geo. 4. c. 6., 6 Geo. 4. c. 5.

had been repeatedly violated, by the statute 7 & 8 Will. 3, c. 22. § 2, which statute was, by express enactment, introduced into, and became part of the law of Canada, under the 18th section of the act 14 Geo. 3. c. 83. By the 9th section of the statute of William the Third, it was enacted, that "all laws, bye-laws, usages and customs, which shall be in practice, in any of the plantations, repugnant to any law made, or to be made, in this Kingdom, relative to the said plantations, shall be utterly void and of none effect." The same restriction was, at a recent period, repeated, in more explicit terms, in the Imperial statute 6 Geo. IV. c. 114, by the 49th section of which it is enacted "that all laws, bye-laws, usages, or customs, at that time, or which should thereafter, be in practice. in any of the British possessions in America, which are in anywise repugnant to that act, or to any act of Parliament made or thereafter to be made, in the United Kingdom, so far as the said act should relate to, and mention the said plantations, are and shall be null and void to all intents and purposes." To these enactments has been superadded, to the same effect, a similar declaratory provision, contained in the statute 3, & 4 Will. 4, c. 59, § 56, couched in the same terms, as those of the section last quoted. The last of these enactments was cited, in the argument of this case, but for a different purpose, from that for which it is now referred to.

The right of the suspended legislature to repeal, alter, or suspend any act of Parliament, whether civil or criminal, not made for the colonies in general, or for Canada in particular, but transplanted into, and making part of the general body of the laws of Lower Canada, being thus shewn to be unquestionable, it is equally certain that the same power has become transferred to, and is now vested in the existing legislature, under the 3d section of the Statute 1. Vic. c. 9. above recited, unless some restraint on this power has been imposed by the proviso annexed to that section. The power of altering the criminal law, it may be observed, was possessed and exercised by a former Legislature of this Province, the Legislative Council established under the Act 14 Geo. III, c. 83, constituted in the same manner as the existing Legislature, but with more circumscribed authority. (*a*) The proviso which has been referred to is in the following words :—

"Provided also, that it shall not be lawful, by any such law or ordinance, to impose any tax, duty, rate, or impost, save only in so far as any tax, duty, rate, or impost which, at the passing of this act, is payable within the said Province, may be thereby continued. Provided also, that it shall not be lawful, by any such law or ordinance, to alter in any respect, the law now existing in the said Province, respecting the constitution or composition of the Legislative Assembly thereof, or respecting the right of any person to vote at the election of any Member of the said Assembly, or respecting the qualifications of such voters, or respecting the division of the said province into counties, cities and towns, for the purpose of such elections ; *nor shall it be lawful, by any such law or ordinance, to repeal, suspend, or alter any provision of any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom, or of any Act of the Legislature of Lower Canada, as now constituted, repealing or altering any such Act of Parliament.*"

This proviso is what is called a saving proviso, the object of which is to establish certain exceptions to the general enactment preceding it ; and it is of the nature of such a proviso, that it be not repugnant to, or inconsistent with, the purview or body of the act : if it be so, it is to be rejected. (*b*) To the general legislative power conferred by the enactment immediately preceding, the proviso makes three exceptions, that is :—From the newly constituted Legislature it withholds 1st. The power of imposing taxes. 2d. The power of making any alteration in the existing law, respecting the constitution and composition of the Legislative assembly. 3d. The power of repealing, altering, or suspending any provision of any act of Parliament, or any act of the suspended legislature, repealing or altering any such act of Parliament.—The first of these exceptions was obviously dictated, by the consideration of the peculiar constitution of the new Legislature, excluding any representation of the people, and the second was required by the very principle on which the act was framed, namely, that of suspending, not of taking away, or altering the constitution, or composition of the then existing Legislature. From neither of these exceptions, proceeding from special motives, therefore, can be inferred any intention, in the Imperial Parliament, not to give to the newly constituted Legislature, in other particulars, the same power held by the suspended Legislature, nor to withhold from the former, any power necessary for its entire efficiency, as a substitute for the latter. The third exception, by the use of the words any "Act of Parliament" without limitation, has given occasion to a misconstruction of the import of these words ;—a misconstruction which will invariably occur, where the import of the law is taken from the mere letter, *ex scriptione legis quæ in literis est*, and not from the intention of the Legislature, and the real sense and meaning of the words which have been used. The words any "Act of Parliament" are construed, on the part of the applicant, as importing *every* act of Parliament whatever, which makes part of the law of this Province ; whereas, according to a sound interpretation of these words, and the sense in which, in our opinion, they were understood by the Legislature, they import, not *every* act of Parliament, but such acts only, as have been made for the colonies in general, or for Canada, in particular.—If the former construction were adopted, the Proviso, instead of being consistent with the purview and body of the Statute, would be destructive of it, in principle and policy :—it would be so also, without the attainment of any reasonable object or purpose, and in direct contradiction to the general policy, that has governed the parent state, in relation to its dependent colonial Legislatures, which have been permitted to repeal, suspend, and alter any portion of their laws, whether civil or criminal, not enacted for them, by the Supreme Legislature of the Empire. If the construction now held to be erroneous were adopted, the newly constituted Legislature would be absolutely powerless. The criminal and civil law of this Province rests on the same basis, the Act 14 Geo. III, c. 83, by which the French civil law, and the English criminal law, are made the rules of decision : if the latter, composed of the English criminal common and statute law, could not be altered or suspended, without violating the authority of that statute, so neither could the former, composed, in part, of the edicts and ordinances of the King of the French, be altered or suspended, without a similar violation. New laws are not made without interfering, more or less, with those which already exist, and a Legislature established, according to this construction of the statute in question, would be an object of contempt, without answering any purpose of utility whatever. It is to be observed, also, that this construction is given to a statute, the object of which was to provide a remedy for evils of the greatest magnitude, which could only be expected from a Government armed with unusual powers. The suspended Legislature, or at least, one of its branches, had virtually abdicated its functions, and rebellion had raised its standard, and threatened destruction to the existing Government. It was to meet and ward off evils, such as these, that the statute now under consideration was passed.

(*a*) Vide 14 Geo, III. c 83, § 11. Prov. Ord. 27 Geo. III. c. 1. and 29 Geo. III. c. 3. § 7.

(*b*) Vide 1. Jon. 339. 10 Mod. 115. Plowd. 504. 1. Rep. 47.

In the construction of such a statute, if doubt existed as to the meaning of any of its terms, it would be the duty of the Court, according to one of the established rules of construction, so to interpret them, as to suppress the mischief, and advance the remedy provided by the Legislature; whereas, if we were to adopt the construction contended for, we should disregard both mischief and remedy, and prefer an unreasonable construction destructive, of the statute, to one perfectly reasonable, calculated to give it effect, and reconcile all its parts with each other. We should also contravene a maxim of Lord Bacon, onthis subject, who says, "words in a Statute may be taken "*to a foreign, but never to an unreasonable, an impertinent, or a repugnant intent.*" The construction which we maintain is, also, strongly confirmed by the policy which has dictated similar provisions, in other Statutes in *pari materia*. I refer, particularly, to the Statutes above quoted—7 & 8 W. 4, c. 22, § 9. 6 Geo. 4, c. 114, §. 49, and 3 & 4 Will. 4. c. 56. It was the object of these provisions, to declare and enforce the restraint, under which colonial legislatures were to exercise their dependent authority: the sense in which the words any "Act of Parliament" with which these legislatures are interdicted from any interference, are understood, in these statutes, may, with great propriety, be referred to, in determining the sense in which the same words are to be understood, in the statute now under discussion. Now, in these statutes, the words any "law," and any "Act of Parliament" include, not Acts of Parliament transplanted into, and making part of the general body of the laws, in any colony, but such acts, only, as relate to and make mention of the colonies.—A sure and sound exposition of the words any "Act of Parliament" is thus obtained, from the legislature itself, by which all these acts have been passed; and, in adopting this exposition, on the present occasion, we run no hazard of falling into error, as to the intention of the Imperial Parliament, in the use of the same words, in the statute, 1 Victoria, c. 9.

I cannot, however, pass over this ground of construction, without observing, that as respects the subject in hand, this construction is further confirmed, by the stastute 14 Geo. 3, c. 83, already quoted, by which, on the permanent establishment of the criminal law of England in this Province, it was expressly subjected to such alterations, as the colonial legislature, constituted by that act, might think proper to make in it. Besides the expediency and fitness of confiding such a power to the local legislature, with respect to a body of laws, made for another country, and, necessarily, requiring adaptation to the country in which it was introduced, the British Parliament, it is to be presumed, was governed, in this enactment, by its general colonial policy already adverted to. The legislature, to which the power of altering the criminal law is thus given, was constituted, precisely, as the present Provincial Legislature now is. This power having been thus given to the former Legislature, when tranquillity prevailed within the Province, it could never have been intended to withhold it from the latter, at a period of civil commotion and rebellion, when the power of the local Legislature might require enlargement, but could not suffer abridgement, without detriment to the public safety. The power which is now contested, as not belonging to the present Legislature, namely, that of suspending the *Habeas Corpus* law, it must further be observed, would have belonged to the Legislative Council, established under the Act 14 Geo. 3, c. 83, and is incident to the Legislative authority of every English Colonial Legislature. It was exercised by the suspended Legislature during a series of years, as may seen in acts passed by it, annually, between the years 1797 and 1811, (*a*). In countries where the principles of English Government obtain, the exercise of this power, in cases of civil commotion and rebellion, is, frequently, a matter of necessity; and, even in England, where the liberty of the subject is so strongly protected, considerations of expediency have, repeatedly, caused this measure to be resorted to. From the reign of William the 3rd, down to that of George the 3rd, at periods when the public safety seemed to require it, the suspension of the *Habeas Corpus* act has taken place. In suspending the *Habeas Corpus* law, therefore, in the recently convulsed state of this Province, the existing Legislature not only exercised a power, to which it was perfectly competent, but a power which has been sanctioned, by the usage of the parent state, in cases of less urgency.

The construction of the statute, which is now insisted upon, is further confirmed by the consideration of the concluding part of the Proviso, by which it is provided, that the newly constituted Legislature shall not repeal, suspend, or alter "any provision of any act of the Legis- "lature of Lower Canada, as now constituted, repealing "or altering any such act of Parliament." This exception or saving of a certain class of Provincial statutes, from the power of the new Legislature, is made, in connection with the exception or saving of a particular class of acts of Parliament, which immediately precedes it; and to give effect to this part of the proviso, two conditions must concur, 1st. The act to which this exception extends must be an act of Parliament of Great Britain, or of the Parliament of the United Kingdom: and 2dly. This act must have been repealed or altered, by the suspended Legislature.—Now, there are no statutes transplanted into this Province, from the statute book of England, making part of the law of this Province, without having been enacted for the colonies in general or for Canada in particular, which had been repealed or altered, by any act of the Legislature of Lower Canada, as constituted at the time of the enactment of the Proviso, as to which the concluding part of this Proviso could apply: but there were, at that time, important statutes, made expressly for Lower Canada, by the Imperial Parliament, which, under an express authority of that Parliament, to that effect, had been in part repealed and altered, by the suspended Legislature. These statutes also, as in part repealed and altered by the suspended Legislature, are laws, which the most numerous portion of the inhabitants of the Province, that is, the inhabitants of French origin, are desirous of maintaining, in complete integrity; while another portion of the inhabitants, that is, the inhabitants of British origin, would readily dispense with, or alter, and modify some of the provisions contained in them. Here, then, is a class of Provincial statutes, which, it would, naturally, enter into the policy of the Imperial Parliament, to protect against change or innovation, by the newly constituted Legislature, in which the influence of the less numerous portion of theinhabitants might preponderate. The act of Parliament, establishing the constitution of this Province passed in the year 1791, (*c*) and the Act of Parliament commonly called the the Tenures Act, (*d*) are acts of the description now mentioned, both these acts having, under the authority of Parliament, been in part repealed and altered, by the suspended legislature. It is plain, then, from the concluding part of the proviso, that the words any "Act of Parliament" cannot be understood, as importing acts of Parliament, not made for this Province and transplanted into it, but must be understood as importing acts of Parliament, made for the Colonies in general, or Canada in particular. So far as this last class of acts of Parliament are in question, the proviso, on the establishment of the new Colonial Legisla-

(*a*) Vide Prov. Stat. passed annually from 37 Geo. 3, to 51 Geo. III. c. 11 inclusive.

(*c*) Vide Brit: Stat: 31. Geo: III, c. 31.

(*d*) Vide Imp: Stat: 6, Geo: IV, 1. W. 4, c: 20. Prov: Stat: 9, Geo: IV, c: 59.

ture, must be understood, *ex majore et abundanti cautela*, in the use of the words any "Act of Parliament," to have renewed and repeated the restraint imposed on colonial legislation, by the Acts 7 & 8 Will. III. cap. 22. Sec. 9.—6 Geo. IV. c. 114. Sec. 49, and 3 & 4 W. IV. c. 59, 56. already quoted; while the concluding part of the proviso, from special considerations, protects against repeal or alteration, the class of Provincial Statutes, of which mention has just been made. In adopting, therefore, the construction, which the Court puts on the Statute in question, the principal test of a sound and good construction is found, in the circumstance of its reconciling the proviso with the purview or body of the statute, and the several clauses and parts of the statute, as well as the particular parts of the proviso, with each other; thus giving full and entire effect to the whole statute, according to the intention of the legislature, and the sense and meaning of its enactments. Although the reasonable and proper interpretation of the statute, as understood by the Court, is thus established, *ex visceribus actus*, without the aid of extrinsic circumstances, I may, perhaps, be allowed, so far to refer to the debates in the House of Commons, in relation to this statute, in its progress through that House, portions of which have been cited in the argument of this case, as to observe, that these debates, as reported, seem to confirm the construction which has been put on the concluding part of the proviso; inasmuch as the protection of the Tenures Act, in particular, as altered and amended by the suspended Legislature, (*a*) against further alteration by the newly constituted Legislature, appears to have furnished the immediate motive for that part of the proviso. On the grounds now stated, the Court can entertain no doubt, that the first reason, which has been assigned, for the supposed invalidity of the ordinance, namely, want of power in the present Provincial Legislature, to suspend the Statute 31 Charles II. c. 2, is without any foundation whatever.

The second reason, urged against the validity of the ordinance, is derived from the fact, that a proclamation was issued, for convening the Special Council on the 9th November, and that the ordinance was passed on the 8th of that month. It is to be observed, that the act, under which the present Legislature is constituted, prescribes no form in which the Special Council is to be convened, nor does it require any specific interval of time to elapse, between the notice of a meeting, and the actual meeting of the Council. The third section enacts "that it shall be lawful for the Governor, with the advice and consent of the majority of the councillors present at a meeting or meetings, to be for that purpose, from time to time, convened by the Governor, to make laws, &c." The manner of convening the Special Council is, therefore, left entirely to the discretion of the Governor. The ordinance which is objected to purports, upon the face of it, to have been enacted by the Governor "with the advice and consent of the Special Council for the affairs of the Province, constituted and assembled, by virtue of an act of the Parliament of the United Kingdom of Great Britain and Ireland, passed in the first year of the reign of Her present Majesty, intituled, "an act to make temporary provision for the government of Lower Canada." The Proclamation of the 9th Nov. is offered as presumptive evidence, that there was no Special Council convened on the 8th. But this is an averment against the truth of what is stated in the ordinance, by the legislature itself, and cannot, therefore, be received. (*b*) Acts of the Legislature are records of the highest authenticity and authority, affording the most absolute proof (*c*). They admit, therefore, of no contradiction, or proof to impeach the truth of what is expressed in them. This Court cannot, therefore, entertain such a ground, for impeaching the validity of the ordinance.

The third reason urged against the validity of the ordinance is, that the Special Council has not been appointed by Her Majesty.

By the 2d section of the act 1 Victoria, ch. 9, Her Majesty may *appoint*, or may *authorize* the *Governor* to appoint the Special Councillors, who are to compose the Special Council. It is not, therefore, necessary, under this act, that the *immediate* appointment of Special Councillors should proceed from Her Majesty.

The grounds on which the validity of the ordinance has been impeached being disposed of, we come now to the second general ground, on which the applicant's right to the writ of *Habeas Corpus* has been urged. This ground is derived from the first section of the ordinance passed on the 8th November, by which it is enacted "That no Judge or "Justice of the Peace shall hail or try any person or persons committed as mentioned in the ordinance, without an order from the Governor, &c." It has been contended that the word "Judge," in this ordinance does not comprehend this Court, and, that therefore, no restraint has been laid on *its* power to bail the prisoner.—This point was raised, and determined by the Court of King's Bench, in England, nearly 150 years ago, which determination has since continued to be law there, and therefore, very little need be said on this part of the subject before us. The words of the ordinance now referred to, have been copied from the English statutes, by which the *Habeas Corpus* Act has been at different periods suspended, in England. The same interpretation of these words, as now contended for, was urged in the case of the *King vs. the Earl of Torrey* and others in the reign of Will. III. (*c*) and was then held to be erroneous, it being determined, that the words in question included the Court of King's Bench, and restrained that Court from bailing the prisoners, charged with the offences mentioned in the statute suspending the *Habeas Corpus* Act.—This decision has since been acted upon as law, from that period to the present, as may be ascertained by referring to the cases which have since occurred. In the case of the *King* vs. *Despard*, which was cited by the prisoner's counsel for the purpose of establishing a different proposition, no question was raised on this point, it being taken for granted that the Court had no power to bail the prisoner.

The third and last ground, on which the Court is called upon, to issue this Writ of *Habeas Corpus* is, that there is no discretion in the Court, to grant or refuse it, and that it must issue, as of course, even though, after it has been issued and returned, the prisoner must be remanded.

This propositition, if true, would not be consistent with the general wisdom of the law, which does not require acts of authority to be performed, which can be of no use, to the party who solicits them, and would be perfectly nugatory. But it is, we think, erroneous. It is, altogether, within the discretion of this Court, to grant or refuse a Writ of *Habeas Corpus*; and convinced as we are, that if the Writ were issued and returned, we must necessarily remand the prisoner, on the grounds which have been stated, our discretion would be ill exercised, if we were to issue it. The case of the King vs. Despard was referred to, in support of this ground, but no such point was agitated in that case. The authority which gave occasion, for a time, to the supposition, that a Writ of *Habeas Corpus* was to be issued, as of course, was that of the King vs. Flower, (*d*) in which a hasty *dictum* fell from Lord Kenyon, that was supposed to warrant this proposition. But this point, afterwards, in 1820, came under consideration of the Court of King's Bench, in the case of the King vs. Hobhouse, (*e*) and the *dictum* of Lord Kenyon, was then held to be unfounded in law. On the ground of authority, therefore, as well as of reason,

(*a*) Vide Prov: Stat: 9. Geo: IV. c. 77.

(*b*) Vide Co. L. 260. a. 6 Com. Dig. v. Record E. p. 170.

(*c*) 1 Gilb. ev. p. 11. 1 St. p. 2. p. 161. 1. Ph. on vid. 214.

(*c*) Vide 8 Mod. p. 98 and Rex. vs. Bernardi in notis, Holt's rep. p. 84. 1 Salk, p. 10.—Rex vs. Despard, 7 T.R. p. 736.

(*d*) 27 Vol. State Trials p. 1022. 8. T. R. 314.

(*e*) 8 B. & A. 420.

we are of opinion that the Writ of *Habeas Corpus* ought not to be granted, as of course, inasmuch as if it were issued, this Court, on the application which has been made for it, would be without power to bail or discharge the prisoner.

BOWEN, *Justice.*

The peculiar circumstances under which this application is made, give to it more than the ordinary share of interest which attaches to every question affecting the liberty of the subject. This application for a Writ of *Habeas Corpus* is founded upon the alledged invalidity of the Ordinances of His Excellency Sir John Colborne, and the Special Council appointed for the Province, but more particularly of the Ordinance of the 8th November, 1838. 2. Victoria—ch. 4. The first clause, however, of that Ordinance, if it be law, affords a complete and perfect answer to the present application, and would enable the Court briefly to dispose of it; but in a matter of this importance, it is fitting to go more at length into the consideration of the subject, which is one of infinite delicacy, as tending to involve the constitutionality of a Legislative Act.

The Imperial Statute 1 Victoria, ch. 9. which suspends the powers of the Provincial Legislature of Lower Canada, and makes temporary provision for the government thereof, authorises the Governor and the Special Council to make such Laws or Ordinances "for the "peace, welfare, and good government of the Province "of Lower Canada" as the Legislature (as then constituted) was empowered to make—and it declares, that all laws or ordinances so made, subject to the provisions in the said act contained, for *disallowance* thereof *by Her Majesty*, "shall have the *like force and effect* as laws "*passed before the passing of the act*, by the Legislative "Council and Assembly and assented to by Her Majesty, "or in her name, by the Governor of the said Province." Then follow several provisoes, the last of which is as follows:—"Nor shall it be lawful, by any such Law or "Ordinance, to repeal, suspend, or alter any provision of "any Act of the Parliament of *Great Britain*, or of the "Parliament of the *United Kingdom*, or of any Act of "the Legislature of Lower Canada as now constituted, "repealing or altering any such Act of Parliament."

The Court is here called *to put a legal construction* upon this Statute, and to ascertain the true intent and meaning of the restriction contained in the said proviso. It cannot for an instant be presumed, that the Imperial Parliament, having seen fit to *suspend* the powers of the then Colonial Legislature, and to substitute, during that suspension, another and differently constituted Legislative body, with power to make laws or ordinances for the peace, welfare, and good government of the Province, words borrowed from the Constitutional Acts 14, Geo. 3, c. 83, and 31 Geo. 3, c. 31, could have contemplated the annihilation of the very powers thereby created, powers extraordinary in themselves, but arising from extraordinary circumstances, and the acknowledged necessity felt for such suspension.

This Act, like all other acts of Parliament, must be so construed, one part of it with the other, that the whole may, if possible, stand, *ut res magis valeat quam pereat*, and to give to it the effect for which it appears to have been framed.

"Every Statute ought to be expounded, not according "to the letter, but according to the intent." (a)

"Every Statute ought to be construed according to the "intent of the Parliament, and, therefore, if a corporation "be misnamed, if it appears that it was intended, it is "sufficient. (b)

Again—"Such exposition of a Statute ought to be "*favoured*, as hinders the Statute from being *eluded*." (c)

"The ground and cause of making a statute explain the intent." (d)

Under the authority of the statute 1 Victoria, ch. 9, divers ordinances have been recently enacted by the Governor and Special Council, and amongst others, one bearing date the 8th November, 1838, 2 Victoria, ch. 4, intituled, "An Ordinance to authorise the apprehension "and detention of persons charged with High Treason, "Suspicion of High Treason, Misprision of High Trea"son, and Treasonable Practices, and to suspend for a "limited time, as to such persons, a certain ordinance "therein mentioned, and for other purposes."

The prisoner's Counsel asserts the *absolute nullity* of this Ordinance, and contends that the Governor and Special Council had no authority to make such a law, because it purports to suspend the provisions of the Act of Parliament of Great Britain 14 Geo. 3, c. 83, which introduced into Canada the Criminal law of England, and the *Habeas Corpus* Act 31 Charles 2, c. 2, one of the principal features of that law.

If it can be shewn that the Criminal law of England was not introduced into Canada by the 14 Geo. 3, and that the 31 Charles 2, forms no part of the Criminal law, and never was in force in the Province, then the argument of the prisoner's Counsel, in this particular, is wholly fallacious.

No principle in law is better understood, than that the Sovereign, by the effect of conquest, carries with him into a newly acquired territory the criminal code of his own kingdom, for neither he or his subjects know, and therefore, cannot be held to obey any other code of criminal law. The civil law, indeed, of the conquered inhabitants remains, until altered by the will of the Sovereign *duly declared*. Canada having been conquered by the arms of His Britannic Majesty in 1759-60, the criminal law of England, by the effect of such conquest, and of the Royal Proclamation of 7th October, 1763, *then* became the criminal law of Canada—it was not introduced by the British Statute 14 Geo. 3, ch. 83, the principal object of that Statute was to *restore* and to secure to the inhabitants of the newly acquired country, not only the free exercise of their religion, but also their ancient laws, usages and customs with respect to real property and civil rights, and to exclude all criminal modes of proceeding which might have obtained in the Province prior to the year 1764. That the criminal law of England was not introduced into Canada by that Statute is manifest from the words of the Statute itself in the 11th section:—

"And whereas the certainty and lenity of the crimi"nal law of England and the benefits and advantages "resulting from the use of it, have been sensibly felt by "the inhabitants from an experience of *more than nine* "*years, during which* it has been *uniformly* administered, "be it therefore enacted, &c. that the same shall *con*"*tinue* to be administered and shall be observed as Law "in the Province of Quebec, as well in the description "and quality of offence, as in the method of prosecution "and trial, and the punishment and forfeitures thereby "inflicted, to the exclusion of every other rule of cri"minal law or mode of proceeding therein, which did "or might prevail in the said Province before the year "of our Lord 1764, any thing in this Act to the contrary "thereof in any respect notwithstanding;—subject "nevertheless, to such *alterations* and amendments as "the Governor, Lieutenant Governor or Commander in "Chief for the time being, by and with the advice and "consent of the Legislative Council of the said Pro"vince hereafter to be appointed, shall from time to "time cause to be made therein in manner herein "after described."

(a) Rol. 318. Bl. Com. 353, 363.
(b) R. 10. Co. 57,-6.
(c) 2. Rol. 217.
(d) Bl. Com. 178. Cömyn's Dig. Parliament R. 10, 11, 28.

If, therefore, it be true, that the Criminal Law of England was introduced into Canada, not by the 14th Geo. 3—but by conquest and the Royal Proclamation, then the Proviso of 1. Victoria ch. 9, cannot be said to limit or restrict the Governor and Special Council, from repealing, suspending, or altering any of the provisions of that law by all such enactments as tend to promote either the peace, welfare, or good government of the Province.

But if it *were true*, that the Criminal law of England had been introduced by the 14th Geo. 3, c. 83, and that the Governor and Special Council are prohibited from suspending the Acts of the Parliament of "*Great Britain*," or of the "*United Kingdom*," this must be understood with reference only to such Acts as were especially enacted for the Colonies in general or for Lower Canada in particular, and which the Colonial Legislature, as such, had not the power to alter or affect;—The 14th Geo. 3, however gave, expressly, to the Colonial Legislature, the power of altering and amending the Criminal Law, and as the statute must be law in all its provisions, so it is a provision of that law, that the criminal code MAY BE ALTERED and amended, and consequently, the *Habeas Corpus*, either at common law, or under the Provincial Ordinance of 1784, which is nearly a transcript of 31. Chs. 2, and may be aptly called the Canadian *Habeas Corpus* act, may be again suspended, as was heretofore done in the year 1797, and subsequently, by the then Provincial Legislature, under the powers contained in the British statute of 1791.

It has also been contended, that although the Governor and Special Council might suspend the Provincial Ordinance of 1784, they could not suspend the 31. Car. 2. c. 2. that being a Statute of the Kingdom of England, forming part of the *Criminal Code* of that country, and *as such introduced into Canada*.

In my opinion, the Statute of 31. Car. 2. c. 2. forms no part of the Criminal Code of England, and was not ever considered as law in Canada, unless indeed, by the mere cursory reference to the title of it, to be found in the last clause of the Provincial Statute 52. Geo. 3. ch. 8. passed in 1812. The Statute of Charles is not a criminal act—it creates no new offence, it imposes no new punishment, it was made to ensure a more ready obedience to the Common Law writ of *Habeas Corpus*, by imposing certain penalties and civil disabilities against persons who, in vacation time, might refuse to grant the writ, or yield obedience thereto. The 10th and 11th clauses of the Statute shew, that it did not extend to the Colonies, that the writ might be directed and run into any County Palatine, the Cinque Ports, or other privileged places *within the Kingdom of England*, dominion of Wales, or Town of Berwick upon Tweed, and the Islands of Jersey or Guernsey, and might be obtained as well out of the High Court of Chancery, or Court of Exchequer, as out of the Court of King's Bench or Common Pleas, or either of them; clearly shewing that the *Judges* and *Courts of Westminster Hall* were those only contemplated by that Statute. That such was universally understood to be the case, ten years after the passing of the Statute 14. Geo. 3. is manifest, as well from the debates in Parliament on the passing of that Act, the history of that period, (a) the case of Pierre Du Calvet and others—imprisoned by General Haldimand in 1780, and from the Memorial to the King—and the investigation into the causes of the removal of Peter Livius, Esquire, Chief Justice of the Province, by General Carleton, of the 1st May, 1778, as from the Provincial Ordinance of 1784, the Canadian *Habeas Corpus* Act, the preamble of which is as follows:—"Whereas it has graciously pleased the King's Most Excellent Majesty, "in his instructions to His Excellency, the Captain "General and Governor in Chief of this Province, to commit to the Legislature thereof, the consideration of "making due provision for the security of the personal "liberty of his subjects therein, and to suggest, that for "that purpose, the Legislature *could not follow* a better "example than that which the common law of England "had set, in the provision made for a writ of *Habeas* "*Corpus*, which is the right of every British subject in "the Kingdom." And it then goes on to enact, almost in the very words of the statute, the same provisions as those contained in the English *Habeas Corpus* Act 31. Chs. II. Now, if this last mentioned statute had at that time been considered as part of the Criminal Law introduced into Canada, either by the effect of the conquest, or by the 14 Geo. III, no such instructions could or would have been given by His Majesty, or any necessity have existed for making that ordinance. And this again tends to shew, that neither the 31 Car. 2, or the Provincial ordinance 24 Geo. 3, constitute, properly speaking, any part of the Criminal Code, but are each of them laws in aid of the prerogative or common law writ of *Habeas Corpus ad subjiciendum* to be issued in the cases of persons charged with some criminal offence, and who may, by law, be entitled to be admitted to bail, or be discharged from custody.

But then it is said, that by the Provincial statute 52, Geo. 3, ch. 8, passed in 1812, the statute 31. Car. II, is referred to as law in Canada—it may not therefore be out of place here to consider what are the purviews of that statute. It is entituled—"An Act to secure the liberty "of the subject, by extending the powers of His Majesty's "Courts of Law in this Province as to writs of *Habeas Cor-* "*pus ad subjiciendum*, and as to the means of enforcing "obedience to such writ." This statute contains *seven clauses*, of which the first six relate, exclusively, to the cases of persons confined or restrained of their liberty, *otherwise than for some criminal or supposed* criminal matter, and the several Judges of the Courts of law are thereby authorised *in vacation*, to issue such writs *ad subjiciendum* returnable immediate, and they are enabled to award process of contempt against persons not paying obedience to such writs.

It also authorises the Judges and Courts, if in their opinion obedience thereto cannot be conveniently paid in vacation, to make the writ returnable in term—and, if applied for in term, may, at the discretion of the Judge, be made returnable, on a day certain, in vacation. Judges are, likewise, empowered to examine into the truth of the facts set forth in the return, and into the cause of confinement and restraint: these are among the principal objects of that Statute, and by the seventh clause it is enacted, that the several provisions of that Act, touching the making Writs of *Habeas Corpus*, issuing *in time of vacation* returnable in the several Courts of King's Bench, or for making such Writs awarded in *term time* returnable in vacation, as the case may respectively happen, and also for awarding process of contempt, in time of vacation, against persons neglecting or refusing to make return of such Writs, shall extend to all Writs of *Habeas Corpus* awarded in pursuance of a certain Act passed in the thirty-first year of King Charles the Second, intituled, "An Act for the "better securing the liberty of the subject, and for the "prevention of imprisonment beyond the seas." And of a certain Ordinance of the late Province of Quebec, made and passed in the twenty-fourth year of the reign of King George the Third, intituled, "An Ordinance "for securing the liberty of the subject, and for the "prevention of imprisonment out of this Province," or either of them, in as ample and beneficial a manner as if such Writs, and the said cases arising thereon had been herein before specially named and provided for.

If then, prior to the year 1812, the English *Habeas Corpus* Act was not law in Canada, and I have attempted to shew it was not, no lawyer will be found to contend, that the mere reference to the title of that Act had

(a) See Chalmer's Annals.

the effect of introducing it, or making it lawful for the Judge to issue Writs under it, to the exclusion of the Provincial Ordinance of 1784, which, being nearly a transcript of the Statute of Charles, may have given rise to the casual mention of it as found in the clause in question. Yet, if it were law in Canada, still it does not fall under the words of the proviso, for it is neither a Statute of "Great Britain," or of the "United Kingdom," but is a Statute of the *Kingdom of England*, local in its nature, and never was law in Canada, nor is the slightest allusion made to it in the Provincial Statute subsequently passed in 1821, the 1 Geo. 4, ch. 8, wherein more ample powers are conferred upon the Judges to grant, issue, and determine upon Writs of *Habeas Corpus ad subjiciendum* in vacation time, under the Ordinance of 1784, and repealing certain provisions of the Judicature Act of 1793.

The effect of a suspension of the *Habeas Corpus* Act is not in itself to enable any one to imprison suspected persons, without giving any reason for so doing, but it prevents persons who are committed, upon certain charges, from being bailed, tried, or discharged for the time of the suspension, except under the provisions of the suspending Act, leaving, however, to the Magistrate, or person committing, *all the responsibility* attending an illegal imprisonment.

It is the happiness of our Constitution, (as *Blackstone* well expresses it,) that it is not left to the Executive power to determine, when the danger of the State is so great as to render this measure, (confinement of the person in gaol) expedient; for it is the Parliament only or *Legislative power* that, *whenever it sees proper*, can authorise the Crown by suspending the *Habeas Corpus* Act for a short and limited time, to *imprison suspected persons* without *giving any reasons for so doing*. In cases of *extreme emergency*, the nation parts with its liberty *for a while*, in order to preserve it for ever. (a)

The Ordinance of the 8th November is but a transcript of the Ordinance of the 23d April last, 1 Victoria ch. 2, which ordinance came under the consideration of the legal authorities in England, and even of the Imperial Parliament, in the discussion which took place respecting the ordinance relating to the banishment of certain persons to Bermuda, and had any doubts been entertained of its legality, would have been disallowed with the Earl of Durham's ordinance in that behalf.

The illegality of this ordinance of the 8th November is likewise on the ground that His Excellency could not legally anticipate the period fixed by his proclamation for the meeting of the Special Council and summoned it to meet at the city of Montreal on the 9th day of November, any law passed by the Governor and Council on the 8th, must be utterly null and void.—To meet this objection, it is barely necessary to consult the Imperial Statute 1 Victoria ch. 9, which does not impose, upon the Governor, the necessity of issuing any proclamation to summon the Special Council, and if from courtesy, the persons residing at a distance from the present seat of Government, the formality of a proclamation, instead of a circular letter, or other mode of calling them from home has been observed, it can in no wise vitiate the proceedings. The Council are not by law allowed to initiate bills, but to give or withold their assent to such bills as the Governor may from time to time think right to submit to their consideration. It is matter of notoriety, that Sir John Colborne was obliged to take the field on the 9th November, against persons who were then in arms attempting to subvert Her Majesty's Government in the Province, and thence the necessity of submitting to the Special Council on the 8th the ordinance in question.

But to revert to the case of the prisoner, *John Teed*:—by his own shewing it appears he is detained in the common gaol at Quebec, charged with suspicion of high treason, his commitment bears date in November 1838.

By the first clause of the ordinance in question the right is taken away absolutely from persons so detained to have a writ of Habeas Corpus, whether claimed by them as a prerogative writ issuing *at common law*, or in *virtue of any statute* "for the better securing the liberty of the subject," made before the passing of the ordinance, the words of it being, that all persons who are or shall be in prison, or otherwise in custody in this Province, at or upon the day of making and passing thereof, *or after*, by any warrant for any of the foregoing offences, may be detained in safe custody without bail or mainprize during the continuance of such ordinance, and no Judge or Justice of the Peace shall, *during such continuance*, bail or try any person or persons so committed, without an order from the Governor with the advice and consent of the Executive Council of the Province.

The suspension of the ordinance 24 Geo. III. ch. 1, contained in the second clause, was by no means necessary for the purpose of depriving persons so confined from the benefit of a writ of *Habeas Corpus*—the chief object of that clause appears to have been to fix and limit the time of the suspension to the first of June next, and likewise to prevent harassing suits at law, from being brought against the ministers and officers of justice, who might refuse to grant writs of *Habeas Corpus*, under the enactments of the first clause.

It has been argued, that this Court is bound to issue the writ of *Habeas Corpus*, and to cause the prisoner to be brought before it, and to examine into the grounds of the commitment, even tho' it should not have the power to liberate, try, or admit to bail, persons so accused. The following authorities will suffice to shew the opinions of the Courts in England and of the United States on this point.

It is not compulsory on the Court or Judge to grant the writ of *Habeas Corpus*.—Lord Kenyon indeed once said in *Flower's* case, (a) "We were bound to grant this *Habeas* "*Corpus*, but having seen the return (committed by the "House of Lords,) we are bound to remand the defendant "to prison." But this *supposed obligation* to issue a *Habeas Corpus* thus ineffectually, can only exist where the *commitment* is so *general*, that the Court *cannot know* its real *occasion* from the *terms* in which it is *worded*, "for the Courts are not compelled to award it without "some *reasonable* ground is shewn for their interference. "If it were otherwise, a traitor, a felon under sentence "of death, a soldier or mariner in the King's service, a "wife, a relative, or a domestic confined for insanity "might obtain a temporary enlargement by suing out "a Habeas Corpus, though sure to be remanded as soon "as brought up on its return." (b)

Sir Edward Coke, Chief Justice, in 13 Jac. I. did not scruple to deny a *Habeas Corpus* to one confined by the Court of Admiralty for piracy—there appearing, *upon his own shewing*, *sufficient* grounds to confine him. (c)

In the case of the *King vs. Hobhouse*, who was committed by the House of Commons for a breach of privilege, Hobhouse applied to the Court of King's Bench for a writ of Habeas Corpus, and in consequence of Lord Kenyon's dictum, which has before been noticed, it was granted, but *Abbot*, Chief Justice, in delivering the judgement of the Court, said, "The Court has power to grant a writ of *Habeas* "*Corpus*, but whether it be granted *under the Common* "*Law Jurisdiction*, or under the Statute, there ought "always to be a proper ground laid before the Court to "justify it in granting the Writ. *It is not to be granted* "*as a matter of course* and at all events. The party "seeking to be brought up by *Habeas Corpus* must

(a) 1. Bl. Com. 136. Coleridge's Ed,

(a) 8. T. R. 324.
(b) 1. Chitty's Crim Law, 128. 14. East, 110, 111. 3. Bl. Com. 132.
(c) 3. Bl. Com. 132.

" lay such a case, on affidavit, before the Court, " as will be sufficient to regulate the discretion of the " Court in that respect.—The Court will not, in the " first instance, grant a *Habeas Corpus* when they see " that in the result they must evidently remand the " party. The Court, in this instance, ordered the Writ " to issue upon a suggestion that the Court was bound " to grant it, and certainly a most respectable authority " (Lord Kenyon) was cited for that purpose, and " the Court being anxious in a case where the " liberty of the subject might be supposed to be " effected, thought it right to grant the Writ that *the* " *question might be finally settled.* That decision, how- " ever, which could not but have been anticipated, the " Court is now bound to pronounce, namely, that the " *Habeas Corpus* does not lie in the first instance, but " must be left to the discretion of the Court, when " guided by grounds stated on affidavit. There are not " wanting authorities for this decision. In the case of " the King vs. Schriver, (*d*) and in the case of the " three Spanish Sailors, (Sir Wm. Blacks. 1324,) " acting upon this principle the Court said, that they " would not grant the Writ in a case where they saw " that they must remand the party as soon as he was " brought up. The Court is bound to exercise their dis- " cretion, as to the grounds laid before them, for granting " the Writ, and they are not to order it as a matter of " course in the first instance. It is necessary thus to " *remove an error* which seems to have prevailed upon " this subject, that this case may not hereafter be cited " as a precedent. (*e*)

Even in the United States, where, in the petition for the Writ of *Habeas Corpus*, the cause of detention is fully stated, the Court, if satisfied that no relief can be granted to the Petitioner, upon the return of the Writ, will not award it. (*f*)

—A petition was presented by T. Watkins for a *Habeas Corpus*, for the purpose of enquiring into the legality of his confinement in the gaol of the county of Washington, by virtue of a judgment of the Circuit Court of the United States of the district of Columbia, rendered in a criminal prosecution instituted against him in that Court. Chief Justice Marshall said, " This application is made " to a Court which has no jurisdiction in criminal cases, " which could not revise this judgment, could not re- " verse or affirm it, were the record brought up directly " by Writ of Error. The power to award writs of *Ha-* " *beas Corpus* is conferred expressly upon this Court by " the 14th Section of the Judicial Act, and has been " repeatedly exercised. No doubt exists respecting the " *power*, the question is, whether this be a case in which " it ought to be exercised. *The cause of imprisonment is* " *shewn* as fully by the petitioner, as it could " appear on the return of the writ, consequently the " writ *ought not to be awarded*, if the Court is *satisfied* " that the prisoner would be remanded to prison."

Sir *William Blackstone*, after analysing the *Habeas Corpus* Act, observes,—" This is the substance of that " great and important Statute, *which extends only to the* " *case of* commitments for such criminal charge *as can* " *produce no inconvenience to public justice*, by a *tempo-* " *rary enlargement of the prisoner.* (*g*)

A motion to bring up a Defendant in custody of a messenger, under order of the Secretary of State, was refused, on the ground of public inconvenience. (*h*)

" The Writ of *Habeas Corpus* is granted on motion, " because it cannot be had of course, and there is there- " fore no necessity to grant it.—The Court ought to be " satisfied that the party hath a probable cause to be " delivered." (*i*)

" Writs not ministerially directed, sometimes called " Prerogative Writs, (because they are supposed to issue " on the part of the King,) such as Mandamus, Prohibi- " tion, *Habeas Corpus* and *Certiorari*, upon a proper " case, may issue to every dominion of the Crown of " England. But notwithstanding the power which the " Court have to grant these Writs, yet where they can- " not judge of the cause, or give relief on it, they " would not think proper to interfere. (*k*)

" Out of many cases, I have selected nine where the " commitments were for *treasonable practices generally*, " and where Lord *Holt* and the rest of the Court were bound by their oaths to *discharge* the defendants, *if the* " *commitments were illegal*, and yet the Court did not " discharge them." (*l*.) " *If there be doubt* in the " case, and the commitment is *only* for treasonable prac- " tices, the *Habeas Corpus* Act, AT TIMES WHEN IT IS " IN FORCE, would entitle the party to be bailed. (*m*) " The arguments against commitments on suspicion of " treason, are at least as strong, for *mere suspicion* may " *not* even *amount to treasonable practices*, and yet they " are admitted on all hands to be legal. (*n*)

As showing the intention of the House of Commons in the year 1774 upon the question whether the *Habeas Corpus* act was introduced into Canada by the 14. Geo. III. c. 83. the following proceeding of that body may be referred to " when all the clauses were rejected or agreed to and the Speaker was reading over the bill *Mr. Dempster* moved that a clause should be inserted " that " the Canadians should, on claiming it, have a right to " the benefit of the *Habeas Corpus* act" a division was the consequence of this motion, when the numbers were 76 noes, 21 ayes. Mr. Mazeres the first Attorney General of the Province, on his examination before the House of Commons in committee upon the same act, adverting to the use of *Lettres de cachet* said " I cannot help " thinking that if they were used, the subjects against " whom they were employed would be without any " legal remedy against them. For if a motion was " made on the behalf of a person imprisoned by one of " them in the Court of King's Bench in the Province " for a writ of *Habeas Corpus* or any other relief against " such imprisonment, the judges would, probably, think " themselves bound to declare, that as this was a ques- " tion concerning personal liberty, which is a civil " right, and in all *matters of property* and *civil rights* " they are directed by *this act* of Parliament to have " resort to the laws of Canada and not to the laws of " England, they could not award the writ of *Habeas* " *Corpus* or any other remedy prescribed by the Eng- " lish law, but could only use such methods for the " relief of the prisoner as were used by the French " Courts of justice in the Province during the time of " the French Government, for the relief of a person im- " prisoned by the intendant or Governor, by a *lettre de* " *cachet* signed by the King of France. And such relief " would, I imagine, be found to be none at all. There- " fore, if it is intended that the King's subjects in Ca- " nada should have the benefit of the *Habeas Corpus* " act, I apprehend it would be most advisable, in order " to remove all doubts and difficulties upon the subject, " to insert a short clause for that purpose in this act." By the foregoing citation I by no means mean to express my own opinion that a subject so imprisoned would not have been entitled to have, from the Court of King's Bench, in term, a writ of Habeas Corpus, at common law,

(*d*) 2 Burr 767.
(*e*) 2 Chitty's Rep. 207. K. vs. John Cam Hobhouse.
(*f*) Ex parte—Tobias Watkins. 3 Peter's Rep. p. 201.
(*g*) 2. Bl. Com. p. 137.
(*h*) 13. East's Rep. p. 457.

(*i*) Per Lord Ch. J. Vaughan in Bushel's case—2. Jon. p. 13. cited by Sir Wm. Blacks. in 3. Com. 132.
(*k*) Per Lord Mansfield. *Rex. vs Cowle.* 2. Burr. 855. 6.
(*l*) Despard's case, 7. Ter. Rep. 743.
(*m*) Ib. p. 740.
(*n*) Despard's case, 7 Ter. Rep. p. 740. 741

but merely that he could have had no such remedy in vacation under the statute of Charles II. As a part of the history of that period it may be observed, that shortly after the passing of the act of 1774, the memorial of Mr. *Livius* to His Majesty, bearing date the 23d September, 1778, may be referred to. He was amoved from his office of Chief Justice of the Province of Quebec, by Sir Guy Carleton, for two motions made by him in the Legislative Council, the first of the 8th April, 1778, That His Excellency the Governor be humbly requested to communicate such Royal instructions as he might have received relative to the legislation of the Province, the second of the 23d of the same month, relating to the appointment by His Excellency of five persons, (calling the same a Privy Council) and of their having taken upon themselves to act as a council for the affairs of the Province of Quebec in opposition to the Quebec Act. In complaining of his amoval from office, Mr. Livius makes mention of the Quebec Act, 14 Geo. III, c. 83, as having "abolished the trial by jury in all "civil causes and of no provision having been made for "the security of personal liberty; to take away these "pretences for discontent, soon after that act was passed, "His Majesty was graciously pleased by his royal in-"structions to the Governor, to recommend and direct "that very ample satisfaction should be given in both "respects, and that the instructions for that purpose "should be forthwith communicated by the Governor to "the Council. They have never, says Mr. Livius, to "this hour been communicated." The 13th of these instructions is as follows: "Security to personal liberty, "is a fundamental principle of justice in all free govern-"ments, and the making due provision for that purpose "is an object the Legislature of Quebec ought never to "lose sight of; nor can they follow a better example than "that which the common law of this Kingdom hath set "in the provision made for a writ of *Habeas Corpus*, "which is the right of every British subject in this "Kingdom." In the petitions presented to the House of Commons after the passing of the Quebec Act in 1774, the following was constantly prayed for by them, "That "the *Habeas Corpus* Act and the other laws of England "relating to personal liberty, be made a part of the "Constitution."

A decision of the Court of King's Bench, at Quebec, rendered by the Commissioners for executing the office of Chief Justice, during the absence of Mr *Livius*, may also be referred to as shewing the opinion of that tribunal that the Statute of Charles 2nd was not in force. I refer to the case of *Pierre Du Calvet*, who was imprisoned by order of General Haldimand, and remained a prisoner from the 27th Sept. 1780 to 2nd May, 1783, not for any supposed correspondence with the King's enemies, or for any other practices against the welfare of the Province, but for having written an expostulatory letter to the Governor, in a style which he thought too free. He petitioned on the 21st Nov. 1782, for a Writ of *Habeas Corpus*, and his petition though supported by very able Counsel (Mr. Russell) was rejected by the Court, on the ground that the English law of *Habeas Corpus* (meaning I presume, the Statute of Charles II.) was not in force in the Province.

Upon the whole of the case I am of opinion, that the prisoner's application must be over-ruled. That the suspending Ordinance of the 8th November last in no way militates against the provisions of any Act of the Parliament of Great Britain or of the United Kingdom, or of any Act of the Legislature of Lower Canada, repealing or altering any such Act of Parliament, that the Ordinance has been enacted by competent authority, is therefore, a law binding upon all classes of Her Majesty's subjects until the 1st day of June next, unless sooner repealed or disallowed by Her Majesty, and, being made for the public good, it is to be expounded so as to attain its end.

The Habeas Corpus Case.

QUEBEC, 20th November, 1838.

In Chambers:—Before the Honble, Justices PANET and BEDARD.

This day Mr. Aylwin appeared before the Hon. Justices Panet and Bedard, in Chambers, in support of a petition addressed to the first named Judge, for a Writ of Habeas Corpus, by John Teed, a prisoner in the Common Gaol of this District, on suspicion of treason.

WEDNESDAY, 21st Nov.

This day, at 12 o'clock, their honors Messrs. Justices Panet and Bedard gave judgment on Mr. Aylwin's motion, to the following effect. The Judgment was rendered on the Bench, the Inferior Term of the Court of K. B. being then open.

MR. JUSTICE PANET observed that the present petition was made by John Teed, who set forth that he was a prisoner in the Common Gaol of this District, under a warrant signed by Thomas Ainslie Young, Esq. Inspector and Superintendent of Police, accusing the said Teed of being suspected of the crime of High Treason; and demanding a Writ of Habeas Corpus in accordance with the imperial Statute 31st Chs. II. cap. 2. This petition, which has been strongly opposed by the Solicitor General, representing the Crown, gives rise to a number of important questions, discussed on either side with much talent, learning and research. The first point mooted is, whether or not the Imperial Act 31st Chs. II. be law in this Province? To ascertain this, it would suffice to enquire whether this Act formed a part of the English criminal law when it was introduced into this country by the 14th Geo. III cap. 83. It would be very difficult to doubt that it did form part of that law. In proceedings of a criminal nature the first step! to arrest the person accused, and on this the person arrested has the right of appeal to a superior tribunal, in order that, in the form of a Writ of Habeas Corpus, the legality, or otherwise, of his imprisonment may be decided. In England it has been so far considered that the Writ of Habeas Corpus formed part of the Criminal Law, that it has been held that the Courts of Common Pleas and Exchequer had no power to issue it, because their jurisdiction extended only to civil matters. Now, where in the Act of the 14th Geo. III which introduces English criminal law into this Province, is to be found an exclusion of the Writ of Habeas Corpus? I am still more strongly supported in my opinion by the Provincial Legislature having admitted in the 52 Geo. III. cap. 8, that this Writ could issue equally under the Ordinance 24th Geo. III. or the Imperial Act 31st Chs. II. It must, therefore, be admitted that it is impossible not to consider, as it forms part of the English criminal law, that it must also be a component part of our criminal code. The second question which presents itself is, whether the Ordinance cap. IV. lately passed by the Special Council affects the Imperial Act 31st Chs. II.? The answer to this question must be in the negative; the Ordinance does not pretend to do so. If it had so pretended, the Special Council would have exceeded the powers with which it is vested by its Constitutional Act, for that act forbids it to repeal, suspend or change any provision of any act of the Imperial Parliament. The Council then not being empowered to do so directly, cannot do it indirectly. Let it be observed, incidentally, that it is remarkable and highly satisfactory to us, that this construction which we put on the provisions of the Imperial Statute constituting the present Legislature of this country, is in conformity with the expressed opinions of the most eminent legal men in the Imperial Parliament A number of other objections have been made to the legality of the Ordinance of the Special Council, and to the legal composition of the Council itself, but I can see no necessity for discussing these difficult questions at the present moment, seeing that the interpretation which we have put on the Ordinances and Statutes that we consulted, enable us to overcome the difficulty, and firmly convince us that we cannot, without palpable injustice, refuse the petitioner the writ of Habeas Corpus which he demands.

MR. JUSTICE BEDARD said,—However it might be my wish to remain silent on the subject of the present application and on the judgment rendered by my fellow Judge, to whom the petition was addressed, I should consider myself wanting in the duty which I owe to the public if, in a matter so deeply interesting to every one who has the

advantage of being able to call himself a British subject. I did not state the reasons which I have for concurring in the petitioner's prayer for a writ of Habeas Corpus being granted. I have seriously thought of the consequences which some individuals who are more zealous than reflective, may deduce from a difference of opinion between the existing legislative and judicial authorities; and I feel the importance and advantage of their acting in unison. I will go further and say, that if I were called upon as an individual, in a time of turbulency, to make a sacrifice of my own personal rights for the peace and happiness of my country, I might do it; but as a Judge, charged with preserving the integrity of the laws of the Empire; also to assure the most humble individual in society of all the rights with which the law invests him; bound to fulfil these duties by an oath of which I have to render an account before a tribunal infinitely superior to any that is human; persuaded as I am that the safety of the Empire depends upon the administration of the law of the land, and that the moral power of the Empire is in exact proportion to the certainty which every one ought to have that he will receive the protection or chastisement of the law, according as he may be deserving of either the one or the other; I cannot hesitate in giving my opinion on the present question. If I had the slightest doubt, I would give that doubt in favour of the legislative authority, but having none, I am unwilling that the Government under which I live should have to blush, for my sake, at the weakness of one of its Judges. God forbid that hereafter, in speaking of the case of John Teed, it could be said of either of us, who are charged with the administration of justice, what Blackstone said in speaking of the affair of Jenks—"New shifts and devices were made use of to prevent his enlargement by law; the Chief Justice as well as the Chancellor declining to award a writ of Habeas Corpus *ad subjiciendum* in vacation although at last he thought proper to award the usual writs *ad deliberandum*. It is these subterfuges which gave rise to the Act 31st. Chs. II. of which the present petitioner claims the benefit. This Act did not introduce a new custom into England, it was merely a remedy to the subterfuges,—the "new shifts and devices"—which the Judges employed to evade the Common Law which then said and still says,—"no man shall be taken or imprisoned by suggestion, or petition to the King or his Council, unless it be by legal indictment on the process of the Common Law." Now the Common law holds as bailable, suspicion of high treason, which is the cause of commitment of the present petitioner. This "suspicion of high treason" is only a misdemeanor. In virtue alone of the axiom that no man can be imprisoned without a legal cause, the Habeas Corpus prayed for ought to be granted, in consequence of the petitioner being detained for a misdemeanour only, which would entitle him to being liberated, on putting in bail, notwithstanding the Ordinance of the Special Council of the 8th November instant, suspending the Provincial laws relating to the Habeas Corpus. Let us consider the intent of this Ordinance; and admitting, hypothetically, that it has the effect of suspending all laws whatever that relate to the Habeas Corpus, I will ask, with one of the last Commentators on Blackstone, "What is the object of a suspension of the Habeas Corpus Act? Is it to enable any individual whose deranged imagination might cause him to mistake for high treason one of the most legitimate acts in human life, to lay hold of the person of any British subject whatever? No. The rule of the law is a safer thing than the brain, well organized or deranged, of any individual whatever. The Commentator on Blackstone says. "The effect of a suspension of the Habeas Corpus, is not in itself to enable any one to imprison suspected persons without giving any reason for so doing, but it prevents persons who are committed upon certain charges from being bailed, tried or discharged, for the time of the suspension, except under the provisions of the suspending act." With this authority, so replete with sound sense, before us, how can we determine the reasons which the accuser had for forming his suspicions, without granting the writ prayed for, and without the assistance of the depositions taken by the Magistrates. The Magistrate, admitting the suspension of all the law of Habeas Corpus, cannot "imprison suspected persons without giving any reason for so doing." Now, is not the granting of the writ the only means of obtaining the reasons? This reason singly, would be sufficient to convince one of the necessity of granting the writ prayed for. Let us however consult another authority. In looking at the case of the King vs. Despard, in the 7th Term Reports, p. 736, it will be seen that although the 38 Geo. III. cap. 36, suspending the Habeas Corpus Act was in force, the Court ordered that a writ of Habeas Corpus do issue. The prisoner was brought into Court in virtue of that writ, and the Attorney General moved to quash the writ *quia improvide emanarit*. The Court overruled the motion, saying that although it was true the Court could not admit to bail, it did not follow that the writ was illegally issued. In the present case the writ ought therefore to issue, though of course, the Court would, as in the case which I have cited, remand the prisoner if the law required it. But a much more important question has been raised. It is that as to the effect which the Ordinance of the 8th November, suspending the Habeas Corpus, has on that privilege of the subject. It has relation to the present case and we ought to decide it. Is this Ordinance legal as to taking away the right which every British subject possesses, in virtue of the Imperial Act of 1774, of obtaining a writ of Habeas Corpus? I am compelled to say, that it has not the effect of doing away with that right, in the first place, because the Ordinance does not pretend to derogate from the Imperial Act of 1774, and, secondly, because, if the Ordinance had any such pretension it could not sustain it. From this arises and is decided the objection taken by the Solicitor General, for, well founded as that objection may appear, I cannot admit the inference which he draws from an acknowledged maxim. It is true, as he says, that a single Judge, in vacation cannot be a judge of the existing Legislature, but that the present Council cannot be the existing Legislature, as far as the Ordinance suspending the Habeas Corpus goes, I am forced to say that it cannot. The real Legislature here is that meant to be established by the Imperial Act 1st Victoria, cap. 9, entitled, "An Act to make temporary provision for the Government of Lower Canada, &c." It is this law made by the Imperial Parliament which becomes exclusively ours. It is this statute which becomes the sole guide of all legislative as well as judicial authority in the country. And it is to this Act of the 1st Vic., cap. 9, that the judicial authority owes implicit obedience, as emanating from the supreme legislative authority existing in this country. Unless the right of the Imperial Parliament to legislate for us be denied, unless it be said that the Judges of this country are not bound to obey this law, emanating from the supreme legislative power, to which the present local legislature is subordinate, we must judge of the powers and attributes of the Special Council, as we would judge the powers of a Corporation to which the Legislature has confided the power of making laws under certain restrictions and limitations. The assertion of the Officer of the Crown that a Judge in vacation cannot judge the Legislature is true, if the application of this principle be made to the supreme legislative authority, but it cannot be admitted when it is applied to the attributes of a subordinate legislative authority; otherwise, it must be said that, being called upon to give a judgment on two contradictory laws passed by two authorities of which one is subordinate to the other, it would be permitted to choose obedience to the subordinate, in order to disobey the primary authority. I must say it would require very strong authorities to induce me to follow such a course. What would result from a decision in conformity with this doctrine, if the present local Legislature had taxed every pane of glass in every window in every house in this city, (this being contrary to the terms of the act constituting the Council,) under penalty in case of refusal, of perpetual imprisonment without the benefit of Habeas Corpus? The consequence would be that the Judge in vacation could give no remedy for such an oppressive act. In vain might the person aggrieved invoke the authority of the supreme Legislature; he would be answered,—the subordinate local authority has thus willed it, the Judges owe obedience to that authority and must disobey the supreme authority. There cannot be a moment's hesitation in declaring such a doctrine to be monstrous. We may then say, advisedly, that in certain cases a Judge is bound to judge a subordinate legislature, and with Dwarris, p. 630, that as the Judges are obliged to take cognizance of general laws, it appertains to them, equally, to decide whether a law which is submitted to them is or is not a statute. It is in vain to say that the Imperial Legislature has not made sufficient provision for the wants of the country. It is in vain to ask, —if treason conspires, if treason is in arms, if society is

menaced with total ruin, if necessity (that stern law of nature) requires and demands such and such means of protection? Ask the answer from the Imperial Parliament. It is not a question to which the Judges bound by duty to administer the law as it is, can or ought to answer. I will now look into the effect which the Ordinance in question can have on the right of Habeas Corpus. I admit granted that the local legislature, being subordinate to the Imperial Parliament by which it was created, cannot infringe upon any of the provisions of the Act under virtue of which it exists; and that its powers and attributes entirely result from the Imperial Act 1st. Vic. cap. 9.—an act of which every section, every line and every word is imperiously authoritative over the present Special Council and the Courts of law. The third clause of this Act after conferring on the present local legislature, powers on the extent of which, in certain respects, I am not at present required to decide, adds these words "nor shall it be lawful by any such Law or Ordinance to repeal, suspend or alter any provision of any Act of the Parliament of Great Britain or of the Parliament of the United Kingdom, or of any Act of the Legislature of Lower Canada as now constituted, repealing or altering any such Act of Parliament." It would seem that the words "of the Parliament of the United Kingdom," would have been sufficient, but the Legislature to avoid all possibility of doubt, as to its intention, goes back to the time of the Union of England and Ireland. If words were ever manifest and distinct, as to their meaning, those which I have quoted are so. If it be true that when the words of a law are clear and distinct it is to those words that we must attach the most importance, if it be true; as it is said by all the writers, that you must look for the intentions of the Legislator in the expressions which he employs; if again, according to Dwarris (p 660.) "Where the proviso of an Act was directly repugnant to the purview of it," (which certainly is not the case here, as the statutory clause and the proviso are easily reconciliable,) "the proviso should stand and be held a repeal of the purview, because it speaks the last intention of the lawgiver;" it must follow that the present local legislature could not repeal and can in no way suspend or alter the Imperial Act of 1774 nor any portion of that Act which was made expressly for, and is in force in this country. The proviso of the 1st Vic. cap. 9. sec. 3. is an express prohibition to meddle with any portion of the Imperial Act. But, again, one of the provisions of this Act of the Imperial Parliament (14 Geo. III. c. 83) introduces into this country the Criminal Law of England. This provision of the Act which it is not permitted to "alter" introduces as a whole the entire code of English Criminal Jurisprudence; we ought therefore to have the absolute total of the English Criminal Law as it is existed in 1774, and as a matter of course, all statutes bearing upon that code, have the force of law in this country, we ought to have the advantages as well as the disadvantages thereof. Now, the statute of the 31st Chas. II. c. 2, (the English Habeas Corpus Act.) is a most distinguishing feature of the English Criminal Code and forms parts of that code, in common with a great many other Statutes, which although not more expressly introduced in the Act of 1774, than the Act of Habeas Corpus, have not been the less adopted and followed by all the Courts of this country. This right of the subject existed in the common law of England for this reason alone, that that law said "no man shall be imprisoned without a legal cause" for, desiring the end, it would provide the means. The law of England, therefore, would provide the means of preventing an illegal imprisonment. These means were found in the Habeas Corpus. In certain cases by subterfuges, this remedy was rendered inefficacious. The law interfered, and, far from destroying the common law, the Act 31st Chas. 2. c. 2, only confirmed it; and the provisions of that Act, like the Common Law, formed part of the English Criminal Code. This Act of the 31st Chas. II, so decidedly forms part of the English Criminal Law that it has been questioned whether it was applicable to any other than criminal matters; and another act was found requisite to extend the provisions of the 31st Chas. II. to cases of imprisonment for offences which could not be considered, technically, of a criminal nature. With this intent the 56th Geo, III. cap. 100, was passed; and it will suffice on this point to refer to the 3d vol. Blackstone, p. 135; Bacon's Abridgement *verbo* Habeas Corpus; 1st Chitty's Criminal Law, pp. 117, 118. These form the first reason for stating that the 31st Chas. II, forming part of the English Criminal Law introduced by the Act of 1774, which the present local Legislature cannot affect, could not come under the controul of the Ordinance of the Special Council of the 8th November instant. We should have noticed the admission made by the learned Solicitor General, that the Habeas Corpus as it existed in England by the Common Law, became the law of this country in virtue of the Imperial Act of 1774. From the instant it is admitted that the Habeas Corpus of the common law is in force in virtue of the latter statute, it follows that the present Council cannot abolish this right, because that would be an abolition of a right introduced by an Imperial Statute, with which the Special Council has no right to meddle. The writ prayed for must then be granted. It is true that the old Legislature of this country passed an act similar to that of the 31st Chas. II. but such an objection does not require much attention; it will be sufficient to say, with the writers, that an affirmative statute does not repeal the original; on the contrary each stands concurrently. If the first should expire the other continues in full force and vigour; and if, in practice, to avoid discussion, the Provincial Act 24th Geo. III, has been invoked, it is not less true that a writ of Habeas Corpus might have been obtained under the Act 31st Chs. II. c. 2; for, subsequently to the passing of the Prov. Act 24th Geo. III. the local Legislature in adopting the Habeas Corpus, expressly provides in the 52d Geo. III. cap. 8, sec. 7, that this last named Act shall in no way affect the Act of the 31st Chs. II. With such a declaration on the part of our own Legislature, can it be said that the Act Chs. II. was not considered as a component part of the law of the country in virtue of the Act of 1774? Let us go one step further in order to see, even admitting with the Solicitor General, that the Act 31st Chs. II, did not become a law of this country by the Act of 1774; admitting for argument such to be the case, the Provincial Act 52d Geo. III, cap. 8, sec. 7, introduced the 31st Chs. II. This Provincial Statute, therefore, charged the Habeas Corpus by introducing the 31st Chs. II., since (speaking, as I am, hypothetically) the Statute of 1774 did not introduce the law of the 31st Chs. II. into this country. Well then, the 1st Vic. cap. 9, does not allow the Special Council to suspend or even alter "any Act of the Legislature of Lower Canada" which repeals or alters any Act of the Imperial Parliament. We have on this point an authority of much greater weight than the opinions of the legal men in England, who discussed the question of the legality of two Ordinances passed under the last Administration.—From these opinions it is unnecessary to cite more, than that of Sir William Follett, the author of the very proviso which has given rise to the present question, and who tells us "As to the power of setting aside the Courts of Justice and the ordinary administration of the Criminal Law, he never supposed that any such monstrous power was conferred by any part of the Act." We have the authority of the supreme legislature of the country, in the Act 1 & 2 Victoria, ch. 112, which tells us that an Ordinance passed under the last Administration cannot be justifiable in law; and in point of principle there is no difference between the disallowed Ordinance and that with which our attention is now occupied. Each of those Ordinances in endeavouring to abolish the Habeas Corpus, are contrary to the Criminal Law of the country, introduced by the Imperial Act of 1774. It is unnecessary to enter into further details. I may be mistaken, but after having given the subject all the attention of which I was capable, such is my conviction. I should have been happy to make it agree with the Ordinance of the present Council. However it may be, the privilege of the Habeas Corpus is too sacred and has cost England too much blood, for any British subject to be able to blame an English Judge for being unwilling to prove a traitor to his conscience, in causing a subject to lose one of his dearest rights,