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Articles

Robert J. Sharpe*

Habeas Corpus in Canada

I. Introduction

Habeas corpus is a subject which has not attracted much attention from legal writers and there has been no thorough examimation of the nature of review which may be exercised on *habeas corpus*.[1] The aim of this article is to provide a critical and comprehensive account of the scope of review which is available on *habeas corpus* in Canada. The subject is a technical one but may be of crucial importance in those situations where *habeas corpus* is still a useful remedy. It is not proposed to discuss all aspects of the law of *habeas corpus* but simply to outline the nature of the powers of review which are available.

In dealing with any aspect of the law of *habeas corpus* we are confronted by the vagaries of the common law and with a somewhat bewildering array of technical rules. The remedy as it exists in Canada is derived from English common law and it is important to read the Canadian authorities in the light of their common law origins. This paper aims to explore the common law background, to expound the rules which determine the scope of review and, hopefully, through a careful analysis of the cases, to demonstrate that the scope of review available on *habeas corpus* is not as narrow as is sometimes suggested.

Quite clearly, *habeas corpus* is not a remedy which is encountered regularly in day-to-day practice. While it does have an established function in the review of extradition committals and committals for trial, it has become a remedy which is used in those relatively unusual situations where statutory appeals are inappropriate. It has also suffered in Canada from what the courts have regarded as improper use, and the judges tend to react by describing in narrow terms the nature of review which is open.

*Robert J. Sharpe, McTaggart, Potts, Stone and Herridge, Toronto.

1. The treatment accorded scope of review in D. A. Cameron Harvey, *The Law of Habeas Corpus in Canada* (Toronto: Butterworths, 1974) is discussed in my review of the book: (1974), 24 U. of T. Law J. 453. For other accounts of the scope of review, see: Amnon Rubinstein, *Jurisdiction and Illegality* (Oxford: Clarendon Press, 1965) at 105-116; D. M. Gordon, "Challenging Convictions by *Habeas Corpus* and *Certiorari*" (1959), 2 Crim. L.Q. 296.

2. *Form of Review*

Initially, it is useful to look at the formal nature of review on *habeas corpus*. The writ is directed to the jailer or person having custody or control of the applicant. It requires that person to return to the court on the day specified the body of the applicant together with the documentation allegedly justifying his detention. The process focuses upon the cause returned. If the return discloses a lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the excuse or reason given.

The problem of defining the scope of review on *habeas corpus* occurs where the propriety of the return depends upon a prior decision, order, or determination. By what method and on what grounds can the court 'go behind' the warrant and review that determination? Under modern practice, *habeas corpus* cases are not usually determined on a formal return, but on the affidavits of the applicant and respondent.[2] The idea of trying the case on the return is, therefore, somewhat misleading, but the technical considerations of the return have largely shaped the scope of review on *habeas corpus*. It is essential to keep those considerations in mind if the cases are to be understood properly.

When the writ actually issued, the only material which was brought before the court for consideration was the return of the jailer. Holt C. J. pointed this out when he compared *habeas corpus* and *certiorari*: "An [habeas corpus] does not remove the record tho' it does the cause, but a certiorari removes the record and cause too. . .besides a certiorari goes to the Judge, but a [habeas corpus] to the officer. . ."[3] When, for example, there has been a conviction or other judicial order, the jailer will usually have a written warrant by which he claims justification for the detention, and his return must either annex or contain a copy of the warrant. From this formal point of view, *habeas corpus* may be described as a collateral method of attack.[4] The writ is directed to the jailer rather than the

2. See Patrick Hartt, "*Habeas Corpus* and *Certiorari* in Criminal Cases" [1961] *Law Society of Upper Canada Special Lectures*, 319.
3. *Hetherington* v. *Reynolds* (1705), 92 E. R. 848; Fort. 269. See also *Fazakerly* v. *Baldoe* (1704), 7Mod. 177; 87 E. R. 932 at 933, *per* Holt C. J.: ". . .for there is a difference in this respect between a *habeas corpus* and a *certiorari*: upon an *habeas corpus* we have not the record itself as we have upon a *certiorari*. . ."
4. For two of the rare instances where the courts have actually used the term "collateral attack" to describe the powers of review on *habeas corpus*, see

person or tribunal ordering the detention. The issue for determination is, in this sense, one between the prisoner and his detainor,[5] and the prior determination is only incidentally or collaterally impugned. When a situation of collateral attack arises,[6] the court cannot review the correctness of the prior decision, but it may review the existence of jurisdiction.[7]

It is clear, however, that more is involved than collateral attack, and that this formal concept is inadequate to describe the powers of review. Historically, the whole basis of the remedy was that the return show cause for the imprisonment or, in other words, that the return fully disclose a lawful basis for the detention. This evolved into something like review for 'error on the face of the return', and the use of this technique is discussed in greater detail subsequently.[8] It will also be seen that methods have been devised which allow the courts to go behind the formal documents returned and examine the proceedings themselves.[9] The two crucial questions raised by the cases may be summed up as follows: (1) 'what are the proper grounds for review and, (2) the more technical question, what material may properly be brought before the court?

3. *Grounds For Review*

(a) *Jurisdictional Review*

It has already been observed that habeas corpus constitutes a form of collateral attack. In other words, the proceedings from which the jailer derives justification for the imprisonment are impugned, but in an indirect way. This simply means that although the order questioned is not under appeal, it cannot support the detention if it does not in law 'exist' or, in conventional terms, the applicant will be released if the determination giving rise to the detention was made without jurisdiction by the tribunal or body in question.

Minister of National Defence for Naval Services v. *Pantelidis* (1943), 58 B.C.R. 321 at 327; [1943] 1 D.L.R. 569 at 572 (*Sub nom. R.* v. *Pantelidis*); 79 C.C.C. 46 at 49 (B.C.C.A.); *Re Khattar* (1927), 59 N.S.R. 191; [1927] 2 D.L.R. 647 (*Sub nom. Re R.* v. *Khattar, Ex parte Thebeault*) 47 C.C.C. 184 (N.S.S.C.).

5. This is, of course, somewhat artificial, and legislation or practice may require that the Attorney-General be served as well; see e.g. *The Habeas Corpus Act*, R.S.O. 1970, c. 197, s. 1(2).

6. Rubinstein, *supra*, note 1 at 39-46 gives several examples of collateral attack.

7. *Id.*, at 36.

8. *Infra*.

9. *Infra*.

There are many instances of *habeas corpus* issuing where the basis of review is that the impugned proceedings were taken without jurisdiction. The concept of jurisdictional review emerged early in the history of the struggle between the common law courts and the other jurisdictions for control. *Habeas corpus* was one of the principal weapons in the hands of the common law courts, especially in the days when committal was one of the principal means of enforcing orders. Thus in the seventeenth century *habeas corpus* was used to challenge the wrongful exercise of jurisdiction by the High Commission and the other rivals of the common law courts.[10] The concept of jurisdictional review emerged with special strength in magisterial law, both in England and in Canada. It is from these cases that many of the principles of review are still drawn and, as the courts frequently refer to those cases, a brief review is warranted.

(i) *Magisterial Cases*

In the magisterial cases, the superior courts placed great importance upon formal or technical matters. The leading principle of magisterial law was that it had to appear from the face of the record that the tribunal had acted within the statutory limits.[11] Nothing was presumed in favour of instruments issued by inferior courts, and jurisdictional review often meant 'Has the inferior court made jurisdiction manifest?' rather than 'Has the inferior court in fact acted within its jurisdictiòn?'.[12] Sucess often depended upon

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10. See, for example: *Glanvile's Case* (1614), 1 Moore K.B. 838; 72 E.R. 939, (Chancery); *Humfrey* (1571), Dal. 82 (Court of Requests); *Thomlinson* (1604), 12 Co. Rep. 104; 77 E.R. 1379. (Admiralty); *Codd* v. *Turback* (1615), 181 E.R. 94; 3 Bulst. 109 and *Hodd* v. *High Commission Court* (1615), 181 E.R. 125; 3 Bulst. 146 (High Commission).
11. For the rationale see the *dictum* of Holt C. J. in *R.* v. *Whistler* (1702), 90 E.R. 1018; Holt K. B. 215 at 215-16: ". . .the defendant is put to a summary trial different from Magna Charta: for it is a fundamental privilege of Englishmen to be tried by jury. . .Then where a penalty is inflicted, and a different manner of trial from Magna Charta instituted; and the party offending, instead of being openly tried by his neighbours in a Court of Justice, shall be convicted by a single justice of peace in a private chamber, upon the testimony of one witness; I fain would know, if on the consideration of such a law, we ought not to adhere to the letter of the law, without carrying the words farther than the natural sense of them."
12. See e.g. *Re Douglas* (1842), 12 L.J.Q.B. 49, where the court (incorrectly) refused to look at affidavits to prove want of jurisdiction, but discharged the prisoner because the warrant did not recite the same matter and thereby make jurisdiction patent.

technical considerations, but at the same time, the inferior courts were required to set out their proceedings in great detail so as to make them readily subject to review.[13]

Habeas corpus was used primarily to review warrants of committal, and the requirement that the inferior process show jurisdiction on its face made for a pervasive form of review.[14] It will be seen that statutuory changes have rendered this basis for review for the most part obsolete,[15] but occasionally modern examples are found. One such Canadian case is *re Munavish*[16] where the court held that it could look only at the warrant of committal issued under the Ticket of Leave Act[16a] but discharged the prisoner as the warrant did not show jurisdiction on its face. While, technically, it had always been the rule that nothing can be assumed in favour of the validity of an inferior process, reasoning of this sort now seems tortured. There can be little doubt that the basis for the decision was that there really had been a jurisdictional defect. Basing the decision on the failure of the warrant to recite jurisdiction on its face is entirely artificial.[17]

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13. The reason for this was undoubtedly because there was no other form of redress. A writ of error did not lie to challenge a summary conviction: *R.* v. *Leighton* (1708), 92 E.R. 806; Fort. 173; *R.* v. *Lomas* (1694), 90 E.R. 488; Comb. 297. Before the *Summary Jurisdiction Act*, 1879 (42 & 43 Vict., c. 49), the right of appeal by trial *de novo* to quarter sessions was granted only in some cases and before the introduction of appeal by stated case to the High Court by the *Summary Jurisdiction Act*, 1857 (20 & 21 Vict., c. 43), there was no method, aside from the prerogative writs, to bring a conviction or warrant before a court of superior jurisdiction for review: see *Paley on Summary Convictions* (9th ed. London: Sweet & Maxwell, 1926) at 670*ff.*
14. See, for example, the decision of Coleridge J. in *Re Peerless* (1841), 1 Q.B. 143 at 154; 113 E.R. 1084 at 1089: "The question is whether the warrant, which the gaoler has returned, be a legal one. Of the conviction we know nothing, except through the warrant. By a legal warrant I mean a warrant which upon the face of it shews a right to detain: and that right cannot exist unless there be jurisdiction in the magistrates. To deny that this must appear on the face of the proceedings, is to call in question one of the most important rules of criminal law." The principle was applied in many Canadian cases: See, eg. *Re Beebe* (1863), 3 P.R. 270, *Re Crow* (1865), 1 C.L.J. 302 (U.C.); *R.* v. *Sears* (1897), 17 C.L.T. 124 (N.S.S.C.): *R.* v. *Townsend (No. 3)* (1906), 11 C.C.C. 153 (N.S.S.C.).
15. *Infra*.
16. (1958), 26 W.W.R. 175; 121 C.C.C. 299 (B.C.S.C.).
16a. R.S.C. 1952, c. 264.
17. Cf. *Re Pearce & Warden of Manitoba Penitentiary* (1966), 55 D.L.R. (2d) 619; 54 W.W.R. 720; [1966] 3 C.C.C. 326 (Man. C.A.); aff'd (1966) 55 D.L.R. 631; 57 W.W.R. 127 (S.C.C.) discussed *infra*, note 26.

There are also English[18] and Canadian cases[19] where *habeas corpus* has been used to review a summary conviction itself. In the older cases, there was a tendency to base review on the failure of the conviction as recited in the committal to reveal jurisdiction on its face,[20] but there have also been instances where the courts have reviewed convictions on *habeas corpus* on the basis of extrinsic evidence to show some jurisdiction defect.[21]

The common law courts were reluctant to curtail review of magisterial orders, even where review was based on insubstantial errors.[22] There is even a case where the court ordered the prisoner's release on the basis of a defect in the committal notwithstanding that a good conviction to support the imprisonment was brought up on *certiorari*.[23] However, the English Summary Jurisdiction Acts of 1848[23a] and 1879[23b] curtailed this form of review, both on *certiorari* and on *habeas corpus*, by providing for simplified and abbreviated standard forms of conviction and committal which were to be deemed sufficient.[24] A similar provision in the Canadian

18. *Nash's Case* (1821), 106 E.R. 946; 4 B. & Ald. 295; *R.* v. *Tordoft* (1844), 114 E.R. 1500; 5 Q.B. 933; *Re Gray* (1844), 14 L.J.M.C. 26; 2 Dow. & L. 539; *Re Hammond* (1846), 115 E.R. 1210; 9 Q.B. 92; *Re Seth Turner* (1846), 115 E.R. 1206; 9 Q.B. 80; and cases cited *infra*, note 21.

19. See e.g. *R.* v. *Smith* (1909), 8 E.L.R. 33; 16 C.C.C. 425 (N.S.S.C.); *R.* v. *Johnston* (1912), 22 Man. R. 426; 1 D.L.R. 549; 1 W.W.R. 1045; 20 C.C.C. 8 (*Sub nom. R.* v. *Johnston*) (Man. K.B.); *R.* v. *Farrell* (1907), 15 O.L.R. 100; 12 C.C.C. 524 (Ont. H. C.); *Re R.* v. *Campbell* (1924), 43 C.C.C. 340 (Ont. S.C.) 27 O.W.N. 88; in these Canadian cases, *certiorari*-in-aid was joined with the *habeas corpus* application.

20. See e.g. the cases cited note 18, *supra*.

21. *Re Bailey, Re Collier* (1854), 118 E.R. 1269; 3 E. & B. 607; *In Re Clew* (1881), 8 Q.B.D. 511; *In Re Authers* (1889), 22 Q.B.D. 345.

22. If the warrant was defective for some technical reason unrelated to the conviction, it was said that a perfect conviction could not cure the defect: *R.* v. *Fletcher* (1843), 8 J.P. 168; *R.* v. *Chandler* (1704), 91 E.R. 1265; 1 Ld. Raym. 545; *R.* v. *James* (1822), 106 E.R. 1418; 5 B. & Ald. 894. Where the validity of the conviction as recited was impugned, the courts sometimes said that it was incumbent upon anyone who asserted it to be good to have it brought before the court: *Re Reynolds* (1844), 1 Dow. & L. 846 (where the conviction had even been previously affirmed); *R.* v. *Chaney* (1838), 7 L.J.M.C. 65; *R.* v. *Timson* (1870), L.R. 5 Exch. 257; *Re Allen* (1860), 30 L.J.Q.B. 38; *Re Hammond* (1846), 115 E.R. 1210; 9 Q.B. 92; *R.* v. *Tordoft* (1844), 114 E.R. 1500; 5 Q.B. 933.

23. *Re Elmy* (1834), 110 E.R. 1430 at 1433 1 Ad. & E. 843 at 850, *per* Denman C.J.: "As this is a proceeding which restrains the liberty of the subject, it ought to appear that the thing done was in perfect conformity to the statute."

23a. 11 & 12 Vict., c. 42.

23b. 42 & 43 Vict., c. 49.

24. *In re Allison* (1854), 156 E.R. 561 at 565; 10 Ex. 561 at 568 *per* Platt B.:

Criminal Code[25] provides: "No warrant of committal shall, on *certiorari* or *habeas corpus*, be held to be void by reason only of any defect therein, where (a) it is alleged in the warrant that the defendent was convicted, and (b) there is a valid conviction to sustain the warrant". Even where a committal is not covered by such a provision, the courts are now less likely to give relief without looking at the proceedings themselves to determine whether there is more than a technical defect on the committal.[26] In any event, it should be remembered that these provisions do not preclude jurisdictional review of summary proceedings. Their effect is to make the inferior process less vulnerable to review, and to require that jurisdictional error be shown to exist rather than letting review depend on the formalities of the document supporting the committal.

(ii) *Modern Examples*

Habeas corpus is still used in Canada to review for jurisdictional error, summary convictions,[27] committals for trial,[28] extradition committals,[29] committals under mental health legislation,[30] and committals in the law of immigration,[31] to give a few examples.

It should be noted, however, that the practice in Canada is almost invariably to join an application for *centiorari*-in-aid to which the

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"The learning of the cases prior to [the 1848 Act] has been swept away. . ." As Lord Sumner explained in his well-known *dictum* in *R.* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (P.C.) at 159 (Alta.): "The Summary Jurisdiction Act. . .did not stint the jurisdiction of the Queen's Bench, or alter the actual law of certiorari. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record "spoke" no longer: it was the inscrutable face of a sphinx."

25. R.S.C 1970, C-34, s. 716.

26. *R.* v. *Governor of Lewes Prison, ex p. Doyle,* [1917] 2 K.B. 254 at 269. In *Re Pearce and Warden of Manitoba Penitentiary* (1966), 55 D.L.R. (2d) 619; 54 W.W.R. 720; [1966] 3 C.C.C. 326 (Man. C.A.); aff'd (1966) 55 D.L.R. (2d) 631a; 57 W.W.R. 127 (S.C.C.), the *omnia praesumuntur rite esse acta* presumption was applied, even though the court was dealing with a magistrate's warrant.

27. *Supra*, note 19.

28. *Infra,* at

29. *Infra*, at

30. See, e.g. *Trenholm v. A. -G. Ont.,* [1940] S.C.R. 301; [1940] 1 D.L.R. 49 (*Sub nom. Re Trenholm*); 73 C.C.C. 129; *Re Avery*, [1951] O.W.N. 810 (Ont. H.C.).

31. See, e.g. *Shin Shim* v. *The King*, [1938] S.C.R. 378; [1938] 4 D.L.R. 88; 70 C.C.C. 321.

powers of review are usually attributed. In England, by way of contrast, *certiorari*-in-aid is rarely used, and the courts feels no restriction in reviewing for jurisdictional error.[32] The significance of this for Canadian practice is that *certiorari*-in-aid is not always available.[33] It is submitted that the absence of *certiorari*-in-aid should not prevent the court from granting a discharge where the prisoner is able to show want of jurisdiction by affidavit.[34]

The problem in this area is, of course, to determine just what is meant by jurisdictional error. In administrative law generally, the courts have tended recently to construe broadly their powers of review, and the bounds of jurisdictional error often seem to be without limit.[35] On the other hand, many of the *habeas corpus* cases arise out of criminal proceedings, and here the Canadian courts have shown a marked determination to confine challenges to the legality of proceedings to the channel of statutory appeals.[36] In cases where there is no statutory appeal and in non-criminal situations, the courts tend to construe jurisdictional error broadly.[37] It is not the province of this paper to discuss the meaning of jurisdictional error: suffice to say that there is no definition of predictive value and the result will depend not only on the substance of the error alleged but also on the availability of other means of redress.

Theoretically, the principle that review is restricted to jurisdictional error means that an inferior court has an area within which it is free to err and still have its decision respected as having validity. However, this area has been encroached upon to such an extent in judicial review cases that it becomes difficult to imagine any error

32. A good example is *R.* v. *Board of Control, ex parte Rutty,* [1956] 2 Q.B. 109 where a magistrate's decision was attacked on *habeas corpus*, the error of jurisdiction being brought before the court by affidavit.
33. This has arisen recently in *Saunders* v. *The Queen*, [1970] S.C.R. 109; 10 D.L.R. (3d) 638; 71 W.W.R. 4 [1970] 2 C.C.C. 57 where an order of preventive detention had to be attacked on *habeas corpus* alone as *certiorari*-in-aid was refused. It does not appear to have been argued that jurisdictional error could be shown by affidavit.
34. Discussed in more detail, *infra*.
35. For leading examples of this, see *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L. (E.)); *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers*, *Local 796*, [1970] S.C.R. 425; 11 D.L.R. (3d) 336.
36. *Infra*, at
37. "There is no want of modern authority to draw upon when a court is inclined to hold that an erroneous finding by a statutory tribunal goes to jurisdiction." S.A. de Smith, *Judical Review of Administrative Action* (3d ed. London: Stevens, 1974) at 105.

of law which could not somehow be classified as jurisdictional.[38] The English *habeas corpus* cases have taken this line,[39] and, if the Canadian cases which deal with challenges to criminal convictions are distinguished[39a], there seems to be a similar approach here. The important point is that the error alleged must somehow be seen to 'go to jurisdiction' and the willingness of the court to so classify the error will depend very much upon the type of decision being questioned.

(b) *Patent Error*

In addition to review based on jurisdictional error, it is submitted that there is a second branch of review on *habeas corpus* which is akin to review for error of law on the face of the record in *certiorari*-type proceedings. The source of this power of review is really the requirement that the return patently show cause for the imprisonment. In the old cases, the courts insisted upon a full return which set out the complete basis for the imprisonment,[40] and it is really upon this requirement that *habeas corpus* depended for its effectiveness.

In other words, the object of the writ is to bring before the court a return which demonstrates cause for the imprisonment, and, while the whole record of the proceedings is not necessarily brought before the court, the return is subjected to a search for error on its face. In a recent House of Lords decision, Lord Pearce adverted to this power of review on *habeas corpus* in the following passage: "The High Court has always had the power by writs of habeas corpus and certiorari to correct any error of law provided that it is able to see that the error has occurred. . .in certiorari difficult

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38. *Supra*, notes 35 and 37; S.A. de Smith, "Judical Review in Administrative Law: The Ever-Open Door?", (1969), 27 Camb. L.J. 161 at 163-4; H.W.R. Wade, "Constitutional and Administrative Aspect of the *Anisminic* Case" (1969), 85 L.Q.R. 198 at 211-2; and "Evidence and *Ultra Vires*" (1971), 87 L.Q.R. 318 at 319.
39. The best recent examples are *R.* v. *Board of Control, ex parte Rutty*, [1956] 2 Q.B. 109 and *Armah* v. *Government of Ghana*, [1968] A.C. 192 (H.L. (E.)).
39a. See *infra;* "superior and inferior courts".
40. See, e.g., *Chamber's Case* (1628), 79 E.R. 717; Cro. Car. 133; *Codd* v. *Turback* (1615), 81 E.R. 94; 3 Bulst. 109; 1 Hale P.C. 584: "[A warrant of commitment must] express the cause for which he is committed, namely felony, and what kind of felony. . .it is necessary upon return of the habeas corpus out of the King's Bench, because it is in the nature of a writ of right or a writ of error to determine whether the imprisonment be good or erroneous."

questions may arise as to whether an error appears on the face of the record. . .In habeas corpus the question was whether an error appeared on the return of the writ."[41]

While *certiorari* is required to bring up the whole record, the courts have, on occasion, achieved a very similar result on *habeas corpus* by requiring a full return. The classic example is the decision of Vaughan C. J. in *Bushell's Case*[42] where the Court of Common Pleas ordered the discharge of a juryman who had been committed for contempt by the London Court of Sessions. The contempt alleged was that the prisoner, together with the other jurymen, had refused to convict an accused despite the weight of the evidence.[43] Vaughan C. J. made it clear that the court could not be satisfied with a bald warrant of committal;

> The Court hath no knowledge by this retorn, whether the evidence given were full and manifest, or doubtful, lame, and dark, or indeed evidence at all material to the issue, because it is not retorn'd what evidence in particular, and as it was deliver'd, was given. For it is not possible to judge of that rightly, which is not expos'd to a man's judgement. But here the evidence given to the jury is not exposed at all to this Court, but the judgement of the Court of Sessions upon that evidence is only expos'd to us; who tell us it was full and manifest. But our judgement ought to be grounded upon our own inferences and understandings, and not upon theirs.[44]

The case suggests a pervasive power of review based upon inquiry into the sufficiency of the return.

There are many other examples of this sort of reasoning in the old English cases. Where the decisions of bankruptcy commissioners were challenged on *habeas corpus*, the courts were able to exercise a kind of direct review through the requirement that the proceedings be recited in full in the committal document.[45] There was no pretence of jurisdictional review in these cases, but simply an acceptance of the position that if the court could see an error patent on the material, it would give relief.[46] In magisterial law the rule

41. *Armah* v. *Government of Ghana*, [1968] A.C. 192 (H.L. (E.)). at 253-4.
42. 124 E.R. 1006; (1670) Vaughan 135.
43. The trial is *Penn & Mead's Case* (1670), 6 St. Tr. 951.
44. (1670) 124 E.R. 1006 at 1007; Vaughan 135 at 137.
45. See, e.g. *Coombe's Case* (1816), 2 Rose 396; *Ex parte Oliver* (1813), 1 Rose 407, 35 E.R. 312; 2 V. & B. 244; *Tomlin's Case* (1824), 1 Glyn. & Jam. 373; *Atkinson's Case* (1827), 2 Glyn. & Jam. 218.
46. Lord Eldon described the nature of review as follows in *Coombe's Case*

was that: ". . .the cause of committment ought to be certain, to the end that the party may know for what he suffers, and how he may regain his liberty. . ."[47] Here, the powers of review may seem to merge with that of jurisdictional review and the requirement that the documents show jurisdiction on their face,[48] but it is clear that non-jurisdictional errors were also reviewed.[49] More recently, the English courts seem to have revived the concept of review for patent error, as distinct from jurisdictional error, when reviewing the sufficiency of evidence in extradition committals.[50]

The courts do not, it should be noted, use the term 'patent error' to describe this sort of review, but it is submitted that there are Canadian cases which most properly come within this category. Good examples are the cases where a prisoner has been discharged because the warrant fails to describe an offence fully or accurately.[51] Other cases which may be placed in this category are those where *habeas corpus* is used to review the term of a sentence. The court is not called upon to review the propriety of the sentence but the court does determine whether or not by its own terms, the committal provides present justification for holding the prisoner.[52]

(c) *Review of Sufficiency of Evidence*

The review of sufficiency of evidence on *habeas corpus* presents certain special problems. In the first place, it must be recognized

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(1816), 2 Rose 396 at 398: ". . .[there must be] satisfaction to a reasonable mind: in the first instance, to the mind of the Commissioners, in the next, to the mind of the Judge, as it were, appealed to, upon a habeas corpus. Thus appealed to, the court has to exercise its own opinion upon the reasonableness of the examination."

47. *Dr. Groenvelt's Case* (1702), 91 E.R. 1038; 1 Ld. Raym. 213.

48. Discussed *supra* at

49. For examples, see: *R.* v. *Chaney* (1838), 7 L.J.M.C. 65; *Ex p. Hill* (1827), 172 E.R. 394; 3 Cor. & P. 225; *Re Timson* (1870), L.R. 5 Exch. 257; (misstatement of offence in the warrant of commitment); *R.* v. *James* (1822), 106 E.R. 1418; 5 B. & Ald. 894; *Mash's Case* (1772), 96 E.R. 473; 2 Black W. 805; *R.* v. *Catterall* (1730), 94 E.R. 705; Fitz-G. 266 (failure to state adequately the term of imprisonment).

50. *Armah* v. *Government of Ghana*, [1968] A.C. 192 (H.L.(E.)).

51. *R.* v. *Holley* (1893), 4 C.C.C. 510 (N.S.S.C.); *R.* v. *McDonald* (1910), 8 E.L.R. 489; 16 C.C.C. 505 (N.S.S.C.); *R.* v. *Nelson* (1908), 18 O.L.R. 484; 15 C.C.C. 10 (Ont. H.C.); *Re Dudoward* (1959), 28 W.W.R. 202; 124 C.C.C. 379 (B.C.S.C.).

52. See, eg. *R.* v. *Robinson* (1907), 14 O.L.R. 519; 12 C.C.C. 447 (Ont. H.C.); *Ex parte McCaud*, [1970] 1 O.R. 772; [1970] 1 C.C.C. 293 (Ont. H.C.); *Re Ange*, [1970] O.R. 153; [1970] 5 C.C.C. 371 (Ont. C.A.); *Ex p. Newfield* (1973), 9 C.C.C. (2d) 222 (Alta. S.C.).

that there has always been some confusion about want of evidence as a ground for judical review. The orthodox position is the view taken by the Judicial Committee of the Privy Council in *R. v. Nat Bell Liquors* in 1922.[53] There it was said that want of evidence may render a decision wrong on the merits but not wrong in the jurisdictional sense. Clearly, this view has not been followed consistently and there is considerable authority for the proposition that a decision made with no evidence at all is a decision made without jurisdiction.[54] In addition, there are more subtle ways around the rule, as described by Professor Wade: "A decision based on no evidence is very likely capricious or unreasonable, or given upon wrong legal grounds, or in breach of natural justice, so that the court, if it wants to intervene, can do so.[55] Indeed, it may be asked whether the recent statutory measures in Ontario[56] and in the Federal Court Act,[57] establishing want of evidence as a ground for review, are properly seen as legislative innovation or simply legislative sanction for what already was being done.

In the law of *habeas corpus*, the review of sufficiency of evidence is a fairly well-established practice, although the courts have shown an uncertainty in approach. It is an especially important ground for review in cases involving committals for trial and extradition committals. An understanding of the historical background is important here, and it is proposed to discuss the manner in which this power of review developed as well as the manner in which it may now be used.

Historically, *habeas corpus* played an important role in criminal procedure as a pre-trial remedy. It was the accepted method by which a person committed by the local justices could appeal to the general power of the King's Bench to grant bail,[58] and it provided a general method of review over pre-trial proceedings. The prisoner could argue that the justice had wrongly refused him bail,[59] that the evidence against him was too weak to warrant holding him for

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53. *R.* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (P.C.) (Alta.).
54. D. W. Elliott, " 'No Evidence': A Ground for Judicial Review in Canadian Administrative Law?" (1972-73), 37 Sask. L.R. 48.
55. H. W. R. Wade, *Administrative Law*, (3d ed. Oxford: Clarendon Press, 1971) at 101 (footnotes omitted).
56. *The Judicial Review Procedure Act,* S.O. 1971, c. 48, s. 2(3).
57, *Federal Court Act*, S.C. 1970-71, c. 1, s. 28(1) (c).
58. 2 Hale *P.C.* at 143-8.
59. *Id.*, at 145

trial,[60] or that the charges against him were deficient in law.[61] For present purposes, the important aspect of the review which was exercised was the extent to which the judges looked into the evidence. In exercising their inherent powers to grant bail, the judges wanted to know the facts of the case. The depositions taken by the justice were brought before the court and, however good or bad the committal document, the court decided for itself on the evidence whether there was a case to put the accused to trial.[62] This provided for a very full review of the pre-trial proceedings on *habeas corpus*, the nature of which was remarkably similar to that now required by the Criminal Code where a superior court is called upon to review the refusal of judicial interim release.[63]

Towards the end of the nineteenth century, a summary application replaced *habeas corpus* as the method of applying for bail in the superior court.[64] This meant that when *habeas corpus* was used as a method to review the sufficiency of evidence to support committals, the court was no longer acting under its inherent power to grant bail. To explain the basis for their action, the judges began to use the language of jurisdictional review. They really continued the old practice and probably worried little about

60. *Infra*, note 62.
61. 2 Hale *P.C.* 111; *R*. v. *Kendal & Roe* (1700), 91 E.R. 304; 1 Salk. 347; *R*. v. *Judd* (1788), 100 E.R. 139; 2 T.R. 255; *R*. v. *Remnant* (1793), 101 E.R. 96; 5 T.R. 169. For modern Canadian examples, see *supra*, note 51.
62. *R*. v. *Horner* (1783), 168 E.R. 237 at 238; 1 Leach 270 at 270-1: "The practice of this Court is, and upon reference to the Officers of the Crown Office we find it to have been long established, that even where the commitment is regular, the Court will look into the depositions to see if there be a sufficient ground laid to detain the party in custody; and if there be not, they will bail him. So also, where the commitment is irregular, if it appear that a serious offence has been committed, they will not discharge or bail a prisoner without first looking into the depositions, to see whether there is sufficient evidence to detain him in custody." See also: *Mohun* (1698), 91 E.R. 96; 1 Salk. 104; *Anon* (1704), 91 E.R. 96; 1 Salk. 104; *R*. v. *Dalton* (1731), 93 E.R. 936; 2 Str. 911; *R*. v. *Judd* (1788), 100 E.R. 139; 2 T.R. 255; *R*. v. *Gittus* (1824) 3 L.J.O.S.K.B. 55; *R*. v. *Manning* (1888), 5 T.L.R. 139; Chitty, *Criminal Law* (1st ed., London: Samuel Brooke, 1816), vol. 1. at 113, 129; Petersdorff, *Law of Bail* (1824) at 520.
63. Section 457.5(7).
64. F. H. Short & F. H. Mellor, *Crown Practice* (2d ed., London: Stevens & Haynes, 1908), at 284. The statute which established the practice in Canada provided: "Upon. . .application [for bail] to any such court or judge. . .the same order concerning the prisoner being bailed or continued in custody, shall be made as if the prisoner was brought up upon a *habeas corpus*." (S. 94, R.S.C. 1886, c. 174, carried through until the 1955 *Code* revision: Martin, *Criminal Code* (Toronto: Cartwright, 1955) at 769.

the technical justification for such action. The introduction of jurisdictional error as the ground for review did, however, introduce a problem: namely, a conflict with the orthodox view that 'no evidence' does not go to jurisdiction.[65] This accounts for the uncertainty in approach which is so evident on reading the cases.

As noted, the Canadian authorities seem to support as a minimum the proposition that making a finding with absolutely no evidence renders the decision reviewable. In the *habeas corpus* cases the courts regularly use this restrictive formula to describe the extent to which they will review the evidence. It is important, however, to recognize that the nature of review which is actually exercised is not as narrow as this sort of language might suggest. In the first place, there must be some evidence on each one of the requisite elements which are required to support the committal, and the court will review the evidence to see that a case has been made out on each point.[66] Secondly, "no evidence" or "absolutely no evidence" have been interpreted to mean "no reasonable evidence." A mere scintilla of evidence will not support a committal; *habeas corpus* lies to determine whether there is "any reasonable and legal evidence".[67] It is also clear on reading the cases that whatever the formula used to describe the powers of review, the courts will interfere where the evidence is not reasonably capable of supporting the committal.[68] It is a question of degree: on the one hand, the court will not hear additional evidence to exculpate the accused,[69] nor will it actually weigh the evidence as it would at a trial. On the other hand, the courts have been scrupulous to make certain that there is evidence on each point requisite to support the charges, and

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65. *Supra.*
66. See, e.g. *Ex p. Welsh* (1898), 2 R. de Jur. 437; 2 C.C.C. 35 (Que. Sup. Ct.); *Re Cohen* (1904), 8 O.L.R. 143; 8 C.C.C. 251 (Ont. H.C.); *R.*v. *Morency* (1917), 30 C.C.C. 395 (Que. Sup. Ct.); *In re Harrison* (No. 3) (1918), 25 B.C.R. 545; 30 C.C.C. 150 (*sub nom. Re. Harrison*) (B.C.S.C.); *Re O'Connor* (1928), 39 B.C.R. 271; [1928] 1 D.L.R. 58; [1928] 1 W.W.R. 65 (B.C.S.C.); 49 C.C.C. 151.
67. *Ex. p. Seitz (No. I)* (1899), 8 Que. R. 345 at 346-7; 3 C.C.C. 54 (Que. Q.B,) at 56, *per* Wurtele J. See also the cases cited *infra*, notes 68 and 70.
68. Often the courts use restrictive language to describe their powers of review, and then (properly, it is submitted) enter a detailed inquiry of the evidence to determine whether it matches up to the requisite standard: see, eg. *Ex. p. Feinberg* (1901), 4 C.C.C. 270 (Que. K.B.); *Browne* v. *U.S.* (1906), 30 Que. S: 11 C.C.C. 167 (*sum. nom. U.S.* v. *Browne (No. 2)*) (Que. Sup. Ct.); *Re Insull,* [1934] O.W.N. 194; [1934] 2 D.L.R. 696; (1934), 61 C.C.C. 336 (Ont. C.A.).
69. *In re Cohen* (1904), 8 O.L.R. 143; 8 C.C.C. 251 (Ont. S.C.); *Schtraks v. Government of Israel,* [1964] A.C. 556 (H.L. (E.)).

to ensure that the magistrate has not acted capriciously. In other words, while the magistrate is clearly left some room for the unfettered exercise of his discretion, the superior court will make certain that there is reasonable evidence to bring the case within that area where the magistrate's discretion may properly be exercised.[70] The test is variously phrased as requiring sufficient evidence to raise a *prima facie* case against the accused, or enough evidence to allow a trial judge to leave the case with the jury.[71]

A more technical problem is to provide justification for having the evidence before the court on *habeas corpus* at all. The English courts have not been concerned about this question when reviewing extradition committals, but have simply carried on the common law practice of perusing the depositions.[72] In the Canadian cases, however, this has caused considerable concern and it has been found necessary to employ *certiorari*-in-aid of *habeas corpus*.[73]

In Ontario, justification for reviewing the evidence is said to be based on the pre-Confederation *Act for More Effectually Securing the Liberty of the Subject*.[74] It was provided by that Act that the court may

> direct the issuing of a writ of *certiorari*. . .directed to the person or persons by whom or by whose authority any such person is confined or restrained of his liberty. . .requiring him to certify and return. . .the evidence, depositions, convictions, and all proceedings had or taken, touching or concerning such confinement or restraint of liberty, to the end that the same may be viewed and considered by such Judge or Court, and to the end

70. For cases which construe broadly the power of the superior court to examine the evidence, see *Re Garbutt* (1891), 21 O.R. 465 (Ont. C.A.); *Re MacKey* (1918), 52 N.S.R. 165; 29 C.C.C. 167 (*sub nom. R.* v. *MacKey*) aff'd 52 N.S.R. 176; 40 D.L.R. 287; 29 C.C.C. 282 (N.S.S.C.); *Re McTier* (1910), 17 C.C.C. 80 (Que. K.B.); *R.* v. *Arsino* (1920), 19 O.W.N. 136; C.C.C. 251 (Ont. H.C.); *R.* v. *Keeper of Cornwall Jail*; *ex p. Pendergast*, [1964] 1 O.R. 443; [1964] 2 C.C.C. 264 (Ont. H.C.).; *Ex.p. Rabin* (1961), 130 C.C.C. 251.

71. See, eg. *R.* v. *Cowden*, [1947] O.W.N. 1018; [1948] 1 D.L.R. 682; 90 C.C.C. 101 (Ont. H.C.), *R.* v. *Plouffe and Warren* [1959] O.W.N. 30; (*sub nom. Ex parte Plouffe*) 122 C.C.C. 291; 29 C.R. 297 (Ont. H.C.); R.E. Salhany, "Review of Committal for Trial" (1965), 8 Crim. L.Q. 31. The standard of proof required may vary depending upon the extradition statute; *R.* v. *Delisle* (1896), 2 R.L.N.S. 326; 5 C.C.C. 210 (Que. Q.B.).

72. See *Schtraks* v. *Government of Israel,* [1964] A.C. 556 (H.L. (E.)); and especially *Armah* v. *Government of Ghana,* [1968] A.C. 192 (H.L.(E.)).

73. *Re Shumiatcher,* [1962] S.C.R. 38; 31 D.L.R. (2d.)2; 131 C.C.C. 259.

74. 29 and 30 Vict., c. 45 (1866). For a discussion of the applicability of the Act, see *Ex parte Johnston,* [1959] O.R. 322; 18 D.L.R. (2d) 102; 124 C.C.C. 23 (*sub nom. Re Johnston and Shane*) (Ont. C.A.)

> that the sufficiency thereof to warrant such confinement or restraint, may be determined by such Judge or Court.[75]

Properly this Act should be read as a codification of the common law practice already described.[76] However, the courts in Ontario have tended to give the Act rather more credit, and have held that the broad inquiry into the validity of committals is founded entirely upon its provisions.[77] This has unfortunately caused some confusion in the provinces which do not have similar legislation and where it has been suggested that this pervasive review of pre-trial proceedings may not be available.[78] However, despite the doubts raised, a relatively uniform practice seems to have evolved. When forced to deal with the matter without the help of such legislation, the courts have tended to rely on common law *certiorari*-in-aid to justify the review of the evidence.[79] As noted, the English courts achieve the same result on *habeas corpus* alone.[80] Where review of the evidence is based on *certiorari*-in-aid, it is not at all clear whether this review of the evidence is an exercise in jurisdictional review or review of patent error.[81]

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75. Section 5.
76. *R. v. Mosier* (1867), 4 P.R. 64 (Ont.) at 70.
77. See, e.g. *R.* v. *Farrell* (1907), 15 O.L.R. 100; 12 C.C.C. 524 (Ont. H.C.); *R.* v. *Page* (1923), 53 O.L.R. 70; [1923] 3 D.L.R. 854; 41 C.C.C. 59 (Ont. C.A.); *R.* v. *Riesy* (1931), 39 O.W.N. 507; 55 C.C.C. 328 (Ont. H.C.); *R.* v. *Massey* (1923), 25 O.W.N. 164 (Ont. H.C.); *Ex p. McGinnis*, [1971] 3 O.R. 783; 4 C.C.C. (2d) 262 (Ont. H.C.); and see *Re McDonald* (1936), 11 M.P.R. 91; [1936] 3 D.L.R. 446; 66 C.C.C. 230 (sub nom. *R.* v. *MacDonald*) (N.S.S.C.) with respect to the Nova Scotia Act which applies to committals within provincial jurisdiction.
78. *Re Trepanier* (1895), 12 S.C.R. 111; *Re R. v. Wong Foon Sing* (1925), 36 B.C.R. 120; 44 C.C.C. 133 (B.C.S.C.).
79. *R.* v. *Thompson* (1950), 1 W.W.R. 66; 99 C.C.C. 89 (B.C.S.C.); *R.* v. *Sednyk* (1956), 14 Man. R. 7; 18 W.W.R. 180; 115 C.C.C. 128 (Man. Q.B.); *R.* v. *Krueger;* [1949] 2 D.L.R. 569; [1949] 1 W.W.R. 140; 93 C.C.C. 245 (Man. K.B.); *R.* v. *Schellenberg* (1958), 66 Man. R. 305; 26 W.W.R. 374; 122 C.C.C. 132 (Man. Q.B.). It has been held that the provincial courts still have jurisdiction to issue *certiorari*-in-aid to question committals of federal tribunals notwithstanding s. 18 of the Federal Court Act: *Ex p. Kolot* (1974), 13 C.C.C. (2d) 417 (B.C.S.C.); *Re Commonwealth of Virginia and Cohen (No. 2)* (1973), 1 O.R. (2d) 262; 14 C.C.C. (3d) 174 (Ont. H.C.). *Certiorari* itself is precluded in certain cases: *Re Milbury & the Queen* (1972), 4 N.B.R. (2d) 450;. 25 D.L.R. (3d) 499 (N.B.C.A.); and see *Commonwealth of Puerto Rico* v. *Hernandez* (1973), 41 D.L.R. (3d) 549; 14 C.C.C. (2d) 209 (S.C.C.)
80. *Supra*, note 72.
81. Most of the cases put review on the footing of want of jurisdiction, but in *R. v. Thompson* (1950), 1 W.W.R. 66; 99 C.C.C. 89 (B.C.S.C.), the court treated it as review of patent error.

The technicality of the reasoning employed in the cases is to be deprecated. The result is that while *certiorari* alone can be used to review committals,[82] it does not lie to review the evidence as this is not seen as an exercise of jurisdictional review or review for error of law on the face of the record when *certiorari* is sought alone.[83] At the same time, however, it is *certiorari*-in-aid that is said to provide the basis for review of the evidence on *habeas corpus*. The Canadian courts have held that an applicant for *habeas corpus* must be in custody[84] .As a consequence, someone free on bail must surrender into custody on the day of his application if the grounds for his application is want of evidence since it is only in this way that he can apply for *certiorari*-in-aid of *habeas corpus*.[85] Obviously there is a clear inconsistency in requiring *certiorari*-in-aid to review the evidence, but refusing to review the evidence when *certiorari* is sought by itself. The courts have tied themselves unnecessarily in technical knots[86] when the common law practice provided ample justification for the review of evidence on *habeas corpus*.

4. Superior and Inferior Courts

In order to understand properly the basis of the decisions, it is

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82. *R.* v. *Botting*, [1966] 2 O.R. 121; 56 D.L.R. (2d) 25; [1963] 3 C.C.C. 373 (Ont. C.A.). *cf.* D. M. Gordon, "Quashing Committals for Trial" (1959), 2 Can. B.J. 67.
83. *R.* v. *Botting*, [1966] 2 O.R. 121; 56 D.L.R. (2d) 25; [1963] 3 C.C.C. 373 (Ont. C.A.); *Re Popoff* (1959), 28 W.W.R. 317; 124 C.C.C. 115 (B.C.S.C.); *R.* v. *Matheson* (1959), 123 C.C.C. 60 (N.S.S.C.).
84. The leading case is *Masella* v. *Langlais*, [1955] S.C.R. 263; [1955] Que. P.R. 375; [1955] 4 D.L.R. 436; 112 C.C.C. 1.
85. This practice is well established: *Masella* v. *Langlais*, id., at 271; *Re Shumiatcher*, [1962] S.C.R. 38; 31 D.L.R. (2d) 2; 131 C.C.C. 259 (S.C.C.); Hartt, *supra*, note 2 at 316-7. It has been suggested, however, that under the new Criminal Code provisions, this may no longer be possible: *Criminal Procedure*, Ontario Bar Admission Notes, 1973-4 at 494-5. The reason is that an order of judicial interim release is effective until the completion of trial: s. 457.8. It is submitted, however, that while the court no longer actually makes a bail order on committing the accused for trial, by denying a discharge, the effect is the same. The accused still may be surrendered into custody by his sureties (ss. 700, 701), and presumbly could surrender himself where he is released on his undertaking or own recognizance. The courts would, it is submitted, be reluctant to permit this established procedure to be upset by such technical considerations: see *Canadian Bill of Rights*, R.S.C. 1970,App. III, s. 2(c); *Cox* v. *Hakes* (1890) 15 App. Cas. 506. (H.L.)
86. In the *Ontario Royal Commission-Inquiry into Civil Rights* (Toronto: Queen's

crucial to recognize the distinction between superior and inferior courts. *Habeas corpus* has never been sought successfully where the convictions or orders of courts of general common law jurisdiction are concerned. While all the Canadian courts ultimately derive their jurisdiction from statute, the courts which exercise this type of jurisdiction are the courts of superior jurisdiction, courts of assize, and with certain exceptions, courts of sessions.[87]

The common law provided only the most awkward and inadequate forms of redress with respect to errors made by these courts.[88] While *habeas corpus* theoretically is never precluded as a remedy and can always be used to require the jailer to justify an imprisonment, as a practical matter, this has been of little avail where committals by these courts are concerned. The reasons are twofold. First, the principle of *omnia praesumuntur rite esse acta* applies to orders issued by courts of general common law jurisdiction.[89] This simply means that regularity must be presumed,

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Printer, 1968), Report 1, Vol. 2, at 771, it is aptly said: "The technicalities of these procedures make legalistic nonsense."

87. See Gordon, *supra*, note 1; Rubinstein, *supra*, note 1 at 109-10. The Ontario pre-Confederation Act uses the phrase "court of record" and this has been interpreted to mean the courts indicated: see the Ontario cases, cited *infra*, note 94; *cf. R.* v. *Gibson* (1898), 29 O.R. 660; 2 C.C.C. 302 (Ont. H.C.); *Ex p. Hill*, [1970] 1 O.R. 699; 9 D.L.R. (3d); [1970] 2 C.C.C. 264 (Ont. H.C.); *Ex p. Wortsman*, [1971] 1 O.R. 136; 1 C.C.C. (2d) 316 (Ont. H.C.), holding that the phrase does not encompass inferior courts of record. The exception with respect to a court of sessions is the summary jurisdiction exercised when hearing trials *de novo*: Gordon, *supra*, note 1 at 301; *R.* v. *Arscott* (1885), 9 O.R. 541 (Ont.H.C.); *R.* v. *Johnston* (1906), 41 N.S.R. 105; 11 C.C.C. 10 (*sub nom. R.* v. *Johnston (No. 2)*) (N.S.S.C.); *R.* v. *Pepper*(1909), 19 Man. R. 209; 12 W.L.R. 58; 15 C.C.C. 314 (Man. K.B.); *R.* v. *Stone* (1941), 56 B.C.R. 321; [1932] 4 D.L.R. 427; 76 C.C.C. 288 (B.C.S.C.); *R.* v. *Petit* (1932), 57 C.C.C. 216 (Man. K.B.); *contra R.* v. *Beamish* (1901), 8 B.C.R. 171; 5 C.C.C. 388 (B.C.S.C.); *R.* v. *Miller* (1913), 25 W.L.R. 396; 25 C.C.C. 151 (Alta. S.C.); *R.* v. *Moore*, [1924] 3 W.W.R. 923 (B.C.S.C.).

88. The only form of direct review available was the writ of error, the inadequacy of which was generally acknowledged: James Stephen, *A History of the Criminal Law of England*, (London: MacMillan, 1883), Vol. 1 at 308-10; W.S. Holdsworth, *A History of English Law* (7th ed. Boston: Little, Brown, 1956) Vol. 1 at 215. It removed the record of proceedings to be reviewed, but the court was restricted to dealing only with those errors which appeared on the face of the record, a document which disclosed nothing of the evidence or jury direction. There were few instances where exception could be taken to the record and the courts held that if error were available, no other direct method of attack, such as certiorari, could be used: *Rice* v. *R.* (1616), 79 E.R. 345; Cro. Jac. 404; *R.* v. *Bethel* (1702), 87 E.R. 781; 6 Mod. 17; *R.* v. *Justices of West Riding of Yorkshire* (1798), 101 E.R. 1080; 7 T.R. 467; *R* v. *Pennegoes* (1822), 107 E.R. 53; 1 B. & C. 142; Gordon, *supra*, note 1.

89. *Re Sproule* (1886), 12 S.C.R. 140; *Peacock* v. *Bell* (1667), 85 E.R. 84 at 87-8

no matter how bald the terms of the instrument.[90] Secondly, the records of common law courts have a sanctity which prevents review of the decision even where an actual absence of jurisdiction is alleged.[91] It is not permissible to impeach the validity of the record by showing want of jurisdiction through extrinsic evidence. There is said to be an exception to the inviolability of superior court orders. If the record or order itself shows want of jurisdiction on its face, the prisoner may obtain habeas corpus.[92] This possibility for review has, however, remained theoretical and superior courts have virtual immunity.[93]

In the Canadian cases, the courts have frequently acted on these principles and this has usually arisen where it is sought to challenge a criminal conviction. Almost without exception, it has been held that convictions made by superior courts of criminal jurisdiction and courts of general or quarter sessions cannot be challenged on *habeas corpus*.[94] In so holding, the courts have simply been following the

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1 Wms. Saund. 73 at 74 "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged."

90. *Re Andrews* (1847), 136 E.R. 491; 4 C.B. 226; *Ex p. Partington* (1844), 115 E.R. 244; 6 Q.B. 649; *Re Dunn* (1847), 136 E.R. 859, 5 C.B. 215; *Dodd's Case* (1858), 44 E.R. 1087; 2 De G. & J. 510; *Re Crawford* (1849), 116 E.R. 1397; 13 Q.B. 613; *Brenan & Galen's Case* (1847), 116 E.R. 188; 10 Q.B. 492; *Carus Wilson's Case* (1845), 115 E.R. 759; 7 Q.B. 984; *Ex p. Lees* (1860), 120 E.R. 718; E.B. & E. 828; *Ex p. Fernandez* (1861), 142 E.R. 349; 10 C.B. (N.S.) 3.

91. *Re Sproule* (1886), 12 S.C.R. 140. A good example of this principle in operation is *Re Newton* (1855), 139 E.R. 692; 16 C.B. 97. The place of the commission of the offence as stated in the record was not within the jurisdiction of the Central Criminal Court. On habeas corpus, the court held that affidavits showing where the stated place was could not be admitted as the issue of the situs of the offence must be taken to have been decided against the prisoner by the jury. See also: *R* v. *Carlile* (1831), 172 E.R. 763; 4 Car & P. 415; *Re Clarke* (1842), 114 E.R. 243; 2 Q.B. 619.

92. *Re Sproule* (1886), 12 S.C.R. 140 at 205; *Burdett* v. *Abbott* (1811), 104 E.R. 501; 14 East 1 at 150; *R.* v. *Paty* (1704), 92 E.R. 232; 2 Ld. Raym. 1105, per Holt C.J. (dissenting); *Middlesex Sheriff's Case* (1840), 113 E.R. 419; 11 Ad. & E 273; *Ex p. Fernandez* (1861), 10 C.B. (N.S.) 3 at 60; Rubinstein, *supra*, note 1 at 110.

93. In *Re Sparrow* (1908), 28 N.Z.L.R. 143, Chapman J. refused relief on the merits, but suggested that habeas corpus could be used against a superior court in a case of exceeded jurisdiction. See also *R.* v. *Collyer & Capon* (1752), 96 E.R. 797; Sayer 44, where *habeas corpus* was awarded against an unlawful sentence at quarter sessions.

94. For good examples of this, see *Re Sproule* (1886), 12 S.C.R. 140; *Re Ferguson* (1892), 24 N.S.R. 106 (N.S.C.A.); *In re Darby*, [1964] S.C.R. 64. With respect to county court or court of sessions convictions, the prevailing view is that review is not possible: *R.* v. *Crabbe* (1854), 11 U.C.Q.B. 447 (C.A.); *R. v. Powell*

common law principles. Unfortunately the language used does not always unequivocally state that this is the basis for the decision, and some *dicta* have been taken to limit the scope of review on *habeas corpus* generally.[95] This is especially true of several decisions of the Supreme Court of Canada under its former original jurisdiction in *habeas corpus* matters.[96] The Court was always anxious to limit the use of *habeas corpus* to circumvent the ordinary system of appeals, and it tended to discourage these applications, especially where a criminal conviction was being challenged.[97] It is often supposed that these cases establish the rule that on *habeas corpus* alone,[98] relief can only be granted if there is a defect of jurisdiction patent on

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(1861), 21 U.C.Q.B. 215 (C.A.); *R.* v. *St. Dennis* (1875), 8 P.R. 16; *R.* v. *Goodman and Wilson* (1883), 2 O.R. 468 (Ont. C.P.D.); *R.* v. *Martin* (1927), 60 O.L.R. 577; [1927] 3 D.L.R. 1134; 48 C.C.C. 23 (Ont. C.A.); *Goldhar* v. *The Queen*, [1960] S.C.R. 431; 25 D.L.R. (2d) 401; 126 C.C.C. 337. *cf.*, *R.* v. *Wong Cheun Ben* (1930), 43 B.C.R. 188; [1930] 3 W.W.R. 282; 54 C.C.C. 399 (B.C.C.A.) allowing review on the grounds that jurisdiction depends upon a valid election; and see *Re Helik* (1939), 47 Man. R. 179; [1939] 3 D.L.R. 56; 72 C.C.C. 76 (Man. K.B.).

95. See, e.g. *Ex p. Macdonald* (1896), 27 S.C.R. 683; 3 C.C.C. 15; *Re Henderson*,[1930] S.C.R. 45; [1930] 1 D.L.R. 420; 52 C.C.C. 95; cases cited *supra*, note 99.

96. *Supreme Court Act*, R.S.C. 1952, c. 259, s. 57 (repealed R.S.C. 1970, c. 44 (1st. Supp.), s. 4).

97. The Act allowed inquiry into the cause of commitment "in any criminal case under any Act of the Parliament of Canada". In *Re Dean* (1913), 48 S.C.R. 235; 9 D.L.R. 364; 20 C.C.C. 374, Duff J. held that the Act gave jurisdiction only where the committal followed a charge which was an offence by virtue of an Act of Parliament. Since the offence in question, theft, was clearly an offence at common law, and since the description of the offence in the committal could have been justified under a British statute still in force by virtue of the then s. 11, the requisite elements were not present to give the Supreme Court jurisdiction. This reasoning was followed in *Smith* v. *The King*, [1931] S.C.R. 578; [1931] 4 D.L.R. 465; 56 C.C.C. 51, where the warrant specified that the accused had been found guilty of an offence 'contrary to the *Criminal Code*'. Since the *Code* did not create the offence, again theft, and since it was still possible to prosecute common law offences, it was said that the form of the charge did not bring it within the Court's jurisdiction. This authority was put to rest when the revised Code specified in s. 8 that no one could be prosecuted for common law offences: *Re Goldhar*, [1958] S.C.R. 692; 16 D.L.R. (3d) 509; 122 C.C.C. 113.

98. The Court refused to grant *certiorari*-in-aid of *habeas corpus*, notwithstanding s. 61 of the *Supreme Court Act* which provided that *certiorari* may issue when ". . .considered necessary with a view to any inquiry, appeal or other proceeding had or to be had before the Court.": *Re Trepanier* (1885), 12 S.C.R. 111; *Re Shumiatcher*, [1962] S.C.R. 38; 31 D.L.R. (2d)2; 131 C.C.C. 259. The rationale was that *habeas corpus* came on in the first instance in chambers rather than in court.

the face of the documents returned.[99] It is submitted, however, that this rule and the refusal to accept extrinsic evidence to show jurisdictional error[100] is only applied properly to cases in which a superior court order is impugned. While the English courts have discouraged in similar terms the use of *habeas corpus* to review summary convictions,[101] they have not permitted the restriction to qualifiy their powers of review in cases not involving convictions. There is no reason that a similar approach should not be taken in Canada. Indeed, if this restriction were a rule of general application, *habeas corpus* would be an ineffective remedy. The rule is one which is applicable to courts of general common law jurisdiction, and provides an element of finality in the judicial process at that level.[102] There is no reason to extend it beyond this class of case; to make it a rule of general application is to misread the cases.

5. *American Usage*

The refusal to permit the use of *habeas corpus* to review convictions contrasts markedly with the use of *habeas corpus* in the United States. There, the principal use of the writ is as a post-conviction remedy. *Habeas corpus* provides a vehicle for prisoners convicted in the state courts to have the proceedings reviewed in the federal courts where a right guaranteed by the constitution has been violated.[103] It is apparently thought that a constitutional claim can best be weighed in a forum which is divorced from the guilt-finding process, and which is able to establish uniform minimum national standards for the administration of criminal justice.[104] There is,

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99. See especially *Re Sproule* (1886), 12 S.C.R. 140; *Goldhar* v. *The Queen,* [1960] S.C.R. 431; 25 D.L.R. (2d) 40; 126 C.C.C. 337; *Re Shumiatcher,* [1962] S.C.R. 38; 31 D.L.R. (2d) 2; 131 C.C.C. 259.

100. Discussed in greater detail *infra*, at

101. *In re Corke* (Practice Note) [1954] 1 W.L.R. 899 [1954] 2 All E.R. 440 (D.C.).

102. See, eg. what was said by Denman C. J. in *Carus Wilson's Case* (1845), 115 E.R. 759, at 769; 7 Q.B. 984 at 1009; "The security which the public has against the impunity of offenders is, that the Court which tries must be considered competent to convict. We could not interfere in this way without incurring the danger of setting at large persons committed for the worst offences." And see *In re Richard Dunn* (1847), 136 E.R. 859 at 860; 5 C.B. 215 at 218 *per* Wilde C. J.: "[If review were allowed] it would follow, that every sentence pronounced by the court of Queen's Bench, would be subject to be reviewed summarily, even by a judge at chambers."

103. *Brown* v. *Allen*, 344 U.S. 443 (1953).

104. For an excellent discussion, see "Developments in the Law — Federal *Habeas Corpus*" (1969-70), 83 Harv. L. Rev. 1038.

however, by no means unanimity on the propriety of federal *habeas corpus* jurisdiction,[105] and this is understandable in view of the protracted litigation which may follow any criminal proceeding which gives rise to a constitutional claim.

In any case, the American experience with *habeas corpus* differs significantly from that in England and in Canada. The writ transplanted has virtually grown into a different strain altogether. The Americans have taken the writ's fundamental purpose of ensuring that every imprisonment is legally justifiable, and developed it fully according to their profound belief in the importance of broadly defined constitutional guarantees.

6. *Material Before The Court*

It has already been noted that the scope of review on *habeas corpus* depends upon the material which may be looked at by the court. It has also been noted that this is a question which has troubled the Canadian judges considerably more than their English brethern. In the Canadian cases, it is often said that on *habeas corpus* alone, the court cannot look beyond the return of the jailer.[106] An escape from this crippling rule is usually provided by *certiorari*-in-aid, the effect of which is to broaden the inquiry as if on *certiorari* itself. This means that the entire record of the inferior proceedings is brought before the court and that affidavit evidence showing jurisdictional error may be introduced. While, in most cases, *certiorari*-in-aid will provide an adequate solution, there are situations where it is not available and where the issue will have to be determined on *habeas corpus* alone.[107] For this reason, it is proposed to examine the authorities with a view to determining the techniques which may be used to justify the reception of material other than the warrant or committal documents when *habeas corpus* is sought alone.

105. See e.g., Henry Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgements" (1970), 38 U. Chi. L.R. 142.

106. See, e.g. *R. v. Wood* (1924), 27 O.W.N. 35; 43 C.C.C. 382 (Ont. S.C.); *In re Henderson,* [1930] 1 D.L.R. 420; 52 C.C.C. 95 (*sub nom. Ex parte Henderson*) (S.C.C.); *Petrovitch* v. *A.G.* (1937), 40 Que. P.R. 411; *Rolling* v. *Langlois*, [1958] B.R. 207 (C.A.); *Re Perry and Steele* (1959), 44 M.P.R. 267; 129 C.C.C. 206 (P.E.I.S.C.); *Ex p. Peters*, [1964] 2 O.R. 354; [1965] 2 C.C.C. 199 (Ont. H.C.); *Ex p. Paterson* (1971), 18 D.L.R. (3d) 84; 3 C.C.C. (2d) 181 (B.C.S.C.).

107. For a recent example, see *Sanders* v. *The Queen* [1970] S.C.R. 109; 10 D.L.R. (3d) 48; 71 W.W.R. 4; [1970] 2 C.C.C. 57, where it was held that *certiorari*-in-aid was barred by s. 682 of the Criminal Code. No argument was made that the court could determine the matter on extrinsic evidence, although the majority went on the reject the application on the merits.

There are two questions which arise. First, must the court always accept the return of the jailer, or may it insist upon further particulars beyond those disclosed initially by the documents in the jailer's possession? Secondly, to what extent is extrinsic material showing some defect in the proceedings admissible on *habeas corpus*?

(a) *Requiring a Full Return*

On the first question, it is clear from an historical perspective that if the courts had always been forced to restrict the inquiry to the documents initially returned, *habeas corpus* would never have become an effective remedy.[108] The early cases stress the overriding requirement that the return state fully the cause of the imprisonment in terms which enable the court to determine for itself the sufficiency of the cause. The leading common law authority already discussed is *Bushell's Case* in 1670[109] where Vaughan C. J. made it clear that on *habeas corpus* the court's "judgement ought to be grounded upon our own interferences and understandings, and not upon their's [that of the inferior court]" .[110] Many of the old cases rest upon the proposition that the court could insist upon a full return so that it could judge whether the applicant had been regularly dealt with.[111] It has been seen that in the magisterial cases the rule that the process show all the requisites of jurisdiction on its face allowed for a pervasive scope of review.[112]

While modern examples of this sort of reasoning are not often found,[113] it is a technique which the Canadian courts do use on occasion. One such case was *Braaten* v. *Sargent and A. -G. for B.C.*, where it was held that a committal for contempt by a Royal Commission was bad for not setting out the offence on its face.[114] The court commented: "It may be said that some of the authorities cited are very old and that the rights and remedies dealt with on

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108. See e.g. *Chamber's Case* (1628), 179 E.R. 717; Cro. Car. 133; *Hodd* v. *High Commission Court* (1615), 81 E.R. 125; 3 Bulst. 146; *Codd* v. *Turback* (1615), 81 E.R. 94; 3 Bulst. 109.

109. 124 E.R. 1006; *Vaughan*, 135.

110. Id., at 137.

111. *Supra*, at

112. *Supra*, at

113. *Bushell's Case* was applied in *Ex p. McEwen and Sago,* [1941] 4 D.L.R. 738; [1941] 3 W.W.R. 424; 76 C.C.C. 360 (*sub nom. R.* v. *McEwen and Sago*) (Man. K.B.)

114. (1967), 61 D.L.R. (2d) 678; 59 W.W.R. 531 (B.C.S.C.).

these applications are of ancient origin. It would seem to be that the rights are still at least of equal importance today and that the remedies are still valid."[115] Indeed, it can be argued that now that *habeas corpus* cases are usually tried on the affidavits of the prisoner and the jailer,[116] there is little reason to feel restricted to an imagined return. When these cases actually were tried on the return the courts devised ways to broaden the inquiry: nowadays there is no reason for the court to feel limited to the committal documents if those documents fail to set out the grounds for the imprisonment with adequate clarity.

(b) *Admission of Extrinsic Material*

The second issue is that of the admissibility of extrinsic material to establish grounds for review. This issue may be crucial where a challenge to the validity of the detention is based upon jurisdictional error. Here again, the English cases[117] indicate a less restrictive approach than is suggested by some of the Canadian authorities and it is submitted, neither the decided cases nor general principle require that the restrictive approach be followed.

It has already been observed that part of the confusion here stems from the failure to restrict properly the cases dealing with superior court orders and convictions. As a general rule, the common law always allowed inferior processes to be subject to collateral attack, looking where necessary at evidence extrinsic to the inferior record to show jurisdictional defect.[118] There is no reason that this should not be possible where a challenge is made by way of *habeas corpus*. Indeed, the English cases recognize properly that the rule for the admissibilty of affidavits on *habeas corpus* is exactly the same as that on *certiorari*.[119]

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115. *Id., per* Seaton J. at 689-90; 543.
116. *Supra*, note 2.
117. See, e.g. *Re Eggington* (1853), 118 E.R. 936; 2 El. & Bl. 607; *Swan v. Dakins* (1855), 16 C.B. 77; 139 E.R. 684; *Re Bailey* (1854), 3 El. & Bl. 607; 118 E.R. 1269. *Re Authers* (1889), 22 Q.B.D. 345; *R.* v. *Board of Control, ex p. Rutty*, [1956] 2 Q.B. 109; and see *Paley on Summary Convictions, supra*, note 13 at 790: "The rule now appears to be the same as that which is applied to proceedings by *certiorari*, where want or excess of jurisdiction may be shown by affidavit as ground for quashing a conviction or order."
118. This was the case even on the 'strict' rule of jurisdiction expounded in *R.* v. *Bolton* (1841), 113 E.R. 1054; 1 Q.B. 66.
119. *Schtraks* v. *Government of Israel*, [1964] A.C. 556 (H.L.(E)) at 605-6, per Lord Hodson.

Another problem in this area is caused by the old common law rule against controverting the facts in the return.[120] The rule was that the facts returned by the jailer had to be taken as true and that those facts could only be impeached by the decision of a jury in an action for false return.[121] The rule, however, probably never meant more than that ultimate issues of fact (for example, the issue of guilt or innocence in a criminal matter) could not be determined on *habeas corpus*. Collateral issues which undermine the validity of the detention by showing want of jurisdiction or want of authority have always been determinable on *habeas corpus*.[122] In the old cases, it was said that the applicant could "confess and avoid" the return.[123] In modern parlance, this simply means that the issue of jurisdiction is open and that issues of fact relating to jurisdiction can be entertained.[124] Evidence showing want of jurisdiction does not controvert the return, but goes behind it to show that the jailer's justification for the imprisonment cannot stand.

The common law rule has been abrogated expressly in Ontario in both criminal[125] and provincial matters,[126] and in New Brunswick,[127] Nova Scotia[128] and Prince Edward Island[129] in provincial matters.[130] These legislative measures, derived from the

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120. See especially Wilmot's *Opinion on the Writ of Habeas Corpus* (1758), Wilm. 81; 97 E.R. 31.
121. *Id.*
122. The authorities permitting evidence to be adduced on jurisdictional issues are listed *supra*, notes 21, 32, 117, 119, and *infra*, note 133. Affidavits were received in proceedings on *habeas corpus* before trial: *R.* v. *Greenwood* (1739), 93 E.R. 1086; 2 Str. 1138; *Farington's Case* (1682), 84 E.R. 1227; T. Jones 222; *Kirk's Case* (1700), 187 E.R. 760; 5 Mod. 454; *Jackson* (1717), 2 Hawkins *P.C.* 169. In the impressment cases, issues of fact were determined: *Goldswain's Case* (1778), 96 E.R. 711; 2 Black, W. 1207; *R.* v. *King* (1674), 90 E.R. 456, Comb. 245; *Good's Case* (1760), 96 E.R. 137; 1 Black W. 251; *Ex. p. Drydon* (1793), 101 E.R. 235; 5 T.R. 417; *R.* v. *Young* (1808), 103 E.R. 650; 9 East 466. This was recognized by Wilmot in his Opinion, *supra*, note 120 at 111-112.
123. *Swallow* v. *London Corporation* (1666), 82 E.R. 1110; 1 Sid. 287; *Gardener's Case* (1600), 78 E.R. 1048; Cro. Eliz. 821.
124. *Supra*, note 122.
125. *An Act for More Effectually Securing the Liberty of the Subject*, 1866 (29 & 30 Vict., c. 45), s. 3.
126. *The Habeas Corpus Act*, R.S.O. 1970, c. 197, s. 7.
127. *The Habeas Corpus Act*, R.S.N.B. 1952, c. 101, s. 6.
128. *Liberty of the Subject Act*, R.S.N.S. 1967, c. 164, s. 7.
129. *Habeas Corpus and Certiorari Act*, R.S.P.E.I. 1951, c. 70, ss. 3, 15.
130. For the test concerning the applicability of provincial legislation, see *Re Storgoff*, [1945] S.C.R. 526; [1945] 3 D.L.R. 673 (*sub nom R. v. Storgoff*); 84 C.C.C. 1.

English *Habeas Corpus Act*, 1816,[131] do not appear to have been interpreted to broaden the inquiry beyond the issue of jurisdiction.[132]

It must be recognized that there are cases which hold ostensibly that the court is confined to the document returned.[133] In some of those, the extrinsic evidence was properly rejected as being irrelevant to the issue of jurisdiction. In others, the special considerations pertaining to the records of superior courts precluded the consideration of extrinsic material. Affidavits have been received in a number of Canadian *habeas corpus* cases,[134] and there is authority for the view that issues of jurisdictional fact may be entertained on *habeas corpus*.[135] The practice of receiving affidavits to show want of jurisdiction is well borne out by the common law authorities cited, and it almost certainly is a proper practice in Canada even where there is no legislation abrogating the rule against controverting the return.[136]

7. *Conclusion*

The Canadian courts have tended to be too technical in their treatment of the scope of review on *habeas corpus*. In this article, an attempt has been made to analyze these technical problems in the light of established common law principles. It is from the English common law that *habeas corpus* is derived, and an understanding of this background is crucial. There can be little doubt that the cases are in conflict on several points. It is submitted, however, that, read

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131. 56 Geo. III, c. 100.
132. For cases where the statutes were applied, see *Ex p. Fitzpatrick* (1893), 32 N.B.R. 182 (N.B.S.C.); *Re Davidson* (1915), 8 O.W.N. 481 (Ont. H.C.)
133. *Supra*, note 106.
134. See, e.g. *R.* v. *Munro* (1864), 24 U.C.Q.B. 44 at 53 (Ont. Q.B.); *Re McKinnon* (1865), 2 C.L.J. 324 (Ont.); *R. v. Boyle* (1868), 4 P.R. 256 (Ont.); *Ex p. Eno* (1884) 10 Que. L.R. 165 (Que. Q.B.); *R.* v. *Cavelier* (1896), 11 Man. R. 333; 1 C.C.C. 134 (Man. Q.B.); *R*, v. *Whitesides* (1904), 8 O.L.R. 622; 8 C.C.C. 478 (Ont. C.A.); *Re Beck* (1917), 27 Man. R. 288; 32 D.L.R. 15; [1917] 1 W.W.R. 657; 27 C.C.C. 331 (Man. C.A.); *R.* v. *Montemurro,* [1924] 2 W.W.R. 250 (B.C.S.C.); *R.* v. *Cardarelli*, [1930] 1 D.L.R. 575; [1929] 2 W.W.R. 223; (1929), 52 C.C.C. 267 (B.C.S.C.); *R.* v. *Rowan* (1930), 42 B.C.R. 559; [1930] 2 W.W.R. 227; 54 C.C.C. 197 (*sub nom Ex parte Rowan*) (B.C.S.C.); *R.* v. *Hardy* (1932), 46 B.C.R. 152; 59 C.C.C. 394 (B.C.S.C.); *Shin Shim* v. *The King,* [1938] S.C.R. 378; [1938] 4 D.L.R. 88; 70 C.C.C. 321.
135. *Id*. See also *supra*, note 122.
136. The English Act of 1816, which applies to non-criminal cases, is in force in those provinces with reception of English law after 1816.

in the light of the common law authorities, a sound argument can be made to support the following propositions:

1. *Habeas Corpus* opens two grounds of attack. First, the applicant is entitled to be released if he can show jurisdictional error which vitiates the justification offered for his imprisonment. Secondly, the prisoner may succeed in certain cases if he can show a patent defect on the face of the documents returned.

2. Where *habeas corpus* is used to challenge a committal for trial or committal for extradition, and perhaps in related situations as well, it is open to the court to review the evidence adduced before the committing magistrate and to determine whether or not it is reasonably capable of supporting the decision. While this form of review has normally been based in Canada upon either special statutory measures and *certiorari*-in-aid, it may be seen as a common law practice which evolved in the days when *habeas corpus* was used as a method to obtain bail.

3. The courts have considerable discretion in deciding what material they should examine. In the first place, the common law always frowned upon bald returns, and it is open to the court to insist that the return of the jailer give some detail as to the basis for the imprisonment. The court must be able to judge for itself the sufficiency of the cause. Secondly, and perhaps more importantly, where a decision is impugned on jurisdictional grounds, it is submitted that the court properly may receive affidavit evidence to demonstrate jurisdictional error.

4. The rule that the court can grant relief only where there is an error of jurisdiction patent on the face of the documents returned by the jailer is confined properly to cases where the order or conviction of a court of general common law jurisdiction is impugned. This rule should not be extended to cases which do not come within this category.