

been, and now is sitting, has been issued, gives the power to the governor alone, without the advice and consent of the council, to issue commissions of Oyer and Terminer. Inasmuch, therefore, as the justices of this court have been appointed and commissioned by the governor alone, it is asserted that, under the constitution of the state, the appointment is not only unauthorised, but by the language thereof, expressly prohibited.

2. The jurors, whose names are on the *venire*, are the proper persons to find a bill of indictment. The indictment in this case appears to be found by other jurors, to wit, *Roland E. Bevans* and *Edward Briddle*, whose names are not on the *venire*. [The sheriff's return stated that he had summoned, amongst others, "*Rolin E. Bevans*" and "*Edward Bridle*."]]

3. The *venire facias* issued in this case, whereby the petit jurors were summoned, was signed by the clerk of *Worcester* county court, and under the seal of *Worcester* county court; whereas by law it ought to have been under the hands and seals of the justices of this court—the clerk of *Worcester* county court not being an officer of this court. [The *venire* to summon the grand jurors, and the *venire* to summon the petit jurors, were both tested in the names of *William Polk*, *John Done* and *William Bond Martin*, Esquires, judges of the court of oyer and terminer, &c. and signed by the clerk, and sealed with the seal of *Worcester* county court.]]

4. When this court met under the commission, *Horsey*, the prisoner, was not in the gaol of *Worcester* county by virtue of any legal commitment or process; and this court have jurisdiction only to hear and determine cases where the offenders were legally in gaol; and during their session they have no legal right to commit offenders, and to hear and determine on the offences for which they may be so committed.

5. There is a variance between the *venire* for the petit jury, in the names of the jury, and the names of the jury empanelled to try the case, and who have found the verdict.

6. No *capias* was issued against *Horsey*, the prisoner, before he was committed, and a commitment, without being brought into court by a *capias*, was improper and illegal.

1810.

Horsey
vs
The State.