

brought before the court for the purpose of his moving in person for his discharge, on the ground that he is unable to perform or do what is required by the judgment.

FERGUSON, J.: The defendant is in contempt for disobedience of the judgment. The position of the defendant was fully stated by me in a former judgment upon a manifold application by him for, amongst other things, the having of the original judgment vacated.

In the case of *Ford v. Nassau*, 9 M. & W. 793, it was decided that the court will not grant a writ of *habeas corpus* to bring up a party in custody under an attachment to enable him to move in person to set it aside. The learned judges in that case refer to authorities on the subject, and seem to have entertained no doubt in respect of the application. The same case is also reported in 1 Dowl., P.C., at page 631.

In the case of *Ford v. Graham*, 10 C.B. 369, it was decided that it was entirely in the discretion of the judge to grant or refuse a writ of *habeas corpus* to enable a prisoner to attend and show cause against a summons. In that case Maule, J., said: "I do not see why a prisoner should have a *habeas corpus* whenever he pleases, in order that he may come out and conduct his business, whether that business consists of a proceeding in court or at chambers, or anything else." And Jervis, C.J.: "The matter is clearly in the discretion of the judge; and I think the refusal was justified, no special ground being laid for the indulgence."

Both these cases are referred to as being the existing law in the last edition of Church on Habeas Corpus, 1893, at s. 95; and it does not appear, so far as I have been able to see, that the law on the subject has been changed since these cases were decided.

When, as here, the party imprisoned desires to move, the *habeas corpus* will not be granted. When the object is to show cause to a motion, the granting of the writ is discretionary, the discretion to be exercised in favour of the applicant upon special ground laid.

If this application had been for a *habeas corpus*, I should feel bound to refuse it, and the reason for refusing is much greater when only the fiat, or order, is asked; for when the *habeas corpus* is granted and acted upon, the party is in custody by virtue of the writ until remanded to the custody whence he came, when he is again in prison under the attachment. I do not see how the same would be the case if only a fiat or order existed. I do not see that the sheriff would be bound to render obedience to a fiat or order; nor do I see that the party, if removed from prison under such a fiat or order, would, in the meantime, be in proper and legal custody.

I am authorized to say that when, on a former occasion, such a fiat or order was granted in this case, authorities were not referred to or consulted. On the present application no special ground is laid. There is nothing beyond the bare request, and I think I am bound to refuse it.

Moss, Q.C., for plaintiff.

J. MacGregor for defendant.