

C. L. Cham.]

REG. V. BOYLE.

[C. L. Cham.]

the Division Court of the division in which they reside, viz., at Toronto.

The rule will go for the prohibition, but under the circumstances detailed in the affidavits there will be no costs.

Prohibition granted.

THE QUEEN V. PATRICK BOYLE.

31 Vic. cap. 16—Warrant under—29, 30 V. c. 51, sec. 357—31 V. (Ont.) c. 30, sec. 38—When alderman qualified as J. P.—*Habeas Corpus*—Return to.

Held, 1. That under the Municipal Acts an alderman is not *ex officio* legally authorized to act as a J. P. until he has taken the oath of qualification required for such.

2. That a warrant of commitment under 31 Vic. c. 16, signed by one qualified J. P. and by an alderman who has not taken the necessary oath, is invalid to uphold the detention of a prisoner confined under it, though it might be a justification to a person acting under it, on an action against him.

3. That the mere fact of the warrant having been countersigned under the statute by the Clerk of the Privy Council does not withdraw the case from the jurisdiction of a Judge on a *habeas corpus*.

4. That the prisoner may contradict the return to the writ of *habeas corpus* by showing that one of the persons who signed the warrant was not a legally qualified J. P.

[Chambers, July 27, 1868.]

The prisoner, Patrick Boyle, was committed to the Gaol of the City of Toronto on the 4th May last, under the provisions of 31 Vic., cap. 16, on a charge of being a member of a treasonable society, called the Fenian Brotherhood.

An order was obtained on behalf of the prisoner from Mr. Justice Adam Wilson, upon which a writ of *habeas corpus* was issued, by virtue of which the Gaoler, on the 22nd July, brought up the prisoner, and returned to the writ that the prisoner was detained by virtue of a warrant of commitment of George D'Arcy Boulton and Geo. McMicken, Esqrs., two of Her Majesty's Justices of the Peace in and for the County of the City of Toronto, and which warrant was to the writ annexed.

The warrant, as stated on its face, was issued under the authority of the Act 31 Vic. chap. 16, and was in the following words:—

"To all or any of the Constables, &c.

"Whereas Patrick Boyle was this day charged before us, two of Her Majesty's Justices of the Peace in and for the County of the City of Toronto, on the oath of Charles Follis, for that he, the said Patrick Boyle, is a member of and hath joined a certain unlawful, illegal and treasonable association, in the said City of Toronto, called the Hibernian Benevolent Society, which Society is connected with and is part of an association in the said City of Toronto by the name of the Fenian Brotherhood; the said association being unlawfully composed of and connected with certain other lawless persons, citizens of the United States of America, being a foreign State, at peace with Her Majesty, for the purpose of making hostile incursions into Canada, and with the intent of levying war against her said Majesty, the Queen, therein, and that he, the said Patrick Boyle, hath joined himself to divers persons who have entered Canada with design and intent to commit felony within the same, and hath been guilty of treasonable practices in the city of Toronto, in said Province, contrary to the laws of the said Province and Dominion, and against the peace of our said Lady the Queen, her Crown and dignity:

"These are, therefore, to command you, the said constables, &c., to take the said Patrick Boyle, and him safely convey to the common gaol of the county of the city of Toronto, and there deliver him to the keeper thereof, together with this precept.

"And we hereby command you, the said Keeper of the said common gaol, to receive the said Patrick Boyle into your custody, in the said common gaol, and there safely keep him until he shall thence be delivered by due course of law; he being committed by us, as aforesaid, under and by virtue of a certain Act of the Legislature of the Dominion of Canada, known as "An Act to authorize the apprehension of such persons as shall be suspected of committing acts of hostility or conspiracy against her Majesty's person or Government."

"Given under our hands and seals, this fourth day of May, A. D., 1868, at the city of Toronto, aforesaid.

"(Signed),

"G. D'ARCY BOULTON. [L. S.]

"G. McMICKEN. J. P." [L. S.]

The prisoner denied, on affidavit, that he was or ever had been a member of the said Fenian society, or connected therewith, or with any secret society whatever.

The warrant and return being read and filed,

O'Donohoe moved for the discharge of the prisoner, upon the ground that the warrant was invalid, as Mr. Boulton, who assumed to act as a Justice, was not authorized or entitled to act as such, or to join in the warrant of commitment, he (Mr. Boulton) being an alderman of the city of Toronto, and not having taken the oath required by sec. 357 of the Municipal Act of 1866, as amended by the 38th sec. of chap. 30 of the Acts of last session of this Province; the Act under which the prisoner was committed requiring that the warrant should be signed by two Justices of the Peace. He also moved that the prisoner should be admitted to bail, if the learned judge should hold the warrant good, as it had not been countersigned by a clerk of the Queen's Privy Council, as provided by the 1st sec. of the 31 Vic. chap. 16, above referred to.

James Patterson, for the Crown, took a preliminary objection that the affidavit filed could not be read, being irregularly sworn; and he also stated that he had been instructed by the Minister of Justice that the warrant was duly countersigned within the 30 days by the Clerk of the Privy Council, and, by inadvertence of the gaoler, the proper and true return to the writ of *habeas corpus* had not been made.

It was then agreed that the prisoner should be remanded until the 24th July, when the prisoner was again brought up. The gaoler then stated that he desired to amend his return, and filed an affidavit, shewing that about the 1st of June he received from the sheriff of the county of York a certified copy of the warrant of commitment, duly certified by the clerk of the Queen's Privy Council, which certified copy he produced; and he further swore that when he made his return to the *habeas corpus*, such certified and countersigned warrant had escaped his memory, and that since he made his return he discovered that he had it in his possession. Affidavits were also filed shewing that such countersigning was done