

of the said D. F. and not showing the place where the blows, if any, were inflicted, or the offence, if any, was committed, as set out in the writ. 2. That the person to whom a writ of *habeas corpus* is directed, commanding him to return "the cause of taking and detaining," must return the original and not merely a copy of the warrant (*In re Kote*, 10 U. C. L. J. 183, to the contrary doubted).

Quere, 1. As to the power of a judge sitting in chambers, on an application of a prisoner for his discharge on a writ of *habeas corpus*, to command him and in aid of the prosecution to order the issue of a *certiorari* to bring up the depositions, &c. Quere, 2. As to the power of a court or judge, upon reading the depositions, to amend a writ of *habeas corpus* of a coroner, or issue a new one for the purpose of detaining a prisoner in custody.

(Chambers, August 20, 27, 1861)

On 8th August last, Mr. Justice Adam Wilson, upon the application of prisoner, who was in custody under a coroner's warrant, directed the issue of a writ of *habeas corpus* to the keeper of the common gaol and for the united counties of Lanark and Renfrew commanding him to have the body of John Carmichael under safe and secure custody, together with the day and cause of his being taken and detained, by whatsoever name he may be called or known, before the presiding judge in chambers, in Osgoode Hall, Toronto, immediately after the receipt of the writ, to do and receive all those things which the presiding judge should consider of him according to law.

On 12th August last, the attorney for the prisoner notified, in writing, the committing coroner, the county crown attorney, and the gaoler, that under the writ the prisoner would be brought before the presiding judge in chambers, at Osgoode Hall, on Saturday, the twentieth day of August last, at eleven o'clock in the forenoon, in order that he, the prisoner, should be discharged out of custody, as to the commitment by which he was then detained in the custody of the keeper of the common gaol.

On 20th August last the sheriff returned the writ as commanded, with schedule thereto annexed, Chief Justice Draper being the presiding judge in chambers.

Robert A. Harrison for the prisoner thereupon moved that the writ and return be filed, which was granted.

He then read the return, which was as follows:

"By virtue of the annexed writ to me directed, I have the body of John Carmichael, named in the said writ, ready before the presiding judge in chambers, as in and by the said writ I am commanded. I do further humbly return and certify, that the said John Carmichael was delivered into my custody as keeper of the common gaol of the united counties of Lanark and Renfrew, on the twenty-seventh day of June, A. D. 1864, and by me as such received, and has from thence hitherto been kept and detained under and by virtue of a warrant under the hand and seal of John D. Clendinning one of Her Majesty's coroners in and for the united counties of Lanark and Renfrew, which said warrant is in the words and figures following:

"To Thomas Culbertson, N. Dewar and other Her Majesty's constables and officers of the peace for the united counties of Lanark and Renfrew, and also the keeper of Her Majesty's gaol of Perth, in said united counties

"United counties of Lanark and Renfrew, to wit:

"Whereas by an inquisition taken before me, one of Her Majesty's coroners for the said united counties, on the days and year hereunder written, on view of the body of David Fitzgerald, lying dead at the village of Osceola, in the township of Brantley, county of Renfrew aforesaid; John Carmichael stands charged with having inflicted blows on the body of the said David Fitzgerald: These are, therefore, by virtue of my office in Her Majesty's name to charge and command you or any of you forthwith safely to convey the body of the said John Carmichael to Her Majesty's gaol of Perth, and safely to deliver the same to the keeper of the said gaol; and these are likewise by virtue of my office, in Her Majesty's name, to will and require you the said keeper to receive the body of the said John Carmichael, and him safely keep in the said gaol, until he shall be thence discharged by due course of law; and for your so doing this shall be your warrant

"Given under my hand and seal at Osceola aforesaid, this twenty-fourth day of June, one thousand eight hundred and sixty-four.

(Signed)

JOHN D. CLINDINEN,

Coroner United Counties Lanark and Renfrew.

"And I further return and certify, that up to six of the clock in the afternoon of the eighteenth day of August instant, no other warrant or writ against the said John Carmichael has been placed in my hands. The answer of

"ROBERT KELLOCK,

"Keeper of Common Gaol, United Counties Lanark and Renfrew."

DRAPER, C. J.—Is not the original warrant annexed to the writ?

Mr. Harrison—No. It has been decided by Mr. Justice John Wilson in Chambers that a copy is sufficient: the gaoler retaining the original for his protection (*In re William Ross*, 10 U. C. L. J. 183).

DRAPER, C. J.—That is not my view of the law. The return must be amended, and the original warrant annexed. The gaoler is required to return "the cause of his being taken and detained, &c.," not a copy of it. The warrant may be a forgery.

The return was then amended by the insertion before the words "The answer of," &c., of the words "I further certify and return the original warrant above mentioned, which is hereto annexed;" and the original was accordingly annexed.

Mr. Harrison, upon reading the writ and return as amended, moved for the discharge of the prisoner upon the following grounds:

1. That the warrant of commitment disclosed no offence in law (*Reg. v. Breden*, 16 U. C. Q. B. 487).

2. That it showed no jurisdiction, inasmuch as the place where the offence, if any, was committed, was not shewn (*In re Beebe*, 10 U. C. L. J. 19; *Regina v. Evelt*, 6 B. & C. 247).

3. That the warrant was, in other respects, informal, defective and void (*Jervis on Coroners*, 2nd edn. 388).

S. Richards, Q. C., said although the warrant might or might not be defective, still as it appeared the prisoner was charged with a very grave offence, before any argument on that point were had, he desired to have the depositions before the judge, and for that purpose would at once apply for a writ of *certiorari*, to be directed to the coroner and the county crown attorney, commanding them to certify the depositions; and in the meantime that the prisoner be remanded.

Mr. Harrison contended that upon the materials before the judge (a void warrant) the prisoner was entitled to his discharge, and protested against a remand, the custody being illegal.

DRAPER, C. J.—I shall remand the prisoner, and in the meantime order the writ of *certiorari* to issue as asked.

The following remand was thereupon made and signed:

Upper Canada, } To the keeper of the common gaol of the united
to wit, } counties of Lanark and Renfrew:

John Carmichael being brought before me, the presiding judge in chambers, at Osgoode Hall, in the custody of the keeper of the common gaol of the united counties of Lanark and Renfrew, by virtue of a writ of *habeas corpus*, tested the eighth day of August instant, issued out of Her Majesty's court of Queen's Bench, at Toronto, to the said keeper directed, now upon reading the said writ and return thereto, and the said John Carmichael having applied for his discharge from custody under the warrant returned as the cause of his detention in custody, I do order that the said John Carmichael be not now discharged, but that he be remanded into custody in the said gaol, and to the custody of the keeper of the said gaol, until Saturday, the twenty-seventh day of August instant, and that on that day the said keeper do have the body of the said John Carmichael before the presiding judge in chambers, at Osgoode Hall, under this order and the said writ of *habeas corpus*.

Dated this 20th day of August, 1864.

(Signed)

Wm. H. DRAPER, C. J.

The writ of *certiorari*, issued on the same day, was in the following form:

Victoria, &c.

[L S] To John D. Clendinning, one of Her Majesty's coroners of the united counties of Lanark and Renfrew, and to Donald Fraser, crown attorney for the said united counties, greeting:

We being willing for certain reasons that all and singular the examinations, informations and depositions taken by or before you the said John D. Clendinning, touching the commitment of