

when the application was made so promptly after the judgment, and a trial has not been lost.

I shall make the summons to set aside the judgment absolute on condition of paying costs, viz., the costs of the judgment and proceedings upon it; the costs of opposing the first summons, which was discharged with costs; and the costs of opposing this summons. And unless these costs shall be paid, and appearance entered, within one month, then this summons to be discharged with costs.

HARVEY FERRY v. JAMES W. COMSTOCK.

Consol. Stats. U. C., cap. 22 sec. 31, p. 191.—Arrest.—Application for discharge—Intention to quit Canada.

Where defendant made application under and pursuant to sec. 31 of Consol. Stats. U. C. cap. 22, to be discharged out of custody, on the ground that when arrested he had no intention to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular, or for any other purpose; and it appeared that the debt for which he was arrested had been created through fraud; that he had no more ties in Canada than anywhere else, where he would not be criminally responsible for his acts of fraud—the application was refused. (Chambers, 13th January, 1860.)

This was a summons calling upon plaintiff, among other things, to shew cause why the writ of *capias* issued in this cause, the arrest of the defendant thereunder, and all proceedings subsequent thereto should not be set aside, on the ground that both the plaintiff and defendant were, at the time of the issue of the writ, citizens of a foreign country; or why the arrest should not be set aside, and the defendant altogether discharged from custody, on the ground that the defendant had not, either at the time of the making of the affidavit to arrest the issue of the writ of *capias* thereon, or the arrest of the defendant thereunder, any intention to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular, or for any other purpose.

The affidavit of plaintiff, on which defendant was arrested, stated that on 2nd July, 1849, defendant applied to him for a loan of \$3,950, security to be given by a bill of exchange at six days, on a Mr. Haggard, of Buffalo, and on warehouse receipts for 600 barrels of flour and 3,000 bushels of wheat: that defendant, in order to put Haggard in funds to meet the bill, had agreed to consign to him flour to the amount of the bill: that before the bill matured, defendant called upon plaintiff and said he would not consign the flour as he could do better with it, but would be sure, notwithstanding, to meet the bill: that when the bill matured, defendant paid to plaintiff \$1,000, and offered a bill of exchange, drawn at thirty days, for \$3,000, upon a Mr. King, of Buffalo, to whom he said he had consigned flour to that amount—the warehouse receipts to be held by the plaintiff in the meantime: that King had no flour consigned to him by plaintiff, and in consequence the draft for \$3,000 was protested: that, on enquiry, plaintiff discovered that there were not in warehouse either the 600 barrels of flour or the 3,000 bushels of wheat called for by the warehouse receipts: that defendant had committed a gross fraud on the plaintiff: that on the 29th August he absconded from Milwaukee to defraud the plaintiff, and to avoid being arrested for fraud: that on the 28th October plaintiff had recovered judgment against defendant for the amount of his said debt: that, for the reasons aforesaid, “he verily believed that the said James W. Comstock will quit Canada, unless forthwith apprehended.”

Corroboratory affidavits were filed by Mr. Haggard and others mentioned in the plaintiff's affidavit.

The defendant filed an affidavit, in which he swore that both himself and plaintiff were citizens of a foreign state; in general terms denying the alleged frauds: and alleged that in Milwaukee it is customary for merchants to advance money at usurious rates on fraudulent warehouse receipts, and to threaten criminal prosecution in the event of refusal to pay the usurious rates. Other affidavits, made by Hon. Cicero Comstock, a member of the Senate of the United States and a brother of defendant, and by Patrick George Norris, his attorney, were filed by the defendant. In the former, the alleged law of the State of Wisconsin as to fraudulent warehouse receipts, was fully stated; and in the latter, certain facts were adduced to show that the defendant never had any intention to quit Canada, knowing, as he did, that if he returned to the United States he would be prosecuted criminally.

Various affidavits were filed by plaintiff in reply, corroborating the affidavits of plaintiff, and strongly denying that it is the cus-

tom in Milwaukee, as alleged by defendant, for commercial men there to advance money on fraudulent warehouse receipts.

The contents of the affidavits, both of plaintiff and defendant, are in other particulars more fully noticed in the judgment of the court.

Harrison, for defendant, as to both plaintiff and defendant being citizens of a foreign state, cited *Cozens v. Ritchie*, Dra. Rep. 176; *Ruyner v. Hamilton*, M. T. 2 Vic. M.S.; R. & H. Dig. “Arrest,” IV. 2; *Frear v. Ferguson*, 2 U. C. Cham. R. 144; *Brett v. Smith*, 1 U. C. Prac. R. 309; *Romberg v. Steenbock et al.*, Ib. 200; *Blumenthal v. Solomon*, 2 U. C. Prac. R. 51; but relied rather on the second ground of the application, viz., for the discharge of the defendant, on the ground that when arrested he was not about to quit Canada for the purposes sworn, or for any purpose. As to this he cited Consol. Stat. U. C. cap. 22, sec. 31 p. 191; *Talbot v. Bulkeley*, 16 M. & W. 196; *Bullock v. Jenkins*, 1 L.M. & P. 645; *Pegler v. Hislop*, 1 Ex. 437; *Burness v. Gurranoorch*, 4 Ex. 620; *Stammers v. Hughes*, 18 C. B. 527; *Hargreaves v. Hayes*, 5 El. & B. 272; *Robinson v. Gardiner*, 7 Dowl. P.C. 716; *Walker v. Lamb*, Ib. 131; *Gibbons. Spalding*, 11 M. & W. 191. *J. B. Read, contra.*

DRAPEL, C. J.—In this application to set aside the defendant's arrest, and discharge him from custody, the only point for decision is raised on this objection—that the defendant had not, at the time of the granting the order, the issuing of the *capias*, or the making of the arrest, any intention of quitting the Province of Canada with intention to defraud.

It was not pressed upon me to review the decision of the learned judge who made the order for the arrest, upon any suggestion of the insufficiency of the affidavit before him to sustain such an order. The application was based entirely on the new matter disclosed upon affidavits. Had the former course been taken, I should have referred the matter to the full court.

It is, however, necessary to refer to those affidavits, in order to apply the affidavits filed on this application.

The plaintiff discloses a gross fraud in obtaining an advance of money on the security of a bill of exchange and two warehouse receipts, the bill drawn at Milwaukee, in the State of Wisconsin, where the plaintiff and defendant both resided at the time, on a party in Buffalo, by whom acceptance and payment were refused; and the warehouse receipts, purporting to represent the defendant to be possessed of a large quantity of flour and oats, which he had not. The defendant absconded from Milwaukee about the time the bill matured, and came to London, in this Province, and the plaintiff recovered judgment against him there, but no satisfaction.

The plaintiff swears that he believed the defendant had with him a large sum of money, of which he defrauded plaintiff and other creditors in the State of Wisconsin: that plaintiff only resided in London for the purpose of avoiding plaintiff and other creditors: and that “defendant will abscond from Canada the moment he learns that plaintiff has discovered his residence.” This affidavit is strongly corroborated, in material parts, by affidavits of other parties.

The defendant's own affidavit does not deny any fact alleged by the plaintiff as to his indebtedness. It goes further, and shows that, by the laws of the State of Wisconsin, the giving such warehouse receipts, where there is no such property in the giver's possession as the receipts represent, is a criminal offence, subjecting the offender to not less than one nor more than two years' imprisonment in the States' prison. It further avers that the defendant left Milwaukee and came to London, not to defraud plaintiff—which intention is wholly denied— but to avoid criminal prosecution: that defendant left real estate which he valued at four thousand dollars, and personal property valued by him at sixteen hundred and twenty-five dollars, in the city of Milwaukee; that all the money he brought with him was two hundred and six dollars: that he would not leave the Province, as he knows he would be arrested on these warehouse receipts if he returned to the United States: that a few days before his arrest he was told by a police officer that the plaintiff had gone to Toronto to get a judge's order for his arrest, but he told the officer he would remain at London, whether the plaintiff got the order or not. He also stated that it was a common thing among business men in