

The defendant, besides appealing, moved the Divisional Court for his discharge from custody upon the merits and upon the ground of concealment by the plaintiffs of material facts in making the ex parte applications for the orders. The right to make such a motion is entirely founded upon Rule 1047, which is confined to the case of an order for arrest before judgment, and does not extend to a ca. sa: *Kidd v. O'Connor*, 43 U. C. R. 193; *Bank of Montreal v. Campbell*, 2 U. C. L. J. N. S. 18; *Gossling v. McBride*, 17 O. R. 585.

As to the motion to set aside the order of 21st May, it was not pressed.

As to the motion to set aside the order of 21st August, upon the ground that plaintiffs, upon the application for it, suppressed and misrepresented facts which it was their duty to have fully and fairly disclosed, the following facts appeared. The plaintiffs' solicitor knew that defendant had been arrested on the evening of the 18th August under the expired concurrent writ by the sheriff of Lambton; he had had a conversation with the sheriff upon the subject over the telephone, and a further conversation with the sheriff's solicitor upon the same subject on the morning of the 19th August; the sheriff on the evening of the 18th August said he would free the defendant unless indemnified, and the plaintiffs' solicitor refused to indemnify him, but he abstained from stating that he supposed the defendant had been freed by the sheriff. With all these facts in his mind, he prepared an affidavit for the manager of the plaintiffs' office in Bothwell, and had it sworn by him on the 19th August, in which it was stated: "That in the month of May last I ascertained that the said defendant was in the neighborhood of Bothwell, in the county of Kent, but was keeping secreted, visiting relatives; that a ca. sa. for his apprehension was issued to the sheriff of Kent, but the defendant evaded arrest, and left for parts unknown to me; that within the last few days I ascertained that the said defendant is in the neighborhood of Sarnia, in the county of Lambton; that I have not the slightest doubt that the said defendant is about to, and will, unless he be forthwith apprehended, quit Ontario with intent to defraud the plaintiffs." The manager stated in a later affidavit that when he swore to this he was not aware that the defendant was under arrest, but believed he was still at large.

The solicitor who drew and procured the manager to swear to the affidavit above quoted, was guilty of an inexcusable breach of his duty to his clients and to the Court in concealing from them the true facts existing at the time the affidavit was sworn.