

DIVISIONAL COURT.

OCTOBER 23RD, 1911.

BANK OF MONTREAL v. PARTRIDGE.

*Appeal—Right of Appeal to Divisional Court—County Court
Appeal—Order for Arrest—Want of Jurisdiction.*

Appeal by the defendant from an order for his arrest made by the Judge of the County Court of the County of Kent, in an action in that Court.

The appeal came on for hearing before BOYD, C., LATCHFORD, and MIDDLETON, JJ.

J. G. Kerr, for the plaintiffs, objected that the appeal did not lie.

J. M. Ferguson, for the defendant.

The judgment of the Court was delivered by MIDDLETON, J.:—In this case the defendant has mistaken his remedy. Upon an order for arrest being made, in the High Court, the defendant may, if he thinks the order has been granted upon improper material, move under Con. Rule 538 to rescind the order. Quite apart from this special jurisdiction (originating in the Rules of the 1st January, 1896, to meet the situation pointed out in *McNab v. Oppenheimer*, 11 P.R. 214), "the Court out of which the process issued has general jurisdiction . . . over the acts and decision of the Judge granting the order, to revoke the order or to discharge the prisoner, proceeding upon the same identical material that was before the Judge:" *Damer v. Busby*, 5 P.R. 356, at p. 389.

In County Court cases it is open to the defendant to seek similar relief. Such applications must be made in the County Court.

In addition, there is the special jurisdiction conferred by the statute, now found in Con. Rule 1047, to move for discharge from custody. This motion for discharge is an entirely independent and original proceeding, based upon the arrest, and upon it the defendant undertakes, upon new material, to satisfy the Court that his further detention is unwarranted—the intention to abscond having been displaced: *Tooth v. Frederick*, 14 P.R. 287. Upon such a motion the original order for arrest is not the subject of attack; and, if discharge is ordered, it still stands and affords protection to those acting under it. In County Court cases, this motion must be made in the County