HAGARTY, J.—It is very much to be regretted that this unrestrained license of swearing has been allowed in this case as the result has been the placing on the files of this court a vast mass of slander and irrelevant vituperation, and parties seem to have been permitted and encouraged to indulge in all sorts of personal ill feeling, *and naughty, wholly beside* the merits of the case and the points really at issue. It seems strange that the consideration of the question whether a man in business in London was about to abscond or not, should induce a large number of persons to work industriously to blacken and defame each other on oath. If their doing so had at all tended to elucidate the matter really in question it would be simply one of the painful necessities of legal disputes. When such abuse is indulged in on wholly irrelevant points it becomes intolerable and deserving of severe reprobation.

On the argument Mr. Freeland for defendant, in addition to the ground set forth in the summons contended that the defendant should be discharged as the debt had been secured and was not in fact due. And that the affidavit to arrest only spoke of a departure from Upper Canada, instead of Canada. He cited *Talbot* v. *Buckley*, 16 M. & W. 173, *Givens* v. *Spalding*, 11 M. & W. 173, *Choate* v. *Stevens*, Taylors' Reports, U. C., 620., *Bradenburg* v. *Needham*, 1 Dowl., P. C. 439, *Baltman* v. *Dunn*, 7 Dowl., 105, *Ross* v. *Balfour*, 5, U. C. O. S. 683, *Larchin* v. *Willan*, 7 Dowl., P. C. 11.

First as to jurisdiction. Our statute following the words of the English Act, 1 & 2, Vic., cap. 110, allows the defendant to apply *to a Judge or to the Court in which the action is brought* for an order or rule for his discharge, and that either judge or court may make absolute or discharge, such order or rule provided that the order made by a judge may be discharged or varied by the Court.

In *Graham* v. *Sandranelli*, and *Talbot* v. *Buckley*, 16 M. & W. 196, in pronouncing the judgment of the Court, Parke, B., says, That the Judges were not agreed upon the question, whether if the Judge secondly applied to should differ from the first on the same state of facts, he has power or right to order the previous discharge as upon an appeal to the Court. Although Baron Parke speaks of "the same state of facts" in the case before the Court, the second application was as here on new facts shewn by affidavits of defendant and others, negativing an intention of leaving England. It is not necessary further to discuss the question of my jurisdiction in Chambers as I dispose of this case on my view of the merits.

As to the debt being due. It was at first thought that this question could not be raised on motion, and Sir John Coleridge, in *Copeland* v. *Child*, 17 Jurist 566, so expressly decided. It is clear however from *Stammers* v. *Hughes*, 18 C. B. 527, *Pegler* v. *Huslop*, 1 Ex. 437, that there is jurisdiction to try if a debt really exist. Mr. Justice Williams adds,—"I never for a moment doubted that the question was an open one, but at the same time, I have always said I would not take upon myself to try a question which was at all doubtful." Parke, B., says, "It must be a very clear case that the plaintiff had no cause of action or we should not interfere."

Now the case before me is anything but a clear case, and the defendant has by no means satisfied my mind that he has been held to bail for any amount not truly due. I therefore pass to the other points taken.

The chief objection to the affidavit seems to be the omission to give the name of plaintiff's informant. From the remarks made by Alderson, B., during the argument of *Talbot* v. *Buckley*, it appears to be the opinion of that learned Judge, that the informant should be named. The same view is strongly laid down by Parke, B., in *Gibbons* v. *Spalding*, 11 M. & W. 173, but is somewhat qualified by the judgment in *Arkenheim* v. *Colegrave*, 13 M & W. 620.

I do not, however, consider this affidavit to fail on this ground. The plaintiff swears that defendant himself informed him that he was going to the Red River settlement out of the jurisdiction, although to return, as he alleges, in six months. He adds to this, that he was elsewhere informed that defendent was going to British Columbia *via* New York.

I think the information furnished by defendent cannot be overlooked in judging of the sufficiency of the affidavit. In *Hargreaves* v. *Hayes*, 5 El. & B. 272, the plaintiff swore to have been informed by defendant that he was going with his family to reside permanently in Australia. Campbell, C. J. says,—"The Act requires that the affidavit shall be such as to satisfy the judge, and if it state facts sufficient to lead the Judge to believe that the defendant, unless forthwith apprehended will leave the country, that is enough." Sir J. Coleridge, "It does not follow that the affidavit must copy the words of the Statute; all that is necessary is that it should satisfy the judge that the contingency is at hand." Crompton, J. "It is left to the judge to decide whether he is satisfied that the defendant will leave the country unless forthwith apprehended."

It is to be borne in mind that the Canadian Statute requires the further proof of the departure with intent to defraud.

The technical objection as to the departure from "Upper Canada" instead of "Canada," would have prevailed most probably in the old affidavit, not stating facts as now required. I think that the facts sworn to as to Red River and British Columbia, and other places beyond the Province of Canada, may, in this case, be held to cure *the objection at this stage of the proceedings.*

As to the general ground that defendant now shews facts to prove that he did not contemplate such a departure as would have warranted his being arrested, I do not consider that I am called on to interfere. The facts of the case are very peculiar. The defendant was confessedly in great pecuniary difficulty, and about to depart for a very remote part of the world, involving even on his own showing, an absence of six months, and possibly for a longer period. It would, of course, be wholly in his own option whether to return to Canada or not.

I abstain from any mention as to the impression on my mind as to his intentions, especially as it is stated that an action is pending for malicious arrest. It is sufficient for me to say that I do consider it to be a case in which, assuming that I have jurisdiction, I am by law required to discharge the defendant from arrest.

I discharge the summons without costs.

The learned judge also referred to the following cases:—*Ross* v, *Montefiore*, 1 H. & N. 722; *Bullock* v. *Jenkins*, 20 L. J. 90, Bail Court; *Burness* v. *Guaranovitch*, 7 D. & L. 235; *Gadsden* v. *McLean*, 9 C. B., 288.

BECKET ET AL v. DURAND.

Costs of the day—Nonpayment thereof—Staying proceedings—Costs.

Nonpayment of cost of the day, is not a sufficient ground for staying proceedings until such costs are paid, especially when such a course would entitle the defendant to sign judgment for his costs, for not proceeding.

There might be an extreme case, when staying proceedings for nonpayment of cost of the day, would be the proper course.

Where a summons moved *with costs* is discharged, it is discharged with costs. A notice to proceed to trial, given by the defendant to the plaintiff under the Statute, is a waiver of any objections that might otherwise have been to a notice of trial regularly given thereafter, and pursuant thereto.

(December, 1859.)

Issue was joined in March, 1858, and notice of trial was served for the Spring Assizes of 1858.

The plaintiffs did not go to trial, and the defendant taxed costs for not proceeding to trial, at £11 5*s.* 8*d.*

The plaintiffs reside out of the Province, and gave the usual security for costs, before issue joined. The defendant demanded the costs so taxed, of the surety, and also of the plaintiffs' attorney.

Since entering the cause for trial, the plaintiffs took no proceeding until the third of October, 1859, when they gave notice of trial for the then ensuing Assizes at Toronto.

On the 8th of September, 1859, defendant served on plaintiffs' attorney, a notice under the 151st section of the Common Law Procedure Act of 1856, to proceed, and thereupon the plaintiffs gave this last notice of trial.

The defendant obtained a summons to stay all further proceedings, until the costs for not proceeding to trial should be paid, and and to set aside the notice of trial, because the plaintiffs had not given a term's notice of their intention to proceed before giving it, upwards of four terms having elapsed since the last proceeding.

The only disputed fact, was as to the plaintiffs' attorney having *undertaken to pay the costs, before giving notice of trial.* The plaintiffs' attorney denied having given any such undertaking, and stated that he could not proceed to trial, because a commission to examine a witness had been refused, but that the plaintiff expected to procure the attendance of this witness, at the then ensuing Assizes for Toronto.