to the means and expectation he then had, and as to the means and property he still has of discharging the said debt, damages or liability, and as to the disposal he has made of any property."

Section 165 enacts in substance that if the party so summoned,

1. Does not attend, &c., &c.

4 If it appear to the judge that the party *obtained credit from the plaintiff*, or incurred the debt or liability under false pretences, or by means of fraud or breach of trust, or that he wilfully *contracted the debt or liability*, without having had at the time a reasonable expectation of being able to pay or discharge the same.

5. If it appears to the satisfaction of the judge that the party had, when summoned, or, since the judgment was obtained against him, has had sufficient means and ability to pay the debt or damages or costs recovered against him, either altogether or by the instalments which the court in which the judgment was obtained was ordered; and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons, the judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the party so summoned resides or carries on his business, for any period not exceeding forty days.

Section 170 authorises the judge to rescind or alter any order for payment previously made against any *defendant* so summoned.

Section 171 authorizes the judge to examine both *plaintiff* and *defendant*, and also any other persons touching the several things hereinbefore mentioned, under certain circumstances, before judgment, and to commit the *defendant* to prison, in like manner as he might have done in case the *plaintiff* had obtained a summons for that purpose after judgment.

Section 172 enacts that no protection, order or certificate granted by any court of bankruptcy for the relief of insolvent debtors, shall be available to discharge any *defendant from* any order of commitment.

Section 173 declares that no imprisonment under the act shall extinguish the *debt* or other *cause of action* on which a judgment has been obtained, or protect the *defendant* from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this act, or to deprive the *plaintiff* of any right to take out execution *against the defendant*.

Mr. Hawkins contended that under sec. 41, before stated, he was not liable to be arrested, because he was the plaintiff in the action, and judgment had been recovered against him for costs only, and he also maintained that the proceedings were open to several other exceptions which I overruled. He cited the case of *Challin* v. *Baker*, 26 L. T. 206, in support of his view that an arrest could not be made for costs only, and which he contended was applicable to his case, although that was a decision under the English C. L. P. Act, sec. 45, before set out, referring to where a *creditor* obtains a judgment; and although our act, under which the arrest was made, is more comprehensive than that section; for he argued that the true construction of our act does not at any rate enable a defendant to examine a plaintiff or arrest him, when a judgment is for costs only.

Mr. Harrison, *contra*, argued that the Legislature, in sec. 41, by using the expression "any party," did so advisedly, to afford a defendant the very reasonable remedy which he ought to have as well against the plaintiff, as the plaintiff against the defendant, for the discovery of the plaintiff's estate and effects, in order that they may be applied to the liquidation of the costs of the action, which, it must be presumed, have been unjustly imposed upon the defendant by the plaintiff's wrongful proceedings, and which may amount to a large sum, and are at all times of serious consequence to defendants; that the arrest is not for the non-payment of costs —which would be contrary to section 3 of the act—but for the neglect and wilful contempt of the plaintiff to the order of the judge —and that there is a plain distinction between the two cases, of which the decision in *Henderson* v. *Dickson*, 19 U. C. Q. B. 593, is a very excellent illustration: and that the process has not been pressed vindictively against the applicant, for if he will now engage to appear and be examined according to the order of the judge his longer imprisonment will not be insisted on.

Mr. Harrison referred to the decision given below of the ex Chief Justice of Upper Canada, Mr. Justice McLean, in *Meyers* v. *Robertson*, 5 U. C. L. J. 251, determining that the section is not restricted to creditors, and is applicable to those cases in which judgments have been recovered against plaintiffs for costs only.

Mr. Harrison further contended that this writ of *habeas corpus* was not one which could be issued under the 31 Car. II cap. 2, for that act applied to criminal cases only, which this is not; and that the Imperial Statute 56 Geo. III cap. 126, which enables judges of the superior courts to issue and adjudicate upon such writs in vacation, in other cases than those which are embraced in the Statute of Charles, does not extend to, and has never been adopted in this province; that the applicant should, therefore, have applied to the court in term time, as he was arrested while the courts were sitting, or must apply in the ensuing term, if he be then in custody; and he referred to Crowley's case, 2 Swanst 1, as a decision upon this point.

As I entertained very strong doubts upon the power of the judge to commit under the circumstances stated, I bailed the applicant, binding him to appear from time to time before the judge in chambers until the matter was finally disposed of.

The case of *Challin* v. *Baker*, 26 L. T. 106, which was cited by Mr. Hawkins, is as follows:

The defendant in that case was called upon by judge's summons to shew cause why she should not, under the 60th sec. of the C. L. P. Act of 1854, attend before the master and submit to examination as to the debts due and owing to her or accruing due; and why, also, she should not produe all books of account, &c., relating to such debts. The judgment had been obtained in ejectment. Mesne profits were not claimed. A verdict was taken against the defendant, she not appearing, and costs were taxed at £35 13s. 2d.

For the plaintiff it was contended that he having obtained a judgment, was entitled to an order to examine his "judgment debtor."

For the defendant it was contended that the plaintiff was not a *creditor* who had obtained a judgment within the meaning of the section; that although he may become a judgment creditor in respect of his costs, yet the statute only applies to actions in which the plaintiff is a creditor at the time of the action brought; that in fact it refers only to creditors bringing actions for the recovery of debts or pecuniary demands in respect of which they have given credit. Platt, B., said that the statute clearly did not apply to a plaintiff in ejectment, and therefore dismissed the summons with costs.

The case of *Meyers* v. *Robertson*, 5 U. C. L. J. 254, referred to by Mr. Harrison is as follows:

The defendant called upon the plaintiff to shew cause why a writ of *ca. sa.* should not issue against the plaintiff for his contempt in not appearing and submitting to oral examination, in pursuance of an order and appointment, duly made under the 22 Vic. cap. 96 sec. 13, now forming sec. 41 of the Consolidated Act for Upper Canada before referred to.

No cause was shewn by the plaintiff. The defendant applied for the usual order for a *ca. sa.* under the statute. McLean, J., on hearing that the judgment was in favor of the defendant for the costs of defence merely, refused the order, on the ground that no *ca. sa.* could issue for costs only; but he said "he would grant the order for committal of the plaintiff under the statute, and he allowed the summons to be amended and again served for that purpose."

I have considered both of the cases on this particular point to which I have been referred, and while I quite agree with the decision of Baron Platt that under the clause relating to *any creditor* having obtained a judgment, no power is given to a plaintiff in ejectment to proceed by the examination of the defendant, when the recovery is for costs merely, and which equally excludes a defendant from so proceeding for his costs only, because in neither case is the party applying "a creditor who has obtained judgment." I am not called upon to dissent from any opinion of Mr. Justice McLean, because he made no decision that the defendant could examine, and arrest for not submitting to examination, the plaintiff in a case when the judgment had been recovered for costs only, because Mr. Justice McLean pronounced no decision whatever. He simply granted a summons on the plaintiff to shew cause why he should not be committed for contempt—a course which might, and no doubt would have been taken by any other judge, to hear on argument what could be advanced in favor of or against such an application. It does not appear that any order was ever made, and it is quite clear that no opinion was expressed upon the occasion.