

The learned Judge says: "The defendants seem carefully to avoid saying that they still carry on business at Buffalo, or giving any information as to the nature of the business which brought them to Canada, so that I may judge as to any probability of their being in Canada merely on some temporary business, which would bring them within the rule that to allow foreigners to arrest each other would be a fraud upon our law." After noticing the affidavits filed by the plaintiffs to show that defendants had come to reside in Canada, the Judge proceeds: "The defendant's affidavit is not satisfactory to bring them within the case of *Freer v. Ferguson*, but if it were so, the fact that they must be treated as subject to our law is established clearly, I think, beyond all question."

I consider the affidavit in this case as far less satisfactory than that in the case just cited.

The case of *Brett v. Smith*, 1 Practice Reports, 315, before Richards, J., seems to regard *Freer v. Ferguson* in the light in which it is placed in the last case cited, as to the defendant being only temporarily here when arrested on the debt contracted abroad.

On the whole I am of opinion that I have not sufficient materials laid before me by the defendant to bring his case within the principle of those already decided in our Courts, and that his application must be discharged. It is hardly a case for costs.

Summons discharged without costs.(a)

#### BAMBERG V. SOLOMON.

*Arrest—Affidavit of debt.*

A defendant will not be discharged from arrest because the affidavit of debt only alleges an "intent to defraud deponent, as the assignee of the estate and effects of plaintiff," without alleging an "intent to defraud plaintiff." But *Seem*, that such an affidavit should show the nature of the assignment, and that deponent is the real plaintiff.

[Dec. 18, 1856.]

The particulars appear in the judgment:

HAGARTY, J.—This is a similar application to the last (*Blumenthal et al v. Solomon*) by the same defendant on an affidavit of facts almost identical.

The additional point taken is that the affidavit is insufficient. It is sworn by Blumenthal, assignee of the estate and effects of Jacob Bamberg, (the plaintiff,) that defendant "is indebted to the estate of the said J. B. and this deponent as the assignee thereof," in so much for goods sold by said J. B. before the assignment, concluding that defendant is about to leave, &c., "to defraud this deponent, as such assignee as aforesaid, of the said debt."

It is objected that this latter allegation does not satisfy our Statute, which requires an intent to defraud "the plaintiff."

The point is new to me, and I do not feel warranted in deciding that the affidavit is open to the objection taken. I rather incline to consider that it substantially complies with the Statute, although it would have been better, perhaps, to have shown the nature of the assignment, and that deponent was the real plaintiff more clearly.

A somewhat analogous objection was taken in *Chamberlain v. Wood*, 1 Prac. Rep. 195, where deponent called himself "attorney and agent," without saying "of the plaintiff."

(a) For a review of the cases bearing upon the point decided in this case, see Harrison's Common Law Procedure Act, page 40.

BURNS, J., refused to discharge, leaving defendant to apply in term if he thought proper, without prejudice to his giving bail in the meantime.

I shall take the same course, and discharge this application without costs, in the same manner.

Summons discharged without costs, with leave to apply in Term.

#### KERR ET AL V. WILSON ET AL.

*Practice—Absconding debtors—Continuation of proceedings commenced under old Law—C. L. P. Act, 1856, sec. 45.*

Proceedings against absconding debtors which have been commenced before the C. L. P. Act, 1856, will be allowed to be continued as nearly as may be in accordance with the former practice.

[Dec. 16, 1856.]

A warrant of Attachment had been issued under the practice in force before the C. L. P. Act, 1856, and due notice given; by the direction of a Judge in Chambers since the new Act, plaintiffs took out a writ of Summons and endeavored to serve defendants.

They now produced affidavits showing that defendants had been served by leaving copies of the writ of Summons affixed to the doors of their respective last place of abode in this Province; and that copies had been put up in the office of the Deputy Clerk of the Crown in the county of Elgin, being the county in which defendants were last resident in this Province; also, that this action was commenced by attachment issued on the 10th June last; that defendants had some time previously absconded to the United States; that up to the time of their absconding, they resided and carried on business as partners at or near Vienna in the county of Elgin; that plaintiffs, after diligent enquiry, can obtain no information as to the place defendants have fled to, further than that they have gone to the United States; and that defendants have done no act in defence of this action.

HAGARTY, J.—I will grant the same order as granted by Burns, J., in *Kekendall et al v. McKimmon*, 2 U.C.L.J., 184(a) and allow the plaintiffs to proceed by filing the declaration with a copy and notice to plead in the office of the Deputy Clerk of the Crown at St. Thomas, in the county of Elgin; and direct that such filing shall be deemed good service, and also that filing notice of assessment to the defendants in the said office shall be good service according to the practice in force before the C. L. P. Act, 1856.

#### COMSTOCK V. LEANEY.

*Removal of suit from Inferior to Superior Courts—Commission.*

An action in which it will be necessary to issue a Commission for the examination of witnesses, may be brought in one of the Superior Courts, although the amount sued for may be within the jurisdiction of an Inferior Court.

[Dec. 16, 1856.]

This action was brought in the Queen's Bench and a verdict recovered by plaintiffs for £8 3s. The only witness who could prove the account on which the action was brought resided out of the jurisdiction of the Courts, and it was necessary that a Commission should be issued to examine him.

On the application of *H. B. Morphy* for plaintiff,

BURNS, J., before whom the cause was tried, now granted a certificate, "that in his opinion this cause was a proper one to be withdrawn, not only from the Division Court, but also from the County Court, and to be brought in one of the Superior Courts."

(a) See Harrison's C. L. P. Act, p. 100.