

The affidavit must state in express terms that there is "a good defence to the action on the merits," (*Lane v. Isaacs*, Dowl. 652.) It may be made not only by the defendant, if *he is advised and believes*, but by the Attorney or his Clerk, if *he is informed or instructed and believes*, or by an agent, if he state that *from his instructions he believes*, (*Rowbottom v. Dupree*, 5 Dowl. 557,—*Schofield v. Huggins*, 3 Dowl. 422.) The affidavit must state the defence to be *merits to the action*, (*Bronley v. Gerish*, 1 D. & L. 768.) See also what the affidavit should state, (*Tate v. Bodfield*, 3 Dowl. 218; *Bower v. Kemp*, 1 Dowl. 282; *Page v. Smith*, 7 Dowl. 412; *Crosby v. Junes*, 5 Dowl. 566.)

In addition to the above the following modern cases may be mentioned:—

An application to set aside the order for leave to proceed under the 17th section (English Act) may be made on affidavits contradicting those upon which the order was obtained, without disclosing a defence on the merits, but if the order stands it would seem that judgment signed in pursuance of it cannot be set aside without such affidavits as are mentioned in sec. 27, (*Hull v. Scotsun*, 9 Exc. 238.) The English Rule of Court excluding Sunday from the computation of legal time, when it is the last day for doing an act, does not apply to sec. 27, and therefore if Sunday is the last day of the eight days after which execution may issue, such execution may issue on the Monday following, (*Roxbury v. Morgan*, 9 Exc. 730.)

ATTACHMENTS—EFFECT OF, WITH RESPECT TO SUITS PREVIOUSLY COMMENCED.

By the 55th sec. of the Common Law Procedure Act, any person who shall have commenced "a suit in any Court of Record in Upper Canada, the process wherein shall have been served or executed before the suing out a writ of attachment against the same defendant as an absconding debtor, shall, notwithstanding the suing out of the writ of attachment, be entitled to proceed to judgment and execution in the usual manner," and if he obtain an execution before the plaintiff in the attachment, he will be entitled to the advantage of his priority of execution subject to the costs of the attachment, if the Judge shall so order.

It will be observed that the prior suit must have been commenced in Courts of Record. Now it is expressly declared by the D. C. Act, that the Division Courts shall not be a Court of Record, and therefore the person commencing a prior suit, a suit in a Division Court against the defendant, will not be entitled to the advantage of his priority of execution. This probably was not foreseen by the Legislature, for it never could have been contemplated to place the small debt suitor in a worse position than the suitor for a large amount. The man who sues for £26 is an eminently more favorable position than the man who sues for £25. We are more strongly convinced that this could not have been so designed by the Legislature in looking at the 57th section, which places attaching creditors in the Superior Courts and in the Division Court on nearly the same footing in respect to distribution.

One result of this enactment whenever the debt approaches £25 will probably be this—that persons naturally desirous to make the best of a demand against a debtor whose means are trifling and who is expected to abscond, will sue in the County Court to obtain the advantage of priority of execution, even if deprived of costs, rather than by suing in the Inferior Courts having cognizance, to risk losing the whole demand. It may also lead to fraud in this way—that the party intending to abscond, and desiring to prefer a particular creditor to whom he is indebted to the amount of, say fifteen or twenty pounds, will put him in a position to make out a case to an amount exceeding £25, and thus defraud other creditors. Where, under the circumstances first mentioned, a party is indebted to several for small sums in the shape of negotiable instruments, it will not be thought by the parties, unfair to transfer all to one of the creditors, so as to raise the claim beyond £25 to enable a suit to be brought in a Court of Record.

The clause certainly provides for setting aside or staying proceedings on a judgment obtained by fraud or collusion, but transactions of this kind are generally so secretly managed that it is very difficult to make out a case that would justify the interference of the Court. The provision giving the suitor in the Court of Record an advantage, thus not only operates unjustly, but holds out temp-