

and set the judgment aside, on the condition precedent that the defendant pay into court £50, (that sum being sufficient to cover the amount for which judgment was signed) to abide the event of this suit, and pay all costs of signing said judgment and subsequent proceedings thereon, and the costs of this application—and, as the cause is in the Inferior Jurisdiction, allow plaintiff to go to trial at the next sittings of the County Court, taking one day's notice of trial.

Order accordingly.

CARRALL ET AL V. BAILL.

Attendance of witnesses before arbitrator—7 Wm. IV, cap. 3, sec. 30—Production of documents.

An *ex parte* order, under 7 Wm. IV, cap. 3, sec. 30, commanding the attendance of witnesses before an arbitrator, will be granted upon affidavit of arbitrator that their evidence is necessary, and that their attendance cannot be procured without such order. On an application under 7 Wm. IV, cap. 3, sec. 30, for an order commanding witnesses to produce documents before an arbitrator, it must be shown that the documents required are such as witnesses would be compelled to produce at a trial.

[Nov. 14, 1856.]

Doyle applied *ex parte* for an order commanding the attendance of witnesses before the arbitrator to whom this cause was referred, and the production by them of all documents in their possession, relating to the matters in dispute, under 7 Wm. IV, cap. 3, sec. 30.

The affidavit of the arbitrator, on which the application was made, stated that upon proceeding with the reference it appeared to him that certain persons (naming them) are necessary and material witnesses in the matters referred; that they or some one of them are or is in possession of documents and papers which are necessary evidence; that the evidence of said witnesses and the production of said documents are necessary for the just settlement of this cause; that deponent believes it will be impossible to procure such attendance and production of documents without a Judge's order therefor; and lastly stated the residence of the witnesses, and that the reference had been adjourned to a certain day.

DRAPER, C. J. C. P., granted the order commanding the attendance of the witnesses, but refused to command the production of documents, because the affidavit did not show that the papers and documents required are such as the witnesses would be compelled to produce at a trial. (a)

CUFF V. SPROULE.

Practice—Proceedings commenced before C. L. P. Act, 1856—61st section.
The 61st section of the Common Law Procedure Act, 1856, has not a retrospective effect.

An appearance *per stat.* had been entered and declaration filed and served with demand of plea under the old practice before the C. L. P. Act, 1856, came into force.

Brooke, for plaintiff, applied for leave to sign judgment by default under the 61st section of the new Act, as in case of non-appearance.

DRAPER, C. J. C. P.—The 61st clause of the C. L. P. Act, 1856, has not a retrospective effect. Your proceedings were according to the former practice, and by it there was an appearance entered for the defendant, so that this is not even a case of non-appearance.

Application refused.

BLUMENTHAL ET AL V. SOLOMON.

Arrest—Foreigners—Residence.

The rule that our law will not allow one foreigner to arrest another, does not apply where the latter has done such acts as establish an intention to become a resident here, previously to the intention of a fraudulent departure. [Dec. 18, 1856.]

The particulars of the case appear in the judgment.

HAGARTY, J.—Defendant has been arrested on the ordinary affidavit of debt.

Mr. McMichael obtained a summons for his discharge on affidavit of defendant, to the effect that he was a native of Germany; for the last ten years had lived in the United States—first in Albany, and the last seven months in Wisconsin—and until the last fortnight had never been in the British dominions: that he was arrested on Saturday, Nov. 15th, having arrived in Toronto "on the Monday but one before the last, the third day of Nov. inst."; that he hired his board for a few days in a boarding-house in this city; and that he never had, nor has he any residence or home in this city or in the Province of Canada; that the debt was contracted in New York and not in Canada; that plaintiffs are natives of Germany and have never resided in Canada, and all reside in New York, where their place of business is.

The defendant relies on the law as laid down in *Freer v. Ferguson*, 2 Cham. Rep. 144, and the cases there cited, and contends that his case is governed thereby.

Mr. C. Gamble, for the plaintiffs, distinguishes this case from those cited, and calls attention to the defendant's affidavit, in which he avoids all reference to any intention as to settling in Canada, or the object of his coming here. He cites *Lamond v. Eiffe*, 3 Q.B., 910; *Atkinson v. Black*, 1 D. & L., 849.

The case of *Freer v. Ferguson* seems to establish that it is contrary to the policy of our law to permit one foreigner to follow another foreigner to Canada, where the latter may happen to be on casual business, and arrest him for a debt contracted abroad. I do not understand it or the cases there cited as going further on this head.

As the defendant here had the opportunity in his affidavit of showing under what circumstances he came to Canada, and whether he was a mere transient visitor, or intending to become a permanent resident, and is silent on these points, I consider that the facts do not warrant me in regarding him in any other light than that of an ordinary resident arrested for a debt contracted abroad. His counsel ingeniously suggests that as he had only arrived a few weeks before, and the plaintiffs swear he was immediately about to depart from this Province, I should regard him as within the principle of the cases cited. It does not so strike me: the intention of a fraudulent departure may have been only formed a few hours or minutes before his arrest, and cannot, I think, affect the question whether he had or had not become a resident of Canada. *Romberg v. Sternbock*, 1 Prac. Rep., 200, before the same learned Judge as in *Freer v. Ferguson*, is much in point. There the defendants swore they had been on business in Buffalo where the debt was contracted; that they came to Canada ten days before arrest, arrived in London, intending "to remain a short time and return to the State of New York."

(a) See Harrison's C. L. P. Act, sec. 87, note f.