ALLEN v. BOICE.

Notice of trial too late—Reference at nisi prius—Time for moving

Where notice of trial had been served too late, but the cause was entered, and referred by the judge at *nisi prius* to arbitration, no verdict being taken. *Held*, that a motion to set aside the proceedings must be made within the first four days of the next term [Q. B., M T., 1863.]

C. Robinson, Q C., on the last day of the term, applied for a rule *nisi* to set aside the notice of trial, and the order made by the presiding judge at *nisi prius*, referring this cause to arbitration, on the ground that the notice was too late, and was irregularly served upon a person as agent for defendant's attorney; or to set aside the order of reference for irregularity, on the ground that the plaintiff obtained the same *ex parte*, and after the defendant had protested against the service of the notice of trial, and against further proceedings under the same.

The application had been made on the day before in Practice Court, and refused by the learned judge presiding there (John Wilson, J.) as too late, but with leave to apply to the full court.

The venue was laid in Stormont, one of the United Counties of Stormont, Dundas, and Glengarry, and issue having been joined a notice of trial was on the 26th of October last served on the defendant's attorney for the next ensuing assizes at Cornwall, on the 2nd of November, 1863, which was clearly too late. The defendant's attorney hearing that another notice of trial had been on the 24th of October served on Mr. Pringle, a practising attorney at Cornwall, as agent for defendant's attorney, served the plaintiff's attorney on the 31st of October with a notice that Mr. Pringle was not his agent, and that he refused to accept the service on him and that if the plaintiff's attorney proceeded application would be made to set the proceedings aside.

The plaintiff's attorney entered his record, but no trial was had or verdict taken, but the cause was referred to arbitration by the learned judge presiding.

DRAPER, C J.—On the foregoing facts it appears to us that the motion should have been made within the first four days of this term (Michaelmas). No excuse is offered for the delay, or any suggestion for departing from the usual rule.

Per cur—Rule refused.

COMMON PLEAS.

(*Reported by* E C. JONES, Esq., *Barrister-at-Law, Reporter to the Court*)

BROWN v. RIDDELL.

Arrest—Capias—Affidavit—Consol. Stats. U. C, ch. 24 sec. 5.

A party having been arrested upon the affidavit of the defendant, and two corroboratory affidavits, which stated that "from information I have received from various sources, and from my own personal knowledge, I have good reason to believe that the said John Riddell is privately making away with his property with the intention of realizing the same and leaving Upper Canada, and that unless the said John Riddell is forthwith apprehended he will leave Canada and depart out of the jurisdiction of this honourable court. * * * and for the express purpose of defrauding me of the damages, I may recover against him.

Upon motion to set aside the *capias*, and arrest all proceedings thereon, or to discharge the defendant from custody.

Held, that under the affidavits made in this case, the court could not infer that the plaintiff did not shew such facts and circumstances as satisfied the judge there was reasonable and probable cause for believing that the defendant was about to leave the Province But inasmuch as the defendant's own affidavit denied the charge upon which he was arrested most unequivocally, and showed circumstances by which it might be inferred he had no intention (then) of leaving the province, the court ordered him to be discharged from custody, but refused to set aside the *capias* and arrest thereunder.

REMARK.—This decision is not to be referred to as upholding arrests upon affidavits such as were made in this case.

(C. P., T. T., 1863.)

During Trinity Term last, *R. A. Harrison* obtained a rule *nisi* to set aside the order of Adam Wilson, J., of the 27th of June last, authorising the issuing of a *capias* for the arrest of the defendant in this cause, and all proceedings had thereunder and subsequent thereto, including the writ of *capias* under which the defendant was arrested and in close custody, upon the ground that the affidavits upon which the order was granted were not sufficient, according to law, to warrant the making of the order, and that the order was improvidently made, and upon grounds disclosed in affidavits and papers filed. Or why the defendant should not be altogether discharged out of custody upon the ground that at the time of the making of the order he, the defendant, had no intention of quitting Canada, and upon grounds disclosed in affidavits and papers filed, and why such order as to costs should not be made as to the court might seem meet.

During the term *Harman* shewed cause, and contended that the statement contained in the affidavits filed on behalf of the plaintiff stated such facts and circumstances as shewed there was good and probable cause for believing that the defendant, unless forthwith apprehended, was about to leave Canada. That the affidavits filed on behalf of the defendant shew, that shortly before the affidavit to arrest was made, defendant proposed to his cousin to buy his farm, no doubt with the intention of leaving the country. True, he stated afterwards that he concluded to abide the consequences of an action, but the plaintiff would not be safe in relying on that determination. He contended there must be a clear case before the order could be set aside or the defendant discharged from custody. He referred to *Delisle* v *Legrand*, 6 U. C. L. J. 12; *Palmer* v. *Rogers*, 6 U. C. L. J. 188; *Terry* v. *Comstock*, 6 U. C. L J. 235; *Bullock* v. *Jenkings*, 20 L. J. Q. B. 90; 1 L. M. & P 645.

Harrison, contra, contended that the plaintiff's affidavits failed to establish any facts from which the intended departure of the defendant could be inferred. He also contended that other affidavits than those before the judge might be used, and at all events on that part of the application to discharge defendant out of custody the affidavits he filed might be read, and they shewed conclusively from facts and circumstances that defendant could have no intention of leaving the country. He referred to *Pike* v. *Davis* 6 M. & W 546; *Gibbons* v *Spalding*, 11 M. & W. 174; *Peterson* v. *Davis* 6 C. B. 235; *Allman* v. *Kensel*, 3 U. C. Prac. Rep. 110; *Samuel* v. *Buller*, 1 Ex. 439; *Graham* v. *Sandrinelli*, 16 M. & W. 191.

RICHARDS, C. J.—The statute authorising the arrest is Con. Stat. U C., cap. 24, sec 5. It provides that in case any party or plaintiff being a creditor, or having a cause of action against any person liable to arrest by affidavit of himself or some other individual, shews to the satisfaction of a judge of either of the superior courts of common law that such party has a cause of action against such person to the amount of $100 or upwards, or that he has sustained damage to that amount, and also by affidavit shews such facts and circumstances as to satisfy the said judge that there is good and probable cause for believing that such person is about to quit Canada with intent to defraud his creditors generally, or the said party or plaintiff in particular, such judge may by a special order direct that the person against whom the application is made shall be held to bail for such sum as the judge thinks fit.

Under sec. 31 of the Common Law Procedure Act, any person arrested on a *capias* issued out of either of the superior courts of common law, may apply at any time after his arrest to the court in which the action had been commenced, or to a judge of one of such courts, for an order or rule on the plaintiff to shew cause why the person arrested should not be discharged out of custody, and such court or judge may make absolute or discharge any such order or rule, and direct the costs of the application to be paid by either party, or make such other order therein as to such court or judge may seem fit; but any such order made by a judge may be discharged or varied by the court on application by either party dissatisfied with such order.

The grounds of belief as to defendant's intended departure are thus stated in plaintiff's affidavit in applying to my brother *Wilson* for the order directing the arrest: "From information I have received from various sources, and from my own personal knowledge, I have good reason to believe that the said John Riddell is furtively making away with his property, with the intention of realizing the same and leaving Upper Canada, and that unless the said John Riddell is forthwith apprehended he will leave Canada, and depart out of the jurisdiction of this honourable court * * and for the express purpose of defrauding me of the damages I may recover against him." Two other persons made similar affidavits, stating that from information they had received, and from their own personal knowledge they had good reason to believe, and did verily believe, that the said John Riddell was furtively