again enlarged; that the plaintiff did not attend, whereupon W. M. C. reported this non-attendance; that on the day to which the summons was lastly enlarged (the judge of the County Court being unavoidably absent), the summons was moved absolute before the junior judge, who made and signed an order, under Con. Stat. U.C. cap. 24, sec 41, for the committal of the plaintiff to the common gaol for thirty days for his default in not attending and being examined. The defendants then severally justified the plaintiff's arrest and imprisonment under this order.

The plaintiff replied that the judgment recovered by Kenrick was for costs, and not for any debt or liability from the plaintiff to Kenrick previous to the recovery of that judgment, which was entered up for less than $100; that the judge of the County Court was not unavoidably absent when the order for the plaintiff's committal was made; that the junior judge had no power to make that order, and that it was illegal and void; and that each of the defendants caused the plaintiff to be arrested and imprisoned thereon.

Rejoinder, by each defendant, that at the time of making the said order for committal the judge of the County Court was unavoidably absent, and the junior judge had power, &c.

Demurrer to the rejoinder, because it does not answer the replication; that it admits the judgment was obtained for costs and for less than $100, and thereby shows the order for the committal of the plaintiff was illegal, and beyond the power of the junior judge even if the senior judge was unavoidably absent.

The defendants joined in the demurrer.

In support of the demurrer, *M. C. Cameron, Q C.*, cited *Bullen* v. *Moodie*, 13 C. P. 126; *Brooks* v. *Hodgkinson*, 4 H & N. 712, to show that the attorney was liable as well as the client. He also referred to Lord Campbell's judgment, in *Copeman* v. *Rose*, 7 E & B 679, 685, to show that the commitment in this case, though in some sense a punishment for misconduct or default, was founded entirely on the judgment debt, and granted at the instance of the defendant Kenrick, who had recovered the judgment; and he referred to the judgment of Mr. Justice Adam Wilson, in this very case, on the proceedings on a *habeas corpus*, when the now plaintiff was discharged from custody, to show that the plaintiff could not be lawfully committed (9 U. C. L. J. 295).

J. H. Cameron, Q C., for defendant Kenrick, cited the case of *The Marshalsea*, 10 Co. 68, 78; *Brown* v. *Chapman*, 6 C. B. 365; *Cooper* v. *Harding*, 7 Q. B 928; *Houlden* v. *Smith*, 14 Q. B. 841; *Rafael* v. *Varelst*, 2 W. Bl. 983; *Rex* v. *Dancer*, 6 T. R. 242; *Henderson* v. *Dickson*, 19 U.C. Q.B. 592; *Murray* v. *Byrne*, 4 Ir. C. L. Rep. 642.

Robert A. Harrison, for defendant Paterson, cited *Meyers* v. *Robertson*, 5 U. C. L. J. 254; *Wallis* v. *Harper*, 7 U. C. L J. 72; *Mills* v. *Collett*, 6 Bing 85; *Pike* v. *Carter*, 10 Moore, 376, S. C, 3 Bing. 78; *Lowther* v. *Earl of Radnor*, 8 East, 113; *Reid* v. *Jones*, 4 C. P. 424; *McCarthy* v. *Parry*, 9 U C Q B 215; *Ackerley* v. *Parkinson*, 3 M. & S. 411; *Prentice* v. *Harrison*, 4 Q. B 852; *Codrington* v. *Lloyd*, 8 A. & E. 448; *Brown* v. *Jones*, 15 M. & W. 191; *McInnes* v. *Hardy*, 7 U. C. L. J. 295; Saund. Plg. & Ev. 1087; *Boyd* v. *Bartram*, 3 U. C. Pr. 28.

Draper, C. J.—This case arises upon the act respecting arrest and imprisonment for debt (Con. Stat. U. C. cap 24), the 41st section of which enacts, that "In case any party has obtained a judgment in any court in Upper Canada, such party, or any person entitled to enforce such a judgment, may apply to such court or to any judge having authority to dispose of matters arising in such court, for a rule or order that the judgment debtor shall be orally examined upon oath before the clerk of the Crown, or before the judge or clerk of the County Court within the jurisdiction of which such debtor may reside, or before any other person to be named in such rule or order, touching his estate and effects, and as to the property and means he had when the debt or liability which was the subject of the action in which judgment has been obtained against him was incurred, and as to the property and means he still hath of discharging the said judgment, and as to the disposal he may have made of any property since contracting such debt or incurring such liability; and in case such debtor does not attend as required by the said rule or order, and does not allege a sufficient excuse for not attending, or if attending he refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors, or any of them, such court or judge may order such debtor to be committed to the common gaol of the county in which he resides, for any time not exceeding twelve months; or such court or judge may by rule or order direct that a writ of *capias ad satisfiendum* may be issued against such debtor, and a writ of *capias ad satisfiendum* may thereupon be issued upon such judgment, or in case such debtor enjoys the benefit of the gaol limits, such court or judge may make a rule or order for such debtor's being committed to close custody."

The third section of the same act declares that no person shall be liable to arrest for non-payment of costs.

The first section of the same act forbids the issue of a capias to arrest and hold to bail for a cause of action less than $100.

I heard, at the request of Mr. Justice Adam Wilson, together with that learned judge, the argument on the application to discharge the plaintiff in this case from custody on the order in question, when he was brought up on a writ of *habeas corpus*. I continue of the opinion that under the foregoing section 41, a plaintiff against whom a judgment has been entered for costs on his failing in his action, cannot be compulsorily examined, or if he fails to attend for the purpose of, or attending refuses to submit to, such examination, he cannot be lawfully imprisoned as guilty of contempt.

The words "debt or liability" apply to the debt or liability to recover or enforce which the action was brought, and upon which the judgment has been recovered, and consequently they include only a debt or liability existing when the action was brought. As a consequence, the words "any party," in the beginning of this section, are restrained by what follows to any party who obtains judgment for a pre-existing debt or liability. The judgment against the present plaintiff being only for the costs of Kenrick's defending that action, cannot be said to be founded upon such debt or liability, for the plaintiff was not indebted or liable to him until that judgment was entered.

I am not now called upon to consider or decide whether a defendant who, under the 104th section of the Con Stat. U. C. cap. 22, obtains on a plea of set-off a verdict for a sum in excess of the plaintiff's demand as proved against him, is entitled to examine the plaintiff. There would be literal difficulties to overcome in giving to the 41st section above quoted such an interpretation, though there may be strong ground for arguing that such a case comes within its true spirit.

In my opinion, therefore, the plaintiff was arrested and imprisoned unlawfully.

I am also of opinion that this action is maintainable against both the defendants. It is admitted on the pleadings that they applied for and obtained this order, and caused and procured the plaintiff to be arrested upon it. The judge of the County Court had no jurisdiction or authority to make an order for the examination of the plaintiff, and consequently no authority to order his committal for disobedience to it, and neither order can afford protection to the defendants for the imprisonment complained of.

Hagarty, J —I agree in holding that the order for this examination, and afterwards for the arrest of the plaintiff, were unlawful.

I think that there must be judgment against defendants on the demurrer before us.

The rule appears to me to be clearly laid down by Wilde, C. J., in *Kinning* v. *Buchanan* (8 C. B. 290), (the action was against the attorney), "where, by a special plea, like the one in question, he admits and undertakes to justify his concurrence in it, we are of opinion that he can only make out his justification by showing a legal authority under which he acted; and, consequently, that it is essential to the defence in the present case that the order relied upon should be a valid order."

The same view is taken in the case cited of *Murray* v. *Byrne* (4 Ir. Com. Law Rep. 642), where the cases down to the period of judgment (1855) are reviewed. The same case re-appears in 6 Ir. Com Law Rep. 580, after trial upon the issues.

I abstain from expressing any opinion on many points raised in the argument, respecting the ultimate liability of the parties, con-