COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Damer et al. v. Busby.—Black v. Wigle.

Capias—Setting aside order to arrest—Discharge of prisoner—Relative powers of Court and Judge—C. S. U. C. c. 22 s. 31, c. 24 s. 4.

Applications having been made to set aside two orders for arrest, with the writs and subsequent proceedings, on the ground that the affidavit to hold to bail in one case was untrue and insufficient, and in the other case was not entitled in any Court, and was insufficient in substance, and because there was a variance between the original writ and the copy served.

Held, 1. (following *Ellerby* v. *Walton*, 2 Prac. Rep. 147) that the affidavit to hold to bail is not irregular, though not entitled in a Court.

2. That a Judge in Chambers has no power to set aside an order to arrest, though he may, on hearing both parties, discharge the prisoner, or, by virtue of his general jurisdiction over procedure, may set aside proceedings subsequent to the order, for irregularity in this respect.

The variance between the writ and copy was corrected by amending the former, so as to conform to the latter.

Semble. The Judge to whom application is made for an order to arrest, has only to be satisfied of the existence of a cause of action, etc., and an intention on the part of defendant to abscond with intent, etc. The affidavit to hold to bail may be entitled in a court or cause, or one of them, or it may be altogether without a title; and it is sufficient to say that deponent "is informed and believes," if the source of his information be given.

The order itself can be rescinded only by the Court, but after arrest defendant may apply for his discharge on the ground of non-existence of the debt, or otherwise upon the merits, to any Judge in Chambers, or to the County Court Judge who granted the order. Such an application is not an appeal from the order to arrest, and new facts must be shewn to warrant the discharge of the prisoner, unless it be granted on account of manifest and vital defect in the original material.

Either of these orders may be discharged or varied by the Court, which possesses over the original order to hold to bail,

(1) a general appellate jurisdiction on the identical material which was before the Judge,

(2.) an express statutory jurisdiction to rescind the order upon a motion made to discharge the prisoner.

In addition to this, the Court has also co-ordinate jurisdiction with a Judge in Chambers, or the County Court Judge who granted the first order, to discharge the prisoner upon merits appearing in the affidavits of both parties.

[Chambers, May 15, 1871.—*Gwynne, J.*]

Damer et al. v. Busby.

The defendant having been arrested and being in close custody under a writ of capias issued upon an order dated the 6th day of May instant, made by Hagarty, C.J. C.P., directing the defendant to be held to bail in the sum of $214.90 at suit of the plaintiffs, obtained a summons from the same Chief Justice on the 10th instant, calling on the plaintiffs to shew cause why the fiat or order for the writ of capias issued in this cause, the said writ of capias, the copy and service, and the arrest of the defendant thereunder, or some or one of them, and all subsequent proceedings had by the plaintiffs herein, should not be set aside with costs as irregular and void, on the following grounds:—

1. That there were no or not sufficient facts and circumstances disclosed by the affidavits filed in support of the said order or fiat, to warrant the same being made or granted, in that the same do not follow the Act of Parliament in shewing that the defendant was justly and truly indebted to the plaintiffs at the time of the making of the said affidavit.

2. That in fact the papers filed, purporting to be such affidavits, were not and are not in fact affidavits.

3. That the same were not and are not, styled or entitled in any court.

4. That the said fiat or order, and the precipe for the said writ, or either of them, are not and were not styled or entitled in any court or cause.

5. That it is not shewn by the said affidavits that the plaintiffs had good reason to believe and did verily believe that the defendant was immediately about to leave or quit Canada with intent and design to defraud them of their just debts, and the omission of the words "for money payable by the defendant to the plaintiffs" in the said affidavit, renders the same insufficient to warrant the granting the said order or fiat.

6. That it is not alleged in the said affidavits, that the plaintiffs or person or persons making the said affidavits or either of them, had good reason to believe that the defendant was immediately about to leave Canada with intent and design to defraud the plaintiffs of a just debt, and the said affidavits filed in support of the said order or fiat are wholly insufficient to warrant the granting thereof.

7. That the paper purporting to be a copy of the said writ of capias, served on the defendant after his arrest, is not a true copy of the said original writ of capias, and in fact that the defendant was never served with a true copy o the said original writ.

8. That at the time of making the said affidavits there was no debt due by the defendant to the plaintiffs, for which he was, under any circumstances, liable to be arrested or held to bail.

9. That the affidavit of the plaintiff King in support of the said order or fiat does not shew his true place of abode;

And on grounds disclosed in the affidavits and papers filed in support of this application.

This application was supported by the affidavits of the defendant and of others, stating matter offered to displace matter contained in the affidavits upon which the order to hold to bail was granted, and for the purpose of establishing that the defendant had no idea or intention of leaving Canada at all, and also for the purpose of establishing that the defendant was not indebted to the plaintiffs in any sum, upon the allegation that the goods which he had purchased from the plaintiffs were purchased on a credit which had not yet expired.

Verified copies of the affidavits upon which the order to hold to bail had been granted were filed, and also verified copies of the original writ of capias, and of the copy served upon the defendant.

Upon the return of the summons, the plaintiffs' attorney asked to enlarge the summons in order to answer upon affidavit the special matters contained in the affidavits filed by the defendant in support of his application. In order to dispense with this enlargement, counsel for the defendant agreed to waive all grounds of application except such as consisted in the insufficiency of the affidavits upon which the fiat was granted, and the variance between the original writ and the copy served. Upon these points only, therefore, the case was argued, the