

## SCANE v. COFFEY.

*Arrest—Order for—Affidavit, sufficiency of—Setting aside order—New material—Application for discharge from custody—Circumstances of leaving Province—Publicity—Intent to defraud—Condition that action shall not be brought against plaintiff—Disclosure of facts—Reasonable grounds—Costs.*

An order for the arrest of the defendant was made on March 16th, 1892, upon an affidavit of the plaintiff, in which he alleged that the defendant in March, 1881, absconded from this Province for the purpose of defrauding his creditors, and that, having lately returned to the Province, he was about to leave it again with a like purpose. The defendant applied, upon new material, to the judge who made the order to set it aside, and to be discharged from custody.

*Held*, that the affidavit of the plaintiff was, if true, a sufficient foundation for the order.

*Kersterman v. McLellan*, 10 P.R. 122, followed.

And the order could not be set aside by the judge upon the new material contradicting the case made by the plaintiff.

*Damer v. Busby*, 5 P.R. 356, and *Gilbert v. Stiles*, 13 P.R. 121, followed.

The departure of the defendant from this Province in March, 1891, was open and public; he announced it at a public meeting to six or seven hundred persons, along with the fact that he intended to sell his household effects before his intended departure; the newspapers in the place where he lived announced that he was going to Chicago, in the United States of America, with his family, to take a situation there which he had obtained; and his fellow-townsmen gave him a public dinner, at which several of his creditors were present, before he left. He departed for Chicago, taking no property with him. The only piece of property he possessed in Ontario was an unsaleable and heavily mortgaged house and lot, which a year before he left he had transferred to a creditor as security for a debt. He had a permanent situation and residence in Chicago with his wife and family, and in March, 1893, returned to this Province for a merely temporary purpose. During the year he spent in Chicago, he remitted considerable sums earned by him to his creditors in Ontario.

*Held*, that, under these circumstances, the defendant could not be said to have left Ontario with intent to defraud his creditors, and that he should be discharged from custody under the order for arrest.

It is within the power of the court or a judge, upon an application to discharge a defendant from custody, to impose upon him the term that he shall bring no action against the plaintiff; but it should only be imposed where the plaintiff is shown to have been entirely frank and open in his application for the order for arrest, and to have had reasonable grounds for the statements he has laid before the judge. The circumstances of this case did not warrant such a term being imposed; for the plaintiff was aware of the circumstances and the publicity of the defendant's departure in 1891, and conveyed a false impression when he swore that the defendant then "absconded from this Province."