Ferguson shewed cause.
J. B Read contra.

Hagarty. J.—I at once say that I should not have ordered defendant's arrest on such an affidavit as seems to have satisfied the County Judge. But I have several times had occasion to express my difficulty in assuming the right to review the exercise of the judge's discretion in a matter clearly within his jurisdiction.

There are certain facts stated to support plaintiff's assertion that defendant is about to abscond. They do not satisfy my mind; but they seem to have satisfied his mind. The legislature gave him full power to form an opinion, and to act thereon. I expressed this doubt in *Allman et ux.* v. *Kensel*, 3 Pr. R 110. The present Chief Justice Draper, says in *Terry* v. *Comstock*, 6 U. C. L. J. 235, that if pressed to overrule such a decision, he would refer the matter to the full court. In the same volume similar doubts are expressed by Richards, C J., in *Swift* v. *Jones*, *Ib* 63, and again in *Palmer* v. *Rogers*, *Ib.* 188, and *Runciman* v. *Armstrong*, 2 U. C. L. J., N. S., 165.

In *Howland* v. *Roe*, within the last twelve or eighteen months, I had occasion to consider and review some of the cases on this subject, but the written judgment which I delivered was mislaid in Chambers. I there arrived at the conclusion that when a judge's order had been obtained on affidavits clearly omitting certain material statutable requirements (under the absconding debtors' act), another judge could properly set it aside.

The order made was moved against in term, but without success, 25 U. C Q B. 467. In *Demill* v. *Easterbrook*, 10 U. C. L. J. 246, Mr. Justice A. Wilson seemed to consider that one judge might review the conclusions arrived at by a brother judge, but he did not set aside the order.

I draw a broad distinction between the case of an order based on affidavits clearly deficient in certain statutable requirements, and those which state facts from which differently constituted minds may in good faith draw different conclusions I think I should wait the positive judgment of a Court in Banc before taking on myself to set aside a judge's order merely because the statements on which it was granted failed to bring my mind to the same conclusion as that of my fellow judge.

But the order before me seems open to the objection that it is granted for a sum far greater than is warranted by the allegation. The affidavits only pretend to charge a debt of $580, and the $80 being for costs, ought not to have formed part of the sum for which defendant was held to bail. I cannot understand on what idea the order issued, or the writ was marked for $700. It is certainly wrong for the excess above $500.

The earlier cases would seem to warrant a literal setting aside of the arrest on such an objection But in *Cunliffe* v. *Maltass*, 7 C. B. 701, the Court points out the difference under the new law, that "the arrest now takes place, not by force of the affidavit stating the amount of the debt, but for such amount as the judge in his discretion may think fit; such discretion, of course, to be exercised, not arbitrarily, but according to the practice of the Court." There the judge ordered that a *capias* should issue for £1050, the sum alleged in the affidavit to be due for principal on certain bills of exchange set out, and defendant was arrested therefor. It was found that as to one of the bills, a good cause of action was not stated in the affidavit. Defendant applied to the same judge (Patteson) to be discharged from custody, not to set aside the order. The judge refused so to do, but made an order reducing the amount for which defendant should be held to bail to £550, thinking that amount to be clearly due.

The Court, after full argument, refused to set aside either order, Wilde, C. J. saying, "that the judge had authority to make the order to the extent of £550 is conceded; the real objection is that he erroneously exercised his discretion by ordering the *capias* to issue for £1050. We, therefore, cannot set aside the order altogether. It was admitted on argument that the authorities show that the circumstance of a defendant being arrested for too large an amount affords no ground for his discharge, if the affidavit warrants the arrest to a certain extent." All the previous cases are reviewed in this judgment.

It is also sought to be shewn by affidavits of the defendant and others, that as a matter of fact he did not intend to leave the country. This is met by affidavits on the plaintiff's part, which shew that others besides the plaintiff believe that such was defendant's real intention.

I do not feel warranted in acting on this part of the application, on the conflicting evidence.

It is objected by the plaintiff that defendant has waived objections to the arrest by putting in special bail It seems from the law laid down in 1 Arch. 796 & 2 Lush Pr. 706, that this would only cure a technical objection, and not substantial defects. It is pointed out that the powers given by the statute to a court or judge to interfere is at "any time after the arrest." This is noticed in *Bowers et al.* v *Flower*, 3 Pr. R. 68, and by Coleridge, J., in *Walker* v *Lumb*, 9 Dowl. 131 The objection here is certainly more than technical.*

Cameron et al v. Murphy.

Ejectment—Letting in landlord to defend.

One Casselman, claiming under a Sheriff's sale, recovered possession by ejectment of the land in dispute against defendant, who had been his tenant at will since the purchase at sheriff's sale; and, on 20th July, 1866, turned him out of possession, but the premises were left vacant. On the 29th March, 1866, plaintiff commenced an ejectment against defendant, and on 8th June, 1867, was put in possession under a writ in this suit. Casselman then applied to set aside this judgment, and be let in to defend as landlord, but

Held, that he must be left to his ordinary remedy by ejectment.

[Chambers, September 13, 1867.]

This was an action of ejectment commenced on 29th March, 1866. Interlocutory judgment for default of appearance was signed 7th March last. A writ of possession was issued and plaintiffs were put in possession on 8th June last.

On 14th Aug., 1867, one Casselman applied to set aside this judgment, and to be allowed to defend the action as landlord of defendant Murphy. He swore that Murphy gave him no notice of this

* The case was subsequently compromised by the parties.—Rep.