that the President, or Secretary, or Treasurer shall be examined. Not one of those officers is called upon by this summons to answer why he should not be examined; but it is the Company that is called upon to answer why they should not. Suppose an order were now made that one of the officers named, or that all these who are named should be examined, we must be satisfied how this order is to be enforced, before we can say the section applies. I know of no way to enforce the order against the corporation, and I do not see any way clear to enforce any obedience against the officers to an order that might be made without calling upon the persons filling those situations in the corporations, to answer why they should not be examined. On the whole I shall decline to make any order.

Summons discharged accordingly.

BARROW v. CAPREOL.

Between July 1st and August 21st, 1856, arrest on bailable writ and proceedings thereon were valid under 2 Geo. IV., cap. 1. sec. 8, 5 W. IV., cap. 3, sec. 1 & 2. and 5 Vic., cap. 6, and not under 8 Vic., cap. 48, sec. 44. which was only in force until the end of the Session (July 1st); nor under C. L. P. Act. which did not come into operation till August 21st.

The affidavit on which such writ is sued out does not state that the writ was not required from any vexatious or malicious motive whatsoever of defendant towards plaintiff. *Held.* this is only an irregularity waived by the defendant on putting in special bail; but without prejudice to any future remedy against the plaintiff.

[Sept. 26, 1856.]

In this case a summons had been obtained to set aside the proceedings upon a bailable writ under which the defendant had been arrested, and put in special bail. The writ had been issued on the 12th of August, and

J. B. Reid now moved the summons absolute, and sought to set the writ aside on the ground that there was no law authorising such an issue in force from the 1st of July, the day on which the last Parliamentary Session ended, and the 21st of August, when the Common Law Procedure Act came into force.—There was also an objection to the writ on the ground that the affidavit upon which it was sued out did not state that the plaintiff did not act from any vexatious or malicious motive whatever.

McMichael showed cause, on the ground recapitulated in the judgment.

BURNS, J.—In this case a bailable writ was issued on the 12th of August, 1856, to hold the defendant to bail in £783 4s. On the same day the defendant was arrested and gave bail to the Sheriff, and on the following day special bail was put in, and subsequently the plaintiff, on the 17th day of August, delivered a declaration and notice to plead with particulars of demand. On the 19th September the defendants obtained a Judge's summons to set aside the arrest, on the ground that there was no law in force authorising the issuing of bailable process between the 1st of July 1856 and the 21st of August, the day on which the Common Law Procedure Act came into operation, as if the defendant could be arrested during that time; yet the arrest was illegal, because there was no affidavit such as would be required in law, upon which to found the writ. The question raised by this application is a very singular one, and it is a proof that sometimes legislation is rather hasty, and without a due regard to the existing state of things. The Common Law Procedure Act was passed on the 19th of June to come into operation on the 21st of August. The law of arrest had long existed in the Province, but the amounts for which arrests were allowed, and which should be set forth in the affidavit to hold to bail, have been raised from time to time by different acts of the Legislature. The last of these was the 44th section of 8 Vic., cap. 48, which was continued in force by 18 Vic. cap. 85 to the 1st of January 1856, and from thence to the end of the next ensuing Session of Parliament, and no longer. The last session of Parliament ended on the 1st July 1856, and cap. 85 passed on the first of July continues 8th Vic., cap. 48, except the 44th section. So far therefore as this last act affects the question, the 44th sec. was allowed to expire on the 1st of July 1856, and if there be nothing else affecting the question we should have to fall back upon whatever the law was anterior to 8 Vic., cap. 48. The Common Law Procedure Act in the 318th section enacts, that from and after the time when this Act shall commence and take effect, the 44th section of 8th Vic. cap. 48 shall be repealed, except so far as the same may be necessary for supporting, continuing and upholding any writs that shall have been issued, or proceedings that shall have been had or taken before the commencement of this Act. It is evident the Legislature must have contemplated the continuing act, and the C. L. P. Act should act contemporaneously; but there is a hiatus of time between the doing so as respects the 44th section, and had that section been continued along with the other provisions of the Act, then all would have been harmonious. The question is whether by force of the concluding words of the 318th section, it can be held that the 44th sec. of 8th Vic., cap. 48, can be resorted to for the purpose of upholding the arrest upon a writ sued out before the 21st of August. I am of opinion that it cannot. The Act continuing that section declared it should be in force no longer than the end of the Session of Parliament next after the 1st of January 1856.—Now it would require a pretty strong inference to be drawn that the section was continued, which in its operation might operate to deprive a person of his personal liberty. I have no doubt the Legislature supposed the section would remain in force until the commencement of the other Act; but it does not appear to me it can be held to have any force by reason of the words of the 318th section; for they only contemplate looking back at the state of things existing on the 21st of August for the purpose of upholding the writ. If this application had been made before the 21st of August, I do not see how it is possible to say the 24th section of 8th Vic., cap. 48, was then in force. Then putting this out of the case, we must fall back upon the 2 Geo. IV., cap. 1, sec. 8, and 5 Wm. IV., cap. 3, secs. 1 & 2, made perpetual by 5 Vic., cap. 6, The writ bailable for arresting the defendant is therefore under these Acts authorised, but the question is whether the affidavit to hold to bail warranted the writ. The 8th section of 2 Geo. IV enacts that it shall not be lawful to proceed to arrest the body of the defendant unless an affidavit be first made; in which, in addition to stating the cause of action, and the amount due, the party making it must state, he is apprehensive that the defendant will leave this Province (then Upper Canada) without satisfying the debt, and that the party does not sue out process for *any vexatious or malicious motive whatever*. The affidavit in the present case contains all that is requisite to warrant the writ, except that of stating that the writ was not sued out from any vexatious or malicious motive whatever. The defendant put in special bail without questioning the regularity of the writ. The case then is reduced to the consideration, whether the want of this allegation is only an irregularity, or whether it is such a defect as to render the arrest altogether void. It appears to me it is only an irregularity. There is an affidavit swearing to a debt due, and that defendant is about immediately to leave Upper Canada, with intent and design to deprive the plaintiff of the said debt. I think it was competent for the defendant to waive a provision made in his favour, in which light I look at the words required to be inserted in the affidavit. It is true that they might be supposed to impose some obligation on the plaintiff or party suing out the writ; but I do not see that the defendant by his omission of them, is deprived of any legal rights he may have against the plaintiff, either for when arresting when no debt was due, or because there was no reason for apprehending that the defendant would leave the Province. I am therefore of opinion that the defendant has waived the irregularity of the arrest by having put in special bail to the action.

Summons discharged, but without costs.