Duffy's case had been settled more than a year before the application to refer. So under the terms of Mr. Justice McLEAN's order the costs occasioned by the taxation of that bill are to be struck out and have been.

Then as to any order it may be proper for me to make, on the return of Mr. Justice RICHARD's summons of the 1st August, 1857, to shew cause why the bills delivered should not be referred back to the Master on the same affidavits and papers that he has already had before him, with directions to tax all taxable items in the said bills, and also to tax all costs of taxation in this matter, except in the case of *Ketchum* v. *Duffy* under section 20 of 16 Vic., ch. 175, against the party chargeable under said section; it seems to me that as it is now clear that *Ketchum* v. *Duffy* was no longer open to taxation, and there was no business charged for in any of the bills delivered which was done in the Queen's Bench, except in that bill—the foundation of reference to the Master for taxation fails, because the power given in the Act is to refer the bills to be taxed "by *the proper officer of any of the Courts in which any of the business charged for may have been done.*" We cannot therefore continue to exercise a jurisdiction after it is plain that we have none.

I therefore discharge this summons of Mr. Justice RICHARDS.

As to any costs of taxation in respect to what has occurred, I do not feel that I can make any order respecting them as desired by the summons, that is, any order under the Stat. 16 Vic., because the whole foundation of taxation under that Statute fails. And I make no order respecting costs of this application, because both parties have been in fault in allowing the proceedings to go on so far, it being within the knowledge of both, when the bills in Duffy's case were settled, and consequently that no taxation ought to take place as a proceeding under the Statute 16 Vic., ch. 175.

I merely discharge the summons.

Note.—The effect of the Statute, 16 Vic., ch 175, s. 20, seems to be that if any of the bills delivered contains charges for business done in either of the Courts then a Judge has jurisdiction to refer all taxable items to the proper officer of the Court. (*Smith* v. *Dimes*, 4 Ex. 32, and see Grey on costs.)

To give jurisdiction therefore under the Act there must be some charges open still to taxation for business done in one of the Courts. If there be that foundation then all charges *are taxable* before the officer referred to for services rendered in a professional character—though not in any cause, such as advice, inquiry, &c.

It seems a defect in our Statute that where there is no charge for business done in Court there can be no reference under the 20th clause of charges for professional services. In the English Statute, 7 & 8 Vic., there is provision in such case for taxation by order of the Lord Chancellor or Master of the Rolls, see 7 & 8 Vic., ch. 93. sec. 37.—Our 20th clause is copied almost from that clause, omitting the provision to which reference is here made.

SCHOFIELD AND ANOTHER v. BULL AND CAVILLIER.

Interlocutory judgment — Insolvency — Final order of discharge — Proceeding by Audita Querela.

An interlocutory judgment will not be set aside to enable a defendant to plead matters arising subsequent thereto. A Judge in Chambers will not in general entertain or enter into a question as to the validity of an order of discharge for insolvency in the nature of a bankrupt's certificate, under 19, 20 Vic. cap. 93, but will rather let the point be determined by way of *audita querela*.

(Sept. 9, 1857.)

This action was commenced on the 9th of August, 1856, by writ of summons, and declaration was filed on the 30th of October, and judgment by default signed on the 20th of January, 1857; and an order or rule of court was made on the 21st of February, 1857, referring it to the Judge of the County Court of Hastings, to compute principal and interest on the promissory note on which the action was brought.

In the meantime, on the 10th of February, 1857, the defendant Cavillier presented his petition to the Judge of the County Court, Hastings, under the provisions of the statute 19, 20 Vic. cap. 93, for relief; and on the 24th of March last he obtained a final order. On the 12th of June the plaintiffs proceeded to obtain an appointment from the Judge of the County Court to compute principal and interest on the promissory note.

The defendant Cavillier appeared to oppose such computation, on the ground that he was discharged from the debt, as the demand had been included in the schedule to his petition. The Judge enlarged the time, to enable the defendant to apply for relief. Accordingly the defendant Cavillier, on the 20th of June, obtained a Judge's summons, calling on the plaintiff to show cause why all further proceedings should not be finally stayed, or why the defendant should not be at liberty to set aside the interlocutory judgment, and have leave to plead the final order so obtained by him on the 24th of March last. The summons was enlarged from time to time, and the proceedings were in the meantime stayed. The plaintiffs opposed the application, and contended that if the application could or should be entertained upon motion, they desired to show that the final order was fraudulently obtained.

BURNS, J.,

With respect to certain grounds for attacking the final order, the Judge of the County Court is the proper tribunal to apply to, to rescind the order. The 26th section of 8 Vic. cap. 48, empowers the Judge of the County Court, on the application of any creditor, official, or other assignee, under certain circumstances, to rescind the final order; but the power is excepted in cases arising under the 5th section of the Act, that is, as to traders within the meaning of 7 Vic. cap. 10, who had failed before the passing of that Act, and who may have obtained a final order. The statute 19, 20 Vic. cap. 93, was passed to embrace a class of persons similar to those mentioned in the 5th section of the former Act; for the 2nd section enacts that in addition to the effect mentioned in the 4th section of 8 Vic. cap. 48, the final order shall have the effect of the bankrupt's certificate under the 59th section of 7 Vic. cap. 10, and this is the same as contained in the 5th section of 8 Vic. cap. 48. Whether such will be sufficient to exclude the power of the Judges of the County Courts to enquire whether the final orders which may have been granted under the 19th and 20th Vic. cap. 93, can be rescinded, is an important question, and much too serious to be determined upon a mere motion, when there can be no appeal to the Court of Error.

Besides this difficulty, there are other considerations which should prevent the present application being entertained upon a motion. The judgment by default was obtained some time before the final order, therefore the final order could not be pleaded in bar of the action. It cannot now be pleaded *puis darrein continuance*, as appears from the case of Shaw v. Shaw, 6 O. S. 458, and the court will not set aside the judgment by default to enable the defendant to set up by way of plea a matter arising after the judgment was obtained. The action is against two defendants, and there is nothing shown which should prevent the plaintiffs from having their judgment against the defendant Bull. All that the defendant Cavillier can have is, that the final order shall operate so as to discharge the debt as against him or any property he may acquire, and not that it should operate to discharge the debt so far as to prevent the plaintiffs from having the judgment completed and perfected which they had begun to perfect long before the order was obtained by the one defendant.

All these considerations appear to me to render it more proper that the defendant should adopt the proceeding by *audita querela*, which will spread the matter upon record, and thus the parties can have the opinion of the Court of last resort, if they think proper.

The summons is therefore discharged, without costs.

RACEY v. CARMAN.

Affidavit to hold to Bail—Irregularity—Waiver.

An Affidavit to hold to Bail on a Promissory Note or like instrument must shew that the note is overdue, either directly stating the fact or by giving the date of the note and the time it has to run.

If Defendant put in Bail after application made to set aside an arrest for irregularity, it will be considered a waiver of the application and an abandonment of the application.

[18th August, 1857.]

This was an application to set aside the affidavit to hold to Bail in which the defendant had been arrested and all subsequent proceedings with costs on the ground that it was not stated in said affidavit when the promissory note therein mentioned was made, or became due, and on the ground that it did not appear whether the note had fallen due or not, or to set aside that part of the affidavit which related to the said note on the above grounds.

The affidavit was in the following words,—"That George Cameron is justly and truly indebted to one Henry Racey in the sum of fifty-five pounds seventeen shillings and five pence of lawful money of Canada for principal money and interest due to the said Henry Racey as Indorsee of a Promissory note made by the said George Carmon, whereby he promised to pay James J. Spence or order the sum of fifty pounds, with interest three months after