#### Soulé *vs.* Hayward.

Section 74 of the Practice Act, which provides for the arrest of a debtor in certain cases, does not apply in the case of one *partner* sueing to recover money received by another.

A., being the owner of an invoice of goods in the city of New York, sold one half interest therein to B., with an arrangement that the latter should proceed to San Francisco, and there dispose of the same on joint account; *Held,* that this constituted a partnership between them, and that B. was not subject to arrest in an action by A. to recover a part of the proceeds of the sales.

A party will be discharged from arrest, where the process, though proper in form, has been issued in an improper case.

*By the Court,*

Bennett, J.

Application for a discharge under a writ of *habeas corpus.* The defendant was arrested in a civil suit, under the first subdivision of section 74 of the Practice Act., *(Statutes of* 1850, y>. 435,) which authorizes an arrest [\*346](#p346)“ in an action for money received, or property embezzled, or “ fraudulently misapplied, by a public officer, or by an attorney “ or counsellor, or by an officer or agent of a corporation, in the “ course of bis employment as such, or by any factor, agent, “ broker, or other person in a fiduciary capacity.” The affidavit, upon which the order of arrest was made, charges that the plaintiff sold to the defendant one half of an invoice of merchandise, and authorized him to proceed from the city of blew York, where the parties then were, to San Francisco, and dispose of the merchandise on joint account, and that the defendant accordingly proceeded to San Francisco, received the property, and sold it. The affidavit then states, that the plaintiff has frequently called upon the defendant for an account of the sale of the goods, which the defendant has positively refused, and still refuses, to render, and that the defendant, although requested, has neglected and refused, ami still neglects and refuses, to pay over to the plaintiff any part of the proceeds of the sales.

Ts the defendant included within any class of persons designated in the section of the statute above cited *%* If so, it must be upon the ground that he was the *agent* of the plaintiff, or ivas acting in *& fiduciary capacity.* Was he the *agent* of the plaintiff? We think not. The relation which subsisted between the plaintiff and defendant was that of partners, and not that of principal and agent; and although one partner is, for many purposes, deemed the agent of his co-partner, we think that the most natural meaning to be attached to the term *agent* in the statute, is that which limits its application to cases in which the parties stand in the relation to each other of principal and agent-in the strict legal acceptation of the words.

Did the defendant act in a *fiduciary capacity ?* We think not. These words have a legal signification, and are used to denote persons occupying the position of guardians, trustees, &e. But we apprehend that they are never used, in strict legal phraseology, to characterize the relation which one partner holds to another.

The case, therefore, was not one, in which the judge was an-[\*347](#p347)thorized to make an order of arrest under the 75th section of the Practice Act. *{Statutes of* 1850, *p.* 435.)

The fourth subdivision of section 20 of the *Habeas Corpus* Act, *{Slot. of* 1850, *p.* 338,) authorizes us to discharge a person under arrest, “ when the process, though proper in form, has “ been issued in a case not allowed by law.” If we are correct in the view above taken, the present case is one in which an arrest is not allowed by law. The defendant should be discharged.

Ordered accordingly.