We have received several notices of non-reception of Nos. of the *Law Journal* from some of our more distant subscribers. The numbers, on issue, are regularly mailed from the Office, and we would request any subscriber who may not receive the *Journal* regularly, to notify us of the same. Irregularity in delivery of Publications is becoming a general complaint; if it were a regulation that the Post-mark should be affixed to newspapers as well as letters on their passage through any Postoffice, a boon would be conferred on the public.

INDEX TO VOL. I.—We have an *elaborate* Index, now in the hands of the printer, to the first volume of this Journal, but fear it may not be ready in time to accompany the present number. Our readers will find that if its issue has been delayed beyond the usual time, the Index will be the more full and complete than that of any similar publication. With the last issue we commenced and will continue in each number a table of Contents for temporary reference.

DIVISION COURTS.

(Reports in relation to.)

ENGLISH CASES.

EX. PHILLIPS v. HEWSTON. *Jan.* 26.

County Courts—Legacy—Jurisdiction—9 & 10 Vic., cap. 95, sec. 65.

A testator by his will gave to H. £100 in trust to pay the same to P. on his attaining the age of 21 years, and in the meantime to invest the money and pay the interest to P.; and he empowered H., if he should think fit, to dispose of the whole or part of the money for the advantage of P. during his minority. At the time of the testator's death P. was an infant. Upon his attaining the age of 21 years he brought an action in the County Court against H. for the recovery of the residue of the £100:

Held, that the £100 was not given as a legacy by the will, but that a trust was thereby created, and that the County Court had no jurisdiction.

This was a motion for a writ of prohibition to stay proceedings in a plaint in the County Court of Lancaster held at Liverpool. The plaint was brought to recover £50, the balance of a sum of £100 claimed as a legacy under a will. It appeared at the trial that the bequest in question was contained in the will of an uncle of the plaintiff, by which the testator, after bequeathing a trifling legacy, left all his estate and effects, consisting of personalty, to the defendant in trust as soon as convenient after his decease to sell his furniture and effects, get in his debts, and stand possessed of the proceeds and of the money so to be collected in trust, to pay to the plaintiff, his nephew, the sum of £100 when he should attain the age of 21 years, and in the meantime to invest the £100 and pay the interest to his nephew; and powers were given to the defendant, who was called "trustee" in the will, to advance either a part or the whole, if he should think fit, for the education or apprenticing of the defendant, or otherwise for his benefit during his infancy. The testator then gave a sum of £50 to each of his two nieces, payable upon their respectively attaining the age of 21 years, and with like powers of disposing of the money for their advancement during infancy. The testator died while the objects of his bounty were respectively infants, and the defendant, before they attained the age of 21 years respectively, had paid a portion of the money, so bequeathed, to their mother for their support. The plaintiff, having come of age, brought this action to recover an alleged residue of £60, and by the particulars he abandoned the residue above £50.

Milward, for the defendant.—The Court will issue a prohibition. Jurisdiction is given to the County Courts in the case of a claim to a distributive share under an intestacy, or of a legacy under a will, by 9 & 10 Vic., cap. 95, sec. 65; but this is a case of trust, and not of a legacy.

Aspland, contra.—A specific sum is given by the will payable at a time certain. It is not the less a legacy because the party to pay it may be also viewed as a trustee. In fact every executor is viewed in equity as a trustee for the payment of legacies. (He cited Stor. Eq. Jur., sec. 540; 1 Wms. Exors., 194; Pears v. Wilson, 6 Exch., 862.)

Milward, in reply, cited *Re* Fuller v. Mackay, 22 L.J.Q.B., 415; W. R. 1852-3, 417.

ALDERSON, B.—I am of opinion that the prohibition should go. This is not simply a case of a legacy. It was necessary in order to effectuate the testator's intentions that a trust should be created, for the *cestuis que trust* are infants, and there are powers to advance during their infancy for their education, &c. This is the case of a real trustee. The merely calling an executor trustee in the will does not prevent County Court entertaining jurisdiction if what is given is a legacy; but we cannot allow the County Court to deal with cases of breach of trust, in which questions of equity arise, for the disposal of which they have no adequate process.

PLATT, B.—The defendant had a discretionary power to make advances, and that is no part of the duty of an executor.

RAMWELL B.—We may consider this case without being at all embarrassed by the case of *Pears v. Wilson*, where the subject matter of the plaint was undoubtedly a legacy. So considered, the plaintiff's cause of complaint only requires to be stated in order to render it clear that it is a breach of trust of which he complains, and that it is not a legacy he seeks to recover: he says that the defendant was intrusted with money which he ought to have invested, and on his attaining 21 years of age to have paid over, and he complains that he did not invest the money, or that, having invested it, he did not pay it over. It is in truth a breach of trust.

Rule absolute for a prohibition.

C.P. ASHCROFT v. FOULKES. *April* 16, 17.

Common Law Procedure Act, 1854, sec. 46—County Court Acts—Costs—Set-off.

If a rule be so drawn up that sufficient materials are not brought before the Court, the Court may, in their discretion, under sec. 46 of the Common Law Procedure Act, 1854, make an order for the production of a document they may deem necessary for the discussion of the rule.

Since the passing of 13 & 14 Vic., cap. 61, if an action be brought for a sum between £20 and £30, and the claim be reduced at the trial by reason of a set-off, the plaintiff is not entitled to his costs, unless there be a certificate, rule, or order for them under that statute.

This cause was tried before the Secondary of London. The plaintiff's claim was £37 odd, but was reduced by a set-off to £4. The Master allowed the plaintiff his costs; and subsequently an order was made by Coleridge, J., for the Master to review his taxation. A rule having been obtained to rescind that order, the rule was drawn up "upon reading the duplicate of an order made by Mr. Justice Coleridge and the two affidavits of William Lewis (as to certain particulars having been made by mistake) and the paper waiting to one of them annexed, it is ordered," &c.

Hawkins, who was instructed to show cause, objected that it was necessary for the party who obtained the rule to bring before the Court materials to show that the order of Coleridge, J., was improperly made, which was not done.

JERVIS, C.J., referred to sec. 46 of the Common Law Procedure Act, 1854, and suggested that the Court would under that section make an order for the production of the Master's allocatur.

Hawkins then showed cause.—Awards v. Rose, 8 Ex. 312; Wallen v. Smith, 3 M. & W. 138; Dixon v. Walker, J. M. & W. 214; and Parker v. Serle, 6 Dowl. P. C., 334, were referred to.