and to have that taxed, only disputing the fact of a settlement of it having been finally made. 3rd. Or they may have accepted the first bill as a settlement, and desired only to have such costs taxed as had been incurred subsequent to the settlement.

The summons of the 9th May, and the order made upon it, of the 30th of that month, take the first ground, for nothing can be more comprehensive than their language. The papers also, which were filed by the Messrs. Evans on that occasion, contain the first bill rendered, and a statement made by Mr. McMurray, "that the charges in the bill on which the receipt of the $160 is endorsed, appear to be very large and exorbitant."

The request made by Mr. Malloch to Mr. McMurray, after the summons to deliver a bill had been served, to send him his former bill to enable him to make out a new bill, shows Mr. Malloch's idea, that he was called upon to deliver new bills altogether; and the letter of Mr. McMurray, refusing to assist Mr. Malloch in any manner with his bills, shows that Mr. McMurray was calling for new bills altogether, and did not desire to accept of the first bill as one which was to be binding either on his clients or on Mr. Malloch.

The reference of the new bill to the master, with the first one in their attorney's possession all the time, is a very strong indication to the like effect against the Messrs. Evans, as well as the fact that the objection to the taxation of the new bill was never raised until after the result of the reference to the master had been ascertained.

If the second ground be relied upon, it is not unreasonable, according to the facts which have been stated by Mr Malloch, that he should have claimed the right to deliver a new bill. But it is extraordinary that the Messrs Evans should not have asked specially for further details and particulars of the identical bill, which would have bound down Mr. Malloch to this particular bill, and effectually have excluded him from interposing any other bill in its stead.

The third ground is not tenable; because it appears from Mr. McMurray's affidavit of the 9th May, that he considered the charges in the first bill to be "very large and exorbitant," and it was upon this affidavit, and the papers then attached to it, upon which the summons and order to deliver a bill "of all causes and matters" wherein Malloch had been concerned for the Messrs. Evans, were granted. He must therefore have taken out the summons to procure a reference of these large and exorbitant items, for he manifestly did not assent to them. This is a perfect answer to the third ground.

There is a passage in Mr. McMurray's affidavit of the 1st July, above quoted, which cannot be quite correct. Perhaps it is some oversight or mistake, for it certainly does not square with the other facts of the case.

Mr. McMurray, as has been said, and as appears, had the first bill in his possession, with the receipt of the $160 endorsed upon it, when he applied for the summons, on the 9th May; for it appears to have been transmitted to him by the Messrs. Evans, on the 15th April; and he annexed a copy of it to his affidavit of the 9th May, when he applied for the summons; and he stated in that affidavit, that the charges in the bill appeared to be very large and exorbitant; and he also declined, on the 14th May, to assist Mr. Malloch with his old bill in any manner. The order to deliver a bill was not granted till the 30th May, long after all these proceedings had taken place After all this, and after the taxation had been concluded, Mr. McMurray, in his affidavit of the 1st July, says, as before quoted: "At the time of taking out the order in this matter, I was totally unaware of the settlement above referred to by and between the said Evans & Evans and the said Malloch, and that the said Malloch would render the same account over again."

Now, he must have been aware of the settlement, one would think, when he took out the order; for the bill, which was in his possession, and which he had so often referred to, had upon its back the receipt before mentioned of $160 in full "of the within account to date." And if the ground which he is taking in the present application, and set forth at large in his summons, be correct, "that a greater portion of the costs allowed to Malloch are the same costs which were rendered in the former bill by Malloch to his clients, and which were paid and settled in full on the 27th March, 1863, as appears by the receipt endorsed on the bill, and the same should not be charged a second time, but only such costs should be charged as have been incurred subsequent to the settlement," then it is quite clear that Mr McMurray must have been, or should have been at all events, aware of this settlement when he took out the order; for his argument at present is, that his order did not call for more than a bill of those charges which had accrued since the time of the settlement. But it is this very position which cannot be reconciled with the fact of his perfect knowledge of the settlement all this time.

I think, therefore, that the Messrs. Evans did intend at the first, and have intended throughout, down to the close of the taxation, not to recognize the first bill delivered at all, or to admit that it had been settled, but intended to go back to the beginning of their transactions with Mr. Malloch, and to have a settlement with him, as if the settlement of March, 1863, had never been made. Their whole proceedings correspond with this view, and no other view but this one could have been taken by Mr. Malloch, or by the master, or can now be accepted.

But what is it, after all, of which the Messrs. Evans complain? It is not that Mr. Malloch has received more on the taxation than he was entitled to; because it cannot be supposed that after so long and rigid an opposition, the master has allowed to Mr. Malloch anything to which he was not strictly entitled. It is true, it is said he has been allowed for services which ought to have been performed by a bailiff; but I am not satisfied that such services ought to have been performed by a bailiff, and I am rather inclined to think that they were more properly performed by a clerk in Mr. Malloch's office, who was under his own inspection. The allusion to a bailiff's services and charges should not have been made against a professional gentleman, and more particularly by another professional gentleman, unless the allusion were really called for, and was fully justified; and I think I must say I do not think it was. The courtesy which should govern gentlemen of the same profession, should induce them rather to spare the use of epithets, even when they might be strictly warranted, than to resort to them when they are not called for or cannot be justified.

I should have thought, after the decision of the master, this matter would have been permitted to end; but it has been followed up when no injustice has been done—when all that is now complained of was occasioned by the applicants' own special proceedings to re-open the whole transaction, and when perhaps great hardship would be imposed upon Mr. Malloch by holding him to a bill delivered under special circumstances, and on a special bargain, which has been since broken by the Messrs Evans;—I say broken, because, although this fact has been directly sworn to for some months past by Mr. Malloch, the parties principally concerned in the fact have not yet thought proper to answer it.

I must therefore discharge this application, and direct that all the costs attending it shall be paid by the Messrs. Evans to Mr. Malloch.

Summons discharged with costs.

In the matter of George Bigger.

Habeas corpus—Where custody not for criminal or supposed criminal matter—Imperial statute 56 Geo. III cap. 100, not in force here—No right to go behind writ or warrant on habeas corpus to determine legality of custody

Where, upon the return of a writ of *habeas corpus*, it appeared that the prisoner was in custody under a writ of *capias*, issued out of County Court, regular on its face, but which, it was contended, had been improperly issued, a judge sitting in Chambers refused to discharge the prisoner.

Quære—As to the right of a judge sitting in Chambers in Upper Canada to order the issue of a writ of *habeas corpus*, where the custody is not for criminal or supposed criminal matter; the Imperial statute 56 Geo III. cap. 100, not being in force in this colony (*In re Hawkins*, 9 U. C. L. J. 298, doubted).

(Chambers, Sept. 14, 26, 1864.)

On the 27th August last, Ann Moore, of the township of Morris, in the county of Huron, widow, having commenced an action against George Bigger, in the county court of the united counties of Huron and Bruce, made affidavit, at Goderich, in the said united counties, that the defendant was justly and truly indebted to her in the sum of $105, for goods sold and delivered by her to defendant; that she was informed, and verily believed, that defendant was about "to leave the country," and with intent to