that the defendant not only took but also converted these parcels to his own use, and if this evidence were not met by contradiction or satisfactory explanation, I think the defendant might, as a bailee, be properly convicted of larceny under the 65th section of our Consol. Stats. C., ch. 92.

I think, therefore, that the rule to enter a nonsuit should be made absolute.

HAGARTY, J.—I concur in the principles of law laid down by the Chief Justice, and only differ from him as to their applicability to the case presented to us on the evidence.

In this case the original receipt of the goods by defendant as a carrier was of course lawful. That fact, coupled with the usual evidence of non-receipt by the consignee, is a *primâ facie* case of liability against defendant. Such evidence was given here, coupled with the fact that defendant absconded, and that an attachment was taken out against him as an absconding debtor for this claim. So far all this is quite consistent with the conclusion that it is common case of civil liability on the carrier.

Under section 55 of ch. 92, Consol. Stats. C., if defendant, being a bailee of property, fraudulently took or converted it to his own use, or the use of any person other than the owner, although he might not have broken bulk, or otherwise determined the bailment, he would be guilty of larceny.

Apart from the fact of absconding, I cannot see how the evidence here necessarily involves a charge of felony. In this it differs from ordinary cases, where the facts relied on for the plaintiffs, in themselves, suggest that a felony has been committed. The facts relied on here are the receipt and non-delivery of goods as a carrier. By themselves they in no way even suggest, much less prove or make out, a case of felony. The absconding is, as far as the civil remedy is concerned, a mere collateral matter, unconnected with the issue.

I cannot help feeling that it is a dangerous precedent to allow defendant's counsel, who offers no evidence for his client, to suggest that a felony has been commited. He may know perfectly well that there is not the most remote chance that his client could be convicted on such a charge. I fully recognise the great importance of the old rule of compelling parties first to vindicate the justice of the criminal law before enforcing the civil remedy; but, with great submission, I think the rule inapplicable to a case like the present.

It is not easy to find many cases, if any, in point. The latest is *Well ck* v. *Constantine*. (2 F. & F 291; 7 L. T. Rep. N. S. 751.) It was an action for assault, and on the trial the plaintiff swore that, in addition to other violence, a rape had been committed. Willes, J., nonsuited the plaintiff The Chief Baron Pollock, in giving the judgment of himself and Bramwell, B., says, "The majority of the court are of opinion the rule should be discharged. The ground upon which the nonsuit proceeded was, that after it appeared that the civil right, or rather the wrong complained of, and for which a civil remedy was sought by the action, involved a charge of felony, the proper course to take was not to go on with that enquiry, but to leave the matter to be tried as a criminal offence. My brother Martin differs so far as to enablet he parties, if they think fit, to take the case to a Court of Error. In speaking of the decision of the court, I am stating what is the opinion I entertain, together with my brother Bramwell."

I think it very important to notice, that what the statute law makes a felony is a subsequent fraudulent dealing with goods lawfully received by defendant. It is not this fraudulent disposition which creates the plaintiffs' civil right, nor is it for any such act that they seek to recover, but for a non-feazance, *i. e.*, the non-delivery to the consignee. The statutable felony is for an act done, not for any omission.

If this action were in trover, where the plaintiffs sought to charge the carrier on proof affirmatively that the latter had broken bulk, or used the goods for his own purpose, (of which there are examples in the books,) I should feel more pressed by the objection; the very act of conversion, which the plaintiffs have to show to prove their case, being by the statute (if done *malâ fide*) declared to be a felony.

As I said before, the plaintiffs have to show nothing of the kind here, and I repeat, it seems to me that it is not inconsistent with the well known rule of law in favor of public justice, to do complete justice by allowing the plaintiffs to recover their just claims.

In *Stone* v. *Marsh* (6 B. & C. 564), one of the cases arising out of Fauntleroy's forgeries, Lord Tenterden says, "In general a man cannot defend himself against a demand by showing on his part that it arose out of his own misconduct, according to the maxim, '*Nemo allegans suam turpitudinem est audiendus.*' There is, indeed, another rule of the law of England, namely, that a man shall not be allowed to make a felony the foundation of a civil action. * * * He shall not sue the felon; and it may be admitted that he shall not sue others together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears by his own showing to be founded on the felony of the defendant. This is the whole extent of the rule."

I think that in the case before us the plaintiffs' claim is not founded on the felony of the defendant, but on his legal liability as a carrier, arising from the receipt and non-delivery of goods.

For reasons of public policy, the statute has made an intermediate act—namely, a fraudulent appropriation—a felony. The plaintiffs' case in no way depends on any act of defendant bringing him within the statute, and I think we can allow him to recover without violating any known rule of law.

MORRISON, J., concurred with the Chief Justice.

Rule absolute—*Hagarty, J.*, dissenting.

HAWKINS v. PATERSON AND KENRICK.

Con. Stat U C cap 24, secs 3, 41—Judgment for costs of defence—Right to examine plaintiff—Liability of defendant and his attorney for arrest under illegal order.

Held, that under Con. Stat U. C. cap 24, secs. 3, 41, a plaintiff against whom a judgment has been recovered for costs of defence only, cannot be compelled to submit to examination or be imprisoned for contempt in not attending.

Held, also, that both defendant and his attorney, who applied for and obtained the order for such imprisonment, and caused the plaintiff to be arrested, and who justified under it, were liable.

Quære, whether a defendant who recovers on a plea of set-off an excess above the plaintiff's demand, is entitled to examine the plaintiff.

The plaintiff declared against John Kenrick and James Paterson, his attorney, for trespass and false imprisonment.

The defendants severed in their pleadings, though their pleas were substantially the same. The pleas averred a suit brought by the plaintiff against Kenrick in the County Court, and a judgment therein recovered by Kenrick against the plaintiff for $83 48; a *fi fa* thereon against the plaintiff's goods, and a return of *nulla bona* thereto; a summons issued by the judge of the County Court for the plaintiff's oral examination on oath, and an order made by the junior judge (acting on account of the unavoidable absence of the senior judge), that the plaintiff should attend before W M C. at such time and place as he might appoint, and be examined *viva voce* on oath touching his estate and effects, and as to the property and means he had when the debt or liability was incurred, and as to the property the plaintiff then had or interest therein, and the means the plaintiff still had of discharging the said judgment, and as to the disposal he might have made of any property since contracting such debt or incurring such liability; that W. M. C. made an appointment, of which the plaintiff was duly notified, but the plaintiff did not attend, whereupon W. M. C. reported his non-attendance, and returned the order with his report to the County Court; that thereupon a summons was issued by the judge of the County Court, calling on the plaintiff to show cause why he should not be committed to the common gaol for a term not exceeding twelve months, for his default in not attending to be examined, which summons was duly served on the plaintiff, and on the return thereof, and the same being moved absolute before the county judge, the plaintiff by his counsel appeared; and at his request, and on his undertaking that the plaintiff should attend before the said W. M. C. at a named time and place, and submit to be examined pursuant to said order, the summons was enlarged to a future named day; that the plaintiff did not attend, whereupon W M. C. reported this non-attendance to the judge, and the last mentioned summons was again moved absolute; that the county judge was again unavoidably absent, and the junior judge sat in his place, and the plaintiff again appeared by his counsel, and at his request, and on his undertaking that the plaintiff should attend before W. M. C. at a named time and place, the summons was