Some time ago he brought an action against the defendants, who are appellants referred to above, for an infringement of his (plaintiff's) trade mark; and the complaint prayed for an injunction enjoining the defendants, and permanently restraining them from what the plaintiff Gillott claims is a trade mark, to wit: No. "303." The testimony in the case tended to show that for many years the plaintiff had used this number "303" with the label; that the number was his trade mark; that he originated it and has used it constantly for twenty years. His name as manufacturer and the No. were impressed on the pen, and the No. was also printed conspicuously on the label on the top of the box which contained his pens. The complaint further sets forth that this number always designated the same pattern and style of pen, and had become well known to the trade as the plaintiff's trade mark, so that these pens were ordered by this mark, and that they had a high reputation and a large sale. Further, that defendants have recently commenced the manufacture of steel pens, and that they imitate the plaintiff's trade mark in every respect except in name of the manufacturer.

The issues formed by the pleadings were tried before Mr. Justice Potter at special term in November 1864. The court on that trial, which lasted several days, found after due deliberation, that the plaintiff Gillott had used this trade mark on pens since the year 1839, and on labels since 1842, and that this usage had become well known to the trade. It was also found that the defendants adopted it, as charged, "with a knowledge of the plaintiff's rights to the same, and with the intent to obtain for themselves the profits and advantages to which the plaintiff was exclusively entitled, in the use of his trade mark, and to mislead the public, and defraud the plaintiff in that respect." That the plaintiff, by the adoption and continued use of the letters and figures—"No. 303" as his trade mark, had in this manner become entitled to the exclusive use of it for this purpose; that it was no defence that the same fraud had been practised by others; that acquiescence could not be inferred, and that it was revocable if it could be. The final conclusion of the special term court was that the injunction restraining the defendants from the use of the trade mark—"No. 303" should be sustained and continued with costs of suit.

The opinion of the court was delivered by

LEONARD, P. J.—The design to defraud by manufacturing and packing pens in all respects similar to the plaintiff's, excepting only in the use of the name, appears very plainly. I cannot reason so artificially as to disguise this conclusion from myself.

To the decision of the court the defendants excepted; first, to the admission of certain testimony on the trial, and generally, to the decision of the court sustaining the trade mark. They also insisted that it was too late for plaintiff to claim the exclusive use of the number 303, even admitting it to be a trade mark; he knew that others were using it long before any legal proceedings were commenced against the defendants.

The defendants, not being content with the decision of Justice Potter, of special term, took an appeal to the general term, where it was argued last month, and the decision which we give below, has just been rendered by a majority of the court, Ingraham, J., dissenting.

The plaintiff had the number 303 first in use. We see by his notice in "caution" that he knew that others had also used the same combination of numbers for the purpose of defrauding him, but it does not appear that he had discovered any individual whom he could attack as an offender; nor can I believe that a "caution" to the public against the fraudulent use of his device can be deemed an acquiescence in the use by others of the particular arrangement of numbers upon steel pens and packing boxes, which the plaintiff had first adopted and used, and which had come to be a designation of a particular and popular pen with the public.

It is also to be observed that the defendants have not excepted to any fact as found by the judge. The exceptions are confined only to the conclusions of law. As the defendants have found no fault with the facts as found by the judge who tried by the cause, the general term ought not to discover any, particularly, as it does not aid the ends of justice.

I am for affirming the judgment, with costs.

CORRESPONDENCE.

Appointment of Official Assignees.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Just before the publication of your article in the last issue of the *U. C. Law Journal*, a question of some importance upon the subject referred to, came up, as questions do very frequently arise, upon which I should like to see some discussion in your Journal.

The creditors prosecuting a compulsory proceeding by attachment in insolvency, applied to the judge of the County Court here, under the 18th sub-section of the 3rd section of the Insolvent Act of 1864, for an order appointing a meeting of creditors to be held before the judge of and in another county. Our judge did not refuse, but granted the order as asked for, intimating, however, that although he was aware some other county judges had made similar appointments, he himself entertained grave doubts as to its legality, for that the words of the 18th sub-section failed to satisfy him that he was at liberty to impose such a duty upon the county judge of another county, or that the duty could be discharged at all by any one out of the county where the proceedings were being carried on; that there was nothing in the statute to require the judge of the other county to discharge the duty, and he might well say, upon such an appointment being made for him, that his own appointments were all that he could reasonably be