

nor the direction upon them enables him to deliver them to the purchaser, and they are lost in consequence, the purchaser may recover back the price paid by him to the vendor for the same; nor will he be presumed to have assented to or waived the vendor's omission, from proof that he received a copy of the imperfect bill of lading before the payment was made, that he thereafter made diligent enquiry to find the goods: *Finan v. Clark*, 10 Allen.—5 Am. Law Reg. 574.

DAMAGES FOR BREACH.—The rule of law that the measure of damages in an action for breach of warranty on the sale of a chattel is the difference between the actual value of the article sold and its value, if it had been as warranted, is not affected by proof that the purchaser subsequently resold it for an increased price, especially if it does not appear that such sale by him was without warranty: *Brown v. Bigelow*, 10 Allen.

A bill of sale of "one horse, sound and kind," is a warranty of soundness, upon which the vendor is liable if the horse proves to be permanently lame, although the purchaser knew that he was lame a week before the sale, and his lameness was talked of before the sale, and the vendor then refused to give a warranty: *Id.*—5 Am. Law Reg. 575.

UPPER CANADA REPORTS.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

McKAY ET AL V. GOODSON.

Committal for default of payment pursuant to order of Division Court Judge—Insolvent Act of 1864—Protection under—Deputy Clerk of Crown—Privilege from arrest.

In 1864 a debtor in a Division Court was ordered to pay \$5 per month, but made default. He was subsequently summoned to appear before the judge on 4th April, 1866, to show cause why he should not be committed for contempt in not obeying the order. On the day previous, however (3rd April), he made an assignment to an official assignee. He afterwards obtained the necessary consent of his creditors to his release under the Insolvent Act, but the judge nevertheless made an order committing the defendant for contempt. Upon an application for a prohibition to restrain all proceedings in the Division Court, *Held*, that the defendant was not, under these circumstances, entitled to protection under the Insolvent Act. *Held*, also, that the fact of the defendant being the Deputy Clerk of the Crown, &c., did not entitle him to any privilege from arrest under the order.

(Chambers, June 9, 12, 1866.)

The defendant is Deputy Clerk of the Crown and Pleas and Clerk of the County Court of the County of Brant.

The plaintiffs, on the 22nd of December, 1859, obtained a judgment against him in the first Division Court of the County of Brant for \$39.90 debts, and \$2.10 costs. On the 26th May, 1864, the defendant was examined before the judge of the court, under sec. 160 of the Division Court Act, and then ordered to pay \$5 a month to the

plaintiffs on the judgment. Before this he had paid the plaintiffs \$19, and there was then due \$37.53. On the 19th September, 1864, the defendants paid the plaintiffs sixteen dollars, but has paid nothing since.

On the 3rd of April, 1866, defendant made an assignment of his estate to Augustus W. Smith, official assignee for the County of Brant, but what the estate was, did not appear. Previous to this, he had been summoned to appear before the judge on the 4th of April, to show cause why he should not be committed for his contempt in not obeying the said order. On this occasion, he informed the judge that he had made the assignment and claimed that no further order could be made against him in respect of the first order. Thereupon the matter stood over till the 28th of the same month.

In the meantime, according to the defendant's statement, he, the defendant, obtained a consent in writing of the requisite number of his creditors, who represent the requisite proportion in value of his liabilities required by the Insolvent Act of 1864, and its amendments, to give validity to such consent to his discharge under the act. (His liabilities were stated \$5542.32, but what his assets are, if any, did not appear.) That although the plaintiff and the judge were informed of all this, on the 28th of April, the judge made an order in this cause directing the defendant to be committed for contempt in not paying the said money according to the terms of the first order, but permitted the issuing the order to stand over for twenty days, to give time to pay the money or to take steps to relieve himself from the order.

On the 4th May last, the defendant obtained a summons in the court below, calling upon the plaintiffs to show cause why the last mentioned order should not be discharged, on the grounds that he had made an assignment and obtained the consent of his creditors to be released as before mentioned. On the return of this summons, on the 7th of May, the parties were heard, and on the 25th this summons was discharged, but directions were given to stay the issuing of the order for commitment for contempt, to give the defendant an opportunity of applying for a writ of prohibition here.

On the 31st of May, *Robert A. Harrison* obtained a summons at the instance of the defendant, calling upon the plaintiffs and the judge to show cause why a writ of prohibition should not issue to restrain all further proceedings in the Division Court in the cause, on the ground that the defendant had obtained a discharge from his creditors under the Insolvent Act of 1864, and on the grounds that the defendant was privileged from arrest, being the deputy clerk of the Crown and clerk of the County Court for Brant, appointed under the great seal.

Moss shewed cause.

JOHN WILSON, J.—The defendant rests his application for the writ of prohibition on two grounds: first, his release under the Insolvent Act of 1864; and secondly, by reason of his privilege from arrest as an officer of the court, holding his office under the great seal.

It does not appear from anything before me here, that the defendant has complied with the provisions of the act, but as the case has rather been presented as an appeal from the judgment of the learned judge, who seems to have stayed the issuing of the order for committal until this appli-