attempt to shew. But assume, for the moment, that Millard did perform what he and Brown had agreed to do, although the evidence shews that Brown did nothing after December, and Humphrey, his vendee, offered to harvest the wheat only, could Brown have claimed one-half of the half of this wheat as his, without any assent of Millard to a division of their joint half, or of Park to a division of the whole? They had rights to adjust with Park, rights to adjust between themselves But Humphrey is at most, the vendee of Brown by means of the sale on the execution. For all the purposes of dealing with this question, Millard and Brown were contractors in this joint enterprise; neither could, as between themselves, have asserted the right to take half of the half of the wheat, without adjusting the debts and accounting for the labor and debts incurred in respect to it The horses were Millard's It was the work to be performed by them, we infer, which entitled Millard and Brown to half the crops instead of one third, as it had been when Park found the horses We think Brown could not have brought trover against Park for this wheat, and therefore Humphrey, his vendee, cannot

This virtually disposes of the case, but we are asked to dispose of the other point As against the party himself whose goods have been sold by the bailiff under execution, it is enough to show an execution, but as between a third party and a vendee under an execution we think the judgment in support of it ought to be shewn.

Judgment will be to allow the appeal and to direct the court below to enter a nonsuit, pursuant to the leave reserved.

Per cur.—Appeal allowed.

Baker et al v. Vanluven.

Agreement—Substantial performance—Acceptance and acquiescence—Work and labour, &c

A having signed an agreement, not under seal, in the following words: "To William Baker Christopher Vanluven, John Ansley Zadoc Wright, and John Hughes, gentlemen—We, the undersigned, understanding that you have resolved to build a church 30 × 40 feet, at a cost of $1,000 in the village of B, do hereby covenant and promise to pay you the several sums opposite our respective names, to assist you in the erection of the said church, and we bind ourselves to pay a fourth of said subscription every three months, and that the whole be paid on or before the 1st of October 1860"—and the parties having built a church at the place named thirty six feet wide by forty eight feet long and of the value of $1,200, with which A found no fault, but had a pew therein cushioned for his own use, which he had always occupied *Held*, that the church built was a substantial performance of the agreement, and *held* also, that by the acquiescence and acceptance of the work by A a new contract might be inferred in which A. would be liable for work and labour and materials provided.

(C P, H. T. 27 Vic)

This was an action, brought in the county court of the united counties of Frontenac, Lennox and Addington, to recover $100 and interest, being a subscription, by the defendant, for building a church, in the following words:

"To Wm. Baker, Christopher Vanluven, John Ansley, Zadoc Wright and John Hughes, gentlemen.—We, the undersigned, understanding that you have resolved to build a church 30 × 40 feet, at a cost of $1,000 (one thousand dollars), in the village of Battersea, do hereby covenant and promise to pay you the several sums opposite our respective names to assist you in the erection of said church, and that we bind ourselves to pay a fourth of said subscription every three months, and that the whole be paid on or before the 1st of October, 1860." It was not under seal.

The declaration contained a special count on this contract averring performance, and also the common counts.

The defendant pleaded to the first count, that the plaintiff did not erect and build a church in the village of Battersea in manner and form as in the declaration alleged. He pleaded never indebted to the common counts.

The cause was tried before the judge of the county court of the united counties of Frontenac, Lennox and Addington, at the sittings held at Kingston in December last.

The plaintiffs proved that the defendant subscribed the instrument, that a church had been built by them which had been called the "Wesleyan Church," and had been dedicated and opened for divine service in the year 1861; that the defendant had a pew cushioned in the church for his own use, which he has always occupied; that some trouble had arisen between the defendant and plaintiffs; that the defendant did not find fault with the church, but said it was larger than the specifications. The church was, in fact, 36 feet wide by 48 feet long, and worth $1,200. The defendant made no objection to the building until he was called upon for his subscription

For the defence it was objected that the defendant had agreed to pay for a church 30 feet by 40 feet; that the one built was 36 feet by 48 feet; that the defendant never promised to pay for such a church.

Leave was reserved to move to enter a nonsuit on the objections taken.

The jury was charged to return a verdict for the plaintiff if they believed the defendant promised to pay the $100 mentioned in the subscription, and that they might allow interest if they thought proper. The verdict was for the plaintiffs for $112

In January Term of the County Court, *Gildersleve* obtained the following rule:—It is ordered that the plaintiff, upon notice of the rule to be given to his attorney, shall, within four days, shew cause why the verdict obtained in this cause should not be set aside and instead thereof a nonsuit entered pursuant to leave reserved at the trial of this cause, on the following grounds: that the plaintiffs at said trial proved the performance, by them, of a different contract from that alleged in their declaration, namely, the erection of a church of the size, thirty-six feet in width by forty-eight feet in length, instead of a church thirty feet in width and forty feet in length, as alleged in said declaration as forming the consideration of the defendant's promise declared on, and in the mean time all proceedings be stayed.

Sir Henry Smith, Q. C., shewed cause.

C. F. Gildersleve was heard in support of the rule, whereupon the learned judge delivered the following judgment:

The conduct of the defendant in resisting the payment of his subscription, because the plaintiffs have built a larger church, a better church, and a more valuable church than the one contemplated appears to me to say the least of it, unreasonable and out of the ordinary course of things The defendant, however, has a right to avail himself of every advantage which the law allows him in resisting this suit On examining the pleadings and evidence, and in looking into the authorities the court finds itself compelled to hold that the plaintiffs cannot recover on the present record. The main question is, what is the issue raised by the first plea The plaintiffs allege, in their declaration, that in consideration that the plaintiffs would cause and procure to be erected and built a church in the village of Battersea, of the size 30 feet in width and 40 feet in length at a cost of $1 000, the defendant promised that he would pay them $10) on the 1st October, 1860, followed with an averment that the plaintiffs did cause and procure the said church to be erected and built. The defendant pleads "that the plaintiffs did not cause and procure to be erected and built a church in the manner and form as in the declaration alleged." There can be no misunderstanding as to the issue thus raised. The plaintiffs assert that they caused a church 30 feet in width and 40 feet in length to be erected at a cost of $1,000. The defendant denies the allegation in direct terms. The evidence produced at the trial proved that the plaintiffs erected a church 48 feet in length and 36 feet in width at a cost of about $1,200. The court cannot say that 48 and 36 amount to the same thing, or that 3 6 means 30. The evidence sustains the plea, and disproves the allegation in regard to the erection made in the declaration The dimensions of the church, and the cost of it, have been made material allegations of the declaration. The defendant has traversed them as such, and, according to the evidence, the issue should have been found for the defendant, unless it can be said that 30 feet express the same thing as 40 feet, and 36 feet the same thing as 48 feet, and $1,000 represents the same amount as $1,200 The arguments addressed to the court, upon shewing cause to the rule, so forcibly by *Sir Henry Smith*, appears to me have been predicated on an erroneous assumption of the relation between the parties, namely, that the church was built for the defendant by the plaintiffs, under a contract to build between