

adjourned as against the garnishee pending the trial of an action against him, by the primary debtor, in the High Court for the debt, part of which was attached in the present suit. Judgment was recovered therein against the garnishee in April, and on the 5th May the primary debtor made an assignment, under the Assignment and Preference Act to one Sumerfeldt, who thereupon gave notice to the plaintiff in this suit that he claimed the debt so attached by him. Thereupon the case came on at an adjourned hearing against the garnishee, and the judgment appealed from was given, discharging him from the suit on the ground that the assignment took precedence of the attachment, and the plaintiff was ordered to pay the garnishee's costs. The question is, whether an assignment under the Act does intercept or take precedence of such an attachment. It is clear that the service of the garnishee summons does not credit as between garnisher and garnishee any debt either at law or in equity, and does not operate to any extent as an assignment or transfer of the debt to the garnisher. *Chatterton v. Walmeley*, 17 Chy.D., 259, C.A., *In re Combined Weighing and Advertising Machines Co.*, 43 Chy.D., 99. Nevertheless, unless sec. 9 of the Assignment and Preference Act applies, the effect of service of the order or summons (it will be understood that I am speaking of the summons under sections of the Division Courts Act), is to prevent the debtor from dealing with the debt to the prejudice of the garnisher, who has obtained a statutory right which he is entitled to follow out to its legitimate results. If, therefore, it is to be intercepted by the subsequent assignment, and the garnisher deprived of the right thus acquired, it must be because his case comes plainly within the provisions of the 9th section. But for that section it is manifest that the assignee could only take what the debtor could give him, and that he would take subject to any rights which creditors had acquired against the property. It may be conceded that an attaching order or summons is a species of execution—an execution against a debt. That is so held and it is so described *In re Stanhope Silk Collieries Co.*, 11 Chy.D., with reference to its effect. But in common parlance we do not speak of it as an execution, but as an attachment, and we see in the English Bankrupt Acts, containing provisions cognate to the 9th section of this Act, that the distinction is main-

tained, and the case of execution and attachment expressly provided for. *Ex parte Pillars*, 17 Chy.D., 653, *Butler v. Wearing*, 17 Q.B.D., 182. Giving all due weight to the fact, no doubt apparent on the face of the quasi insolvent legislation found in the Assignment Act and the Creditors' Relief Act, that the object of the legislature is to prevent one creditor from obtaining by preference or otherwise advantage over others, we must, nevertheless, see that the language of the 9th section fairly treated embraces this case. I think that the reference to the execution in the sheriff's hands and the special provisions as to the costs of the execution creditor, show that the executions therein referred to are executions ordinarily known as such—executions placed in the sheriff's hands, under which the assignor's goods or lands may be seized and sold. It appears to me that the case of an attachment of a debt was not present to the mind of the legislature; that it has not been provided for, and, therefore, that the right of the attaching creditor has not been taken away. Grotesque and unjust as are provisions of the Act in some respects as regards the execution creditor, they would, if he were within them, be doubly so as regards an attaching creditor. The execution creditor by *fi. fa.* has a judgment for his debt, the costs of which he is entitled to recover from his debtor if he can. They are, and remain, a debt, and he can prove for them as such against the estate or the lands of the assignee, if he was not entitled to enforce payment in full under his execution. On the other hand, if the garnisher is cut out by the assignment and the attaching order or summons discharged, the costs which he has lawfully incurred are lost to him, and he may even, as in the case before me, be ordered to pay the costs of a proceeding, against which, until the execution of the assignment, the garnishee had no defence whatever. Nay, if the attaching order is an execution within the meaning of the section a final order to pay over may have been made or judgment recovered against the garnishee in a contested issue as to the debt and execution against him placed in the sheriff's hands, and yet as against the original debtor, the execution by way of attachment not having been completed by assignment of the debt, it would probably follow that all these proceedings would go for nothing. The creditor must lose his costs, and the assignee, since he cannot take the benefit of them, must bring his own action for