

City of Toronto. That the said lot last mentioned, according to the books of the Registrar of deeds in and for the said City of Toronto, is (subject to a mortgage thereon for the sum of £3.0) the property of the said James E. Smith. That the rental paid for the use of said houses on said lot last mentioned is \$140 per annum, being in deponent's opinion much more than the fair value thereof; and that said rent was, as deponent was informed and verily believed, directly or indirectly, paid by the said corporation of the said City of Toronto.

Robert A. Harrison, for the relator, moved, upon reading the statement and affidavits filed in support of the same, together with the recognition of the relator and his sureties therein named, and the same being allowed as sufficient for an order for a writ of summons to issue calling upon the said James E. Smith to shew by what authority he, the said James E. Smith, now exercises or enjoys the office of alderman for the Ward of St. Johns in the City of Toronto. Mr. Harrison submitted that the defendant was in law disqualified as having an interest in the existence or continuance of contracts with or on behalf of the corporation, and so within the letter and the spirit of sec. 73 of Con. Stat. U. C. cap. 54. He contended that the evil contemplated being evident and the words used general. The act should be construed so as to extend to all cases that come within the mischief, and argued that this case was one clearly within the mischief of the act. He referred to *Towsey v. White*, 5 B. & C. 125, 131; *Reg. ex rel. Armor v. Coste*, 8 U. C. L. J. 290.

HAGARTY, J., having taken time to consider, held that Jas. E. Smith was not, upon the facts stated, to be deemed "a person having by himself or his partner an interest in any contract with or on behalf of the corporation," within the meaning of the statute, and so refused the order.

Order refused.

INSOLVENCY CASES.

Before the County Judge of the County of Elgin.

IN RE JOHN CAMPBELL.

Election of assignee—Appointment of agent.

HUGHES, Co. J., declined at a meeting of creditors to elect an assignee, to take the advice of a person not appearing to be duly authorised in writing by his principals, and said, moreover, that this authority should be filed of record.

DIVISION COURTS.

In the First Division Court of the County of Elgin.

PUTNAM v. PRICE.

Interpleader—Priority of attaching and non-attaching creditors—Two executions placed in bailiff's hands at the same moment.

Where the claimant's judgment was recovered long before the attachment issued, and an execution thereon issued and placed in the hands of the bailiff at the same moment as the execution on the judgment of the plaintiff, the attaching creditor: *Held*, 1st, that the attaching creditor was not, by reason of his attachment, entitled to priority; 2nd, that it is to be presumed that the execution oldest in date came to the hands of the bailiff first, and the maxim, "*qui prior est in tempore potior est in jure*," applies.

The claimant recovered judgment and obtained execution against the goods of the defendant some months before the defendant absconded. The execution was returned *nulla bona*. Defendant then absconded; and the plaintiff sued out an attachment, and caused property to be seized under it; and, recovering judgment in his attachment suit, sued out execution for the sale of the goods attached. In the meantime the claimant issued an alias execution upon his prior judgment, which was placed by the clerk in the hands of the bailiff at the same moment as the execution of the attaching creditor—the clerk placing both executions on the desk before the bailiff, who picked up the plaintiff's (the non-attaching creditor) first, and marked it "first." Mr. Nichol claimed the proceeds of the sale of defendant's goods in satisfaction of his judgment and execution, and contended that as the executions were both handed to or placed in the custody and power of the bailiff at the same instant, it mattered not which he picked up or marked "first;" that his execution was oldest in date, and was first in time, for the clerk ought to have handed that to the bailiff first, as it was first in point of time; and referred to the secs. 69 and 204 of Con. Stat. on Division Courts; *Bank of British North America v. Jarvis*, 1 U. C. Q. B. 182; *Drake v. Parlee*, 1 U. C. L. J. 177; *Ex parte McDonald*, 1 U. C. L. J. 77, and insisted that he was entitled to the proceeds of the sale of the goods, as the attaching creditor gained no priority by reason of his attachment.

On the other hand, it was contended that the attaching creditor had a right against all claimants to the proceeds of the sale of the property attached, excepting against those who attached within one month, and cited secs. 203, 204, 206 & 207 of Division Courts Act.

HUGHES, Co. J.—The case of *ex parte McDonald*, 1 U. C. L. J. 77, is very similar to this, excepting in one respect, and affords, if the decision is correct, a precedent against Mr. Nichol's claim. The facts of that case were dissimilar in this, that the claimants, *i. e.*, the execution creditors, who had not attached in that case, obtained judgment and execution *before* the attaching creditor; they obtained judgment and execution *after* the attachment, and before the attaching creditor obtained execution. In this case the execution of the claimant and of the plaintiff came to the custody of the bailiff at the same moment.

The first statute of Upper Canada, which authorized the attaching the property of absconding debtors, was 2 Wm. IV. cap. 5, and under it the sheriff was required to attach and seize, &c., all the estate, &c., of the absconding debtor; and from the moment he seized, the estate was *in custodia legis*. The sheriff acquired a special or qualified property in the estate, and the former owner no longer retained the power of disposing of it (*Gamble et al. v. Jarvis*, 5 U. C., R. O. S. 275, per Robinson, C. J.); and unless the debtor returned and put in bail to the action, or caused the claim of the attaching creditor to be discharged within three months, all his estate, real and personal, or so much of it as might be necessary, was held liable for the payment, benefit and satisfaction of the claim of the plaintiff. The Court of King's Bench, in *Gamble v. Jarvis*,