principle. These cases are not applicable to the present question and do not give any color to the present defence.

The question in them was one of fraud on the part of one execution creditor and the execution debtor, to delay, hinder, and defeat another *bona fide* creditor, contrary to the statutes of Elizabeth. Here it is simply a question, whether the sheriff shall, in excuse of a breach of his duty to execute a writ, be allowed to raise the question, whether as between the plaintiff and defendant in the original action anything remains due.

I can find no case in which this question is directly raised, but we have been referred to the case of *Wylie* v. *Birch*, 4 Q. B. 566, as establishing, that in an action for a false return to a *fi. fa.* pleas which, admitting the defendant's breach of duty, shew that the plaintiff has sustained no damage by the action, are good answers to the action. If that be a general principle, applicable to all similar cases where the pleas shew that there was no damage, then I do not see how this case can be distinguished, for, at the time of the delivery of the writ to the sheriff, the judgment was satisfied, and nothing was due to the plaintiff by the execution debtor. It is difficult to see what damage the alleged false return would cause.

The issues, in fact, were tried at the last assizes at Brantford, before Burns, J. The plaintiff put in an exemplification of a judgment against Charles Pickle, entered 18th April, 1857, for £4003 14s. 9d., upon a cognovit given without the previous issue of process. A copy of a writ of *fi. fa.* (admitted) issued by the plaintiff thereon on the 16th August, 1858, against the goods and chattels of Pickle, directed to the defendant, received by the defendant on the day it was issued, endorsed to levy £2750 with interest from date, £8 14s. 9d. costs, 15s. for this and concurrent writ and sheriff's fees (note—the costs appear by the roll to have been taxed at £3 14s. 9d. ;) and endorsed is a return of levy of goods to the value of £25 remaining on hand for want of buyers, and no goods *ultra*.

Then a paper was put in by consent, coming from defendant's office, bearing date on 8th Oct., 1859, which shewed that on the 7th May, 1858, the defendant received an execution against the goods of Pickle, in favour of one Carden for £606 8s. 8d,. which, before the 9th of Sept., 1858, defendant had returned goods to the value of £100 on hand, whereupon, as appeared later in the case, Carden issued a *ven. ex* and *fi. fa.* for the residue received by defendant, 10th Sept., 1858, and returned *feci.*; and up to the 4th August, 1858, three other executions, amounting together to £116, under which writs actual possession of Pickle's goods was taken by the defendant on the 6th August, 1858. After such possession taken the defendant received two writs of attachment against the estate of Pickle, as an absconding debtor, one on the 7th August, 1858, at the suit of the Commercial Bank for £125, the other on the 10th August, 1858, at the suit of one Moore for £888 14s. 4d., and next on 16th August, 1858, he received the plaintiff's execution; afterwards, and between that day and the 7th of February, 1859, he received nineteen writs of attachment for various sums, amounting in the whole to £5896 4s. 8d.

By the sale of Pickle's goods the sheriff realized in gross £2246 18s. 2d. The expenses of insurance, &c, £215 16s. 2d.. The amount of the executions prior to the plaintiff's was stated on the learned judges notes to have been £699, leaving a balance of £1331 17s., which the plaintiff claimed as applicable on his writ.

The defendant gave evidence for the purpose of shewing that plaintiff's judgment was satisfied; which the plaintiff met by strong rebutting evidence. It is necessary to refer to it, as the jury found for the plaintiff on the fifth and sixth issues. There was also evidence to shew that Pickle was considered in insolvent circumstances in the spring of 1858. There was nothing to give rise to a suspicion that the plaintiff was not a *bona fide* creditor of Pickle's. The learned judge, by consent of the parties, directed a general verdict for plaintiff, and £1331 17s. damages, with leave for the defendant to move to enter a verdict for him on the 1st, 2nd and 3rd issues, if the court should be of opinion that the writs of attachment were entitled, under the circumsiances, to priority.

In Michaelmas Term *Beard* obtained a rule *nisi* accordingly, referring to *Daniel* v. *Fitzall*, 17 U. C. Q. B. 369. *Gamble* v. *Jarvis*, U. S. O. S. 272.

Wood showed cause referring to the C. L. P. Act, s. 55; Consol. Stat. ch. 25, s. 21, 22: *Bank B. N. A.* v. *Jarvis*, 1 U.C. Q. B. 182; *Caird* v. *Fitzall*, 2 U. C. Prac. R. 262.

Beard, in support of the rule, referred to the C. L. P. Act, 1856, s. 49 Consol. Stat. c. 25, s. 14.

DRAPER, C. J.—There are some features in this case which distinguish it from any which as yet, so far as I am aware, has been decided in respect to the conflicting rights of creditors who have got judgment or judgment and execution against an absconding debtor, before his absconding; and creditors who have commenced suits against such debtor by writ of attachment.

1. The plaintiff's judgment, which was on *cognovit*, signed without any process having been first issued, was entered up long before Pickle absconded, and while he was apparently in good credit.

2. When the first of the attacking creditors put his writ into the defendant's hands against the property, credit, and effects of Pickle, his goods had been seized, and were in the sheriff's hands upon several writs of *fi. fa.*

3. The plaintiff's *fi. fa.* was received by the defendant while Pickle's goods were thus in his hands; and, so far as appears, before any proceedings were taken, if, indeed, any could be taken under the two writs of attachment which defendant received, before he received the plaintiff's *fi. fa.*

The sections of the statutes which it appears necessary to consider, are the following, which I cite from the Consolidated statutes: chap 25, s. 14—all the property, credit, and effects, including all rights and shares in any association or corporation, of an absconding debtor may be attached in the same manner as they might be seized in execution; and the sheriff to whom any writ of attachment is directed, shall forthwith take into his charge or keeping all such property and effects, according to the exigency of the writ, and shall be allowed all necessary disbursments for keeping the same; and he shall immediately call to his assistance two substantial freeholders of his county, and with their aid he shall make a just and true inventory of all the personal property, credits, and effects, evidence of title or debt, books of account, vouchers, and papers that he has attached; and shall return such inventory signed by himself and the freeholders, together with the writ of attachment. 19 Vic., c. 43 s. 69.

Sec. 19.—The sheriff having made an inventory and appraisement on the first writ of attachment against any absconding debtor, shall not be required to make a new inventory and appraisement on a subsequent writ of attachment coming into his hands; 19 Vic., c. 43, s. 54.

Sec. 21.—Any person who has commenced a suit in any Court of Record of Upper Canada —the process wherein was served or executed before the serving out of a writ of attachment against the same defendant as an absconding debtor—may, nothwithstanding the suing out of the writ of attachment, proceed to judgment and execution in his suit in the usual manner; and if he obtains execution before the plaintiff in any such writ of attachment, he shall have the full advantage of his priority of execution, in the same manner as if the property and effects of such absconding debtor still remained in his own hands and possession; but if the court or a judge so orders, subject to the prior satisfaction of all costs of suing out and executing the attachment; 19 Vic, c. 43 s. 55.

Sec 22.—In case it appears to the court in which such prior action has been brought, or to a judge thereof, that such judgment is fraudulent, or that such action has been brought in collusion with the absconding debtor, or for the fraudulent purpose of defeating the just claims of his other creditors, such court or judge may, on the application of the plaintiff on any writ of attachment, set aside judgment and any execution issued thereon, or stay proceedings thereon; 19 Vic. c. 43, s. 55.

Sec. 25 enacts that if the real and personal property, credits and effects of any absconding debtor, attached &c. prove insufficient to satisfy the executions obtained in the suit, the debtors of the absconding debtors may be sued to recover such debts; 19 Vic. c. 43. s. 53.

Sec. 29.—When several persons sue out writs of attachment against an absconding debtor, the proceeds of the property and