

on the understanding that he should be allowed to keep possession of his household furniture, which he did keep and enjoy just as before.

In my opinion it was also fraudulent by reason of the stipulation contained in the assignment that no creditors should share in the proceeds, except such as should execute the assignment within forty days, which assignment contained a release by the creditors who should execute of all the debts in full, on condition of their getting the dividend out of what the effects might produce, and a provision that after the execution creditors should be paid their dividend any surplus that there might be should go to the assignor.

This comes, I think, within the principle of these cases in which assignments have been held void as to creditors, who could not execute without coming under such conditions as would subject them to be treated as partners in a continued business, proposed by a deed of trust to be carried on in order to the better winding up of the affairs of the estate. It is an attempt to coerce the creditors to come under a disadvantageous condition at the peril of getting nothing.

In my opinion a nonsuit should be entered.

BURNS, J.—The only point which I have considered is, whether in describing what was intended to pass by the deed the fourth section of the statute 20 Vic., ch. 3, has been complied with, and upon that I think the plaintiff's case fails.

According to the wording of the deed the case presents two questions; first, with respect to the *stock in trade*, and next, with respect to *all other goods, chattels, furniture, household effects, horses, cattle, and also all bonds, &c.* The latter cannot be held a compliance with the provision that they are so to be described, that the same may be thereby readily and easily known and distinguished. Where all or any of these things then were, or were to be found, the deed is silent. Of course it could not be expected that every chair or table must be so described that by reading the description in the deed a person could go and identify them, but surely the legislature meant something when the enactment was made. If it would be inconvenient to describe each article or each set of articles, either as to numbers or quantities, marks or otherwise, that they might be known, yet a description by locality might be given which would enable a person to go with the deed in his hands and point out the goods transferred. No one, however, on reading this deed, could possibly say any of these *other things* mentioned could either be readily or easily known or distinguished. *Quoad* these things the plaintiff's case must, I think, fail.

Then with regard to the stock in trade. This is a term very well known in bankruptcy matters, and I should find no fault with that expression if we had further information to tell us what it was that was assigned. There is an attempt in this to give information as to locality, but it is very vague. The deed simply says, the stock in trade situate on Ontario street, in the town of Stratford. In what part of the street we are to look for it, the deed does not tell us. Further, we are not informed what description of stock in trade it is; there is nothing on the face of the deed to give us the slightest idea whether it was the stock in trade of a dry goods dealer, a grocer, a distiller, a brewer, or of any kind of business which the assignors carried on. The deed is singularly silent with respect to any information from which a person reading it might draw an inference, except that the assignor is described himself to be a merchant. Without that term used in describing him we should not know what he was; but will that do from which to draw an inference that the stock in trade was that of a merchant? It does not appear to me that would be a compliance with the act of parliament. The term merchant, with reference to the business carried on, is as convertible as that of stock in trade. The proper definition of the term is applicable to one who traffics or carries on trade with foreign countries, as an exporter or importer. The popular usage of the expression is to apply it to any trader, or one who deals in the purchase of goods. There are wheat merchants, timber merchants, lumber merchants, and a thousand others, as well as a dealer in cottons, calicoes, and what not. I do not see that we are helped at all in finding out what the stock in trade was by being told that the assignor was a merchant. To be sure we discover it by reference to the evidence; but the question is, whether this information should not exist on the face of the deed.

The statute says it shall contain such efficient and full description thereof, &c. It does not appear to me this deed does contain such efficient description as that any one can possibly say what the stock in trade was that was transferred. If we had been told in what house it was, or on what premises the same might be found, that perhaps might have helped, but here we are told the stock in trade will be found on the street in Stratford. To take this literally the public would have the opportunity of helping itself, or the corporation would complain of a nuisance. I think we should scarcely look for the goods upon the street, but the parties might have told us better where to find them.

NICLÉAV, J., concurred.

Judgment for defendants

(CHAMBERS.)

(Reported by MR. J. G. WOOD.)

PERRIN, TRUSTEE, &C., v. BOWES.

*Setting aside irregular execution on motion of strangers.*

An execution will not be set aside at the instance of a subsequent execution creditor, even although eight days from the last day for appearance had not expired at the time when such execution issued.

(23th March, 1859.)

This was a summons calling on one J. G. Bowes to shew cause why the writ of *fi. fa.* issued by him against the defendant's goods should not be set aside with costs for irregularity, on the grounds that the writ should not have issued until the 23rd March, whereas it was issued on the 21st March, and also upon grounds disclosed in affidavit filed.

The affidavit put in stated that final judgment was entered up in this cause on 22nd March, 1859, and execution issued against defendant's goods on the same day. That final judgment had been entered up in default of appearance against the defendant at the suit of one J. G. Bowes, on 19th March, (the writ of summons upon which the last mentioned judgment had been signed, having been served upon the defendant on 4th March) and that execution had issued on such last mentioned judgment, and been placed in the hands of the sheriff on the 21st March.

L. W. Smith shewed cause.

ROBINSON, C. J.—The execution against the defendant by J. G. Bowes was issued a day too soon; but I find no authority for setting aside an execution at the instance of a stranger to the action. The cases are all the other way. The plaintiff's summons must therefore be discharged with costs.

Summons discharged with costs.

CHAPMAN v. DELORME.

*Practice—Service of Writ of Attachment—Reference to the Clerk of the Court.*

When a writ of attachment has been served upon the wife of an absconding debtor, who has fled to parts where personal service cannot be effected, the plaintiff's damages may be ascertained by the Clerk of the Court under section 143, C. L. P. Act.

(18th May, 1859.)

This was an application for leave to proceed under sections 45 and 143 of the C. L. P. Act, 1856. The affidavit put in stated that diligent enquiry had been made as to the place where defendant had fled to; that he was believed to be in California or in parts adjacent to Fraser River, and that personal service upon him could not be effected. That the writ had been served on defendant's wife who was residing in the city of Toronto, and that no special bail had been put in. That this action was brought to recover the amount due on certain acceptances made by defendant, and for goods sold and delivered, and that the amount for which judgment was to be signed could be correctly ascertained by reference thereof to the Clerk of the Court. Upon which

BURNS, J., granted an order that the amount for which final judgment was to be signed should be ascertained by the Clerk of the Court, and that judgment for the amount so ascertained might be signed without further notice to the defendant, except serving a copy of the order and of the Master's appointment upon defendant's wife.