one of the United Counties of Northnmberland and Durham, and soon afterwards obtained judgment and execution in the manner pointed out by the statute 13 & 14 Vic. ch. 53. His goods had been seized under the writ of attachment, and placed in the charge of the clerk of the Division Court; and before he had obtained his judgment in the Division Court, and while Hutton's goods were thus in the custody of the law, two of the defendants in this action, Brown and Harty, who had obtained a judgment in the Court of Queen's Bench against Hutton, sued out a writ of *Fi. Fa.* against his goods, and placed it in the hands of the other defendant, Ruttan, the sheriff of the said counties; and the plaintiff averred that the three defendants, well knowing the said goods of Hutton to be in the custody of the law under the said attachment, and that they were insufficient to satisfy this plaintiff's debt, and wrongfully intending to injure this plaintiff, wrongfully, unjustly, and injuriously caused the said goods to be seized and taken under colour of the said writ of *Fi. Fa.* out of the custody of the clerk of the Division Court, and to be sold under said writ of *Fi. Fa.*, by means whereof the plaintiff has been deprived of all the benefit and advantage of his judgment and execution in the said Division Court, and the same remains wholly unsatisfied.

The defendants demurred to the declaration. The causes of demurrer, and the statutes bearing upon the question, appear in the judgments.

Richards for the demurrer. *Eccles* contra.

Robinson, C.J., delivered the judgment of the court.

The first question is—whether, if the goods were illegally taken by the sheriff under the circumstances, this kind of action could be maintained at the suit of the plaintiff in the attachment, for the consequential damage arising to him from his being deprived of the means of obtaining satisfaction of his judgment.

This plaintiff, it seems, could have no other remedy against the defendants; for the goods not being his, nor in his custody, he had not even a special property in them, and so could not have maintained trespass,—though I do not see why the clerk of the Division Court might not have brought such an action, as having a special property. Yet though this plaintiff could not bring trespass against these defendants, it was admitted in the argument that no instance had been found of a special action on the case having been brought, either in England or here, under similar circumstances, though there must have been frequently the same grounds for such an action. Whenever, for instance, several persons have separate executions against the goods of the same debtor, and one who is not entitled to priority procures the sheriff nevertheless to seize aud sell for his benefit, the others, whose writs have been improperly postponed, would have the same grounds for an action on the case against the sheriff and the plaintiff, whose writ had been executed, as the plaintiff has in this case. Still, though no precedent for such an action has been found, I am not prepared to say it would not lie; for though the clerk from whom the goods were taken might sue in trespass, yet the parties who really sustain the injury cannot compel him to sue; and if he should sue and recover damages, they would have a remedy against him, which would be a circuitous mode of obtaining redress. I do not at present see why, if the seizure in this case was illegal, the plaintiff, who is the person really injured, might not support such an action as the present for the consequential damage, unless it be that an action of this nature on the case will not, as a general principle, lie against a person who has merely been asserting his own supposed claim, any more than it will lie against a person for harassing another by a non-bailable action which turns out to be groundless.

It is, however, my opinion that the defendants are entitled to our judgment on the main ground—that the goods were legally seized by the sheriff, being at the time subject to the *Fi. Fa.* from this court, which was placed in the hands before judgment had been recovered in the Division Court on the attachment suit; though it would have been more satisfactory if the statute which gives the attachment from the Division Court had contained a clear provision on that point. In the first Absconding Debtors' Act, 2 Wm. IV., ch. 5, there is nothing which would expressly allow an execution creditor who had obtained judgment on a suit commenced in the ordinary manner to obtain satisfaction by levying upon goods of the debtor that had been attached under that Act at the suit of some other creditor. The general terms of the Act would lead us to suppose that the Legislature contemplated the goods after attachment continuing in the hands of the sheriff until the attaching creditor could obtain judgment and execution, yet the operation of that system would be so unjust, as regards creditors who had served their process and were proceeding in the ordinary course, that the Legislature, by their Act passed three years afterwards, 5 Wm. IV., ch. 5, sec. 4, declared that they had no such intention, and expressly enacted that the creditor who should obtain judgment after service of process, and sue out execution before the attaching creditor has obtained his execution, "shall be allowed the full advantage of his legal priority in the same manner as if the estate had not been attached and were remaining in the possession of the debtor."

It is true that the statute 13 & 14 Vic., ch. 53, secs. 64 to 71 inclusive, and sec. 102, contains no such enactment, but much of the goods remaining in the hands of the clerk of the court until the attaching creditor could obtain execution. Still, on the other hand, there is no express enactment that a plaintiff who has obtained his prior judgment and execution in the ordinary way shall lose his priority; and the former statute, 5 Wm. IV., ch. 5, sec. 4, being declaratory, is an expression of the intention of the Legislature that under such circumstances the advantage of priority should not be lost.

And there is also this strong circumstance to be considered—that under this late Act, 13 & 14 Vic., ch. 53, attachments may be taken out from the Division Court under circumstances and on grounds which would not allow a creditor having a large demand to sue out an attachment from any of the courts of record; so that he would be helpless, and must allow the whole advantage to rest with the suitors in the Division Court. The Legislature never could have intended this; the remedy of suitors obtaining judgment in the superior courts could not be so defeated without express provision to that effect; and I therefore think that the seizure by the sheriff was in this case legal, and that the defendants are on that ground entitled to judgment on this demurrer.

Draper, J.—The first attachment law (2 Wm. IV., ch. 5,) confined the remedy to the Court of Queen's Bench and the District Court, for an obvious reason. The object of the writ was to compel the absconding or concealed debtor to appear and give bail to the action; and this being done (see sec. 2) no further proceeding on the writ itself was had. If bail to the action was not put in, a bond might be given (see 3) having the same effect in entitling the debtor to the restoration of his effects. This remedy was, therefore, properly confined to the courts which had the power of issuing process against the person; and the surrender of the debtor on judgment being obtained would, of course, relieve the special bail, and would also relieve the obligor, who gave a bond under sec. 3.

This Act was amended by the 5 Wm. IV., c. 5, which (sec. 4,) enacted that the plaintiff, in any suit begun by the process therein being served upon the alleged absconding or concealed debtor, before the suing out an attachment against his estate, might continue his suit to judgment; and in case of his obtaining execution before any attaching creditor, he was allowed not merely the full benefit of his legal priorty, but he was entitled to any advantage to be derived from the bond (if there were one) taken under sec. 3 of the first Act—a provision in his favor going beyond what might have been looked for.