

plaintiff, after getting his judgment, sued out an execution against the real estate of John McGowan, and seized it as in his possession. The bailiff's return, however, shows that the property was not in the possession of John when seized, and there is not one word of evidence to show that it then belonged to John. The first question is this: Can you take out an execution *de plano* against a man, and seize property, as his, in the possession of another? I think that when property has passed out of the possession of the debtor into the hands of a third party, who holds it in good faith, it cannot be seized under an execution. There may be an action *in fraudem creditoris*. Even admitting that there is fraud, you cannot seize A's property under an execution, in the possession of B. The moment that the debtor's property has passed into the possession of a third party, under a title, it is only by a revocatory action that it can be brought back to the creditors. It may be brought back by a process, but not by a seizure. Besides the plea of fraud in this case, there was a plea of *chose jugée*. There was a decision when the moveables were seized, that there had been no legal transfer of the moveables to Peter; and now, when the immoveables are seized, it is contended that the previous decision has the force of *chose jugée*. I am of opinion that the plea of *chose jugée*, as well as the plea of fraud, is unfounded, and should be dismissed.

BADGLEY, J. It is necessary to examine the facts in this case, as they appear on the face of the record. In 1855, John McGowan & Co. were carrying on business at Vaudreuil, and in that year they became indebted to the plaintiffs, Masson & Co., in a considerable sum of money, first, in March, in the sum of £23 for goods sold and delivered, and subsequently in various amounts on notes, &c., in all about £370. The firm paid no part of these sums as they became due; they were, in fact, insolvent, and unable to pay anything. On the 3rd Dec., when they still owed the plaintiffs this sum of £370, and other amounts to other parties, swelling their indebtedness to a total of £800, John McGowan, the head partner, transferred to his brother Peter a farm that belonged to him, and not only the farm, but

all the farm stock that was upon it, consisting of five horses, waggons, &c. At this time Peter McGowan was not a trader nor a farmer; he was a sailor. In this way he became the *cessionnaire* of the farm and of all the stock upon it. Early in January following, the plaintiff sued out a writ of attachment, and seized all the goods belonging to the partnership firm. These goods realized £150, while the firm owed £800. It is pretended that there was a large amount in debts due to the firm, but experience teaches us how little such debts in the country are worth; and, in fact, there is the evidence of the collecting bailiff that he had a large amount of debts in his hands, but that they were all prescribed. Does this show that John McGowan was solvent? It is said that his partner was solvent; but this did not make John solvent. He was then hopelessly insolvent, not having paid even the first £23 due for goods in March, or any part of the subsequent liabilities, yet he ceded to his brother the only immoveable and moveable property he possessed in the world.

From this statement of facts, I make the deduction, not only that John was a bankrupt, but that Peter knew the circumstances under which John made the transfer to him, and that it was made for the purpose of secreting the property from John's creditors. John had allowed his father and sisters to occupy this property, and, after the transfer, he went and resided there with his sisters. In fact, in the deed of cession, John reserved to himself and his wife the right of occupation of half the house for their lifetime, and when he found his affairs so involved that he was unable to carry on his business, he removed into the house, and lived there on the farm. Further, in 1857, Peter, who was a sailor, made a lease to his brother John, for three years, of this very property. These transactions were kept very quiet; no one knew anything about them, except the few to whom they were communicated. One of the witnesses states that during the whole time, John was the apparent and reputed proprietor of the farm. Under these circumstances, the possession of the farm was in John. The *procès-verbal* says that service could not be