

petitioning under sub-sec. 3, or for making an assignment in accordance with the demand;

3. That the writ of attachment should have been endorsed, with a statement that the same was issued by order of the judge of the county court; but an amendment was allowed on payment of costs by plaintiffs.

4. Objections that the affidavits of the two credible witnesses were not filed at the time of issuing attachment, that the proceedings were not taken within three months, &c., and that sufficient time was not allowed to defendant to give notices required by act for taking proceedings on a voluntary assignment, were over-ruled.

### DIVISION COURTS.

In the First Division Court of the County of Elgin.

PATON ET AL V. SCHRAM (JONES, CLAIMANT).

*Interpleader—Execution—Attachment—Priority.*

Goods seized under an attachment held liable to the execution of any creditor who may obtain a judgment and place it in the hands of the bailiff before the attaching creditor obtains judgment and execution.

It was admitted that the goods were seized under an attachment issued in favor of the plaintiffs on the 9th October, 1863.

The claimants' judgment was recovered on 19th November, 1862, and execution issued upon it on 4th November, 1863, and placed in bailiff's hands.

The plaintiff's judgment was obtained on the 27th November, 1863.

Eight sheep were sold as the property of defendant, and realized \$17.

*Ellis*, for claimant, claimed the proceeds of the sale under his execution, as having priority over the subsequent execution of the plaintiffs, and cited *Putnam v. Price*, 1 L. C. G. 9, and *Francis v. Brown*, 11 U. C. Q. B. 588; 1 U. C. L. J. 225.

*Mann*, for the plaintiffs, insisted that their attachment gave them a lien over all the goods of defendant as against all others but attaching creditors, whose writs of attachment should be sued forth within one month. He referred to the D. C. Act, secs. 204 to 209.

*HUGHES, C. J.*—I have carefully gone over the grounds and reasons for my judgment delivered in this court in *Putnam v. Price*, some time ago, in which Mr. Nichol was claimant of money the proceeds of a sale of property attached, under similar circumstances; and I have also read over attentively the case of *Ex parte Macdonald* in 1 U. C. L. J. 77, and the judgment of the court of Queen's Bench in *Francis v. Brown*, particularly the judgment of the late Mr. Justice Burns, wherein he made no distinction in favor of executions from the superior courts over those of inferior courts, but laid down broad principles which are common to both; and I think that the execution of Mr. Jones, the claimant here, under the judgment and execution in his favor, the oldest in date and first in the hands of the bailiff is entitled to priority over the execution obtained afterwards by the plaintiffs under their attachment suit. The late Mr. Justice Burns said in that case, "There is no expression of words in the act of Parliament indicating that it was the will of the Legislature that the attaching creditor should have so much advantage over the non-at-

taching creditor; but the affirmative of the proposition depends upon the effect of the provisions respecting the duty of the bailiff, and then of the clerk who is made the depositary of the goods. The clerk is directed to take the property into his charge and keeping, and the same property is declared to be liable to seizure and sale under the execution upon such judgment as the attaching creditor may obtain. In this general provision, the Legislature must not be understood as dealing with the rights of parties other than the debtor and the attaching creditor. As between *them* the goods should be placed in the clerk's hands, and as between *them* the goods should be held liable to any execution that the creditor might obtain. In that sense the goods would be under the custody of the law, in case the debtor did not avail himself of the provisions for obtaining a return of them upon giving security." And again, "If the debtor has obtained a return of goods there can, I think, be no question that in his hands they would be liable to be seized upon any execution which another creditor in the meantime should obtain, and if so, it could not be pretended that, in order to defeat the execution, the goods were in the custody of the law. They are no more in the custody of the law because they happen to be deposited with the clerk as respects other creditors than if delivered back to the debtor upon security. The property and the right of property is not changed in any way by seizure upon attachment, but it is necessary that the attaching creditor should obtain an execution before the goods can be disposed of." And again, "An attaching creditor must proceed to judgment and execution, and if there be more than one attaching creditor, they are specially provided for, but in the cases of an attaching and a non-attaching creditor, as both must proceed to judgment and execution, I apprehend the rule "*qui prior est in tempore, potior est in jure*," as respects the execution must prevail, and no lien or priority is gained merely by the attachment."

Supposing this were a contention between these same parties and an execution creditor having a judgment and execution in and from a superior court, I apprehend that as between Mr. Jones and that superior court execution creditor the only question which could or would arise between them would not be to give priority to the superior court execution, merely because it is issued from a court of record, but simply the priority of execution in the sheriff's or bailiff's hands, which under the 266th section of the C. L. P. Act would be decided by a reference to the precise dates or times when the executions were respectively placed in their hands. The sheriff would not be permitted to override, with the execution he might hold, the executions the bailiff of the division court might hold, simply because it was the process of a court of record, for the law makes no such distinctions or preferences. If so, surely the execution from this court could not upon any fair pretence be excluded from the priority upon any grounds which might not be urged against the execution of the superior court.

I therefore adjudge and order that the proceeds of the sale of defendant's goods be applied towards satisfaction of the execution of John H. Jones, the claimant.