itor; but it was proved that, though a servant of such alleged vendee was immediately put into the house, yet the former owner and his wife continued to carry on the business of publican as usual, with the stock-in-trade that had been so assigned, during which time the servant was employed to keep possession, when he sold beer, put the money into the till, to which they had access. Lord Ellenborough held that there was in that case no *bona fide* substantial change of possession: that a concurrent possession with the assignee was colourable, and was fraudulent and void; and that the merely putting another in possession with the former owner of the goods was a mere mockery.

That language was just and reasonable as applied to the case which the learned judge had before him, but we cannot safely take it as a guide for the decision of this case, when the object of the assignment, and what was done under it, were so utterly unlike. If we were to set the verdict aside which has been given in this case in favour of the assignees, when there is no reason to doubt that all was done in good faith, without any secret understanding in favour of the former owner of the goods, we should be holding that the statute means in all cases not merely an actual and continued change of possession, but an *exclusive possession*, in the assignee, and that so peremptorily that a jury must be held to have decided against law, if in a case of this kind they find that there has been a change of possession, when the former owner of the goods is allowed by the assignees to give his attendance and assistance jointly with their clerk or agent, and under their control and direction, in disposing of the goods.

That this was a circumstance in the present case which might fairly be submitted to the jury, and considered by them as raising suspicion of the assignment being colourable, we have no doubt, but it was considered and disposed of by the jury with that view, and the conclusion which they came to in favour of the honesty of the case seems to be consistent with the truth of the case. All therefore turns on the question whether, as a point of law, the statute, as it regards change of possession, should be held not to be complied with in any case where the former owner of the goods is allowed, as he very commonly is in cases of assignments for the benefit of creditors, to remain upon the premises assisting the assignees in carrying out the purposes of the assignment. We think we cannot construe the statute so strictly. Rule discharged.

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### Cann v. Thomas.

*Absconding debtor—Attachment—Execution—C. L. P. A., secs. 53. 55.*

The plaintiff obtained execution against A., whose goods were then under seizure upon an attachment issued against him as an absconding debtor. The sheriff under C. L. P. A., sec 53, having sued and obtained payment of a sum due by one of A's debtors,

*Held*, that such money was not liable to the plaintiff's execution, but must be divided among the attaching creditors.

This was an action brought by the plaintiff against the defendant, as sheriff of the county of Wentworth, on a return of *nulla bona* made to a writ of *fieri facias* placed in his hands on the second day of November last past, against the goods and chattels of one William Dodds, in favour of the said plaintiff; and by consent of parties, and by order of a judge, the following case was stated for the opinion of the court without pleadings:—

On the 10th of October, 1857, the above named plaintiff obtained a judgment in this honourable court against one William Dodds, and on the second day of November following placed a writ of *fieri facias*, against the goods and chattels of the said Dodds, in the hands of the defendant, as sheriff, for the execution thereof.

On or about the eleventh day of October last past the said William Dodds absconded from this province, and proceedings were then taken against him as an absconding or concealed debtor, and on the twelfth day of the same month a writ of attachment against the said William Dodds, as such absconding or concealed debtor, was placed in the hands of the defendant, as such sheriff as aforesaid, at the suit of John Riddle and John McNab, who in due course obtained a judgment, and placed a writ of *fieri facias* thereon, against the goods and chattels of the said William Dodds, in the hands of the defendant, to be executed according to the exigency thereof.

Various other writs of attachment, including one at the suit of one Young against Dodds issued on the thirteenth day of such last mentioned month of October, were sued out against the said William Dodds at or about the time of the issuing of the last mentioned writ of attachment, and were also duly prosecuted to judgment and execution.

On or about the thirteenth day of the same month October, and before the writ of *fieri facias* of the said plaintiff, so by him obtained under his judgment, was issued and placed in the hands of the said defendant, he, the said defendant, as such sheriff aforesaid, did give notice in writing to the Great Western Railway Company, a debtor of the said absconding debtor, as provided by the 52nd section of the Common Law Procedure Act, and the personal and other property of such absconding debtor having proved insufficient to satisfy the said attachments and the executions issued thereon, did, in pursuance of the provisions of the said act, sue for and recover from the Great Western Railway Company the sum of £311 13s. 3d., and the said money now remains in the hands of the said defendant as such sheriff as aforesaid, and was in the possession and custody of the said defendant before and at the time of the return of the writ of *fieri facias* in favour of the plaintiff hereinbefore mentioned.

The said sum is not sufficient to satisfy said attachments.

The question for the opinion of the court is, whether the money so received by the sheriff from the Great Western Railway Company is liable to be seized and taken by the sheriff in satisfaction of the *fieri facias* so issued and placed in his hands by the plaintiff, or whether the same is liable to the several attachments so issued against the absconding debtor.

If the court should be of opinion that the money was or is so liable to seizure under the *fi. fa.*, judgment shall be entered for the plaintiff, if otherwise for defendant.

*Start*, for the plaintiff. *Burton*, contra.

C. L. P. A., 1856, secs. 53, 55, 57, 58, 194; *Collingridge* v. *Paxton*, 11 C. B. 683, were referred to.

Robinson, C. J.—I think the money obtained by suing the Great Western Railway Company under the 53rd clause of the act must be divided among the plaintiffs in the writs of attachment, and cannot be treated as if it was the proceeds of goods remaining in the hands of the absconding debtor, and so paid over to the judgment creditor, who obtained judgment before the debtor absconded; and cannot therefore be paid over to such judgment creditor, under the 55th clause of the Common Law Procedure Act.

The legislature never could have intended that when an attachment creditor had availed himself of this provision of the statute, giving the security for costs which the act requires, a creditor who had obtained execution upon a judgment against the debtor before he absconded, should step in and sweep away the fruits of the action brought by the sheriff at the instance of the attachment creditor for his benefit.

If the debtor had never absconded, and this were a question between a previous execution creditor and a subsequent one, which should receive the benefit of a garnishee order obtained by the plaintiff in the second writ, there could be no question that when the money was collected by the creditor who obtained the order, he would hold it against the creditor who had the prior execution.

The case cited from 11 C. B. 683, has a material bearing on this case. We are clear that the plaintiff cannot sustain this action.

Burns, J.—I think judgment should be given for the defendant. It is admitted that the judgment debt due from the Great Western Railway Company to the debtor was merely an account, and therefore not liable to seizure by virtue of 22nd sec. of 20 Vic., ch. 57, similar to the English act 1 & 2 Vic., ch. 110, sec. 12, enabling sheriffs to seize upon writs of *fi. fa.*, money, bank notes, cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or securities for money. It is said the plaintiff might have had the remedy by garnishment under the 194th section of the Common Law Procedure Act, after he had obtained his judgment, had it not been for the attachments sued out and notices given under the 52nd section of the act, which would deprive him of that remedy. All we can say to that question is, if it be any hardship upon one creditor more than upon another, which of them is to obtain the fruit of his legal proceedings first, the legislature must apply the remedy. The 55th section preserves to the creditor who sues before the debtor has absconded his legal rights upon his execution to the exclusion of the attaching creditor, and the