wrong for me to allow a subject matter of defence—already fully adjudicated—to be a cause of action, merely by the party changing his position from that of defendant to plaintiff. There must be judgment for defendant with costs. [See *Outram* v. *Morewood*, 3 East.; *Russell* v. *Rowe*, 7 U. C. R. 484; and *Eastmure* vs. *Lawes*, Easter Term, 1839, Com. Pleas, England, reported in the *Jurist* (New York) No. 6, page 475.]

(County of Wentworth—Alexander Logie, Judge.)

EX PARTE W. R. MACDONALD.

IN RE ALEX. MAWHINNEY *vs.* JAMES GIBSON, AN ABSCONDING DEBTOR.

W. J. BROWN *v.* JAMES GIBSON.

SILAS BOND *vs.* JAMES GIBSON.

Attachment—Priority of claim of attaching creditor.

This was an application by Mr. Macdonald, Clerk of the 1st Division Court of the County of Wentworth, to determine to whom certain monies now in Court shall be paid.

An attachment was sued out by Mawhinney, under which certain perishable goods were seized and sold, and the money, amounting to £5 17s. 6d., paid into court. Mawhinney obtained judgment, and on the 13th January, 1855, took out execution. Previous, however, to the suing out of the attachment, the other execution creditors had obtained judgments, and after the issuing of the attachment, but before Mawhinney had taken out execution, the other plaintiffs took out executions—Brown, on the 3rd of Jan., 1855, and Bond on the 4th of Jan., 1855. The attaching creditor claimed the money, and also the execution creditors, the amount being insufficient to pay all.

LOGIE, J.—I think the attaching creditor, Mawhinney, is entitled to the money realized from the goods seized under his attachment and paid into court. The 64th section of the Division Courts Act of 1850 authorizes the issuing of attachments from the Division Courts, and points out the mode of proceedure. In that section it is enacted as follows:—

"That the property seized upon any such attachment shall "be liable to seizure and sale under the execution to be issued "upon such judgment," (that is, the Judgment in the attachment suit) "or the proceeds thereof, in case such property "shall have been sold as perishable, *shall be applied* in "satisfaction of such judgment." And in the following section, the 65th, the mode of proceeding by other creditors desiring to participate in the property is pointed out. The intent of the statute appears to be to give creditors suing out attachment a sort of lien or claim upon the property seized under the attachment until judgment is obtained, when the property is to be sold, or the proceeds in case of a previous sale, *applied in satisfaction*. The statute provides for the claims of other creditors by allowing them to take out attachments, and share pro rata with the first attaching creditor; if they neglect or refuse to do this they cannot by any other means, as by first obtaining execution, deprive the attaching creditor of his claim upon the property.

In the Superior Courts the law appears to be the same, except in cases where the execution creditor had sued out process and served the debtor personally prior to the issuing of the writ of attachment and obtaining judgment before the attaching creditor. In such cases the execution creditor is entitled to priority by the 4th sec. of the Act 5th Wm. IV. c. 5, and see also Bank of British North America *vs.* Jarvis, 1 U. C. Q. B. R. 182. The making of such an exception shews that in the contemplation of the Legislature the claim of the attaching creditor would in general prevail. There is no such exception in the Division Courts Acts, and I think in all cases where goods are seized under attachment, even after other creditors have obtained judgment, the claim of the attaching creditor obtaining judgment is entitled to prevail, and that the goods must be first applied in payment of his judgment. I think, therefore, that the money should be paid over to Mawhinney.

[The point involved in this case has been decided otherwise in some Counties, but *on what grounds we are not informed*. Judge Logie's views, we have heard, accord with those of Judges Gowan and Malloch, both having decided in the same way. So far as we see, the decision is sound.—*Ed. L. J.*]

(County of Essex—A. Chewett, Judge.)

DAVIS *v.* THE MUNICIPALITY OF WINDSOR.

Action for work and labour—Contract with Corporation not under seal—How far equity and good conscience relieve.

The plaintiff sued for three days' levelling for side-walk of a street, and amount paid the men employed. The performance of the work, its value, and also that it had been done under the direction of the Board of Works of the Municipality of Windsor, were respectively proved.

The defendant contested the claim on several grounds:

1st, That it was for work to be done by one Donelly (under a sealed contract) for the Municipal Council for 1854.

2ndly, If not so, that the Board of Works had no right to employ the plaintiff, but only to superintend the work required by the Council.

3rdly, That in any case, there could be no valid contract with the Municipal Council, unless under seal.

To support defence, the sealed contract of Donelly with the Municipality for 1854 to perform certain levelling, &c., was put in; and Donelly stated that he completed his work under the contract,—that there was dissatisfaction amongst the inhabitants and the Council, and they required it to be altered and done differently,—that plaintiff made the alteration under the direction of the Board of Works,—that the municipality had the benefit of plaintiff's work, and that if he (Donelly) had done it, he should have charged for it as an extra. A witness also proved that the plaintiff was not employed by any resolution of the Municipality.

CHEWETT, J.—In ordinary cases between individuals the plaintiff could recover where a party, clerk, or agent, directed another without his express leave to do any work for him of a beneficial nature, and necessary to be done, in any matter which he was obliged to do, and lawfully carrying on. If such used the work, being well done and answering his purpose, the law considers he had tacitly assumed and adopted the work, and thereby impliedly agreed to receive it in making use of it.

The question then arises whether the Board of Works had a right to direct plaintiff to do this work as far as the plaintiff was concerned. I think impliedly it had, as the work was a necessary preparation for the planking of the street and side-walk by the contractor for that purpose, who was furnished with a working plan, and the plaintiff completed the work without objection or enquiry by the Municipal officers. This I take to be the assuming, adopting, and impliedly accepting by the Council of the piece of work. If, as is contended, the work is the same as intended in Donelly's contract, the Municipality having rejected Donelly's performance of it must look to him; but as it would not in an ordinary case deprive the plaintiff of his right to recover, does it in the case of a Municipality, where the work done is within the scope of its authority? I think it should not, where the contract,