the purpose of bringing the point in difference up for judicial enquiry; but, in enacting that the original road allowance shall be opened, although describing that road by metes and bounds, I do not see that the applicant can be prejudiced, for in any litigation arising upon the point, it would, I apprehend, in such a case, be necessary to establish that the metes and bounds assumed to be are in fact the true limits of the original allowance. The first clause of the by-law will have, therefore, to be quashed, which will be effected by expunging all between the words "township of Caradoc." in the first enacting clause, and the words "that the said side road," in the second.

Judgment accordingly.

COMMON LAW CHAMBERS.

JAMESON AND CARROLL *v.* KERR, GALLEY *v.* KERR.

Replevin—Assignee in insolvency—Con. Stat. U. C. cap. 29, sec. 2—Insolvent Act, 1869, sec. 50.

Goods are repleviable out of the hands of a guardian in insolvency, notwithstanding Con. Stat. U. C. cap, 29, sec. 2.

[Chambers, Feb. 8, 1872.—*Mr. Dalton* and *Gwynne, J.*]

J. H. Macdonald for Jameson and Carroll, and *Clarke* for Galley, moved before Mr. Dalton for orders to replevy certain bricks which had been seized by the Sheriff of the County of York, under an attachment in insolvency against one Moran, and handed over by the sheriff to Mr. Kerr, an official assignee, as guardian. The applicants claimed these bricks as their property, having purchased them from Moran.

Mr. Dalton refused to grant orders for writs of replevin on the ground that section 2 of the Replevin Act precluded replevin under such circumstances. From this decision the applicants appealed to a judge. The matter was then argued before Mr. Justice Gwynne, who, reversing the decision of Mr. Dalton, ordered writs of replevin to issue. The further facts of the case appear in the following judgment of

GWYNNE, J.—These were two summonses by way of appeal from two orders made by Mr. Dalton in these cases, whereby he discharged two several summonses asking for writs of replevin to issue in these suits, and refused to grant the writs of replevin upon the ground that the goods sought to be replevied were in the custody of Mr. Kerr, an official assignee, as guardian, under a delivery to him, by the sheriff, of the goods in question, seized under a writ of attachment issued from the County Court in compulsory liquidation against one Moran, an insolvent.

The evidence offered upon affidavits by the applicants is strong to show, and conclusive, if not contradicted, that the goods in question, namely divers kilns of bricks, were the property respectively of the applicants. No affidavits are offered in opposition to the title set up by them; it may be that Mr. Kerr, being official assignee, can admit nothing. The case, therefore, stands thus: that the evidence of title offered by the applicants, although not admitted, is not denied; the property seized is shown to be of that nature that, having regard to the business of the respective applicants, namely that of builders, they may be exposed to very serious injury if the property should not be restored to them, which any damages which they might recover in actions of trespass would not reimburse them for, and Mr. Dalton, I am informed by himself, felt this so strongly that he would have granted the writs without hesitation, if he had not considered himself fettered by the language of the second section of the Replevin Act, Consolidated Statute U. C. ch. 29.

By that section it is provided that "the provisions herein contained shall not authorize the replevying of or taking out of the custody of any sheriff or other officer any personal property seized by him, under any process, issued out of any court of record for Upper Canada." The section is consolidated from 18 Vict ch. 118. In order to put a correct construction upon this section, it will be necessary to consider what was the law before the passing of the Act from which this section is taken, for the purpose of consolidation, and what was the object of the Act.

Although it was held in England in the cases collected and cited in *Harling* v. *Mayville*, 21 C. P. 499, that replevin lay for *any wrongful taking* of property from the possession of the true owner, still it never lay where the taking was in execution under a judgment of a superior court, and the reason is given by Parke, B., in *George* v. *Chambers*, 11 M. & W. 160, citing Chief Baron Gilbert's treatise on Replevin, p. 138, as his authority, where it is said, "If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution; and if any person shall pretend to take out a replevin and execute it, the court of justice would commit him for contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them, *and it would be troubling the execution awarded, if the party upon whom the money was to be levied should fetch back the goods by replevin*, and therefore they construe such endeavour to be a contempt of their jurisdiction, and upon that account commit the offender; that is, if a person attempt to defeat the execution of the court, they will treat it as a contempt, and punish it by attachment of the sheriff." In *Rex* v. *Monkhouse*, 2 Str. 1184, the court granted an attachment against a sheriff for granting a replevin of goods distrained on a conviction for deer stealing, for the reason that the conviction was conclusive and its legality could not be questioned in replevin; and in *Earl Radnor* v. *Reeve*, 2 Bos. & Pul. 391, the court said that it had been determined that when a statute provides that the *judgment* of commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way; and so not in replevin.

In *Pritchard* v. *Stephens*, 6 T. R. 522, where goods taken under a warrant of distress granted by commissioners of sewers were replevied, and the proceedings in replevin moved into the King's Bench, the court refused to quash the proceedings, leaving it to the defendant in re-