held that the goods, &c., were not to be looked upon as taken for mere safe keeping for the benefit of all the creditors, and as remaining in the hands of the sheriff, subject to the first execution that might come against them; but that the attaching creditor had in effect a lien upon the property attached, which was to continue (unless he could be shewn to have forfeited or abandoned it), and he held priority over all others.

It is to be remarked that in that first statute no provision whatever was made for ratably dividing the proceeds of any sale of the estate attached, in cases where several attachments might be issued against the same absconding debtor, where there was not enough estate to pay all claims; nor for the cases of those plaintiffs who might have commenced suits against and served process upon the debtor before he absconded, and before the issuing of the attachment. These things were provided for by the enactments of the amended act 5 Wm. IV. cap. 5, ss. 4 & 6, and before the passing of the second statute the questions which came up for decision in *Gamble* v. *Jarvis* arose; and it was held as contrary to the principle of the common law that goods *in custodia legis* should be seized in execution, they having already been seized for the benefit of another plaintiff, who had not forfeited his lien to them. Goods attached by foreign attachment, issued from the Lord Mayor's Court of the city of London—a proceeding bearing analogy to our Absconding Debtors Act—are held not to be subject to be taken in execution in another suit. "The owner of the goods has lost for the time his power of disposing of them, and his creditor can have no greater right of disposing of them than himself."

It was also held that the attachment was in the nature of a distress, to compel the absconding debtor's appearance, and that it was "impossible to exclude the case from the operation of the principle that goods taken as a distress are exempt from execution." The question of priority was excluded from consideration by the amended act I have named, and subsequently by the act 19 Vic., cap., 43, sec. 53, and now by 21st sec. of Con. Stat. of U. C., p. 293, in so far as the Courts of Record are concerned; but it has been long an open and much debated question in the division courts. The proceedings by attach was never in use in the Courts of Requests.

The case of *Gamble* v *Jarvis* goes therefore to show an analogy between the U. C. Stat, 2 Wm. IV. c. 5, and our D. C. Acts, that in the absence of any express provision giving priority of claim to a person circumstanced as Mr. Nichol is, the seizure of goods under the attachment was obviously intended for the purpose, not of enforcing the mere appearance of the debtor, for that would be of no use in a court which has no power of issuing process against the person, or of detaining a debtor, nor of taking bail to the action, as the superior courts may do in cases of attachments against absconding debtors, but for "*securing*" out of the debtor's estate the debt and costs of the attaching creditor. The form of the attachment is given at page 180 of the Con. Stat. of Upper Canada, commanding the officer to attach seize, take, and safely keep, all the personal estate end effects of the absconding, removing, or concealed debtor, &c, liable, &c, within, &c., or a sufficient portion thereof, to secure A. B. (the creditor) for the sum of (i. e. the sum sworn to be due) together with the costs of his suit thereupon, and to return this warrant with what you shall have taken thereupon, to the clerk of the division court forthwith, &c.; and section 208 provides that the property when seized is to be forthwith handed over to the custody and possession of the clerk of the court, who is to take the same into his charge and keeping, &c.; and then in case the debtor, before judgment recovered, executes and tenders to the creditor who sues out the attachment, a bond, with sureties binding the obligors in the event of the case being proved and judgment recovered, to pay the claim, "or the value of the property attatched," or produce the property when required to satisfy the judgment, the clerk is to supersede the attachment. (See sec. 209).

By the 210th section of the D. C. Act, if within one month from the seizure, the debtor does not appear and give the bond, execution may issue so soon as judgment has been obtained upon the claim, and the property attached, or sufficient of it, to satisfy the judgment and costs, may be sold for the satisfaction thereof, or in case of perishable property having been sold, enough of the proceeds may be applied to satisfy the judgment and costs.

But whatever conclusion I might arrive at under *Gamble* v. *Jarvis*, I am nevertheless bound by the later cases of *Francis* v. *Brown*, 11 U. C. Q. B. 558; 1 U. C. L. J. 225; *Fisher* v. *Sculley*, 3 U. C. L. J. 89, and which appears to me to over-rule *Gamble* v. *Jarvis*, to decide that a creditor in the Division Court, who obtains the first judgment and execution, gains the prior satisfaction, and that the attachment does not deprive him of his legal priority of execution; for in this respect I can see no difference between a creditor having a judgment and execution in a Court of Record, and a creditor having a judgment and execution, in the same circumstances in the Division Court In the case of an attaching creditor, and a non-attaching creditor, both must proceed to judgment and execution, and as said by Mr. Justice Burns, "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 means of an attachment."

I therefore decide that the claimant's execution is entitled to priority. Because if a sheriff under similar circumstances may on a *fi fa.* from a court of record seize upon the goods in the hands of the clerk of the Division Court, and claim priority over the Division Court creditor, who has attached them before he obtains execution, there certainly can be no reason why a judgment creditor in similar circumstances in the same court may not occupy the same position.

The other point in question is as to which execution is entitled to priority as having reached the bailiff's hands first. They reached the possession of the bailiff at the same instant, in the same way as they would had they been both sent to him by mail; they were both in his custody and power at the same instant. I must therefore hold that the one oldest in date reached his hands first, and that that must prevail (for his marking the one or the other as first could not alter the fact); the rule *prior est in tempore potior est in jure* must also apply here.