

*Suit No. 782 of 1864.*1865.  
Jan. 20.

SAVA' RA'MJI V. JA'DAVJI NATHU.

*Ex parte* GAMBLE, Official Assignee.*Attachment before Judgment—Insolvency—Vesting Order.*

In an attachment before judgment, under the 83rd and subsequent sections of Act VIII. of 1859, the court does not interfere with the legal disposal of the property attached, beyond declaring that possession shall not be taken without its previous sanction, undertaking only that, if no subsequent order to the contrary be made, the property shall be forthcoming, at the time of pronouncing the decree, to abide whatever order it shall make about it.

A vesting order in insolvency is in effect an assignment in trust for the benefit of creditors, and as such paramount to the right of an attachment before judgment creditor; as it is more equitable that property under the control of the court should be applied for the benefit of all the creditors, than for the exclusive advantage of one.

THIS was an application by the Official Assignee, under Sec. 246 of Act VIII. of 1859, to remove an attachment before judgment from certain goods, which he claimed under a vesting order made upon the petition of the defendant for the benefit of the Insolvent Act. The order for attachment was made on the 24th of November 1864; the goods were attached on the 25th; and the petition of the defendant was filed subsequently in the course of the same day, and the usual vesting order made. On the 8th of December the plaintiff obtained a decree in the suit against the defendant.

*Dunbar*, for the plaintiff, opposed the application.

*White* for the Official Assignee.

*Cur. adv. vult.*

SAUSSE, C. J. :—This was an application by the Official Assignee, under Sec. 246 of the Civil Procedure Code (Act VIII. of 1859), to remove an attachment before judgment from goods, which he claims under the usual vesting order, made upon a petition in insolvency by the defendant. The order for attachment was obtained on the 24th of November; the goods were attached on the 25th; and subsequently, in course of the same day, the defendant presented his petition,

and the vesting order was made. The plaintiff obtained a decree on the 8th of December.

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Upon its being admitted that the defendant was in actual possession of the goods, as his own property, when they were attached, the claim of the Official Assignee was disallowed, in accordance with the provisions of the above section, and as the application was wholly misconceived, the plaintiff became entitled to have the motion refused, and to his costs; but, not objecting to have the real question decided upon this application, the plaintiff then insisted that the effect of the attachment before judgment was to secure the payment of his decree in this suit, in priority to the claim of the Official Assignee.

An attachment before judgment is not known to courts in the United Kingdom, except so far as the process of foreign attachment may be considered to be somewhat analogous to it. Under the 83rd and following sections of the Civil Procedure Code, an attachment before judgment is obtained upon satisfying the Court, that a defendant is about to dispose of his property, or to remove it out of the jurisdiction, with intent to obstruct or delay the execution of the decree sought for in the suit; and the defendant is called upon, either to find security in a given amount to produce or place at the disposal of the court, when required, the property indicated in the application, or to show cause why he should not do so.

Upon his failing to do either, the Court, under Sec. 84, is empowered to direct, that property sufficient to fulfil the decree sought for should be attached until further order. The property in the goods attached is in no wise altered, but remains as before in the defendant. The court, as it were, locks up the goods, so that they cannot be disposed of or carried away, in any mode that would improperly delay or defeat the execution of the decree, if obtained.

It does not in any other way interfere with a legal disposition of the attached property, beyond declaring that possession shall not be taken without its previous sanction being obtained; nor does the court engage to the plaintiff that he

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shall be paid out of the goods in its custody. It simply undertakes that, if no subsequent order to the contrary be made, the property shall be forthcoming, at the time of pronouncing the decree, to abide whatever order the Court shall make about it. That order will depend upon whether any preferable title can be then shown to the property, than that which the plaintiff can make under his decree; and in ordinary cases, the Court would, upon such decree, make an order for payment to the plaintiff by the sureties, or out of the produce of the goods attached.

The Code, in Sec. 89, appears sedulously to guard against its being supposed, that any lien or title was intended to be conferred upon a plaintiff by this attachment: for that section specially provides that attachments before judgment shall not affect the rights of persons not parties to the suit; nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

This latter provision gives a clear priority to a decree-holder over any right which the attachment (before judgment) creditor might be supposed to have acquired; but a voluntary assignment in trust for creditors, at any time before seizure under decree, would defeat the claim of such a judgment or decree-holder against goods so assigned. Such assignments are much favoured by courts of justice; and a court having the control over the property, will consider it more equitable that it should be applied for the benefit of all the creditors, than for the exclusive advantage of one.

A vesting order in insolvency is in effect an assignment in trust for the benefit of creditors; and as such, it should be treated as paramount to the rights, which an attachment before judgment creditor can claim by virtue of his having called the court into action to preserve the property during the suit.

There are several cases in which the Official Assignee has been held to represent creditors only, and in that capacity to be entitled to bring actions and do acts, which the insolvent could not have done. In *Doe v. Ball (a)*, Barons *Parke* and

*Alderson* lay it down "that the assignee of an insolvent debtor represents the creditors for all purposes;" and that as such he was entitled to set aside a deed void against creditors, although binding against the insolvent.

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The present case is one in which the assignee is entitled, on behalf of creditors, to take advantage of this assignment in trust; and thus claim priority over the plaintiff's decree, and over the rights (if any) which the plaintiff as attachment creditor may have acquired. If an attachment before judgment were held to give the priority claimed by the plaintiff, it would open a wide door for fraudulent preference, and for fraudulent concealment of property by persons in insolvent circumstances.

The case of *Holmes v. Tutton* (b), which was relied on by the plaintiff, is quite distinguishable from the present. That case turned upon the construction to be placed upon Sec. 63 of the Common Law Procedure Act in England, whereby it is provided, that service of an order attaching property upon a garnishee "shall bind such debts in his hands."

It was properly held that under the force of the word "bind," the creditor had a security for his debt upon the debts so bound; but no such words are to be found in the sections of the Civil Procedure Code relating to attachment before judgment. Besides, the attachment in that case was, as it is described by Lord *Campbell* in his judgment, a "statutory compulsory execution," which is quite dissimilar from the proceedings in the present case. We do not consider the dicta or decision in *Holmes v. Tutton* to affect in any way the case before us.

The title of the Official Assignee must prevail over any claim the plaintiff might have had to call upon the court to liquidate his subsequent decree out of the property attached. And our order is that the attachment upon the goods be removed: the Official Assignee paying the plaintiff the costs of this motion, with liberty to charge the same against the estate of the insolvent which shall come to his hands.

ARNOULD, J., concurred.

(b) 21 Law J., N. S., Q. B. 346.