RODERICK McLEAN.....APPELLANT;

AND

BENJAMIN BRADLEY.....RESPONDENT.

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*Feb'y. 6, 7.

June 4.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Absent and absconding debtors Act of Nova Scotia, Ch. 97, Rev. St. of N. S.—Attachment—Demurrer—Conversion by Sheriff—Corporation, sale by—Justification under Order of Court—Seal.

One *H.* instituted proceedings against the *L. C. M. Company*, the officers of which resided in the *United States*, but which did business in *Nova Scotia*, and, on the 25th May, 1872, caused a Writ of Attachment to be issued out of the Supreme Court at *Amherst*, under the absent and absconding debtors Act of *Nova Scotia*, (1) directed to the Appellant, the High Sheriff of the County of *Cumberland*. Under this Writ, the Appellant seized certain chattels, as being the chattels of the said Company. On the 12th November, 1872, an order was issued out of the said Court, directing the Appellant to sell, and the Appellant did sell said chattels as being of a perishable nature. On the 11th December, 1874, a discontinuance was filed in the said cause by *H.* On the 30th May, 1876, the Respondent commenced an action against the Appellant for the conversion of the chattels in question, contending that the Company, having failed in its operations and being desirous of winding up its affairs, and being indebted to him, had sold and conveyed to him the said chattels by a certain memorandum of sale, dated July 5th, 1867, "signed on behalf of the Company," by one "*Hawley*, agent." To this memorandum a seal was affixed which did not purport to be the seal of the Company. The Appellant pleaded to the Declaration, that he did not convert; goods not Plaintiff's; not possessed; and also a special plea of justification, setting forth the proceedings by *H.*, and that he had seized and sold the goods as the goods of the Company, in obedience to the attachment and order issued in said proceedings. The Respondent replied, setting up the dis-

*PRESENT:—Sir William Buell Richards, Knt., C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

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continuance. The Appellant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale. He also demurred, on the ground that being bound to obey the order of the Court, he could not be affected by the discontinuance. At the trial a verdict of $500 damages was rendered for Respondent. The Appellant obtained a rule *nisi* to set aside verdict, and the rule and demurrer were argued together. The Court below refused to set aside the verdict and gave judgment for Plaintiff on the demurrer.

Held,—That the appeal should be allowed; that the plea of justification showed a sufficient answer to the declaration; that the replication was bad, and that the verdict must be set aside and judgment be for the Defendant on the demurrer.

Ritchie, J., dissented, on the ground that the seizing under the attachment, and not the sale, constituted the conversion; that there was sufficient evidence to show that the chattels in question had been transferred by the Company to Respondent, and that under Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia*, the sale of the chattels did not require to be under the corporate seal of the Company.

Per *Strong*, J.: The sale, and not the seizure, was the conversion complained of, and to this the order of the Court was a sufficient answer. *Semble*, a mere taking of the goods of a third person under a *mesne* attachment against a Defendant to keep them *in medio* until the termination of the action is not a conversion.

Per *Henry*, J.: The order for sale would not have been a justification for the original levy on the goods, as well as for the sale, if they had been the property of the Respondent, but the evidence failed to show a sale by the Company to the Respondent. Such a sale would require to be under the corporate seal of the Company, and did not come within the meaning of Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia*.

THIS was an appeal to the Supreme Court of *Canada* from the judgment of the Supreme Court of *Nova Scotia*, giving judgment on demurrer in favour of the Plaintiff (Respondent), and discharging a rule *nisi*, granted to the Defendant (Appellant), to set aside the verdict for the Plaintiff.

The *Lawrence Coal Mining Company*, a body corpo-

(1) Ch. 97 Revised Statutes of Nova Scotia, 4th Series.

rate, incorporated out of *Nova Scotia*, in the State of *Massachusetts*, in the *United States of America*, under the Joint Stock Companies Act of *Nova Scotia*, commenced coal mining operations in 1862 on a colliery property at or near river *Hebert*, in the County of *Cumberland*, in the Province of *Nova Scotia*, purchased from one *George Hibbard*, and continued to work the same until 1865, when the Company became hopelessly insolvent. *Hibbard*, the former owner, who resided on the spot, continued from the outset to be a Director, and was the only resident Director in *Nova Scotia*, and was Managing Director from 1862 up to the spring of 1867, excepting only one season in 1864, and as such had charge of all the property of the Company. He also attended all the annual meetings of the Company held at *Boston*.

To enable the Company to carry on its operations, the Company, through *Hibbard* as Managing Director, obtained from *Bradley* a loan of $10,000, for which *Hibbard*, as Managing Director, gave a note or notes and a warrant to confess to *Bradley*, the Respondent, on which judgment was entered up by *Bradley* for $10,022.75, for principal and interest, on the 11th September, 1865. In 1866 the real and personal property was advertized for sale under Respondent's judgment, and the real estate was sold to him for $3,975, leaving $6,025 still due; the personal property was not sold, and remained on the premises until July, 1867, when *Hawley*, as agent of the Company, transferred it to Respondent, who, in consideration of the transfer, gave up notes and claims for about $1,500. *Hawley*, at the same time, gave the following memorandum of sale (filed in the case as exhibit A):—

"RIVER HEBERT, CUMBERLAND COUNTY,
"NOVA SCOTIA, July 5th, 1867.

"Know all men by these presents, that *Benjamin*

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Bradley, of *Boston*, Commonwealth of *Massachusetts*, *United States of America*, has this day purchased through *T. R. Hawley*, authorized to sell the same, the following described property, with the exception of two horses previously sold by his representative, *Ezra C. Dillingham.*

"Signed on behalf of the Company by

"T. R. HAWLEY, Agent, (Seal).

"Signed in behalf of *Benjamin Bradley*, the purchaser, by

"EZRA C. DILLINGHAM, (Seal)."

Witness: { GEORGE MOFFAT, (Seal). NATHAN J. HOEY, (Seal). JESSE E. HOEY, His x Mark. (Seal).

There was no seal to this document purporting to be the seal of the Company, nor had any resolution been passed by the shareholders authorizing a sale by *Hawley*, but at an adjourned meeting of the Company, held on the 26th February, 1866, it had been, on motion, voted that Messrs. *Hawley*, *W. G. Howe* and *Alden*, should be and were thereby authorized to sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms as in their judgment would be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of said Company, and if the amount of such sale exceeded the debts the balance to be paid *pro rata* among the stockholders.

From the date of the sale, *Bradley*, and others claiming under him as proprietors, employed an agent to take care of the property, and paid all taxes and expenses connected with it. The mem. of sale was delivered by *Hawley* to *Alden*, who acted as Secretary of the Company.

No meetings of the Company were held subsequent to that of the 26th February, 1866, until December 30 and 31, 1874, when the Company, being still largely indebted to Respondent on his judgment, by a resolution unanimously adopted by the shareholders present, further resolved that all the interest of the Company in the mining lease of the Company be transferred to Respondent.

On the 25th May, 1872, *Hibbard*, who claimed $1,760 from the Company, brought an action against the Company, and caused a writ of attachment to be issued out of the Supreme Court at *Amherst*, under the absent or absconding debtors Act of *Nova Scotia* (1), directed to the Appellant, as High Sheriff of the County of *Cumberland*, requiring him to seize, and in obedience to the writ the Appellant did seize, certain chattels as being the chattels of the said Company.

On the 12th November, 1872, an order was issued out of the said Court, directing the Sheriff to sell the said chattels, as being of a perishable nature within the meaning of sec. 6, of the last mentioned Act ; and they were sold by the Sheriff.

On the 11th December, 1874, a discontinuance of the cause "and all proceedings thereunder," was entered in the action brought by *Hibbard* against the Company.

On the 30th May, 1876, the Respondent, contending that the chattels in question were his property, commenced an action of trover against the Appellant, the Sheriff, for the conversion of the said chattels.

The Appellant pleaded to the declaration :—1st. That he did not convert. 2nd. That goods were not the property of the Plaintiff. 3rd. Not possessed. And 4th. A special plea of justification setting forth the proceedings by *Hibbard*, against the *Lawrence Coal Mining Com-*

(1) Rev. Stat. *Nova Scotia*, 4th series, ch. 97.

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pany, and that the Defendant, as Sheriff, under the said writ of attachment, and the said order made in such proceedings, seized and sold the chattels in question as and being the chattels of the Company.

The Plaintiff replied to the fourth plea, that after the proceedings aforesaid the said proceedings were discontinued.

The Defendant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale in the fourth plea mentioned.

He also demurred to the replication, on the ground that, being bound to act in obedience to the order of the Court, he could not be affected by a discontinuance of a suit under which property was sold.

The Plaintiff joined in demurrer.

The issues of fact were tried at *Amherst* on the 16th October, 1876, before the Chief Justice, Sir *William Young*, and a jury, when a verdict was rendered for the Respondent for five hundred dollars damages.

The Appellant obtained a rule *nisi* to set aside the verdict, and the said rule *nisi* and the demurrer were argued together.

The Court below, after argument, gave judgment refusing to set aside the verdict, and, on the 2nd April, 1877, a rule was made ordering that the rule *nisi* be discharged with costs, and that the Plaintiff have judgment of the demurrer with costs.

The Appellant, thereupon, appealed to the Supreme Court of *Canada*.

Mr. *Gormully*, for Appellant:—

The Respondent claims title to the chattels in question by a transfer or conveyance thereof from the *Lawrence Coal Mining Company*. If once admitted to be the property of the Company, they must so remain until divested. The principal question is whether

there was an actual sale of the goods; whether exhibit A had the effect of transferring the chattels to *Bradley*; I contend it had not. That document must operate either as a contract or conveyance. If it operates as a contract, it must be regarded as a contract under seal, or as a simple contract. It is not binding on the Company, because it does not purport to bind them, and because the seal affixed is not the corporate seal of the Company, which was necessary, there having been evidence of the existence of one. Sec. 15, ch. 87, *Rev. Stat., N. S.*, 3rd series, only establishes as a rule of statute law what was formally a rule of common law. It has been held that as to personalty a corporation could sell it, but whether they could do so, except under seal, is another question.

The Statute says: "Acts within the scope of their charter." This sale, purporting to convey all the property, and showing an intention to abandon the object for which the Company was incorporated, should have been under seal.

Hawley never was duly authorized. There never was a meeting respecting the sale, and no evidence of that concerted action which was necessary.

D'Arcy v. *The Tamar, Kit Hill and Callington Railway Co.* (1); *Ridley* v. *Plymo Grinding Co.* (2). There is no evidence that the Company delegated their power; and further, if they did delegate it, they had no right to do so. The last delegation of authority is to *Hawley*, *Howe* and *Alden*—and this was a power which must have been exercised by all three, and was not a power which could be delegated. The Respondent was bound to know what was being done. *Exparte Brown* (3).

The transaction was a fraudulent one as against the

(1) L. R. 2 Ex. 158. (2) 2 Ex. 711.
(3) 19 Beav. 97.

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statute of *Elizabeth* (1), there was no change of possession, and this was a document which should have been registered under the statute.

The learned counsel then proceeded to argue that the learned judge who tried the action had improperly admitted evidence and had misdirected the jury; and that as to the demurrer, the Appellants fourth plea was good in law, and replication bad because it admits and does not sufficiently avoid the plea.

Mr. *Haliburton*, Q. C., for Respondent:—

The Company became indebted to *Bradley* for an advance of $10,000. In 1865, they find themselves insolvent. *Hibbard*, from whom the Company purchased their mine, was the only director resident in *Nova Scotia*, and was the only person up to this date who had any benefit from the Company. He attended all the meetings and was familiar with all that was done. In 1865, meetings were called, but nothing was done, and at last *Bradley* enters up judgment and issues execution. He unwisely allowed the matter to stand over to save Sheriffs' fees, and a conveyance became necessary from the Company. Five days after the sale of the personal property, *Hibbard* renders an account, showing $25 due him. The Company set off against that the rent, and considered they had paid every body; they supposed all claims were paid both in *Canada* and the *United States*. The Company authorized *Hawley* to go to *Nova Scotia* to sell the property.

[RITCHIE, J.:—Will you show us from the evidence that he was authorized by the Company?]

There is no one at present claiming the property except *Bradley*. The Company did not claim it, nor any shareholder or director on behalf of the Company.

[THE CHIEF JUSTICE:—A question has been raised

(1) Twyne's case 1 Coke 80; 1 Sm. L. C. 1.

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which seems important. This property was sold by order of the Court as perishable property. How can the Sheriff be held responsible for selling this specific property under the order of the Court?]

I am prepared to show that the Sheriff, under the circumstances, was not justified in selling.

Where there is a seal, the seal must be presumed to be the seal of the Company. *Ontario Salt Co.* v. *Merchants Salt Co. (limited)* (1).

[RITCHIE, J.:—Where is the evidence that *Hawley* had any right to use the seal of the Company?]

It is to be presumed he had the right.

[RITCHIE, J.:—What evidence raises this presumption?]

The Company took this man's money, which was the consideration for the sale.

[RITCHIE, J.:—If you can show that this party was professing to act for the Company and entered into this sale, and afterwards the Company had known of the facts and received the money, you will have good evidence that the sale was the sale of the Company.]

In 1874 a general meeting of the Company was called, and it is to be presumed the Company ratified the action of Mr. *Hawley*. When proceedings have been manifestly illegal between a Company and an individual, and the Company choose to continue these dealings, that is a ratification by the Company of such dealings.

[HENRY, J.:—The difficulty seems to me to be that there were no meetings, and no Company.]

It is to be presumed all necessary by-laws were passed to continue the Company, and the meeting of 1874 was a ratification of what was done before.

The transfer purporting to be signed and sealed by *R. Hawley*, as their agent, was given to the Secretary of

(1) 18 Grant 555; Rev. Stat. Nova Scotia, 3rd. series, ch. 87, s. 1.

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the Company, and was never repudiated by them, and *Bradley* continued thenceforth to be in undisputed possession of the property and paid taxes on it, and employed an agent to take charge of it.

Even though the Company could not contract directly except under seal, yet they could without the corporate seal appoint an agent, whose acts and contracts within the scope of his authority were binding on the Company. 3 *P. Wms.* 419. 1 *Fonb.*, 305 ; *Phil.* Ed , n. o. *Abbott's* Dig. of Law of Corporations (1).

The sale was not *ultra vires*, but was a lawful means of making the most of the assets of the Company to discharge its liabilities. *Featherstonehaugh* v. *Lee Moor Porcelain Clay Co.* (2) ; *Burrell* on assignments, 36.

The promises and engagements of a Company may as well be implied from its acts and the acts of its agent as if it were an individual. *Abbott's* Dig. of Law of Corporations (3).

In a case like the present the law presumes *omnia rite acta* and, unless the contrary appears, that all necessary by-laws and resolutions have been passed necessary for the validity or ratification of the acts performed by the Company's agent. *Field* on Corporations (4).

The Company, after notice to it of sale by *Hawley*, did, by their acquiescence for so many years in the possession of Respondent of the personal property sold to him, by their accepting therefor notes, &c., to the amount of $1,500, and by their unanimous vote in 1874 in further satisfaction of the balance due Respondent, that the lease of the mine should be transferred to him, ratify and confirm the sale of the personal property to Respondent by *Hawley*, as their agent ; and it must be assumed that all necessary by-laws and resolutions had been passed and adopted to ratify and confirm the sale

(1) Pp. 5 and 6.
(2) 35 L. J. N. S. 84.
(3) 578, S. 96-8, 579 S. 100-5.
(4) P. 287 & 296.

by *Hawley*, as agent of the Company. To enforce an executory contract against a corporation it may be necessary to show that it was by deed: but where the corporation has acted upon an *executed contract*, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. *Doe dem. Pennington* v. *Taniere* (1); *Wilson* v. *Miers* (2); *Royal British Bank* v. *Turquand* (3); *Reuter* v. *Electric Tel. Co.* (4); *Australian Steam Navigation Co.* v. *Marzetti et al* (5); *Crook* v. *Corporation of Seaford* (6); *Buffalo and Lake Huron Railway Co.* v. *Whitehead* (in appeal) (7); *Brewster* v. *The Canada Co.* (8); *Mayor of Stafford* v. *Till* (9); *Angel & Ames* on Corporations (10); *Bigelow* on Estoppel (11).

If any question could be raised as to the power of the Company to sell, or the agency of *Hawley*, or as to the validity of the sale by him, or as to the ratification of such agency, or of such sale by the Company, it is settled by the provisions of the *Nova Scotian* Act respecting factors and agents. *Rev. Stat. Nova Scotia*, Fourth Series, App. 63, secs. 1—10.

The Respondent further contends that Appellant's plea of justification is bad in substance, for the following reasons:—

Because it appears by it that the attachment under the *Nova Scotian* Act respecting absent or absconding debtors, was issued against "a body corporate doing business in *Nova Scotia*," the said Act not extending to such a company, but only to companies "incorporated

(1) 12 Q. B. 998, 13 Jur. 119, 18 L. J. Q. B. 49.
(2) 10 C. B. N.S. 367.
(3) 6 E. & B. 331.
(4) 6 E. & B. 347.
(5) 24 L. J. Exch. 273.
(6) L. R. 6. ch. App. 554.
(7) 8 Grant 157.
(8) 4 Grant 443.
(9) 4 Bing. 75.
(10) P. 172.
(11) 477, 447 N. 2.

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out of the Province and doing business by an agent within the Province." *Rev. Stat. Nova Scotia*, Fourth Series, ch. 97.

Because, even if sec. 6 of the said Act refers to such foreign companies doing business in *Nova Scotia*, it does not appear that the goods in question were exhibited to the Sheriff as the goods of the Company, nor does it appear that they were valued by two sworn appraisers, or that the amount of appraisement was endorsed on writ of attachment, or that the Sheriff levied on such part of the goods as would be sufficient to refund the sum so sworn to, &c.

Because, if sec. 7 is also applicable to such foreign companies, it does not appear that notice of such assessment was given to the agent of the Company, or that the three days were allowed him to find security; nor does it appear that the prothonotary had any power to issue the order for sale in consequence of the absence of a judge. *Rex.* v. *Croke* (1).

Because the plea of justification does not show that the Sheriff has made a return of the writ of attachment, without which he cannot be allowed to justify in such a case. Rev. Stat. Third Series, ch. 40, s. 13. *Rowland* v. *Veale* (2); *Cheaseley* v. *Barnes* (3); *Freeman* v. *Bluett* (4); *Williams* v. *Babbitt* (5); also, American cases cited in 2 *Greenleaf* on Ev., 597.

And Respondent further contends:—That as it is only service of summons on the agent of a foreign company doing business in the Province by an agent, which the statute says "gives jurisdiction to the Court," and as it appears that the summons was served on the agent of Respondent, and not of the company, the Court had no jurisdiction, and the writ of attachment and order

(1) 1 Cowp. 30.
(2) 1 Cowp. 20.
(3) 10 East 81.
(4) 1 Salk. 409, Ld. Ray. 633.
(5) 14 Gray 141.

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for sale, and all proceedings thereunder, were null and void; that a Court of law has in itself no inherent power or right to order perishable goods seized under attachment to be sold, *La Rochelle* v. *Piche et al* (1); and that sec. 6 and 7 of Absent or Absconding Debtors Act does not extend to foreign companies doing business in the Province by an agent, and the Court has no power to order a sale of their property under the said Act, and that all proceedings for a sale of such property are therefore null and void. "When the Court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and actions will lie against the above mentioned parties without any regard to the precept or process, and in this case it is not necessary to obey one who is not judge of the cause." *Broom*, L. M. 90, *Taylor* v. *Clemson* (2). *Factum a judice, quod ad officium jure non pertinet, ratum non est.* "A plea of justification by a constable acting under the warrant of a justice will accordingly be bad, if it does not show that the justice had jurisdiction over the subject matter upon which it is granted." *Taylor* v. *Clemson* (3); *Broom's Prac.* (4); *Broom*, L. M. (5).

As to evidence necessary in support of defence, see *Crocker* on Sheriffs (6).

Mr. *Gormully* in reply:—

RITCHIE, J.:—

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This was an action brought against the Sheriff of the County of *Cumberland* for converting to his own use Plaintiff's goods. Defendant, as such Sheriff, levied on these goods under an attachment. There is a provision in the Act under which these goods were seized, giving

(1) 1 L. C. Jur. 158.
(2) 2 Q. B. 1034.
(3) 2 Q. B. 1031.
(4) 667 et seq.
(5) 95, 96.
(6) P. 867.

* The Chief Justice was absent when judgment was delivered.

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power to the Court to order perishable goods to be sold (1). The Court did in this case order the goods to be sold, and they were sold, and after such sale all the proceedings under the attachment appears to have been discontinued. If the Sheriff had properly taken the goods in the first instance, and if they were legally in his hands, and he sold them under the order of the Court, I think that order would protect him; but, in this case, in my opinion, the conversion of the goods took place when the Sheriff levied on them. The evidence shows the goods originally belonged to the *St. Lawrence Coal Mining Company*, the officers of which were domiciled in *New York*. The Company appears to have failed in its operations, and all their property in *Nova Scotia* was disposed of, except that now in question, and all debts in that Province, except $28, appear to have been settled, leaving a large debt due to the Plaintiff, who had been connected with the Company, and for which he held the promissory notes of the Company. The Supreme Court of *Nova Scotia* held there was evidence of a sale of these goods; and there appears to me to have been ample evidence for the consideration of the jury of a *bonâ fide* sale, for a valuable consideration, by the officers of the Company to the Plaintiff, for the purpose of discharging the lawful indebtedness of the Company. I think this was within the legislative power given to incorporated companies under ch. 53, sec. 15, *N. S.* Acts, which makes acts performed within the scope of their charter, or acts creating them, valid, notwithstanding they may not be done under, or authenticated by, the seal of the Company, if such an authentication was needed, but which, I think, was, in this case, wholly unnecessary (1).

The Company having in the due course of its busi-

(1) Sec. 6, ch. 97 Rev. Stats. N. S., 4th Series.

ness become indebted to the Plaintiff, I can see no reason why it might not as well pay that liability by a sale and delivery of personal property to their creditor in discharge thereof, as by handing him the amount in money, or selling the property to third parties, and handing over the proceeds to the creditor.

With reference to the conversion, I think the very circumstance of Defendant's levying on the goods, and subsequently selling them, was a clear conversion. There was not, it is true, evidence that the goods were on the levy moved, but it is clear the Sheriff did levy on them, and it is equally clear that the Court ordered the goods, thus in his hands and under his control, to be sold, as being in his possession under the levy, and that they were so sold.

The definition of a conversion, as given by the editor of *Bacon's* abridgment "Trover" (B), is this:—

> The action being founded upon a conjunct right of property and possession, any act of the Defendant which negatives or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the Defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of Plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use."

I think when a Sheriff levies on property he does take possession of it, as against the party, and does convert it. If he exercises control in defiance of the party who had the right, there is a conversion, and he may be sued for the conversion, and, as said by *Alderson*, B., in *Fouldes* v. *Willoughby* (1),

> For this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion.

(1) 8 M. & W. 548.

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I think the Plaintiff's right of action did not commence at the time of the sale, but so soon as the Sheriff levied upon the goods, and so exercised a claim and dominion over them adverse to the Plaintiff and inconsistent with his general right of dominion.

Under these circumstances, I think the Plaintiff has made out his case, viz.: that the Company, by its officers, was competent to sell the goods in question, that there was evidence to establish the sale of the goods to the Plaintiff, and of a conversion by the Defendant. I state this with hesitancy, only because the views of my learned brethren are at variance with the conclusion at which I have arrived.

STRONG, J.:—

The conversion complained of by the declaration was the sale, not the seizure or taking of the goods. The 4th plea justifies the sale under the order of the Court, and avers that to have been the act complained of in the declaration. The Plaintiff is therefore confined to the sale as the conversion for which he sues. If he wanted to insist on the taking as constituting a conversion he should have new assigned. I should doubt, however, if a mere taking of the goods of a third person under a mesne attachment against a Defendant, to keep them *in medio* until the termination of the action, is a conversion. A conversion is defined to be a taking of chattels with an intent to deprive the Plaintiff of his property in them, or with an intent to destroy them or change their nature. Taking under a mesne attachment does not, like taking under a writ of *fieri facias* with intent to sell, imply any such intention. But, be that as it may, the conversion here must, on the pleadings, be taken to be the sale. Now, this sale was under an order of the Court, and was the act of the Court, not the act of the

Sheriff. It was not the case of a writ of execution or attachment being placed in the Sheriff's hands against the goods of A, and a seizure under it of the goods of B, which the exigency of the writ did not warrant; but these specific goods being already in the Sheriff's hands, having been seized under the attachment, the Court orders them to be sold. The Sheriff is, therefore, protected by the order for sale. The issue, it is true, on this line of pleading, is narrowed to this: Was the discontinuance after or before the sale? It appears that the sale took place on the 7th November, 1866, and that there was no discontinuance until December 11th, 1874. The issue on the rejoinder to the replication to the plea of justification ought, therefore, to have been found for the Defendant. But it was proper to consider, whether the plea did disclose a good justification, since there would be no use in granting a new trial if in point of law the Sheriff could not justify. As regards the other point argued, there can, in my judgment, be no doubt that the Company was one to which the Rev. Stats. p. 8, (4th Series), ch. 97, was applicable. I am, therefore, of opinion that the verdict ought to have been set aside with costs, and a new trial ordered.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

The points to be decided in this case are in an action of trover, brought by the Respondent against the Appellant, who, as Sheriff of the County of *Cumberland*, sold certain chattel property claimed by the Respondent to belong to him to recover its value.

To the charge of conversion in the Respondent's writ the Appellant pleaded:—

1st. That he did not convert to his own use the Plaintiff's goods, as in the writ alleged.

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2nd. That the goods were not the property of the Plaintiff.

3rd. That the Plaintiff was not possessed, nor was he entitled to the possession of the said goods.

And by a fourth plea, he justifies the taking of the goods, as and being the goods of the *Lawrence Coal Mining Company*, under a writ of attachment at the suit of one *George Hibbard*, against the said *Lawrence Coal Mining Company*, directed to him as Sheriff of the County of *Cumberland;* and the subsequent sale thereof under an order issued by the Supreme Court and signed by *A. S. Blenkhorn*, Esquire, Prothonotary of the said Court at *Amherst* in the said County of *Cumberland*, whereby he was ordered and required, amongst other things, as such Sheriff, as aforesaid, to put up and sell the said goods at public auction to respond the judgment which might be obtained. The Plaintiff replied to the latter plea:—

That after the proceedings in the plea mentioned, taken by the said *George Hibbard*, the suit instituted by the said *George Hibbard* against the *Lawrence Coal Mining Company* was discontinued by him, and the attachment and all proceeding thereunder were thereby abandoned; which said discontinuance is on the fyles of this honorable court.

To that replication the Appellant rejoined, first, that the said cause was not discontinued, and second:—

That the said discontinuance was not filed until after the goods in said writ mentioned were sold under the order in his said plea mentioned, and the proceeds applied as therein mentioned.

On the trial of the issues of fact, leave was given to the Appellant to demur to the replication of the Respondent, which he did, and therein says that the Plaintiff's replication is bad in substance, inasmuch as the Sheriff is justified by his writ of attachment and order for sale, and was bound to execute it:—

That the act of the Plaintiff in the cause under which the attachment was made, in discontinuing the cause after the Sheriff had sold the property in question, cannot and does not affect his justification, as pleaded.

Marginal note on the demurrer :—

Matter of law to be argued—that the Sheriff, being bound to act in obedience to the order of the Court, cannot be affected by a discontinuance of a suit under which property was sold.

Joinder in demurrer by Respondent. Under the charge of the learned Chief Justice of *Nova Scotia*, before whom the cause was tried in October, 1876, the jury found a verdict for the Plaintiff for $500, and a rule *nisi* was granted to set it aside on the following grounds :—

1st. That the verdict was against law and evidence.

2nd. That the learned Chief Justice misdirected the jury.

3rd. That evidence was improperly received.

4th. That evidence was improperly rejected, and

5th. That there was no sufficient evidence of the conversion of the goods.

This rule and the demurrer were argued before the whole Court at *Halifax*, and by a majority of the Court the rule *nisi* was discharged with costs, and a judgment on the demurrer given in favor of the Respondent.

In the majority judgment, the fourth plea is pronounced bad, and a doubt expressed as to the sufficiency of the replication to it. Hence the judgment on the demurrer. The appeal to this Court is from that judgment on all the points, both as to the facts and the law.

I will first deal with the demurrer. I would not question the correctness of the judgment if the fourth plea is defective, but I don't think it is.

To decide that point, we must first consider the nature of the position held by the Appellant when he received the order for the sale of the goods. He had previously levied on the goods under the attachment, but had not removed them. Section 6, ch. 97 of the *Revised Statutes of Nova Scotia*, entitled : "Of suits against absent and absconding debtors," provides that :—

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Where the goods consist of stock, or are shown by affidavit to be of a perishable nature, and the agent shall not, within three days after notice of the appraisement, give security for their value, a judge, or a prothonotary of the county, in his absence, may, at his discretion, cause the same to be sold at public auction, and the proceeds thereof shall be retained by the Sheriff, or paid into Court, to respond the judgment.

The prothonotary of the county made an order under the provisions of that section, and directed to the Sheriff, to sell the said goods under the terms thereof.

On receipt of that order it was the Sheriff's duty to execute it. He could have been compelled by legal and summary means to do it, and would also be answerable to the Plaintiff in that suit for any resulting loss or damage to the goods, in case he eventually obtained judgment. So far, therefore, as the conversion *by the sale*, the order to sell the specific goods would be a complete justification and the plea to that extent is a sufficient answer.

If the plea admitted the goods were the property of the Plaintiff it would have been bad; but, on the contrary, it alleges them to have been, when levied upon, the goods of the *Lawrence Coal Mining Company*, and that, with the other allegations contained in it, forms a perfect answer to the writ; and, as a whole, is consequently a good plea. The Respondent virtually says:—they were not the Plantiff's goods, but those of the *Lawrence Coal Mining Company*, and I, as Sheriff, levied upon them under the attachment, and subsequently sold them.

A special plea of justification is only necessary where goods of one party are taken out of the possession of another, and is only necessary as a justification for interfering with the possession. If goods are not taken out of the possession of the Plaintiff the right is tried by a simple denial of ownership. The justification in this case would only be necessary in case the goods in

question, were, when taken, in contemplation of law, in the possession of the Respondent.

The replication to the plea is bad, for the simple reason that the Respondent could not, by any possibility, be affected by any subsequent act of the Plaintiff in regard to the discontinuance of the suit. I think, therefore, the judgment on the demurrer must be in favor of the Appellant.

Under that ruling the judgment on the facts submitted to the jury should also be for him, if the order for sale would be a justification to the officer for the original levy on the goods, as well as for the sale, even had they been the property of the Respondent; but, as it is not, the result must be affected by the question as to the ownership of the goods when the levy was made. If, then, they were not the Respondent's, he cannot recover; but the whole case, as far as the rule *nisi* for a new trial goes, depends altogether on the settlement of that question. The property, as admitted by both parties, was that of the *Lawrence Coal Mining Company* up to the date of the transfer claimed by the Respondent. Did he, then, obtain the property in the goods by the document signed by "*J. W. Hawley*, agent." If not, he had no property in them. In determining that point we must see if, in the first place, *Hawley* had sufficient authority to divest the Company of the ownership. The alleged transfer is signed by him on the 5th of July, 1867. He, the Respondent, and others were appointed Directors of the Company on the 18th of January, 1865, *for one year* from that date. No subsequent appointment of Directors was ever made, and there is no provision to be found anywhere, as far as the evidence goes, as is sometimes the case in respect of public officers, that the Directors should hold office till others were appointed in their place. There may have been such a provision in the

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by-laws of the Company, but evidence of it is wanting. On the 18th of January, 1866, the Directors ceased to be so; and, as such, could not collectively or individually bind the Company. Resolutions of the stockholders were passed in April and December, 1865, authorizing certain Directors named, to sell on certain conditions the real and personal property of the Company; but *Hawley* was not one of them. On the 26th of February, 1866, at a meeting of the stockholders, a resolution was passed authorizing Messrs. *Hawley*, *W. G. Howe* and *Alden*:—

> To sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms, as in *their* judgment will be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of the said Company, and if the amount of such sale exceeds the debts, the balance to be paid *pro rata* among the stockholders.

No one will pretend for a moment that *Hawley* alone had power to make the sale to the Respondent, which the document signed by him purports to have been made. The delegated power by the Company was to *three*, and the *three* were to exercise *their judgment* in regard to it; and besides, none of them, nor the three together, had power to give any portion of the property *in payment of any particular debt.* It was to be sold for cash, and that paid into the hands of the Treasurer. The Respondent was himself a Director; and was quite aware, no doubt, of the nature of the authority given to *Hawley*, *Howe* and *Alden*, and is concluded thereby. There is no evidence of any ratification of the sale by the Company. In fact, there was but one meeting of the Company after that of February, 1866, and that was in 1874, which appears to have been called for the purpose of authorizing a transfer of the lease of the mines to the Respondent, which was done; and that only.

Some oral evidence was offered of the authority of *Hawley* to sell the personal property; but it was objected to and cannot be received for the obvious reason that no meeting had ever considered the subject. In the absence, then, of legitimate evidence, and when considering, too, that if any Directors existed at the time of the transfer, the Respondent was one, and could not become a purchaser through a sale by the Directors, he having with them a fiduciary authority to sell, if any such existed, I must say I can see no authority for the transfer to bind the Company, even if it had been made in the name of the Company and under its seal.

The instrument in question does not purport to be a transfer by the Company. It contains no words making a transfer. It only says baldly that the Respondent *has purchased* through *T. R. Hawley*, authorized to sell the same, the property mentioned in the schedule. A mere naked purchase, without evidence of any consideration given, or any delivery of the property, will not pass it. I cannot think the instrument of any more value than a letter to some person would have been, containing the same substance. It does not say who owned the property, or by whom he was authorized to sell it, and it is signed by "*T. R. Hawley*, agent." Agent of whom? It discloses no consideration or terms for the purchase. No consideration is shown either by, or *dehors*, the instrument by any one present at the alleged purchase. I will not say a *written* transfer was absolutely necessary, but I am of opinion the document *per se* is insufficient to make it. There is no other evidence of it; for neither of the parties to the transfer, *Hawley* and *Dillingham*, or any of the witnesses to it, or any other person present, was examined; and there is, therefore, no legal evidence of it. *Alden's* hearsay evidence upon this point, objected to at the trial, cannot be received.

The Respondent, in his evidence, says:—

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Alden, *Dillingham*, *Hawley* and *Wentworth*, were all creditors of the Company, and were the four interested with me in the transfer of the personal property—

under his honorary obligation. Thus, then, was *Hawley* undertaking to act as the agent of the Company to convey, with the assistance of *Dillingham*, the property of the Company to the Respondent for his, *Hawley's*, *Dillingham's* and *Wentworth's* benefit. Surely the Company, at any time, could repudiate such a transfer; and, if void, as against the Company, it must be so as against a creditor of the Company, as *Hibbard* appears to have been.

And, now, in conclusion, as to the seal. I have carefully examined all the authorities, and have had no difficulty in arriving at the conclusion that, in the absence of statutory enactment, the contract in question could only be valid under the seal of the Company.

By the registry of the articles of association in evidence, this Company was incorporated, not as a trading company, but :—

> For the special purpose of opening and working mines and veins, or deposits of coal and oils in the River *Hebert* Settlement, * * * and the exporting and making sale thereof, and of constructing and operating railways, tramways, or plank roads, necessary for transporting the said coal, when mined, to tide water, and for the purpose of constructing piers, docks and buildings necessary for carrying on said business, and of doing all other business which may be lawfully undertaken and connected therewith.

This is not, then, a "trading" Company, and therefore rules as to buying and selling stocks in trade will not apply to it.

The "selling" contemplated by this Company was to be of coal and oil, not the houses, buildings, or plant. The intention was to keep the latter as means to enable the Company to carry out the intentions of the charter.

The intention is clear and obvious, and I cannot strain words declaring, as do those of section 15, chap. 53 of the *Revised Statutes of Nova Scotia*, that :—

The acts of incorporated companies performed within the scope of their charters, or acts creating them, shall be valid, notwithstanding they may not be done under, or authenticated by the seal of such corporations,

to mean that a company may, without seal, sell and dispose of their whole property, and thereby wind up the company. Such a power is certainly, to my mind, not given by the section just quoted; for that section clearly has reference, as to this Company, to acts done "in the opening and working mines, &c." and the exporting and making sale of "coal and oil, &c." It, in fact, only applies to a *going* Company, and cannot be applied to the expiring flicker, or final sale of the houses, plant, &c., of a bankrupt company. For the reasons given, I think, the rule for the discharge of the rule *nisi* herein should itself be discharged and the said rule *nisi* made absolute with costs.

Appeal allowed with costs, and new trial ordered with costs in the Court below.

Solicitor for Appellant: *Charles T. Townshend.*

Solicitor for Respondent: *W. Inglis Moffat.*