

1890 DONALD ARCHIBALD (DEFENDANT).....APPELLANT ;
 *Feb. 26, 27. AND
 *Nov. 10. ANDREW HUBLEY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Bill of sale—Registry—Defective affidavit—Assignment for benefit of creditors—Writ of execution—Signature of prothonotary—Seal of court.

An assignment of personal property in trust to sell the same and apply the proceeds to the payment of debts due certain named creditors of the assignor is a bill of sale within sec. 4 of the Nova Scotia Bills of Sale Act (R.S.N.S. 5th ser. c. 92) not being an assignment for the general benefit of creditors and so excepted from the operation of the act by sec. 10.

The omission of the date and the words "before me" from the jurat of an affidavit accompanying a bill of sale under s. 4 of the said act makes such affidavit void and the defect cannot be supplied by parol evidence in proceedings by a creditor of the assignor against the mortgaged goods. Gwynne J. dissenting.

Per Gwynne J. Sec. 4 of the act only applies to bills of sale by way of chattel mortgage and not to an assignment absolute in its terms and upon trust to sell the property assigned.

In the Province of Nova Scotia writs of execution need not be signed by the prothonotary of the court. It is the seal of the court which gives validity to such writs, not the signature of the officer.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment in favor of the plaintiff at the trial.

The defendant is sheriff of the County of Halifax, N. S., and the action is brought for the possession of goods seized under an execution which the plaintiff claims under a deed of assignment to him from one Eaton, against whom the execution was issued, for the benefit of creditors. The points raised and argued in the case were the following :

PRESENT.—Sir W.J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

1. That the execution under which the sheriff justified was improperly issued, not being signed by the prothonotary of the court.

2. That the affidavit attached to the assignment and required by the Bills of Sale Act was defective, the jurat containing no date and the words "before me" being omitted, in consequence of which the deed could not be registered and would not operate as against subsequent creditors.

3. That the assignment itself was void for containing preferences to creditors and a resulting trust in favor of the debtor.

R.S.N.S. 5th ser. ch. 942 contains the following provisions :—

Sec. 1. Every bill of sale of personal chattels, made either absolutely or conditionally, or subject or not subject to any trust * * * shall be filed with the registrar, etc.

Sec. 4. Every bill of sale or chattel mortgage of personal property, other than mortgages to secure future advances, * * * shall hereafter be accompanied by an affidavit of the party giving the same, or his agent or attorney duly authorized in that behalf, that the amount set forth therein as being the consideration thereof is justly and honestly due and owing by the grantor * * * * : otherwise such bill of sale or chattel mortgage shall be null and void as against the creditors of the grantor or mortgagor.

Sec. 10. In constructing this chapter the following words and expressions shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction, that is to say :

The expression "bills of sale" shall include bills of sale, assignments, transfers, and other assurances of personal chattels, and also powers of attorney, authori-

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ties or licenses to take possession of personal chattels as security for any debt, but shall not include the following documents, that is to say, assignments for the general benefit of the creditors of the person making or giving the same * * *.

The assignment in this case, made by Chas. L. Eaton to the respondent Hubley, contained the following declaration of trust after the usual words of conveyance which included all the household goods and furniture and all other personal estate and effects of the assignor:—

“To have and to hold the said land and premises and the said personal estate upon trust to sell and dispose of the same at such time and manner as to him shall seem best and collect in the money therefor, upon trust to pay the costs and expenses incurred by him on respect of these presents, and ten per centum of the gross proceeds to the said party of the second part in payment for his labor and responsibility herein, and the residue of said trust moneys in the payment of the following amounts to the persons, creditors of said Charles L. Eaton, named herein without any preference of payment, namely : The said Andrew Hubley, \$100, Benjamin Hubley \$400, Thomas Ritchie (interest \$45, city taxes and water rates now \$38), Gordon and Keith \$12, Doctor Cowie \$60, John McLearn \$8.35, R. N. McDonald \$12.16, Williams and Manual \$14.40, Heslian and Devine, \$4.10, and the balance, if any, to the said Charles L. Eaton.”

The assignor, Eaton, made an affidavit as required by the above section 4 of the act the jurat to which was as follows :

“ Sworn to, at Halifax, in the County of
 Halifax this day of September, 1887.

J. PARSONS.

A Commissioner of the Supreme Court, County of Halifax."

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The assignment with this affidavit attached was filed as a bill of sale under the above act.

One James Jack having recovered judgment for a debt due to him by the said Eaton issued execution and caused the goods covered by the assignment to be seized thereunder. The present action was then brought against the sheriff.

The court below held that the assignment was not one for the general benefit of creditors and therefore came within the act, and that whether or not the affidavit was void for the defect in the jurat the plaintiff was entitled to recover as the execution issued by the defendant was void for want of the signature of the prothonotary.

The defendant appealed to the Supreme Court of Canada.

Ross for the appellant. Under the practice established by the Judicature Act, in 1884 the signature of the prothonotary is not required to writs. See R. S. N. S. 5 Ser. Order 40 and rules p. 903. Rule 14 gives the form of execution which was followed in the present case.

If the writ should have been signed the omission of the signature is an irregularity only and does not make it void.

The jurat to the affidavit annexed to the deed of assignment is defective in two respects. The words "before me" are omitted, which has been held fatal in many cases. *The Queen v. Bloxham* (1); *Graham v. Ingleby* (2). And the day of the month was left blank, which has also been held bad. *In re Lloyd* (3); *Duke of Brunswick v. Harmer* (4).

(1) 6 Q. B. 528.

(3) 1 L. M. & P. 545.

(2) 1 Ex. 651.

(4) 1 L. M. & P. 505.

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The deed is void under the statute of Elizabeth. In the case of *The Union Bank of Halifax v. Whitman* (1) an assignment for benefit of creditors was set aside as creating preferences to which unpreferred creditors could not be asked to assent. The present deed is open to the same objections as were made to the deed in that case.

Eaton Q. C. for the respondent. The question as to the form of the execution is one of practice in the court below with which an appellate court will not interfere.

The Judicature Act did not expressly alter the practice which had been followed for many years previously, and will not be held to alter it by implication.

That the writ is void, and not merely irregular, is supported by *Hooper v. Lane* (2).

As to the objection to the affidavit it is submitted that a different rule prevails in respect to affidavits required by statute and those used in judicial proceedings. See *Ex parte Johnson* (3); *Cheney v. Courtois* (4); *Moyer v. Davidson* (5).

Perjury could be assigned before jurats were used. *Cheney v. Courtois* (4); *Hollingsworth v. White* (6).

No question can arise as to the registration of the deed as plaintiff was in possession.

A deed is not void merely for containing preferences. *Whitman v. Union Bank of Halifax* (1) does not so decide, and the deed in that case was of a peculiar character. Nor is a resulting trust fatal. If there had been nothing else in *Whitman v. Union Bank* (1) but a resulting trust the deed would not have been set aside.

Ross, in reply, cited *Ex parte Parsons* (7), and *New-*

(1) 16 Can. S. C. R. 410.

(2) 6 H. L. Cas. 443.

(3) 50 L. T. N. S. 214.

(4) 7 L. T. N. S. 680.

(5) 7 U. C. C. P. 521.

(6) 6 L. T. N. S. 604.

(7) 16 Q. B. D. 532.

love v. Shrewsbury (1), on the question of possession avoiding the necessity of registry.

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SIR W. J. RITCHIE C. J.—The first question that arises in this case is : Was this deed of assignment an instrument which required to have an affidavit attached ? If it was, was the affidavit so attached a compliance with the statute, or if it was not were the executions under which the sheriff levied, valid executions ?

As to the first question, the court below appears to have considered that the instrument not being for the general benefit of creditors, the statute required that to be valid against an execution creditor the provisions of ch. 92 R.S.N.S. 5th ser. must be complied with, and that therefore there should have been an affidavit ; in this I quite agree with the court below.

Secondly: Was the affidavit in this case a compliance with the statute ? I think it was not ; it was without date and the words “ before me ” were omitted. I have no hesitation in saying that the omission of the date and the words “ before me ” are fatal, and I quite agree with Mr. Justice Ritchie that

When the legislature required an affidavit to be filed with the bill of sale they meant a document that had all the requisites of an affidavit according to the common law and the well recognized practice of the Superior Courts.

These omissions are not mere matters of form. In addition to the cases cited in the court below I may mention as to the want of a date *Re Lloyd* (2), and *The Duke of Brunswick v. Slowman* (3), and as to the absence of the words “ before me ” as Lord Denman remarked in *The Queen v. Bloxham* (4):

The objection is not ambiguity but insufficiency.
And again :

(1) 21 Q. B. D. 41.

(3) 8 C.B. 617.

(2) 15 Q.B. 683.

(4) 6 Q.B. 528.

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I think this is not an irregularity which can be waived ; a defect of jurisdiction is shown and the objection is, one which we cannot avoid giving effect to.

And in the same case Coleridge J. says :

The objection is not a mere irregularity but affects the jurisdiction.

But I do not think it necessary to refer to the effect of such omission in affidavits at common law, or those used in judicial proceedings based on the practice or rules of the court. We have a statutory enactment by which we must be governed; the statute ch. 92 R.S.N. S. 5th ser. expressly provides by the 11th sec. that the affidavits mentioned in secs. 4 and 5 shall be as nearly as may be in the form in schedules A and B respectively, and the following is the form of jurat in said schedules :

Sworn to at _____, in the
county of _____ this _____ day
of _____, A.D. 18 _____ (Sgd.) A.B.

Before me,

How can it be said that this affidavit is as nearly as may be in the forms of schedules A and B. respectively? Certainly the date and the words "before me" are material ingredients in affidavits. If these can be omitted why may not the place where sworn be likewise dispensed with, and so the whole jurat be got rid of? I cannot think the words "as nearly as may be" were intended to permit material and substantial omissions and departures from the forms given, but rather referred to the material facts set forth in the body of the affidavit, which, under the peculiar circumstances of the case, cannot be, or are not, in the exact words of the affidavit given, but are, as nearly as may be, substantially the same. The jurat, unless strictly as provided for, cannot be "as nearly as may be," for the substantial requisites of the jurat are entirely omitted. How can this affidavit be said to be a substantial

equivalent to the form when it cannot be said to have the same legal effect? The cases of *Parsons v. Brund* and *Colson v. Dickson* (1), on the English Bills of Sale Act, show how rigidly the Court of Appeal held parties to a strict adherence to the provisions of the statute and to a compliance with the forms prescribed. In those cases Lord Justice Cotton said :

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There was nothing in the act itself requiring that the names, addresses and descriptions of the attesting witnesses should be added. The question was, whether either of these bills of sale complied with the requirement of sec. 9—that they should be made in accordance with the form in the schedule to the act.

And the court held that the bills of sale did not comply with what that section required, but were void for want of the addresses and description of the attesting witnesses as required by the form in the schedule. And see *Bird v. Davey* (2).

And I am quite clear that this deficiency cannot be supplied by parol evidence. If this could be done, and the date established, and the person before whom sworn and his authority to take affidavits can be shown by parol testimony, why may not the whole jurat be dispensed with and even the signature of the attesting party himself?

I cannot, however, agree with the court below that the execution under which the sheriff justifies is void because, though sealed with the seal of the court, it is not signed by the prothonotary. It appears to me to be utterly useless to go back a hundred years to ascertain what the practice of the Supreme Court of Nova Scotia then was; though this may be a very interesting antiquarian study for those who have the time to pursue it I fail to see that it has any practical bearing on the case we are now considering, because the whole matter of the practice of suing out writs has been in

(1) 25 Q. B. D. 110.

(2) [1891] 1 Q. B. 29.

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 ARCHIBALD modern times the subject of special legislation. By the first series R.S.N.S. (1857) ch. 133, it was provided—

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 HUBLEY. That all writs should be signed by the prothonotary with his name and the date of their issue and be subscribed with the name of the attorney or party by whom they are sued forth, and shall be directed to the proper officer and be in the form theretofore used.
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When the statutes were again revised in 1859, the second series, this section was omitted; so also in the third and fourth series this provision was likewise omitted, clearly showing, to my mind, that the legislature did not deem the signing of the prothonotary necessary; in the fifth series, 1884, there is the strongest possible confirmation of this view, with reference to writs of summons:

Every writ of summons shall be issued out of the office of one of the prothonotaries. Every writ of summons shall be sealed by the officer issuing the same and shall thereupon be deemed to be issued.

Then we have the provisions with reference to executions as follows:—

20. A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided, but such writ may at any time before its expiration, by leave of the court or a judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writs, either by being marked with a seal of the court, and having indicated the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal of the court and date; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

The production of a writ of execution, or of the notice renewing the same, purporting to be sealed and marked as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

All this showing, to my mind, beyond all doubt, that the proper authentication of the execution was the seal of the court, not the signature of the prothonotary; and I think it cannot be doubted that the seal

of the court is the proper authentication of all acts of the court and not the signing of the prothonotary. This is evidenced by order 59, sec. 2, applicable to copies and other documents, which declares that

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All copies, certificates and other documents appearing to be sealed with a seal of the court, used by the prothonotary, shall be assumed to be authenticated copies or certificates or other documents issued by the prothonotary, and may be received in evidence, and no signature or other formality except the sealing with the prothonotary's seal shall be required for the authentication of any such copy, certificate, or other document.

Then section 10 provides :

The forms contained in the appendices shall be used in or for the purposes of the prothonotary's office, with such variations as circumstances may require.

The form for an execution is the following :

TITLE OF CAUSE.

Seal a writ of execution directed to the sheriff of
 to levy against C.D., the sum of \$ and interest thereon at
 the rate of \$6 per centum per annum from the day of
 (and \$ costs) to judgment (or order) dated day of
 X. Y.

Solicitor for party on whose behalf writ is to issue.

Therefore, in my opinion, it is unquestionably the seal which is necessary to the validity of the writ and gives it vitality, and not the signature of the prothonotary. But assuming, for the sake of the argument, that the signature of the prothonotary is necessary his omission to put it to an execution in all other respects regularly issued, as this appears to have been, would amount to no more, in my opinion, than an irregularity and render the writ voidable and not void, and the execution would be a good and valid instrument until set aside which has not been attempted to be done in this case. The following authorities may be referred to on this point :

Chitty's Practice of the Law (1):

(1) Vol. 3 ch. 5 p. 224.

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The sealing or resealing seems to be considered more important than signing. Original writs issued out of the Court of Chancery, were not only in the King's name, but sealed with his great seal, but mesne process founded thereon always issued under the private seal of the particular court, and not under the great seal, and are tested, not in the King's name, but in the name of the chief justice, or chief baron of the particular court. The seal at present is the same as heretofore. In the King's Bench and Common Pleas the sealing of the writ is considered of principal importance, and is the act which completes its authenticity.

Bacon's Abridgement.—Sheriff M. (1).

2. That he cannot dispute the authority by which writs issue, nor object to any irregularity in them. Neither the sheriff nor his officers are to dispute the authority of the court out of which any writ, process, or warrant issues, but are at their peril truly to execute all such writs, &c., as are directed to them by the King's judges and justices, according to the command of the said writs, and hereunto they are sworn.

And in *Burt v. Jackson* (2) Tindall C.J. says :—

Although by the rule of M. T. 3 Will. 4 the filacer is entitled to certain fees for signing writs, it does not therefore follow that he must sign them.

In *Frost v. Eyles* (3), on a motion to set aside a proceeding for irregularity, the name of the filacer not being on a common capias, the court held the proceedings regular, the addition of the filacer's name not being necessary. In *Wilson v. Joy* (4), it was held that the omission of the name of the chief clerk of the King's Bench on a writ of summons is but an irregularity, and Taunton J. said :

I think it is sufficient if the writ of summons is conformable to the form given in the schedule of the act.

And the same rule appears to prevail in the United States. In *Benjamin v. Armstrong* (5) Tilghman C. J. says as to the writ not being signed by the prothonotary :

(1) P. 690.

(2) 2 Dowl. 748.

(3) 1 H. Bl. 120.

(4) 2 Dowl. 182.

(5) 2 Serg. and Raw. 392.

The omission in this case is but an informality; the writ derives authenticity from the seal of the court.

Lessee of Boal v. King (1). Judge Lane delivered the opinion of the court :

No principle is more definitively settled than that the process of a court having a seal can only be evidenced by its seal, which is the appointed mode of showing its authenticity. Without it, a majority of the court hold such process void. The cases in 19 Johns. 170, 5 Cow. 550, and 5 Wend. 133, show the necessity of a seal to writs.

The affidavit then being clearly necessary and being, as I think, substantially defective, and the executions having been regularly issued, I think this appeal should be allowed with costs in this court and in all the courts below.

FOURNIER J.—I am in favor of allowing this appeal for the reasons given by the learned Chief Justice.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—I am of opinion that the appeal in this case should be dismissed with costs. The bill of sale under consideration does not appear to be avoided by the statute of Elizabeth, and as to the alleged defect in the affidavit filed with the bill of sale, assuming an affidavit to have been necessary in the present case, I do not consider that we are bound by the decision in *The Queen v. Bloxham* (2) and such like cases, or that they apply in the circumstances of the case before us. In that case a writ of certiorari was quashed because the words “before me” were not inserted in the jurat of the affidavit upon which it had been issued, although the name of a commissioner for taking affidavits was inserted at the foot of the jurat. The Court of Queen’s Bench held that they had no jurisdiction to

(1) 6 Ohio 11.

(2) 6 Q.B. 528.

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grant the certiorari upon such a document. Without evidence of the matter relied upon in the affidavit filed upon a motion for a certiorari the court clearly had no jurisdiction to grant the writ. It was by affidavit alone that the matter necessary to give the jurisdiction could be laid before the court. The court had the right to determine the sufficiency or insufficiency of the mode in which such matter was laid before it, and as it held that the affidavit was defective and could not be amended, there was no matter laid before the court so as to give it jurisdiction to interfere by granting the certiorari. But in the case of these bills of sale, when a question arises affecting their validity, it is raised in a suit in court upon the trial of which evidence upon oath taken in the ordinary way in suits *inter partes* can be given showing, as matter of fact, that the affidavit was duly sworn before it was filed. The courts in Nova Scotia are not governed in a matter of this nature by the rules by which the Court of Queen's Bench was governed in *The Queen v. Bloxham* (1). In an issue in a cause in court whether an affidavit was filed with the bill of sale, the question would be one of fact, to be tried in the ordinary way, upon evidence taken in the cause in court upon the issue joined therein ; upon the trial of such an issue the judge presiding could not as a point of law, because of the absence of the words " before me " from the jurat, exclude the evidence, for example, of the commissioner whose name was at the foot of the jurat, to the effect that he had administered the affidavit, and that in point of fact it was sworn before him. *The Queen v. Bloxham* (1) is no authority that upon such an issue such evidence can be excluded ; it is, in my judgment, an authority only to the effect that the Court of Queen's Bench in England had no jurisdiction to entertain a motion upon matter which can only be brought to its notice by affidavit, unless the

(1) 6 Q. B. 528.

words "sworn before me" are inserted in the jurat above the name of the commissioner by whom the affidavit was administered, when the affidavit purports to have been administered by a commissioner, for the same court has held that an affidavit sworn before a judge at chambers will be received on a motion in court although the words "before me" do not appear in the jurat. In *The Queen v. Bloxham* (1) the court held that the defect in the jurat was not amendable although a defect of a somewhat similar nature had been amended by the court, and they pronounced the document upon which the certiorari had been obtained as no affidavit at all and, as such, to have been absolutely void. No such rule of law prevails in the Province of Nova Scotia. Ch. 104 of the Revised Statutes, 5th series, order 36, prescribes all that is necessary to be done by a commissioner in administering an oath taken before him in order to the filing of an instrument, and the words "before me" are not there mentioned as necessary to be inserted to give validity to the affidavit, and sec. 14 of that act enacts that:

The court or a judge may receive any affidavit for the purpose of being used in any cause or matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat or any other irregularity in the form thereof.

So that the defect in the jurat which, in *The Queen v. Bloxham*, (1) was pronounced to occasion nullity is, by the law of Nova Scotia, declared to be no nullity, and if not nullity in an affidavit upon which a motion is made in court how can it possibly exclude evidence upon an issue joined *inter partes*, to show that the affidavit before it was filed was duly administered? Or upon what principle can we hold the case of *The Queen v. Bloxham* (1), an incontrovertible authority in the Nova Scotia courts governing a case like the present?

(1) 6 Q. B. 528.

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But, further, the point upon the omission of the words "before me," from the jurat of the affidavit under consideration, does not, as it appears to me, apply in the present case; ch. 92 of the Revised Statutes 5th series, makes a distinction between bills of sale which are absolute or upon trust to sell, and those which are in the nature of chattel mortgages only, to secure by mortgage a debt due to the grantee. Section 1 of the act is the section within which the bill of sale in the present case comes, for it is a bill of sale absolute in its terms and on trust to sell—it requires no affidavit to be filed with it as sec. 4 does with the bills of sale there mentioned which are, as it appears to me, bills of sale by way of chattel mortgage only. The affidavit required by this section shows that the section applies to chattel mortgages only. It enacts that every bill of sale, or chattel mortgage, of personal property, other than certain excepted chattel mortgages, shall be accompanied by an affidavit of the party giving the same that the *amount set out therein, as the consideration thereof, is justly due and owing by the grantor to the grantee*, showing that the instrument which this affidavit is to accompany is a chattel mortgage securing a debt due to the grantee or mortgagee from the grantor or mortgagor.

Lastly, upon the question as to the validity of the writs of execution under which the appellant claims title to the goods in question, as at present advised I am disposed to regard that as a question of practice and procedure which the Supreme Court of Nova Scotia was itself competent exclusively to determine and the most competent court for the determination of a question of that kind, namely, the essentials necessary and in use, according to the practice of the court, to constitute a valid writ of execution issued by the court, and I do not feel disposed to question, unless absolutely

necessary, the judgment of the full court upon this question, and in the view which I take upon the other point it is unnecessary that I should express a conclusive opinion upon the point.

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PATTERSON J.—I am happy to say that I find no difficulty in concurring with his lordship the Chief Justice in holding that the writ of *fi-fa* is not void for want of the signature of the prothonotary. There is a regular judgment, followed by a writ of execution which is sealed with the seal of the court, and in all respects in full compliance with the directions of the judicature act and the orders under the act. If the sheriff is not protected in executing that writ, even if it was the duty of the prothonotary to sign the writ, the law will not be administered, as it strikes me, on the same principle as in the cases of *Carratt v. Morley* (1) and *Hargreaves v Armitage* (2) referred to by one of the learned judges in the court below.

I think he is protected under any of the views of the question of practice which have been presented to us.

If we assume, what at present I think would be an incorrect assumption, that the rule which governs these matters in Nova Scotia is to be found in the regulations adopted by the Executive Council in 1749, we find a direction that "all original process, and all executions, and all process whatsoever, belonging to any matter prosecuted in the general court, be issued from the secretary's office, signed by the clerk of the court, and also be returned into the same office;" and further, "that all writs be in the same form as in England."

I borrow the quotation as abbreviated in *Leary v. Mitchell* by Mr. Justice Ritchie, copies of whose judgment have been furnished to us by the respondent.

(1) 1 Q. B. 18.
 9½

(2) L. R. 4. Q B. 141.

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 ARCHIBALD of which is the seal.

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 HUBLEY. A writ, *breve*, is said to be a formal letter of the King, in parchment,
 sealed with a seal, &c., &c. (1).
 PATTERSON J.

I understand the regulations to be, as correctly expressed by Mr. Justice Ritchie, "regulations in respect to the court." They provide for the administrative service, but leave the substantial requirements of the writ to follow the English law. No doubt it would be irregular to issue process from any office but that of the secretary, or to return it into any other office, or to omit the signature of the clerk, but those would be venial irregularities. In *Leary v. Mitchell* the question was only one of irregularity.

In his judgment in the case now in hand Mr. Justice Ritchie refers to *Hooper v. Lane* (2) which turned a good deal upon an arrest made under a document which had been placed in the hands of the sheriff as a writ of *capias*, but which in *Hooper v. Lane* (2) was conceded to be void. The learned judge understands the defect to have been that—to quote his own words:—

The *capias* under which the arrest was made was in regular form, properly tested and sealed, but did not have an extra mark or stamp called signing, which was required for the validity of a writ of *capias* or *mesne process*.

With great respect for the learned judge who has given us, on other branches of this appeal, the assistance of much learning and industry, I am unable to read *Hooper v. Lane* (2) as he has done. It was an action against the sheriff for negligence in not executing a good *capias* which the plaintiff had put in his hands against one Bacon. The misadventure was caused by the sheriff having arrested Bacon on the other document, from which arrest he was discharged by a judge's

(1) Old Nat. Br. 4—Shep. Abr. (2) 10 Q.B. 546; 8 E. & B. 245—Tomlin's L. D. Writ. 1095.

order. What we know of the void writ we learn from the bill of exceptions in the case, and that is that a piece of parchment purporting to be a *capias* against Bacon at the suit of one Aramburn, indorsed for bail, had been brought to the sheriff's office by an attorney's clerk. The piece of parchment was produced at the trial, purporting to be a writ of *capias* issued out of the Court of Exchequer at the suit of Aramburn, but it was not duly signed or marked by the sealer of writs, nor had a *præcipe* thereof been taken to the office of the court according to the practice of the Exchequer. The point in the case was the sheriff's liability for negligence in so acting on this document, which is spoken of not as a void writ only but as no writ at all, as to leave the plaintiffs' good writ unexecuted until Bacon was gone. It was not that the so called writ, which came into being we are not told how, was worse for want of the signature, but that the sheriff had been misled by what was not only worthless in fact but had not on it the indicia of genuineness which a signature would have afforded. The case does not appear to me to touch our subject.

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I suppose, though I have not verified the supposition, that the practice of the Exchequer referred to in the Bill of Exceptions was under a general rule. The rules of Hilary Term, 1832, which applied to all three courts, did not, I believe, regulate the issue of *mesne* process. They did provide, as to executions, that

It shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment paper, *postea* or *inquisition* has been seen by the proper officer.

I observe a Common Pleas case, in 1833, *Burt v. Jackson* (1), the headnote of which is:

It is not necessary for the filacer to sign his name to a writ of summons; if he impress upon it the stamp of court it is sufficient, al-

(1) 3 M. & Scott 552.

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though the rule of Mich. 3 Will. 4, r. 2, allows fees to be taken for signing as well as for sealing the writ.

And approaching a little nearer to the remote date of the order in council, there is this note of an anonymous case in 1814 (1):

Reader moved to set aside proceedings for irregularity, stating that an old copy of writ had been used, with the names of clerks of the court subscribed who were no longer so. Bayley J. That is an immaterial part.

I have looked rather extensively into the subject, and I have not seen any reason for considering the regulations of the order in council otherwise than directory, and as being matters of practice. It may not add to this to say that they strike me as coming within Order LXVIII., as "rules of practice for the time being in force."

We are told that ever since the Judicature Act of 1884 has been in force the practice of signing executions, which had continued from 1747, has been discontinued, signature by the prothonotary not being in terms required by that act which follows in this respect the English rule expressed in the rule of Hilary, 1832, and continued under the Judicature Act 1875.

A question is made whether the rule of the Judicature Act has superseded the practice as it was before.

The practice inaugurated so long ago by the order in council was adopted and continued under the provincial legislation, as has been explained to us, the rule under the statute in the first series of revised statutes requiring in express terms the signature of the officer, and in the later series down to the fourth that express enactment being dropped, but the form appended to the statute continuing to indicate, by a place for the signature, that the practice was to be the same. Of course, whatever has been said as to the directory

character of the legislation when it was under the order in council is, to at least as great an extent, applicable to it under these statutes.

The provisions of ch. 94 of the fourth series of the Revised Statutes, which included those in question, remain in force only so far as not altered by the Judicature Act (1). The excepted provisions, some of which relate to executions, are pretty numerous, but those regulating procedure cannot be among them. The mode of issuing executions is one of those things dealt with by the orders under the Judicature Act, and it would be anomalous to hold that an isolated provision of the old statutory rule of practice or procedure, such as that which directs the prothonotary to sign executions, survives to supplement those of the new system.

The objection to the assignment by reason of the omission of the words "before me" in the jurat of the affidavit is one that I should gladly deal with as it has been ably dealt with in the court below if I could distinguish the case of *Parsons v. Brand* (2), to which his lordship the Chief Justice called my attention when it appeared in the Times Law Reports. I regret to say that I cannot distinguish it. By section 11 of the Nova Scotia Bills of Sale Act the affidavit required by sections 4 and 5 shall be as nearly as may be in the forms in schedules A and B respectively. Those forms require the commissioner or person before whom the affidavit is taken to certify that it was sworn "before me." Omit those words and the certificate is merely his certificate that it was sworn, which is not as nearly as may be to the same effect. By sec. 4 the mortgage or bill of sale is to be null and void as against creditors unless the prescribed affidavit of *bona fides* is made, and sec. 11 is imperative that it shall be as nearly as may be in the given form. This is undis-

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(1) Jud. Act, sec. 45.

(2) 25 Q. B. D. 110.

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tinguishable from the English act of 1882 which provides in sec. 9 that the bill of sale shall be void if not made in accordance with the form in the schedule to the act, the form in the schedule containing the words "add witness's name, address and description." The absence of these particulars was held fatal to the bill of sale attacked in the case of *Parsons v. Brand* (1), for reasons which I can neither controvert nor hold inapplicable to the statute or the facts before us. Some of the decisions in Ontario which have been cited have gone as far as liberal construction of the facts would allow to uphold defective affidavits in cases of this kind, but no case has gone the length we are asked to go in this case and, besides, they have no provision in Ontario like that of the 11th section of the Nova Scotia act. It has been contended that the statute does not, under the circumstances, require this assignment to be accompanied by the affidavit or, indeed, to be registered. I am afraid the circumstances must be somewhat strained to arrive at that conclusion. The first section requires that, at the risk of losing priority over creditors, &c, every bill of sale shall be filed whereby the assignee shall have power, either with or without notice, on the execution thereof or at any subsequent time, to take possession of the property. It cannot be doubted that this bill of sale comes within that category. Possession was not given at the time it was made, and the right to take possession depended on the terms of the deed. The definition of a bill of sale is similar to that contained in the English bills of sale acts, 1878 and 1882, and is illustrated by several decisions; the latest of which is the case of *Mills v. Charlesworth* (2) which was decided since the argument of this appeal.

The first section of the Nova Scotia statute does not

(1) 25 Q. B. D. 110.

(2) 25 Q. B. D. 421.

require the affidavit now in discussion, but it is required by the 4th section in all cases except those excepted by the tenth section. Assignments for the general benefit of creditors form one exception, but assignments for a select number of creditors, like the deed before us, are not excepted.

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But it is said that possession was taken by the assignee. His statement is that about two months after the date of the assignment of the 15th of September, 1887, which is the one on which the questions arise, he received another which the assignor, who was in the United States, had executed in order to include all his creditors, but which could not be registered for want of affidavits sworn before a proper person. On receiving that deed the assignee went to the house of the assignor, whose wife was still living there, and removed one piece of furniture to his own house. Two or three days afterwards he took an inventory of all the furniture in the house but permitted the wife to remain in possession and use of it in the house, and she was in possession of it when the sheriff seized.

This taking of possession was only formal, there was no actual change of possession.

What the effect of taking actual possession and retaining it might have been I do not think we are called on to consider for the purpose of this case, and I should not venture to do so without more acquaintance than I have at present with the course of decisions in Nova Scotia under this statute.

The statute departs from the English bills of sale Acts of 1854 and 1878 (1) which furnished the language, at least, in which some of its enactments are partly framed by providing that a bill of sale of the class described in the first section shall take effect, as against persons whom we may in general terms call creditors, only

(1) 17 & 18 V. c. 36; 41 & 42 V. c. 31.

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from the time of its registration, in place of the provisions of the English acts that it shall be null and void to all intents and purposes whatsoever so far as regards the property or right to the possession of any personal chattels comprehended in it which at or after the time of the bankruptcy, &c., shall be in possession or apparent possession of the person making such bill of sale, &c. But, while thus dropping the reference to "apparent possession," it retains the definition of those words in the interpretation clause which is borrowed, with slight modifications, from the English statutes. We have thus "apparent possession" of an assignor contrasted with "formal possession;" and although there is nothing in the statute to declare the effect of the giving or taking of possession, either apparent or formal, we may at least regard the interpretation clause as recognizing the two kinds of possession which may have to be distinguished from each other when questions of possession happen to arise in connection with the working of the act.

The formal possession that was taken gave the assignee no better title to the goods than he already had. He had title by the deeds. A delivery by the assignor might perhaps have operated as a conveyance at common law to cure defects, if any there were, in the instruments under which he held, but the assignor did not make any delivery. He executed the deeds, being himself at a distance from the goods, and the assignee thereby acquired the right to take possession or, as expressed in the first section, the power to take possession. The deeds were thus of the category dealt with by the first section and which, under the fourth, were null and void against creditors. The case of *Davies v. Jones* (1), which was cited by Mr. Eaton, turned on the character of the possession. The assignor sold his goods

(1) 7 L.T.N.S. 130.

or stock in trade and went away, and the assignees put an agent of their own in possession to carry on the business for them, and added to the stock. They retained a relative of the assignor in their service in the shop and kept the assignor's sign over the door. The question of "apparent possession" was held to be one of fact. It was held that there had not been a mere formal possession but a *bonâ fide* sale, an actual delivery, and a complete change of possession, and that it was not within the statute at all. I do not see that that case can aid the argument. Nor can *Graham v. Wilcockson* (1), another case which was cited. It was an interpleader issue relating to household goods which a landlord had bought from his tenant, taking them in payment of rent, taking possession of them, and then letting them to the tenant at a weekly rent. The tenant signed a paper acknowledging payment for the goods by way of the rent account, and the only question argued in the case was whether the paper was a bill of sale or only a receipt. It was held to be a receipt and therefore not to require registration.

The result is that while I am clearly of opinion, for reasons similar to those which I gave at some length in *Whitman v. Union Bank of Halifax* (2), that the assignment is not bad under the 13 Eliz. c. 5, I have to concur in holding it void under the Nova Scotia Bills of Sale Act for want of a sufficient affidavit of *bona fides*.

I agree that we must allow the appeal.

*Appeal allowed with costs.*

Solicitors for appellant : *Ross, Sedgewick & McKay.*

Solicitors for respondent : *Eaton, Parsons & Beckwith.*

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(1) 46 L.J. Ex. 55.

(2) 16 Can. S.C.R. 410.