

C. L. Cham.]

NICOL V. EWIN.—LINDSAY V. EWIN.—DARRAGH V. EWIN.

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NICOL V. EWIN.

(In the County Court of the County of Simcoe.)

LINDSAY V. EWIN.

DARRAGH V. EWIN.

(In the County Court of the County of Wellington.)

*Absconding Debtors' Act—Non-personal service of writ of summons—Priority of executions—Surplus proceeds of sale of land by mortgagee.*

Some time prior to the 2nd of March 1876, defendant, having previously mortgaged his real estate, absconded from this Province. On that day Nicol commenced his action by writ of summons, and on the 31st of March, after attempts at personal service, served defendant's wife. On the 20th of April an order was obtained for leave to proceed as if personal service had been effected. On the 8th of May judgment was signed, and *f. fa.* lands placed in the hands of the Sheriff of Simcoe. On the 8th of April, 1876, Lindsay and Darragh issued writs of attachment against defendant, and on the 30th of November placed *f. fa.* lands in the said Sheriff's hands. On the 7th of May, 1877, the mortgagees sold under their power of sale, from the proceeds of which there remained a surplus.

*Held*, 1. That Nicol's writ of summons was "served" within the meaning of section 20 of the Absconding Debtors' Act before the issue of the attachments, and he, having obtained judgment first, was entitled to be paid in full.

2. That the rights of the execution creditors in respect of the defendant's equity of redemption remained unchanged by the sale by the mortgagees.

[April 26, May 1—Mr. DALTON.

This was a special case, stated by consent, for the opinion of Mr. Dalton in Chambers.

The facts, as stated more at length in the special case, were shortly as follows:—

1. Ewin absconded from the Province prior to the 2nd of March, 1876. Nicol, on that day, issued a specially endorsed writ against Ewin and one H. Interlocutory judgment was entered against H. for default of appearance. On the 31st of March Ewin's wife was served, and on the 20th of April an order obtained to proceed as if personal service had been effected. On the 8th of May writs of *f. fa.* goods and lands were placed in the hands of the Sheriff of Simcoe.

2. On the 8th of April, 1876, Lindsay issued an attachment in the County Court of Wellington, under the Absconding Debtors' Act, against Ewin, and placed it in the said Sheriff's hands on the 13th of April. On the 30th of November *f. fa.* goods and lands were placed in the said Sheriff's hands.

3. Exactly the same proceedings were taken in Darragh's case.

4. At the time Ewin absconded he was the

owner of the equity of redemption in a certain parcel of land in the County of Simcoe.

5. The mortgagees of Ewin, on the 7th of May, 1877, sold the lands under the power of sale contained in their mortgage, and realized more than enough to pay the mortgage.

6. Ewin had no other available assets.

7. There were no other incumbrancers except those mentioned.

8. The question for the decision of Mr. Dalton was—whether Nicol was entitled to be paid in full out of the surplus in the hands of the mortgagees, or should rank *pari passu* with Lindsay and Darragh?

*O'Brien* for Nicol.

*Creelman* for Lindsay and Darragh.

The following authorities were referred to:—*Absconding Debtors' Act*, secs. 20, 28, 30; *Potter v. Carroll*, 9 C. P. 442, 448. *Daniel v. Fitzell*, 17 U. C. R. 369; *McKay v. Mitchell*, 6 U. C. L. J. 61; *Smith v. Trust and Loan Co.* 22 U. C. R. 525,

Mr. DALTON.—I think the process in Nicol's case was served in the terms of the statute before the suing out of the writs of attachment. I do not think personal service was necessary.

This being so, unless the fact of the sale by mortgagees alters the position of the parties, Nicol is entitled to be paid in full. It appears to me that the right to surplus must follow the course of the property out of which it arose, as if it had continued in its original condition as land. Nicol could have redeemed the mortgagees, because his *f. fa.* was a lien and encumbrance on Ewin's land; or suppose Ewin dead, the rights of Ewin's heir and executor as to the surplus would have stood thus: Had the mortgagees sold during Ewin's life time, the executor would have been entitled to the surplus, if after Ewin's death his heir; because, in the first case, Ewin would have died owning personal property: in the latter, owning real property; and so in the different cases the executor or heir would have been entitled accordingly. The reason is, that the Building Society could not change the nature of the property beyond their own interest in it adversely to the interests of others concerned, nor alter the legal devolution of the title to the surplus in prejudice of the vested interest of another. In this case the writs of *f. fa.* were all in the Sheriff's hands, while the equity of redemption was yet in Ewin, and bound the property as realty, subject to the claims of the mortgagees