

Div. Ct.]

FLEMING v. DICK.

[Div. Ct.]

And BURNS, J., says, p. 509 : "The first filing was upon the 15th of May, consequently the year expired on the 14th May succeeding, at the latest moment of the day."

Mr. Barron, in his valuable work on Chattel Mortgages, at p. 191, expresses an opinion that a mortgage filed on the 1st January in one year, at 11:30 a.m., and re-filed on the 1st of January in the succeeding year, at 11:30 a.m., is re-filed in time, and cites *Armstrong v Ausman* as an authority.

With the greatest respect for the learned author, I think the proposition is a deduction hardly warranted by this and the other cases cited by him. The real question decided in *Armstrong v. Ausman*, was, whether the words of the Act excluded the twenty-four next before the actual hour and minute of the expiration of the year; or computing the day by its date, whether the day next before the day on which the expiration takes place is to be excluded. DRAPER, J., expressly says:—"I do not perceive any ground for so determining."

I think the learned judges in *Armstrong v. Ausman* expressly assumed that the day of the filing was not excluded. The words of the Act are "from the filing," not the "day of" or "date of" filing in which later cases it would be excluded.

Considering then that the year in the case before me expired, either at 2 p.m. on the 18th of September, 1882, or, at the best for the claimants contention, at the last minute before midnight between the 18th and 19th, I think a second year had been entered upon on the 19th, and any filing at any hour of that day, too late. I must therefore find for the execution creditor and bar the claimant's claim.

G. T. Smith, for the claimant.

J. A. McGilvray, for the execution creditor.

#### FLEMING v. DICK.

*Division Court practice—Warrant of committal—Amendment—Renewal—Endorsement of mileage.*

Errors of dates and recitals in warrants of commitment can be amended by the judge under Rule 118.

The omission by the bailiff to endorse upon the warrant the number of miles, and the amount of mileage required to be done under Rule 103, will not vitiate the warrant.

The warrant was issued and dated on 2nd October, 1882, and renewed under Rule 102, by judge's order, dated 4th February, 1883.

*Semble*, properly renewed and in force.

[Whitby—DARTNELL, J.J.]

J. B. Dow, for the judgment debtor, who was in custody under a warrant of commitment under the Division Courts Act, moved for his discharge, both on the merits and on various objections to the warrant, all of which are set out in the judgment.

W. H. Billings, contra.

DARTNELL, J.J.—I am against the defendant on the merits, and therefore have only now to consider the technical objections to the warrant itself. There are three errors in dates or recitals, made by the clerk. These I think I have ample power to amend under Rule 118. In *Peck v. McDougall*, 27 U. C. R. 362, HAGARTY, J., says:—"We should hesitate before we hold that the omission of the clerk to enter an order of commitment in the procedure book destroyed the validity of the warrant, and made the party applying for it a trespasser." I think this language is applicable to other mistakes or errors made by the clerk. The officer executing the warrant endorsed in writing, under Rule 103, the actual day of the arrest, but omitted to give the number of miles, or amount of mileage, as required by the rule. I think this is merely directory, and for the purpose of the defendants being made aware of the total amount of debt and costs, should he seek his discharge under the provisions of section 186 of the Division Court Act. In case of payment under this section the bailiff or officer would simply lose his mileage through his own neglect. I do not see how his omission affects the validity of the warrant.

The remaining question has more force. The warrant was issued on 19th October, 1882. It is shown that the defendant, having become aware of its issue, left the Province and did not return until after the expiration of three months from its date. Application was then made for a renewal, and a judge's order therefor was made on the 4th February, 1883, and the defendant arrested. The affidavit upon which the order was based, satisfactorily showed the cause of the non-execution, and that the debt and costs had not been satisfied.

I think it is quite clear that under Rule 101