The language of Gibb, C. J. in *Phillipson* v. *Caldwell*, 6 Taunt. 176, is as far as it goes adverse to the defendants, though not any authority on the point at issue. Nor have I found any case which affords any direct guidance for a decision.

Looking then at the facts, it appears to me that the second mortgage would never have been taken from Duignan, but for the loss of the priority of the first mortgage given by him to the intestate. The jury have in this case determined that such priority was lost by the neglect of the defendants. It may be truly said that by taking this mortgage the intestate had a reasonable prospect of being secured in the payment of Duignan's debt to him, but it does not appear that the intestate was aware of the necessity of this step, nor that he sanctioned it before it was taken, and it is obvious that it was for the defendant's interest to obtain this security, since to whatever extent it proved available, they so far reduced their liability in damages to the plaintiffs for their neglect.

The necessity for the second mortgage arose from the defendants' omission in regard to the first. The necessity for the foreclosure suit arose from the same cause. The costs of that suit are what the defendants first of all seek to obtain judgment for against the intestate's estate, and then to set it off against the plaintiff's judgment for that negligent omission. The special circumstance relied on to support the application is the insolvency of the intestate's estate. It is urged, and if true, as appears to me with irresistible force, that the deficiency in the assets has arisen from defendants' conduct, and the total loss of the debt due by Duignan, that the retainer is fully open to question, that the verdict against the defendants is the only fund out of which the plaintiffs have to pay the expenses of administration for which they are personally liable, and that it would be unjust under the circumstances to relieve the defendants by a proceeding beyond any decided case, and which would occasion loss to innocent parties.

Without reference to the assignment, because I do not feel driven to rely upon it, but preferring the broad ground that the defendants' case is not one which entitles them to the equitable relief asked for. I discharge the summons with costs. See *Young* v. *Gye*, 10 Moore 198; *Johnson* v. *Lakeman*, 2 Dowl. P. C. 646; *Taylor* v. *Cook*, 1 Younge, 201; *O'Hare* v. *Reeves*, 13 Q. B. 659.

Summons discharged with costs.

WARD v. VANCE—THOMPSON, GARNISHEE.

Garnishee proceedings—Service of attaching order and summons to pay over—Death of garnishee before issue of order to pay over—Effect thereof—Amendment nunc pro tunc—Issue as to indebtedness.

Personal service of an attaching order, or summons to pay over issued thereon, is unnecessary, if it can be shewn or can be gathered from the materials before the court that the garnishee had a knowledge of the service.

Where the summons to pay over was argued on one day, and judgment deferred till the next day, when the summons was made absolute (the garnishee having died during the interim) on an application to set aside the order, on the ground that it was made after the proceedings had abated, by reason of the death of the garnishee, leave was given to the judgment creditor to amend his order *nunc pro tunc*, without costs, the delay being the delay of the judge and not of the party.

Quære, should not all orders as well as rules be in practice dated as of the day of argument, and not of the day of delivery of judgment?

The executor of the garnishee having sworn that there was no debt due at the time the order was made, and that there was collusion between the judgment creditor and judgment debtor, which neither of them denied, leave was given to take an issue on payment of costs. (Chambers, July 29, 1863.)

A summons was obtained by the executor of the garnishee, calling upon the judgment creditor and judgment debtor to shew cause why the order made in this matter on the 22nd June last, ordering the garnishee to pay over to the creditor the amount of his indebtedness to the debtor should not be rescinded.

1. Because the summons to shew cause upon which the order was mas made had not been personally served on the garnishee.

2. Because at the time of the making of the order the garnishee was dead.

3. Because nothing was due at the time.

And upon grounds disclosed in the affidavits and papers filed.

The affidavit made by Mr. Brunskill, and referred to in the summons, stated, among other things—that the garnishee died on the 25th June, 1863; that he, Mr. Brunskill, is one of the executors of the deceased; that for about five months before his death the garnishee was chiefly confined to his house, and too unwell to attend to his business, that for some time before the garnishee's death, the deponent resided chiefly at Bradford, and looked after the affairs of the garnishee, and he is well acquainted with the same; that an attaching order was taken out on the 14th April last; that a summons to pay over was taken out on the 16th June; that neither of them was personally served on the garnishee, and from statements made by him to the deponent, he (the deponent) believes the garnishee had no knowledge of the summons having been issued; that a copy of the attaching order was handed to the deponent, but he did not accept service for the garnishee; that the summons of the 16th June he believes was served on J. W. H. Wilson, an attorney, who had occasionally been retained to do business for the garnishee, but who had no authority to accept service of writs or papers requiring personal service; that he (the deponent) on the 22nd of June, having heard of the issue of the summons, and that the judgment creditor was pressing the judge in chambers for an order thereon, despatched a telegram to Messrs. Paterson & Harrison, his solicitors, to see Mr. O'Brien, the agent for the said J. W. H. Wilson, and to repudiate the service, which he believes was accordingly done, and a communication was made to the presiding judge in chambers by Messrs. Paterson & Harrison that the order and summons had never been personally served; that in order to set aside the summons and service on Wilson, an affidavit was drawn up to be sworn by the garnishee, stating that no service had been made upon him, but before the affidavit arrived at Bradford the garnishee was dead; that on the 26th of June the order on the garnishee to pay over was made; that he can say with confidence the garnishee's estate is not indebted to ance; that the judgment creditor and the judgment debtor are brothers-in-law, and he the deponent believed there was collusion between them.

Robert A. Harrison, for the summons, said he did not rely so much upon a want of personal service, as upon an utter want of service, both of the attaching order and summons to pay over and so contended that the order to pay ought to be rescinded (*Abbey* v. *Dale*, 14 Jur. 1070). This ground he urged as open to him as being a ground 'disclosed in affidavits and papers filed.' He also contended that under any circumstances the summons ought to be made absolute, because of the death of the garnishee, whereby the proceeding had abated at the time the order was made (Con. Stat. U. C., cap. 22, secs. 288, 289, 290). He admitted there was no direct authority in favor of this position, but argued that the order to pay upon which execution might issue was a quasi judgment, and so analogous to an ordinary judgment in an ordinary action, which, if obtained after the death of either plaintiff or defendant, was at common law void (Har. C. L. P. A. 374, note *k*). He argued that the statutes 17 Car. II, cap. 8, and 8 & 9 Will. III, cap. 11 sec. 6, providing for the continuance of proceedings in an action under certain circumstances to judgment, notwithstanding the death of plaintiff or defendant, are inapplicable to garnishee proceedings. Moreover, he submitted that as the garnishee, or rather his legal representative, now really disputed the debt, the order ought, upon that ground at all events, to be rescinded, and an issue directed (Con. Stat. U. C., cap. 22, sec. 291; *Wintle* v. *Williams*, 3 H. & N. 288; *Wise* v. *Birkenshaw*, 8 W. R. 420 S. C. 29 L. J. Ex. 240).

Tilt, contra, contended that the order was good as against the objections raised, and if not, submitted that, under the circumstances, he was entitled to have the order amended and made *nunc pro tunc* (*Miles* v. *Bough*, 3 D. & L. 105; *Lawrence* v. *Hodson*, 1 Y. & J. 368; *Bates* v. *Lockwood*, 1 T. R. 637; *Heathcote* v. *Wynn*, 25 L. T. Rep. 247; *Bryant* v. *Simmons*, 24 L. J. Q. B. 253; *Wright* v. *Mills*, 28 L. J. Ex. 223; *Moor* v. *Roberts*, 27 L. J. C. P. 161, *Lauman* v. *Audley*, 2 M. & W. 535; *Trueman* v. *French*, 21 L. J. C. P. 214; *Wilkins* v. *Canty*, 1 Dowl. N. S. 855; *Griffith* v. *Williams*, 1 C. & J. 47, 2 Saund. 72 *i*.

Harrison in reply contended that if the judgment creditor considered himself entitled to have his order amended *nunc pro tunc*, he should make a substantive application for the purpose, to which cause would be shewn; and that, without amendment, the application must prevail.

ADAM WILSON, J.—I do not think I ought to re-open the question of service, either of the attaching order, or of the summons on the garnishee to shew cause why he should not pay over, as I have already disposed of this point at some length, on the application being made for the final order;* besides, the present proceedings, in my opinion, show no reason why this matter should be renewed.

Ward v. *Vance—Thompson, Garnishee*, 9 U. C. L. J. 214.