

C. L. Ch.] T. &amp; L. Co. v. DICKSON—PORTMAN v. SMITH—YOUNG v. WILSON. [Chy. Ch.]

Clerk of the Crown, and was signed prematurely and before the time for pleading had expired either with or without the extra day for pleading allowed by an order of the Chief Justice of Upper Canada of the 29th day of March last, and was irregularly and improperly signed, and was not according to the correct or proper form, and was in form a final judgment in debt for debt and damages, and was expressed in the singular instead of the plural number, and should not have been so signed in this suit where the writ was not specially endorsed; or why the issue book and notice of assessment and service thereof should not be set aside with costs for irregularity on the grounds aforesaid, and on the grounds that the same were served on Easter Monday and too late for the ensuing assizes at Cobourg; or why the defendant should not be allowed to plead and defend this action on the merits.

Several affidavits were filed touching on various points referred to in the summons. But the principal fact as shewn by them was, that judgment was signed on Easter Monday, which it was contended could not legally be done, and that therefore the judgment should be set aside.

*T. H. Spencer* shewed cause. Easter Monday is not a *dies non*, and there is no statute absolutely requiring business to be suspended on that day. The only statutory provision is C. S. U. C. cap. 10, sec. 38, which permits but does not require deputy clerks of the Crown to close their offices on that day. Any act which is ordinarily done *ex parte* can therefore be legally done on that day, if the clerk chooses to do it.

DRAPER, C. J.—Con. Stat. U. C. cap. 10, sec. 38, enacts, that except between 1st July and 21st August, every deputy clerk's office shall be kept open between certain hours, "Sundays, Christmas day, Good Friday, Easter Monday the birthday of the Sovereign, New Year's day, and any day appointed by royal proclamation for a general fast or thanksgiving excepted." On a non-judicial or non-judicial day an award of judicial process or entry of a judgment is void: *Dedoe v. Alp*, Sir W. Jones, 156; Though bail may be put in, or such business as is transacted at Judge's Chambers, may be done: *Baddeley v. Adams*, 5 T. R. 170; see also *Figgins v. Wilhe*, 2 W. Bl. Rep. 1186, and *Sparrow v. Cooper*, *ib.* 1314; *Worthy v. Paller*, 5 Taunt. 180. The Imperial Stat. 3 & 4 Wm. IV. ch. 42, is limited to holidays occurring in term time, but the Monday and Tuesday in Easter week are such holidays. There is an English rule of court making some other days holidays, provided they do not fall in term (H. T., 6 Wm. IV.)

I think our statute above cited must be construed as declaring the specified days to be days on which business is not to be transacted in the Crown offices. It is evidently not the duty of the officer to attend, and the English cases show strongly that the courts will not permit the doing of business on a holiday to be made a means of demanding increased fees by the officers; neither was it meant to enable the officer to open his door to one and to keep it closed to another. I think the safest construction on all accounts is, to hold that the offices are not to be opened on that day.

In the present case the plaintiff has created the difficulty by signing judgment on Easter Monday. The defendant filed pleas at the opening of the office on Tuesday morning, and the plaintiff might have joined issue, served his issue book, and given notice of trial on that day, as the defendant, by an order of the 29th March, had to take one day less than the usual time for notice of trial.

I should be glad if this question could be brought before the full court, but as I think the plaintiff's proceeding irregular I must set it aside with costs.

Summons absolute. \*

## CHANCERY.

(Reported by MR. CHARLES MOSS, Student at-Law)

### PORTMAN v. SMITH.

*Proclosure decree—Change in state of account after day appointed for payment—Notice of motion—Final order.*

A plaintiff who goes into possession of the mortgaged premises and receives rents after the day appointed for payment by the mortgagor, is entitled to a final order of foreclosure without a new account being taken and a new day for payment given to the mortgagor.

*Sensible* the plaintiff in such a case should serve the mortgagor with notice of the motion for the final order.

[Chambers, April 23, 1866.]

The plaintiff applied for a final order of foreclosure under the following circumstances: The Master had by his report appointed the amount found due to the plaintiff to be paid on the 2nd of January last by the mortgagor, who made default in payment. Upon the 8th of the same month the plaintiff rented the mortgaged premises to a tenant, and had since received rents, for which he gave the mortgagor credit and served him with notice thereof. Notice of the application for the final order was also served upon him. The cases of *Constable v. Howick*, 5 Jur. N. S. 331, and *Greenshields v. Blackwood*, Chamber Reports, 60, were cited.

MOWAT, V. C.—The case of *Greenshields v. Blackwood*, throws some doubt upon the authority of *Constable v. Howick*, where there has been a receipt of rents. As, however, the plaintiff has served notice of this application upon the mortgagor he may take the order.

### YOUNG v. WILSON ET AL.

*Defendant out of the jurisdiction—Substitutional service.*

Where a defendant who was made a party to the suit in respect of a mortgage held by him upon the lands which form the subject matter of the suit was out of the jurisdiction, but it appearing that his solicitor has and always had the mortgage in his possession, substitutional service upon the solicitor was allowed.

[Chambers, April 24, 1866.]

The defendant Dunn being out of the jurisdiction the plaintiff examined his solicitor before one of the special examiners as to the whereabouts of the defendant. It appeared from the depositions that the defendant was in the East Indies; that the solicitor had had no communication with him in respect of this suit, and held no power of attorney from him, but he had in his possession the mortgage in respect of which

\* There has been no appeal from this decision.—EDS. L. J.