DIARY FOR AUGUST.

6. Saturday. .. Articles, &c, to be left with Secretary, Law Society.
7. SUNDAY... *10th Sunday af. Trinity.*
14. SUNDAY... *8th Sunday after Trinity.*
20. Saturday ... Long Vacation ends. Last day for service of Writ for Co. Court.
21. SUNDAY... *9th Sunday after Trinity,*
22. Monday..... Trinity Term begins.
23. Tuesday..... Last day for notice of Examination Chancery, Toronto & Cobourg.
24. Wednesday Last day for notice of Examination Chancery, Goderich.
26. Friday..... Paper Day, Q. B.
27. Saturday ... Paper Day, C. P.
28. SUNDAY... *10th Sunday after Trinity.*
29. Monday..... Paper Day, Q. B.
30. Tuesday..... Paper Day, C. P. Last day for declaring for County Court.
31. Wednesday. { Paper Day, Q. B. Last day for return of non-resident defaulters to County Treasurer.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

AUGUST, 1859.

GARDINER v. GARDINER.

To the Editors of the Law Journal:

GENTLEMEN,—The success which has attended our joint efforts to ameliorate Chancery practice, by directing public attention to the imperfect state of the law regulating its proceedings, encourages me to attempt by similar means the remedy or settlement of the existing laws which govern, or are supposed to govern, the rights of creditors, and the real and personal representatives of every owner of lands in Upper Canada who happens to die more or less in debt.

The point is this: can each or any of those creditors—although the real estate passed at the instant of death either to the devisees by the will, or to the heirs-at-law by descent, without any judgment or lien upon it as against deceased, through whom alone the real representatives claim, without claiming through the executors or administrators, to whom the real estate now passed—can creditors, I say, sue the executors or administrators alone, issue a *fi. fa.* lands against them alone, and cause the sheriff to sell those lands on that *fi. fa.*, as if those lands on the death of the owner had passed by the will or the letters of administration to the executors or administrators, instead of to the heirs or devisees; and will a *bona fide* purchaser at such sheriff's sale for value, get as good a title to the lands as if they had passed by the will or the letters of administration to the executor or administrator instead of the heir? For if not, then the innocent *bona fide* purchaser for value is defrauded by the prevailing practice; and if he does, then he gets a good title to A's land, because it was sold as B's land, on a *fi. fa.* against B. alone, in a suit against B. alone,—the whole proceedings, as regards the owners, the real representatives, being "*res inter alios acta,*" of which they had neither notice or knowledge, and, unless authorized by some express exceptional legislative enactment, directly contrary to every principle of British law, and even of natural justice, which would not deprive the owner of his property unheard and without the opportunity of defence or redemption, and would not entrust his defence against his will to his rival, whose interest it is to favor the personalty at the expense of the real estate; thereby affording that rival the opportunity (not always neglected) of in effect confessing judgment against his adversary, under cover of defending him. Yet, according to the case of *Gardiner v. Gardiner*, all that may be very easily and with perfect certainty accomplished, by means of a legal contrivance in the form of a suit at law, by which the creditor is plaintiff and the executor or administrator defendant, and which is so far of the nature of the old action of ejectment on a vacant possession, that the executor or administrator acts the part of casual ejector, instead of the now exploded Richard Roe, but is unlike the action of ejectment to this extent, that there the true owner was not finally concluded by what was done; and besides, by means of notice to the true owner, and the consent rule and confession of lease, entry and ouster, the fictitious suit between fictitious parties was before judgment changed into a real suit between the real parties, and full opportunity of defence afforded before the rights of those really interested could be affected; while by the legal contrivance which *Gardiner v. Gardiner* declares to be authorized by the law of Upper Canada, everything is concocted, transacted and finished, so far as the party really interested is concerned, *in nubibus*, and remains as it commenced, a fiction, until it resolves itself into the tangible fact of the duly registered sheriff's deed of the land of the real representatives to the *bona fide* purchaser thereof for value, without notice, at sheriff's sale; when it immediately, by force of the registry acts, which affect all the world with notice of registered deeds, descends like the bolt of Jove upon the devoted heads of the real representatives, and for the first time gives them legal notice and warning of their danger, by showing them that all is over, that their rights are irretrievably destroyed, and that it is then too late for defence or redemption.

This case of *Gardiner v. Gardiner* was decided against the opinion of Chief Justice Macaulay, and has since been acted upon in practice, although believed to be contrary to the opinions of many of the judges. It enunciates the doctrine that such sheriff's sales and deeds are good, under and by virtue of the English statute 5 Geo. II. cap. 7, sec. 4, and, if law, establishes that titles depending on such sheriff's deeds are good; but if not law—and it has never been held to be so, either by the Court of Appeal here or by the Privy Council in England—then all titles depending on such sheriff's deeds are worthless. Therefore, as the doctrine it enunciates may any day be exploded on appeal, it is well worth while considering whether it be or be not correctly decided; and the subject well deserves the attention of the *Law Journal*, for it is certainly yet open for consideration whether the point has been well decided. I would ask you therefore to discuss the subject in your pages.

Yours, &c.,

A CITY SOLICITOR.

The foregoing letter, from a personage to whom the public are already indebted for the discussion of important questions of law reform, serves as a fitting introduction to a brief notice of the case to which it refers.

In every view such a notice is important, and we shall proceed to the discussion of the topic with all the freedom which the honest investigation of a scientific subject is entitled to claim.

Making all proper allowance for the necessities of a new country, and admitting the propriety of facilitating the transfer of real estate by all the methods known to the law, we yet think that real and personal property should not be placed exactly on the same footing, and, looking to the future of Canada, confess to a feeling—perhaps our readers