

and as to the operation of an assignment of money before it came to the hands and possession of the garnishee.

The second question is whether the amount of the award is divisible, one part of it being for a debt due in June, 1860, the other being in the nature of damages given to the plaintiff over and above the debt actually due to him.

Mr. Manning's statement establishes that this sum was not awarded as part of the debt due to Tate by the City of Toronto under his contract, but as damages sustained by him for having the work taken out of his hands. The attaching orders could not affect anything but debts owing or accruing due to the judgment debtor by the City of Toronto when each attaching order was served; and this latter sum of \$1,410 60 did not become a debt due to Tate until the award was made, and was not affected, as appears to us, by any attaching order served before the making of the award. The attaching orders which came in after the making of the award would therefore, in our view, bind the new debt in the order in which they were received.

We are therefore of opinion that a rule absolute should issue, directing the master to ascertain the order in which the creditors of Tate, or any of them named in the rule nisi, served their respective attaching orders on the garnishees, before the date of the award, and that, out of the moneys paid into court to the credit of this cause, he do pay the sum of \$5,339 40 to such creditors in the order of priority so ascertained, paying each creditor in full as far as that sum will go. And that the master do ascertain the order in which the creditors of Tate, or any of them named in the rule nisi, served their respective attaching orders on the garnishees after the making of the award, and that out of the moneys paid into court to the credit of this cause, he pay the sum of \$1,410 60 to such last named creditors in the order of priority so ascertained, paying each creditor in full as far as the last named sum will go.

If any part of the sum paid into court is absorbed by a charge of commission or fees authorised by rule of court, a rateable proportion thereof is to be deducted from each of the sums of \$5,339 40 and \$1,410 60, and the balance only distributed.

NICHOLLS v. MARY NICHOLLS, EXECUTRIX OF NATHAN NICHOLLS.

Judgment and execution—Amendment of—Right of other judgment creditors to object.

The plaintiff having declared against defendant as executrix, and obtained judgment by default, by mistake entered it and issued execution as against her in her own right, and on discovering the error obtained an order to amend the judgment roll and *fi. fa.* so as to correspond with the declaration. On motion to set aside this order, at the instance of other judgment creditors of defendant as executrix, *Held*, any fraud or collusion between the plaintiff and defendant in the suit being denied, that the applicants had no right to prevent or interfere with such amendment, and that the fact of their judgments being unknown to the judge when he made the order was immaterial.

[Q. B., M. T., 1863.]

S. Richards, Q. C., on behalf of Peter Clark, Hugh Clark, James Beachell, and Thomas Bacon, judgment creditors of defendant, obtained a rule nisi calling on the plaintiff and defendant respectively to show cause why an order made in this cause by Adam Wilson, J., in June, 1863, ordering that the judgment roll in this cause should be amended, and also the amendments made pursuant to that order, and the writ of *ven. ex. for part* and *fi. fa. for residue* against lands, and also the *fi. fa.* against lands, issued on that judgment, directed to the sheriff of Northumberland and Durham, should not be set aside, on the following grounds:

1. That the order and amendments prejudice the rights of other judgment creditors, namely, Peter Clark, Hugh Clark, James Beachell and Thomas Bacon, who have obtained two judgments in the County Court of Northumberland and Durham against the defendant, executrix as aforesaid, and Adam Holmes and John Butler, each of whom has obtained a judgment in the said County Court against the defendant as executrix, on all which judgments writs of execution against lands were in the sheriff's hands before and at the time of making the order: that the order and amendments prejudice a Chancery suit mentioned in the affidavits and papers filed, instituted by one of the judgment creditors for the benefit of himself and the other creditors of the testator: that the fact that any of the said executions were in the sheriff's hands was not made known to the said judge, nor were any of the judg-

ment creditors made parties to the application, or had any knowledge thereof.

2. That the order should not have been granted, as it prejudices the rights acquired by the judgment creditors under their executions against lands.

3. That the causes of action, or some of them, in respect of which the judgment is entered on the roll, are against the defendant personally, and not against her as executrix, and do not warrant a judgment against her as executrix.

4. That there is no sufficient writ of execution against goods to warrant the writ against lands, or the *ven. ex.* and *fi. fa.* for residue, as the writ against goods directed the amount to be made of the personal goods of the defendant, and not of the goods of the testator in her hands as executrix to be administered, and that writ does not on the face of it appear to be founded on a judgment against the defendant as executrix.

5. The *fi. fa.* against lands directs the amount to be levied of the lands of the defendant.

6. That the *ven. ex.* and *fi. fa.* against lands does not truly recite the preceding writ of *fi. fa.* against lands: that there is no writ such as is recited in the *ven. ex.*, and no judgment warranting such a writ as is recited in the *ven. ex.* and *fi. fa.* for residue.

Or why such other order should not be made for the relief of the judgment creditors, or some of them, as to this court may seem meet on the facts.

From the judgment roll in this cause it appeared that the plaintiff declared against the defendant, "executrix of the last will and testament," &c., "for money payable by the defendant as such executrix as aforesaid, to the plaintiff for goods sold and delivered by the plaintiff to defendant as such executrix, for money lent by the plaintiff to the defendant, as such executrix, for money paid by plaintiff to defendant, as such executrix, at her request, and for money received by defendant as such executrix for the plaintiff's use," and for money found to be due by defendant "as such executrix" to the plaintiff on accounts stated. Judgment was entered by *nil dicit*, that the plaintiff do recover against the defendant* the said £259 16s 3d. The amendment made under the order was by inserting, after the word defendant (at*), the words "as such executrix as aforesaid," and adding after the statement of the amount recovered the words following, "to be levied of the goods and chattels which were of the said Nathan Nicholls at the time of his death in the hands of the defendant as executrix as aforesaid to be administered, if she hath so much in her hands, and if she hath not so much thereof in her hands to be administered, then £8 4s. 11d., being for the costs aforesaid, to be levied of the proper goods and chattels of the defendant."

This rule was granted in the Practice Court, and was made returnable here.

The affidavits in support of the application set out the proceedings in this cause, verifying by copies the original judgment roll, the amendment, and the summons and order for the amendment. Copies of the judgment rolls in the County Court, and of the bill in Chancery referred to were also put in.

An affidavit of the attorney for the plaintiffs in the suit in the County Court, stated (par. 22) that no affidavits or papers on which the summons or order moved against were founded, were found upon search with the judge's clerk in Chambers, and (par. 23) that the deponent believed that neither the judge who granted the summons nor the judge who made the order were informed of the existence of the Chancery suit, or of the recovery of the judgments in the County Court, or of the proceedings therein, and that he sincerely believed that had they been so informed the order would not have been made, and he believed there was a fraudulent concealment of these facts, or some of them, from the judge; and he stated (par. 24) that the effect of the order was to prejudice the suit in Chancery, and the claims of the judgment creditors in the County Court, and that the plaintiff's object in obtaining the same was to defeat the recovery of these claims; and (par. 25) that he had been informed by the attorney who entered an appearance for the defendant in this suit, that he received his instructions from the plaintiff and the plaintiff's attorney in this suit, and that he never saw the defendant, and that his instructions were to enter an appearance, but to do nothing further.