were ordered to be paid in the usual manner under a decree for sale. An application was now made for a final order for sale.

The Judges' Secretary.—The Accountant not having found specifically by his report whether a sale or foreclosure should be had, the order cannot be made

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(*Reported by* Mr. Charles Moss, *Student at Law.*)

Rice v. George.

Motion to dismiss for want of prosecution—Abatement of suit by death of a defendant.

A defendant, who is also executor of a co-defendant, by whose death a suit has been abated, cannot move to dismiss plaintiffs' bill for want of prosecution; his only course is to move that the plaintiff be ordered to revive within a certain period, otherwise that the bill be dismissed. Nor can a co-defendant, who has appeared and answered by the same solicitor as a defendant who is precluded from making such an application, move to dismiss; though he could do so if he had appeared and answered by a different solicitor.

A defendant may move to dismiss, notwithstanding replication has been filed and the cause is at issue.

[Chambers, October 13, 1866.]

Hector, Q. C., moved on behalf of Cleghorn and Agar two of the defendants for an order that the plaintiffs' bill might be dismissed for want of prosecution, or that the plaintiffs might be ordered to revive, one of the defendants, Benjamin Seamon having died.

The bill was filed in 1855, the answers were all filed before 1857, replication was filed some years ago, and the cause had been set down for hearing at the Spring Sittings in Toronto in 1866, when the plaintiffs' solicitor became aware of Seamon's death. Although there had been great delay in the progress of the suit, yet the plaintiff's solicitors were not solely to blame for it.

Geo. Morphy and *R. Sullivan* on behalf of the plaintiffs, contended that replication having been filed, the defendants could not move for want of prosecution, their only course being to proceed under Order 57, Sec. 6, and set the cause down for hearing. Also, that the suit having abated by Seamon's death, was an answer to the motion so far as it sought an order to dismiss, the proper motion in such a case being for an order that the plaintiffs do revive the suit within a limited time, and in default of their doing so that the bill be dismissed.

The Judge's Secretary,—I must hold in accordance with the decision in *Spawn* v. *Nelles*, Chan. Cham. R. 270, that a defendant is not obliged after replication filed to set the cause down for hearing in order to have the bill dismissed, but that he may apply in Chambers for an order to dismiss for want of prosecution. While the only course open to the defendants on the death of plaintiff is to move for an order that his representatives do revive the suit within a limited time, or in default that it be dismissed, and that on the death of a defendant the only course his representatives can take, is to move that the plaintiff do revive the suit against them, or in default that the bill be dismissed—yet the death of a defendant is no bar to a co-defendant moving to dismiss for want of prosecution. *Williams* v. *Page*, 24 Beav. 490; *Hall* v. *Green*, 2 U. C. Jur. 42.

In the present case, however, Agar, one of the defendants now applying being also an executor of the deceased defendant, cannot move to dismiss. Cleghorn appears by the same solicitor, and seems on that ground also prevented from moving. In *Winthrop* v. *Murray*, 7 Hare 150, it was held that a defendant who had filed his answer and was in a position to move to dismiss, could not do so if a co-defendant appearing by the same solicitor had not filed his answer; and see *Rees* v. *Jacques*, 1 Grant 352.

The proper order, therefore, to be made is that the plaintiffs do revive and bring the cause on for hearing at next term, and in default that the bill be dismissed, plaintiffs to pay the costs of this application.

Order accordingly.

Ardagh v. Orchard.

Final order of foreclosure—Delay in moving for—Notice of motion.

Where a party entitled to a final order of foreclosure neglects to apply until nearly two years have elapsed from the time his right to the order first accrued, the order will not be granted *ex parte*

[Chambers, Oct. 18, 1866.]

This was an application in behalf of the plaintiff for a final order of foreclosure. The money was payable under the report on the 17th November 1864. The application was made *ex parte* on the usual papers.

The Judges' Secretary,—Under such circumstances of delay the plaintiff is not entitled to the order *ex parte*, and notice of motion must be served on the party entitled to redeem, it not appearing that it would be either difficult or expensive to do so.

INSOLVENCY CASE.

(In the County Court of the County of Hastings.)

In re Frank Starling & Co. and re Starling and Arkle.

Insolvent Act—Application for discharge—Mailing notices.

On an application for a discharge under sec. 9, sub-sec. 10, of the Insolvent Act of 1864, *held* unnecessary to mail notices to creditors under sec. 11, sub-sec. 1.

[June 3, 1866.]

Application by petition on behalf of Starling and Arkle, insolvents, for a discharge in both matters, under sub-sec. 10 of sec. 9 of the above act.

Holden for assignees and opposing creditors, objected that notices of the applications had not been mailed, post-paid, as directed by sub-sec. 1 of sec. 11.

Dickson for petitioners, contra.

Sherwood, Co.J.—The Insolvent Act requires, by different clauses, notices of meetings of creditors and other notices to be given, without specifying what the name shall be, and there are only three cases in which the kind of notice is specially designated, viz.: in sec. 4, sub-sec. 13, in regard to the sale of real estate; and in sec. 9, sub-sec. 6, in regard to proceedings for confirmation of discharge given by creditors, and sub-sec. 10 of same section, in regard to insolvents applying to the court for a discharge. Sec. 11, sub-sec. 1, provides, "that notice of meeting