"FI. FA. LANDS" IN UPPER CANADA.

As is well known the Writ of Fieri Facias was not effective as against land in England: Levari Facias was employed to enable the crops to be seized and Elegit gave the judgment creditor the right to the use of half the judgment-debtor's lands until the debt was satisfied.

This practice, along with the Capias ad Satisfaciendum under which the debtor was imprisoned, seems to have satisfied the English people; but the American Colonists complained, and relief was given in 1732 by the Act 5 George II., cap. 2, "An Act for the more easy Recovery of Debts in His Majesty's Plantations and Colonies in America." By this Act, it was provided that "The Houses, Lands, Negroes and other Hereditaments and real Estates, situate or being within any of the said Plantations shall be liable" for debts, etc.; and it was further provided that these should be subject to the process of Courts towards satisfying debts in the same way as Personal Estates.

To consider here the curious effect upon the Negro in making him a Hereditament and real Estate like the Common Law Villein *adscriptitius glebæ,* and the equally curious effect of the great Enfranchising Act of 1833, 3-4 Will. IV., cap. 73 (Imp.) in destroying this status would lead us too far from our subject—those interested may consult my *The Slave in Canada,* The Journal of Negro History, vol. V., No. 3 (July, 1920), pp. 13, 51, and the luminous judgment of the Judicial Committee in *Richard* v. *Attorney-General* of *Jamaica.*[1]

By the Act of 1732, land became subject to be seized and sold under Fi. Fa. just as goods were, in the territory to which it applied, that is, the British Plantations and Colonies, insular or continental —of course, Canada was still French.

Shortly after the surrender of Montreal in 1760, the "Upper Country," including what became Upper Canada as well as the Detroit and Michillimackinac country, was taken possession of by Britain; and her ownership of the whole of Canada and its dependencies was assured by the Treaty of Paris, 1763.

The Royal Proclamation of October 7, 1763, assured all in the newly-acquired country "the Enjoyment of the Benefit of the Laws of our Realm of England": that the King alone without Parliament had the right to prescribe laws for a conquered or ceded land, has

[1] (1848) 6 Moo. P.C. 381.

never been successfully contested or, indeed, except in theoretical writings, so much as disputed since Lord Mansfield's famous judgment in *Campbell* v. *Hall*[2]—even the protest of Baron Maseres, once Attorney-General at Quebec and equally accomplished as lawyer as mathematician, proved wholly ineffective.

From the promulgation of this Proclamation until the passing of the Quebec Act (1774) 14 George III, cap. 83 (Imp.), the law of England, civil and criminal, was, at least in theory, in force throughout all the enormous territory of the "Government" or Province of Quebec (except in a class of cases not of importance here).

No special provision was at first made for execution in the old "Government" or Province of Quebec (coming as far west as a line drawn from Lake Nipissing to about the present Cornwall, the "Upper Country" being left for the fur trade and Indians)—the first and very badly drawn Ordinance of September 17, 1764, is silent as to execution; but a still worse drawn Ordinance of March 9, 1765, recited the Imperial Act of 1732, and, without actually so declaring, seems to take it as in force in Quebec.

The amending Ordinance of February 1, 1770, expressly directs that execution issue against "Lands, Goods or Effects"; and thus stood the law when the Quebec Act of 1774 was passed. This Act extended the Province of Quebec south to the Ohio and west to the Mississippi, and reinstated the former French law in civil matters —all the territory afterwards Upper Canada was, of course, now included.

It was found necessary to make come changes in the proceedings of the Courts; and an Ordinance was passed, February 25, 1777, 17 George III, c. 2 (Que.); this provided that execution should be had against the person (Capias ad Satisfaciendum) or the debtor's "goods and chattels, lands and tenements." This was the first legislation on the subject affecting most of the territory which was afterwards Upper Canada and later Ontario. The Ordinance was continued by (1779) 19 George III, cap. 1 (Que.), January 16, 1779; (1781) 21 George III, cap. 1 (Que.), January 21, 1781; (1783) 23 George III, cap. 1 (Que.), February 5, 1783; and when the practice was recast, the same provision was made (1785) 25 George III, cap. 2 (Que.), April 21, 1785, continued by (1787) 27 George III, cap. 4 (Que.), April 30, 1787, and (1789) 29 George III, cap. 3 (Que.), April 30, 1789.

[2] (1774) 1 Cowp. K.B. 204.

Thus stood the law when Lord Dorchester (formerly Sir Guy Carleton), the Governor, by Letters Patent, July 24, 1788, divided the "Upper Country" into four Districts; in each of these Districts was erected a Court of Common Pleas with full civil jurisdiction.

In the legislation passed specially for the new Courts, (1789) 29 George III, cap. 3 (Que.), April 30, 1789, provision is made, sec. 12, for the Sheriff advertising the sale of "Lands and Tenements . . . taken in execution . . . for at least four months by three several publications in writing . . . fixed at the Door of the Court House of the District, and in some ostensible place in the office of the Clerk of the Court . . . and at the nearest Grist-mill."

That lands were actually sold under Fi. Fa. from the Court of Common Pleas is absolutely certain, not only from the Records of at least one of them, but also from extant Deeds made by the Sheriff. The Records of the Court of Common Pleas for the Districts of Hesse (afterwards the Western District) are reprinted in my *Michigan under British Rule.* In a very recent publication by the Detroit Library Commission: *The John Askin Papers . . .* 1747-1795, we find copied two Sheriff's Deeds of land sold under execution, pp. 368-372. In one, Gregor McGregor, Sheriff for the District of Hesse, on November 11, 1780, conveys to John Askin of Detroit, certain land (now in Detroit) for £25..12..6 currency (say $102.50, the land being now worth some millions) taken in execution "by virtue of a Writ of fire facias issued out of His Majesty's Court of Common Pleas for the said District." In the other, the same Sheriff, March 25, 1791, conveys to Askin land at the "River aux Raisin" for £15..12..6 currency, seized under a "Writ of fire facious." Both the "Writ of fire facias" and the "Writ of fire facious" were against "the Goods & Chattels, Lands and Tenements" of the defendant, and were, of course, issued under the authority of the legislation we have been speaking of.

So long as this legislation continued in effect, there could be no doubt of the liability of land to be sold under Fi. Fa. But in the last days of 1791, there vanished the old Province of Quebec, and came into existence two new political entities, the Provinces of Upper Canada and Lower Canada. The former was populated almost exclusively by immigrants from the English-speaking Colonies to the South and from the British Isles: they loved their familiar law; and in the first Session of the Legislature of Upper Canada, held at Newark (now Niagara-on-the-lake) in 1792, the first legislation passed introduced the law of England in civil matters.

Whether this meant that now no longer was land exigible under Fi. Fa. or not, was a question upon which lawyers and Judges differed. I have made a careful examination of the Records of the Court of King's Bench of Upper Canada (which was instituted in 1794), and find that the question came before the Court for the first time in 1798.

In *Hamilton* v. *Ellsworth*, July 13, 1798, on a motion for a Fi. Fa., Elmsley, C.J. and Powell, J. (afterwards C.J.), differed in opinion, and we find the formal record: "The Court gave no opinion in this case, because it was an argument to ascertain whether lands can be taken in execution and sold for debts." The real difference of opinion was, apparently, as to the form of the writ, although this does not appear and is not indicated in the official entry.

In the following year, in the case of *Ellis* v. *Street*, the plaintiff having failed to realize on his Fi. Fa. Goods, moved the Court for a Writ of Fieri Facias against the defendant's lands; the main argument was as to the effect of the Imperial Act of 1732; the Court divided in opinion, Allcock, J., considering that the land was not exigible at all, while Elmsley, C.J. and Powell, J., thought the Statute applied; but did not agree as to the form of the Writ—accordingly, the plaintiff "took nothing by his motion." This was unsatisfactory; the Court ordered a re-argument; and, on the re-argument, directed, Allcock, J., dissenting, "that a Writ of Fi. Fa. against the goods, chattels, lands and tenements, agreeable to the 5 Geo. 2, shall issue from the proper officer when demanded."

The Legislature then intervened, and the Act (1803) 43 George III., cap. 1 (U.C.), was passed: being reserved for the King's pleasure, it was assented to by him, January 4, 1803, and so became law. This provided that a Writ of Fi. Fa. Goods should first issue, and a Writ of Fi. Fa. Lands should not issue until return of the Fi. Fa. Goods; and the lands were not to be sold until after 12 months from the receipt of the Fi. Fa. Lands. Then came the case of *Gray* v. *Willcocks*, in which the Court again divided. On the first argument, Allcock, now C.J., held that a Fi. Fa. Lands should not issue, Powell, J., that it should. On re-argument, Allcock, C.J., was joined by Cochrane, J., Powell, J., retaining his former opinion. On a third application, the Court again divided, Powell, J., holding that the Writ should issue. Thorpe, J., was of the opposite opinion: this time it went to the Court of Appeal, who sustained Thorpe's view; but the Privy Council reversed this judgment, July 13, 1809. Since this judgment, there has never been any doubt in the matter.

Toronto. WILLIAM RENWICK RIDDELL.