

## SNOWDEN v. SNOWDEN

It is sufficient, that the answer of an adult defendant be sworn to before some judge or justice of the peace within the State.

It was formerly the practice to send the commission to *four*, but now it is sent to only *one* commissioner to appoint a guardian and take the answer of an infant defendant within the State. If a person appointed as such a guardian accepts the trust, he may be compelled to answer. But if the infant defendant be out of the State, the commission to appoint a guardian and take his answer must be sent to *three* persons.

The express provisions of a constitutional act of Assembly cannot become obsolete, and are of superior authority to any usage or adjudged case whatever.

If a defendant be not in fact a nonresident, the order of publication against him is a nullity.

This bill was filed on the 28th of February 1829, by *Thomas Snowden jun'r, John Contee and Ann Louisa* his wife, *Albert Fairfax and Caroline E.* his wife, *Timothy P. Andrews and Emily R.* his wife, against *Richard N. Snowden*. The bill states, that the plaintiffs were tenants in common with the defendant of a tract of land, which would not admit of partition without injury or loss; that the defendant is an infant; and that he "is a citizen of Ann Arundel county, but is at this time in the State of New York." Upon which they prayed, that the land might be sold to effect a division; and that a *subpœna* might issue against the defendant. The plaintiffs sued out a commission in the usual form directed to *Benjamin Allen* alone, of the State of New York, authorizing him to appoint a guardian, and to take the infant's answer by such guardian. Which he did, and returned the answer accordingly. The whole proceeding being in precisely the same form as if such a commission had gone to *one* commissioner only within the State; to obtain the answer of an infant defendant residing here.

18th April, 1829.—BLAND, Chancellor.—On adverting to the act of Assembly in relation to this matter,<sup>(a)</sup> I deemed this proceeding erroneous: whereupon the plaintiffs on the 15th instant filed their petition praying for a commission to *three* persons therein named, and again submitted their case upon the notes of their solicitor, which with the proceedings were read and considered.

According to the English course of proceeding it would seem to be a general rule, that the defendant must appear in person and swear to his answer before one of the masters in chancery. This

(a) 1797, ch. 114, s. 5.